

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

In the Matter of)
NAVAJO NATION) ULS File No. 0009174685
Request for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 2021

Released: December 9, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On August 5, 2020, the Navajo Nation (Navajo 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 Navajo seek 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 the Navajo’s waiver request, as amended, 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. 0009174685, 2.5 GHz Application and Waiver Request, Navajo Nation (filed Aug. 5, 2020, amended Apr. 13, 2021, June 28, 2021, July 28, 2021, and Nov. 12, 2021) (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.”⁷ Finally, the applicant must have a local presence on the eligible Tribal lands for which it is applying.⁸

3. In 2020, 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.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 to allow for the licensing of off-reservation lands in the Tribal Window.¹¹

4. The Navajo filed one application within the Tribal Window including its reservation, adjacent off-reservation trust land administered by the Eastern Navajo Agency, encompassed non-Tribal lands intended to fill in gaps in the “checkerboard” layout of the Eastern Navajo Agency, as well as certain other non-Tribal lands adjacent to the Tribe’s reservation and trust lands.¹² As part of this application, the Navajo requested a waiver of the Tribal lands definition with respect to the Eastern Navajo Agency off-reservation trust lands, as well as the other adjacent and encompassed non-Tribal lands.¹³

5. As outlined by the Tribe in the Waiver Request, the Eastern Navajo Agency land area “includes ‘checkerboard’ lands and other lands adjacent to the Navajo Reservation.”¹⁴ This area encompasses various parcels including: (1) land held in trust for the Navajo Nation but not part of its reservation; (2) land owned in fee by Navajo Tribal members; (3) land owned by the State of New Mexico; and (4) land owned by private non-Native landowners.¹⁵ The Tribe asserts that this entire land area is administered by the Eastern Navajo Agency, and its constituent chapters, on the same basis as the

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. 0009174685. For example, our analysis indicates that two small parcels in and around the Cibola National Forest are adjacent to Navajo reservation lands but currently held in trust by the State of New Mexico and leased to the Navajo. See State of New Mexico Land Office Data Access, Land Status Map, available at <https://mapservice.nmstatelands.org/LandStatus/> (showing lands in question as New Mexico state trust lands); Lease No. LE-1406-0000, available at http://dataaccess.nmstatelands.org/DataAccess/Lease_Information_Single.aspx?Lease_Prefix=LE&Lease_Number=1406&Lease_Assignment=0 (lease of lands to Navajo).

¹³ See Waiver Request at 1.

¹⁴ See *id.* at 2.

¹⁵ See *id.*, citing 2014 TLBC Order, 29 FCC Rcd at 13773, para. 10.

other four agencies of the Navajo Nation.¹⁶ For these and other reasons, the Navajo note that the Commission previously has granted requests seeking to classify the entire Eastern Navajo Agency land area as Tribal land for the purpose of other Commission programs.¹⁷

6. The application was accepted for filing on November 10, 2020.¹⁸ 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.¹⁹ Here, we find that the Navajo's showing with respect to the off-reservation trust lands covered by the Eastern Navajo Agency meets the first prong of the Commission's waiver standard, and its showing with respect to all other types of non-Tribal lands 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 and non-Tribal lands specified in the application.

8. The Commission established the Tribal Window to address the acute problem of lack of access to wireless communications services in rural Tribal areas.²⁰ 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 Navajo have shown that the off-reservation trust lands in question are held for the specific benefit of the Tribe, and the Tribe has adequately demonstrated its authority over the trust land by the administrative activities of the Eastern Navajo Agency and its constituent chapters, as components of the government of the Navajo Nation.²¹ We find, based upon the showing made by the Navajo, that treating these rural lands as eligible Tribal lands under the Tribal Window would be consistent with the Tribal Window's purpose.²² We note that

¹⁶ Waiver Request at 2. The Navajo Nation's government is comprised of 110 chapters which fall within five agencies; four of these agencies cover much of the Tribe's reservation lands. *See* Navajo Nation Chapters, available at <https://www.navajo-nsn.gov/chapters.htm>.

¹⁷ *See generally* Federal-State Joint Board on Universal Service and Smith Bagley, Inc. Petition for Waiver of Section 54.400(e) of the Commission's Rules, Memorandum Opinion and Order, 20 FCC Rcd 7701 (Smith Bagley), Request for Waiver of the Definition of 'Federally Recognized Tribal Land' under Section 1.2110(f)(3)(i) of the Commission's Rules to Include Additional Areas within the Eastern Navajo Agency of the Navajo Nation, Order, 29 FCC Rcd 13769 (2014 TLBC Order).

¹⁸ *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). As noted above, the Navajo filed amendments to its application on August 5, 2020, April 13, 2021, June 28, 2021, July 28, 2021, and November 12, 2021. The collective result of those amendments was to remove certain lands near Winslow, Arizona, Gallup, New Mexico, and the Cibola National Forest from the Navajo's shapefile.

¹⁹ 47 CFR § 1.925(b)(3).

²⁰ *Reconsideration Order* at para. 4.

²¹ *See* Waiver Request at 2.

²² 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").

the lands in question are areas within the Tribe's current, demonstrated authority and are largely contiguous to part of the reservation. Granting a waiver under these particular facts and circumstances would facilitate service on the Tribe's reservation by creating a larger contiguous service area covering both the reservation and adjoining trust lands held for the benefit of the Tribe. In addition, we find that a waiver would be in the public interest because the Navajo plan to use the spectrum to provide service on rural lands specifically held in trust for the Tribe's benefit. As such, we find the Tribe has adequately demonstrated that it has "the requisite authority over the deployment of facilities and service[s]"²³ 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 Navajo would have no reasonable alternative in providing service to its reservation and trust lands. The nature of the reservation and trust land being interspersed with non-Tribal land presents technical challenges in establishing a wireless network. The location and nature 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 Navajo to provide service to its reservation and trust 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.²⁴ 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).²⁵ Therefore, licensing the non-Tribal land separately could result in a situation where no licensee would be able to provide service to either the reservation and trust land or the adjacent non-Tribal lands.

10. Given the severe technical difficulties that the Navajo or an adjacent licensee would incur in attempting to provide service in these adjacent and 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 Navajo's application and proposed waiver. We find that grant of a waiver to permit the Tribe to serve the off-reservation trust and non-Tribal lands will promote the Tribe's ability to provide service to its adjacent reservation, in furtherance of the Commission's objective in establishing the Tribal Priority Window.²⁶ Our determination relies on the fact that the Navajo have minimized the amount of non-Tribal land within this contiguous service area, and that the non-Tribal land in question is adjacent to, or interspersed with, the Tribe's reservation or off-reservation trust lands.²⁷

11. We note that our decision here is limited to the suitability of these specific off-reservation trust 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.

²³ *Reconsideration Order*, 35 FCC Rcd at 15081, para. 22.

²⁴ See 47 CFR § 27.55(a)(4).

²⁵ See 47 CFR § 27.1221.

²⁶ See *Reconsideration Order*, 33 FCC Rcd at 15075, para. 4.

²⁷ We conclude that the same rationale applies to the two small parcels of New Mexico state trust land in and near the Cibola National Forest leased to the Navajo. As the leased lands can create a unified service area with a portion of the Navajo reservation, and they represent a very small portion of the Navajo's overall shapefile, we find that a waiver is appropriate in these specific circumstances.

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 Navajo Nation on July 29, 2020, as amended, IS GRANTED, and Section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the off-reservation trust and 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 Navajo Nation for a new 2.5 GHz license (File No. 0009174685) 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

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