

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

In the Matter of)
THE OGLALA SIOUX TRIBE) ULS File No. 0009210465
Request for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 2021

Released: April 20, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 2, 2020, the Oglala Sioux Tribe (“the Oglala 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 The Oglala Sioux requests 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 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

1 File No. 0009210465, Waiver Request of the Oglala Sioux Tribe (Sept. 2, 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).

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 Oglala Sioux filed three applications in the Tribal Window.¹² The first application sought a license for the Tribe’s Pine Ridge Indian Reservation in South Dakota.¹³ That application has been granted.¹⁴ The Oglala Sioux filed two additional applications requesting waivers of the Tribal lands definition, one of which is the subject of this *Memorandum Opinion and Order*.¹⁵ The instant application and associated waiver request seek a license to provide service on land owned by the Tribe near Hells Canyon in Falls River County, South Dakota.¹⁶

5. As detailed in the Waiver Request, the Oglala Sioux wholly owns in fee and manages these 1,227 acres, and presently leases the land to the Black Hills Wild Horse Sanctuary.¹⁷ The Tribe asserts that the land is poorly served by telecommunications providers, limiting the ability of the Tribe’s Land Office staff to stay in communication with each other while conducting regular compliance checks.¹⁸ The Oglala Sioux believe that grant of the requested waiver will further allow it to support other Tribal uses of the land, including but not limited to a horse therapy program for veterans.¹⁹

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 and 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 Nos. 0009166464 (filed July 29, 2020); 0009210465 (filed Aug. 19, 2020); 0009210549 (filed Aug. 18, 2020; amended Aug. 27, 2020).

¹³ File No. 0009166464 (filed July 29, 2020).

¹⁴ File No. 0009166464 (granted Oct. 21, 2020).

¹⁵ See File No. 0009210465 (filed Aug. 19, 2020). The other application and associated waiver request filed by the Oglala Sioux for a license along the Oglala Sioux Rural Water Supply System remains pending. File No. 0009210549 (filed Sept. 2, 2020).

¹⁶ Waiver Request at 1.

¹⁷ Waiver Request at 3.

¹⁸ Waiver Request at 4-6, 8.

¹⁹ Waiver Request at 6-8.

6. The instant application was accepted for filing on January 14, 2021.²⁰ 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.²¹ Here, we find that the Oglala Sioux meet 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 lands owned in fee by the Tribe as 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.²² In this instance, we find that strictly applying the Tribal lands definition would be inconsistent with the Window's purpose of providing wireless communications services in rural Tribal areas. First, we find that the Oglala Sioux have shown that the lands in question are owned in fee by the Tribe. Further, the Tribe's authority over the land is adequately demonstrated by its authority to manage and lease the property. We find, based upon the showing made by the Oglala Sioux, that treating these rural lands as eligible Tribal lands under the Tribal Window would be consistent with the Tribal Window's purpose.²³ 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 Oglala Sioux plan to use the spectrum to provide wireless service on rural lands owned directly by the Tribe. As such, we find the Tribe has adequately demonstrated that it has "the requisite authority over the deployment of facilities and service[s]"²⁴ 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 fee lands found as eligible 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

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 Oglala Sioux Tribe on September 2, 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.

²⁰ *Wireless Telecommunications Bureau Announces Additional 2.5 GHz Rural Tribal Priority Window License Applications Accepted for Filing*, Public Notice, DA 21-61 (WTB rel. Jan. 14, 2021).

²¹ 47 CFR § 1.925(b)(3).

²² *Reconsideration Order*, 35 FCC Rcd at 15075, para. 4.

²³ 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").

²⁴ *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 Oglala Sioux Tribe for a new 2.5 GHz license (File No. 0009210465) 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