

Committee on Energy and Commerce
Hearing on
“Addressing the Urgent Needs of Our Tribal Communities”
July 8, 2020

Ms. Pilar M. Thomas, Partner, Quarles & Brady LLP

The Honorable Frank Pallone, Jr. (D-NJ):

1. Ms. Pilar, given the general legislative proposals you identified in your written testimony, is there specific language you can recommend to reduce the barriers to tribal energy development and management you and the other witnesses identified?

RESPONSE: Specific legislative language is attached.

The Honorable Anna G. Eshoo (D-CA):

1. Over 25 percent of Native Americans living in rural areas don't have access to reliable electricity. This is a particular concern for the dozens of tribes served by PG&E which shuts off power to reduce wildfire risks, sometimes for days at a time. How can Congress best ensure there is reliable electricity in tribal communities, particularly those at risk of wildfires and intentional power shut offs?

RESPONSE: There are five potential solutions the Committee might consider to help ensure energy reliability for California Indian tribes impacted by wildfire risks and power shut offs:

- 1) Fund micro and regional grid technical assistance and deployment grants through DOE and USDA that support implementing energy systems that can island from the "big grid" and produce power on a more local basis;
- 2) Amend PURPA to require utilities to interconnect micro-grid systems - irrespective of state interconnection rules but consistent with interconnection standards;
- 3) Support tribal jurisdiction over utility operations on tribal lands (e.g., energy, water and telecommunications infrastructure) so that tribes have leverage with their utilities to deploy energy systems, such as microgrids or distributed energy resources, that will provide energy reliability solutions;

4) Create grants in lieu of tax credits for tribally-owned and -operated energy infrastructure, so that tribal governments can more readily fund these governmental activities; and

5) Create refundable tax credits for microgrid systems so that tribes can partner with third-parties to develop, fund, own and operate energy resiliency systems

The Honorable Doris O. Matsui (D-CA):

1. Ms. Thomas, in your written testimony you raised an issue that is particularly close to home for me and my colleagues from California. In our home state, public safety power shutoffs are becoming more and more normal in the face of devastating and life-threatening wildfires.

a. How many tribes would you say could avoid some of the most painful impacts of these shutoffs with the installation of microgrids?

RESPONSE: Without specific utility service information, it is difficult to say how many tribes are impacted by power shut-offs. At a minimum, it's likely that at least 40 or so California tribes have been impacted over the course of the last year when the three investor-owned utilities began de-energizing actions for public safety purposes. I would encourage the Committee to request specific information from utilities - in California and elsewhere - through a study or assessment of utility outages in Indian Country, including the number, reasons, length and economic and other impacts of those outages.

b. What are the current primary barriers to such developments?

RESPONSE: In addition to my answers to Rep. Eshoo above, additional barriers to development include tribal capacity and capacity building, access to technology and trusted technology partners, access to capital, and regulatory flexibility.

- **Tribal capacity building can be addressed through technical assistance funding and capacity building funding for tribes in resilient energy efforts. This might include specific appropriation line items in the DOE Office of Indian Energy Programs appropriation and the DOI ASIA appropriation to ensure explicit support for capacity building grants directly to tribes. Further, an internal capacity building tool could include an additional appropriation through the DOE Office of Indian Energy to fund an energy general assistance program for tribes - similar to the DOE State Energy Program or the EPA Indian General Assistance Program.**
- **Access to technology can be addressed through legislative expansion of DOE programs to support tribal efforts to understand and partner with technology partners. Several proposed bills have included grid modernization, which doesn't include tribal utility or tribal-owned**

infrastructure. Technical assistance through the DOE energy programs should also be expanded and supported.

- **Technical assistance (engineering, legal, other) with respect to building resilient, segmented energy infrastructure is needed, particularly in rural tribal areas where distribution channels and technical expertise for microgrid development are scarce. Creating ‘microgrid centers of excellence’ as a first stop for microgrid feasibility would be effective, and could be a partnership between tribes, national labs, local academic and research centers, and other stakeholders. These microgrid centers of excellence could serve tribal and non-tribal governments and communities alike.**
 - **Access to capital is a permanent issue for tribes, and there are many federal programs that can provide needed funding - either grants or loans. Of course, more funding in these programs would always be welcome, especially in the USDA Rural Development programs and DOE programs, such as the Tribal Energy Loan Guarantee Program. Amendments to these programs are also necessary to facilitate use of these loan guarantee programs; for example, no cost applications for low interest direct loans and bond guarantees. But, it is difficult for tribes to partner with third-parties using these programs, so access to private capital can be supported through changes in the tax code, including refundable tax credits, private activity bonding authority, prohibition on dual taxation, and targeted tax incentives for investment in energy on tribal lands. .**
- c. A microgrid may alleviate some of the hardship from shutoffs, but what else can we do to fortify tribal communities from these events?

RESPONSE: Other resiliency approaches include incentivizing creation of redundant energy systems tied to critical infrastructure. For example, many tribes have built out tribal government facilities, health care facilities, public safety facilities, gaming facilities, water systems and telecommunication infrastructure - all of which are critical infrastructure facilities. Deploying clean back-up energy systems in these facilities can provide additional resiliency. Ideally, clean energy such as distributed solar or wind and storage are the best (lowest cost, least operations and maintenance burden) technologies. The vast majority of tribes have some degree of clean generation resources. Pairing intermittent clean resources with energy storage enables co-benefits of economic optimization, greater demand response / grid balancing, and islandable power in emergencies.

It is also important to acknowledge the increasing interdependency of energy and telecommunications. Increasingly, internet access is needed to run energy systems of all kinds, and of course power is needed to have telecommunication, including broadband, infrastructure. In PSPS events and other outages, reports across tribal communities were that telecom service began to falter at the ~20-

hour mark. No internet access cascades to effect emergency communications, and operation of power systems, and other systems (water, wastewater) as well. Combining energy with telecom projects helps solve emergency operations issues, and in general helps bridge the digital divide between tribal communities and the opportunities of distance learning, e-commerce, new technology integration, and more.

The DOE Office of Indian Energy deployment grants have now been expanded to support the deployment of non-renewable back up power systems, such as diesel engines, natural gas fuel cells and combined heat power systems. USDA's programs can also be accessed. EPA also administers the Clean Diesel program authorized by the Diesel Emissions Reduction Act to replace old diesel generators. But, this program is typically not accessible for backup systems (the diesel generators must be operated a minimum number of hours), so DERA might be amended to fund these types of technologies or clean energy replacement technologies for back-up and redundancy purposes.

Finally, tribes need the ability to effectively respond to planned or emergency events - especially those tribes that are more rural or remote. The Committee might consider additional technical assistance and funding to support the creation of inter-tribal utilities or consortia that provide response resources and support for tribes during these events. These would have the added benefit of creating jobs for tribal members and reducing the burden on each tribe to be prepared individually.

Attachment A
Legislative Language in Response to Chairman Pallone's Question

Amend Federal Power Act and PURPA

Amend 16 U.S.C. § 796(6) by inserting:

“State” means a State admitted to the Union, the District of Columbia, ~~and~~ any organized Territory of the United States, **and any federally recognized Indian tribe.**

Amend 16 U.S.C. § 824(f) by inserting:

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, **an Indian Tribe, a company that is at least 51% owned by an Indian Tribe** or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference.

Amend 16 U.S.C. § 1645(13) by inserting:

The term “public utility” means any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce; **provide that, a federally recognized Indian Tribe or a company that is at least 51% owned by a federally recognized Indian Tribe shall not be deemed to be a “public utility”.**

Amend Indian Trade and Intercourse Act, 25 U.S.C. Chapter 6, subchapter I

Add Section 234 Jurisdiction over utility providers in Indian Country

Notwithstanding any applicable state law, an Indian Tribe may adopt a utility code to govern and exercise jurisdiction over the energy, water and telecommunications utility services, activities, rates and policies within the exterior boundaries of its Indian reservation. In the event no such utility code is approved, energy and utility services, activities, rates and policies being provided to Indian reservations shall be provided by the utility companies to all customers within the boundaries of Indian reservations in a nondiscriminatory manner consistent with those services, activities, rates and policies as the utilities provide within the state at large pursuant to state law. No utility which provides services to an area adjacent to an Indian reservation may deny services to any customer within the Indian reservation if such utility is capable of providing such services under usual facility expansion policies.

Amend the General Right of Way Act of 1948

Amend 25 U.S.C. § 323 by inserting at the end:

Provided that, any right of way grant by an Indian tribe for the purposes authorized under this section shall not require the approval of the Secretary, so long as the right of way approval process by the Indian tribe substantially complies with 25 U.S.C. § 415(h) or the Indian tribe has approved regulations under 25 U.S.C. § 415(h).

Amend the Indian Tribal Energy Self-Determination Act (Title V, Energy Policy Act of 2005)

Allow for "reimbursement" grant under the Office of Indian Energy grant program

Amend 25 U.S.C. § 3502(b)(5) to insert the following:

Add subsection (C) - In providing a grant under this subsection for projects that provide, or expand the provision of, electricity on Indian land or for energy efficiency or conservation purposes, the Director shall, upon application from an Indian tribe or tribal energy development organization, provide a payment to such Indian tribe or tribal energy development organization for reimbursement of at least 50% of the construction costs of such projects so long as such projects are wholly owned by the Indian tribe or tribal energy development organization.

Expand eligibility for Tribal Energy Loan Guarantee Program; increase funding sufficient to provide full 90% loan guarantee on authorized lending authority; authorize a direct loan and bond guarantee program

Amend 25 U.S.C. § 3502(c) as follows:

(1) Subject to paragraphs (2) and (4), the Secretary of Energy may provide **direct loans**, loan or **bond** guarantees (as defined in section 661a of title 2) for an amount equal to not more than 90 percent of the unpaid principal and interest due on any loan made to an Indian tribe, ~~or~~ a tribal energy development organization, **tribally-owned utility, or any energy company owned in part by an Indian tribe or tribal energy development organization** for energy ~~development~~ projects located at least in part on Indian lands.

(2) In providing a **direct loan**, loan or **bond** guarantee under this subsection for an activity to provide, or expand the provision of, electricity on Indian land, the Secretary of Energy shall encourage ~~cooperative arrangements between Indian tribes and utilities that provide service to Indian tribes~~ **the use of specialized lenders and other types of lenders who issue credit and finance projects as a regular course of business**, as the Secretary determines to be appropriate.

(3) A **direct loan**, loan or **bond** guaranteed under this subsection ~~shall~~ **may** be made by—

(A) a financial institution subject to examination by the Secretary of Energy;

(B) an Indian tribe, from funds of the Indian tribe; ~~or~~

(C) a tribal energy development organization, from funds of the tribal energy development organization;

(D) a tribally-owned utility; or

(E) an energy company owned in part by an Indian tribe or tribal energy development organization, from funds of the energy company.

(4) A direct loan, loan or bond guaranteed under this subsection may be made for the following purposes:

(A) pre-development, pre-construction costs;

(B) construction of energy projects or energy infrastructure located at least in part on Indian lands;

(C) purchase and refinance of existing energy projects or energy infrastructure located at least in part on Indian lands;

(5) The aggregate outstanding amount guaranteed by the Secretary of Energy at any time under this subsection shall not exceed \$2,000,000,000; provided that the outstanding loan portfolio for direct loans by the Secretary at any time under this subsection shall not exceed \$2,000,000.

(6) A direct loan, loan or bond guarantee under this subsection will be issued where the earnings of the business can meet business expenses, management has a proven ability to operate the business successfully, and the business has a history of timely repayment (for new business entities, the Secretary may also assess the experience of the management team and credit history of the owners (e.g., members, partners, shareholders)).

Prohibit state and local taxation of energy projects on tribal lands.

Amend 25 U.S.C. § 3503 by inserting:

(d) - Notwithstanding any other provision of law, no State or any of its political subdivisions shall impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity for energy generated on Indian lands or any production of resources from Indian lands or for any production of resources developed under any lease, right-of-way, Indian mineral development agreement or tribal energy resource agreement.

Require federal power marketing authorities to purchase tribal energy generated power and finance certain tribal grid transmission projects.

Amend 25 U.S.C. § 3505 as follows:

(c)(3) the Administrator of ~~the Western Area Power Administration~~ **any federal power marketing authority** ~~may~~ **shall** purchase non-federally generated power from Indian tribes to meet the firming and reserve requirements of the ~~Western Area Power Administration~~ **federal power marketing authority**.

Insert new subsection (e): Pursuant to the terms and conditions of Section 402 of the American Recovery and Reinvestment Act, PL 111-5, the Administrator of the Western Area Power Administration shall provide technical assistance, development assistance and financial assistance, if requested, to an Indian tribe, tribal energy development organization or a tribally-owned electric utility for the purpose of constructing electric transmission and distribution lines on Indian lands.

Expand eligibility for energy programs under Title V of the Energy Policy Act of 2005 to include organizations owned and controlled by Indian allottees for energy projects on allottee lands

Amend 25 U.S.C. § 3501(2) by adding:

(C) land that is owned by an Indian tribe and was conveyed by the United States to a Native Corporation pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), ~~or~~ that was conveyed by the United States to a Native Corporation in exchange for such land, **or that is located in an Alaska Native Village Statistical Area as determined by the Bureau of the Census.**

Amend 25 U.S.C. § 3501(12) by inserting:

(C) Any group of allottees representing the required undivided interests in an allotment pursuant to 25 USC §2218(b), or like representation for more than one allotment.

Amend the Internal Revenue Code

Amend the business investment tax credit for renewable energy projects to allow tribes to receive payment and participate in projects

Amend 26 U.S.C. § 45A as follows:

Add subsection (g) - **PAYMENTS IN LIEU OF TAX CREDIT**

(i) **IN GENERAL.**—Upon application, the Secretary of the Treasury shall, subject to the requirements of this section, provide a payment to each Tribal Enterprise that would otherwise be qualified for the tax credit if not for its tax status.

(ii) **TIME FOR PAYMENT**—The Secretary of the Treasury shall make payment under subsection (i) during the 60-day period beginning on the later of the date of the application for such payment

Amend 26 U.S.C. § 50(b)(4)(A)(i) as follows:

Insert at the end: **provided that, this provision does not apply to property owned - in whole or in part - or used by a federally recognized Indian tribe, tribal energy development organization (as defined in 25 U.S.C. 3502), or a tribally-owned electric utility.**