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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**FEDERAL COMMUNICATIONS COMMISSION****In the Matter of:****Request for Review by Kawerak, Inc. and**

Native Village of Elim (HCP# 10687)
Native Village of Koyuk (HCP# 10690)
Native Village of Saint Michael (HCP# 10692)
Native Village of Shaktoolik (HCP# 10694)
Native Village of Shishmaref (HCP# 10695)
Stebbins Community Association (HCP# 10697)
Native Village of Teller (HCP# 10698)
Native Village of Unalakleet (HCP# 10699)
Native Village of Wales (HCP# 10701)
Native Village of Diomedes (HCP# 10702)
Native Village of White Mountain (HCP# 10703)
Native Village of Brevig Mission (HCP# 10745)

Of Decision of the Universal Service Administrator.**FCC Docket Nos. 97-21 and 96-45.****REQUEST FOR REVIEW**

Kawerak, Inc. and the twelve tribal governments referenced above request review of a January 24, 2001 decision by the Universal Service Administrative Company, Rural Health Care Division (RHCD), denying their applications for RHCD universal service support. The parties' interest in the matter is that the RHCD denial removes universal service support for the operation of a Wide Area Network serving Kawerak and the named tribal governments.

ISSUE PRESENTED

Whether RHCD-USAC erred in concluding the twelve tribal government offices named in the Kawerak consortium applications are not eligible for universal services support as "local health departments and agencies" pursuant to 47 USC §254(h)(5)(B)(iii).

I. Factual Background

A. KAWERAK IS A TRIBAL CONSORTIUM

Kawerak's principle argument is that RHCD misunderstood the nature of Kawerak, which is a consortium of tribal governments, and of the particular tribal offices for which Kawerak applied for universal service support. The applications cover a Wide Area Network (WAN) linking Kawerak and twelve local tribal government offices. The particular tribal sites are the health and human services offices of the individual tribes. See, Affidavit of Loretta Bullard, attached hereto as Exhibit 1. (Exhibit 1 supports the factual assertions in this and following sections.)

Kawerak is an Alaska Native regional non-profit organization, which is an entity unique to the special circumstances and history of rural Alaska. Alaska is divided into 12 Native regions, each of which has one or more regional non-profit entities that provide federally-funded services for local tribal communities. Kawerak, like its sister regional non-profits, has a dual identity: on the one hand it is a non-profit corporation under state law; on the other hand it is also a consortium of tribal governments, recognized as such by the federal government. See Exhibit 2, Kawerak's Compact of Self-Governance with the United States.

Alaska Native tribes have a long history of banding together into regional consortia to pool resources and achieve efficiencies of scale in providing services to extremely remote locations. The Kawerak consortium is made up of twenty¹ federally recognized tribal governments. Its headquarters are in Nome, on the Seward Peninsula in northwest Alaska. Its constituent tribes are Native villages scattered over a surrounding area of 22,000 square miles, with 570 miles of coastline. They include some of the most remote communities in the United States. Little Diomedé, for example, is an island community in the Bering Straits only three miles from the Russian island of Big Diomedé. There are no roads linking the region to the outside world, and only one affected village, Teller, is linked to Nome by road.

Kawerak provides a wide variety of services to its tribes, including educational services (scholarships and various adult education programs), child protection, counseling, law enforcement, land management, and core tribal government support.

Although Kawerak itself, as a non-profit corporation, is eligible for and receives grant funding for various purposes from state and federal agencies, it receives most of its funding and provides most services as a consortium of tribes. Kawerak's biggest funding source, representing about 60% of its total operations, is a regional tribal Compact of Self-Governance, through which Kawerak operates virtually all Bureau of Indian Affairs programs for nineteen tribes. Kawerak is eligible to compact as a tribal consortium pursuant to Title IV of the Indian Self-Determination and Education Assistance Act,

¹ Although Kawerak has 20 member tribes, 19 participate in its Self-Governance Compact and only 12 tribal offices are included in the applications denied by RHCD-USAC.

specifically 25 USC §458bb(b)(2). Kawerak has been a self-governance consortium compactor since FY 1992.

Thus, Kawerak is both a non-profit corporation and a tribal consortium operating with delegated authority from its member tribes. Although Kawerak could reconstitute itself as a purely tribal organization, maintaining a corporate structure assists in transacting business with outside entities. Financial institutions, insurance companies, and even many state and federal agencies are simply not familiar with tribal consortia.

B. THE RHCD-USAC APPLICATIONS ARE FOR LOCAL TRIBAL OFFICES

Kawerak provides services to its constituent tribes through a variety of mechanisms. Some services are provided directly from Kawerak's main offices in Nome, but Kawerak also places staff in the villages under the supervision of the tribe and transfers some compact funds and administrative responsibility to the tribes via sub-recipient agreements. In addition, each tribe provides services from its own resources or through government grants it receives independently from Kawerak.

Each tribe is a sovereign entity. *See generally*, the Department of Interior's 1993 list of federally recognized tribal entities, 58 Fed. Reg. 54,364 (Oct. 21, 1993), listing all of Kawerak's tribes. Although the tribes are small, ranging from about 150 to 1100 in population, they provide a full range of government services, either from their own resources or grants or through Kawerak. Because the tribes are small, tribal services are not as compartmentalized into separate departments or offices as is the case in larger governments.

The WAN is one service Kawerak provides the tribes. The tribal offices linked by the WAN and covered by the RHCD applications are the tribal equivalent of state or county "Health and Human Services" departments. The applications do not cover Kawerak's main offices or all of Kawerak's village work sites. The applications are for tribal offices that provide, among other health-related services, family and mental health counseling, drug and alcohol screening, and tribal administrative oversight of local health clinics, in addition to social services. The tribes provide, from these offices, most services that any local health agency would provide except for direct medical care. (Direct medical services are provided by Kawerak's sister consortium, the Norton Sound Health Corporation, which operates the Indian Health Service hospital in Nome and satellite clinics in most villages.)

The particular staffing pattern in the offices varies by tribe depending on their particular agreements with Kawerak, but whether tribal employees, Kawerak employees, or both staff the offices, they are still tribal offices. The tribal governments own the offices, and all of the staff is under the day-to-day supervision of the tribe even if they are on the Kawerak payroll.

The relationship between Kawerak and tribe in regard to these offices is indicated by the FFC Form 465s, which identify the Health Care Provider by village name ("Eliot Office," "Koyuk Office," etc.). Each village has a separate HCP number, and in each instance the president of the tribe is provided as the local contact for the HCP. Kawerak, since it is operating the WAN and pays the bills, signed the applications and is listed as the contact for mailing purposes.

C. PROCEDURAL BACKGROUND

These applications are for "Year 3," covering the period 7/1/2000 through 6/30/2001.

The genesis of these universal service applications was in 1996, when Kawerak and the Norton Sound Health Corporation (NSHC), and two other regional agencies entered a Memorandum of Agreement to jointly explore means of providing internet access to Bering Straits villages. Two of the organizations dropped out, but Kawerak and NSHC eventually decided to jointly develop a Wide Area Network linking their main offices with the Kawerak/tribal offices and NSHC's village clinics. The necessary contracts were entered and installation of the hardware took place in 1999 and 2000, and the system came on line in some villages beginning in March of 2000. The WAN is satellite based, since there are no land lines between the villages or between Nome and larger communities such as Anchorage.

NSHC submitted "Year 1" RHCD applications covering its sites and Kawerak sites. These applications had no particular effect since the WAN system was not operational and no universal service subsidy was used that year.

Prior to the Year 2 (1999) applications, NSHC decided to end the joint relationship with Kawerak for purposes of RHCD-USAC funding. NSHC had previously taken the lead on developing the WAN and seeking funding, and Kawerak was not fully familiar with the qualification requirements for RHCD universal services. Since Kawerak/tribal staff provides counseling at the village offices, Kawerak submitted the FCC 465 Forms under the "community mental health center" eligibility category. The form did not allow multiple categories to be listed.

The Year 2 applications were approved, and Kawerak received some subsidized services that year as village sites began coming on line in March of 2000.

Kawerak submitted timely Year 3 applications, covering the period July 1, 2000 through June 30, 2001. Although the 465 form changed, Kawerak filled them out the same as in the prior year since there had been no problem in Year 2. One difference is that the Year 3 form did not ask for the same information from consortia as did the Year 2 form. See Year 2 and Year 3 FCC Form 465 examples, from Elim, attached hereto as Exhibits 4 and 5.

On December 5, 2000, RHCD issued a decision finding that Kawerak is not a rural health care provider and denying all twelve village applications. The decision turned primarily on the definition of "community mental health center." Kawerak appealed this decision to RHCD on December 15, raising the argument that – however the forms were filled in – the particular sites served qualify as tribal health departments. RHCD denied the appeal on January 24, 2001. This Request for Review follows.

II. ARGUMENT

Both the December 5 denial letter from RHCD-USAC and its January 24th denial of Kawerak's appeal fundamentally misconstrue the nature of Kawerak and of the applications themselves. These applications were by an umbrella tribal consortium (Kawerak) for the benefit of and on behalf of twelve tribal governments.

The January 24th decision repeated RHCD-USAC's prior rationale, based on a U.S. Department of Health and Human Services definition of "community mental health center." The decision focused on that definition while summarily rejecting Kawerak's

argument, apparently without understanding it, that the 12 applications were for *local tribal government* health and social services offices that meet the "local health department or agency" eligibility category of 47 USC §254(h)(5)(B)(iii) and the companion regulations, 47 CFR §54.601.

The decision states: "Kawerak, Inc. does not appear [sic] be or to represent itself to the public as a 'local health department or agency' within the meaning of the regulations..." and further, that "Kawerak only claims that is a functional equivalent of a 'local health department or agency,' rather than actually being a 'local health department or agency' as that term is understood by the FCC..."

These statements miss the point by a wide margin. Kawerak itself is consortium of tribal governments. The fact the consortium is incorporated does not change the organic reality of the organization. Kawerak administers more than \$8 million in Bureau of Indian Affairs funding annually because it is eligible to do so as a consortium of tribes; it is the sole tribal signatory on the regional Compact of Self-Governance with the United States.

Kawerak, as such, does not represent itself to be a "local health department or agency" for the same reason the State of Alaska would not – providing health-related services are a relatively small part of what Kawerak does.

More importantly, Kawerak is not making a "functional equivalency" argument. Rather, the twelve tribal offices for which Kawerak submitted RHCD-USAC applications are the *tribal government* equivalent of state, county or municipal "health department" and thus *are* "local" health departments or agencies within the meaning of the statute. They are offices of the tribes, not merely "Kawerak" offices. These sites are the Native

Village of Elim's health and social services office, the Native Village of Koyuk's health and social services office, etc. They do the same things that any state or municipal health department would do, albeit on a smaller scale.

Kawerak submitted these applications and indeed provides the WAN services for and on behalf of the local tribal governments, as their agents. Most of Kawerak's program services are provided this way; it is the way tribal consortia do business.

Kawerak acknowledges it could have done a better job identifying and establishing the tribal offices' eligibility in the applications and in subsequent communications with RHCD. However, the RHCD program has been a shifting target. FCC Form 465 only allowed one eligibility category to be marked. After two years of finding these offices eligible as community mental health centers, this year RHCD-USAC applied a new definition taken from another agency to conclude they are not eligible. The DHHS definition requires state licensure as CMHC's, with no allowance for tribal licensure even though tribes have as much licensing authority as do states.

This decision had the effect of denying a subsidy to Kawerak and its tribes that had every reason to expect to continue, in a manner that leaves Kawerak retroactively liable for unsubsidized telecommunication services back to July 1, 2000. There are serious due process concerns with this system.

III CONCLUSION

Kawerak respectfully urges the FCC to reverse the RHCD-USAC determination that the offices covered by these applications are not eligible for universal services support. The January 24 RHCD-USAC decision, to the extent it considered the

applicability of the "local health agency" definition, did not consider that the applications were by a consortium of tribal governments, for local tribal government offices.

Kawerak relies on a prior FCC decision defining public health services: "For purposes of Section 254, we define "public health services" to mean health-related services, including non-clinical, informational, and educational public health services, that local public health departments or agencies are charged with performing under federal and state laws." CC Docket 96-45, FCC 97-157, part XI.B. paragraph 10 (released May 8, 1997).

In explaining the definition, that decision says: "We also agree with those commentators suggesting that telecommunication services used by public health agencies to provide health-related services – including the education of the public and health care community about matters of importance to public health, the collection and dissemination of public health data to appropriate government entities; the coordination of public response to disasters, and the prevention and control of diseases – should be eligible for universal service support." *Id.*

These above functions are provided by the tribes from the subject offices, using a combination of local tribal and Kawerak resources. Kawerak executed the applications because the WAN services for which the subsidy is needed are funded by Kawerak from

its tribal self-governance compact, which in turn is authorized by the tribes and operates under authority delegated to Kawerak by the tribes. The RHCD-USAC decision simply did not consider the status of the tribes as local governments or Kawerak's status as a tribal consortium.

Dated: February 23, 2001

Respectfully Submitted,



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Exhibits

1. Affidavit of Loretta Bullard
2. Compact of Self-Governance between Kawerak, Inc. and the United States
3. Kawerak, Inc. Articles of Incorporation, as amended
4. Elim "Year 2" FCC Form 465
5. Elim "Year 3" FCC Form 465
6. December 5, 2000 Denial Letter from RHCD-USAC
7. December 28, 2000 Appeal by Kawerak of the December 5 Decision
8. January 24, 2001 RHCD-USAC Decision Denying Kawerak's Appeal

AFFIDAVIT OF LORETTA BULLARD

STATE OF ALASKA }
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 }
SECOND JUDICIAL DISTRICT }

I, Loretta Bullard, being first duly sworn, state:

1. I am the President of Kawerak, Inc., and have been the Kawerak president continuously since July of 1991.
2. At Kawerak, the President is the organization's chief executive officer and its highest-ranking employee. As President, I report directly to the Kawerak Board of Directors and am ultimately responsible for all of Kawerak's operations. I am personally familiar with Kawerak's internal structure, its finances, and its program operations.
3. Kawerak, Inc. is a non-profit corporation incorporated under state law in 1973. However, it is a particular kind of corporation commonly referred to as an "Alaska Native regional non-profit." Alaska is divided into 12 Native regions, established in their present boundaries by the Alaska Native Claims Settlement Act (ANCSA) of 1971. ANCSA settled aboriginal land claims in Alaska, and among other things set up 12 regional "for profit" business corporations to administer Native lands and ANCSA settlement funds. At the time the for-profit ANCSA corporations were being established, non-profit corporations were also established along the same regional boundaries to provide health and social service functions that the ANCSA corporations could not provide. Most of these non-profits, including Kawerak, were successors in interest to unincorporated regional Native associations formed in the 1960's, or earlier, to lobby for Native land claims.
4. Kawerak's service area is the Bering Straits Region, encompassing Nome and all of the coastal communities around Norton Sound from Stebbins and St. Michael in the south to Shishmaref in the north, plus communities on St. Lawrence Island and Little Diomedede Island. All of these communities are Alaska Native villages as defined in ANCSA, and are federally recognized tribes.
5. Kawerak, Inc., like most of our sister regional non-profits, is also a consortium of tribal governments. The members of Kawerak are the tribal governments of the 20



Native villages in our region. Each tribe has one seat on the Kawerak Board of Directors, which is usually filled by the tribal president.

6. Kawerak's largest single funding source is its Compact of Self-Governance with the United States, through which we administer virtually all Bureau of Indian Affairs services available to the region. Nineteen of Kawerak's twenty member tribes participate in the Compact. Our current FY 2001 Annual Funding Agreement for BIA and related services is in excess of \$8.5 million. Kawerak is able to compact BIA programs because it is a consortium of tribes, not because of its non-profit corporation status. The Kawerak Compact exists only through the authorization of the tribal governments: the tribes authorize Kawerak to provide the BIA service, but in any given year a tribe can decide to allow the BIA to provide the service or assume the program itself under a separate contract with the BIA.

7. Kawerak's compact services are provided to the tribes in a variety of ways. Some services are provided by Kawerak from Nome; we also place staff in the villages under tribal supervision and we pass through more than \$1 million of compact funds for tribal administration.

8. A key to efficient administration of our compact is good telecommunications links to the tribal offices. To that end, Kawerak established a Wide Area Network (WAN) which came online in the spring of 2000.

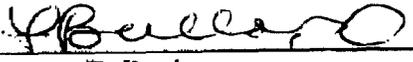
9. The WAN links Kawerak's main offices to tribal offices in 12 of our villages. The particular tribal offices served by the WAN house the tribe's social and health services (other than direct medical care) and some tribal administration. The offices in all instances are owned by the tribe, and are staffed by people who may be on either Kawerak or the tribe's payroll depending on the positions and our agreements with the particular tribe. All staff in these offices, whether or not on Kawerak's payroll, are under the day-to-day supervision of the tribal councils.

10. In my opinion, the tribal/Kawerak offices served by the WAN are the tribal equivalent of health and human service department of any state government. Tribal and Kawerak staff in these offices provide a variety of health-related functions including counseling, alcohol and drug screening, community health education, environmental surveys, disaster coordination, as well as social services.

11. The Kawerak WAN has been funded from Kawerak compact funds and a US OIA grant specifically for the WAN equipment. All staff in the offices are paid either from Kawerak compact funds or local tribal funds. We do not have any "non-compact" staff in these offices.

12. The difference in cost to the Kawerak compact between unsubsidized rates and the universal service fund rate is \$1,900 per month per site versus \$121.60 per month per site.

FURTHER AFFIANT SAYETH NOT.


Loretta Bullard

Subscribed and sworn to or affirmed before me at Nome, Alaska, on February 21, 2001.


Notary Public

Carolyn Kulukhon, Notary Public
State of Alaska
My Commission Expires 5/23/2004

My commission expires: 5/23/04