

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

In the Matter of)
BLUE LAKE RANCHERIA) ULS File No. 0009167604
Requests for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 2021

Released: July 26, 2021

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 1, 2020, Blue Lake Rancheria (Blue Lake 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). Blue Lake seeks a waiver of section 27.1204(b)(2) of the Commission’s rules, which defines eligible Tribal lands for purposes of the Tribal Window. In this Memorandum Opinion and Order, we grant Blue Lake’s Waiver Request because it meets the Commission’s waiver standard.

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. 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.” Second, the applicant must apply for eligible Tribal lands, as defined in section 27.1204(b)(2) of the Commission’s rules. 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.” Finally, the

1 File No. 0009167604 Blue Lake Rancheria, Waiver Request (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.

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, 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. Blue Lake filed one application within the Tribal Window.¹² The application requests a license for the Tribe’s reservation land, off-reservation trust land, and a small parcel of non-Tribally owned land.¹³ As detailed in its Waiver Request, the Tribe requests a waiver of the definition of “Tribal lands” in section 27.1204(b)(2) for certain lands contiguous to the reservation that are held in trust for the Tribe.¹⁴ Tribal housing and community resources such as a community garden are currently located within the waiver area.¹⁵ Blue Lake has further development plans in this area, including but not limited to potential new government offices, an assisted living facility and additional Tribal housing.¹⁶ The Tribe also requests a waiver for one area of non-Tribally owned land, which the Tribe states is entirely occupied by the City of Blue Lake waste water treatment plant.¹⁷ The Tribe indicates that it is technically necessary to include this non-Tribally owned land in the Waiver Request, because without inclusion of this land “there would be a technical challenge to deploy this technology within the area effectively and meet the maximum signal strength at its boundaries with the tribal land.”¹⁸

5. If this application is granted, Blue Lake intends to use the resulting license to provide the reservation and off-reservation trust land with high speed broadband, which is currently only available to the Tribal government buildings and some existing economic enterprises.¹⁹ Blue Lake states that access to 2.5 GHz spectrum will allow deployment of a connected infrastructure without the need for high cost fiber cable.²⁰

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. 0009167604 (filed July 30, 2020, amended Aug. 25, 2020, amended Sept. 1, 2020).

¹³ *Id.*

¹⁴ Waiver Request at 1-2.

¹⁵ Waiver Request at 2.

¹⁶ Waiver Request at 2.

¹⁷ Waiver Request at 2.

¹⁸ Waiver Request at 2.

¹⁹ Waiver Request at 2, 3.

²⁰ Waiver Request at 2.

6. The Blue Lake application was accepted for filing on November 10, 2020.²¹ 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.²² Here, we find that Blue Lake's showing with respect to the trust land meets the first prong of the Commission's waiver standard and its showing with respect to the non-Tribally owned land 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 non-reservation trust and non-Tribally owned 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.²³ 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 Blue Lake has shown that the 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 Tribal housing and community garden in this area. We find, based upon the showings made by Blue Lake, that treating this rural land as eligible Tribal land under the Tribal Window would be consistent with the Tribal Window's purpose.²⁴ We note that the trust lands in question are areas subject to the Tribe's current, demonstrated authority and are 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 Blue Lake have plans to use the spectrum to provide wireless 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]"²⁵ over the lands at issue, and they have therefore demonstrated that strictly applying the Tribal lands definition would be inconsistent with its purpose.

9. With respect to the non-Tribally owned land that Blue Lake also included in its 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, Blue Lake would have no reasonable alternative in providing service to its reservation and trust lands. As shown in the map included in the application, and as described in the Waiver Request, the non-Tribally owned land requested is small, and surrounded on three sides by Blue Lake's reservation and trust lands. Blue Lake states that the parcel is entirely occupied by a wastewater treatment facility, with no residents and no other economic enterprises located

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

²⁴ 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").

²⁵ *Reconsideration Order*, 35 FCC Rcd at 15081, para. 22.

on the land.²⁶ The location and nature of this non-Tribally owned parcel 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 Blue Lake to provide service to its reservation and trust lands and still comply with the interference protection rules applicable to the non-Tribally owned parcel. 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.²⁷ 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).²⁸ Therefore, licensing the non-Tribally owned 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-Tribally owned land.

10. Given the technical difficulties that Blue Lake would incur in attempting to provide service on its reservation and trust lands if we did not include in the non-Tribally owned land in its service area, we also find that strictly applying the Tribal lands definition in this instance would be contrary to the public interest. We agree with Blue Lake that it would be technically challenging to effectively deploy high speed broadband service to its reservation and trust lands if it were required to limit emissions over the small, surrounded wastewater treatment area.²⁹ We also note that no petitions to deny or oppositions were received with respect to Blue Lake's application and proposed waiver. We find that grant of a waiver to permit the Tribe to license the non-Tribally owned parcel will promote the Tribe's ability to provide broadband service to its own reservation, in furtherance of the Commission's objective in establishing the Tribal Priority Window.³⁰ Our determination relies on the fact that Blue Lake has minimized the amount of non-Tribally owned land within this contiguous service area, and that the non-Tribally owned land in question is surrounded on three sides by the Tribe's reservation and trust lands.

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

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 Blue Lake Rancheria on September 1, 2020 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-Tribally owned land 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 Blue Lake Rancheria for a new 2.5 GHz license (File No. 0009167604) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

²⁶ Waiver Request at 2.

²⁷ See 47 CFR § 27.55(a)(4).

²⁸ See 47 CFR § 27.1221.

²⁹ Waiver Request at 2.

³⁰ See *Reconsideration Order*, 33 FCC Rcd at 15075, para. 4.

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

Joel Taubenblatt
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