

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

In the Matter of)
THE PASSAMAQUODDY TRIBE) ULS File No. 0009209411
Request for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2021

Released: March 30, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 1, 2020, the Passamaquoddy Tribe (Passamaquoddy 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 Passamaquoddy 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 the Passamaquoddy’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 of an urbanized area or urban cluster area with a population equal to or greater than 50,000.”7 Finally, the

1 File No. 0009209411 The Passamaquoddy Tribe, Waiver Application Information for The Passamaquoddy Tribe (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).

7 47 CFR § 27.1204(b)(3).

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. The Passamaquoddy filed an application within the Tribal Window, which is the subject of this *Memorandum Opinion and Order*. The application and accompanying Waiver Request seek a license for approximately 94,000 acres of trust lands that fall outside of the Tribe’s Pleasant Point and Indian Township reservations.¹² All of the Passamaquoddy’s reservation and non-reservation trust lands, the latter of which were acquired through the Maine Indian Claims Settlement Act (MICSA), are located in rural areas.¹³ According to the Tribe, most of the trust lands are in areas lacking state municipal governments and where “there is a general lack of basic infrastructure, and there is simply no telecommunications infrastructure like cell phone or radio towers.”¹⁴

5. As detailed in its Waiver Request, the Tribe explains that MICSA specifically authorized it to acquire the trust lands to promote “stewardship and use of land and resources.”¹⁵ The Passamaquoddy further assert that their Tribal laws permit “use of MICSA lands for residences, sustenance, and a multitude of occupations” including at two seasonal Tribal businesses.¹⁶ The Passamaquoddy state that it is critically important for the Tribe to communicate between its reservation lands and trust lands and to do so in reliance on its own infrastructure given the lack of investment from private carriers in the region.¹⁷

6. The Passamaquoddy’s application was accepted for filing on November 10, 2020.¹⁸ No petitions to deny or oppositions were filed against the application.

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 Waiver Request at 1.

¹³ Waiver Request at 3.

¹⁴ Waiver Request at 3.

¹⁵ Waiver Request at 5.

¹⁶ Waiver Request at 4.

¹⁷ Waiver Request at 5.

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).

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 Passamaquoddy'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 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.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 Passamaquoddy have 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 Tribal laws authorizing their use for residences and the presence of seasonal Tribal businesses on the trust lands. We find, based upon the showing made by the Passamaquoddy, that treating these rural lands as eligible Tribal lands under the Tribal Window would be consistent with the Tribal Window's purpose.²¹ We note that the 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 Passamaquoddy have plans to deploy telecommunications infrastructure on rural lands specifically held in trust for the Tribe's benefit.²² 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. 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

10. 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 Passamaquoddy Tribe on September 1, 2020 IS GRANTED, and section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the land specified in the application.

¹⁹ 47 CFR § 1.925(b)(3).

²⁰ *Reconsideration Order*, 35 FCC Rcd at 15075, para. 4.

²¹ 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").

²² *See Waiver Request* at 1.

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

11. 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 Passamaquoddy Tribe for a new 2.5 GHz license (File No. 0009209411) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

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

Joel Taubenblatt.
Acting Chief, Wireless Telecommunications Bureau