

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

In the Matter of)
)
 LOWER SIOUX INDIAN COMMUNITY) ULS File No. 0009167814
 GENERAL COUNCIL)
)
 Request for Waiver of Tribal Lands Definition in)
 the 2.5 GHz Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 2021

Released: April 6, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 30, 2020, the Lower Sioux Indian Community General Council (Lower Sioux 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 Lower Sioux 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 Lower Sioux’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. 0009167814 Lower Sioux Indian Community General Council, Request for Waiver (filed July 30, 2020) (Waiver Request), Amendment (filed Sep. 15, 2020) (Waiver Request Amendment).

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. 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 Lower Sioux filed two applications in the Tribal Window. The first application sought a license for the Tribe’s reservation in Minnesota.¹² That application has been granted.¹³ The second application, which is the subject of this *Memorandum Opinion and Order*, requests a waiver of the Tribal lands definition in order to obtain a license for small areas of off-reservation trust lands directly adjacent to the reservation.¹⁴

5. As detailed in its Waiver Request, these trust lands were acquired to restore the Lower Sioux’ reservation land base and to have additional land for housing and other community uses.¹⁵ The Tribe intends to address its broadband service needs across all of its Tribal lands, and indicates that its contemplated wireless network would cover the tracts described in the Waiver Request.¹⁶

6. The Lower Sioux’s application was accepted for filing on November 10, 2020.¹⁷ 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

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. 0009157301 (filed July 21, 2020).

¹³ File No. 0009157301 (granted Dec. 22, 2020).

¹⁴ Waiver Request at 1 (citing the United States Department of the Interior, Bureau of Indian Affairs Title Status Report for Tribal Tracts 402 T 1024 and 402 T 1020).

¹⁵ Waiver Request Amendment at 1.

¹⁶ Waiver Request at 1; Waiver Request Amendment at 1.

¹⁷ *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).

contrary to the public interest, or the applicant has no reasonable alternative.¹⁸ Here, we find that Lower Sioux'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.¹⁹ 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 Lower Sioux 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 its development plans for these parcels for housing and other developments. We find, based upon the showing made by the Lower Sioux, that treating these rural lands as eligible Tribal lands under the Tribal Window would be consistent with the Tribal Window's purpose.²⁰ We note that the lands in question are areas subject to the Tribe's current, demonstrated authority and are contiguous to the reservation land 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 adjoining trust lands. In addition, we find that a waiver would be in the public interest because the Lower Sioux have plans to use the spectrum to provide broadband service on these rural lands specifically held in trust for the Tribe's benefit.²¹ As such, we find the Tribe has adequately demonstrated that it has "the requisite authority over the deployment of facilities and service[s]"²² 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 Lower Sioux Indian Community General Council on July 30, 2020, as amended on September 15, 2020, IS GRANTED, and section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the lands specified in the application.

¹⁸ 47 CFR § 1.925(b)(3).

¹⁹ *Reconsideration Order*, 35 FCC Rcd at 15075, para. 4.

²⁰ 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").

²¹ We note that the instant application (File No. 0009167814), overlaps with the Lower Sioux application that has already been granted (File No. 0009157301). The Commission cannot grant two applications for the same channels and the same area, even if the applicant is the same. Before the Broadband Division is able to process the application associated with the Waiver Request, Lower Sioux will have to reduce the shapefile for its non-reservation parcels (File No. 0009167814) to exclude the overlap area.

²² *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 Lower Sioux Indian Community General Council for a new 2.5 GHz license (File No. 0009167814) 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