



USET

SOVEREIGNTY PROTECTION FUND

1730 Rhode Island
Avenue, NW
Suite 210
Washington, DC 20036
P: (615) 872-7900
F: (615) 872-7417
www.usetinc.org

Transmitted Electronically

November 30, 2023

Susan Mort
Deputy Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
45 L St. NE
Washington, DC 20554

Bambi Kraus
Chief
Office of Native Affairs and Policy
Federal Communications Commission
45 L St. NE
Washington, DC 20554

**Re: Wireless Telecommunications Bureau and Office of Native Affairs and Policy Seek
Comment on Tribal Nation and Native Hawaiian Access to Spectrum and Related Data, GN
Docket ID No. 23-265**

Dear Deputy Bureau Chief Mort and Chief Kraus,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Federal Communications Commission's (FCC) Public Notice seeking comment on Tribal Nation access to spectrum licenses. We appreciate the FCC's efforts to identify how to improve its data collection efforts on Tribal Nation access to spectrum licenses. While USET SPF's comments will not go into specific detail about these licensing practices by the FCC, we do offer recommendations that the FCC should consider moving forward to increase Tribal Nation opportunities and access to these valuable and critically important spectrum licenses. In its Public Notice, the FCC recognized the impact of the 2.5 GHz Rural Tribal Priority Window proceeding held in 2019 and while this was a momentous opportunity for Tribal Nations to obtain spectrum licenses outside the FCC's auction process, more must be done by the FCC to increase these opportunities. Our comments will provide recommendations on how the FCC can increase Tribal Nation access to spectrum as well as some specific responses on how the FCC should identify Tribal Nations on its wireless licensing application forms.

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).

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

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. While new programs have been developed in the past by the FCC to support wireless deployment, such as the Mobility Fund and Tribal Mobility Fund programs, these failed to support Tribal Nation participation due, in part, to a lack of access to spectrum licenses for wireless broadband deployment. This has contributed to the persistence of the digital divide in Indian Country and 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, Executive Orders, 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, which now includes the provision of broadband services on Tribal Lands.

Through the U.S.'s consistent development, investment in, 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. The FCC must recognize and acknowledge that this has been a critical resource taken from Tribal Nations without our consent. It is essential that the FCC adhere to and uphold its trust and treaty obligations and increase Tribal Nation access to spectrum licenses, especially those licenses that have been held by non-Tribal entities that have failed to deploy wireless services on our lands. The announcement of this Public Notice proceeding should be the first step in the FCC's process of developing and adopting true changes in how the FCC awards and manages spectrum licenses over Tribal Lands.

Recommendations to the FCC to Increase Tribal Nation Access to Spectrum Licenses

As the FCC moves forward in identifying how it will determine Tribal Nation affiliation on its wireless licensing forms, it must also advance regulations to address the unique access to spectrum challenges facing Tribal Nations. This should be achieved by consulting with Tribal Nations to identify the current challenges experienced in the FCC's licensing process as well as to set the priorities for a Tribal Nation Priority to all spectrum licenses over Tribal Lands.

Below are several preliminary recommendations for the FCC to increase Tribal Nation access to spectrum licenses over Tribal Lands—

- **The FCC must 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 the July 2019 Report and Order was adopted by the FCC to establish a Tribal Priority Window (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 the 2.5 GHz 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, without our consent by the commercial communications industry. This practice has effectively prevented Tribal Nation participation in these auctions since 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 does offer a Tribal Lands 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 Lands Bidding Credit, therefore, does not address the initial barrier to entry for Tribal Nations to participate in the FCC's competitive bidding auction process.

The FCC sought to address these spectrum challenges experienced by Tribal Nations in 2011 when it initiated a Notice of Proposed Rulemaking under [WTB Docket ID No. 11-40](#), "In the Matter of Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands" (WTB 11-40). During this proceeding, the FCC invited comments on several proposals including: 1) expanding a Tribal Priority to advanced wireless services; 2) establish a build or divest process for spectrum use over Tribal Lands; 3) establish a formal and mandatory negotiation process between both current and future licensees and Tribal governments; 4) inclusion of a demonstration of service requirement as part of any Tribal-lands safe harbor; 5) modifications to the Tribal Lands Bidding Credit; and 6) adoption of well-defined eligibility criteria for Tribal Nations to obtain spectrum.

Each of these proposals, if they were adopted, would have significantly supported Tribal Nation efforts to gain access to spectrum licenses. However, following closure of the comment period and reply comment period on May 19, 2011 and June 20, 2011 respectively, the FCC did not proceed with any further rulemaking on WTB 11-40. Although the 2.5 GHz Tribal Priority Window would follow in 2019, it did not include the comprehensive proposals from WTB 11-40. We urge the FCC to review the record of Tribal commenters in the WTB 11-40 proceeding as well as the 2.5 GHz proceeding as the basis for initiating a further rulemaking on Tribal Nation access to spectrum licenses, especially on developing a Tribal Priority to all commercial wireless spectrum licenses over Tribal Lands. 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 since we are the sole authorities to determine how broadband service should be deployed on our lands.

- **The FCC must 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 licensee cannot have their license 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 has 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 must address the unique access to spectrum challenges affecting Tribal Nations. Innovative solutions to consult with Tribal Nations, as emphasized in the FCC’s 2000 Statement of Policy, must be developed and implemented by the FCC to gather input and recommendations on these longstanding, persistent barriers for Tribal Nations to access and use spectrum for the provisioning of wireless broadband services on our lands.

- **Developing a Tribal Priority to spectrum licenses should be done in consultation with Tribal Nations.** While our comments have emphasized support for the FCC developing a Tribal Priority to spectrum licenses, further consultations must be held with Tribal Nations and our recognized technical experts to develop robust recommendations to address the current state of spectrum and telecommunications access in Indian Country. 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 tracks 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 U.S. Department of Agriculture, 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 terrestrial and wireless 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.

Recommendations on Defining “Tribal Nations” on the FCC’s Wireless Licensing Forms

The FCC has posed several questions in the Public Notice on how it should proceed in identifying Tribal Nations applying for, or are currently holding, spectrum licenses. The FCC has stated that since it doesn’t collect demographic or other identifying information from Tribal Nations on its wireless licensing forms, its Universal Licensing System cannot identify license records based on a Tribal Nation applicant or demographic criteria. While USET SPF firmly believes that the FCC should initiate Tribal consultations on these questions, especially on whether these identifiers should be mandatory or optional, we do have some initial recommendations for the FCC to consider.

First and foremost, the use of a Tribal Nation identifying mechanism should not be used by the FCC or industry with the malicious intent of rescinding a Tribal Nation’s license(s) to spectrum frequencies. Any spectrum currently held by Tribal Nations, or our Tribally owned and operated telecommunications companies or utilities, should always remain licensed to such entities. We should have the sole decision-making authority on how we utilize or lease such licenses. Second, we would recommend that the FCC rely on the Department of the Interior’s “List of Federally Recognized Tribes” published annually in the Federal Register to determine the legal, federally recognized status of a Tribal Nation applying for a spectrum license. Another option would be to rely on the definition of “Indian tribe” or “tribe” under [25 U.S. Code § 2201](#). Finally, regarding Tribally owned and operated telecommunications companies and utility authorities, the FCC’s wireless licensing forms should have a method of verifying this through an “upload document” mechanism. The recognized documents could include the charter of the Tribally owned and operated telecommunications company or utility or some form of verification from the Tribal government recognizing the company or utility, such as a federally recognized Tribal Nation resolution or signed document on the federally recognized Tribal Nation’s letterhead.

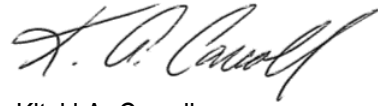
Conclusion

The COVID-19 pandemic underscored and highlighted the pervasive absence and unreliability of vital broadband services in Indian Country. While the federal government has responded by establishing new broadband programs to address this issue, the issue of Tribal Nations having access to the necessary spectrum licenses required to support robust and affordable wireless broadband services persists. Moving forward, the FCC must reevaluate how it continues to award spectrum licenses over Tribal Lands through the competitive bidding process. This process does not uphold and fulfill the federal government’s trust and treaty obligations to Tribal Nations. Until a Tribal Priority to all commercial wireless spectrum licenses is adopted by the FCC, Tribal Nations will continue to contend with the immense economic barriers to participation in the FCC’s competitive auction bidding process. We expect further action from the FCC to reevaluate this process and develop mechanisms that support Tribal Nation sovereignty and self-determination to pursue spectrum licenses. 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,

A handwritten signature in black ink, appearing to be 'K. Francis', written in a cursive style.

Chief Kirk Francis
President

A handwritten signature in black ink, appearing to be 'K. A. Carroll', written in a cursive style.

Kitcki A. Carroll
Executive Director