

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

In the Matter of)
)
BURNS PAIUTE TRIBE) ULS File No. 0009142952
)
LOWER ELWHA KLALLAM TRIBE) ULS File No. 0009132715
)
Requests for Waiver of Tribal Lands Definition in)
the 2.5 GHz Tribal Priority Window)
)

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 2024

Released: March 13, 2024

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Burns Paiute Tribe (Burns Paiute)¹ and the Lower Elwha Klallam Tribe (Lower Elwha)² each filed an application in the 2.5 GHz Rural Tribal Priority Window (Tribal Window). In connection with the applications, Burns Paiute and Lower Elwha each submitted a request for waiver³ of section 27.1204(b)(2) of the Commission’s rules,⁴ which defines eligible Tribal lands for purposes of the Tribal Window. In this Memorandum Opinion and Order, we grant both Waiver Requests.⁵

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.⁶ 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.⁷ 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.”⁸ Second, the applicant must apply for eligible Tribal lands, as defined in section 27.1204(b)(2) of the Commission’s

¹ See File No. 0009142952 (filed July 9, 2020, amended Aug. 26, 2020) (Burns Paiute Application).

² See File No. 0009132715 (filed July 1, 2020, amended Sept. 1, 2020, and Sept. 2, 2020) (Lower Elwha Application).

³ Burns Paiute Application, Petition for Waiver (Burns Paiute Waiver Request); Lower Elwha Application, Waiver Request (Lower Elwha Waiver Request).

⁴ 47 CFR § 27.1204(b)(2).

⁵ See 47 CFR § 1.925(b)(3).

⁶ Transforming the 2.5 GHz Band, Report and Order, 34 FCC Rcd 5446 (2019) (2.5 GHz Report & Order).

⁷ Id. at 5463–69, paras. 47–65.

⁸ 47 CFR § 27.1204(b)(1).

rules.⁹ 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.”¹⁰ Finally, the applicant must have a local presence on the eligible Tribal lands for which it is applying.¹¹

3. In 2020, 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.¹² 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.”¹³ 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.¹⁴

4. Burns Paiute¹⁵ and Lower Elwha¹⁶ each filed one application within the Tribal Window requesting a license for their respective reservations, off-reservation trust lands, and small parcels of non-Tribal land.¹⁷ Both Tribes specify that technical elements of their anticipated 2.5 GHz deployment plans necessitate a waiver encompassing the off-reservation trust and non-Tribal lands. Burns Paiute proposes to deploy 2.5 GHz spectrum as a mid-mile backbone to connect the Burns Butte area, where its Tribal lands are located, to one of the few feasible fiber connection options in the area.¹⁸ Similarly, Lower Elwha states that without a 2.5 GHz license covering the off-reservation trust and non-Tribal lands it has requested, the Tribe would not be able to utilize an existing Tribally-owned tower that is already connected to fiber to provide service to its reservation.¹⁹ Both Burns Paiute and Lower Elwha indicate that their proposed service areas are rural in nature and have limited and cost-prohibitive broadband options.²⁰

⁹ *Id.* § 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 Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, July 9, 1921, 42 Stat 108, *et seq.*, as amended.” *Id.*

¹⁰ *Id.* § 27.1204(b)(3).

¹¹ *Id.* § 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 Tribal 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 (WTB 2020).

¹² See *Transforming the 2.5 GHz Band*, Order on Reconsideration, 35 FCC Rcd 15074, 15080–81, para. 22 (2020) (*Reconsideration Order*).

¹³ *Id.* at 15081, para. 22.

¹⁴ *Id.* at 15081, para. 23.

¹⁵ Burns Paiute Application.

¹⁶ Lower Elwha Application.

¹⁷ Burns Paiute Waiver Request at 3–4; Lower Elwha Waiver Request at 1.

¹⁸ Burns Paiute Waiver Request at 3.

¹⁹ Lower Elwha Waiver Request at 4, 9, 11.

²⁰ Burns Paiute Waiver at 3–4; Lower Elwha Waiver Request at 3, 10.

5. Both the Burns Paiute and Lower Elwha applications were accepted for filing on November 10, 2020.²¹ No petitions to deny or oppositions were filed against either application or Waiver Request in response to the Bureau's Public Notice.

III. DISCUSSION

6. 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 both the Burns Paiute and Lower Elwha showings with respect to each Tribe's off-reservation trust land meet the first prong of the Commission's waiver standard and their showings with respect to the non-Tribal land referenced in their applications meet the second prong of the Commission's waiver standard. Accordingly, we grant waivers of section 27.1204(b)(2) of the Commission's rules to Burns Paiute and Lower Elwha to allow licensing of the off-reservation trust and non-Tribal lands specified in their respective applications.

7. 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 these instances, 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 Burns Paiute and Lower Elwha have shown that their respective off-reservation trust lands are held for the specific benefit of each of the Tribes, and each Tribe has adequately demonstrated its authority over the off-reservation trust land. We find, based upon the showings made by both Burns Paiute and Lower Elwha, that treating these rural lands as eligible Tribal lands under the Tribal Window would be consistent with the Tribal Window's purpose.²⁴ We note that the off-reservation trust lands in question are areas subject to the Tribe's current, demonstrated authority. In addition, we find that waivers would be in the public interest because each Tribe has plans to use the 2.5 GHz spectrum to provide service on rural lands specifically held in trust for each Tribe's benefit. As such, we find that both Tribes have adequately demonstrated that they have "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.

8. With respect to the non-Tribal lands that Burns Paiute and Lower Elwha also included in their Waiver Requests, we find under the second prong of the Commission's waiver standard that unique or unusual factual circumstances exist, and that absent the waiver, the applicants would have no reasonable alternative in providing service to their reservation and off-reservation trust lands. We note that the unique configuration of each Tribe's reservation and off-reservation trust land relative to the non-Tribal parcels they seek to license presents technical challenges in establishing a wireless Internet network. From an engineering perspective, it would be difficult for each Tribe to provide service to its

²¹ *Wireless Telecommunications Bureau Announces Additional 2.5 GHz Rural Tribal Priority Window License Applications Accepted for Filing*, Public Notice, 35 FCC Rcd 12850, 12853, 12854, Attachs. A, B (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 & 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 Deployment 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.

reservation and off-reservation trust lands and still comply with the interference protection rules applicable to the non-Tribal parcels.²⁶ The location, nature, and size of each non-Tribal parcel makes it unlikely that any other operator would seek to provide wireless service there, if we were to decide that they must be separately licensed. Under the specific circumstances presented here, we conclude that waivers would facilitate improved service to each Tribe's reservation in furtherance of the Commission's objective in establishing the Tribal Priority Window, as well as their off-reservation trust lands.²⁷ In reaching that conclusion, we note that no petitions to deny or oppositions were received with respect to the applications and Waiver Requests. Thus, we grant the Waiver Requests filed by Burns Paiute and Lower Elwha.

9. We note that our decision here is limited to the suitability of these specific off-reservation trust and non-Tribal lands to be licensed 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. In particular, our decision to grant the Waiver Requests is based on the unique circumstances of the individual applicants and the specific situation present in the 2.5 GHz band at this point in time, and the presence of any one particular fact should not be viewed as supporting a waiver or other form of relief in a different context at a different point in time.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 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 Burns Paiute Tribe on July 9, 2020, and the Lower Elwha Klallam Tribe on September 2, 2020, ARE GRANTED, and that section 27.1204(b)(2) of the Commission's rules IS WAIVED to allow licensing of the off-reservation trust and non-Tribal lands specified in each application.

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 applications filed by the Burns Paiute Tribe (ULS File No. 0009142952) and the Lower Elwha Klallam Tribe (ULS File No. 0009132715) for new 2.5 GHz licenses 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. This *Memorandum Opinion and Order* is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Joel Taubenblatt
Chief, Wireless Telecommunications Bureau

²⁶ See, e.g., 47 CFR § 27.55(a)(4), 27.1221.

²⁷ *Reconsideration Order*, 35 FCC Rcd at 15075, para. 4.