

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

In the Matter of )
)
NEBRASKA INDIAN COMMUNITY COLLEGE ) ULS File No. 0009074188
)
Request for Waiver of Tribal Lands Definition in )
the 2.5 GHz Tribal Priority Window )

MEMORANDUM OPINION AND ORDER

Adopted: October 14, 2021

Released: October 14, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On May 11, 2020, the Nebraska Indian Community College (NICC) submitted a request for waiver in connection with an application it filed in the 2.5 GHz Rural Tribal Priority Window (Tribal Window).1 NICC seeks a waiver of section 27.1204(b)(2) of the Commission’s rules,2 which defines eligible Tribal lands for purposes of the Tribal Window. In this Memorandum Opinion and Order, we grant NICC’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

1 File No. 0009074188, 2.5 GHz Application and Request for Waiver, Nebraska Indiana Community College (filed May 11, 2020, amended July 2, 2020, July 29, 2020, Nov. 9, 2020, and Nov. 10, 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). As described herein, NICC is owned and controlled by two federally recognized Tribes, and is thus, an entity eligible to participate in the Tribal Window.

rules.<sup>6</sup> Third, the eligible Tribal lands 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>7</sup> Finally, the applicant must have a local presence on the eligible Tribal lands for which it is applying.<sup>8</sup>

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 purposes of the Tribal Window.<sup>9</sup> 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.”<sup>10</sup> The Commission recognized, however, that there might be “exceptions to the general rule” where case-by-case waivers would be appropriate to allow for the licensing of off-reservation lands in the Tribal Window.<sup>11</sup>

4. NICC is an accredited educational institution originally chartered in 1979 by three federally recognized tribes: the Omaha Tribe of Nebraska (Omaha), the Santee Sioux Tribe of Nebraska (Santee) and the Winnebago Tribe of Nebraska, the latter of which subsequently dropped out of NICC.<sup>12</sup> NICC has a six member Board of Governors, with three members from each of the Omaha and the Santee Tribes, and maintains a campus on each Tribe’s reservation.<sup>13</sup>

5. NICC filed two applications in the Tribal Window. The first application sought a license for the Santee reservation in Nebraska.<sup>14</sup> That application has been granted.<sup>15</sup> The second application, which is the subject of this *Memorandum Opinion and Order*, requests a license for the Omaha reservation, and seeks a waiver of the Tribal lands definition to also license an adjacent area that would allow it to cover the entire Bancroft-Rosalie School District (the “District”). The majority of the District

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<sup>6</sup> 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.*

<sup>7</sup> 47 CFR § 27.1204(b)(3).

<sup>8</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 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).

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

<sup>10</sup> *Id.* at 15081, para. 22

<sup>11</sup> *Id.* at 15081, para. 23.

<sup>12</sup> File No. 0009074188, Statement of Qualifications, Nebraska Indian Community College (filed May 11, 2020) at 1.

<sup>13</sup> *Id.*

<sup>14</sup> File No. 0009074198 (filed May 11, 2020, amended July 22, 2020 and July 29, 2020).

<sup>15</sup> File No. 0009074198 (granted Oct. 21, 2020).

is on the Omaha Reservation, but part falls in the immediately adjacent portions of Cuming and Burt counties.<sup>16</sup>

6. NICC asserts that it has support from the Superintendent of Bancroft-Rosalie Public Schools and the Chairman of the Village Board of Bancroft.<sup>17</sup> NICC states that the District has already partnered with NICC and three other K-12 districts within the Omaha Reservation to create an educational broadband system that will benefit all of the students within the District.<sup>18</sup> Without the waiver, NICC argues that the areas of the Bancroft-Rosalie School District located outside the Omaha Reservation will not be included in this system and may not be served by a commercial operator, leaving it and its students without reliable access to a broadband network.<sup>19</sup> NICC indicates that it has limited the scope of its Waiver Request to the minimum additional land area necessary to provide a reliable interference-free signal to the entire District.<sup>20</sup> Finally, NICC notes that since most of the population of Cuming and Burt counties lives outside of the waiver area, the impact to any future commercial operator in those counties will be minimal.<sup>21</sup>

7. The NICC application was accepted for filing on November 10, 2020.<sup>22</sup> No petitions to deny or oppositions were filed against the application.

### III. DISCUSSION

8. 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.<sup>23</sup> Here, we find that NICC's showing with respect to the non-Tribal land it requests 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 non-Tribal lands specified in the application.

9. The Commission established the Tribal Window to address the acute problem of lack of access to wireless communications services in rural Tribal areas.<sup>24</sup> 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. With respect to the non-Tribal lands that NICC included in its Waiver Request, we find under the second prong of the Commission's waiver standard that

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<sup>16</sup> Waiver Request at 1-2 ("approximately two-thirds of the District is located on the Reservation, with about one-third being located outside the boundary of the Reservation").

<sup>17</sup> Waiver Request at 2-3. NICC notes that other than Bancroft, which is located directly outside the boundary of the Omaha Reservation, there are no other towns within the waiver area. *Id.* at 3-4.

<sup>18</sup> Waiver Request at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 3 ("Based on available Census data, Cuming County currently has 9139 residents, 8,308 (91%) of whom live outside of the waiver area. Burt County has 6858 residents, 6751 (98%) of whom live outside of the waiver area.")

<sup>22</sup> *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).

<sup>23</sup> 47 CFR § 1.925(b)(3).

<sup>24</sup> *Reconsideration Order*, 33 FCC Rcd at 15075, para. 4.

unique or unusual factual circumstances exist, and that absent a waiver, NICC would have no reasonable alternative in providing service to the entire District, creating a disparity between the portions on and adjacent to the Omaha Reservation. As demonstrated in the maps included in the application, and as described in the Waiver Request, the majority of the District is on the Omaha Reservation but approximately one third falls outside in a directly adjacent area.<sup>25</sup> Without the grant of the waiver, unified service to the entirety of the District may be impractical if not impossible given the location and nature of the non-Tribal land away from the population centers in Cuming and Burt counties. Even if those areas were licensed to commercial operators tomorrow, NICC would need to work with potentially multiple operators to provide consistent and reliable broadband access throughout the District, resulting in a potential delay in service to those portions on the Omaha Reservation. Therefore, licensing the non-Tribal land separately could result in a situation where no licensee would be able to provide service to the adjacent non-Tribal lands.

10. Under the unique circumstances presented here, we find that strictly applying the Tribal lands definition in this instance would be contrary to the public interest. We also note that no petitions to deny or oppositions were received with respect to NICC's application and proposed Waiver Request. We find that grant of a waiver to permit NICC to license the non-Tribal lands will promote NICC's ability to provide broadband service to the adjacent Omaha reservation, in furtherance of the Commission's objective in establishing the Tribal Priority Window.<sup>26</sup> Our determination relies on the fact that NICC has minimized the amount of non-Tribal land within this contiguous service area and that the land is directly adjacent to the Omaha reservation, creating a unified service area.

11. We note that our decision here is limited to the suitability of these specific non-Tribal lands under 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 Nebraska Indian Community College on May 11, 2020, IS GRANTED, and section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the non-Tribal lands 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 Nebraska Indian Community College for a new 2.5 GHz license (File No. 0009074188) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

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<sup>25</sup> Waiver Request at 2-3, 7-8.

<sup>26</sup> See *Reconsideration Order*, 33 FCC Rcd at 15075, para. 4.

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