

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

In the Matter of)
)
Transforming the 2.5 GHz Band) WT Docket No. 18-120

**Cheyenne River Sioux Tribe Telephone Authority, Gila River Telecommunications, Inc.,
Hopi Telecommunications, Inc., Mescalero Apache Tribe of the Mescalero Reservation,
Nez Perce Tribe, San Carlos Apache Telecommunications Utility, Inc., Tohono O’odham
Utility Authority, and Warm Springs Telecommunications Company**

**PETITION FOR WAIVER OF
47 C.F.R. §27.14(u) 2.5 GHZ TRIBAL PRIORITY WINDOW LICENSE
PERFORMANCE REQUIREMENTS**

Cheyenne River Sioux Tribe Telephone Authority, Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Tribe of the Mescalero Reservation, Nez Perce Tribe, San Carlos Apache Telecommunications Utility, Inc., Tohono O’odham Utility Authority, and Warm Springs Telecommunications Company (together, the *Petitioners*)¹, pursuant to 47 C.F.R. § 1.3, hereby request a waiver of the performance requirements related to 2.5 GHz licenses granted via the Tribal Priority Window as contained 47 C.F.R. §27.14(u). Specifically, the *Petitioners* request a waiver of the interim and final milestones for licenses granted pursuant to the Tribal Priority Window of two and five years, respectively, and ask the Commission to grant additional time consistent with the 2.5 GHz licenses to be granted outside of the Tribal Priority Window.

FACTUAL BACKGROUND

The Federal Communications Commission (Commission or FCC) transformed the 2.5 GHz spectrum band, known as Educational Broadband Service (EBS), in 2019.² As part of this transformation, the FCC adopted a process where rural Tribal entities could apply for and obtain 2.5 GHz licenses for their Tribal areas through what the Commission termed the Tribal Priority Window.³ The *Petitioners* applied for and were granted 2.5 GHz licenses by the FCC through the Tribal Priority Window.⁴

In the *2.5 GHz Report and Order*, the Commission adopted certain performance requirements for 2.5 GHz licenses awarded through the Tribal Priority Window, and for those

¹ All *Petitioners* are members of the National Tribal Telecommunications Association (NTTA)

² *In the Matter of Transforming the 2.5 GHz Band*, Report and Order, WT Docket No. 18-120 (FCC 19-62, rel. Jul. 11, 2019) (*2.5 GHz Report and Order*)

³ *2.5 GHz Report and Order* at 47-65

⁴ See e.g., *FCC Grants First Licenses in 2.5 GHz Rural Tribal Priority Window*, News Release (Oct. 23, 2020)

licenses assigned via the future auction for non-Tribal areas.⁵ The performance, or construction, requirements adopted are specific to the type of service being provided by the license holder:

- For licenses providing mobile or point-to-multipoint service: 50% of the population of the geographic service area must be served at the first milestone, and 80% must be served as of the final milestone.⁶
- For licenses providing fixed point-to-point service, there must be 1 link per 50,000 persons in the geographic service area at the first milestone, and 1 link per 25,000 persons as of the final milestone.⁷
- For licenses providing broadcast service: 50% of the population of the geographic service area must be served at the first milestone, and 80% must be served as of the final milestone.⁸

The milestones for the above performance obligations are different between those licenses issued under the Tribal Priority Window and those granted via auction. For the non-Tribal Priority Window licenses, the interim milestone is four years, and the final milestone is eight years.⁹ For Tribal Priority Window 2.5 GHz licenses, the interim milestone is two years and the final milestone is 5 years.¹⁰

The *Petitioners* understood the performance requirements when applying for the 2.5 GHz licenses through the Tribal Priority Window during 2020. However, with the ongoing nature of the COVID-19 pandemic, and the associated problems discussed in detail below, the *Petitioners* will require additional time in which to meet the interim, and likely the final, milestone.

⁵ 2.5 GHz Report and Order at 101

⁶ 47 C.F.R. § 27.14(u)(2)

⁷ 47 C.F.R. § 27.14(u)(3)

⁸ 2.5 GHz Report and Order at 101

⁹ *Id.*, at 106

¹⁰ *Id.*, at 108

THE REQUESTED WAIVER MEETS THE COMMISSION’S WAIVER STANDARD

The Commission may waive its rules for good cause shown.¹¹ Waiver of the Commission’s rules is appropriate if “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and . . . grant of the requested waiver would be in the public interest,” or “[i]n 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.”¹² In exercising its discretion, the Commission may consider hardship, equity, or more effective implementation of policy on an overall basis.¹³ Special circumstances clearly exist in this case, and the public interest would be far better served by a waiver of the conditions set forth in the buildout rules for Tribal entities in the 2.5 GHz band.

TRIBAL LICENSEES HAVE FACED OF LITANY OF UNIQUE AND UNUSUAL CIRCUMSTANCES

The *Petitioners* have experienced numerous difficulties and delays in meeting the construction requirements adopted by the Commission. The most significant of these difficulties is the pandemic raging throughout the world and hitting Tribal communities especially hard.¹⁴ Covid-19 has forced Tribes to focus their efforts on public health related issues, and working within their governments to meet the needs of their people. No one expected that Tribal governments would still be dealing with the impact of COVID-19 on its members health and its

¹¹ 47 C.F.R. § 1.3.

¹² *Id.* § 1.925(b)(3)(i)-(ii). The Commission has concluded that these two rules require “substantially the same showing.” *Barry P. Lunderville, College Creek Broadcasting, Inc., and Cumulus Licensing LLC, Petition for Reconsideration; Connoisseur Media, LLC, Application for Review; Nassau Broadcasting Holdings, Inc., Petition for Reconsideration*, Memorandum Opinion and Order, 28 FCC Rcd 665, 671 n.51 (2013) (internal quotation marks omitted).

¹³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff’d*, *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). *See also Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁴ <https://theconversation.com/tribal-leaders-face-great-need-and-dont-have-enough-resources-to-respond-to-the-coronavirus-pandemic-134372>

continued spread 19 months into the pandemic. The outlay of resources has caused an inevitable delay in building out broadband facilities.

Remarkably, the pandemic may not even be the greatest difficulty faced by Tribes in constructing their 2.5 GHz systems: that honor falls to communications supply chain issues, where the *Petitioners* are finding it difficult, if not impossible, to procure the necessary equipment, or obtain the necessary equipment at reasonable prices in order to proceed with construction. Supply chain issues are real and have impacted the technology industry both in pricing and timing, Arista CEO Jayshree Ullal indicated the following on May 4, 2021:

“The supply chain has never been so constrained in Arista history. To put this in perspective, we now have to plan for many components with 52-week lead times. COVID has resulted in substrate and wafer shortages and reduced assembly capacity. Our contract manufacturers have experienced significant volatility due to country specific COVID orders.¹⁵

Those comments were made in May, prior to the shipping and trucking crisis that currently grips the country, and the supplies to build out a broadband system are not exempt from these woes. Today, ships wait off the coast of California to be unloaded, there is a shortage of truck drivers and dock workers, and rail yards are seeing unprecedented backups. The price to ship a container from Asia to the West Coast of the United States has nearly doubled since July according to news reports.¹⁶ There is no end to the supply chain issues in sight, and small entities are being pushed further down the supply chain to satisfy those large companies that have more cargo at stake.

In addition, as many of the *Petitioners* are located in the western and southwestern part of the United States, natural disasters such as wildfires have affected how and when the license holders are able to commence construction of the 2.5 GHz broadband networks. Moreover, the

¹⁵ <https://www.zdnet.com/article/global-chip-shortages-supply-chain-woes-leading-to-tech-infrastructure-inflation/>

¹⁶ <https://www.washingtonpost.com/business/interactive/2021/supply-chain-issues/>

Petitioners are encountering issues with contractor availability and ongoing COVID-19 pandemic-related mitigation measures, making construction of any type challenging, at best, and an insurmountable problem at worst.

Clearly, each of these obstacles are unique and extraordinary, with the world never having seen anything like it before. In addition, each of these obstacles are unquestionably beyond the licensee's control. It simply appears that outside forces have made meeting a two-year buildout requirement nearly impossible.

**FAILURE TO GRANT THE WAIVER WOULD FRUSTRATE THE PURPOSE OF THE
RULE**

The *Petitioners* received 2.5 GHz licenses through the Commission's Tribal Priority Window in 2020, and are all either Tribal governments or entities owned and operated by Tribal governments. As such, the *Petitioners* will utilize the 2.5 GHz spectrum associated with these licenses to expand broadband services to the most remote and hard to reach areas on their respective reservations – locations often too expensive to reach by wireline-based technologies. Thus, the *Petitioners* are not engaging in speculation or application mills¹⁷ and are instead using the licenses to help reduce the digital divide that exists between rural Tribal areas and the rest of the United States.

In the *2.5 GHz Report and Order*, the Commission stated “in extraordinary circumstances, the Commission may consider waiver requests to accommodate unanticipated difficulties requiring short-term accommodations.”¹⁸ The *Petitioners* believe the circumstances discussed above represent “extraordinary circumstances” that warrant short-term accommodations – namely the

¹⁷ *2.5 GHz Report and Order* at 108

¹⁸ *Id.*, at 107

extension of the interim and final construction milestones for holders of 2.5 GHz licenses awarded via the Tribal Priority Window. The extension requested in this petition will not affect the ultimate use of the spectrum and the outcomes expected by the Commission in adopting the Tribal Priority Window, and will instead allow the affected license holders to better plan, execute and ultimately operate the networks being made possible by the 2.5 GHz spectrum.

First, the Commission adopted the Tribal Priority Window to provide “Tribal Nations with an opportunity to obtain unassigned EBS [Educational Broadband Service] spectrum 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.”¹⁹ The Commission’s efforts appear to be a success, as 270 licenses have been granted as of September 22, 2021 to Tribes or Tribally-controlled entities.²⁰ In order to achieve the goals the Commission established for these 2.5 GHz licenses, these Tribes and Tribally-controlled entities must be provided the necessary time, and in some instances resources, to properly utilize the valuable spectrum and deploy the wireless networks that will assist in narrowing the digital divide. A grant of the waiver will help ensure that Tribes have the time and resources required to help to provide access to those unserved members of our country.

Second, the penalty for missing a milestone deadline is (1) an acceleration of the final milestone by one year in the case of missing the interim deadline, and (2) the revocation of the license in the case of a missed final milestone.²¹ Enforcing these penalties on Tribes and Tribal entities when missing the milestones is caused by the extraordinary circumstances described herein would negate the purpose of the Tribal Priority Window licenses, and would penalize the efforts

¹⁹ *Id.*, at 47

²⁰ *Wireless Telecommunications Bureau Announces Additional 2.5 GHz Rural Tribal Priority Window License Applications Accepted for Filing*, Public Notice, DA 21-1185, rel. Sep. 22, 2021 at 1

²¹ 47 C.F.R. § 27.14(u)(5)

of the Tribes and Tribal entities due to circumstances out of their control, thereby harming the very Native Americans the Commission is attempting to help.

Third, the Commission's reasoning for adopting a compressed construction milestone timeline in the first place does not apply in the circumstances described in this Petition. NTTA addressed the threat of speculation and application mills above, but to reiterate the *Petitioners* represent Tribes and Tribal entities that are utilizing or are planning on utilizing the 2.5 GHz spectrum directly in order to provide much-needed broadband services to hard-to-reach unserved and underserved areas. The Commission also states that the "equipment ecosystem" has matured considerably, thus easing some past difficulties of deployment.²² While the *Petitioners* agree that the equipment necessary to deploy 2.5 GHz networks has matured, the fact remains that supply chain problems are making such equipment difficult, if not impossible, to obtain. Finally, the Commission claims that because recipients of licenses granted through the Tribal Priority Window are able to specify their own service areas, the compressed timeline will encourage applicants to accurately estimate an achievable level of deployment.²³ The *Petitioners* are well aware of necessary and achievable levels of deployment, but in order to achieve the necessary levels of deployment, a fully functioning communications supply chain is a must.

The problems listed above, including those involving communications supply chains, natural disasters, the continuing COVID-19 pandemic, and contractor scarcity, have made compliance with the construction timelines adopted by the Commission for 2.5 GHz Tribal Priority Window license holders, such as the *Petitioners*, virtually impossible. These problems were completely outside of the *Petitioners'* control, and thus should warrant the relief sought herein.

²² *2.5 GHz Report and Order* at 108

²³ *Id.* at 109

RELIEF SOUGHT

The *Petitioners* request the Commission extend the construction requirements contained in 47 C.F.R. § 27.14(u) for 2.5 GHz Tribal Priority Window license holders to be consistent with the requirements adopted for non-Tribal Priority Window license holders: the interim milestone equal to four years from the date the license is granted, and the final milestone equal to eight years from the date the license is granted.

CONCLUSION

The *Petitioners* respectfully request an extension of the construction requirement milestones contained in 47 C.F.R. §27.14(u). The *Petitioners* clearly meet the FCC’s well established waiver standard as there are certainly unique facts and circumstances, and the purpose of the buildout rule, to provide broadband service to those in rural Tribal areas would be frustrated without a grant of this waiver. At this point it is critical to permit Tribes additional time to build systems that will provide a necessary service that is currently lacking in many Tribal areas. Due to circumstances beyond the *Petitioners’* control – problems with the communications supply chain, natural disasters, contractor scarcity, and the ongoing COVID-19 pandemic – meeting the compressed timeline is no longer feasible. The problems discussed herein meet the definition of “extraordinary circumstances” the Commission states in the *2.5 GHz Report and Order* that may require a waiver of the timelines. In order to recognize these extraordinary circumstances and give the *Petitioners* the time and space necessary to deploy 2.5 GHz-powered networks that will help narrow the digital divide between Tribal areas and the rest of the United States, an extension of the construction requirement milestones to be consistent with those adopted for non-Tribal Priority

Window license holders – interim milestone of four years and final milestone of eight years is requested.

Respectfully Submitted,

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President

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and

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Representing *The Petitioners* - Cheyenne River Sioux Tribe Telephone Authority, Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Tribe of the Mescalero Reservation, Nez Perce Tribe, San Carlos Apache Telecommunications, Inc., Tohono O’odham Utility Authority, and Warm Springs Telecommunications Company