

Hawaiian Telcom, Inc.

Opposition to Sandwich Isles Communications Waiver Petition

FCC Meeting – CC Docket No. 96-45

April 30, 2013

Hawaiian Telcom's Right to Serve Hawaiian Home Lands

- Sandwich Isles Communications (SIC) refuses to recognize Hawaiian Telcom's (HT) right to serve Hawaiian Home Lands (HHL)
- SIC's exclusivity claim is based on a license from the State of Hawaii Department of Hawaiian Home Lands (DHHL)
- However, Section 253(a) of the Act bars States or local governments from "prohibiting the availability of any entity to provide any interstate or intrastate telecommunications service"

SIC's Claim Lacks Legal Support

- There is no legal support for SIC's claims regarding the “sovereign” or “Tribal” nature of Hawaiian Home Lands
- Hawaiian Homes Commission Act did not recognize any Native Hawaiian government (or quasi government) entity
- Lands were held in trust by the then-Territory of Hawaii for the benefit of individual Native Hawaiians

Rice v. Cayetano

- The United States Supreme Court recognized the distinction between Native Hawaiians and Indian tribes in *Rice v. Cayetano*
- The Court declined to decide whether Congress had given, or even could give, Native Hawaiians a status similar to Indians in organized tribes
- The Court made clear that there was no existing precedent establishing that Native Hawaiians were entitled to the same status as members of Indian tribes

Congress

- Congress also recognizes that the relationship between the U.S. and Native Hawaiians is different from that which exists with respect to Indian tribes
- Legislation to establish a quasi sovereign entity to represent Native Hawaiians has been unsuccessful in each of the last seven Congresses
- Senate Committee report on the most recent version of the legislation refutes SIC's theory
- Legislation would not be necessary if SIC's claims about sovereign status were correct

Department of Interior Regulations

- Regulations of the Department of Interior, Bureau of Indian Affairs confirm that Native Hawaiians do not have the same “quasi sovereign” status as recognized Indian tribes
- “Indian group”, “Indian tribe”, and “Indigenous” are defined in terms of groups “within the continental United States”
- “Continental United States” is defined as “the 48 contiguous states and Alaska” – excludes any group in Hawaii for treatment as an Indian tribe

Department of Hawaiian Home Lands

- DHHL is a State agency that holds title to the HHL property as a trustee – not as a sovereign representative of Native Hawaiians
- As a landowner, and under State law, DHHL does have rights to control access to and use of HHL property
- That does not make DHHL a regulatory agency

DHHL is a Landowner

- DHHL does not have a regulatory apparatus that parallels the entire State government
- If the HHL were truly “sovereign” as SIC pretends, HHL residents would not be subject to civil or criminal jurisdiction of Hawaii state courts
- DHHL does have exclusive authority over land use on HHL properties, and the Hawaiian Homes Commission Act, 1920, authorizes DHHL to grant “licenses as easements”

Hawaii Public Utilities Commission (PUC)

- Contrary to SIC's claims, the Hawaii PUC has not recognized DHHL as the regulatory authority for telecommunications services in the HHL
- In 1995, letter from the PUC Chairman to SIC only recognizes DHHL's power to grant licenses and easements for utility services
- In 1997, SIC sought and the PUC granted it authority to provide intrastate telecommunications services "within and between the Hawaiian Home Lands"

SIC Cannot Enforce Claimed Exclusivity Under Federal Law

- As a State agency, DHHL is subject to Section 253(a) and (c) which clearly preempt any basis for exclusive access under State or local law
- The Hawaiian Homes Commission Act, 1920, is considered a State law and therefore is subject to preemption under Section 253
- DHHL grants Native Hawaiians lands under 99-year leases and is a “multiunit premises owner”
- FCC rules prohibit contracts guaranteeing exclusive access to multiunit premises

Deficiencies in SIC's Reply Comments

- SIC avoided responding to Hawaiian Telcom's questions about how SIC intends to "acquire" lines that Hawaiian Telcom is currently serving on DHHL properties
- SIC also did not discuss what the effect of such acquisitions would be on SIC's claim on the high-cost support fund
- To date, SIC has not contacted Hawaiian Telcom about acquiring our lines that serve DHHL

Summary

- Through its study area waiver petition, SIC seeks to increase its USF support
- SIC's request to reassign lines served by another carrier (HT) to SIC over the other carrier's objections is unprecedented
- SIC's claim to exclusivity over HHL directly contravenes the express language and intent of Section 253(a) of the Act
- The waiver petition fails to satisfy the Commission's public interest test and should be denied

Questions?