

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

In the Matter of)	
)	
HO-CHUNK NATION)	ULS File No. 0009210653
)	
LUMMI INDIAN BUSINESS COUNCIL)	ULS File No. 0009171227
)	
MUSCOGEE (CREEK) NATION)	ULS File No. 0009210060
)	
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY)	ULS File No. 0009190551
)	
SAN FELIPE PUEBLO)	ULS File No. 0009210111
)	
SHOSHONE-BANNOCK TRIBES)	ULS File No. 0009169592
)	
TABLE MOUNTAIN RANCHERIA)	ULS File No. 0009169208
)	
Requests for Waiver of the 2.5 GHz Rural Tribal Priority Window Rules		

MEMORANDUM OPINION AND ORDER

Adopted: November 20, 2020

Released: November 20, 2020

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Ho-Chunk Nation (Ho-Chunk),¹ Lummi Indian Business Council (Lummi),² Muscogee (Creek) Nation (MCN),³ Salt River Pima-Maricopa Indian Community (SRPMIC),⁴ San Felipe Pueblo,⁵ Shoshone-Bannock Tribes,⁶ and Table Mountain Rancheria⁷ submitted the above-captioned applications to participate in the Commission's 2.5 GHz Rural Tribal Priority Window in areas where there is no available unassigned 2.5 GHz spectrum. Each of these seven applications included a request for waiver of certain rules governing the Commission's 2.5 GHz Rural Tribal Priority Window. In

¹ See ULS File No. 0009210653 (filed Sept. 2, 2020) (*Ho-Chunk Application*).

² See ULS File No. 0009171227 (filed Aug. 3, 2020) (*Lummi Application*).

³ See ULS File No. 0009210060 (filed Sept. 2, 2020) (*MCN Application*).

⁴ See ULS File No. 0009190551 (filed Aug. 29, 2020) (*SRPMIC Application*).

⁵ See ULS File No. 0009210111 (filed Sept. 2, 2020) (*San Felipe Pueblo Application*).

⁶ See ULS File No. 0009169592 (filed Aug. 3, 2020) (*Shoshone-Bannock Tribes Application*).

⁷ See ULS File No. 0009169208 (filed July 31, 2020) (*Table Mountain Application*).

in addition to other relief, San Felipe Pueblo,⁸ the Shoshone-Bannock Tribes,⁹ and SRPMIC¹⁰ each sought, in different forms, waiver of the 2.5 GHz Rural Tribal Priority Window rule limiting applications to areas where there is available unassigned 2.5 GHz spectrum in order to obtain an overlay license for their requested service areas.¹¹ Ho-Chunk,¹² MCN,¹³ Lummi,¹⁴ and Table Mountain¹⁵ each sought waiver of non-spectrum-based rules, such as the requirements that the application cover eligible Tribal Land¹⁶ and that eligible Tribal Land be in a rural area.¹⁷ In this *Memorandum Opinion and Order*, we deny the requested spectrum-based waivers of San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC because they fail to meet the Commission's waiver standard.¹⁸ To the extent that San Felipe Pueblo and the Shoshone-Bannock Tribes offer policy arguments in support of other forms of relief beyond a waiver of the unassigned spectrum requirement, we find such requests were not timely filed.¹⁹ We dismiss all

⁸ San Felipe Pueblo notes that licenses covering their rural Tribal lands already have been issued to one or more other entities and requests that the Commission "increase the bandwidth or make efforts to increase or find room in the available channels so that the Pueblo of San Felipe can make use of the bandwidth over the Pueblo for our educational, medical, economic and other needs." *San Felipe Pueblo Application*, Waiver Request at 1, 2, 3-4. San Felipe Pueblo also seeks waiver of the Tribal Land definition in section 27.1204(b)(2) of the Commission's rules to include certain off-reservation trust and fee land in New Mexico within its requested service area. *Id.* at 1-2, 3-4; see 47 CFR § 27.1204(b)(2).

⁹ The Shoshone-Bannock Tribes request that all 2.5 GHz spectrum already licensed over their Tribal lands be relicensed to the Tribes or, in the alternative, that "a like-kind block of spectrum that is acceptable to the Tribe[s]" be granted in addition to granting an overlay license for the 2.5 GHz spectrum. *Shoshone-Bannock Tribes Application*, Waiver Request at 1.

¹⁰ SRPMIC seeks the right to obtain any eligible 2.5 GHz spectrum "that becomes available over time should an incumbent license that covers its rural Tribal land be cancelled or terminated." *SRPMIC Application*, Waiver Request at 1. Furthermore, assuming that the Commission were to grant SRPMIC this requested waiver, SRPMIC seeks a limited waiver of the requirement that the Tribal Lands be rural. See *id.* ("To the extent that the southern area of SRPMIC's lands are not considered rural, SRPMIC seeks a waiver to obtain frequencies covering those non-rural areas should such frequencies become available.") (citing 47 CFR § 27.1204(b)(3)).

¹¹ *Transforming the 2.5 GHz Band*, Report & Order, 34 FCC Rcd 5446, 5469, para. 65 (2019) (*2.5 GHz Report and Order*).

¹² Ho-Chunk seeks waiver of the Tribal Land definition in section 27.1204(b)(2) of the Commission's rules to include off-reservation trust and fee parcels in Lynwood, Illinois, within its requested service area. *Ho-Chunk Application*, Waiver Request at 5-7.

¹³ MCN seeks waiver of the rural lands requirement in section 27.1204(b)(3) of the Commission's rules to include the Tulsa Metropolitan Area within its requested service area. *MCN Application*, Waiver Request at 1-4.

¹⁴ Lummi filed a "Petition for Waiving the FCC Rules" but does not identify a specific rule from which it is seeking relief, nor does it include an actionable request or any proposed remedy. *Lummi Application*, Waiver Request at 1-4.

¹⁵ Table Mountain seeks waiver of the Tribal Land definition in section 27.1204(b)(2) of the Commission's rules to include off-reservation land called the Upper Rancheria within its requested service area. *Table Mountain Application*, Waiver Request at 1. The *Table Mountain Application* is defective in that it does not include a shapefile identifying the specific land in question, but we note there is no unassigned spectrum throughout the region surrounding Table Mountain's reservation land, also referred to as its rancheria.

¹⁶ See 47 CFR § 27.1204(b)(2).

¹⁷ See 47 CFR § 27.1204(b)(3).

¹⁸ See 47 CFR § 1.925(b)(3).

¹⁹ In addition to arguing for a waiver to obtain an overlay license where there is no unassigned spectrum, San Felipe Pueblo and the Shoshone-Bannock Tribes make policy arguments as to why the Commission should open up additional frequencies for Tribal entities and/or revisit its decision in the *2.5 GHz Report and Order* not to take

(continued....)

other requested waivers of all of the foregoing applicants as moot due to the lack of available unassigned 2.5 GHz spectrum in the requested service areas.²⁰ As such, we direct the Broadband Division of the Wireless Telecommunications Bureau to dismiss the Ho-Chunk, MCN, Lummi, San Felipe Pueblo, Shoshone-Bannock Tribes, SRPMIC, and Table Mountain applications.²¹

II. BACKGROUND

2. In the *2.5 GHz Report and Order*, the Commission transformed the regulatory framework governing the 2.5 GHz band (2496-2690 MHz) in order to promote more efficient use of this spectrum to benefit Americans across the country, and particularly in rural and Tribal areas.²² Among other things, the Commission established a Rural Tribal Priority Window to provide eligible Tribal entities with a unique opportunity to apply for unassigned 2.5 GHz spectrum in order to address the acute problem of lack of access to broadband and advanced communications services in rural Tribal areas.²³ Successful applicants in the Rural Tribal Priority Window will be able to acquire licenses for all unassigned 2.5 GHz spectrum over their rural Tribal lands.²⁴

3. The Commission determined that the Rural Tribal Priority Window would include only unassigned 2.5 GHz spectrum.²⁵ The Commission explicitly declined in the *2.5 GHz Report and Order* to adopt suggestions from Tribal commenters that it permit Tribal entities to apply for already-licensed spectrum, noting that such proposals were outside the scope of the *NPRM* and would have a substantial adverse effect on existing licensees who are in compliance with the Commission's rules.²⁶ In the *Bureau Procedures PN*, we reiterated that Rural Tribal Priority Window "applications will only be accepted for channel groups for which there is currently unassigned spectrum in the eligible portion of the 2.5 GHz band . . . over the relevant rural Tribal land."²⁷ We strongly encouraged potential applicants to conduct "due diligence to determine whether they will be able to provide service in the areas for which they intend to apply for licenses," an inquiry that should have included an evaluation of "how much unassigned

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spectrum away from existing licensees. *See e.g., San Felipe Pueblo Application*, Waiver Request at 2; *Shoshone-Bannock Tribes Application*, Waiver Request at 1. These arguments might have been more appropriately included in petitions for reconsideration of the *2.5 GHz Report and Order*, but those were due to be filed with the Commission by November 25, 2019. *See Transforming the 2.5 GHz Band*, 84 Fed. Reg. 57343, 57343 (Oct. 25, 2019); 47 U.S.C. § 405(a); 47 CFR § 1.429(d).

²⁰ 47 CFR § 1.934(e)(2) ("The Commission may dismiss applications that request spectrum which is unavailable because...[i]t was previously assigned to another licensee on an exclusive basis or cannot be assigned to the applicant without causing harmful interference.").

²¹ *See* 47 CFR §§ 1.925(c)(ii), 1.934(d)(2), (e)(2). As an alternative and independent ground, we also direct the Broadband Division to dismiss the *Table Mountain Application* because it does not contain the required shapefile identifying the specific land in question. *See id.* § 1.934(d)(1).

²² *2.5 GHz Report and Order*, 34 FCC Rcd at 5447, para. 3.

²³ *Id.* at 5463-69, paras. 47-65. at 5463-69, paras. 47-65.

²⁴ *Id.* at 5463-69, paras. 47-65. To the extent the Commission received mutually exclusive applications in the 2.5 GHz Rural Tribal Priority Window that comply with our rules, the Commission is required to use competitive bidding resolve the mutual exclusivity. *See* 47 U.S.C. § 309(j)(1). Following the completion of the 2.5 GHz Rural Tribal Priority Window, the Commission will make any remaining unassigned 2.5 GHz spectrum available for commercial use via competitive bidding. *Id.* at 5472, para. 75.

²⁵ *2.5 GHz Report and Order*, 34 FCC Rcd at 5469, para. 65.

²⁶ *Id.*

²⁷ *Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window*, Public Notice, 35 FCC Rcd 308, 309, para. 3 (WTB 2020) (*Bureau Procedures PN*).

eligible 2.5 GHz spectrum is available.”²⁸

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 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.²⁹ San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC each submitted an application to participate in the Rural Tribal Priority Window that was accompanied by a request seeking waiver of the unassigned spectrum requirement to obtain an overlay license for 2.5 GHz spectrum in areas where there is no unassigned spectrum. Here, we find that San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC showings fail to meet either prong of the Commission’s waiver standard and accordingly deny their requests.

5. San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC do not meet the first prong of the waiver standard because they do not demonstrate that the underlying purpose of the unassigned spectrum requirement would not be served or would be frustrated by its application to the instant cases.³⁰ As discussed above, the underlying purpose of this requirement is to prohibit Tribal entities from applying for already-licensed spectrum because the grant of such applications “would have a substantial effect on existing licensees that are in compliance with our rules.”³¹ San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC do not explain why, nevertheless, a waiver is warranted in each of their cases.³²

6. San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC likewise fail to meet the second prong of the Commission’s waiver standard, as they demonstrate no unique or unusual factual circumstances that make application of the rule contrary to the public interest in their cases.³³ San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC are identically positioned to every other eligible Tribal entity with no unassigned 2.5 GHz spectrum available over their rural Tribal lands and do not demonstrate in their waiver request how these general circumstances bear on the goal of the unassigned

²⁸ *Id.* at 309, para. 5.

²⁹ 47 CFR § 1.925(b)(3); *see Bureau Procedures PN*, 35 FCC Rcd at 312, para. 15 (“Waiver requests will be considered on a case-by-case basis using the Commission’s waiver standard contained in Section 1.925 of the rules.”).

³⁰ *See* 47 CFR § 1.925(b)(3)(i). Section 1.925(b)(2) specifically requires waiver requests to “contain a complete explanation as to why the waiver is desired.” *Id.* § 1.925(b)(2).

³¹ *2.5 GHz Report and Order*, 34 FCC Rcd at 5469, para. 65.

³² The *Bureau Procedures PN* specified that waivers would be considered using the standard in section 1.925 of the Commission’s rules. *Bureau Procedures PN*, 35 FCC Rcd at 312, para. 15. Although SRPMIC’s waiver request instead cites section 1.3 of the Commission’s rules, *SRPMIC Application*, Waiver Request at 1, we will consider SRPMIC’s request under section 1.925 because these waiver standards “have been found to be substantially the same.” *Ted W. Austin, Jr. Application for Review of Order Denying Request for Waiver of Down Payment Deadline for Auction 62*, Memorandum Opinion and Order, 30 FCC Rcd 3486, 3488 n.18 (2015) (citing *Bellsouth Corp. v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999)). Pursuant to the applicable standard in section 1.925, SRPMIC has not demonstrated that the underlying purpose of the relevant Commission rules would not be served or would be frustrated by its application here because the requested waiver would defeat the Commission’s determination that canceled or terminated incumbent licenses in this band automatically revert to the co-channel county-based licensee or, in the absence of such a licensee, to the Commission. *See* 47 CFR §§ 27.1209(b), 1.955; *2.5 GHz Report and Order*, 34 FCC Rcd at 5473, para. 77.

³³ *See* 47 CFR § 1.925(b)(3)(ii).

spectrum requirement.³⁴ Although San Felipe Pueblo and SRPMIC describe the impact of the COVID-19 pandemic on their respective communities,³⁵ granting an overlay license would not help with their response to the pandemic because, without the consent of the existing licensees, the Tribes could not use the spectrum to provide service unless and until the existing licenses expired.³⁶ For these reasons, we must deny the spectrum-based waiver requests of San Felipe Pueblo, the Shoshone-Bannock Tribes, and SRPMIC, and, given the absence of unassigned spectrum in their requested service areas, all other requests for relief in these applications are thus rendered moot and are dismissed without consideration of their merits. We therefore direct the Broadband Division to dismiss the San Felipe Pueblo, Shoshone-Bannock Tribes, and SRPMIC applications because they request unavailable spectrum and, in the event of the denial of their waiver requests, fail to seek any alternative relief that complies with our rules.³⁷

7. In a similar vein, Ho-Chunk, Lummi, MCN, and Table Mountain each submitted an application, accompanied by a waiver request, to participate in the Rural Tribal Priority Window in areas where there is no available unassigned 2.5 GHz spectrum.³⁸ These applications included a request for waiver of one or more of the 2.5 GHz Rural Tribal Priority Window rules, but they did not seek waiver of the unassigned spectrum rule.³⁹ The lack of unassigned 2.5 GHz spectrum in their requested service areas makes the Ho-Chunk, Lummi, MCN, and Table Mountain waiver requests moot, and we dismiss these requests without addressing the merits. We therefore direct the Broadband Division to dismiss the Ho-Chunk, Lummi, MCN, and Table Mountain applications.⁴⁰

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 303(c), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 303(c), and 309(a) and Section 1.925(b)(3) of the Commission's Rules, 47 CFR § 1.925(b)(3), that the waiver requests filed by the Ho-Chunk Nation on September 2, 2020, Lummi Indian Business Council on August 3, 2020, Muscogee (Creek) Nation on September 2, 2020, Salt River Pima-Maricopa Indian Community on August 19, 2020, San Felipe Pueblo on September 2, 2020, Shoshone-Bannock Tribes on August 3, 2020, and Table Mountain Rancheria on July 31, 2020 ARE DENIED to the extent specified in this Memorandum Opinion and Order and otherwise ARE DISMISSED as specified herein.

³⁴ See generally *San Felipe Pueblo Application*, Waiver Request; *Shoshone-Bannock Tribes Application*, Waiver Request; *SRPMIC Application*, Waiver Request.

³⁵ *San Felipe Pueblo Application*, Waiver Request at 2; *SRPMIC Application*, Waiver Request at 1, 2.

³⁶ Likewise, the Shoshone-Bannock Tribes broadly assert that the Commission unlawfully granted spectrum licenses over its Tribal Lands in violation of the Fort Bridger Treaty of 1868, *Shoshone-Bannock Tribes Application*, Waiver Request at 1, but they do not demonstrate how the terms of that Treaty could be read to address the Commission's exclusive authority over radio spectrum. See *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (1968) (stating that the Commission is "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio" (internal quotation marks and footnotes omitted)).

³⁷ See 47 CFR § 1.925(c)(ii), 1.934(d)(2), (e)(2).

³⁸ See *Ho-Chunk Application*; *Lummi Application*; *MCN Application*; *Table Mountain Application*.

³⁹ See generally *Ho-Chunk Application*, Waiver Request; *Lummi Application*, Waiver Request; *MCN Application*, Waiver Request; *Table Mountain Application*, Waiver Request.

⁴⁰ 47 CFR § 1.925(c)(ii), 1.934(d)(2), (e)(2). As an alternative and independent ground for the dismissal of the *Table Mountain Application*, we find that it is defective because it does not contain the required shapefile identifying the specific land in question. See *id.* § 1.934(d)(1) (stating that the Commission may dismiss an application that is "incomplete with respect to required answers to questions, informational showings, or other matters of a formal character").

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), 1.934(d)(2), and 1.934(e)(2) of the Commission's Rules, 47 CFR §§ 1.925(c)(ii), 1.934(d)(2), (e)(2), that the Broadband Division of the Wireless Telecommunications Bureau SHALL DISMISS the applications filed by the Ho-Chunk Nation on September 2, 2020 (ULS File No. 0009210653), Lummi Indian Business Council on August 3, 2020 (ULS File No. 0009171227), Muscogee (Creek) Nation on September 2, 2020 (ULS File No. 0009210060), Salt River Pima-Maricopa Indian Community on August 19, 2020 (ULS File No. 0009190551), San Felipe Pueblo on September 2, 2020 (ULS File No. 0009210111), and Shoshone-Bannock Tribes on August 3, 2020 (ULS File No. 0009169592).

10. 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), 1.934(d)(1)-(2), and 1.934(e)(2) of the Commission's Rules, 47 CFR §§ 1.925(c)(ii), 1.934(d)(1)-(2), (e)(2), that the Broadband Division of the Wireless Telecommunications Bureau SHALL DISMISS the application filed by the Table Mountain Rancheria on July 31, 2020 (ULS File No. 0009169208).

11. 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