

**First Responder Network Authority
Special Review Committee**

**Report on Openness and Transparency, Access to Information
and Network Planning**

September 20, 2013

Executive Summary

The Special Review Committee, with the assistance of the U.S. Department of Commerce's Office of the Chief Counsel for Economic Affairs, has examined the issues before it in this Report and, based on the available information and legal advice that it has received, has concluded that: (1) the First Responder Network Authority ("FirstNet") conducted open and transparent decision making; (2) FirstNet did not withhold records from Board members; and (3) FirstNet continues to work on a network plan in compliance with statutory requirements.

These conclusions are based on interviews, documents and other information compiled through and in conjunction with the efforts of the Chief Counsel for Economic Affairs and his staff, including: Board member Sheriff Paul Fitzgerald's April 23, 2013 motion and statement; legal analysis of FirstNet's statutory authority; interviews with FirstNet Board members and staff; interviews with staff from the National Telecommunications and Information Administration; and FirstNet's bylaws, resolutions, meeting minutes, meeting webcasts, internal correspondence, and notices to the public.¹

This report endeavors to provide sufficient detail to the public concerning the matters placed within the responsibility of the Special Review Committee. This report is divided into three sections:

- Section I discusses the issues of openness and transparency;
- Section II examines Board member access to information;
- Section III focuses on the continuing development of FirstNet's network plan.

Background

On February 22, 2012, Congress enacted *The Middle Class Tax Relief and Job Creation Act of 2012* (Public Law 112-96) ("the Act") establishing the First Responder Network Authority ("FirstNet") as an independent authority within the National Telecommunications and Information Administration ("NTIA") of the U.S. Department of Commerce. FirstNet's mission is to "ensure the establishment of a nationwide, interoperable public safety broadband network."² To help achieve this aim, the Act established a Board to head FirstNet, and directed the Secretary of Commerce to select the 12 appointed members of the Board, each of whom

¹ We note that much of the work of the Special Review Committee and the Chief Counsel's independent review involved reviewing both the sufficiency of legal advice provided and subsequent compliance with the legal advice that was previously issued to FirstNet by Department of Commerce attorneys. Communications and attorney work product such as these are privileged under the law and, therefore, are not subject to disclosure. For that reason, the specific legal analysis and advice provided to the Board and developed in this review will not be available to the public.

² 47 U.S.C. § 1422(a).

were required to have public safety, technical, network, and/or financial expertise, among other requirements.³ The Act also named the Secretary of Homeland Security, the Attorney General, and the Director of the Office of Management and Budget as permanent members of the Board.⁴ Through its bylaws, the FirstNet Board permits the Secretary of Homeland Security, the Attorney General, and the Director of the Office of Management and Budget to name designees to participate on their behalf in Board and Committee activities and votes.

At the April 23, 2013 FirstNet Board of Directors meeting, Board member Sheriff Paul Fitzgerald of Story County, Iowa, presented a resolution raising various concerns, including whether: (1) the FirstNet Board engaged in open and transparent decision making; (2) FirstNet's Board members have equal access to records; and (3) FirstNet's national public safety broadband network ("NPSBN") plan has been developed without input from all Board members and the Public Safety Advisory Committee ("PSAC").⁵ After significant discussion, the Board voted to table the motion and Chairman Sam Ginn immediately requested that the Board undertake a review of the issues raised.

On May 8, 2013, the FirstNet Board convened a special Board meeting by telephone and voted unanimously to establish a Special Review Committee ("SRC") in response to Board member Fitzgerald's concerns. This report addresses Board member Fitzgerald's three concerns as described above.

The SRC is chaired by Wellington Webb; Ed Reynolds is the Vice Chair. Other members of the Special Review Committee include: Chuck Dowd; Dana Hyde (representing the Director of the Office of Management and Budget); Jeff Johnson; Suzanne Spaulding (representing the Secretary of Homeland Security); and Tony West (representing the Attorney General of the United States).

At the request of the FirstNet Board Chairman, former U.S. Department of Commerce General Counsel Cameron Kerry assigned the Office of the Chief Counsel for Economic Affairs ("Chief Counsel") to assist the SRC in its review and preparation of this report. In preparing this report, the SRC, through and with the assistance of Chief Counsel, reviewed a variety of material, including: the motion and statement of Board member Fitzgerald; FirstNet's statutory authority; and FirstNet's bylaws, resolutions, meeting minutes, selected internal correspondence, and notices to the public. This review also involved interviews and discussions with a majority of the FirstNet Board members including Board member Fitzgerald, Department of Commerce staff, and the FirstNet Board Secretary.

This report addresses issues related to openness and transparency and provides a summary of the findings and conclusions reached based on the information reviewed to date by the SRC and Chief Counsel in three areas: openness and transparency; Board member access to

³ 47 U.S.C. § 1424(b).

⁴ *Id.*

⁵ Board member Fitzgerald also raised concerns about ethics and procurement matters that will be addressed in a separate report.

information; and the continuing development of FirstNet's network plan. The SRC is continuing its review of additional issues relating to ethics and procurement issues and will present those findings in a separate report. The SRC may also consider recommendations related to the issues within this review. If additional information relevant to the issues of openness and transparency comes to the attention of the SRC during this process, it will be addressed in the forthcoming report.

I. Openness and Transparency

In his motion, Board member Fitzgerald stated, in part, that the FirstNet Board conducted official Board business in a non-transparent manner.⁶ Specifically, Board member Fitzgerald raised concerns with briefing sessions and conference calls conducted outside of formally noticed Board meetings that apprised Board members of ongoing activities and prepared them for upcoming Board meetings. He is concerned that these interactions were not publicly announced or disclosed, and were not subject to public observation.

In order to review Board member Fitzgerald's claims regarding the openness of the Board's decision making, the reviewers employed a three-step approach. First, e-mail invitations and agendas for the non-public, pre-meeting briefing sessions and bi-weekly calls were collected and reviewed to determine what occurred during these briefings and calls. Second, interviews were conducted with Board members who participated in many of the briefings and calls at issue, as well as with NTIA staff who provided legal advice to the Board regarding non-public, informational briefings, to obtain their observations and elicit their perspectives on whether the closed events included the kind of decision-making that should have been done in a public forum.⁷ Finally, minutes and webcasts were reviewed from Board meetings on or before April 23, 2013, to examine any resolutions adopted by the Board.

Based on its review as outlined by this approach, the SRC concludes that the Board's pre-meeting briefings and bi-weekly calls served as informational briefings that did not constitute decision-making, voting or otherwise narrow options in such a manner so as to preclude issues that would appropriately be considered by the Board in public session. Language in the e-mails stating the purpose of the calls, as well as text in the e-mail invitations to Board members, reflected that informational briefings were to occur during the calls and briefing sessions rather than Board decision-making. The agenda items for these briefings and calls, moreover, reflected the same. Indeed, a review of the information reveals that most of

⁶ Motion at 3 ("The board of FirstNet has meetings and conference calls with a quorum of directors present that are not treated as board meetings, are not publicly announced or disclosed, and are not subject to public observation. The proceedings of the public board meetings are generally well-rehearsed performances while the real decision-making takes place in other forums. I want all of my public safety colleagues to be able to see what we are doing.")

⁷ These interviews included, but were not limited to: Susan Swenson, Telecommunications/Technology Executive; Tim Bryan, CEO, National Rural Telecommunications Cooperative; Teri Takai, Government Information Technology Expert; Jeffrey Johnson, Fire Chief (Retired), Former Chair, State Interoperability Council, State of Oregon; CEO, Western Fire Chiefs Association; Uzoma Onyeije, Secretary of FirstNet; William Kever, Retired Telecommunications Executive; and Kevin McGinnis, Chief/CEO, North East Mobile Health Services.

the discussion during FirstNet's briefings and bi-weekly calls involved matters that did not require imminent or even any Board action. Instead, these briefings and calls focused on issues of long-term importance to the organization. In addition, emails sent to establish the agendas invited Board members to contribute topics they wished to see covered.

Interviews with staff and Board members separately confirmed that decisions were not made during the bi-weekly teleconferences or the pre-meeting briefings, nor were Board members surveyed as to how they intended to vote upon the issues discussed during the calls. The briefings and calls were designed primarily to provide Board members with information about FirstNet's day-to-day activities. In addition, where actual meeting items were discussed, the totality of the information reviewed indicates that discussion was limited to ensuring that the Board members understood the items that would be presented for a vote during the publicly-noticed Board meeting. While the information reviewed does suggest that, on occasion, Board members would recommend changes to a resolution at a briefing session, it appears that such recommendations were part of an extended period during which Board members were permitted to propose edits to FirstNet resolutions following circulation of those items by the Board Secretary. Notably, all such proposed modifications were subject to the approval by the Chair and, as a result, did not involve action by the Board.

The SRC recognizes the concern that the briefings and/or calls may have brought the Board to consensus on issues or foreclosed future discussions of other possible options in a way that was not public, even if final votes were not taken. The totality of the information does not support that concern, however. The information indicates that discussions of substantive issues occurred at the open Board meetings, and Board members did not know whether resolutions and motions would pass, fail or be tabled until the Board meetings themselves. The briefings and calls may have helped frame issues for clearer presentation to and informed discussion by the Board at the public meeting, but the public meetings were essential to the Board's ability to reach consensus and resolution on substantive FirstNet issues.

Based on the information reviewed, the Chief Counsel concluded that the Board did not violate the requirement as established in the Act that "[m]eetings of the Board, including any committee of the Board, shall be open to the public."⁸ The Chief Counsel found, consistent with the criteria set forth by the Act concerning quarterly Board meetings and meetings held at other times as called by the Chair, that in light of the fact that decision-making and voting did not occur in the briefings or calls, they were not meetings required to be open to the public under the Act.⁹ As the information suggests, to the extent the Board seeks to hold a meeting

⁸ 47 U.S.C. § 1424(e): (e) Meetings (1) Frequency The Board shall meet—(A) at the call of the Chair; and (B) not less frequently than once each quarter. (2) Transparency Meetings of the Board, including any committee of the Board, shall be open to the public. The Board may, by majority vote, close any such meeting only for the time necessary to preserve the confidentiality of commercial or financial information that is privileged or confidential, to discuss personnel matters, or to discuss legal matters affecting the First Responder Network Authority, including pending or potential litigation.

⁹ The Chief Counsel's legal analysis underlying these conclusions constitute privileged attorney work product, and while the legal analysis has been shared with and discussed among members of the SRC, it is not subject to public disclosure absent a privilege waiver. The key elements, however, are summarized in this report.

that involves decision-making and voting, openness and transparency is achieved by: (1) providing reasonable notice to the public; (2) ensuring that the meeting is reasonably accessible at a convenient location and time; and (3) providing proper documentation of the actions taken.

II. Board Member Access to Information

During the April 23, 2013 Board meeting, Board Member Fitzgerald raised his concern that members of the Board may have different levels of access to critical documents. Specifically, he was concerned that information about financial issues, such as contracts and personnel matters, was not made available to all Board members. In support of this assertion, Board member Fitzgerald stated that “despite frequent requests, I was never provided with our consultant’s rates, statements/scope of work, contract information, qualifications in public safety, or information about the ‘objective’ qualifications against which they were hired.”¹⁰ He further noted that, “I requested this information from Acting-GM Farrill and Mr. Randy Lyon, Chief Financial Officer of FirstNet on multiple occasions and was rebuffed.”¹¹

While there are no statutory provisions relating to Board sharing of information, Article VI of the FirstNet Board’s Bylaws contains general provisions relating to information. Section 6.02 in particular, titled “Books and Records,” explains:

FirstNet shall keep the following records within NTIA:

- (a) Current Bylaws;
- (b) Correct and adequate records of accounts and finances;
- (c) A record of officers’ and directors’ names and addresses; and
- (d) Minutes of the proceedings of the Board of Directors and any minutes which may be maintained by committees of the Board of Directors. Records may be written, or electronic if capable of being converted to writing.

Any books, records, and minutes may be in written form or any other form capable of being converted into written form within a reasonable time. The records shall be open at any reasonable time to inspection by any member of the Board of Directors for a purpose reasonably related to his or her position as a director. Such books and records will be made available to the public by NTIA pursuant to Federal law, formal Congressional request, or judicial order.¹²

To explore Board member Fitzgerald’s concerns, the SRC, through and with the assistance of the Chief Counsel, reviewed various internal correspondence supplied by Board member Fitzgerald and other FirstNet Board members and staff to determine whether and under what circumstances Board member Fitzgerald may have made any written requests for

¹⁰ Written Presentation at 30.

¹¹ *Id.*

¹² Bylaws at Article VI § 6.02 (emphasis added).

financial records that went unanswered. In addition, interviews were conducted with various Board members and Randy Lyon, Chief Financial Officer of FirstNet, to determine the same.¹³

With regard to the FirstNet internal correspondence provided to the reviewers, none appeared to contain requests from Board member Fitzgerald for financial records. With regard to interviews conducted on this topic, it appears that two Board members -- Sheriff Fitzgerald and Sue Swenson -- made oral requests to the Acting General Manager for additional financial reports in late February 2013. Further, Mr. Lyon, who joined FirstNet in late March 2013, noted that he received a request for financial information from Board member Fitzgerald on the evening before the April Board Meeting.

The SRC notes that Board member Fitzgerald's concerns may have been generated by the fact that while a financial report was sent to the Board in early February, there were some delays in the first quarter of 2013 in delivering regular financial reports to FirstNet Board members. At the time of the February requests from Board members, the FirstNet Acting General Manager was working with the finance office within NTIA to develop a new financial reporting format designed specifically for FirstNet. Due to these activities, the Acting General Manager decided that the financial reports should not be immediately provided to the Board because he believed that the reports that could be generated at that time, which were done on a cash basis, needed modifications to reflect obligations and outlays to avoid confusion among the Board members. In addition, the Acting General Manager sought refinements in the reporting so the FirstNet would be able to report costs below the object class level. These modifications took some time and some Board members expressed concerns about the delay as the revised report was not delivered to the Board until April 2013. Nevertheless, when the format changes were finalized, each Board member received reports simultaneously when available.

With regard to Board member Fitzgerald's concern that Board members have unequal access to records, the information reviewed suggests that those Board members who served in dual capacities (as Board members and in managerial roles), did have more access to FirstNet records than the rest of the Board. The SRC recognizes that the fact of these Board members holding dual roles, while not ideal, stemmed from the need to stand up the FirstNet organization quickly in its infancy, as well as the lag time in hiring a FirstNet full-time staff. Since that time, FirstNet has hired a General Manager and has taken other steps to ensure that Board and management responsibilities are not conflated in the future.¹⁴ Nevertheless, now that the Board has officially established four permanent committees, there will be instances in which committee members have more information about the subject matter of their

¹³ Telephone Interview of Susan Swenson, Telecommunications/Technology Executive (Aug. 19, 2013); Telephone Interview of William Keever, Retired Telecommunications Executive (Aug. 26, 2013); Telephone Interview of Kevin McGinnis, Chief/CEO, North East Mobile Health Services (Aug. 26, 2013); Telephone Interview of Tim Bryan, CEO, National Rural Telecommunications Cooperative (NRTC) (Aug. 26, 2013); Telephone Interview of Jeffrey Johnson, Fire Chief, Retired; CEO Western Fire Chiefs Association (Aug. 28, 2013).

¹⁴ See FirstNet Resolution 39 (adopted August 13, 2013).

committee than will other Board members. The SRC recognizes, however, that such a structure is standard operating reality of all Boards.

Upon consideration of the totality of the information available, the SRC was unable to substantiate the concern that existing financial (or other) reports were intentionally withheld from specific Board members. While there were delays in delivering some financial information for a period of time prior to the hiring of a FirstNet Chief Financial Officer, such information was unavailable to all Board members during that time with the exception of Board members who were also serving in managerial roles.

III. The Ongoing Development of FirstNet's Network Plan

As part of the resolution he presented at the April 2013 Board Meeting, Board member Fitzgerald expressed his belief that a plan presented to the Board concerning the development of the National Public Safety Broadcast Network ("NPSBN") was flawed. Specifically, Board member Fitzgerald was concerned that the plan was not reviewed by the Board, did not include alternatives, did not receive the benefit of consultation with state, public safety and Public Safety Advisory Committee (PSAC) stakeholders; and reflected such an advanced state of development that meaningful state stakeholder impact on FirstNet's operations was effectively precluded.

To evaluate and address these concerns, reviewers undertook an extensive examination of the "Company Start-Up Planning Document" ("Planning Document") referenced by Board member Fitzgerald; the agenda for the December 2012 Board meeting, as well as the webcast of that meeting; interviews with relevant FirstNet staff and others; and applicable statutory requirements.

Based on this review and the supporting information, the SRC concludes that the Planning Document Board member Fitzgerald referenced was not a network plan; was not intended to foreclose future discussion or consideration of alternatives; and that it did not, in fact, preclude any such discussion or consideration. Notably, the document explicitly states that it "does not represent any finalized business, network or organizational plan and is not presented to solicit any formal vote from the FirstNet Board."¹⁵ Rather, the reviewed information suggests that the Planning Document was the result of brainstorming by FirstNet staff on a variety of projects and was shared with the Board for informational purposes only. The Board did not vote on the Planning Document, nor did FirstNet staff represent to the Board that the Planning Document was intended to be a fully developed plan, ripe for Board action. And it appears evident from the available information that the Board never regarded the Planning Document as a final network plan.

Moreover, FirstNet's activities both prior and subsequent to the April meeting at which Board member Fitzgerald voiced his concerns reveal that FirstNet's consultation process with

¹⁵ *Company Start-Up Planning Document* 9 (2013).

state, law enforcement and other stakeholders is extensive and ongoing. For example, both before and after the April Board meeting, Board member Jeff Johnson engaged in an extensive array of outreach activities, including: (1) direct outreach to over 4,500 people who are part of FirstNet's primary or secondary target audience; (2) forty-five presentations to state, local and tribal officials, with additional presentations scheduled for the remainder of 2013; (3) six regional workshops which reached approximately 500 state, local and tribal officials; and (4) a plan for one-on-one consultations with state officials and identified necessary staff and a proposed budget to accomplish further outreach.

FirstNet's General Manager, hired in April, has taken on the primary responsibility of developing a network plan that will eventually be presented to the Board for action. In discharging his duties with respect to a network plan, the General Manager has sought considerable feedback from the public, in addition to reviewing the outreach efforts of Jeff Johnson and Deputy General Manager T.J. Kennedy. And when asked by industry press about potential business models for the NPSBN, he replied: "Everything is on the table."¹⁶

Consistent with that sentiment, in the last several months, FirstNet has issued multiple Requests for Information (RFIs) to solicit information from all interested parties and further inform the development of its network plan. In fact, during the April 23, 2013 FirstNet Board meeting, Board member Craig Farrill announced that FirstNet would be developing and releasing 17 RFIs which would broaden FirstNet's market research efforts to include a wide range of wireless broadband network platforms, systems, equipment, software, services, applications, support systems and other components and aspects of the FirstNet Nationwide Network. In June 2013, FirstNet received numerous responses to its first RFI on Mobile Devices. In July, FirstNet released ten (10) of the remaining 16 RFIs (notably, responses to the July RFIs were not due until August 30, 2013, further indicating that the Planning Document was not intended to crystallize any particular vision for the network). FirstNet's work on the RFIs is the first step in a process that will enable the organization to issue Requests for Proposals related to FirstNet's network architecture -- proposals the organization expects will reflect the ongoing outreach efforts to various stakeholders and state and tribal governments.

In addition, the Board has established the PSAC as its standing public safety advisory committee.¹⁷ Board member Fitzgerald stated in his motion that the Board did not receive the benefit of PSAC consultation prior to adoption of the network plan. As discussed above, it is the conclusion of the SRC that there is no final network plan and that work continues on the development of a proposed course of action that may be presented to the Board for action. Moreover, the available information indicates that there are continuing efforts to engage with the public safety community, the PSAC and other stakeholders in the development of a network plan (for example, the SRC notes that Board member Johnson has met on several occasions with the Executive Committee of the PSAC, and a full PSAC meeting took place earlier this month as part of FirstNet's ongoing efforts to solicit PSAC input).

¹⁶ See <http://urgentcomm.com/public-safety-broadbandfirstnet/firstnet-gm-d-agostino-potential-business-models-everything-table> last visited, September 11, 2013.

¹⁷ 47 U.S.C. §1425(a)(1). See Board Resolution 4, Sep. 25, 2012; and Board Resolution 13, Dec. 11, 2012.

Based on all of the foregoing, as well as the information reviewed by and discussed with Chief Counsel, it is the conclusion of the SRC that FirstNet has yet to make any final decisions with respect to network design. The Planning Document that has given rise to expressed concerns was a "straw man," a FirstNet staff effort intended to provoke reaction and thought among the Board members. Outreach efforts continue and involve material input from Board members, the PSAC, and state, local and tribal jurisdictions. And, in light of the fact that the network plan is still very much under development, the SRC finds that the rights of states to build their own their own radio access networks (RANs) within their borders has not been compromised or improperly constrained.

Based on the above facts and supporting information, the Chief Counsel has determined that FirstNet has acted consistently with its statutory responsibilities with respect to the development of the NPSBN. The Act requires FirstNet to deploy and operate a NPSBN with the following components: 1) a core network; and 2) a radio access network.¹⁸ In developing requests for proposals and "otherwise carrying out its responsibilities," the Act requires FirstNet to "consult with regional, state, tribal, and local jurisdictions regarding the distribution and expenditure of any amounts required to carry out" network policies established by FirstNet.¹⁹ FirstNet is also required to establish a "standing public safety advisory committee" to assist FirstNet in carrying out its duties specified in the statute.²⁰ Finally, the Act provides that states have an opportunity to decide whether or not to "opt-in" to the NPSBN once the plans are finalized, or build their own RANs.²¹ Based on the factual analysis above, the SRC concludes that FirstNet has complied, and continues to comply, with the statutory requirements for the development of the NPSBN.

Conclusion

The Special Review Committee has examined the issues before it in this report and has concluded that: (1) the FirstNet Board has engaged in open and transparent decision-making; (2) FirstNet did not withhold information from Board members; and (3) FirstNet is still developing its network plan with full consultation and outreach. In the coming months, the Committee will prepare and present an additional report on the second phase of our review, which addresses matters of procurement and ethics and provides a combined set of recommendations for all of the issues examined by the Committee.

¹⁸ 47 U.S.C. §1422(b).

¹⁹ 47 U.S.C. §1426(c).

²⁰ 47 U.S.C. §1425(a)(1). FirstNet also has discretion to establish other standing or ad hoc committees, panel or councils. 47 U.S.C. §1425(a)(2).

²¹ § 6302 of the Act.