

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
KAUMANA HAWAIIAN HOMES ) ULS File No. 0009209312
COMMUNITY ASSOCIATION )
)
Request for Waiver to File as an Eligible Entity in )
the 2.5 GHz Tribal Priority Window )
)
)

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 2020

Released: November 12, 2020

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 1, 2020, the Kaumana Hawaiian Homes Community Association (Kaumana) submitted a Petition for Waiver of the Commission’s rules regarding those Tribal entities that are eligible for the 2.5 GHz Rural Tribal Priority Window so that it could be considered eligible to apply for an overlay license covering specified Tribal lands in Hawai’i.1 In this Memorandum Opinion and Order, we deny Kaumana’s Petition for Waiver because it fails to meet the Commission’s waiver standard.2 We also direct the Broadband Division of the Wireless Telecommunications Bureau to dismiss Kaumana’s application.

II. BACKGROUND

2. In July 2019, the Commission approved an order modernizing the portion of the 2.5 GHz band formerly known as the Educational Broadband Service.3 Among other things, the order created a Rural Tribal Priority Window during which eligible Tribal entities could apply for licenses for currently unassigned 2.5 GHz spectrum. To obtain a license in the Rural Tribal Priority Window, an applicant must meet four requirements. First, the applicant must be an eligible entity, which the rule defines as a “federally recognized American Indian Tribe or Alaska Native Village; or an entity that is owned and

1 See ULS File No. 0009209312 (filed Sep. 1, 2020), Waiver Request (Kaumana Petition). On October 28, 2020, the Department of Hawaiian Homelands (DHHL) filed a Motion to Dismiss Kaumana’s application. See ULS File No. 0009209312, Motion to Dismiss of Department of Hawaiian Homelands (filed Oct. 28, 2020) (DHHL Motion). In its Motion to Dismiss, DHHL argues that the Bureau should dismiss Kaumana’s application in light of the previous determination that DHHL is uniquely qualified to file on behalf of the Hawaiian Homelands during the Tribal Priority Window, that Kaumana lacks standing to participate in the Tribal Priority Window, that the application lacked a sufficient waiver request, and that dismissing the application is in the public interest. DHHL Motion at 3, 5-8. As discussed below, however, because this Memorandum Opinion and Order denies Kaumana’s waiver request and directs the dismissal of Kaumana’s application, it also renders the DHHL Motion moot, and we need not address the merits of DHHL’s motion.

2 See 47 CFR § 1.925(b)(3).

3 Transforming the 2.5 GHz Band, Report & Order, 34 FCC Rcd 5447 (2019) (2.5 GHz Report & Order).

controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes.”<sup>4</sup> Second, the applicant must apply for eligible Tribal lands, which are defined, in relevant part, as “any federally recognized Indian Tribe’s reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) and Indian Allotments, see § 54.400(e) of this chapter, as well as Hawaiian Home Lands—areas held in trust for native Hawaiians by the State of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, July 9, 1921, 42 Stat 108, et seq., as amended.”<sup>5</sup> Third, the eligible Tribal land must be in a rural area, which is defined as “lands that are not part of an urbanized area or urban cluster area with a population equal to or greater than 50,000.”<sup>6</sup> Finally, the applicant must have a local presence on the eligible Tribal land for which it is applying.<sup>7</sup>

3. Kaumana is a Hawaiian Homestead Association (HHA) seeking a waiver of section 27.1204(b)(1) of the Commission’s rules to grant it eligibility to apply for an overlay license covering certain specified Tribal lands in Hawai’i.<sup>8</sup> According to the Bureau of Indian Affairs’ current list of federally recognized Tribes, there are none in Hawai’i.<sup>9</sup> Therefore, under the eligibility requirements adopted in the *2.5 GHz Report and Order*, there were no entities eligible to apply for the available spectrum in that state, despite the explicit recognition of certain Hawaiian Home Lands as eligible Tribal Lands. We recognized this fact when, on March 20, 2020, we adopted a *Memorandum Opinion and Order* that granted a Department of Hawaiian Homelands (DHHL) request for waiver of the Commission’s rules regarding eligibility for the Tribal Priority Window so as to allow DHHL to participate in the Tribal Priority Window.<sup>10</sup> DHHL subsequently submitted five timely applications to participate in the Tribal Priority Window, which cover eligible rural Tribal areas with unassigned frequencies on five Hawaiian islands.<sup>11</sup>

### III. DISCUSSION

4. The Commission may grant a request for a waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual

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<sup>4</sup> See 47 CFR § 27.1204(b)(1). This limitation to federally recognized Tribes is consistent with Commission precedent in other contexts. See *2.5 GHz Report & Order*, 34 FCC Rcd at 5464, para. 49.

<sup>5</sup> See 47 CFR § 27.1204(b)(2).

<sup>6</sup> 47 CFR § 27.1204(b)(3).

<sup>7</sup> 47 CFR § 27.1204(b)(4). On January 6, 2020, the Wireless Telecommunications Bureau (Bureau) released a Public Notice setting forth the process for submitting applications in the 2.5 GHz Rural Tribal Priority Window, including details regarding demonstrating compliance with the eligibility requirements and requests for waiver. *Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window*, Public Notice, 35 FCC Rcd 308 (2020) (*Window Procedures Public Notice*).

<sup>8</sup> *Kaumana Petition* at 1. The Department of the Interior defines an HHA as a “beneficiary controlled organization that represents and serves the interests of its homestead community; has as a stated primary purpose the representation of, and provision of services to, its homestead community; and filed with the Secretary [of the Interior] a statement, signed by the governing body, of governing procedures and a description of the territory it represents.” See 43 CFR §§ 47.10, 48.6.

<sup>9</sup> See *Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5462, 5462-66 (Jan. 30, 2020) (BIA 2020 Eligible Entities List). HHAs do not appear on the list as they are not considered federally recognized Tribes by the Bureau of Indian Affairs.

<sup>10</sup> *Department of Hawaiian Homelands Request for Waiver to File as an Eligible Entity in the 2.5 GHz Rural Tribal Priority Window*, Memorandum Opinion and Order, 35 FCC Rcd 2820 (2020) (*DHHL Waiver Order*).

<sup>11</sup> See ULS File Nos. 0009166854, 0009166908, 0009166944, 0009168749, 0009168908.

factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>12</sup> Here, we find that Kaumana's showing does not meet either prong of the Commission's waiver standard and accordingly deny its request.

5. Although Kaumana makes a single reference to Section 1.925 of the Commission's rules in its Petition for Waiver, it provides no rationale or explanation for why it warrants waiver of the Commission's Rural Tribal Priority Window rule defining eligible entities.<sup>13</sup> First, Kaumana does not assert that the purpose of that rule would be frustrated absent a waiver nor that grant of a waiver would be in the public interest. Second, Kaumana makes no assertion that it was subject to unique factual circumstances that would make application of the eligible entity rule to Kaumana inequitable or contrary to the public interest. Indeed, Kaumana is identically situated to all HHAs, none of which are eligible for participation in the Tribal Priority Window.

6. Finally, Kaumana does not assert that it is without any reasonable alternative to gain the benefits of access to the 2.5 GHz spectrum. In fact, like all HHAs, Kaumana has an opportunity to access this spectrum through cooperation with DHHL, which has applied in its capacity as an eligible entity for the benefit of all HHAs statewide. In the *DHHL Waiver Order*, we found that "DHHL is uniquely suited to administer resources on behalf of the Hawaiian Homesteads, due to its designation by the State of Hawai'i as the entity responsible for managing Hawaiian Home Lands, including trust resources, and because of its capabilities and operational history with regard to 'managing and licensing utilities for expansion and service to rural Homestead communities.'"<sup>14</sup> We also noted the existence of a Memorandum of Understanding among DHHL, the Office of Hawaiian Affairs and the Department of Business, Economic Development, and Tourism, as well as the absence of any objections to DHHL's suitability to administer this spectrum resource on behalf of native Hawaiians.<sup>15</sup> Indeed, the areas and frequencies Kaumana included in its Rural Tribal Priority Window application are included in one of the applications filed by DHHL.<sup>16</sup> Kaumana, like other HHAs, is encouraged to work with DHHL to see that the spectrum is deployed in a way that is suited to its needs.<sup>17</sup>

7. Put simply, Kaumana makes no attempt in its Petition for Waiver to address the Commission's waiver standard, nor does it advance any justification for a waiver or explain why a waiver is warranted in light of the grant of a waiver to DHHL. Therefore, we cannot find that granting a waiver is in the public interest in this instance. The only argument Kaumana presents in its Petition is that "the Commission's omission of HHA eligibility may be a matter of inadvertent oversight due to the unfamiliarity with the unique relationship of the federal government in its administration of the Hawaiian Home Lands, the native Hawaiians, and the HHAs."<sup>18</sup> In short, Kaumana argues that the Commission erred in adopting an eligible entity rule that excludes HHAs. This argument would have been more

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<sup>12</sup> 47 CFR § 1.925(b)(3).

<sup>13</sup> *Kaumana Petition* at 1.

<sup>14</sup> *DHHL Waiver Order*, 35 FCC Rcd at 2822, para. 9.

<sup>15</sup> *Id.*

<sup>16</sup> See ULS File No. 0009166908.

<sup>17</sup> In its Request for Waiver, DHHL described itself as a trustee on behalf of the native Hawaiians. *DHHL Waiver Request* at 9. "The HHCA delegates to the DHHL the authority 'to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like.' The Department also is authorized to grant licenses 'to the United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.'" Department of Hawaiian Homelands Petition for Waiver at 5-6, WT Docket No. 20-21 (filed Jan. 14, 2020) (citation omitted).

<sup>18</sup> *Kaumana Petition* at 1.

appropriately included in a Petition for Reconsideration of the *2.5 GHz Report and Order*, but such petitions were due to be filed with the Commission by November 25, 2019.<sup>19</sup> To the extent Kaumana's Petition could be construed as a Petition for Reconsideration, it thus was not timely filed. In sum, since we deny the Petition for Waiver, and Kaumana seeks no alternative relief that complies with our rules, its application must be dismissed.<sup>20</sup>

#### IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(c), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 309(a), and Section 1.925(b)(3) of the Commission's Rules, 47 CFR § 1.925(b)(3), that the waiver request filed by the Kaumana Hawaiian Homes Community Association on September 1, 2020 IS DENIED.

9. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925(c)(ii) and 1.934(d)(2) of the Commission's Rules, 47 CFR §§ 1.925(c)(ii), 1.934(d)(2), that the Broadband Division of the Wireless Telecommunications Bureau SHALL DISMISS the application filed by the Kaumana Hawaiian Homes Community Association on September 1, 2020 (File No. 0009209312).

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 CFR §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale, Jr.  
Chief, Wireless Telecommunications Bureau

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<sup>19</sup> See *Transforming the 2.5 GHz Band*, 84 Fed. Reg. 57343 (Oct. 25, 2020); 47 U.S.C. § 405(a); 47 CFR § 1.429(d).

<sup>20</sup> See 47 CFR §§ 1.925(c)(ii), 1.934(d)(2).