

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

August 9, 2013

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Hawaii & Oahu

After-the-Fact Consent to: (a) Sublease under General Lease No. S-4130, Hawaiian Telcom, Inc., Sublessor, to Cellco Partnership d/b/a Verizon Wireless, Sublessee, Humuula, North Hilo, Hawaii, Tax Map Key: (3) 3-9-02: pors.; (b) Sublease and Assignments of Sublease under General Lease No. S-4588, Hawaiian Telcom, Inc., Sublessor, to Clear Wireless LLC, Sublessee, Kalawahine and Opu, Honolulu, Oahu, Tax Map Key: (1) 2-5-19: pors.; (c) Sublease under General Lease No. S-4588, Hawaiian Telcom, Inc., Sublessor, Hochman Hawaii-Three, Inc., Sublessee, Kalawahine and Opu, Honolulu, Oahu, Tax Map Key: (1) 2-5-19: pors.; and (d) Sublease under General Lease No. S-4614, Hawaiian Telcom, Inc., Sublessor, to T-Mobile West LLC (fka Western PCS II Corporation), Sublessee, Humuula, North Hilo, Hawaii, Tax Map Key: (3) 3-8-01: pors. 1 & 10

APPLICANT:

Hawaiian Telcom, Inc., Sublessor, to: (a) Verizon Wireless, (b) Clear Wireless LLC (via mesne assignments of sublease), (c) Hochman Hawaii-Three, Inc., and (d) T-Mobile West LLC (fka Western PCS II Corporation), Sublessees

LEGAL REFERENCE:

Section 171-6, -36(a)(6), Hawaii Revised Statutes, as amended.

TABLE 1: LOCATION/ TAX MAP KEY/ AREA/ ANNUAL RENT/ TERM OF LEASE:

GL No.	Location	Tax Map Key:	Area*	Annual Rent	Term
S-4130	Humuula, North Hilo, Hawaii	(3) 3-9-02: pors.	1.047 acres Exhibit A	\$21,000	01/01/68-12/31/22**
S-4588	Kalawahine and Opu, Honolulu, Oahu	(1) 2-5-19: pors.	56,653 sf Exhibit B	26,600	06/06/73-06/05/38
S-4614	Humuula, North Hilo, Hawaii	(3) 3-8-01: pors. 1 & 10	7,500 sf Exhibit C	18,250	12/01/77-11/30/42
			Total:	\$65,850	

*The areas shown include the facility sites as well as appurtenant easements and access roads, where applicable. Refer to the exhibit letters referenced in this column for maps of the lease sites (attached).

**For General Lease S-4130, the termination date set forth in the lease is incorrect. The correct date is shown in this column. The discrepancy will require a lease amendment and is addressed in a companion submittal at today’s meeting.

TABLE 2: TRUST LAND STATUS/ CHARACTER OF USE/ RENTAL REOPENINGS:

GL No.	Trust Land Status***	Lease Character of Use	Rental Reopenings	
			Last	Next
S-4130	Section 5(b) DHHL: No	Microwave radio station and other radio communications purposes	01/01/13	N/A
S-4588	Section 5(b) DHHL: No	Maintenance and operation of radio-telephone transmission facilities purposes	06/06/98	06/06/18
S-4614	Section 5(b) DHHL: No	Microwave radio relay station site purposes	12/01/12	12/01/22

*** “Section 5(b)” refers to Section 5(b) lands of the Hawaii Admission Act. “DHHL: No” means the lease premises are not former sugar cane lands, and DHHL is therefore not entitled to 30% of the revenues as provided for under the Hawaii State Constitution

TABLE 3: SUBLESSEE/ SUBLEASE CHARACTER OF USE/ RENTAL/ TERM:

GL No.	Sublessee	Sublease Character of Use	Rental	Term
S-4130	Cellco Partnership, d/b/a Verizon Wireless	Cellular communications purposes	\$17,400	10/01/08 – 09/30/18
S-4588	Clear Wireless LLC	Cellular communications purposes	32,064	10/15/07 – 10/14/17
	Hochman Hawaii-Three,	Cellular communications purposes	21,576	11/01/11 – 10/31/21

GL No.	Sublessee	Sublease Character of Use	Rental	Term
	Inc.			
S-4614	T-Mobile West LLC	Cellular communications purposes	14,544 (annualized)	Month-to-month
		Total:	\$85,584	

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

From the date of the Board action going forward, staff recommends that HTI pay to the State as additional rent 30% of the gross revenues received for the first sublease under each lease, 40% of the gross revenues for the second sublease under each lease, and 50% of the gross revenues for the third and subsequent subleases under each lease.

DCCA VERIFICATION:

SUBLESSOR HAWAIIAN TELCOM, INC.:

Place of business registration confirmed: YES X NO __
 Registered business name confirmed: YES X NO __
 Good standing confirmed: YES X NO __

SUBLESSEE CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS:

Place of business registration confirmed: YES X NO __
 Registered business name confirmed: YES X NO __
 Good standing confirmed: YES X NO __

SUBLESSEE CLEAR WIRELESS LLC:

Place of business registration confirmed: YES X NO __
 Registered business name confirmed: YES X NO __
 Good standing confirmed: YES X NO __

SUBLESSEE HOCHMAN HAWAII-THREE, INC.:

Place of business registration confirmed: YES X NO __
 Registered business name confirmed: YES X NO __
 Good standing confirmed: YES X NO __

SUBLESSEE T-MOBILE WEST LLC:

Place of business registration confirmed: YES X NO __
 Registered business name confirmed: YES X NO __
 Good standing confirmed: YES X NO __

REMARKS:

The subject leases were issued to Hawaiian Telephone Company by direct negotiation in the 1960s and '70s for communications purposes (the specific character of use is indicated in Table 2 above). Hawaiian Telephone Company had a number of name changes over the years and is now known as Hawaiian Telcom, Inc. (HTI). HTI requests

the consent of the Board of Land and Natural Resources, after-the-fact, to the four subleases and for the uses indicated in Table 3 above.

Although HTI did bring a number of requests to the Board in prior years for consents to licenses of the lease premises, staff can find no record of requests relating to most of the current subleases.¹ Details are provided as to each lease as follows:

General Lease No. S-4130

At its meeting of January 22, 1999, Item D-23, as amended, the Board consented to a 59-month license from HTI to GTE Wireless of the Pacific, Inc. The annual lease rental at the time was \$12,700, and the annual license rental was \$10,800. The staff appraiser determined that no sandwich rent was due to the State. The sublease expired by its own terms on December 21, 2004.

On March 2, 2009, HTI entered into a license agreement with Cellco Partnership, d/b/a Verizon Wireless (Cellco), with an effective date of October 1, 2008. The annual lease rent at the time was \$12,700, and the sublease rent payable by Cellco was \$16,705.20. The current annual lease rent is \$21,000, and the current annual sublease rent is \$17,400. The initial sublease term is 5 years expiring November 30, 2013, and Cellco has an option to extend for one 5-year period. Staff only recently received information regarding the existence of this sublease, and brings it to the Board now for after-the-fact approval. Staff is including a recommendation that the Board consent to both the current license term and the extended term in the event Cellco exercises the extension option.

General Lease No. S-4588

At its meeting of September 24, 1999, Item D-12, the Board approved a 5-year license to GTE Media Ventures Incorporated, commencing on December 15, 1997 and expiring on November 14, 2002, with one 5-year option to extend. The annual lease rental at the time was \$26,600. The sublease rent for the first year of the sublease term was \$9,000, but increased incrementally each year thereafter. The staff appraiser determined that sandwich rents were due to the State. For the first year of the sublease, the appraiser calculated that the sandwich rent was \$5,070.73, or approximately 56% of the annual sublease rent.²

¹ For purposes of this submittal, the terms “license” and “sublease” are used interchangeably. Staff views a license agreement as a type of sublease.

² There was another sublease under General Lease No. S-4588 (as well as a sublease under General Lease No. S-4614) that received the necessary approval. On November 6, 2003, the Chairperson approved a sublease to Weblink Wireless I, L.P., Inc. (Weblink). The sublease term was December 12, 2002 to December 11, 2003, and the annual sublease rent was \$4,800. Under the Board’s sublease rent participation policy as interpreted at the time, no sandwich rent was found to be due. On October 5, 2004, the Chairperson approved the change of the sublessee from Weblink to Metrocall, Inc., and the amendment of the sublease end date to May 19, 2003. This sublease is no longer in effect.

GTE Media Ventures Incorporated subsequently changed its name to Verizon Media Ventures Inc. Without notice to the Board, the December 15, 1997 license agreement was amended on July 10, 2000 to include additional license space and increase the sublease rent to \$18,450 per year. In 2001, also without notice to the Board, Verizon Media Ventures Inc. sold its assets (including the December 15, 1997 license agreement) to Craig Wireless Honolulu Inc. (Craig). By letter dated May 21, 2002, Craig exercised the extension option under the license agreement.

In 2005 (again without notice to the Board), Craig sold all of its company stock to Fixed Wireless Holdings, LLC (FWH) who thereby purported to become the licensee under the December 15, 1997 license agreement. In 2007 (again without notice to the Board), HTI granted Clearwire Corporation, who apparently was an affiliate of or successor to FWH, a renewal of the license agreement for an initial term of 5 years at an annual rent of \$26,626.56, plus a 5-year extension with a 15% rent increase for the extended term. The renewal became effective October 15, 2007. Clearwire Corporation subsequently became known as Clear Wireless LLC (Clear Wireless). Staff only learned of the current license to Clear Wireless in 2013.

Also, HTI entered into a license with Hochman Hawaii-Three, Inc. (HHT) under this lease commencing on November 1, 2011. HTI applied for Board consent to this sublease in January 2012. The license term is for an initial 5 years, with one 5-year extension. The current sublease rent is \$21,576. Staff is including a recommendation that the Board consent to both the current license term and the extended term in the event HHT exercises the extension option.

General Lease No. S-4614

At its meeting of April 9, 1999, Item D-16, the Board consented to a 59-month license to Western PCS II Corporation (PCS). The annual lease rent at the time was \$1,080 and the initial annual sublease rent was \$9,000. The staff appraiser calculated that an annual sandwich profit of \$5,131.80 was due on the sublease rent.³ A scheduled rental reopening occurred on December 1, 2002, which raised the annual lease rent to \$18,700.⁴

By memorandum dated October 10, 2003, the Chairperson found that the application of the Board's sublease rent participation policy of May 26, 2000, Item D-24, as amended January 26, 2001, Item D-8, superseded the Board's prior action of April 9, 1999 and that no sandwich rent was therefore due to the State. Accordingly, HTI stopped paying sandwich rent.

Although the April 9, 1999 Board action approved only a 59-month term of the sublease, the license agreement gave PCS an option to extend the license for a period of 5 years.

³ The sandwich profit, \$5,131.80, was approximately 57% of the annual sublease rent of \$9,000.

⁴ A December 1, 2012 rental reopening decreased the rent to \$18,250, the current rent indicated in Table 1 above.

By letter dated August 6, 2003, the licensee exercised the extension option with the result that the sublease ran until January 16, 2009. Since January 17, 2009, T-Mobile West LLC (fka Western PCS II Corporation) has continued as a licensee on the premises on a month-to-month basis. Staff only received information on the extensions in 2013 and therefore brings them to the Board for after-the-fact approval.⁵

Reevaluation of Sublease Rent Participation

After the adoption of the Board's sublease rent participation policy in 2000/2001, staff interpreted the policy to preclude sharing in sublease rents when the improvements were owned by the lessee who paid fair market rent, unless the right to participate in sublease rents and the method of calculation were specifically stated in the lease. However, the Board's approval of the policy always included the caveat that it was not intended to be rigidly applied, and that staff should look at the facts of each case to determine whether participating in sublease rents is warranted. The Board stated:

This policy shall apply to leases under the direct management of the Land Division. **Furthermore, the following formulae generally reflect the intent of the Board regarding the calculation of sublease sandwich profit and shall serve as guidelines in such calculation. The board authorizes staff to use their discretion in representing the State's interest in applying these formulae to address the varying sublease arrangements that may not fit neatly into the formulae.**

Beginning in 2011, staff began to take a closer look at subleases of communications towers in particular, especially when it appeared the initial costs of the construction of the facility had been largely amortized and the subleases were becoming a revenue generator for the lessee. For example, at its meeting of October 28, 2011, Item D-27, the Board approved staff's recommendation for the State to receive 50% of the sandwich profits generated in a sublease/license situation under General Lease No. S-4223, which was issued in 1969 for microwave station and other radio communication facilities purposes. In that case, the ground rent under General Lease No. S-4223 was \$31,400 per year, and the sublease rent collected by the lessee was \$33,153.57 per year. The staff submittal noted that the improvements constructed by the lessee had largely been depreciated over the course of approximately 40 years since the issuance of the lease. The Board approved the State's participation in sublease rents at the rate of 50% even though the right to participation and method of calculation were not specifically stated in the lease.

At its meeting of August 24, 2012, Item D-14, the Board refined its sublease rent participation policy to encourage staff to continue to evaluate each sublease on its facts. Specifically, the Board directed that:

If the lessee subleases improvements not owned by the State, the Board

⁵ Additionally, the Board approved another sublease under General Lease No. S-4614 that has expired by its terms. See footnote 2 above for details.

shall not receive any portion of sublease rents from subleasing improved space unless: (i) that right and method of calculation are specifically stated in the lease, or (ii) participation in sublease rents is warranted considering the age of the improvements (including but not limited to the extent to which the improvements have been depreciated or amortized), lessee's expenditures to maintain the same in relation to sublease revenues, and the extent to which the lessee actually occupies and uses the lease premises for its own business.

Application of the Policy to the HTI Subleases

In the present case, the right to sublease rent participation is stated in the leases, but the method of calculation is not. In each lease, HTI constructed the towers and related facilities many years ago, and the costs of construction have largely been amortized.⁶ HTI does incur expenses annually to maintain the sites, and occupies and uses the lease premises for its own business.

The Board has the authority to require HTI to account for rents received under the subleases to determine whether any adjustment to lease rent is warranted.⁷ Staff is recommending that additional rent in the amount of a one-time payment of \$1,000 per lease be required as a condition to the after-the-fact consents to sublease due to HTI's delay in notifying the Board of the existence of three of the subleases.

Furthermore, going forward from today's date, staff recommends that HTI pay a set percentage of the gross rent received under each lease to the State as additional rent. Staff has researched cell tower leasing issues and has found that landlords generally share in sublease rents at rates between 25-50% of the gross rents paid by the sublessee. Staff confirmed with the Army that its standard cell tower lease form provides for a 40% share of the first sublease rent, and 50% of the second and subsequent subleases. Staff's recommendation is that the State share in the gross revenues from these subleases at the rate of 30% for the first sublease under each lease, 40% for the second sublease under each lease, and 50% for the third and subsequent subleases under each lease. As shown in the table below, this would result in \$27,832 in additional annual rent to the State for the subleases addressed in this submittal.

⁶ Construction costs are shown in the companion submittal on assignments at today's Board meeting.

⁷ The Board has authority to "[s]et, charge, and collect additional rentals for the unauthorized use of public lands by a lessee, licensee, grantee, or permittee who is in violation of any term or condition of a lease, license, easement, or revocable permit, retroactive to the date of the occurrence of the violation. Such amounts shall be considered delinquent payments and shall be subject to interest and service charges as provided in [the preceding paragraph]." HRS Section 171-6(14).

TABLE 4 – SUBLEASE RENT PARTICIPATION

GL No.	Sublessee	Term	Annual Sublease Rent	State % Share	Add'l Rent to State (rounded)
S-4130	Cellco Partnership, d/b/a Verizon Wireless	10/01/08 – 09/30/13	\$17,400	30%	\$5,220
S-4588	Clear Wireless LLC	10/15/07 – 10/14/17	32,064	30%	9,619
	Hochman Hawaii-Three, Inc.	11/01/11 – 10/31/21	21,576	40%	8,630
S-4614	T-Mobile West LLC	Month-to-month	14,544	30%	4,363
		Total:	\$85,584		\$27,832

As discussed in the companion submittal before the Board today, HTI is seeking consent to the assignment of the subject leases (and five others) to affiliates of Global Tower Partners (GTP), a communications tower operator. If the assignment is approved, GTP will be responsible for paying the additional rent received on the subleases.

HTI is compliant with all lease terms and conditions of the leases (including rent, insurance, performance bond), with the exception of the unauthorized subleases that are the subject of this request.

The status of rental reopenings of the leases is as shown in Table 2 above. There are no outstanding rental reopening issues.

No agency or community comments were solicited as there is no change in use under any of the leases.

RECOMMENDATION:

That the Board:

- A. Consent after-the-fact to: (a) Sublease under General Lease No. S-4130, Hawaiian Telcom, Inc., Sublessor, to Cellco Partnership d/b/a Verizon Wireless, Sublessee; (b) Sublease and Assignments of Sublease under General Lease No. S-4588, Hawaiian Telcom, Inc., Sublessor, to Clear Wireless LLC, Sublessee; (c) Sublease under General Lease No. S-4588, Hawaiian Telcom, Inc., Sublessor, Hochman Hawaii-Three, Inc., Sublessee; and (d) Sublease under General Lease No. S-4614, Hawaiian Telcom, Inc., Sublessor, to T-Mobile West LLC (fka Western PCS II Corporation), Sublessee, subject to the following:

- 1. The standard terms and conditions of the most current consent to sublease and

consent to assignment of sublease forms, as may be amended from time to time;

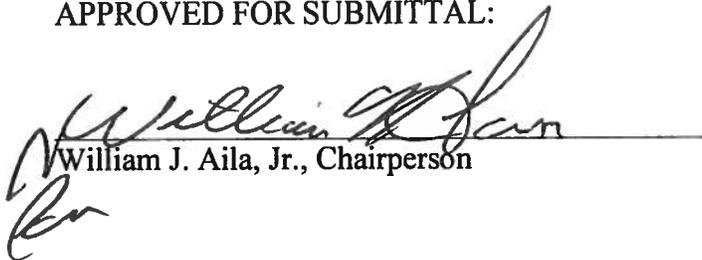
2. Hawaiian Telcom, Inc. shall make a one-time payment of retroactive rent in the amount of \$1,000 per lease (or a total of \$3,000 for three leases) prior to the Chairperson's execution of the consent documents;
3. Review and approval by the Department of the Attorney General; and
4. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

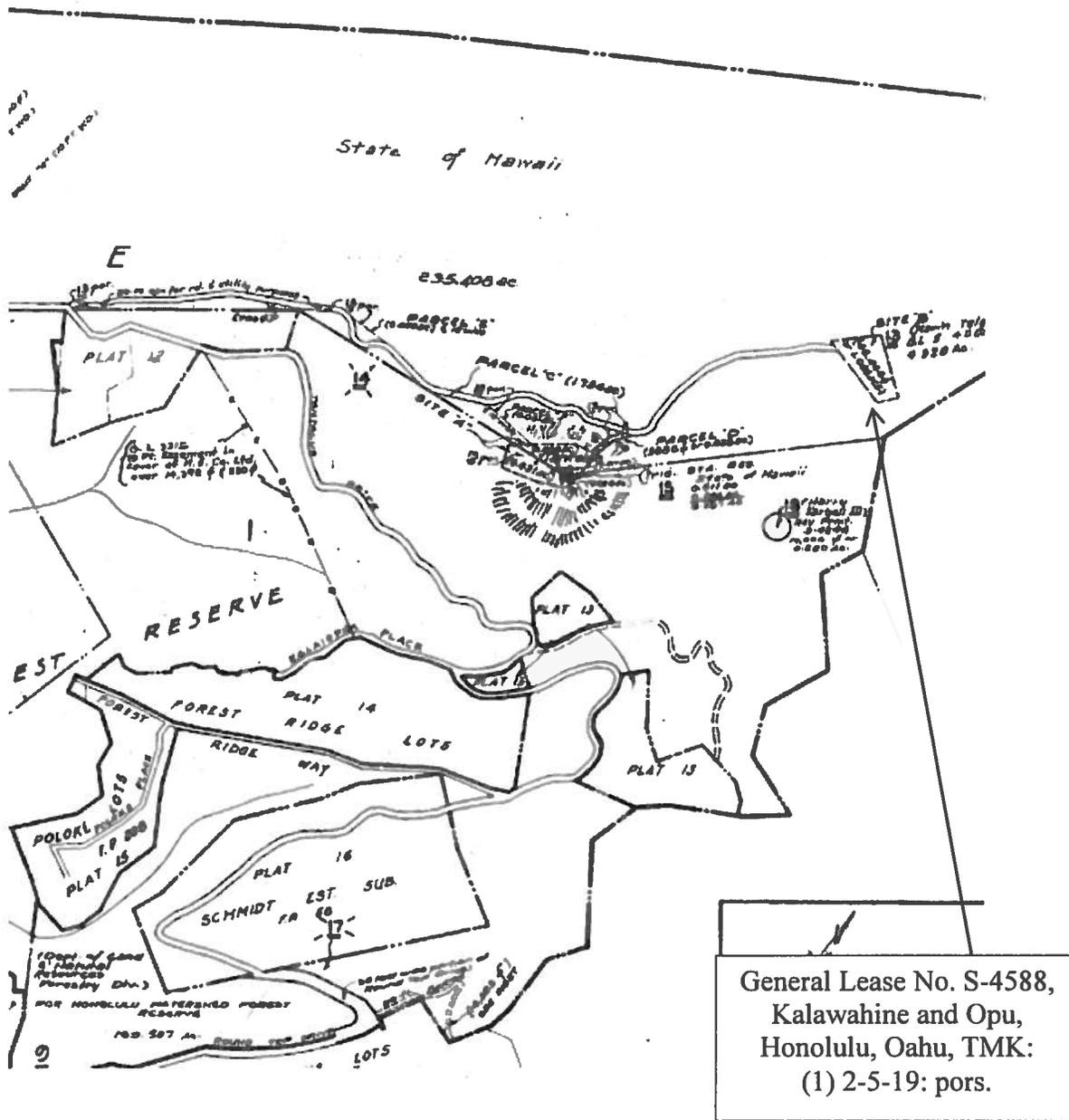
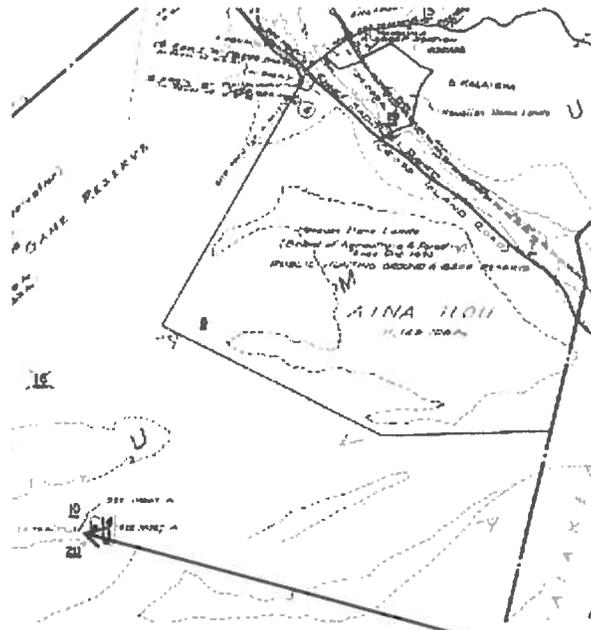


EXHIBIT B



General Lease No. S-4614,
Humuula, North Hilo,
Hawaii, TMK: (3) 3-8-01: 1
& 10 pors.

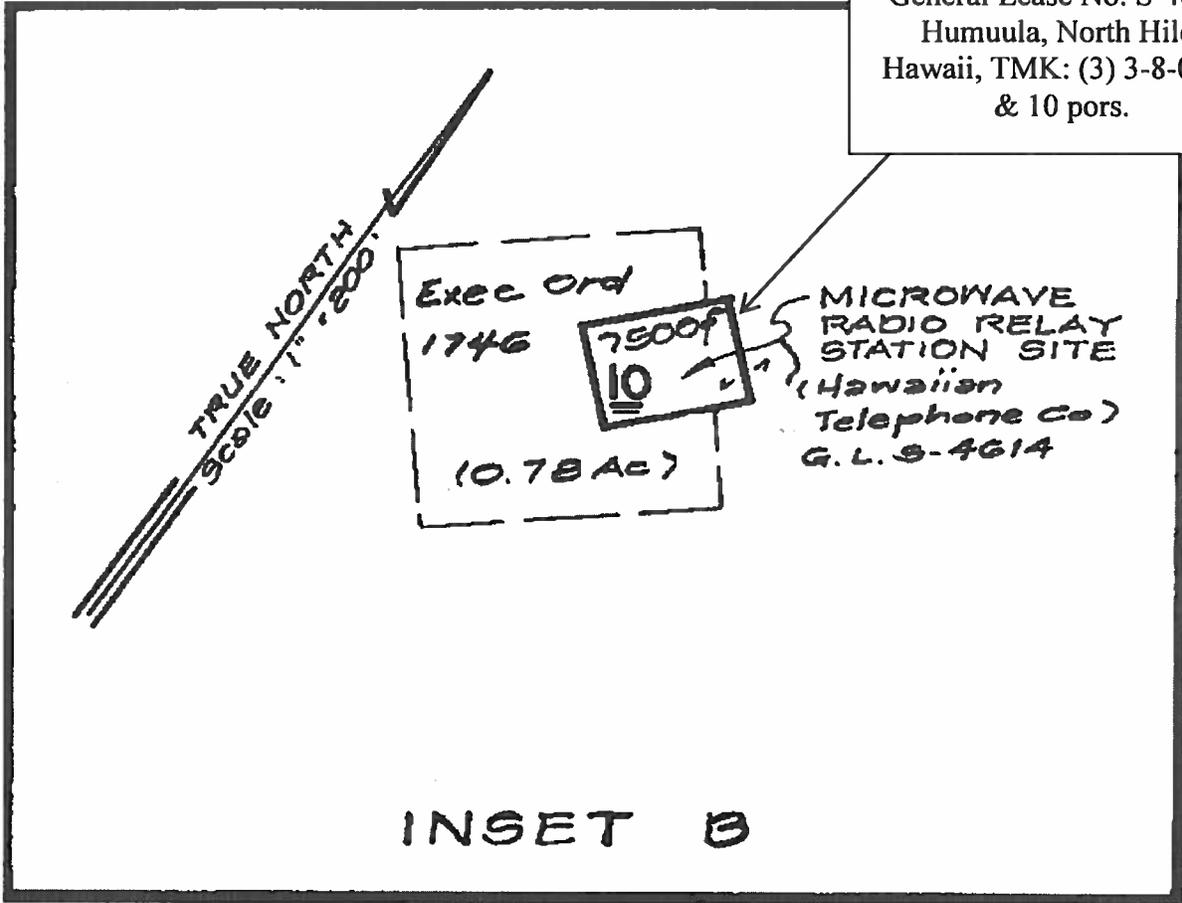


EXHIBIT C