Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CG Docket No. 96-45
	)	
Sandwich Isles Communications, Inc.	)	
Petition for Waiver of the Definition of "Study	)	
Area" of the Appendix-Glossary of Part 36 of the	)	
Commission's Rules	)	

To: Wireline Competition Bureau

REPLY COMMENTS OF SANDWICH ISLES COMMUNICATIONS, INC.

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Date: March 19, 2013

TABLE OF CONTENTS

SUMMARY i

Reply Summary 1

SIC is Exclusively Licensed to Serve the HHL 2

The DHHL License is not Preempted by Federal Law and Does Not Violate Commission Rules 5

SIC's Petition Raises no Regulatory Concerns 8

SIC's Study Area Waiver is in the Public Interest 9

CONCLUSION 11

SUMMARY

HTI's filed Opposition to SIC's petition for waiver of study area boundaries is solely based on its unwillingness to recognize SIC's right to serve the Hawaiian Home Lands. The Department of Hawaiian Home Lands granted SIC an exclusive license to serve the Hawaiian Home Lands. SIC's right to issue this license, as well as the license's validity, have been previously acknowledged by the Commission.

HTI argues that the Department of Hawaiian Home Lands lacks authority to issue licenses, is in violation of Section 253 of the Telecommunications Act, and the Commission rules. However, HTI refuses to acknowledge the sovereign authority granted to the Department of Hawaiian Home Lands by the Hawaiian Homes Commission Act.

Rather than pre-empting the actions of sovereign tribal governments, the Commission has respected the preferences of tribal government leaders in determining how to best meet the needs of their members. Moreover, SIC has the unique status of being a service provider established with the goal of serving the complicated telecommunications needs of the Hawaiian Home Lands, working with the Department of Hawaiian Home Lands to do so.

Although HTI argues that the grant of an exclusive license to SIC by the Department of Hawaiian Home Lands deprives the people of the Home Lands the benefits of competitive pricing and breadth of services, the facts speak for themselves—had HTI offered reasonable prices and services to the Hawaiian Home Lands, there would have been no need to create SIC. As the incumbent service provider, HTI served

the Hawaiian Islands for a hundred years before SIC was founded. In that time, HTI had an opportunity to provide diverse and affordable services to the Hawaiian Home Lands.

The expansion of SIC's study area will increase the number of lines it serves, therefore generating more revenue for SIC to operate independently. Also, the number of lines served by SIC is significantly smaller than the number served by HTI. Most importantly, the right of tribal governments to determine how best to provide telecommunications services for their members has been clearly articulated by the FCC and should be honored in this case. In light of the fact that HTI's opposition raises no relevant substantive objections, the Commission should grant SIC's Petition for Expedited Study Area Waiver.

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To: Wireline Competition Bureau

REPLY COMMENTS OF SANDWICH ISLES COMMUNICATION'S, INC

Sandwich Isles Communications, Inc. ("SIC"), by its attorneys, submits these Reply Comments in response to Hawaiian Telcom Inc.'s ("HTI") Opposition to SIC's Petition for Expedited Study Area Waiver ("Petition"), filed with the Commission on March 4, 2013.

Reply Summary

One might have guessed that Hawaiian Telcom would file an opposition to SIC's Petition. HTI throughout the years has earned a reputation as the schoolyard bully of Hawaii's communications sector. Few efforts by SIC to launch, expand or improve communications services for the citizens of the Hawaiian Home Lands have been unopposed by HTI.[1] HTI's latest opposition rehashes arguments that the FCC has

[1] *See, e.g. GTE Haw. Tel. Co., Inc.*, Memorandum Opinion and Order, FCC 04-256, 19 FCC Rcd 22268 (2004); *Sandwich Isles Commc'ns, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules*

previously addressed and refuted. Nevertheless, in the interests of closing the record so that the FCC may proceed to the important task of addressing SIC's request on the merits, SIC will briefly reply.

SIC is Exclusively Licensed to Serve the HHL

HTI contends that SIC does not have an exclusive license to provide telephone service to the HHL properties.[2] HTI also argues that the Department of Hawaiian Home Lands (DHHL) "is not a regulatory agency, and has no power to issue exclusive licenses, or indeed any license at all ..."[3] These allegations are false as a matter of law; the FCC, the Hawaii Public Utilities Commission and the DHHL have all refuted these assertions in previous decisions.

The Hawaiian Home Lands qualify as unique trust lands that were established for the sole benefit of Native Hawaiians in 1921 by an Act of Congress.[4] As a condition of statehood, the Hawaiian Homes Commission (which heads the DHHL) was incorporated into the Hawaii State Constitution, resulting in the transfer of the Hawaiian Home Lands to the State of Hawaii and the continuing exclusive authority of the Hawaiian Homes Commission in managing these trust lands on behalf of eligible Native Hawaiians.[5] The Hawaiian Home Lands consist of roughly 70 noncontiguous parcels set aside on the six major Hawaiian Islands.

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and Request for Clarification, Order, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998); *Sandwich Isles Commc'ns Petition for Declaratory Ruling*, 25 FCC Rcd. 13647 (Wireline Comp. Bur. 2010).

[2] *HTI Opp.* at 16.

[3] *Id.*

[4] *See* Hawaii Homes Commission Act (HHCA), Pub. L. No. 67-34, 42 Stat. 108 (1921).

[5] *See* Hawaii Statehood Act, Pub. L. No. 86-3, 73 Stat. 4 (1959); Haw. Const. art. XII, §1; *Ahuna v. Dep't of Haw. Home Lands*, 64 Haw. 327, 640 P.2d 1161, 1168-1169 (1982) ("The Department of Hawaiian Home Lands, headed by the Hawaiian Homes Commission, received exclusive control of the Hawaiian home lands by section 204 of the HHCA").

Prior to the efforts of SIC, these lands were largely lacking in even basic telephone service. The rural and remote nature of HHL properties means higher costs for carriers to construct broadband network facilities, with little to no means to recover these expenses. Commercial carriers cannot make a business case to invest in broadband infrastructure throughout most of the HHLs, absent some sort of state or federal assistance. As a result, for the longest time HTI was unwilling or unable to provide broadband or even basic telephone service to the HHLs at reasonable rates. For example, in 1990, the HHLs wanted to build 12 homes in Maku`u; these homesteaders were quoted a price of One Million Dollars, plus land rights, merely to obtain party line service from HTI, the Incumbent Local Exchange Carrier.

After no other carrier stepped forward to provide comprehensive broadband services to the HHLs, SIC was created to carry out Congress's vision for the rural areas of Hawaii, specifically the HHLs. Pursuant to "License Agreement No. 372," an exclusive license was awarded by the DHHL, on May 9, 1995 to Waimana Enterprises, Inc. (Waimana). Waimana was granted an exclusive right and privilege to build, construct, repair, maintain and operate a broad band telecommunications network to serve all lands under the administration and jurisdiction of the DHHL. In May of 1996, that authorization was assigned in part to SIC, a wholly-owned subsidiary of Waimana, to satisfy the wireline voice requirements of the license.

These facts are not in dispute, notwithstanding HTI's comments to the contrary. Over a decade ago, the FCC concluded that "Sandwich Isles is a new telephone company

seeking to provide telephone exchange service to rural customers *in a previously unserved area.*"[6]

Likewise, SIC's exclusive right to provide telecommunications service to these lands is not open to speculation or dispute.[7] As the FCC and state authorities have held on several occasions, SIC was "issued an exclusive license by the State of Hawaii, Department of Hawaiian Home Lands (DHHL) on May 9, 1995 to provide telecommunications services on the trust lands that we [DHHL] administer."[8]

HTI nevertheless claims, unfettered by legal authority or case citation, that "DHHL is not a regulatory agency, and has no power to issue exclusive licenses, or indeed any licenses at all ..."[9] According to HTI's view of the law in Hawaii, only the Hawaiian Public Utilities Commission has authority to issue licenses to provide telecommunications services in Hawaii, "and that authority encompasses all parts of Hawaii, including the Hawaiian Home Lands."[10] But, the Hawaii Public Utilities Commission has itself refuted this assertion.

Contrary to HTI's assertions, the Hawaii Public Utilities Commission, citing laws that have been on the books since 1920, has categorically stated that "pursuant to section 207(c)(1) of the Hawaiian Homes Commission Act of 1920, it appears that the Hawaiian Homes Commission has the power to grant licenses and easements for telephone lines

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[6] *Sandwich Isles Commc'ns, Inc. Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, 13 FCC Rcd. 2407, 2409 (Com. Car. Bur. 1998) (emphasis added).
[7] *HTI Opp.* at 16.
[8] Letter from Chairman, Dep't of Haw. Home Lands, to Marlene H. Dortch, FCC (December 23, 2004) (attached hereto as Exhibit One); *Sandwich Isles Commc'ns Petition for Declaratory Ruling*, 25 FCC Rcd. 13647 at ¶ 2.
[9] *HTI Opp.* at 16-17.
[10] *Id.* at 17.

and other utility services."[11] Notwithstanding HTI's continued assertions to the contrary, the FCC also has repeatedly affirmed that SIC is "licensed by the Department of Hawaiian Homelands to construct and operate a modern telecommunications network serving the HHL [Hawaiian Home Lands]."[12]

The DHHL License is not Preempted by Federal Law and Does Not Violate Commission Rules

HTI alleges that even if SIC does have an exclusive license from the DHHL to provide telecommunications services to the Hawaiian Home Lands, that authorization is invalid because it conflicts with Section 253 of the Telecommunications Act and the FCC's Rules.[13] That would presumably come as news to the FCC, in light of the FCC decisions cited herein acknowledging SIC's status as the "exclusive licensee" in the HHL. Moreover, HTI overstates the scope of Section 253 and completely ignores the fact that the Hawaiian Home Lands have been recognized by Congress and the FCC as akin to sovereign, tribal lands.

None of the opinions cited by HTI involve Indian tribal lands; for that reason alone the cited authorities are entirely irrelevant. Moreover, the concept of federal pre-emption does not apply in this case; here, the DHHL has made a decision about the best telecommunications interests of its own members within its own territories.[14] As the FCC has acknowledged time and again when it recognized SIC's exclusive license, the

[11] Letter of Chairman State of Haw. Pub. Util. Comm'n to A. Hee, Sandwich Isles Commc'ns (Sept. 20, 1995) (attached hereto as Exhibit Two).
[12] *Sandwich Islands Commc'ns Petition for Declaratory Ruling*, 25 FCC Rcd. 13647 at ¶ 2.
[13] *HTI Opp.* at 18-19.
[14] *See Montana v. U.S.*, 450 U.S. 544, 565 (1981) ("...[a] tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

HHLs have the unique status of being akin to sovereign land within a sovereign territory.[15]

The question of the interplay between the Telecommunications Act, Section 253 in particular, and tribal laws is not new or novel; the FCC itself addressed this matter some years ago. Tribal governments are sovereigns with supreme authority over their own members. In response to requests from Indian Tribes urging the Commission to issue a statement of telecommunications policy "that recognizes Tribal sovereignty, federal trust principles, and the importance of agency consultation with federally-recognized Indian Tribes," the Commission "reaffirm[ed] its commitment to promote a government-to-government relationship between the FCC and federally-recognized Indian Tribes."[16] In promoting that "government-to government" relationship between the Commission and Indian tribes, the Commission stated that it "recognizes the right of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership."[17]

Rather than preempt tribal laws regarding telecommunications facilities on tribal lands, the FCC's rules and policies promote the opposite of what HTI suggests. The FCC's policy is to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."[18]

State laws in Hawaii are in harmony with federal law in this regard. The HHCA of 1921 granted much broader authority than the regulation of utility rights; it gave

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[15] *Sandwich Isles Commc'ns Petition for Declaratory Ruling*, 25 FCC Rcd. 13647 at ¶ 2.
[16] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (June 23, 2000), www.fcc.gov/Bureaus/OGC/Orders/2000/fcc00207.doc.
[17] *Id.*
[18] *Id.*

DHHL a right to grant an exclusive license to SIC as a governing body of a sovereign government.[19] The State of Hawaii delegated to DHHL the duty of protecting the best interests and communications priorities of Native Hawaiians on the HHLs. Accordingly, the HHC determined that it was in the best interests of the HHLs to grant SIC a license to provide services to the HHLs in 1995. As acknowledged by the FCC, the HHC has a right to set communications priorities that will be best for its membership.

HTI's attempt to analogize the DHHL to a "multiunit premises owner" under 47 C.F.R. § 64.2500-2501, makes no sense at all.[20] HTI argues that if DHHL were not a State actor, but a private landowner, it would be prohibited from entering into an agreement that would exclude HTI from access to any commercial or residential multiunit premises, and therefore DHHL is violating Commission rules.[21] The analogy is erroneous since DHHL is in fact a state/governmental actor with a defined grant of governing authority over the Hawaiian Home Lands. Moreover, the Hawaiian Home Lands are evidently not a "multi-unit premise"; rather, they are a broad collection of islands and communities comprising a sovereign state.

The FCC's Rules cited by HTI by their own terms do not support HTI's arguments. Section 64.2502 of the FCC's Rules states in relevant part as follows:

> This subpart shall not preempt any state law or state regulation that requires a governmental entity to enter into a contract or understanding with a common carrier which would restrict such governmental entity's right to obtain telecommunications service from another common carrier.

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[19] *Ahuna v. Dep't of Haw. Homelands*, 64 Haw. 327, 640 P.2d 1161, 1168-1169 (1982) ("The Department of Hawaiian Home Lands, headed by the Hawaiian Homes Commission, received exclusive control of the Hawaiian home lands by section 204 of the HHCA"); *see also* Comments of Pacific Lightnet, Inc. In Support of Sandwich Isles Commc'ns, Inc.'s Petition for Waiver, CC Docket No. 96-45 (Other carriers in Hawaii agree that SIC has exclusive rights to serve the HHLs).
[20] *HTI Opp.* at 21.
[21] *Id.*

As a sovereign governmental agency, DHHL has not violated the Commission's rules by exercising its right to grant an exclusive license to SIC for telecommunications services.

The FCC's actions to date with respect to SIC and the DHHL have been entirely consistent with federal deference to, and respect for, tribal laws and tribal governmental authorities. Indeed, as recently as this past summer, the FCC issued "further guidance" to the public wherein it unequivocally stated that the legal definition of "tribal lands" includes "Hawaiian Home Lands – areas held in trust for native Hawaiians by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act ...."[22] In short, DHHL's grant of an Exclusive License to SIC to provide telecommunications services to the Hawaiian Home Lands was and remains valid and in accordance with FCC rules, policies and federal law.

SIC's Petition Raises no Regulatory Concerns

Among its scattershot objections to SIC's efforts to improve telecommunications services in the HHL, HTI raises the perplexing argument that DHHL has somehow "disadvantaged" the people of the Hawaiian Home Lands by "effectively deny[ing] residents and business the freedom to choose their telecommunications service provider." According to HTI, a grant of SIC's petition for waiver may lead to adverse consequences for consumers with respect to competitive pricing and breadth of services that would otherwise be available to them in Hawaii.[23]

In reality, there would have been no need to create SIC in the first place had HTI provided anything approaching quality telecommunications service throughout the

[22] *Office of Native Affairs and Policy, Wireless Telecomm. Bureau and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, DA 12-1165 (July 19, 2012).
[23] *HTI Opp.* at 20.

Hawaiian Home Lands. Indeed, given the 100 year head-start HTI has had in Hawaii, proudly noted in its Opposition, it is by no means apparent how or why SIC could pose any sort of competitive threat to the exponentially larger HTI.[24]

DHHL chose SIC to be the Hawaiian Home Lands' telecommunications provider precisely because no other carriers were meeting the needs of local residents. Faced with conspicuous lack of service in many parts of the Hawaiian Home Lands, SIC created a comprehensive plan, then followed through on it, to provide the HHLs with quality telecommunications services comparable to or better than those available to other Hawaii residents. Moreover, as a company formed with the goal of providing service to the Hawaiian Home Lands, SIC has remained particularly attuned to the unique needs of Native Hawaiians within the Hawaiian Home Lands and has a positive working relationship with the DHHL, established upon shared goals.

SIC's Study Area Waiver is in the Public Interest

For reasons stated in the laws of Hawaii, it is the DHHL that has direct authority over the certification of SIC as a telecommunications carrier in the Home Lands, despite HTI's assertions to the contrary.[25] Nevertheless, even if the Hawaiian PUC had jurisdiction over the extension of SIC's network facilities in the HHL, there is no reason to expect that it would have any objection to SIC's expansion plans. In fact, the Hawaii PUC had no objections to the grant of SIC's initial study area waiver.[26] Should the FCC

[24] Haw. Telcom Holdco, Inc. (2012). 10-K Annual Report 2012. Retrieved from SEC EDGAR website http://www.sec.gov/Archives/edgar/data/1487986/000104746913002690/a2213497z10-k.htm. HTI's latest Form 10-K states that it has "approximately 390,300 local access lines" in service as of March 1, 2013.
[25] *HTI Opp.* at 24.
[26] *See Sandwich Isles Commc'ns Petition for Waiver of the Definition of Study Area*, 20 FCC Rcd. 8999, 9004 (Wireline Comp. Bur. 2005).

require specific evidence that the HPUC and the DHHL do not object to a grant of this request, that documentation could readily be provided.

Apart from HTI's polemical assertion that a grant of this request will somehow lead to an FCC-sanctioned "fire sale" of HTI's network facilities,[27] most rational observers would readily conclude that the public interest would benefit from a grant of SIC's petition. HTI apparently objects to SIC's receipt of high-cost funding support,[28] if so, then it cannot also object to SIC's efforts to produce additional revenues for its local telephone network. That is one public interest that is readily apparent: additional lines and revenues will make it possible for SIC to spread the costs of its extensive network across a larger customer base, thereby achieving economies of scale.

While it is true that SIC does not yet have a precise estimate of the number of lines that could be added to its network, under either HTI's or SIC's line estimates, the fact remains that the "number of lines at issue" here is relatively small, indeed, exponentially smaller than the number of lines served by HTI.[29] Consequently, that element of the FCC's public interest test, the relatively small number of lines at issue, can also be demonstrated.

And finally, the public interest warrants that Tribal territories have considerable say in the manner in which telecom services are provided to their members. That is a clear and recently articulated FCC and federal policy. A grant of SIC's waiver will allow SIC to fulfill the mission it was created to fulfill: provide high quality, reasonably priced telecommunications services to all of the residents of the Hawaiian Home Lands.

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[27] *HTI Opp.* at 23.
[28] *HTI Opp.* at 3.
[29] Haw. Telcom Holdco, Inc. (2012). 10-K Annual Report 2012 at 1.

CONCLUSION

HTI's opposition raises no substantive objections to a grant of SIC's waiver request, other than those arising from its own pecuniary interests. The public interest and the interests of current and prospective HHL customers warrant a grant of this petition. Therefore, good cause having been shown, SIC respectfully requests that this Petition be granted expeditiously, thereby allowing affected customers to benefit from the proposed revisions to SIC's study area as soon as possible.

Respectfully submitted,

Sandwich Isles Communications, Inc.

By: _____

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Its Attorneys

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Date: March 19, 2013

EXHIBIT 1

LINDA LINGLE
GOVERNOR
STATE OF HAWAII

MICAH A. KANE
CHAIRMAN
HAWAIIAN HOMES COMMISSION

BEN HONDERSON
DEPUTY TO THE CHAIRMAN

KAULANA H. PARK
EXECUTIVE ASSISTANT

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
P.O. BOX 1879
HONOLULU, HAWAII 96805

December 23, 2004

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Ms. Dortch:

Re: AAD 97-82: Sandwich Isles Communications, Inc., Petition for Study Area Waiver

Sandwich Isles Communications, Inc. (SIC) was issued an exclusive license by the State of Hawaii, Department of Hawaiian Home Lands (DHHL) on May 9, 1995 to provide telecommunications services on the trust lands we administer.

Additionally, on May 14, 1997, DHHL designated SIC an eligible telecommunications carrier (ETC) under Section 214 of the 1996 Communications Act within our Hawaiian home lands properties. Subsequent to our initial designation and in response to the FCC issuing further qualifying rules, DHHL reconfirmed its ETC designation for SIC on June 2, 1998.

We now understand the FCC in the above referenced docket is requiring SIC to petition for a Study Area Waiver. For purposes of granting that waiver, DHHL fully supports SIC continuing to provide telecommunications services on Hawaiian home lands (HHL) and reaffirms its exclusive license issued in 1995.

Hawaiian home lands are held in trust for the benefit of native Hawaiians. They consist of over 70 non-contiguous parcels totaling over 200,000 acres located on the 6 major Hawaiian Islands. The provision of modern, reliable telecommunications infrastructure and services is important to our mission to rehabilitate our beneficiaries. These services impact quality of life – health, education, personal safety; and serve as a platform for economic development. Prior to issuing SIC the license, there were many beneficiaries living on HHL that did not have phone service due to the high cost either they or DHHL would have to pay to install the infrastructure.

Today these beneficiaries enjoy the same service that is available in urban areas. Additionally, SIC is now investing tens of millions of dollars to pay for the communications infrastructure in the areas DHHL is currently developing.

SIC has been able to provide this service without contributions in aid of construction from either DHHL or its beneficiaries. This has allowed DHHL to utilize the funds it previously would be required to spend to install communications infrastructure to fulfill our mission.

Aloha,

Micah A. Kane, Chairman
Hawaiian Homes Commission

cc: Sandwich Isles Communications, Inc.

EXHIBIT 2

OFFICE COPY

RECEIVED
SEP 20 1995
Ans'd.....

JIN J. CAYETANO
GOVERNOR

YUKIO NAITO
CHAIRMAN

JOHN P. SPIERLING
COMMISSIONER

DENNIS R. YAMADA
COMMISSIONER

STATE OF HAWAII
PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
465 S. KING STREET, #103
HONOLULU, HAWAII 96813

September 20, 1995

Albert S.N. Hee
Sandwich Isles Communications, Inc.
Pauahi Tower, Suite 1520
1001 Bishop Street
Honolulu, Hawaii 96813

Dear Mr. Hee:

Your letter of September 1, 1995, requests responses to two questions. The questions stem from responses made by the Hawaii Public Utilities Commission's Chief Counsel, Clay Nagao, to questions raised by Mr. Ken B. Chandler of the U.S. Department of Agriculture. We respond to the questions as follows.

Your first question is whether the PUC agrees that the Hawaiian Homes Commission has the power to authorize a public utility to provide service on its lands. Our response is that, pursuant to section 207(c)(1) of the Hawaiian Homes Commission Act of 1920, it appears that the Hawaiian Homes Commission has the power to grant licenses and easements for telephone lines and other utility services.

Your second question is whether the PUC agrees that public utilities do not have the ability to use their power of eminent domain to obtain easements for utility services on Hawaiian Homes lands. Our response is that, pursuant to the State of Hawaii Attorney General's opinion no. 60-77, it appears that a public utility may not acquire any Hawaiian Homes land through eminent domain proceedings, in spite of the right of eminent domain granted to public utilities by Hawaii Revised Statutes section 101-4.

I hope these responses will clarify any confusion that may have been generated by Mr. Nagao's July 18, 1995, letter to Mr. Chandler.

Very truly yours,

Yukio Naito
Chairman

YN:CN:ac

CERTIFICATE OF SERVICE

I, Lula Robinson, a legal administrative assistant in the law firm of Venable LLP, do hereby certify that on this 19th day of March, 2013 copies of the foregoing reply comments were sent via electronic mail to the following:

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Lula Robinson /s/

Lula Robinson