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Transmitted Electronically

April 17, 2023

Scott Blake Harris
Senior Spectrum Advisor
Director, National Spectrum Strategy
National Telecommunications and Information Administration
Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Re: USET SPF Comments to NTIA on Development of a National Spectrum Strategy, Docket ID No. NTIA-2023-0003

Dear Director Harris,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the National Telecommunications and Information Administration's (NTIA) Request for Comments on the development of a National Spectrum Strategy. Recognizing that spectrum is a finite resource, NTIA is soliciting input on the development this Strategy from federal partners, Tribal Nations, state and local governments, equipment manufacturers, technology standards associations, and the communications industry. NTIA has scheduled Tribal consultations on this topic for April 18, and April 20, 2023. However, the comment deadline to respond to NTIA's Requests for Comments on developing a National Spectrum Strategy is April 17, 2023, which is before the scheduled Tribal consultations. Although NTIA is also soliciting comments in response to question topics proposed for the Tribal consultations, these responses are due April 21, 2023. Both deadlines do not allow adequate time for Tribal Nations to provide input. Therefore, USET SPF strongly recommends that NTIA develop a Tribal Nation Spectrum Strategy to ensure that our communications, technology, and funding priorities are considered when setting the goals and policies for national spectrum management.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and

^[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

The digital divide that has persisted in Indian Country is yet another example of the federal government's failure to uphold its trust and treaty obligations to Tribal Nations. These obligations have been established by the U.S. Constitution, treaties, federal statutes, and judicial decisions rendered by federal courts. They exist in perpetuity, with the U.S. federal government having a legal and moral obligation to fulfill its solemn promises to Tribal Nations due to our exchange of vast landholdings and natural resources, oftentimes by force. It is essential that NTIA adhere to and uphold its trust and treaty obligations and develop a Tribal Nation Spectrum Strategy. This initiative will ensure that the unique challenges Tribal Nations face in accessing and utilizing spectrum over our lands are appropriately addressed through formulated policy recommendations and actions.

Preliminary Recommendations to Develop and Implement a Tribal Nation Spectrum Strategy

Through the U.S.'s development, investment, and deployment of high-speed wireless communications devices and services, spectrum has become a critical, high-demand resource and an essential component for delivering telecommunications backhaul, middle mile, and last mile services. Licenses to spectrum are an integral part of the communications landscape in areas such as national security, critical infrastructure, transportation, emergency/disaster response, long-distance learning, and public safety. Spectrum is also an essential underpinning of fixed and mobile wireless commercial broadband communications used by the public.

As NTIA and the Federal Communications Commission (FCC) moves forward in identifying and repurposing radio frequencies to support commercial 5G deployment nationwide, the development and implementation of policy to address the unique telecommunications challenges facing Tribal Nations must receive appropriate consideration. This should be achieved by consulting with Tribal Nations to identify and set the priorities for a Tribal Nation Spectrum Strategy. This initiative would establish a direct focus on addressing Tribal Nation issues related to spectrum access and use, as well as work in coordination with a National Spectrum Strategy on issues that affect our traditional homelands outside our current jurisdictional boundaries. These issues include cell tower placement, co-location services, preservation and protection of cultural/historic/natural resources, shared/secondary spectrum access opportunities, deployment and backhaul interconnectivity, and adoption initiatives ensuring internet affordability.

Below are several preliminary recommendations for developing and implementing a Tribal Nation Spectrum Strategy—

- **Develop a Tribal Nation Spectrum Strategy in consultation with Tribal Leaders.** Although NTIA is hosting upcoming Tribal consultations to gather input from Tribal Leaders on developing a National Spectrum Strategy, further consultations must be held with Tribal Leaders and our recognized technical experts to develop a robust Tribal Nation Spectrum Strategy. Specific input must be incorporated into this Strategy to recognize and advance recommendations and solutions to address the unique communications challenges facing Tribal Nations. Although this initiative is specifically focused on spectrum access and utilization, Tribal Nations experience pervasive issues with access to the energy grid, interconnection to backhaul services, geographic challenges, and high costs associated with deployment and adoption—all of which will affect how we can use spectrum to provide broadband services on Tribal Lands. Similarly, many Tribal Nations, including several in the USET SPF region, have small land bases or are landless, which creates complications when applying for federal funds, especially those that support broadband deployment. Several federal programs incorporate definitions for what

constitutes 'rurality', which rely on population density metrics in Census tracts to determine eligibility to receive federal support. This has often led to the exclusion of Tribal Nations to access vital federal programs and services, if we are part of a Census tract/tracts that are inclusive of a nearby urban or metropolitan center, regardless of the population density or economic demographics within our jurisdictional boundaries. These actions have led to Tribal Nations being excluded from eligibility to participate in various federal programs and access to federal funds, such as those offered by the USDA, for the deployment of broadband services on Tribal Lands. All these issues and concerns inevitably factor into the high costs associated with the deployment of broadband services, the affordability for our citizens to subscribe to such service offerings, and the lack of investment by the commercial telecommunications industry to connect our lands and citizens. The development of a Tribal Nation Spectrum Strategy should account for all these issues and others advanced from input received through consultation with Tribal Leaders and input provided by our technical experts.

- **Establish a Tribal Advisory Council to ensure ongoing dialogue and coordination on the development and implementation of a Tribal Nation Spectrum Strategy.** While USET SPF encourages and recommends further consultation with Tribal Leaders to develop a Tribal Nation Spectrum Strategy, we also recommend that NTIA establish a Tribal Advisory Council to continue to refine and provide additional recommendations for this Strategy during its implementation. This Tribal Advisory Council should be comprised of Tribal Leaders, along with our designated Tribal technical experts, and exhibit regional representation to ensure that our specific and unique telecommunications/spectrum challenges are appropriately considered. Additionally, any recommendations or changes to the Tribal Nation Spectrum Strategy should undergo review through consultation efforts with Tribal Leaders.
- **The Tribal Nation Spectrum Strategy must include specific focus on and protections for Tribal cultural, historic, and natural resources.** One of the foundational pillars of a Tribal Nation Spectrum Strategy would be the acknowledgement of federal obligations and commitments to protect and preserve our areas of cultural and historical significance. These include areas that are located within and outside of our current jurisdictional boundaries. Furthermore, the Tribal Nation Spectrum Strategy must also include commitments to protect our natural resources, which are inclusive of, but not limited to, our waters, forests and fields, desertscapes, everglades, plants and traditional foods, medicines, and land based and aquatic wildlife. The Tribal Nation Spectrum Strategy should include recommendations to increase federal appropriations for Tribal Historic Preservation Officers and funds for the hiring of other Tribal natural/cultural resources personnel.
- **Work with federal partners to integrate other Tribal broadband efforts and initiatives into a Tribal Nation Spectrum Strategy.** NTIA should solicit feedback from its partner federal agencies, including the FCC, to gather information on broadband initiatives that have been launched over the years and the challenges and successes experienced through development and implementation of these efforts. For instance, the Department of the Interior (DOI) published a National Tribal Broadband Strategy on January 16, 2021 to provide a roadmap for the federal government and the private sector to close the digital divide in Indian Country. DOI has also hosted a series of National Tribal Broadband Summits in recent years to provide an overview of program and service offerings available to Tribal Nations for broadband deployment and adoption. Similarly, the Federal Communications Commission adopted a Report and Order in July 2019 establishing a Tribal Priority to spectrum licenses prior to the auction of repurposed spectrum in the 2.5 GHz band. This was highly supported by Indian Country and advocacy efforts to implement a Tribal Priority to all high-speed, broadband capable spectrum has been suggested for well over a decade. Learning

about the challenges and successes associated with these federal partner initiatives can better inform NTIA on how to develop and implement a Tribal Nation Spectrum Strategy.

- **Include input and recommendations developed by other Tribal Advisory Councils and Task Forces focused on broadband issues in Indian Country.** In addition to soliciting feedback from its federal partners, USET SPF also recommends that NTIA collect information and recommendations advanced by other Tribal Advisory Councils and Task Forces focused on broadband issues affecting Indian Country. This would include reviewing reports issued by the FCC's Native Nations Task Force, such as its "[Handbook on Infrastructure Deployment on Tribal Lands](#)." This Handbook includes several spectrum management and use related recommendations to improve broadband access on Tribal Lands.
- **Recommend the President issue an Executive Memorandum to all federal agencies, including independent agencies, to implement a Tribal Nation Strategic Plan.** For the implementation of a Tribal Nation Spectrum Strategy to be successful, the President must direct all federal agencies and independent agencies to coalesce on implementation of this Strategy. Since President Biden issued the January 2021 Memorandum reaffirming commitment to Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", Tribal Nations have experienced a renewed focus from federal agencies to develop or update Tribal consultation policies. Such a commitment should extend to implementation of a Tribal Nation Spectrum Strategy to ensure federal agencies are consulting with Tribal Nations and establishing implementation recommendations and milestones. Furthermore, we recommend inclusion and participation of the White House Council on Native American Affairs (WHCNA) in these efforts.
- **Urge the FCC to establish a Tribal Priority Window to all high-speed, broadband capable spectrum licenses prior to an FCC auction proceeding since the current competitive bidding process does not uphold trust and treaty obligations.** Until a July 2019 Report and Order was adopted by the FCC to establish a Tribal Priority to spectrum licenses being auctioned in the 2.5 GHz band, Tribal Nations have largely been excluded from obtaining vital spectrum licenses to assist in the deployment of high-speed wireless broadband services on our lands. The establishment of this Tribal Priority enabled Tribal Nations to apply for and claim a spectrum license to frequencies in the 2.5GHz band—prior to an auction proceeding—if those frequencies included coverage of Tribal Lands. This effectively removed the exorbitant cost barrier to entry and did not require Tribal Nations to participate in an FCC competitive auction process. Since the FCC established the practice of auctioning spectrum licenses through a competitive bidding process in 1994, large quantities of spectrum licenses that include coverage of Tribal Lands have been purchased, and oftentimes hoarded, by the commercial communications industry. This practice has effectively prevented Tribal Nation participation in these auctions since these licenses are awarded to the highest bidder at a price point of hundreds of thousands, if not millions, of dollars. For instance, in the FCC's Auction 111, which closed in January 2022, AT&T bid over \$9 billion and won awards of 1,624 licenses in the 3.45 GHz band to support 5G wireless deployment. Overall, the FCC's Auction 111 generated over \$22.4 billion in net revenues for access to 4,060 licenses in the 3.45-3.55 GHz bands. The extremely high price point for obtaining spectrum licenses creates an insurmountable barrier to entry for Tribal Nations, especially since federal funds or credit offsets are non-existent or do not adequately provide the financial support required to participate in these auctions. While the FCC offers a Tribal Land Bidding Credit to auction bidders, including Tribal entities, agreeing to provide certain levels of service on Tribal Lands, a bidder must first win the award of a spectrum license over Tribal Lands before applying for the

credit. The Tribal Land Bidding Credit, therefore, does not address the initial barrier to entry for Tribal Nations to participate in the FCC's competitive bidding auction process.

Moving forward, NTIA and the FCC must address the issues and barriers to access Tribal Nations experience in obtaining spectrum licenses. Focus on these issues is a critical component for developing and implementing a Tribal Nation Spectrum Strategy. Furthermore, as NTIA and the FCC develops and implements an overall National Spectrum Strategy to identify additional spectrum bands for commercial broadband use, or repurpose spectrum currently allocated to federal agencies, the development and implementation of a Tribal Priority is unequivocally necessary. USET SPF recommends that NTIA and the FCC gather input on developing a Tribal Priority to all high-speed broadband capable spectrum licenses through consultation with Tribal Leaders and our designated technical experts. The U.S. must move beyond its current competitive bidding process for auctioning commercial spectrum licenses over Tribal Lands, and instead empower Tribal Nations to obtain these licenses to determine how broadband service should be deployed on our lands.

- **Work with the FCC to partition spectrum licenses or develop enforcement mechanisms on non-Tribal entities to enable secondary/shared use of spectrum over Tribal lands.**

The federal government owns all spectrum licenses and the award of licenses to access and use spectrum frequencies is controlled by the FCC. Therefore, although a commercial wireless company may hold a spectrum license, it does not own it. Like other assets held in trust by the federal government for the benefit of Tribal Nations, spectrum over Tribal Lands must be viewed within the same lens—as an asset analogous to a natural resource that is held in trust for the benefit of and use by Tribal Nations. If a license cannot be partitioned for exclusive use by a Tribal Nation, for instance due to potential interference issues, then the FCC must develop and adopt enforcement mechanisms on the non-Tribal licensee if it fails to deploy and provide affordable broadband services on Tribal Lands. Furthermore, if these services cannot be provided affordably, then the federal government, including the FCC, has trust and treaty obligations to Tribal Nations to provide financial support/incentives to offset high costs associated with the deployment, maintenance, and provisioning of broadband services on Tribal Lands.

The FCC must pursue these actions for the benefit of Tribal Nations, regardless of its status as an independent agency. The FCC cannot claim that it is not beholden to trust and treaty obligations since it recognized the principles of Tribal sovereignty and the federal trust responsibility when the agency adopted its, [“Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes”](#) in June 2000. The agency has made a solemn obligation to uphold trust and treaty obligations. Through this Statement of Policy, the FCC has committed to:

“...endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to communications services” (Sec. III(1)).

Further, through its 2000 policy, the FCC has also committed to,

“...endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands” (Sec. III(3)).

As a matter of upholding and fulfilling trust and treaty obligations, the FCC and the federal government as a whole must address the unique access to spectrum challenges affecting Tribal Nations. Innovative solutions, as emphasized in the FCC's 2000 Statement of Policy, must be

developed and implemented by the federal government to address these longstanding, persistent barriers for Tribal Nations to access and use spectrum for the provisioning of broadband services on our lands.

- **Work with Tribal Leaders and Congress to develop any legislation needed to implement a Tribal Nation Spectrum Strategy.** The implementation of a Tribal Nation Spectrum Strategy is not solely the responsibility of federal agencies and the Administration. Congress must enact laws to remove any statutory barriers that have prohibited Tribal Nations from accessing federal programs and services for broadband deployment and adoption on Tribal Lands. For instance, an issue that has become prevalent as of late with the implementation the COVID-19 relief laws, the Inflation Reduction Act (IRA), and the Bipartisan Infrastructure Law (BIL), is the inclusion of statutory language prohibiting the non-duplication of federal funds for infrastructure projects. Some federal agencies have interpreted this non-duplication language to mean that Tribal Nations cannot leverage funds received from a federal agency in combination with other funds or loans provided by other federal agencies to cover the costs of constructing an infrastructure project.

USET SPF recently submitted [testimony for the record](#) to the Senate Committee on Indian Affairs (SCIA) in response to its oversight hearing on, “The Future of Tribal Energy Development: Implementation of the Inflation Reduction Act and the Bipartisan Infrastructure Law.” In our testimony, USET SPF highlighted issues with the interpretation of this statutory language by federal agencies and how it has prohibited Tribal Nations from utilizing multiple federal funding sources for a single infrastructure project. During the oversight hearing, SCIA aptly acknowledged that it was not Congress’s intent to limit the stacking of multiple federal capital funding sources to meet the total amount of funding needed for an infrastructure project. Rather, it was to ensure that, for instance, a \$10 million federal grant and a \$10 million federal loan could not be obtained to cover the costs of a single \$10 million project. We recommended that SCIA and Congress enact legislation to remove the non-duplication of federal funds language in laws that have restricted Tribal Nations from leveraging funds from multiple federal sources to meet the costs of infrastructure projects and service delivery.

Congress must remove barriers for Tribal Nations to deploy, maintain, and deliver affordable broadband services on our lands must be supported by federal agencies and included as part of a Tribal Nation Spectrum Strategy. Furthermore, federal agencies must request and support increased appropriations to hire additional personnel to provide technical assistance to Tribal Nations. This technical assistance should include support for Tribal Nations to obtain federal funds for broadband deployment as well as applying for and managing spectrum licenses over Tribal Lands. USET SPF also recommends that federal agencies support legislative efforts to pass through federal funds to Tribal Nations under an Indian Self-Determination and Education Assistance Act (P.L. 93-638) self-governance compact and contract process. These actions would support Tribal Nation sovereignty and self-determination and uphold the federal government’s trust and treaty obligations, which exist in perpetuity.

Conclusion

The COVID-19 pandemic underscored and highlighted the pervasive absence and unreliability of vital broadband services in Indian Country. Since the late 1990s, the federal government has attempted to subsidize telecommunications deployment in Indian Country, but these efforts have not kept pace with everchanging and advancing technologies, especially in the areas of spectrum management and use. The digital divide that has persisted in Indian Country is yet another example of the federal government’s failure to uphold its trust and treaty obligations to Tribal Nations. In developing a National Spectrum Strategy to

manage the U.S.'s finite supply of spectrum resources, the federal government has a trust and treaty obligation to develop a Tribal Nation Spectrum Strategy to establish goals, milestones, and priorities to bridge the digital divide in Indian Country. We look forward to the upcoming Tribal consultations and strongly recommend that NTIA, in coordination with its federal partners and through consultation with Tribal Leaders, develop a Tribal Nation Spectrum Strategy. Development of this Strategy should incorporate the guidance of Tribal Leaders and our technical experts. We are hopeful that our preliminary recommendations provided in our comments can establish an initial roadmap to guide NTIA in its coordination, collaboration, and consultation efforts with Tribal Nations. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Chief Kirk Francis
President



Kitcki A. Carroll
Executive Director