

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

In the Matter of)
DEPARTMENT OF HAWAIIAN HOMELANDS) WTB Docket No. 20-21
Request for Waiver to File as an Eligible Entity in)
the 2.5 GHz Rural Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 2020

Released: March 20, 2020

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On January 14, 2020, the Department of Hawaiian Homelands (DHHL) filed a petition for a waiver of the Commission’s rules regarding eligibility for the 2.5 GHz Rural Tribal Priority Window (Window).1 In this Memorandum Opinion and Order, we grant this waiver and allow the DHHL to apply in the Rural Tribal Priority Window as an eligible entity.

II. BACKGROUND

2. In July 2019, the Commission approved an order modernizing the portion of the 2.5 GHz band known as the Educational Broadband Service (EBS).2 Among other things, the order created a Window during which eligible Tribal entities can apply for licenses for currently unassigned EBS spectrum. To obtain a license in the 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 controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes.”3 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 Hawai’i, pursuant to the Hawaiian Homes Commission Act, 1920, July 9, 1921, 42 Stat 108, et seq., as amended.”4 Third, the eligible Tribal land must be in a rural area, which is defined as lands that are not part of an

1 See Department of Hawaiian Homelands Petition for Waiver (Waiver Request) (filed January 14, 2020).

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

3 See 47 CFR § 27.1204(b)(1). This limitation to federally recognized Tribes is consistent with Commission precedent in other contexts. See Report & Order, 34 FCC Rcd at 5464, para. 49.

4 See 47 CFR § 27.1204(b)(2).

urbanized area or urban cluster area with a population equal to or greater than 50,000.⁵ Finally, the applicant must have a local presence on the Tribal Land for which they are applying.⁶

3. According to the Bureau of Indian Affairs' current list of federally recognized Tribal entities, there are no federally recognized tribes in Hawai'i.⁷ Therefore, there are no entities eligible to claim the available spectrum in that state.

4. Since its establishment, DHHL has managed thousands of Homesteading leases⁸ and other resources on behalf of native Hawaiians across twenty distinct regions in Hawai'i, fifteen of which have spectrum available.⁹ The Hawaiian Homes Commission Act (HHCA), the same statute referenced by the Commission's rules in the definition of Tribal lands eligible for the Window,¹⁰ also delegates to DHHL the authority to grant various utility licenses and easements, as well as general control of the administration of the Hawaiian Home Lands.¹¹

5. On January 14, 2020, DHHL filed its *Waiver Request* seeking a waiver of the eligibility rules to allow it to apply for licenses under the Tribal Priority Window.¹² Along with its Waiver Request, DHHL provided a Memorandum of Understanding signed by the Office of Hawaiian Affairs, the Department of Business, Economic Development, and Tourism, and itself, in which all three agencies agree that DHHL is the appropriate applicant.¹³ The Wireless Telecommunications Bureau's Broadband Division sought comment on the *Waiver Request* on January 24, 2020.¹⁴ No oppositions or comments were filed.

III. DISCUSSION

6. 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.¹⁵

7. We conclude that DHHL has met the first prong of the waiver standard, because application of the entity eligibility rules to DHHL would frustrate the underlying purpose of the rules establishing the 2.5 GHz Rural Tribal Priority Window. As explained in the *Report and Order*, these rules

⁵ 47 CFR § 27.1204(b)(3).

⁶ 47 CFR § 27.1204(b)(4).

⁷ See Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 85 FR 5462 (2020) (*BIA 2020 Eligible Entities List*).

⁸ Homesteading leases are 99-year residential, agricultural, and pastoral leases to native Hawaiians, at an annual rent of one dollar. See *Waiver Request* at 3.

⁹ See *Waiver Request* at 2-3.

¹⁰ See 47 CFR § 27.1204(b)(2).

¹¹ See *Waiver Request* at 3-4, *Hawaiian Homes Commission Act*, 1920, July 9, 1921, 42 Stat 108 § 207(c)(1).

¹² See *Waiver Request* at 1.

¹³ See *Waiver Request* at Exhibit 1.

¹⁴ *Wireless Telecommunications Bureau Seeks Comment on Department of Hawaiian Homelands Request for Waiver to File as an Eligible Entity in the 2.5 GHz Rural Tribal Priority Window*, Public Notice, DA 20-104 (WTB BD rel. Jan. 24, 2020).

¹⁵ 47 CFR § 1.925(b)(3).

are intended to provide an opportunity for Tribal Nations to obtain unassigned [2.5 GHz] spectrum over rural Tribal lands to address their communications needs.¹⁶ These rules explicitly include Hawaiian Home Lands as one of the types of eligible Tribal lands, demonstrating the Commission's intent that the Window make the relevant spectrum in Hawai'i available in the Window.¹⁷ However, because there are currently no federally recognized Tribes located in Hawai'i, and thus no entities eligible to apply in that state, the available spectrum over eligible Tribal land in Hawai'i will be effectively unavailable in the Window unless this waiver is granted.¹⁸ Thus, granting DHHL's Waiver Request would avoid frustrating the underlying purpose of these rules.¹⁹

8. We also conclude that DHHL has met the second prong of the waiver standard, because application of the entity eligibility rules to DHHL would be inequitable and contrary to the public interest under the unique circumstances of Tribal lands in the state of Hawai'i. Because there are no eligible entities in Hawai'i that can apply for the available spectrum over eligible Tribal land in Hawai'i, no entities will be able to take advantage of the Window in Hawai'i unless this waiver is granted. This is a unique factual circumstance not present in any other state or with respect to any other Tribal land eligible for the Window, as every other state with eligible Tribal lands is home to eligible federally recognized Tribes able to apply for available spectrum over their eligible land.²⁰ The explicit inclusion of Hawaiian Home Lands as eligible Tribal land for purposes of the Window demonstrates the intent of the Commission that such spectrum be made available for licensing in those areas through the Window, and it would be inequitable to exclude that spectrum due to the lack of any entities eligible to apply for it.²¹ Providing a path for eligible 2.5 GHz spectrum to be acquired and used for the benefit of native Hawaiians is consistent with the purpose of the rules establishing the Window and also is in the public interest.

9. Moreover, DHHL has no reasonable alternative to its Waiver Request to meet its goal of ensuring that this spectrum is used to serve rural tribal lands in Hawai'i. Because there are no eligible entities in the state of Hawai'i, DHHL will not be able, for example, to assist eligible entities in filing their applications. Nor can DHHL partner with eligible entities to assist them with buildout requirements after those entities acquire the spectrum. The only available relief that will ensure that Hawaiian Natives have access to the remaining unassigned spectrum over Hawaiian Home Lands is to grant this Waiver Request. 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."²² The only other entities that arguably are similarly situated do not object to DHHL's serving in this capacity, and, in fact have signed a Memorandum of Understanding in support of DHHL's Waiver Request.²³ In the absence of any objections to DHHL's suitability to administer this valuable resource on behalf of native Hawaiians, and in light of DHHL's long history of experience managing the resources of the Hawaiian Home Lands

¹⁶ See *Report & Order*, 34 FCC Rcd at 5463, para. 47.

¹⁷ See *Report & Order*, 34 FCC Rcd at 5465, para. 51; 47 CFR § 27.1204(b)(2).

¹⁸ See 47 CFR § 27.1204(b)(1), *BIA 2020 Eligible Entities List*.

¹⁹ See *Report & Order*, 34 FCC Rcd at 5465, para. 51; 47 CFR § 27.1204(b)(2). See also *Waiver Request* at 1-2.

²⁰ See *BIA 2020 Eligible Entities List*.

²¹ See *Report & Order*, 34 FCC Rcd at 5465, para. 51; 47 CFR § 27.1204(b)(2). See also *Waiver Request* at 1-2.

²² See *Waiver Request* at 3.

²³ See *Waiver Request* at Exhibit 1.

and its Memorandum of Understanding with both other relevant Hawaiian government agencies, we conclude that DHHL is uniquely qualified to serve as the eligible entity to obtain unassigned 2.5 GHz spectrum and to ensure the resulting buildout requirements are met over rural Hawaiian Home Lands.

10. We note that a grant of this order does not automatically award DHHL any spectrum license. DHHL still will be required to apply for such license pursuant to the Commission's rules, including all rules relevant to the Window for which DHHL has not sought a waiver. The grant of this waiver merely establishes that DHHL, as an entity, is eligible to apply.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended 47 U.S.C. § 154(i), and Section 1.925(b)(3) of the Commission's Rules, 47 CFR § 1.925(b)(3), that the waiver request filed by the Department of Hawaiian Homelands on January 14, 2020 IS GRANTED, and Section 27.1204(b)(1) of the Commission's rules IS WAIVED for the Department of Hawaiian Homelands for an application specifying eligible rural Tribal land in the state of Hawai'i.²⁴

12. 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

²⁴ In completing its Form 601, DHHL should answer "Yes" to the waiver question (Main Form, Question 11) and include a copy of this *Memorandum Opinion and Order* as part of its waiver exhibit.