

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

In the Matter of)
)
TURTLE MOUNTAIN BAND OF CHIPPEWA) ULS File Nos. 0009168676, 0009168746
INDIANS)
)
Requests for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 2021

Released: March 11, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 31, 2020, the Turtle Mountain Band of Chippewa Indians (Turtle Mountain or “the Tribe”) submitted requests for waiver in connection with two applications it filed in the 2.5 GHz Rural Tribal Priority Window (Tribal Window).¹ Turtle Mountain seeks waivers of section 27.1204(b)(2) of the Commission’s rules,² which defines eligible lands for purposes of the Tribal Window. In this *Memorandum Opinion and Order*, we grant Turtle Mountain’s Waiver Requests because they meet 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. 0009168676, Turtle Mountain Band of Chippewa Application for Spectrum License for Off-Reservation Trust Allotments (Rolette County Waiver Request); File No. 0009168746, Turtle Mountain Band of Chippewa Application for the Trenton Service Area Allotted Lands (Trenton 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, in 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. Turtle Mountain filed three applications in the Tribal Window. The first application sought a license for the Tribe’s reservation land in North Dakota.¹² That application has been granted.¹³ The other two applications, which are the subject of this *Memorandum Opinion and Order*, request waivers of the Tribal lands definition in order to obtain licenses for trust lands that fall outside the Tribe’s reservation.¹⁴ One application seeks a waiver for trust lands in Roulette County, North Dakota that are largely adjacent to the Tribe’s reservation.¹⁵ The second application requests a waiver to license 479 acres of non-reservation trust lands around Trenton, North Dakota, in the western part of the state.¹⁶

5. As detailed by the Tribe, its trust lands in Rolette County and around Trenton were set aside and, consistent with federal law, the Tribe exercises authority over the lands.¹⁷ Further, the Tribe states that it maintains an active presence on the trust lands throughout Rolette County, including a pow-wow grounds and Tribal housing developments.¹⁸ Around Trenton, Turtle Mountain has established the Grand Treasure Casino and various low income homes and rental units.¹⁹ For both sets of trust lands, Turtle Mountain intends to use the spectrum to provide wireless communications services to those areas.²⁰

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. 0009138037 (filed July 6, 2020, amended July 8, 2020).

¹³ File No. 0009138037 (granted Oct. 21, 2020).

¹⁴ Rolette County Waiver Request; Trenton Waiver Request.

¹⁵ See File No. 0009168676, Rolette County Waiver Request.

¹⁶ See File No. 0009168746, Trenton Waiver Request at 1.

¹⁷ Rolette County Waiver Request at 1-2; Trenton Waiver Request at 1-2.

¹⁸ Rolette County Waiver Request at 2.

¹⁹ Trenton Waiver Request at 2.

²⁰ Rolette County Waiver Request at 5; Trenton Waiver Request at 3.

6. The applications were accepted for filing on November 10, 2020.²¹ No petitions to deny or oppositions were filed against the applications.

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.²² Here, we find that Turtle Mountain's showing meets the first 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-reservation trust lands specified in the applications.²³

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 Turtle Mountain has shown that the trust lands in question are held for the specific benefit of the Tribe, and the Tribe's authority over the lands is adequately demonstrated by the fact that the Tribe is building various Tribal housing developments in these areas. We find, based upon the showing made by Turtle Mountain, 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 lands in question are areas subject to the Tribe's current, demonstrated authority and, in the case of the Rolette County lands, they are contiguous to the reservation lands for which we already have issued a license. 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 much of the adjoining trust lands. In addition, we find that a waiver would be in the public interest because Turtle Mountain has plans to use the spectrum to provide wireless communications service on rural lands specifically held in trust for the Tribe's benefit.

9. Turtle Mountain must ensure that any system it deploys complies with our technical rules. In particular, 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.²⁶ 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

²¹ *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).

²² 47 CFR § 1.925(b)(3).

²³ The Tribe asserts that a waiver is not required for the non-reservation trust lands at issue. Rolette County Waiver Request at 1-2, Trenton Waiver Request at 1-2. We disagree. As discussed in the *Order on Reconsideration*, off-reservation trust lands do not fall within the Tribal lands definition adopted for the Tribal Priority Window. *Reconsideration Order* at paras. 22-23. The Commission recognized, however, that there could be circumstances where a waiver would be appropriate to allow licensing of off-reservation trust lands. *Reconsideration Order* at paras. 23. We find those circumstances are met in the instant case.

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 *See* 47 CFR § 27.55(a)(4).

distance to another licensee's geographic service area.²⁷ Absent agreements with neighboring licensees or a waiver of those rules, Turtle Mountain must comply with those rules.

10. We note that our decision here is limited to the suitability of these specific trust lands found as eligible Tribal lands under the Tribal Window. We make no determination as to the status of these trust lands with respect to other Commission rules or programs, nor for any other purpose.

IV. ORDERING CLAUSES

11. 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 requests filed by the Turtle Mountain Band of Chippewa Indians on July 31, 2020 ARE GRANTED, and section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the land specified in the applications.

12. 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 applications filed by the Turtle Mountain Band of Chippewa Indians for new 2.5 GHz licenses (File Nos. 0009168676 and 0009168746) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

13. 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 § 27.1221.