

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

**In the Matter of** )  
 )  
**Request for Waiver of the 2.5 GHz Report &** )  
**Order Tribal Priority Window Entity** )  
**Eligibility Rules** )

**PETITION FOR WAIVER**

**Department of Hawaiian Home Lands**

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**PETITION FOR WAIVER**

The Department of Hawaiian Home Lands (“DHHL”), pursuant to Federal Communications Commission (“Commission”) Rule Section 1.925, requests a waiver of the 2.5 GHz Report & Order Tribal Priority Window Entity Eligibility Rules over Hawaiian Home Lands.

**I. INTRODUCTION AND SUMMARY**

In 2018, the Commission released a Notice of Proposed Rulemaking (“NPRM”) seeking comment on opening a Tribal Priority Filing Window (“Tribal Window”) for access to the 2.5 GHz spectrum band.<sup>1</sup> On July 10, 2019, the Commission adopted a Report & Order (“Report & Order”) establishing eligibility criteria for the Tribal Window.<sup>2</sup> Under the Report & Order, an applicant for the Tribal Window must be “a federally recognized American Indian tribe or Alaska Native Village; or an entity that is owned and controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes.”<sup>3</sup>

Among other criteria, applicants in the Tribal Window must request a license on tribal land, “which is defined to be any federally recognized Indian tribe’s reservation, pueblo or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) and Indian Allotments, see §54.400(e), as well as Hawaiian Home Lands—areas held in trust for native Hawaiians by the state of Hawai‘i, pursuant to the Hawaiian Homes Commission Act, 1920, July 9, 1921, 42 Stat 108, et seq., as amended; and any lands designated as Tribal lands pursuant to the designation process contained in Section 54.412 of our rules prior to July 10, 2019.”<sup>4</sup> On October 25, 2019, the Commission published its Final Rule on the Tribal Window in the Federal Register.<sup>5</sup>

There are approximately 203,500 acres of lands encompassed by the Hawaiian Homes Commission Act distributed across 20 distinct Homestead regions and 6 islands. The Department

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<sup>1</sup> *Transforming the 2.5 GHz Band*, Notice of Proposed Rulemaking, 33 FCC Rcd 4687(7) (2018).

<sup>2</sup> *Transforming the 2.5 GHz Band*, Report & Order, 34 FCC Rcd 5446(7), para. 49-50 (2019) [hereinafter “Report & Order”].

<sup>3</sup> Report & Order, Appendix A, Section 27.1204(b)(1).

<sup>4</sup> Report & Order, Appendix A, Section 27.1204(b)(2).

<sup>5</sup> Final Rule, *Transforming the 2.5 GHz Band*, 84 FR 57343 (October 25, 2019).

services and manages nearly 10,000 Homesteading leases, and over 700 leases utilizing lands not currently required for Homesteading, all of which require some degree of connectivity. Approximately 15 of those regions have an available 2.5 GHz license that can be claimed during the Tribal Priority Filing Window. However, under the Commission's rules, it is unclear which Native Hawaiian entity is eligible to claim a license.

While the Commission expressly included Hawaiian Home Lands within the definition of tribal lands eligible for the Tribal Window, the Report & Order omitted native Hawaiians from the list of eligible applicants for the window, and therefore excluded them from the opportunity to access this spectrum. On November 22, 2019, the DHHL filed a letter in the docket regarding the Tribal Window encouraging the Commission reach out to native Hawaiians to resolve this matter.<sup>6</sup> DHHL now files this request for waiver of the Commission's eligibility rules and to grant DHHL the license.

## II. BACKGROUND

The Hawaiian Homes Commission Act of 1920 ("HHCA") was passed by Congress and signed into law in 1921.<sup>7</sup> Prince Jonah Kūhiō Kalaniana'ole shepherded the HHCA through the United States Congress and established a rehabilitative program for native Hawaiians<sup>8</sup> in response to the dwindling native Hawaiian population. The HHCA set aside approximately 203,500 acres of land in Hawai'i to establish homesteads for native Hawaiians.<sup>9</sup> The federal government served as the sole trustee of the Hawaiian home lands program until Statehood.

The HHCA was adopted into the Hawai'i State Constitution as a condition of Statehood in 1959.<sup>10</sup> The Admission Act provides that the United States continues to have oversight responsibilities over the HHCA and certain amendments may be made only with the consent of the United States.<sup>11</sup> Thus, the United States and the State of Hawai'i assumed the duties of a trustee for native Hawaiians under the HHCA.

Consistent with the provisions of the HHCA and the Admission Act, Congress enacted the Hawaiian Home Lands Recovery Act ("HHLRA") in 1995 to settle land use and ownership disputes as a result of the federal government's removal of Hawaiian Home Lands.<sup>12</sup> In addition,

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<sup>6</sup> See Letter from William J. Aila, Jr., Department of Hawaiian Home Lands, to Marlene Dortch, WT Docket No. 18-120 (filed Nov. 22, 2019).

<sup>7</sup> *Hawaiian Homes Commission Act, 1920*, Pub. L. No. 67-34, 42 Stat. 108 (1921) (formally codified as amended at 48 U.S.C. §§ 691-718 (1958) (omitted from codification in 1959)) (set out in full as amended at 1 Haw. Rev. Stat. 261 (2009)) [hereinafter "HHCA"].

<sup>8</sup> Pursuant to HHCA, "native Hawaiian" is defined as "any descendant of not less than one half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *HHCA*, Section 201.

<sup>9</sup> *HHCA*, Section 203.

<sup>10</sup> *Hawaii Admission Act*, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959) [hereinafter "Admission Act"].

<sup>11</sup> *Admission Act*, Section 4.

<sup>12</sup> *Hawaiian Home Lands Recovery Act*, Pub. L. No. 104-42, 109 Stat. 353 (1995) [hereinafter "HHLRA"].

the HHLRA provides a procedure for approval of amendments to the HHCA<sup>13</sup> and land exchanges.<sup>14</sup>

The following year, Congress enacted the Native American Housing Assistance and Self-Determination Act (“NAHASDA”) to provide block grants to build affordable housing for American Indians and Alaska Natives.<sup>15</sup> NAHASDA was amended to add Title VIII housing assistance for Native Hawaiians in 2000.<sup>16</sup>

The final rule that provides clarity in how the Department of Interior administers certain provisions of the HHCA and HHLRA best explains that the “HHCA is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for implementation through State law.”<sup>17</sup>

Congress has repeatedly recognized and implemented the United States’ special trust relationship with the Native Hawaiian community, a relationship analogous to that between the United States and American Indians and Alaska Natives, and the United States’ responsibility for the welfare of those communities. Congress established special Native Hawaiian programs in the areas of housing, health care, employment, and education, among other areas.<sup>18</sup> In addition, Congress enacted statutes to study and preserve Native Hawaiian culture, traditions, language, and historical sites.<sup>19</sup>

#### **A. Department of Hawaiian Home Lands**

Pursuant to provisions of the HHCA, the Department of Hawaiian Home Lands provides 99-year residential, agricultural, and pastoral leases at an annual rental of one dollar, with the State of Hawai‘i holding the land and resources managed by the DHHL in trust for native Hawaiians.

The DHHL has a demonstrable history over the last century of managing and licensing utilities for expansion and service to rural Homestead communities. The HHCA delegates to the DHHL the authority “to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like.”<sup>20</sup> The Department is also authorized to grant licenses “to the

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<sup>13</sup> HHLRA, Section 204.

<sup>14</sup> HHLRA, Section 205.

<sup>15</sup> *Native American Housing Assistance and Self-Determination Act*, Pub. L. No. 104-330, 110 Stat. 4016 (1996).

<sup>16</sup> Pub. L. No. 106-568, 114 Stat. 2868 (2000); Pub. L. No. 106-569, 114 Stat. 2944 (2000) (codified as amended at 25 U.S.C. §§ 4221-43) (2013).

<sup>17</sup> Final Rule, Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920, 43 CFR Parts 47 and 48 (July 12, 2016).

<sup>18</sup> *Native American Programs Act of 1974*, 42 U.S.C. §§ 2991-2992 (1975); *Native Hawaiian Health Care Improvement Act of 1988*, 42 U.S.C. §§ 11701-11714 (1992); *Workforce Investment Act of 1998*, 29 U.S.C. § 2911 (1998); *Native Hawaiian Education Act*, 20 U.S.C. §§ 7511-7517 (2002).

<sup>19</sup> *National Historic Preservation Act of 1966*, 54 U.S.C. § 302706 (1966); *American Indian Religious Freedom Act*, 42 U.S.C. § 1996 (1978); *Kaloko-Honokohau National Park Reestablishment Act*, 16 U.S.C. § 396d(a) (1978); *Native American Graves Protection and Repatriation Act*, 25 U.S.C. §§ 3001-3013 (1990); *Native American Languages Act*, 25 U.S.C. §§ 2901-2906 (1992).

<sup>20</sup> HHCA, Section 207(c)(1).

United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.”<sup>21</sup> While the framers of the HHCA could not have contemplated the advent of advanced telecommunications in 1920, the 2.5 GHz spectrum band is similar in nature to utilities like telephone lines and electric power. Section 204(a) of the HHCA provides that all “available lands” shall “immediately assume the status of Hawaiian Home Lands and be under the control of the Department to be used and disposed of in accordance with the provisions of the [HHCA]....”<sup>22</sup> The DHHL is the only entity both with the oversight over the Hawaiian Home Lands contemplated in the Report & Order and with the historical record of servicing such communities.

## **B. Other Parties/Collaborators**

### **Office of Hawaiian Affairs**

The Office of Hawaiian Affairs (“OHA”) and the DHHL both serve native Hawaiian beneficiaries as defined by the HHCA. In 2008, the DHHL and OHA approved a long-term arrangement that provides OHA funding to the DHHL for the planning, design and construction of infrastructure for homestead development on properties owned and controlled by the DHHL. Four years later, OHA and the DHHL adopted a joint resolution that affirmed their commitment to work collaboratively to establish goals, projects and programs to serve our mutual beneficiaries.

OHA will support the DHHL to meet the build-out requirements for this opportunity and to succeed in the overall management of the 2.5 GHz spectrum licenses on behalf of our mutual beneficiaries. OHA has a broad range of technical expertise that could be beneficial to the DHHL in complying with applicable federal laws (e.g., the National Environmental Policy Act and the National Historic Preservation Act) and the State of Hawai‘i equivalents. OHA offers its resources to assist the DHHL, such as its Washington D.C. Bureau, which can facilitate efficient communication between the DHHL and the FCC or other interested federal parties, and its social and print media outlets, which can share important news and opportunities related to the 2.5 GHz spectrum licenses with beneficiaries.

### **Department of Business, Economic Development, and Tourism**

The Department of Business, Economic Development, and Tourism (“DBEDT”) has a long history of supporting the DHHL on a number of economic development projects over the years. For example, in 2005 an economic development report for the DHHL was developed by the Hawai‘i Office of Planning, an attached agency to DBEDT, by contracting the Hawai‘i Alliance for Community Based Economic Development (“HACBED”) to summarize the challenges and opportunities for economic development in native Hawaiian communities and to identify roles for native Hawaiian organizations for financing and mentoring project teams. This report led to the development of the Community Based Economic Development Grant and Loan program administered by DBEDT.

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<sup>21</sup> *HHCA*, Section 207(c)(2).

<sup>22</sup> *HHCA*, Section 204(a); *see HHCA*, Section 206.

Another program involves the Hawai‘i Community Development Authority (“HCDA”), an attached agency to the DBEDT, and their oversight of renewable solar project on lands in the Kalaheo district which contains Hawaiian Home Lands. HCDA has planning jurisdiction “to establish community development plans in community development districts; determine community development programs; and cooperate with private enterprise and the various components of federal, state, and county governments to bring community development plans to fruition.”

Specifically, DBEDT is prepared to work with administrative branch, Enterprise Technology Services (“ETS”), to support the DHHL in establishing the necessary databases to manage frequencies, channels, land parcels, and licensee data. The DBEDT itself is supportive in the planning, consulting, design, and implementation of community networks in Hawaiian Home Lands.

### **C. Memorandum of Understanding Between Collaborators**

OHA and the DBEDT are supportive of the DHHL’s Petition for Waiver of the Entity Eligibility requirement. In the event the Commission grants this Petition, the parties have committed to a Memorandum of Understanding (“MOU”) that memorializes continued support for the DHHL through the prospective application process and eventual deployment.<sup>23</sup>

On November 22, 2019 three letters were filed in the docket regarding the Tribal Window encouraging the Commission reach out to Native Hawaiians to resolve this matter. The letters were submitted by the Office of Hawaiian Affairs, the DHHL, and the Office of Governor David Ige of the State of Hawai‘i.<sup>24</sup>

## **III. WAIVER REQUEST**

### **A. The Purpose of the Tribal Priority Window Will Be Frustrated if the Commission Applies its Entity Eligibility Rule over Hawaiian Home Lands.**

Under Section 1.925(b)(3)(i) of the Commission’s rules, the Commission may waive a rule when (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and (2) a grant of the requested waiver would be in the public interest.<sup>25</sup>

The underlying purpose of the Tribal Priority Filing Window eligibility rules is “to provide Tribal Nations with an opportunity to obtain unassigned EBS spectrum to address the communications

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<sup>23</sup> See Memorandum of Understanding between the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, and the Department of Business, Economic Development, and Tourism (dated January 14, 2020).

<sup>24</sup> See Letter from Sylvia M. Hussey, Office of Hawaiian Affairs, to Marlene Dortch, FCC, WT Docket No. 18-120 (filed Nov. 22, 2019); Letter from William J. Aila, Jr., Department of Hawaiian Home Lands, to Marlene Dortch, WT Docket No. 18-120 (filed Nov. 22, 2019); Letter from Governor David Ige, State of Hawai‘i, to Marlene Dortch, FCC, WT Docket No. 18-120 (filed Nov. 22, 2019).

<sup>25</sup> 47 CFR § 1.925(b)(3)(i).

needs of their communities.”<sup>26</sup> Under the current Eligibility Rule, an applicant for the Tribal Window must be “a federally recognized American Indian tribe or Alaska Native Village; or an entity that is owned and controlled by a federally-recognized Tribe or a consortium of federally-recognized Tribes.” At this time, native Hawaiians do not belong to a federally recognized American Indian tribe or Alaska Native Village. The goals of the Tribal Window, however, would not be served if native Hawaiians are denied the opportunity to obtain spectrum licenses to serve Hawaiian Home Lands. In addition, excluding the sole beneficiaries of Hawaiian Home Lands, which are the only Tribal Lands in Hawai‘i, from applying for licenses to serve Tribal Lands would frustrate the purpose of the rule.

The intent to be inclusive of Hawaiian Home Lands, and by extension, native Hawaiians, is reflected not only in the Report & Order, but also in 47 CFR § 54.400(e). An “eligible resident of Tribal lands” is defined as follows:

“a ‘qualifying low-income consumer,’ as defined in paragraph (a) of this section, living on Tribal lands. For purposes of this subpart, ‘Tribal lands’ include any federally recognized Indian tribe’s reservation, pueblo, or colony, including former reservations in Oklahoma; Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688); Indian allotments; *Hawaiian Home Lands – areas held in trust for Native Hawaiians by the state of Hawai‘i, pursuant to the Hawaiian Homes Commission Act, 1920 July 9, 1921, 42 Stat. 108, et. seq., as amended*; and any land designated as such by the Commission for purposes of this subpart pursuant to the designation process in §54.412.” (Emphasis added.)<sup>27</sup>

The enforcement of the eligibility criteria, as proposed, conflicts with the Commission’s memorialized intent to equitably recognize Hawaiian Home Lands as it recognizes other Tribal Lands. Under the Code of Federal Regulations, Hawaiian Home Lands are the only Tribal Lands in Hawai‘i. The Eligibility Rule, as proposed, excludes the only people permitted to populate these Tribal Lands—native Hawaiians—a result that both frustrates the purpose of the Tribal Window and creates a conflict between the rules and the rules’ intent.

In order to further the purpose of the Tribal Window, the DHHL respectfully asks the Commission to rectify the incongruencies created by the Eligibility Rule’s inclusion of Hawaiian Home Lands as an eligible area and exclusion of native Hawaiians from participation. The DHHL is the only entity with the legal authority and operational capacity to make this request on behalf of native Hawaiians. The FCC’s findings that “adoption of a Tribal priority window for Tribal entities to obtain EBS licenses on Tribal lands that are located in rural areas is in the public interest” necessitates a waiver by the Commission on behalf of native Hawaiians.<sup>28</sup> Granting a waiver for native Hawaiians and the DHHL would eliminate the apparent conflict between the rules as written and the rules’ intent, as particular to Hawaiian Home Lands, and support the public interest of providing rural Hawaiian Home Land communities with access to EBS licenses.

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<sup>26</sup> Report & Order, para. 47.

<sup>27</sup> 47 CFR § 54.400(e).

<sup>28</sup> Report & Order, para. 47.



**B. Management of Hawaiian Home Lands is a Unique Factual Circumstance Requiring Waiver of the Entity Eligibility Rule to Avoid Inequitable Results Contrary to the Public Interest that Leave Native Hawaiians with no Reasonable Alternative.**

Under Section 1.925(b)(3)(ii) of the Commission's rules, the Commission may waive a rule when, in view of the 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.<sup>29</sup>

The recognition afforded to Hawaiian Home Lands within the scope of eligible Tribal Lands is an acknowledgment of the unique trust relationship between the State of Hawai'i, the DHHL, and native Hawaiians. The HHCA originally delegated control of the Hawaiian Home Lands with a body known as the Hawaiian Homes Commission. Shortly after Statehood, the Hawai'i Legislature create the DHHL, a State agency responsible for managing Hawaiian Home Lands. At present, the DHHL is the single entity responsible for management of all trust resources and serving beneficiaries in furtherance of the HHCA. The Hawaiian Homes Commission is now the executive body that controls DHHL.<sup>30</sup> The trust responsibilities and fiduciary duties exercised by the State of Hawai'i, by way of the DHHL, are embedded in the Constitution of the State of Hawai'i.<sup>31</sup> This trust relationship is uniquely similar to that of federally recognized tribal governments, and yet, not affording native Hawaiians a similar opportunity for access to spectrum licenses creates an inequity that is contrary to the public interest.

Granting a waiver such that the DHHL, the sole entity responsible for the management of Hawaiian Home Lands, can apply within the Tribal Window serves the public interest. The DHHL has nearly a century of experience in allocating limited, valuable resources for the benefit of native Hawaiians and is the only entity whose sole purpose is to act as trustee to the people to whom these particular Tribal Lands—Hawaiian Home Lands—belong. Native Hawaiians are effectively excluded from participating without a waiver of the Eligibility Rule. A waiver, therefore, is necessary because Native Hawaiians have no other reasonable alternative to participate.

#### **IV. CONCLUSION**

For the foregoing reasons, the Department of Hawaiian Home Lands respectfully requests the Commission grants a waiver of the 2.5 GHz Report & Order Tribal Priority Window Entity Eligibility Rules over Hawaiian Home Lands.

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<sup>29</sup> 47 CFR § 1.925(b)(3)(ii).

<sup>30</sup> See HHCA, Section 202.

<sup>31</sup> Haw. Const. art. XII, § 1 and 3.

## Exhibit 1

### **MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding (“MOU”) is entered into by and between:

#### **Department of Hawaiian Home Lands (“DHHL”)**

The Department of Hawaiian Home Lands is governed by the Hawaiian Homes Commission Act of 1920, enacted by the U.S. Congress to protect and improve the lives of native Hawaiians. The act created a Hawaiian Homes Commission to administer certain public lands, called Hawaiian home lands, for homesteads. The Act was incorporated as a provision in the State Constitution in 1959 when Hawai‘i was granted statehood. Responsibility for the Commission and the Hawaiian home lands was transferred to the State at that time. Except for provisions that increase benefits to lessees or relate to administration of the Act, the law can be amended only with the consent of Congress. The primary responsibilities of the Department of Hawaiian Home Lands are to serve its beneficiaries and to manage its extensive land trust. The land trust consists of over 200,000 acres on the islands of Hawai‘i, Maui, Moloka‘i, Lāna‘i, O‘ahu, and Kaua‘i.

#### **Office of Hawaiian Affairs (“OHA”)**

OHA is established by the State Constitution as a separate state entity independent of the executive branch of the State of Hawai‘i. OHA is governed by a Board of Trustees made up of nine members who are democratically elected by the citizens of Hawai‘i and set policy for the agency. OHA is administered by a Chief Executive Officer who is appointed by the Board of Trustees. To fulfill their mandates and achieve their vision and mission, OHA coordinates and collaborates with various organizations to work towards the betterment of the Hawaiian people.

#### **Department of Business, Economic Development, and Tourism (“DBEDT”)**

DBEDT’s mission is to achieve a Hawai‘i economy that embraces innovation and is globally competitive, dynamic and productive, providing opportunities for all Hawai‘i’s citizens. Through its attached agencies, DBEDT also fosters planned community development, creates affordable workforce housing units in high-quality living environments, and promotes innovation sector job growth.

#### **A. Purpose.**

The purpose of this MOU is to memorialize the parties’ support for the DHHL’s intent to apply for and deploy the infrastructure to make the 2.5GHz broadband spectrum available to beneficiaries and lessees on Hawaiian Home Lands.

#### **B. Roles and Responsibilities.**

The parties offer their support for the DHHL and acknowledge that the DHHL is the singular entity best suited to request and apply for the spectrum license on behalf of native Hawaiians residing on Hawaiian Home Lands.

If the Petition for Waiver is granted, the parties agree to support the DHHL in its application for the spectrum license. This MOU does not create any legal obligation for the parties to provide resources or perform.

Should the DHHL be successful in its application for the spectrum license, the parties will discuss the promulgation of a Memorandum of Agreement ("MOA") that establishes further roles and responsibilities related the deployment of infrastructure related to the license.

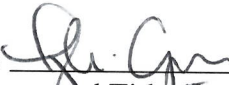
**C. Timeframe.**

This MOU shall commence on January 14, 2020 and shall terminate upon any of the following triggering events, whichever occurs first:


- 1) Denial of the Petition for Waiver;
- 2) Denial of the Application for a License to the 2.5GHz Spectrum;
- 3) Promulgation of a MOA related to the management and operation of infrastructure associated with the deployment of the spectrum license.

This Memorandum of Understanding is the complete agreement between and may be amended only by written agreement signed by each of the parties involved.


Department of Hawaiian Home Lands Authorized Official:

Signature:   
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