

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

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| In the Matter of |) | |
| |) | |
| HO-CHUNK NATION |) | ULS File Nos. 0009210316, 0009210488, |
| |) | 0009210636, 0009210647, 0009225560, and |
| Requests for Waiver of the 2.5 GHz Rural Tribal |) | 0009225561 |
| Priority Window Rules |) | |

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 2024

Released: March 19, 2024

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Ho-Chunk Nation (Ho-Chunk or the Tribe) filed multiple applications in the 2.5 GHz Rural Tribal Priority Window (Tribal Window). In connection with six applications, Ho-Chunk submitted requests for waiver of section 27.1204(b)(2) of the Commission’s rules,¹ which defines eligible Tribal lands for purposes of the Tribal Window.² In this *Memorandum Opinion and Order*, we grant the Waiver Requests in part, as specified below.

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.³ 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.⁴ To obtain a license in the Tribal 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

¹ File Nos. 0009210316, 0009210488, 0009210636, 0009210647, 0009225560, and 0009225561, Petitions for Waiver (collectively, Waiver Requests).

² See 47 CFR § 27.1204(b)(2). Two of Ho-Chunk's applications also request a waiver of 47 CFR § 27.1204(b)(3), which excludes lands that are part of an urban area or urban cluster with a population of greater than 50,000 from being eligible in the Tribal Window. File No. 0009210647, Petition for Waiver (Beloit Waiver Request) at 7; File No. 0009210316, Petition for Waiver (Madison Waiver Request) at 7. See para. 3, *infra*.

³ *Transforming the 2.5 GHz Band*, Report and Order, 34 FCC Rcd 5446 (2019) (*2.5 GHz Report & Order*).

⁴ *Id.* at 5463-69, paras. 47-65.

⁵ 47 CFR § 27.1204(b)(1).

⁶ *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.*

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. Among the criteria adopted by the Commission as part of the Tribal Window was the requirement that any area being requested be “in a rural area, which is defined to be lands that are not part of an urbanized area or urban cluster area with a population equal to or greater than 50,000”⁹ The Commission later denied a petition for reconsideration seeking to include urban areas in the definition of eligible Tribal lands for the Tribal Window,¹⁰ reflecting that its underlying purpose was “to address the communications needs of their communities and of residents on rural Tribal lands, including the deployment of advanced wireless services to unserved or underserved areas.”¹¹

4. In 2020, the Commission also 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

5. Ho-Chunk filed multiple applications in the Tribal Window. One application was granted on May 12, 2021, as it sought a license only for the Tribe’s eligible lands in Wisconsin and did not require a waiver.¹⁵ A second application was previously dismissed by the Bureau as “moot due to the lack of available unassigned 2.5 GHz spectrum in the requested service areas.”¹⁶ In this *Memorandum Opinion and Order*, we also direct the licensing staff of the Broadband Division to dismiss ULS File No. 0009210488 as duplicative.¹⁷ The five remaining applications seek to obtain licenses for various areas

⁷ *Id.* § 27.1204(b)(3).

⁸ *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) (*Bureau Procedures Public Notice*).

⁹ 47 CFR § 27.1204(b)(3). *See also Bureau Procedures Public Notice*, 35 FCC Rcd at 313, para. 20.

¹⁰ *See Transforming the 2.5 GHz Band*, Order on Reconsideration, 35 FCC Rcd 15074, 15079-80, paras. 18-21 (2020) (*Reconsideration Order*).

¹¹ *Id.* at 15080, para. 19 (citing *2.5 GHz Report & Order*, 34 FCC Rcd at 5463, para. 47).

¹² *See Reconsideration Order*, 35 FCC Rcd at 15080-81, para. 22.

¹³ *Id.* at 15081, para. 22.

¹⁴ *Id.* at 15081, para. 23.

¹⁵ File No. 0009209624 (granted May 12, 2021) (WRMP552).

¹⁶ *Ho-Chunk Nation, Lummi Indian Business Council, Muscogee (Creek) Nation, Salt River Pima-Maricopa Indian Community, San Felipe Pueblo, Shoshone-Bannock Tribes, Table Mountain Rancheria, Requests for Waiver of the 2.5 GHz Rural Tribal Priority Window Rules*, Memorandum Opinion and Order, 35 FCC Rcd 13061, 13062-63, para. 1 (WTB 2020) (directing the Broadband Division to dismiss File No. 0009210653).

¹⁷ File No. 0009210488 contains the same shapefile as File No. 0009210647 (Beloit), but the attached waiver request discusses land in the Black River Falls area (although the waiver is titled Beloit), which is the subject of File No. 0009210636. Ho-Chunk’s requests for waivers with respect to the Beloit and Black River Falls areas are being fully considered in connection with File Nos. 0009210647 and 0009210636 in the instant *Memorandum Opinion and Order*.

including trust land, Tribally-owned fee lands, and allotments.¹⁸ The Tribe expresses its intent to use the 2.5 GHz licenses to address its broadband service needs across all of the Tribal land areas for which it has sought licenses.¹⁹

6. The five remaining Ho-Chunk applications were accepted for filing on April 8, 2021.²⁰ No petitions to deny or oppositions were filed against the applications in response to the Bureau's Public Notice.

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, with limited exceptions noted below, Ho-Chunk's showings with respect to its trust lands and Tribally-owned fee lands meet the first prong of the Commission's waiver standard. To the extent necessary, we find that Ho-Chunk's showings with respect to various allotments meet the second prong of the Commission's waiver standard. Accordingly, with the limited exceptions noted below, we grant waivers of section 27.1204(b)(2) of the Commission's rules to Ho-Chunk to allow licensing of the trust lands, Tribally-owned fee lands, and allotments specified in its applications.

8. The Commission established the Tribal Window to address the acute problem of lack of access to wireless communications services in rural Tribal areas.²² 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 Ho-Chunk has shown that its trust and Tribally-owned fee lands are either held for the specific benefit of the Tribe or are directly owned by the Tribe, and the Tribe has adequately demonstrated its authority over the trust and Tribally-owned fee lands. We find, based upon the showings made by Ho-Chunk, that treating the rural portions of this land as eligible Tribal land under the Tribal Window would be consistent with the Tribal Window's purpose.²³ We note that the trust and Tribally-owned fee 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 Ho-Chunk has plans to use the 2.5 GHz spectrum to provide service on rural lands either specifically held in trust for the Tribe's benefit or directly owned by the Tribe. As such, we find that it has adequately demonstrated that it has "the requisite authority over the deployment of facilities and service[s]"²⁴ over the lands at issue, and it has therefore demonstrated that strictly applying the Tribal lands definition would be inconsistent with its purpose.

¹⁸ See File Nos. 0009210316, 0009210636, 0009210647, 0009225560, and 0009225561.

¹⁹ See Waiver Requests at 5.

²⁰ *Wireless Telecommunications Bureau Announces Additional 2.5 GHz Rural Tribal Priority Window License Applications Accepted for Filing*, Public Notice, 36 FCC Rcd 7124, 7128-29, 7130, Attachs. A, B (WTB 2021).

²¹ 47 CFR § 1.925(b)(3).

²² *Reconsideration Order*, 33 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 & 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.").

²⁴ *Reconsideration Order*, 35 FCC Rcd at 15081, para. 22.

9. Ho-Chunk also references allotments in three of its Waiver Requests.²⁵ While our rules include “Indian Allotments” in the definition of eligible Tribal lands,²⁶ allotments are not otherwise specifically defined for purposes of the Tribal Window. To the extent necessary, and in light of the unique factual circumstances of the instant case, we find that grant of a waiver to permit the Tribe to license the rural portions of the allotments specified in its applications will promote the Tribe’s ability to provide broadband service to its reservation, trust, and Tribally-owned fee lands, in furtherance of the Commission’s objective in establishing the Tribal Window.²⁷ Our determination relies on the fact that Ho-Chunk is requesting to license relatively small allotment areas that are rural and nearby or adjacent to the Tribe’s eligible land areas, trust, and Tribally-owned fee lands.

10. We note that the scope of these waivers does not extend to the limited circumstances in which any requested land areas are urban. The *Reconsideration Order* and the *Bureau Procedures PN* specified that the Tribal Window was limited to rural areas and urban areas were not eligible.²⁸ Our review of the applications shows that portions of the shapefiles of two applications are within urbanized areas, as determined by United States Census Bureau.²⁹ While Ho-Chunk requests a waiver of that rule,³⁰ it does not offer a separate justification in support that affords a basis for concluding that application of the rule would not be inconsistent with its purpose, or that any unique or unusual factual circumstances exist in this case.³¹ As such, the two Waiver Requests with respect section 27.1204(b)(3) of the Commission’s rules are denied.³²

11. We note that Ho-Chunk must ensure that any system it deploys complies with our technical rules. In particular, 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.³³ Also, a licensee’s entitlement to interference protection is

²⁵ File Nos. 0009210636, 0009225560, and 0009225561.

²⁶ See 47 CFR § 27.1204(b)(2).

²⁷ See *Reconsideration Order*, 33 FCC Rcd at 15075, para. 4.

²⁸ See *Reconsideration Order*, 34 FCC Rcd at 5469, para. 65; *Bureau Procedures PN*, 35 FCC Rcd at 313, para. 20.

²⁹ See *Bureau Procedures Public Notice*, 35 FCC Rcd at 313, para. 20 (citing <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html>). Our review of File No. 0009210647 shows that the property in Beloit bounded by Interstate 39/90 and East Cooley Road is within the Beloit, Wisconsin urbanized area. File No. 0009210647, Shapefile. With respect to File No. 0009210316, the Madison Branch Office and Cottage Grove properties are within the Madison, Wisconsin urbanized area. File No. 0009210316, Shapefile.

³⁰ Beloit Waiver Request at 7; Madison Waiver Request at 7.

³¹ See 47 CFR § 1.925(b)(3); Beloit Waiver Request; Madison Waiver Request. Accordingly, we will not issue licenses for the property in Beloit bounded by Interstate 39/90 and East Cooley Road, nor for the Madison Branch Office and Cottage Grove properties in or near Madison, Wisconsin. *Id.* Also, the shapefiles of File Nos. 0009210316, 0009210636, 0009225560, and 0009225561 overlap with the Tribe’s previously granted license (callsign WRMP552). The Commission cannot grant two applications for the same channels and the same area, even if the applicant is the same. Broadband Division staff is directed to grant licenses for all other rural land areas in the Waiver Requests to the extent they do not overlap with the Tribe’s existing license. Further, two of the applications seek to license channel blocks where no spectrum is available in any portion of the proposed license area. Our analysis shows that no spectrum is available in channel block 3 in File Nos. 0009210316 and 0009210647. Accordingly, any license resulting from a grant of File Nos. 0009210316 and 0009210647 will be limited to channel blocks 1 and 2.

³² Before the Broadband Division is able to process those applications, Commission staff will create revised shapefiles to exclude the overlap areas, as well as any urban areas referenced in File Nos. 0009210647 and 0009210316 (i.e., the property in Beloit bounded by Interstate 39/90 and East Cooley Road, the Madison Branch Office, and Cottage Grove properties). See *supra*. The final shapefiles will be reflected in the licenses granted by the Broadband Division in lieu of the application records. Bureau staff will be available to respond to any questions about either the final shapefiles or the Ho-Chunk’s license records.

³³ See 47 CFR § 27.55(a)(4).

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.³⁴ Absent agreements with neighboring licensees or a waiver of those rules, Ho-Chunk must comply with those rules.

12. We note that our decision here is limited to the suitability of these specific trust, Tribally-owned fee, and allotment lands, excluding urban areas, to be licensed under the Tribal Window. We make no determination as to the status of these trust, Tribally-owned fee, and allotment lands with respect to other Commission rules or programs, nor for any other purpose. In particular, our decision to partially 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

13. 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 Ho-Chunk Nation on September 2, 2020, ARE GRANTED IN PART, and section 27.1204(b)(2) of the Commission's rules IS WAIVED IN PART to allow licensing of the trust and Tribally-owned fee lands and allotments specified in the applications, to the extent they are not otherwise considered urban lands. Otherwise, the waiver requests ARE DENIED.

14. 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 1.934 of the Commission's rules, 47 CFR § 1.934, that the licensing staff of the Broadband Division SHALL DISMISS as duplicative the application filed by the Ho-Chunk Nation for a new 2.5 GHz license (ULS File No. 0009210488).

15. 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 Ho-Chunk Nation for new 2.5 GHz licenses (ULS File Nos. 0009210316, 0009210636, 0009210647, 0009225560, and 0009225561) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

16. These actions are 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

³⁴ See 47 CFR § 27.1221.