



NATIONAL CONGRESS OF AMERICAN INDIANS

June 15, 2012

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Re: *Request for Information – Development of the State and Local Implementation Grant Program for the Nationwide Public Safety Broadband Network*

**Docket No:120509050-1050-01
RIN 0660-XC001**

Dear Ms. Petus,

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative congress of American Indians and Alaska Natives in the United States. NCAI was created by tribal leaders in 1944 in response to termination and assimilation policies that threatened the existence of American Indian and Alaska Native tribes. Since then, NCAI has fought to preserve the treaty rights and sovereign status of tribal governments, while ensuring that Indian people may fully participate in the political system. As the most representative organization of American Indian and Alaska Native tribes, NCAI serves the broad interests of tribal governments across the nation.

On May 16, 2012 a Request for Comments by the National Telecommunications and Information Administration (NTIA) for the development of the State and Local Implementation Grant Program was published in the Federal Register.ⁱ The funds are specifically targeted for use by States to assist State, regional, tribal, and local jurisdictions to integrate necessary components for a nationwide public safety broadband network.ⁱⁱ While PL-112-96 requires NTIA to consult with the aforementioned jurisdictions, section 6203 establishes a single officer or government body within a State to commence consultations and coordination of the State and Local Implementation grant program.

On behalf of NCAI, I respectfully submit these comments regarding the development of the State and Local Implementation Grant Program for the Nationwide Public Safety Broadband Network (FirstNet). While the NTIA is statutorily required to disburse these grants directly to states, NCAI is concerned about the extent to which states will collaborate and coordinate with tribal governments regarding planning and implementation processes.

To ensure tribes are included in these important discussions it is essential that NTIA and the FirstNet authority establish reporting mechanisms for those states opting to receive State and Local Implementation Grant program funds that have tribes within

their boundaries. Recognizing that only \$135 million in grant funds will be available to states pursuing their own implementation plans for FirstNet,ⁱⁱⁱ certain regulations must be developed to protect tribes from exclusion from the planning process and from this network.

Compliance with Executive Order 13175

NTIA and FirstNet should adhere to former President Clinton's Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments",^{iv} and President Obama's reaffirming, "Memorandum for the Heads of Executive Departments and Agencies",^v which both declare that federal departments and agencies are "charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications..."^{vi} The Department of Commerce and NTIA have a fiduciary responsibility to tribes to ensure FirstNet regulations protect, preserve, and advance tribal sovereignty and public safety initiatives.

Executive Order 13175 should establish the foundation for regulations and policies developed by FirstNet to ensure State governments do not, intentionally or unintentionally, exclude tribes from the planning and implementation of this national public safety network for first responders. As a matter of upholding the federal fiduciary trust responsibility between the United States of America and tribal governments, the Department of Commerce, NTIA, and FirstNet must have the ability to intervene in State implementation efforts when those efforts are in conflict with tribal sovereignty, the directions of the Presidential Executive Order 13175 and the goals of the FirstNet network.

NCAI's Concern with State Certification and Designation of a Single Officer or Governmental Body to Administer Consultation and Coordination of Grant Funds

NCAI is concerned with the single 'point of contact' designation for consultation and grant coordination efforts since there have been instances where similar designations in other programs proved unsuccessful or were impeded. One such example is the State Broadband Data and Development (SBDD) grant program administered by NTIA. The SBDD grant program was created by the Broadband Data Improvement Act (PL-110-385) and provided with \$350 million in funding by the American Recovery and Reinvestment Act of 2009 (PL 111-5). However, this grant program was made available only to State designated eligible entities.

Recipients of the SBDD grant program were charged with collecting data to populate the National Broadband Map. This Map was to serve as a tool illustrating broadband availability in the United States. A similar Native Nations National Broadband Map ('Native Nations Map') was created relying on data gathered by the SBDD grant recipients and reports from eligible telecommunications carriers (ETCs) serving tribal lands.^{vii} This 'Native Nations Map' was meant to illustrate tribal lands connected, or not, to telephone and Internet services.

However, members of the Federal Communications Commission (FCC) Native Nations Broadband Task Force (NNB Task Force) have expressed concerns about the validity and integrity of the 'Native Nations Map'.^{viii} NNB Task Force member Bruce Holdridge, General Manager of Gila River Telecommunications, Inc. 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 [the FCC and NTIA].^{ix}

Similarly, The Homeland Security Act of 2002 established the Department of Homeland Security (DHS) as the principal agency to develop a national effort through a system of counterterrorism analysis, preparedness, and information-sharing. The Act was comprehensive yet incomplete because it failed to include tribal governments as eligible entities entitled to participate in DHS program implementation. Instead, tribes were instructed to work with the states. However, states did not reach out to tribes for emergency preparedness and planning activities and there were no sanctions for not sharing federal funding they received. Some states such as Arizona and California attempted to ignore tribal sovereignty and subject tribes to state jurisdiction for dispute resolution as a requirement to receive funding as a subgrantee. This problem persisted until tribes were successful in amending the homeland security law to establish the Tribal Homeland Security grant program.

States have their own priorities, that lead them to sharing available funding with local governments under their jurisdiction. It is not likely that they will make the effort to share funds with tribes when the amount of funding is small as in this situation. Furthermore, some states have prohibitions on giving grants to tribes regardless of the source of funding.

NTIA and the FirstNet authority must be aware of these issues and institute rules and reporting requirements to ensure that tribal governments are included in the planning and implementation processes. Creation of a nationwide public safety broadband network will not succeed if tribal lands are not included in this process. While a single State entity is charged with consultation with tribal governments and coordination of grant funds, NTIA and the FirstNet authority must recognize that this engagement does not override the federal trust responsibilities they have to tribes. As federal government entities NTIA and the FirstNet authority must uphold the federal fiduciary trust responsibility and act in compliance with Presidential Executive Order 13175.

NTIA's Request for Comment

Consultation Process

1. What steps should States take to prepare to consult with FirstNet regarding [1(i) – 1(vii)] issues?

States should become knowledgeable of and coordinate with the federally-recognized tribes within their boundaries, if they have not already established formal government-to-government relationships. The tribal-state relationships vary around the United States. Some states have established Indian Affairs Departments, Commissions, or equivalent State governmental offices that

recognize and foster tribal-state relations. However, FirstNet must be aware of and recognize that in some instances tribal-state relations operate in conflicting and hostile environments.

Tribal-state relations have often been mired by instances where State actions have interfered with or infringed on tribal sovereignty. Jurisdictional and legal differences concerning law enforcement, taxation, right-of-way permitting, and others areas have provided complications for these relations to operate cooperatively. However, there are also several instances of beneficial coordination and cooperation between states and tribal sovereigns. In compliance with Presidential Executive Order 13175, regulations must be established for the FirstNet authority to intervene in instances where these relations can lead to State exclusion of tribes in the planning and implementation of this national public safety network.

2.(b) Who might serve on the governmental body (e.g., public partners, private partners, technical experts, Chief Information Offices, SWIC, finance officials, or legal experts)?

Rather than reliance on a single officer within each State, NCAI would encourage the selection of a governmental body as the entity designated by the State for consultation and coordination of grant funds. Reliance on a single officer to conduct consultations with tribal governments and other entities would be unduly burdensome, and serve to impede coordinated efforts for the deployment of FirstNet. There are 566 federally-recognized tribes in the United States, each with its own diverse cultural beliefs and political structures, laws and regulations. The State of Alaska alone has 226 federally-recognized tribes.^x To designate a single officer to coordinate efforts among the plethora of jurisdictions would not only prove complex, but would also increase the potential for exclusion of entities – tribal and non-tribal – from the FirstNet deployment process.

Those States that do have tribes within their boundaries must have tribal representation in a State governmental body conducting consultations and coordination of grant funds. NTIA and the FirstNet authority should develop and enforce criteria for ‘governmental bodies’ that are inclusive of tribal leaders,^{x1} and tribal technical experts with public safety and telecommunication backgrounds. Instead of a single tribal representative on a State designated ‘governmental body’, tribal representation should be reflective of the diverse tribal nations within a State. Each tribe is unique and, as such, necessitates diverse representation to ensure tribal challenges and needs are addressed.

However, final development of these criteria should be sought through consultation with tribal governments. NCAI can assist the effort to inform and educate NTIA and the FirstNet authority of the uniqueness and complexities that exist in Indian Country, but as part of a federal agency, it is the responsibility of NTIA to consult with tribal nations. Executive Order 13145 is reflective of that federal obligation to tribes.

2.(d) How should States plan to involve the tribal entities in the grant program?

State entities should conduct outreach to tribes regarding FirstNet implementation, and connect tribes with the entity designated with consultation and coordination of grant funds. However, recognizing that not all States may have ‘Indian Affairs’ departments or agencies it would be essential for States to engage with intertribal organizations, consortiums, and/or equivalent tribal entities. Contact with these tribal organizations would benefit State efforts for outreach and enable States to contact and coordinate with tribal leaders.

Additionally, States should reach out to tribes on an individual basis as many tribes have their own public safety communication disparities and require a tailored approach to address such issues. Tribes typically have an ‘executive’ body of government or similar administrative body that oversees various government functions. These bodies of government should be contacted by the State government for FirstNet coordination. Of the 50 States only 34 contain federally-recognized tribes within their boundaries and they vary from one to 226 tribes.^{xii} NTIA should empower FirstNet with the regulatory oversight to mandate requirements for States to engage with their respective tribal governments. Furthermore, NTIA should consider requiring States with tribes within their borders to designate a representative of each tribe in a governmental body tasked with determining the current infrastructure on tribal lands, assisting with planning, and understanding the historical, cultural and land-based complexities of tower siting on tribal lands.

2.(e) What requirements should be included in the grant program to ensure that local and tribal public safety entities are able to participate in the planning process?

To ensure participation by tribal public safety entities in the planning process NTIA and the FirstNet authority should develop State reporting requirements. These reporting requirements should be established to ensure that states are meaningfully engaging with tribal governments to coordinate FirstNet deployment. These reporting requirements would also serve to provide tribes with an avenue of recourse in the event tribal input and concerns are not being addressed by the State or their designated consultation entities. NTIA and the FirstNet authority have an obligation to tribes to intervene if tribal-state relations deteriorate and bring FirstNet deployment in Indian Country to a standstill.

The Federal Communications Commission (FCC) recently promulgated reporting requirements for eligible telecommunications carriers (ETCs) serving tribal lands that NTIA could modify to State reporting requirements for the FirstNet Authority.. On November 18, 2011 the FCC released a Report and Order and Further Notice of Proposed Rulemaking that adopted a new Connect America Fund (CAF). Included in the CAF Order were ‘tribal engagement’ requirements for ETCs receiving CAF funds from the forthcoming Mobility Auctions. The FCC recognized the federal trust responsibility in the CAF Order, and stated that the adoption of the tribal engagement provisions acknowledged tribal sovereignty and would provide support for the deployment of telecommunication services to tribal lands.^{xiii} The tribal engagement provisions state that:

ETCs serving Tribal lands must include in their reports documents or information demonstrating that they have meaningfully engaged Tribal governments in their supported areas. The demonstration must document that they had discussions that, at a minimum, included: (1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning; (3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.^{xiv}

ETCs serving tribal lands and receiving funds from the forthcoming Mobility Fund auction will be required to submit, to the FCC and tribal government officials, an annual certification and summary of their compliance with these engagement provisions.^{xv} Failure to comply with these regulations will result in the loss of CAF funds.

While these engagement provisions are unique and detail regulations imposed on industry entities providing wireless services to tribes and tribal lands, this reporting concept should be considered by NTIA and FirstNet. The failure of States and State designees to meaningfully engage and coordinate with tribal governments should have repercussive mechanisms to allow tribal recourse. These mechanisms will ensure tribal participation in FirstNet deployment, and acknowledge NTIA and the FirstNet authority's dedication to the federal trust relationship between the United States and tribes.

Existing Public Safety Governance and Planning Authorities

4.(a) What is the current role of these existing governance structures (SWIC, SIGB, SIEC) in the planning and development of wireless public safety broadband networks?

Currently there are no good examples of these structures as they pertain to tribal inclusion. There are statewide interoperability committees, such as those that exist in Arizona, but there is no documented tribal outreach or input. Therefore, tribes are excluded from these participating in these structures. This is problematic and creates inconsistent coverage within the state with tribal lands covering an estimated 30 percent of the land base in Arizona. The Navajo Nation and Tohono O'odham Nation are the first and second largest land base tribes in the country, with the Navajo Nation encompassing an area similar to the size of West Virginia and the Tohono O'odham Nation an area roughly the size of Connecticut.

State and Local Implementation Grant Activities

9. What types of costs should be eligible for funding under the State and Local Implementation grant program (e.g., personnel, planning meetings, development/upgrades of plans, or assessments)?

It would be beneficial to gather data related to broadband speeds (upload and download), availability (wireline and wireless), and price comparisons of services (reflective of speeds offered) in tribal, rural, and urban areas. These determinations would allow for current and future targeted funding efforts to improve broadband services to the country overall. Provision of affordable, high-speed broadband service can only be obtained with data highlighting areas of capacity and need. It is clear that costs should be eligible for actual data collection, the creation and populating of GIS or other databases and travel expenses specifically related to data collection.

9.(a) Should data gathering on current broadband and mobile data infrastructure be considered an allowable cost?

Gathering data on current broadband and mobile data infrastructure should be an allowable cost. Without the investment required to consolidate all such data at the national level, there will be too many opportunities to overbuild, overspend and poorly plan the network while potentially ignoring unserved and underserved counties and reservations that currently lack capacity or infrastructure. This data collection would not only serve to benefit the deployment efforts of the FirstNet network, but also assist in the continued identification of unserved areas for the FCC Mobility Fund and Tribal Mobility Fund auctions. However, data collection should follow certain protocols when it comes to tribal lands and communities.

As aforementioned there have been disparities highlighted with the Native Nations Broadband Map due to its misrepresentations of broadband availability on certain tribal lands. There is a need to provide updated and accurate data, but this data collection must not be reminiscent of the issues

encountered by tribes during the data collection efforts of the State Broadband Data and Development grant program. NTIA and the FirstNet authority must provide oversight and intervene if tribal-state relations deteriorate to the point where this data collection is not feasible. In respect for tribal sovereignty tribes must be consulted regarding the proper protocol for this data collection initiative.

9.(b) Should the State and Local Implementation grant program fund any new positions at the State, local, or tribal level that may be needed to support the work to plan for the nationwide public Safety Broadband Network? If so, what, if any, restrictions should NTIA consider placing on the scope of hiring and the type of positions that may be funded under the grant program?

NCAI would support any newly created positions that facilitate tribal involvement in the data gathering, planning and deployment processes of the FirstNet network. These positions should manage efforts to engage with tribal governments and provide a bridge for tribal-state coordination efforts. States that have already established relevant departments and agencies that deal specifically with ‘Indian Affairs’ should allocate these additional State and Local Implementation grant funds to those offices for increased coordination with tribal governments. If States, with federally-recognized tribes within their boundaries, lack an established ‘Indian Affairs’ department or agency then these grant funds should be utilized to create positions reflective of those responsibilities.

NTIA and the FirstNet authority, again, must have increased oversight and regulatory authority to ensure that certain reporting mechanisms are in place that require States to account for the distribution of these funds – to ensure that funds are being allocated for the purpose of facilitating tribal involvement with the FirstNet initiative.

12.(a) Do States envision [State Broadband Initiative (SBI)] state designated entities participating or assisting this new State and Local Implementation grant program?

If use of the SBI designated entities as a resource is to be considered by States, then NTIA and FirstNet must make concerted efforts to ensure that tribes do not experience the same issues related to previous data collection efforts for the National Broadband Map. NCAI acknowledges that there are beneficial tribal-state relations that exist throughout the country. However, we urge NTIA to empower the FirstNet authority to provide protections for tribal governments given the history of federal fund allocations to States that were supposed to be inclusive of tribes.

13. What outcomes should be achieved by the State and Local Implementation grant program?

One of the most beneficial outcomes would be a determination of available broadband capable infrastructure in the United States. A detailed catalog highlighting ‘dark fiber’ held by both industry and federal government entities would serve as a foundation for future efforts to deploy broadband services. ‘Dark fiber’ refers to dormant fiber networks currently not in use. A federal department and agency-wide analysis should be conducted to save costs and ensure that duplicative spending is not incurred from infrastructure buildout in areas that contain ‘dark fiber’.

For instance, many Indian Health Service (IHS) clinics and hospitals have telemedicine capabilities that operate on closed fiber networks to preserve bandwidth. Supplementing these networks with FirstNet capabilities would lower costs for FirstNet deployment, increase broadband availability for the surround community through the ‘secondary user’ lease arrangements, and benefit local anchor

institutions. The FCC's recent announcement to consider use of the 4.9GHz band of spectrum for backhaul purposes would enable closed networks already in place, like those of IHS, to be opened up for public use.^{xvi}

Ideally, the result of the data gathering and a roll-up of that information in a common format to the federal level would allow for the creation of a GIS-based database that is fully searchable by infrastructure component and capacity by federal, state, city, county and tribal land area.

Public Safety is a Basic Human Right

Regardless of political differences and competing jurisdictional issues, access to first responders and public safety networks is a basic human right. While NCAI is urging NTIA to develop strong reporting mechanisms for the FirstNet authority, we recognize that this issue is not just limited to tribes. Development of sound and enforceable regulations for FirstNet to be a success would benefit not only all jurisdictions, but serve to protect all of our families and loved ones. It is unfortunate that in the United States, purportedly the most developed country in the world, we still have citizens that are unable to dial '911' in times of distress.

Although tribes have been excluded from receiving direct disbursements from the State and Local Implementation grant program, we are hopeful that States will work with tribes to ensure tribal lands and citizens are connected to FirstNet. However, if complications arise between tribes and states due to lack of coordination or consideration of tribal input and interests then NTIA and the FirstNet authority must have the ability to intervene and ensure tribal inclusion.

Additionally, NTIA must conduct consultations with tribal governments during the development of all FirstNet regulations to ensure tribal inclusion, uphold its trust responsibility to tribes, and to act in compliance with Executive Order 13145.

Thank you for your consideration and we look forward to working with you on this important matter.

Sincerely,



Jacqueline Johnson Pata
Executive Director
National Congress of American Indians

ⁱ See "Development of the State and local Implementation Grant Program for the Nationwide Public Safety Broadband Network; Request for Information". 77 Federal Register 95 (16 May 2012), pg 28857 - 28860. Available at http://www.ntia.doc.gov/files/ntia/publications/public_safety_rfi_05162012.pdf.

ⁱⁱ See Middle Class Tax Relief and Job Creation Act of 2012, PL 112-96, 126 Stat. 156. Subtitle C. Sec. 6302(a). State and Local Implementation. Available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf>.

ⁱⁱⁱ See Middle Class Tax Relief and Job Creation Act of 2012, PL 112-96, 126 Stat. 156. Subtitle C. Sec. 6301(c)(1). State and Local Implementation. Available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf>.

^{iv} See Executive Order No. 13175, 65 Federal Register 218 (November 9, 2000). Available at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

^v See Memorandum for the Heads of Executive Departments and Agencies. The White House, Office of the Press Secretary. November 5, 2009. Available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

^{vi} *Id.*

See also Executive Order No. 13175, 65 Federal Register 218 (November 9, 2000). Section 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Available at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

^{vii} See Native Nations National Broadband Map. Available at <http://www.broadbandmap.gov/native-nations>.

^{viii} 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>.

^{ix} *Id.*

^x See “Tribal Leaders Directory”. Department of the Interior, Bureau of Indian Affairs. Section 3, page 1. 2012. Available at <http://www.bia.gov/cs/groups/xois/documents/text/idc002652.pdf>.

^{xi} Note the term ‘tribal leaders’ is inclusive of those tribal governmental representatives that are elected and/or appointed by their membership. Recognition of the different political and governmental structures of tribes is essential for inclusion of tribal government officials.

^{xii} Note: List of States with federally-recognized tribes within their boundaries.

1. Alaska: 226
2. Alabama: 1
3. Arizona: 20
4. California : 104
5. Colorado: 2
6. Connecticut: 2
7. Florida: 2
8. Iowa: 1
9. Idaho: 4
10. Kansas: 4
11. Louisiana: 4
12. Massachusetts: 2
13. Maine: 4
14. Michigan: 12
15. Minnesota: 6
16. Missouri: 1
17. Mississippi: 1
18. Montana: 7
19. North Carolina: 1
20. North Dakota: 4
21. Nebraska: 4
22. New Mexico: 21
23. Nevada: 17
24. New York: 8
25. Oklahoma: 38
26. Oregon: 9
27. Rhode Island: 1
28. South Carolina: 1
29. South Dakota: 8
30. Texas: 3
31. Utah: 5

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32. Washington State: 29
 33. Wisconsin: 11
 34. Wyoming: 2

Source: “Tribal Leaders Directory”. Department of the Interior, Bureau of Indian Affairs. Section 3, pages 1 – 25. 2012. Available at <http://www.bia.gov/cs/groups/xois/documents/text/idc002652.pdf>.

^{xiii} See “Connect America Fund Report and Order and Further Notice of Proposed Rulemaking”. Federal Communications Commission. WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208. Paragraph 484, page 157. Adopted October 27, 2011. Released November 18, 2011. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

^{xiv} *Id.* Paragraph 604, page 194.

^{xv} *Id.* Paragraph 637, page 205.

^{xvi} See “Improving Spectrum Efficiency in the 4.9 GHz Band”. Federal Communications Commission, News Release. June 13, 2012. Available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0613/DOC-314613A1.pdf.