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FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

March 3, 2016

TJ Kennedy
President
First Responder Network Authority
12201 Sunrise Valley Drive
Reston, VA 20192

Dear Mr. Kennedy:

Thank you for appearing before the Subcommittee on Communications and Technology on Tuesday, February 2, 2016, to testify at the hearing entitled "Status of the Public Safety Broadband Network."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Thursday, March 17, 2016. Your responses should be mailed to Greg Watson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to Greg.Watson@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Greg Walden
Chairman
Subcommittee on Communications and Technology

cc: Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Attachment —Additional Questions for the Record

The Honorable Frank Pallone, Jr.

The inclusion of our nation's tribes in the deployment of FirstNet will be critical to its overall success. Tribal communities have unique public safety needs and we should ensure that reliable coverage to these areas is fully realized. As noted in the attached testimony by the National Congress of American Indians, many tribal leaders are concerned that FirstNet does not have a formal tribal consultation policy or guidance document that ensures tribal governments consult directly with FirstNet instead of state points of contact.

1. To what extent are tribal governments currently involved in FirstNet funding, planning, and deployment?

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NATIONAL CONGRESS OF AMERICAN INDIANS

HOUSE ENERGY & COMMERCE COMMITTEE
SUBCOMMITTEE ON COMMUNICATIONS & TECHNOLOGY

FEBRUARY 16, 2016

TESTIMONY FOR THE RECORD:
"STATUS OF THE PUBLIC SAFETY BROADBAND NETWORK"

INTRODUCTION

The National Congress of American Indians (NCAI) is the oldest and largest representative organization of American Indian and Alaska Native tribal governments. NCAI represents the broad interests of tribes and their citizens to promote the advancement of tribal sovereignty and self-determination. On February 2, 2016, the House Subcommittee on Communications and Technology held a hearing on the, "Status of the Public Safety Broadband Network". The hearing was to receive an update from the Federal Communications Commission (FCC) and the First Responder Network Authority (FirstNet) regarding the progress in deploying a nationwide interoperable public safety broadband network for first responders. *The Middle Class Tax Relief and Job Creation Act of 2012* (*P.L. 112-96*) established FirstNet as an independent authority under the Department of Commerce, National Telecommunications & Information Administration.

Since the creation of the FirstNet Authority, NCAI has advocated for the inclusion of tribal recommendations and priorities in the development and eventual deployment of this nationwide public safety network. However, *P.L. 112-96* created a tiered level of consultation that excluded direct government-to-government consultation between tribal nations and the FirstNet Authority. Under current law, FirstNet is required to consult with the 50 states, territories, and the District of Columbia, while the states are supposed to be responsible for consulting with tribal nations within their boundaries.

NCAI respectfully submits this testimony for the record of the Subcommittee on Communications & Technology Oversight Hearing on "Status of the Public Safety Broadband Network".

PERSISTENT RECOMMENDATIONS TO DEVELOP A TRIBAL CONSULTATION POLICY

Nearly all departments in the federal government have developed a tribal consultation policy that acknowledges the fiduciary trust relationship existing between tribal governments and the United States. The Department of Commerce was in the process of creating its own tribal consultation policy during the time FirstNet was established under the National Telecommunications & Information Administration (NTIA), and it was assumed that FirstNet would be guided by this process. However, after nearly four years of engagement, FirstNet has still not developed and released a tribal consultation policy or guidance document. This tribal-specific policy is critical to provide guidance on how tribal issues will be addressed by the FirstNet Authority and/or state points of contact.

During many of our early meetings with NTIA—and then the FirstNet Authority after it was formally established—NCAI consistently recommended that development of this policy was needed to address the tribal inconsistencies referenced in *P.L. 112-96*. However, this recommendation has constantly come under scrutiny by the FirstNet Authority due to its own legal interpretations of consultation requirements under *P.L. 112-96*. NCAI also previously recommended that Presidential *Executive Order 13175* provided FirstNet with guidance on how to develop a tribal-specific consultation policy.[1] Again, this recommendation has been ignored by FirstNet as it constantly references that *P.L. 112-96* established it as an independent authority and therefore not beholden to Executive Orders. Despite FirstNet's assertions as an independent authority, NCAI used the Federal Communications Commission (FCC) as an example of an independent agency that has adopted a formal tribal consultation policy.[2]

Despite the absence of recognition to tribal sovereignty in the *1934 Communications Act*—and subsequent amendments to the *1996 Telecommunications Act*—the FCC has made concerted efforts over the past sixteen years to include tribal issues in its rulemakings. Section 254 of the *Telecommunications Act of 1996*, declared that all Americans, regardless of where they live, will have access to communications services at reasonable and affordable rates.[3] The FCC has interpreted Section 254 as applying to consideration of tribal-specific issues as well since citizens of tribal nations are also citizens of the United States.[4] In contrast, FirstNet has constantly referenced Section 6206(b) of the *Middle Class Tax Relief and Job Creation Act* as directing FirstNet to, "take all actions necessary to ensure the building, deployment, and operation of the nationwide public safety network." Yet FirstNet has still not taken the necessary actions to create a consultation policy that would address tribal inclusion in FirstNet deployment and maintenance.

NCAI has consistently pointed to this example in an effort to encourage FirstNet to exercise "administrative flexibility" to include tribes where the law has failed to recognize us. This recommendation is especially important in those instances where states may not be inclusive of tribal entities due to historic and contentious tribal-state relations. Unfortunately, these recommendations continue to be deflected because of legal interpretations of *P.L. 112-96* and FirstNet's stance as an independent authority.
While NCAI is grateful that FirstNet has established a tribal seat on its Public Safety Advisory Committee, created a tribal liaison and outreach officer, and a Tribal Working Group, the absence

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[1] *See* "Executive Order 13175—Consultation and Coordination with Indian Tribal Governments". President Bill Clinton. November 6, 2000. *Available* at http://www.gpo.gov/fdsys/pkg/WCPD-2000-11-13/pdf/WCPD-2000-11-13-Pg2806-2.pdf. *See also*, "Memorandum for the Heads of Executive Departments and Agencies". President Barack Obama. November 5, 2009. *Available* at https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president.

[2] *See* Federal Communications Commission, Native Nations Consultation and Policy. "Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes". June 8, 2000. *Available* at http://www.fcc.gov/encyclopedia/native-nations-consultation-and-policy.

[3] *See* 47 U.S.C. § 254—Universal Service. "254(b)(1): quality services should be available at just, reasonable, and affordable rates", "254(b)(2): access to telecommunications and information services should be provided in all regions of the nation", and, "254(b)(3): consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services...that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." *Available* at http://www.gpo.gov/fdsys/pkg/USCODE-2011-title47/html/USCODE-2011-title47-chap5-subchapII-partII-sec254.htm.

[4] *See* Federal Communications Commission, Native Nations Consultation and Policy. "Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes". June 8, 2000. *Available* at http://www.fcc.gov/encyclopedia/native-nations-consultation-and-policy.

of a consultation policy for tribal issues has stymied true tribal inclusion in FirstNet policy development. As an independent authority that has been charged to "take all actions necessary" to ensure the success of FirstNet, NCAI strongly urges the FirstNet Authority to develop a consultation policy and/or guidance to address tribal issues. This will not only ensure that tribal areas receive the appropriate attention needed for FirstNet deployment, but it should also serve to provide guidance to state points of contact that are uncertain as to how to work with tribal governments and entities.

INTERPRETATION OF *P.L. 112-96* HAS CREATED CONFUSION REGARDING TRIBAL INCLUSION

Section 6206 of *P.L. 112-96* outlines specific powers, duties, and responsibilities of the First Responder Network Authority. Section 6206, also highlights one of the more confusing references to tribal inclusion in implementing the FirstNet national public safety broadband network (NPSBN). It is clear that references to tribal inclusion were hastily incorporated into the final law, and the record of Congressional proceedings and draft bills indicates that tribes were an afterthought in the assembly of the final bill. A specific example of this confusion in language is reflected below:

> *Section 6206(c)(2)(A), Required Consultation.—In developing requests for proposals and otherwise carrying out its responsibilities under this Act, the First Responder Network Authority shall consult with regional, State, tribal, and local jurisdictions regarding the distribution and expenditure of any amounts required to carry out the policies established under paragraph (1), including with regard to the—*
>
> *(i) construction of a core network and any radio access network build out;*
> *(ii) placement of towers;*
> *(iii) coverage areas of the network, whether at the regional, State, tribal, or local level;*
> *(iv) adequacy of hardening, security, reliability, and resiliency requirements;*
> *(v) assignment of priority to local users;*
> *(vi) assignment of priority and selection of entities seeking access to or use of the nationwide public safety interoperable broadband network established under subsection (b); and*
> (vii) *training needs of local users.*[5]

On first read of Section 6206(c)(2)(A), it would seem that the FirstNet Authority is responsible for consulting with regional, state, tribal, and local jurisdictions in building and maintaining the NPSBN. However, much of the confusion and extra limitations regarding this language comes from the following Section 6206(c)(2)(B), "Method of Consultation". Section 6206(c)(2)(B) of *P.L. 112-96* stated that the method of consultation would follow the parameters of Section 6302(d), which established the State and Local Implementation Grant Program (SLIGP) and that consultation for SLIGP would occur through the state points of contact. These conflicting sections of *P.L. 112-96* illustrate that tribes were added as an afterthought in the final law; Section 6206(c)(2)(A) states that FirstNet should consult with tribes in building and maintaining the NPSBN, yet Section 6302(d) limits that consultation to the development and award of SLIGP—a grant program for infrastructure data collection purposes that was only available to the 50 states, territories, and Washington, DC.

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[5] *See* Public Law 112-96, the Middle Class Tax Relief and Job Creation Act of 2012. February 2012. *Available* at https://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf.

THE ROLE OF TRIBES IN THE REQUEST FOR PROPOSAL PROCESS

On January 16, 2016, FirstNet issued a Request for Proposals (RFP) to gather responses for the deployment of this nationwide broadband public safety network. While the RFP process was developed to incentivize states into accepting the FirstNet RFP, there are still uncertainties as to how tribes will be involved and represented in those RFPs. The State and Local Implementation Grant Program (SLIGP), which tribes were not eligible to apply for, was created to gather information on existing telecommunications infrastructure in the states and further highlight areas that are unserved and underserved by telecommunications services. The SLIGP information collected was to be used to inform the development of the FirstNet RFP process, which leads to serious concerns about how tribal participation is presently being included by the states.

While tribal governments, tribal telecommunications providers, and tribal organizations provided input and recommendations in requests for information (RFI's) to develop the FirstNet RFP, tribal recommendations to develop a tribal-specific consultation policy have never been fulfilled. FirstNet established a Tribal Working Group with regional representation of tribal IT and public safety officials, yet the FirstNet Authority has still not released a finalized tribal consultation policy. Under *P.L. 112-96*, FirstNet was empowered to "take all actions necessary" to ensure tribal inclusion in the NPSBN deployment, yet it is still uncertain how tribes that operate their own telecommunications companies or infrastructures will be included in the RFP and eventual deployment processes. For instance, FirstNet's proposals to utilize existing infrastructure on tribal lands could lead to delays in network deployment if a tribe that owns such infrastructure is not consulted beforehand; FirstNet should not assume that it can simply co-locate on existing tribal infrastructure, but rather it should fully engage and involve tribes through direct government-to-government consultative means.

Additionally, it is uncertain how states collecting SLIGP information will inform the FirstNet RFP process as it relates to tribal lands. The SLIGP program was modeled after the State Broadband Initiatives (SBI) program under the *American Recovery and Reinvestment Act of 2009* (*P.L. 111-5*). The SBI program created to populate telecommunications infrastructure and service information on the National Broadband Map and it was only awarded to the 50 states, territories, and the District of Columbia[6], thereby effectively excluding direct tribal eligibility. State agencies, or their contracted designees, were expected to collect data on telecommunications infrastructure and services on tribal lands but some tribes refused to share data or allow outside entities onto tribal lands to collect this information.

According to a 2012 U.S. Department of Commerce Performance Progress Report, the Gila River Indian Community of Arizona, and their tribally-owned and operated telecommunications carrier refused to share information with the State of Arizona and NTIA.[7] Although the Report didn't specify the exact reasons for the Gila River Indian Community's refusal to participate in the data collection efforts, similar instances of tribes refusing to share their data or information with outside entities can be found in other areas nationwide. Data collection and retention has more recently been held as an exercise of tribal sovereignty since many tribes have historic and deep-seated issues with sensitive information being exploited by non-tribal entities. A key example of this

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[6] *See* BroadbandUSA: Connecting America's Communities. State Broadband Initiative. *Available* at http://www2.ntia.doc.gov/SBDD.

[7] *See* U.S. Department of Commerce, Performance Progress Report. Arizona – Government Information Technology Agency. February 24, 2012. *Available* at http://www2.ntia.doc.gov/files/grantees/04-50-m09045_arizona_department_of_administration_-_adoa_ppr2012_q1.pdf.

infringement dates back to the early anthropological and archaeological publishing of religious and cultural practices, or seizing of sacred cultural items by non-tribal researchers.

An August 2011, Ex-Parte Presentation of the FCC's Native Nations Broadband Task Force (NNB Task Force) further highlighted Gila River's issues in working with the State of Arizona and NTIA on the data collection efforts of the SBI program. In an FCC Ex-Parte filing of the meeting, members of the FCC's NNB Task Force raised concerns with the Native Nations Map—a subset of the National Broadband Map managed by NTIA and the FCC that was initially populated with information collected under the SBI program.[8] In a statement by NNB Task Force member Bruce Holdridge—General Manager of Gila River Telecommunications, Inc.—he expressed the willingness and desire to work with NTIA or the FCC to ensure accurate portrayals of the Gila River Indian Community on the 'Native Nations Map'. In the Ex-Parte transcript Mr. Holdridge stated:

> *We asked the NTIA to contact us and work with us directly, that we would rather work with the FCC or the NTIA rather than through a government organization at a state level that offered no support mechanism but yet received funding from the federal government, [and] wouldn't distribute it to Native America... then [the state government organization] proceeded to inadequately and inaccurately represent us in the National Broadband Map... I further think that we can get beyond [this inaccurate portrayal], provided that we can go back and work through a federal agency at some... government-to-government organization level and we'd be happy to work with you.*[9]

CONCLUSION: TRIBAL PARTICIPATION IN FIRSTNET IS UNCERTAIN

There are many uncertainties regarding how and to what extent tribes will be involved or included in FirstNet funding, planning, and deployment. NCAI strongly recommends that the FirstNet Authority develop a tribal consultation policy and guidance that can ensure tribes are included in the deployment of this nationwide public safety broadband network. Tribes have already been excluded from direct participation in the State and Local Implementation Grant Program (SLIGP), and it is uncertain how this lack of eligibility to participate has informed deployment plans as they pertain to tribal lands. There have already been documented issues with Internet data collection on tribal lands under the State Broadband Initiatives Program that was administered by NTIA—the same agency that collected information for FirstNet's SLIGP. If tribes are truly going to be included in FirstNet deployment and maintenance on tribal lands, Congress must amend *P.L. 112-96* to recognize government-to-government consultation between tribal governments and the FirstNet Authority.

We are hopeful that the Subcommittee will consider these issues and inquire to FirstNet about the adoption of a tribal-specific consultation policy, and to determine FirstNet's willingness to provide Administrative recourse if tribes are not being included in the development of FirstNet deployment. If you have any questions please contact NCAI Legislative Associate, Brian Howard, at bhoward@ncai.org.

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[8] *See* Notice of Ex Parte Presentation - Connect America Fund, WC Docket No. 10-90; Improving Communications Services for Native Nations, CG Docket No. 11-41. Page 3. Federal Communications Commission Electronic Comment Filing System. *Available* at http://apps.fcc.gov/ecfs/document/view?id=7021703527.

[9] *Id.*

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ATL-14-010

TITLE: Urging Government-to-Government Consultation between the FirstNet Authority and Tribal Nations

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Middle Class Tax Relief and Job Creation Act of 2012 ("P.L. 112-96", or "the Act") authorized the creation of the First Responder Network Authority (FirstNet), an independent authority within the Department of Commerce, National Telecommunications & Information Administration (NTIA); and

WHEREAS, the intent of FirstNet is to provide police officers, fire fighters, emergency medical service professionals, and other public safety officials the ability to communicate with each other across agencies and jurisdictions on a single nationwide, interoperable, public safety broadband network; and

WHEREAS, under Section 6204 of the Act (47 U.S. Code § 1424), there are explicit references to: 1) tribal members and their eligibility for appointment to the FirstNet Board; 2) acknowledgement of tribes for consultation purposes in deployment of FirstNet; and 3) that tribes are eligible to enter into contractual agreements with FirstNet to utilize existing infrastructure on tribal lands; and

WHEREAS, though the Act listed tribal governments among the entities required for consultation purposes, the "method of consultation" stated that said consultation will occur between FirstNet and the designated officer or governmental body established by each respective State; and

WHEREAS, after the Act became law in February 2012, and given the disparate levels of telecommunications services on tribal lands, tribal entities worked with NTIA to ensure that tribal considerations were included and addressed during the establishment of the FirstNet Authority and its Public Safety Advisory Committee (PSAC); and

WHEREAS, a tribal seat was created on the PSAC and there has been ongoing work regarding FirstNet tribal inclusion and outreach, including the designation of a FirstNet Board Member to act in the capacity of "Tribal Liaison;" and

WHEREAS, although there have been ongoing tribal interactions with FirstNet, under current law consultation with tribal nations does not and will not occur at the federal government-to-government level; and

WHEREAS, explicitly established by the U.S. Constitution, Executive Orders, Acts of Congress—and affirmed by the Judicial system—the federal government has a fiduciary trust relationship with tribal nations, and the protocols for tribal consultation established under P.L. 112-96 abrogate the fiduciary legal relationship tribal nations have with the federal government.

NOW THEREFORE BE IT RESOLVED, that NCAI urges Congress to amend the Middle Class Tax Relief and Job Creation Act of 2012 ("P.L. 112-96") to codify an explicit recognition of tribal sovereignty and require direct government-to-government consultation between the FirstNet Authority and tribal nations; and

BE IT FURTHER RESOLVED, that until Congress amends P.L. 112-96, the Department of Commerce—as a federal department that has adopted a "Tribal Consultation and Coordination Policy"—intervene on behalf of tribes when state designated officers or governmental bodies are not including tribes in FirstNet proceedings; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Atlanta, October 26-31, 2014 in Atlanta, Georgia, with a quorum present.

[redacted]

ATTEST:

[redacted]

Recording Secretary