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October 19, 2011

VIA ELECTRONIC FILING

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Permitted Written *Ex Parte* Presentation
WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45 and WC Docket No. 03-109

Dear Chairman Genachowski:

The State of Hawaii (the "State"),[1] by its attorneys, hereby expresses its growing concern regarding the factual record that may be employed by the Commission to justify its findings in any order that is adopted in the above captioned proceeding. Specifically, the State is concerned about a letter that was recently placed in the docket for this proceeding by the Wireline Competition Bureau indicating that, in crafting its rules for universal service and intercarrier compensation reform, the Commission may rely in part on data gleaned from the National Broadband Map.[2]

The State's Department of Commerce and Consumer Affairs was the entity responsible for securing the data that was included in the National Broadband Map for the State of Hawaii. Thus, although the State can attest to the substantial industriousness and diligence that went into the development and processing of that data, certain federal requirements of the mapping program make the resulting National Broadband Map inappropriate for use at this time as a reliable indicator of actual broadband availability in Hawaii.

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[1] These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

[2] *See* Letter from Jennifer Prime, Legal Counsel, Wireless Competition Bureau, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 10-90, et al., Appendix I at 4 (Oct. 7, 2011).

The primary impediment to reliance on the National Broadband Map to determine broadband availability in Hawaii is a federal programmatic requirement that broadband availability be reported in most cases on a census block level.[3] As a result, in many cases, including those involving Hawaii, the National Broadband Map indicates that broadband service may be available throughout an entire census block even though broadband may actually be available only in a small portion of that census block.

Although the reporting of broadband availability on a census block basis may have a relatively limited impact on the reliability of the reported data for most states, the impact is often substantial in rural Hawaii. This is because much of the broadband service that is currently available in rural Hawaii is often limited to areas immediately adjacent to the coastal highways that circle the outer perimeter of all or portions of the major islands. Concurrently, many census blocks in rural Hawaii are drawn to include a portion of coastline and then reach inland to form the very rough equivalent of a hub-and-spoke segmentation of each island. As a result, many, if not most, census blocks in rural Hawaii include some areas that have access to broadband, while most of those same census blocks include much larger geographic areas that may not have any access to broadband.

The second impediment to reliance on the National Broadband Map to determine broadband availability in Hawaii is an additional federal programmatic requirement that defines broadband for purposes of the map as reaching or exceeding 768 Kbps downstream and 200 Kbps upstream.[4] This relatively modest definition of broadband is far below the goals that were tentatively established by the Commission in its Notice of Proposed Rulemaking ("*NPRM*") in this proceeding,[5] and is also significantly below the broadband speed goal that the State established for itself earlier this fall in its Hawaii Broadband Initiative.[6]

The State is continuing to work with its data processing specialists and with broadband service providers to reduce the overestimates inherent under the current federal mapping requirements in order to refine the reliability of the data reflected in the National Broadband Map. This refinement effort will invariably increase the number of consumers and enlarge the geographic areas in Hawaii that are reported on the National Broadband Map as not having access to wireline broadband services. Such an increase in

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[3] *See Notice of Funds Availability; Clarification*, Department of Commerce, National Telecommunications and Information Administration, State Broadband Data and Development Grant Program (pub. Aug. 7, 2009) (instructing that broadband mapping data should be supplied to NTIA on a census block basis for all census blocks that do not exceed two square miles in area, which includes the vast majority of census blocks in Hawaii).

[4] *See Notice of Funds Availability*, Department of Commerce, National Telecommunications and Information Administration, State Broadband Data and Development Grant Program, at Section III (pub. July 8, 2009).

[5] *See In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking, FCC 11-13, Appendix A, at 238 (rel. Feb 9, 2011) ("*NPRM*").

[6] *See* News Release, *State Launches Broadband Initiative As Critical Component Of Economic Development Strategy*, Aug. 23, 2011, available at: http://hawaii.gov/gov/newsroom/press-releases/state-launches-broadband-initiatve-as-critical-component-of-economic-development-strategy.

broadband unavailability in Hawaii would be entirely consistent with the documentation that has been presented in the record of the Commission's universal service proceeding.

As the State has explained in its comments in this proceeding, there is ample evidence in the record regarding the unique obstacles that face broadband communications service providers in Hawaii and the significant impact that these challenges have had on broadband deployment and availability for consumers in the State.[7] For example, both Hawaiian Telcom and Sandwich Isles Communications, Inc. have submitted detailed documentation regarding their difficulties resulting from Hawaii's geographic isolation from the mainland and the low density of the State's population, 50% of which reside in rural communities spread across six major islands that are separated by up to 100 miles of deep ocean.[8] The record is also replete with documentation regarding the unique challenges of constructing and maintaining broadband communications networks in Hawaii's mountainous rocky terrain, dense rain forest, and along rugged coasts, where infrastructure is rapidly damaged by salt corrosion, storms, landslides and volcanic activity.[9]

The Commission appears to have recognized the unique burdens that exist in Hawaii and the significant impact those challenges have had on broadband availability in the State. For example, Chairman Genachowski acknowledged in his written response to questions raised last year by the Senate Committee on Commerce, Science and Transportation that Native Hawaiian communities "have fallen behind with respect to broadband deployment and adoption" and the Chairman pledged to "take into consideration the unique needs of Native Hawaiians and work to address those needs."[10] The Commission's Wireline Competition Bureau has also recognized the "unique geographic conditions" in Hawaii and the resulting "unique telecommunications infrastructure needs" in the State.[11] For example, the Bureau noted that service providers in Hawaii "rely on submarine cable transmission to connect the various islands that they serve" and the use of expensive route diversity for those cables is "particularly important in an area like Hawaii, given, for example, the depth of the ocean and associated difficulty of repairs."[12]

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[7] *See, e.g.*, Comments of the State of Hawaii, WT Docket Nos. 10-90, et al. (Aug. 24, 2011) ("*Hawaii Comments*").

[8] *See, e.g.*, *Comments of Hawaiian Telcom, Inc.*, WT Docket Nos. 10-90, et al. (April 18, 2011) (Appendix: Background on the Unique Challenges of Bringing Broadband to Hawaii) ("*Hawaiian Telcom Comments*"); *Comments of Sandwich Isles Communications, Inc. and Mescalero Apache Telecom, Inc.*, WT Docket Nos. 10-90, et al., at 5-11 (July 12, 2011) ("*Sandwich Isles Comments*"). Although previous filings by DCCA and carriers in the State have indicated that about 30% of the State's population lives in rural areas, data produced by the 2010 U.S. Census has increased that figure to nearly 50% of the State's population.

[9] *See generally Hawaiian Telcom Comments* and *Sandwich Isles Comments*.

[10] See Letter from The Honorable Julius Genachowski, Chairman, Federal Communications Commission, to The Honorable John D. Rockefeller, Chairman, Committee on Commerce, Science and Transportation, United States Senate (rel. June 15, 2010).

[11] In the Matter of Sandwich Isles Communications, Inc., Petition for Declaratory Ruling, DA 10-1880, *Declaratory Ruling*, 25 FCC Rcd 13647, ¶¶ 17-18 (Chief WCB, rel. Sept. 29, 2010)

[12] *Id.*, ¶ 19.

Given these facts, the State urges the Commission to expressly acknowledge in any order that it adopts in this proceeding that unique challenges do exist in Hawaii with respect to the construction of broadband infrastructure and, as a result, significant needs exist among consumers in Hawaii for greater access to broadband services. Further, as explained by the State in its comments in this proceeding, the significant needs that exist in Hawaii for broadband services cannot be addressed in a reliable manner using alternative broadband technologies such as satellite or wireless.[13] Therefore, although the rules adopted by the Commission in this proceeding may be intended to apply generally across the entire United States, a more customized and unique approach will likely be necessary to address the particular concerns in Hawaii.

Further, the Commission should not unnecessarily burden broadband service providers in Hawaii by indicating that any special relief that may be made available to them can be accessed only through individual petitions for waiver of the Commission's rules. Such a waiver process would likely delay access to critically-needed universal service funding for broadband service providers and greatly increase the regulatory uncertainty for those carriers, further impairing their access to capital markets. If the Commission does require broadband service providers in Hawaii to employ a waiver process to secure customized funding access, the Commission should expressly state in any order that it adopts in this proceeding that the unique challenges and conditions that exist in Hawaii provide a strong presumption that a waiver of the Commission's rules is warranted and should be granted.

Finally, in adopting special provisions for broadband infrastructure construction on Tribal Lands, the Commission should ensure that the definition of Tribal Lands that is employed in this proceeding includes the Hawaiian Home Lands ("HHL"). Although the Commission's *NPRM* tentatively concluded that the HHLs should be included within the definition of Tribal Lands,[14] the Commission, without explanation, omitted the HHLs from its definition of Tribal Lands in its National Broadband Plan.[15] No party to this proceeding has presented any reason why the HHLs should be excluded from the definition of Tribal Lands. As the Commission has previously recognized, the significant needs for broadband infrastructure development in the HHLs mirror the conditions of reservations in the rest of the United States.[16] Therefore, the Commission should adhere to the requirements of reasoned decision making by continuing to include the HHLs in any definition of Tribal Lands that is adopted in this proceeding.

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[13] *See Hawaii Comments* at 9-11.

[14] *See NPRM*, ¶ 3 n.4.

[15] *See Connecting America: The National Broadband Plan*, Federal Communications Commission, Chapter 2, endnote 3 (March 16, 2010).

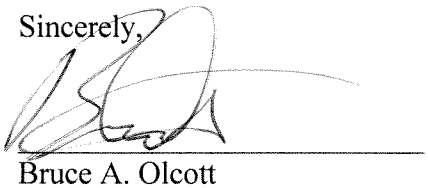
[16] *See* Improving Communications Services for Native Nations, 26 FCC Rcd 2672, *Notice of Inquiry*, ¶ 1 (rel. March 4, 2011). The Commission observed that

> A deep digital divide persists between the Native Nations of the United States and the rest of the country. While most Americans enjoy the communications services of the Internet age, Americans living on Tribal lands -- the lands of federally recognized American Indian Tribes and Alaska Native Villages -- and Hawaiian Home Lands, usually lack broadband access and many lack even basic telephone service.

Id. (internal footnotes omitted).

Please contact the undersigned if you have any questions about this filing.

Sincerely,



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