

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

In the Matter of)
)
TOLOWA DEE-NI' NATION) ULS File No. 0009210633
)
Request for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)
)

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 2021

Released: September 30, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 2, 2020, the Tolowa Dee-ni' Nation (TDN or "the Tribe") submitted a request for waiver in connection with an application it filed in the 2.5 GHz Rural Tribal Priority Window (Tribal Window).¹ The TDN seeks a waiver of section 27.1204(b)(2) of the Commission's rules, which defines eligible Tribal lands for purposes of the Tribal Window.² In this Memorandum Opinion and Order, we grant the TDN's waiver request because it meets the Commission's waiver standard.³

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.⁴ 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 controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes."⁵ Second, the applicant must apply for eligible Tribal lands, as defined in section 27.1204(b)(2) of the Commission's rules.⁶ Third, the eligible Tribal lands must be in a rural area, which is defined as "lands that are not part

¹ File No. 0009210633 (filed Sept. 2, 2020) (Application); Petition for Waiver (filed Sept. 2, 2020) (Waiver Request).

² See 47 CFR § 27.1204(b)(2).

³ See 47 CFR § 1.925(b)(3).

⁴ Transforming the 2.5 GHz Band, Report & Order, 34 FCC Rcd 5447 (2019) (2.5 GHz Report & Order).

⁵ See 47 CFR § 27.1204(b)(1).

⁶ See 47 CFR § 27.1204(b)(2). The rule defines eligible Tribal lands 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." Id.

of an urbanized area or urban cluster area with a population equal to or greater than 50,000.⁷⁷ Finally, the applicant must have a local presence on the eligible Tribal lands for which it is applying.⁸

3. Recently, the Commission denied a petition for reconsideration seeking adoption of the broader definition of Tribal lands contained in part 73 of our rules, which includes off-reservation trust lands, for the Tribal Window.⁹ Specifically, “[t]he Commission required the direct participation of Tribal governments, or entities owned and controlled by such Tribes, in the 2.5 GHz context to ensure that licensees would have the requisite authority over the deployment of facilities and service on their rural Tribal lands.”¹⁰ The Commission recognized, however, that there might be “exceptions to the general rule” where case-by-case waivers would be appropriate allowing for the licensing of off-reservation lands in the Tribal Window.¹¹

4. The TDN filed two applications during the Tribal Window.¹² The TDN first filed an application seeking a license for 160 acres of reservation land on the Smith River Rancheria in northwest Del Norte County, California.¹³ That application was granted on December 22, 2020.¹⁴ The TDN also filed a second application, which is the subject of this *Memorandum Opinion and Order*, requesting a waiver of the Tribal lands definition to obtain a license for two parcels immediately adjacent to its reservation, each of which include trust and fee lands interspersed with non-Tribal lands.¹⁵ The off-reservation trust and fee lands within the southern parcel include a hotel, casino, senior Tribal housing, a Tribal administration building (under construction), a Head Start early learning center, and a Tribally-owned mobile home and RV park.¹⁶ The off-reservation trust and fee lands within the northern parcel include Tribal housing, a community center, Tribally-owned maintenance facilities, and a planned food processing and storage facility.¹⁷ Both parcels are narrowly tailored to include the Tribe’s fee and trust lands with minimal overage.¹⁸

5. The TDN intend to use the spectrum to offer affordable wireless service, to support connectivity to critical Tribal services, including telemedicine, counseling and distance learning, and to provide emergency communications services.¹⁹ The TDN explain that wireless services are unaffordable and unreliable and emergency communications are of “deep concern” due to the very rural and Tribal

⁷ 47 CFR § 27.1204(b)(3).

⁸ 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 how applicants could demonstrate compliance with the eligibility requirements or file requests for waiver. *Wireless Telecommunications Bureau Announces Procedures for 2.5 GHz Rural Tribal Priority Window*, Public Notice, 35 FCC Rcd 308 (2020).

⁹ See *Transforming the 2.5 GHz Band*, Order on Reconsideration, 35 FCC Rcd 15074, 15080-81, para. 22 (2020) (*Reconsideration Order*).

¹⁰ *Id.* at 15081, para. 22.

¹¹ *Id.* at 15081, para. 23.

¹² File No. 0009168134 (filed July 30, 2020); Application.

¹³ File No. 0009168134, Eligibility Exhibit at 1-2.

¹⁴ File No. 0009168134 (granted Dec. 22, 2020).

¹⁵ Waiver Request at 3-8.

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 4, 6.

¹⁹ *Id.* at 2-3, 5, 7.

nature of the area.²⁰ The TDN argue that a waiver would be in the public interest because its proposed system would increase wireless reliability and affordability and promote emergency communications.²¹

6. The TDN's application was accepted for filing on November 10, 2020.²² No petitions to deny or oppositions were filed against the application.

III. DISCUSSION

7. A request for a waiver may be granted 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.²³ Here, we find that the TDN have demonstrated that it meets the second prong of the Commission's waiver standard. Accordingly, we grant a waiver of section 27.1204(b)(2) of the Commission's rules to allow licensing of the off-reservation trust, fee, and non-Tribal land specified in the Application.

8. The Commission established a Tribal Priority Window to address the acute problem of lack of access to wireless communications services in rural Tribal areas.²⁴ In this instance, we find that strictly applying the Tribal lands definition would be inconsistent with the Tribal Window's purpose of providing wireless communications services in rural Tribal areas. First, we find that the TDN have shown that the off-reservation trust and fee lands in question are either held for the specific benefit of the Tribe or are directly owned by the Tribe. Further, the Tribe's authority over the lands is adequately demonstrated by the Tribe having built various Tribal facilities and housing on these lands. We find, based upon the showings made by the TDN, that treating these rural lands as eligible Tribal lands under the Tribal Window would be consistent with the Tribal Window's purpose.²⁵ We note that the trust and fee lands in question are areas subject to the Tribe's current, demonstrated authority. In addition, we find that a waiver would be in the public interest because the TDN have plans to use the spectrum to provide wireless service on rural lands specifically held in trust for the Tribe's benefit or directly owned by the Tribe. As such, we find the Tribe has adequately demonstrated that it has "the requisite authority over the deployment of facilities and service[s]"²⁶ over the lands at issue, and they have therefore demonstrated that strictly applying the Tribal lands definition would be inconsistent with its purpose.

9. Second, with respect to the non-Tribal land included in the Waiver Request, we find under the second prong of the Commission's waiver standard that unique or unusual factual circumstances exist, and that absent the waiver, the TDN would have no reasonable alternative in providing service to its trust and fee lands. The nature of the trust and fee land being interspersed with non-Tribal land presents technical challenges in establishing a wireless network. The location and nature

²⁰ Waiver Request at 3; *see also id.* at 2, 5, 7.

²¹ *Id.* at 2, 7-8.

²² *Wireless Telecommunications Bureau Announces Additional 2.5 GHz Rural Tribal Priority Window License Applications Accepted for Filing*, Public Notice, 35 FCC Rcd 12850 (WTB 2020).

²³ 47 CFR § 1.925(b)(3).

²⁴ *Reconsideration Order*, 35 FCC Rcd at 15075, para. 4.

²⁵ The Commission has noted that the problem of lack of communications is particularly acute on rural Tribal lands. *See 2.5 GHz Report and Order*, 34 FCC Rcd at 5466, para. 56; *see also Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Progress Report, 35 FCC Rcd 8986, 9013, para. 47 (2020) ("Rural Tribal lands continue to lag behind urban Tribal lands, with only 52.9% of all Tribal lands in rural areas having deployment of both [fixed and mobile broadband] services, as compared to 93.1% of Tribal lands in urban areas").

²⁶ *Reconsideration Order*, 35 FCC Rcd at 15081, para. 22.

of the non-Tribal land make it unlikely that any other operator would seek to provide wireless service there, if we were to decide that it must be separately licensed. From an engineering perspective, it would be difficult for the TDN to provide service to its trust and fee lands and still comply with the interference protection rules applicable to the non-Tribal land. Our rules for the 2.5 GHz band limit the field strength that can be radiated at the border of a licensee's service area.²⁷ Also, a licensee's entitlement to interference protection is dependent on its compliance with the height benchmark, which is dependent on the height of the antenna and the distance to another licensee's geographic service area.²⁸ Therefore, licensing the non-Tribal land separately could result in a situation where no licensee would be able to provide service to trust and fee lands or the adjacent non-Tribal lands.

10. Given the severe technical difficulties that the TDN or an adjacent licensee would incur in attempting to provide service in these interspersed areas, we also find that strictly applying the Tribal lands definition in this instance would be contrary to the public interest. We note that no petitions to deny or oppositions were received with respect to the Application and Waiver Request. We find that grant of a waiver to permit the TDN to serve the off-reservation trust, fee, and non-Tribal lands will promote the Tribe's ability to provide wireless service to its adjacent reservation, in furtherance of the Commission's objective in establishing the Tribal Priority Window.²⁹ Our determination relies on the fact that TDN have minimized the amount of non-Tribal land within this contiguous service area, and that the non-Tribal land in question is interspersed with and adjacent to the off-reservation trust and fee lands.

11. We note that our decision here is limited to the suitability of these off-reservation trust, fee, and non-Tribal lands to be licensed in the Tribal Window. We make no determination as to the status of these lands with respect to other Commission rules or programs, nor for any other purpose.

IV. ORDERING CLAUSES

12. 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 Tolowa Dee-ni' Nation on September 2, 2020 IS GRANTED, and section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the off-reservation trust, fee, and non-Tribal land specified in the Application.

13. 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 section 27.1204 of the Commission's rules, 47 CFR § 27.1204, that the licensing staff of the Broadband Division SHALL PROCESS the Application filed by the Tolowa Dee-ni' Nation for a new 2.5 GHz license (File No. 0009210633) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

14. 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

Joel Taubenblatt
Acting Chief, Wireless Telecommunications Bureau

²⁷ See 47 CFR § 27.55(a)(4).

²⁸ See 47 CFR § 27.1221.

²⁹ *Reconsideration Order*, 35 FCC Rcd at 15075, para. 4.