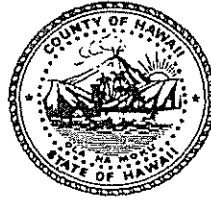


Harry Kim  
Mayor



Geraldine M. Giffin  
Chairperson

## County of Hawaii

### PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720  
(808) 961-8288 • Fax (808) 961-8742

CERTIFIED MAIL

7000 0600 0024 2904 3852

JUL 7 2002

Donna Y. L. Leong, Esq.  
Cades Schutte Fleming & Wright  
1000 Bishop Street, 10<sup>th</sup> Floor  
Honolulu, HI 96813

Dear Ms. Leong:

Special Management Area Use Permit Application (SMA 00-16)

Special Permit Application (SPP 00-043)

Applicant: AT&T Wireless Service of Hawaii, Inc. through it Agent,  
USCOC of Hawaii, Inc.

Request: To Allow A 140-Foot Telecommunication Lattice

Tower, Antennas, Accessory Equipment Building And Accessory Structure

Tax Map Key: 8-1-9:Portion of 17

The Planning Commission at its duly held public hearing on June 7, 2002, voted to approve the above-referenced applications. Special Management Area (SMA) Use Permit No. 423 (SMA 00-16) and Special Permit No. 1161 (SPP 00-043) are hereby issued to allow a 140-foot telecommunication lattice tower, antennas, accessory equipment building and accessory structures on approximately 3,600 square feet of land in the State Land Use Agricultural District. The property is located along the south side of Ka'awaloa Road approximately 700 feet west (makai) of Nāpō'opo'o Road at the 1,200-foot elevation, Ka'awaloa, South Kona, Hawai'i.

This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Attached is a certified copy of the Findings of Fact, Conclusions of Law, and Decision and Order adopted by the Planning Commission for the subject property.

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021043

JUL 18 2002

Donna Y. L. Leong, Esq.  
Page 2

Should you have questions, please contact Alice Kawaha of the Planning Department at 961-8288 or Daryn Arai of the Kona office at 327-3510.

Sincerely,



Geraldine M. Giffin, Chairman  
Planning Commission

Attachment

cc/att: Planning Department – Kona

Mr. Jerry Erickson

Robert Kim, Esq. (Certified Mail – 7000 0600 0024 2904 3845)

Mr. Lawrence Ford (Certified Mail - 7000 0600 0024 2904 3838)

BEFORE THE PLANNING COMMISSION

OF THE COUNTY OF HAWAII, STATE OF HAWAII

In the Matter of the Special Management  
Area and Special Permit Applications of

AT&T WIRELESS SERVICES OF  
HAWAII, INC., through its agent, USCOC  
OF FLORIDA RSA #7, INC., fka USCOC  
OF HAWAII 3, INC., dba UNITED  
STATES CELLULAR.  
(TMK (3) 8-1-9:17)

SMA NO. 00-16  
SPP NO. 00-043

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW AND  
APPROVAL OF SPECIAL MANAGEMENT  
AREA USE PERMIT APPLICATION SMA NO.  
00-16 AND SPECIAL PERMIT APPLICATION  
SPP NO. 00-043; RECOMMENDATION

**Hearing:**

Date: June 7, 2002

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND  
APPROVAL OF SPECIAL MANAGEMENT AREA USE PERMIT  
APPLICATION SMA NO. 00-16 AND SPECIAL PERMIT  
APPLICATION SPP NO. 00-043; RECOMMENDATION**

APPLICANT USCOC OF HAWAII 3, INC., dba UNITED STATES CELLULAR, nka USCOC OF FLORIDA RSA #7, INC. ("US Cellular"), as agent of AT&T WIRELESS SERVICES OF HAWAII, INC.<sup>1</sup> ("Cellular"), is seeking a special management area ("SMA") use permit under Chapter 205A of the Hawai'i Revised Statutes ("HRS") and a special permit under HRS Chapter 205 for a telecommunication lattice tower and antennae, an appurtenant prefabricated communication equipment shelter, a security fence, appurtenant structures and accessory improvements on 3,600 square foot of land area, located at Ka'awaloa, District of South Kona, Island and County of Hawai'i, State of Hawai'i (the "Project"). Coverage includes

<sup>1</sup> On August 1, 2000, AT&T Wireless Services of Hawaii, Inc. completed the purchase of certain US Cellular assets, including the subject Project. As of that date, US Cellular has acted as the agent of AT&T for purposes of this application.

Māmalahoa Highway from Captain Cook to Kēōkea and an open ocean area south of Miloli'i of about 934 square miles. US Cellular and Cellular are jointly be referred to as "Applicant."

At its meeting held on November 30, 2000, the Hawai'i County Planning Commission ("Commission") granted standing to intervene to Lawrence M. Ford, Brenda Ford, Brian Lievens, Andrea Lievens, Mary Day Laird, George A. Schattauer, Margaret Schattauer, Eric Curtis, Gunnar Freivalds, Barbara Allen, Nicholas Ransom, Caroline Mae Smith, and Captain Cook (Royal Hawaiian) Co., Ltd. (collectively, the "Intervenors") in the contested case hearing regarding the Project.

On January 14, 2002 and March 5, 2002, hearing officer Sherry P. Broder reviewed evidence, and heard testimony in a contested case hearing conducted at the West Hawai'i Mayor's Office, in Kailua-Kona, Hawai'i and a site visit on March 5, 2002. Donna Y. L. Leong and Kelly G. LaPorte appeared for Applicant; Deputy Corporation Counsel Lester J. Ishado appeared for the Hawai'i County Planning Department (the "Department"); Robert D. S. Kim appeared for Captain Cook (Royal Hawaiian) Co., Ltd.; and Lawrence M. Ford appeared pro se and on behalf of the remaining Intervenors at the hearing.

Hearing Officer Sherry P. Broder reviewed the respective Statement of Issues, Written Testimonies and Exhibits filed by Applicant, the Department, and the Intervenors on October 9, 2001; the Statement of Issues, Witness List, and Written Testimony filed separately by Captain Cook (Royal Hawaiian) Co., Ltd. on November 11, 2001; and the respective Rebuttal Statement of Issues and Rebuttal Exhibits filed by Cellular and the Intervenors on November 19, 2001.

On January 14, 2002, Norman Newkirk, a Radio Frequency Engineer for US Cellular from April 1997 to December 2000, testified in person as an expert for Applicant. Certain issues were raised and the parties agreed that Norman Newkirk could submit supplemental

written testimony to provide his curriculum vitae, original of Exhibit CC and verification and explanation of the information contained therein, which was done on January 28, 2002. Jerry Erickson also submitted supplemental testimony on the issues of co-locations and stealth technology dated January 28, 2002, which was admitted by the Hearing Officer.

Jerry Erickson, Network Operations Manager for the Island of Hawai'i for US Cellular from 1998 through August 1, 2000, was unable to testify in person on January 14, 2002. The parties all agreed that Applicant could submit the supplemental testimony of Jerry Erickson in written form, which was done on January 28, 2002. All supplemental testimony, including the issue of difficulties with land lines, by Jerry Erickson was admitted.

Mr. Ford submitted written testimony about the reliability of alternate land line routing in rebuttal to Jerry Erickson's testimony, which was admitted by the Hearing Officer.

Hearing Officer Sherry P. Broder admitted Captain Cook's Exhibit G of the map with historic sites from Kealakekua Bay to Pu'uhonua and took judicial notice of those sites. Captain Cook called James Medeiros, Jr., President of Protect Keopuka 'Ohana, a lineal and cultural descendant of the Kealakekua area, to testify on Native Hawaiian ancient burials, cultural and gathering practices in the vicinity of the project. Hearing Officer Sherry P. Broder allowed Applicant to submit the supplemental written testimony of Robert B. Reckman, Ph.D. for the limited purpose to rebut the testimony of James Medeiros, Jr. from the January 14, 2002 hearing.

Walter John Kelly, Conservation Coordinator for Keep Kealakekua Wild which is associated with the Sierra Club was called as a witness by Captain Cook and testified that he heard testimony from another hearing that during construction in February 1993 cement was pouring into a lava tube beneath the project site and the lava tube had to be severed.

Hearing Officer Sherry P. Broder allowed Applicant to submit the written testimony of J. M. Bennett, former Senior Network Field Engineer for Applicant on the Island of Hawai'i from July 1991 to October 1996 dated February 8, 2002. Mr. Bennett was present at the construction of the proposed tower in February 1993, for the limited purpose to rebut the testimony that there were lava tubes under the surface of the proposed tower.

The County submitted the Nextel Background Report and letter approving their request for a special permit for a stealth tower.

Pursuant to a court order entered January 23, 2001 in Ford v. AT&T Wireless Services of Hawaii, Inc., et al., Civil No. 00-1-0204K, Circuit Court of the Third Circuit of the State of Hawai'i, Judge Ronald Ibarra ordered that these proceedings "should be conducted as if no tower has been erected. However, if Ford or other non-AT&T parties or witnesses in [these proceedings] refer to the fact that the cellular tower has been erected, AT&T may introduce evidence and argument regarding the existing tower." At the commencement of the hearing on January 14, 2002, Intervenor Captain Cook requested a site visit and stated that the tower was a "built" and "operating." Thus since a party to these proceedings referred to the existing tower, the Hearing Officer Sherry P. Broder ruled that all parties could refer to an existing tower.

The Hearing Officer Sherry P. Broder and the parties conducted a site visit on March 5, 2002 and all the parties either agreed to the site visit or did not have an objection.

The Hearing Officer Sherry P. Broder, admitted all of the Parties' exhibits, affidavits and declarations into evidence and considered the testimony provided by the public and the Parties' witnesses at the hearings on January 14, 2002 and March 5, 2002; considered the entire record and file herein; and heard and considered the arguments of the Parties, and now therefore

the Hearing Officer Sherry P. Broder makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. The land that is the subject of these applications (the "Property") is located within the designated SMA. The Property also lies in the State Land Use Agricultural District, is zoned A-5a (Agricultural) District by the County of Hawai'i ("County"), and is a portion of tax map key ("TMK") number (3) 8-1-9:17.
2. The Property is located on the *mauka* portion of a parcel of land owned by Wahi Pono LLC (the "Owner"). The parcel has a total of approximately 3.00 acres (130,680 square feet) of land. Owner's parcel is located in Ka'awaloa, District of South Kona, and lies on the western slope of Mauna Loa at an elevation of 1,200 feet. The subject parcel is designated as Orchard on the GP LUPAG map and as Unplanned on the Kona Regional Plan.
3. The property is located along the south side of Ka'awaloa Road approximately 300-700 feet *makai* (west) of Nāpō'opo'o Road, about 600 feet south of its intersection with Māmalahoa Highway (Highway 11), which is a county roadway between approximately the Captain Cook Police Station and Honalo. Nāpō'opo'o Road is also a county roadway and not a State highway. The Owner has granted a license in the Property to AT&T for the Project. The original owner of the Owner's parcel granted US Cellular a lease, which was assigned to AT&T as of August 1, 2000. That lease has been cancelled and AT&T will continue to use the Property under a grant of license. The remainder of the Owner's parcel is used as a tropical fruit orchard.
4. Access to the site is by an access easement over existing roads used by several adjoining lots from Nāpō'opo'o Road to the Property.

5. Intervenor's own properties in the vicinity of the Property.

6. HRS section 205A-27 designates "the authority" as the SMA authority that is empowered to carry out the objectives, policies and procedures of the SMA Law (HRS chapter 205A, Part II). For purposes of HRS chapter 205A, HRS section 205A-22 identifies the "authority" as "the county planning commission, except in counties where the county planning commission is advisory only[.]" Hawai'i County Charter section 6-4.3(d) empowers the Commission to "[c]onduct public hearings in every case prior to action on any matter upon which the commission is required by law . . . to act. . . . [and to] [p]erform such other related duties and functions as may be necessary or required pursuant to law[.]" Accordingly, US Cellular submitted an application for a SMA use permit to the Commission on August 28, 2000.

7. HRS section 205-6(a) and Hawai'i Administrative Rules ("HAR") section 15-15-95(b) authorize the Commission to permit "certain unusual and reasonable uses within [the State's] agricultural . . . districts other than those for which the district is classified." HRS section 205-6 delegates the authority to grant special permits to the Commission for proposals involving less than 15 acres of land. Because the Project involves approximately 3,600 square feet of land, which is less than 15 acres, US Cellular submitted an application for a special permit to the Commission on August 28, 2000.

8. By Decision and Order No. 17795 filed June 15, 2000, the Hawai'i Public Utilities Commission ("PUC") approved the expansion of AT&T's Certificate of Registration to include cellular telecommunications on the Island of Hawai'i. Cellular will use the Property for utility cellular and microwave telecommunications purposes.

9. Norman Newkirk, Radio Frequency Engineer for US Cellular, from April 1997 to December 2000, testified while he was a Radio Frequency Engineer it was his responsibility to



design and select cellular sites. Jerry Erickson, Network Operations Manager on the Island of Hawai'i for US Cellular from 1988 through August 1, 2000, and currently Systems Development Officer for AT&T Wireless Services of Hawaii testified. His duties included the development of and being responsibility for the operations of the cellular telecommunication facilities. Both explained how the cellular's island-wide system works and how tower sites, including the project site, are selected.

10. The Project forms an integral part of establishing Cellular's island-wide network, which attempts to provide continuous cellular telephone coverage to its customers in an orderly plan.

11. The proposed tower is 140 feet tall and is a free-standing, self-supporting, three-legged lattice structure on a concrete base. It is painted blue to minimize visual impacts. At the top of the proposed tower are a six-foot diameter grid dish and two antennae that are 9 feet long.

12. The microwave dish antenna is part of the "backbone" of Cellular's network that transmits and receives microwave transmissions to and from Cellular's Mobile Telephone Switching Office ("MTSO"), where all call routing occurs, calls are tracked, and commands are originated for handoffs from cell site to cell site.

13. A secondary purpose of the microwave backbone, which has not yet been achieved, is to provide a way to reroute the microwave frequency signals to the MTSO so that if one point in the backbone network is lost, the cellular traffic can be rerouted going in the opposite direction to the MTSO and using other cellular tower sites. This backup concept is called "redundancy." Redundancy would prevent the loss of service to an entire half of the island if one point in the backbone network is lost. This goal has not yet been achieved because the

backbone is not yet complete, and will be substantially hindered if the Project is not allowed.

14. Because of the microwave backbone that is able to function when land line telephone service is disrupted or lost, Cellular's network is used by Hawai'i's Civil Defense as part of its emergency reaction network and by the American Red Cross.

15. The testimony of Norman Newkirk established that the Kealakekua Tower alone would not adequately serve the area and that an additional tower in the Captain Cook area was needed.

16. This proposed tower, like the other towers in Cellular's network, has a low power radio frequency ("RF") transmitter that provides cellular telephone service within its coverage area or "cell." As a telephone user passes from one coverage area to the next, the call is passed automatically to the next cellular tower site. Because of the low power transmitters, the "handoff" from one coverage area to the next requires many cellular tower sites that are strategically located to achieve good quality performance.

17. It is very difficult to engineer a tower in Hawai'i because of the terrain. Hawai'i is what is referred to in the cellular industry as "terrain limited," which means that the RF signal in many areas is severely degraded or blocked because the many slopes and curves of the mountains and valleys, as well as the foliage, cause shadows or "eclipses," which block or interfere with the RF signal. As Hawai'i's terrain does not permit the type of coverage that can be achieved on flat land, it requires towers in numerous locations to minimize RF signal blockage.

18. The selection criteria for the proposed tower was based on the need to provide cellular service along Māmalahoa Highway (Highway 11) from the town of Captain Cook to

Kēōkea. Due to terrain restrictions, there was a limited area available for sites that would meet the technical criteria.

19. US Cellular considered six other sites, but rejected them for various reasons, including the fact that all of the other sites would have required higher towers, which would have been more visible from Māmalahoa Highway than the proposed tower at the Property. The other sites were additionally rejected because they could not meet setback requirements or because the property was not available for lease or license.

20. The Project site was selected for several reasons. It met the technical requirements, including setback requirements, and it was available for lease or license. Moreover, the Property is level and thus buildable, it is at a relatively high elevation (1,200 feet), and it is suitable for linkage to other Cellular network facilities by line-of-sight, thus permitting Cellular to provide more complete coverage through its island-wide system.

21. It is Cellular's policy to offer efficient service by providing maximum cellular coverage with a minimal number of towers. This practice reduces the impact on the community and the natural environment by minimizing the number of cellular towers, associated facilities, and access roads to the extent possible.

22. Cellular's policy is to permit co-location of other antennae on its towers as long as such co-location does not impair or compromise the operation of Cellular's or other users' improvements and existing facilities at the Project. However, no co-location has been requested.

23. The Property's location enables Cellular to provide mobile telephone service in the Captain Cook and South Kona areas and offers telephone service to residents who were previously unable to install telephones through land line systems due to the high cost of

extending poles and transmission lines. If the proposed tower site is not approved, there will be a significant gap in Cellular's coverage in the Captain Cook area.

24. This tower will provide service to fishermen and boaters south of Miloli'i, covering an open ocean area of approximately 934 square miles.

25. The proposed tower is designed to withstand wind speeds over 100 miles per hour, which exceeds the Uniform Building Code standard of 80 miles per hour.

26. An 8-foot by 20-foot prefabricated equipment shelter, which houses the ancillary communications equipment needed for the tower to function, is adjacent to the proposed tower.

27. The 3,600 square foot area for the proposed tower and equipment shelter is surrounded by a six-foot high chain link fence.

28. The only utility required is electricity, which is already available to the Owner's parcel.

29. Access to the site is by private access easements over roads from Nāpō'opo'o Road. Virtually no traffic will be generated by the operation of the proposed tower, as it is a low-maintenance, unmanned facility that is not continuously staffed. Except for maintenance and repair, the Project is self-operating. A Cellular employee will periodically monitor the tower, antennae and its appurtenant equipment. There are no long-term traffic impacts resulting from this Project.

30. According to the State Department of Agriculture, the Land Study Bureau Overall Master Productivity Rating is "C" or "Fair." The Property is classified as "Other Important" on the Agricultural Lands of Importance to the State of Hawai'i map, which means that, although these lands are important to agriculture, they exhibit properties, such as seasonal wetness,

erodibility, limited rooting zone, slope, flooding, or droughtiness that exclude them from the "Prime" or "Unique" categories.

31. The vegetation of the site and general area consists of orchards of lychee and cherimoya and weedy vegetation, including guinea grass. According to the Botanical Survey Report dated March 30, 2000 prepared by Phillip Conley, there are no endangered or threatened species of plants or animals inhabiting the subject or surrounding properties.

32. The lower portion of the tower will not be visible from Nāpō'opo'o Road because it is situated in an orchard of trees which may reach 30 feet at maturity and behind a rather large building constructed by the Owner on the Owner's parcel, *mauka* of the Project site. The proximity of two existing tall trees will also minimize visual impacts. The tower will not be visible from the Ka'awaloa peninsula near Captain Cook's monument, the Hikiau heiau in the Kealahou State Historic Park, or Manini Beach just outside the park. According to the County of Hawai'i Planning Department's Background Report dated November 24, 2000, view plan profiles submitted by US Cellular in 1992 showed that the proposed tower is either not visible at all or barely visible from various historic/scenic locations in the vicinity of the tower. The site visit confirmed that the tower is visible to those residents in the immediate vicinity but is not visible at all or visibility is very slight from surrounding historic and scenic areas.

33. According to a report dated October 13, 1992 from Don Hibbard, the then-administrator of the State Historic Preservation Division of the Department of Land and Natural Resources for the State of Hawai'i, the Project "will have 'no effect' on historic sites."

34. According to the Archaeological Report dated November 15, 1999 prepared by Robert B. Rechtman, Ph.D., there are no archaeological or historic sites either on the Property or in the immediate vicinity, and the Project does not adversely affect any historic properties.

According to the supplemental written testimony of Robert B. Rechtman, Ph.D. dated February 9, 2002, there are no historic regional trails that cross the Property or in the immediate vicinity. The proposed tower is not situated in an area where there are any identified valued cultural historic or natural resources and after a review of several archaeological studies of the area of the proposed cell tower makai to Pali dating back to 1989, there are no Hawaiian burial sites within a quarter mile of the proposed tower location.

35. According to written testimony of J. M. Bennett dated February 8, 2020, who, as the senior network field engineer for Applicant, was involved in the original construction in February 1993. He testified that although the soils report prepared by an engineering report indicated the possibility of voids or clinkers under the proposed tower site, upon excavation, he witnessed no significant voids, nor were any significant voids reported to him and no lava tubes were found.

36. There are no known drainage channels within the Property and the area is designated "X" or outside the 500-year flood plain by the FIRM maps. Thus, the Project does not block any known drainage channels.

37. The General Plan Land Use Pattern Allocation Guide Map designates the area as "Orchard."

38. There is no county community plan or design plan to which the Property is subject. Although the Property is covered by the Kona Regional Plan, which was drafted in 1982, that plan was never adopted as an ordinance by the County Council, and nothing in that Plan prohibits the Project.

39. Only electrical service is required for the proposed Project, and this is available onsite. Police, fire, and emergency services are available through the fire station and police

sub-station at Captain Cook, which are one mile away.

40. County zoning for the immediately adjacent properties is Agriculture with either a two-acre minimum lot size (A2-a) or a five-acre minimum lot size (A5-a). Nearby properties either are developed with houses and accessory structures, are planted into orchards, or are vacant.

41. The Telecommunications Act of 1996, Section 704, which amended portions of the 1934 Act, prohibits local authorities from regulating the placement of cellular towers based on environmental effects, more specifically RF emissions, as long as those towers comply with the guidelines of the Federal Communication Commission ("FCC").

42. The cellular radio antennae have filter equipment and operate in the ultra-high frequency radio wave band, between 800-to-900 megahertz. The propagation pattern of the antennae is directed towards the horizon and not downward, and the radio frequency energy near the base of the tower is minimal.

43. The Project was designed to comply with and does comply with FCC guidelines regarding RF emissions.

44. There were no major objections or concerns expressed by agencies reviewing Cellular's permit applications.

45. Letters from approximately 212 area residents and businesses that supported the Project were provided to the Commission as part of Cellular's exhibits and rebuttal exhibits submitted on October 9, 2001 and November 19, 2001, respectively. In addition, a listing was provided of 735 calls made for assistance to 911 on Cellular phones from January 1, 2000 to November 10, 2000.

46. In selecting a site, the Applicant considered the site's ability to allow co-sharing with other providers and whether the site is economically feasible, which includes such factors as the amount of coverage the site can provide and the cost of construction. No other providers have expressed interest in co-sharing the proposed tower.

47. Intervenors expressed concern in the event of lightning striking the tower. According to the report of Northern Technologies dated March 23, 2001, "the existence of the tower does not attract lightning to the area, but merely becomes a primary target if a charge separation occurs directly above it. . . . [I]t is our professional opinion that the installation of the communications tower should have no effect on the number or severity of lightning strikes in the immediate area. Furthermore, it is expected that a certain zone of protection will exist for other structures near the installed tower. Given proper tower and system grounding, lightning strikes may be directed efficiently to the earth, where the energy will be dissipated safely."

48. Persons owning property adjacent to the subject property were granted status as intervenors objected to the granting of the special permit because of the effect of the tower in depreciating land value, blocking their views, and having an adverse effect upon their health. Other residents objected for similar reasons.

49. The Attorney for Captain Cook raised the fact that the cellular tower was already built at the January 14, 2002 hearing and requested that the hearing officer and the parties conduct a site visit. Pursuant to a court order entered January 23, 2001 in Ford v. AT&T Wireless Services of Hawaii, Inc., et al., Civil No. 00-1-0204K, Circuit Court of the Third Circuit of the State of Hawai'i, Judge Ronald Ibarra ordered that these proceedings "should be conducted as if no tower has been erected. However, if Ford or other non-AT&T parties or witnesses in [these proceedings] refer to the fact that the cellular tower has been erected, AT&T



may introduce evidence and argument regarding the existing tower.” At the commencement of the hearing on January 14, 2002, Intervenor Captain Cook requested a site visit and stated that the tower was a “built” and “operating.” Thus since a party to these proceedings referred to the existing tower, the Hearing Officer Sherry P. Broder ruled that all parties could refer to an existing tower.

50. According to the testimony of Jerry Erickson dated January 28, 2002 and Norman Newkirk dated January 28, 2002, Applicant found that stealth technology is not appropriate in this case because of height restrictions and the greater number of towers that would be needed for said technology.

51. According to the testimony of Jerry Erickson dated January 28, 2002, there were only two other towers owned by other cellular companies in the area but were not acceptable for co-sharing as an alternative to the project because they would not cover the RF coverage design and there could not provide the necessary service. Cellular customers would still not be able to use their phones on the Captain Cook area.

52. According to the oral testimony of Norman Newkirk, applicant uses microwave to route its communications for dependability purposes rather than land lines.

53. Applicant provided sufficient specific information and empirical data for rejecting alternative sites and alternative technology.

54. To the extent that any of these findings of fact constitute conclusions of law, they shall be so considered and construed.

#### CONCLUSIONS OF LAW

1. **This Commission has jurisdiction over Cellular’s SMA use permit application pursuant to HRS sections 205A-22 and 205A-27. As the Project involves less than 15 acres**

of land, this Commission has jurisdiction over Cellular's special permit application pursuant to HRS section 205-6.

**2. The Project Is Consistent with the Objectives and Policies Contained in HRS Chapter 205A (Coastal Zone Management Act).**

HRS chapter 205A is the Coastal Zone Management Act ("CZMA") for the State of Hawai'i. All lands in the State, including the mountain tops, are in the coastal zone management area under HRS section 205A-1. Although the objectives of the CZMA are extremely broad and far reaching, the essence of the CZMA is "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii" by "maintaining, restoring, and enhancing the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values, and to provide adequate public access to publicly owned or used beaches, recreation areas and national reserves" by controlling development within the SMA, an area along the shoreline.

The Project is consistent with the objectives, policies and guidelines pertaining to developments in the SMA as follows:

- (i) *Provide coastal recreational opportunities accessible to the public (HRS 205A-2(b)(1)(A)).*

The Project furthers the goals of "[p]roviding coastal recreation opportunities" for the public by providing communications to cellular telephone users along the coast and at sea. Because the Property is not used for recreational purposes and is located just under one mile from the shoreline, it will not decrease any coastal recreational opportunities for the public.

- (ii) *Protect, preserve, and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture (HRS 205A-2(b)(2)(A)).*

There are no archaeological or historic sites on or in the immediate vicinity of the Property. Therefore, the Project is not contrary to this objective.

- (iii) *Protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources (HRS 205A-2(b)(3)(A)).*

Because the Project is slightly less than one mile from the shoreline, the Project does not interfere with the public's coastal scenic and open space resources. Indeed, the proposed tower reduces the need for the construction of additional telephone poles and overhead wires.

- (iv) *Protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems (HRS 205A-2(b)(4)(A)).*

As the Project is a little less than one mile from the shoreline, the Project does not affect coastal ecosystems. Therefore, the Project is not contrary to this objective.

- (v) *Provide public or private facilities and improvements important to the State's economy in suitable locations (HRS 205A-2(b)(5)(A)).*

The Project will provide a service that is important to the State's economy. Since US Cellular's commencement of cellular telephone service on the Island of Hawai'i in 1989, the number of consumers on the Island of Hawai'i using and relying on such service has grown from zero to approximately 24,000 consumers. Cellular employs approximately twenty-four people on the Island of Hawai'i.

Cellular's service has provided affordable, improved communications for a diverse spectrum of individuals and businesses in Hawai'i. Many commercial fishermen use cellular telephones as their primary emergency communication system, especially in areas where VHF and citizens band radio communications are limited by the topography of the island. The proposed Project will provide service to the off-shore area south of Miloli'i, covering an open ocean area of approximately 934 square miles. Furthermore, Cellular is part of the civil defense network for the County, thus permitting otherwise unavailable communications during

emergencies such as natural disasters when land line systems have been damaged and rendered unusable and in areas that are not serviced by traditional telephone service.

- (vi) *Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution (HRS 205A-2(b)(6)(A)).*

Because the Project site is a substantial distance from the shoreline and at an elevation of 1,200 feet, the Project is not contrary to this objective. In fact, the Project will help to reduce such hazards by providing an effective communication tool during times requiring immediate disaster response. Cellular is part of the civil defense network for the County.

- (vii) *Improve the development review process, communication, and public participation in the management of coastal resources and hazards (HRS 205A-2(b)(7)(A)).*

This objective does not apply to Cellular's requirements for obtaining a SMA use permit for this Project. Therefore, the Project is not contrary to this objective.

- (viii) *Stimulate public awareness, education, and participation in coastal management (HRS 205A-2(b)(8)(A)).*

To the extent it may be applicable to this objective, Cellular has provided all required public notices of its SMA use permit application and has participated in several public hearings regarding it.

- (ix) *Protect beaches for public use and recreation (HRS 205A-2(b)(9)(A)).*

As the Project is a little less than one mile from the shoreline and at an elevation of 1,200 feet, the Project does not affect any beach and this objective does not apply to Cellular's requirements for obtaining a SMA use permit. Therefore, the Project is not contrary to this objective.

- (x) *Implement the State's ocean resources management plan (HRS 205A-2(b)(10)(A)).*

The Project does not affect, nor is it within the parameters of, the State's ocean resources management plan. Therefore, the Project is not contrary to this objective.

**3. The Project is Consistent with the Objectives and Policies Contained in the SMA**

**Guidelines (Planning Commission Rule 9-7 and HRS 205A-26).0**

- (i) *The development will not have any significant adverse environmental or ecological effect. Any adverse effect is minimized to the extent practicable and is outweighed by public health, safety, or compelling public interest.*

There is no significant adverse environmental or ecological effect caused by the Project.

In fact, this project has the potential to minimize such effects by possibly reducing or eliminating the need to erect poles and miles of overhead wires associated with traditional land line telephone service. This minimizes the costs of providing utilities and other services through rational development.

On balance, the Project will provide a valuable and essential communication service to a large geographical area, including the open ocean, which is otherwise without such service. The testimonials from Cellular's customers that were admitted into evidence at the hearing in this matter demonstrate the public health, safety and compelling public interests that are served by the proposed tower.

- (ii) *The development is consistent with the objectives and policies of HRS Chapter 205A and the SMA Guidelines.*

The Project's consistency with the objectives and policies of HRS chapter 205A is addressed above.

HRS section 205A-26 lists the guidelines that the Commission should use in reviewing developments in the SMA and states that the Commission "shall seek to minimize where reasonable" the following:

- (1) Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon.

- (2) Any development which would reduce the size of any beach or other area usable for public recreation.
- (3) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management area and the mean high tide line where there is no beach.
- (4) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast; and
- (5) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agricultural uses of land.

The Project will create no effects that fall within SMA Guidelines (1), (2) and (3).

With regard to SMA Guideline (4), the Project does not interfere with or detract from the line of sight toward the sea from Māmalahoa Highway, which is a county roadway between approximately the Captain Cook Police Station and Honalo. Nāpō'opo'o Road is also a county roadway and not a State highway. Further, there is no scenic area identified in the General Plan that is near the Project site that the proposed tower would interfere with views toward the sea.

With regard to SMA Guideline (5), the Project will create no effects on water quality, existing areas of open water, existing and potential fisheries and fishing grounds, wildlife habitats, or estuarine sanctuaries. The proposed Project site affects a total of 3,600 square feet

or less than three percent (3%) of a parcel of land that has approximately 130,680 square feet. The Project will not preclude the Owner's continued use of the remaining 127,000 square feet of the Property for orchards.

(iii) The development is consistent with the County General Plan and zoning.

The Project's consistency with the General Plan is addressed below. Under HCC section 25-4-12 (HCC chapter 25 is the County's zoning code), a telecommunication tower and antennae is considered a permitted use in the County's agricultural districts.

**4. The Project is consistent with, and not contrary to, the objectives sought to be accomplished by HRS chapters 205 and 205A, as amended, and the rules of the Land Use Commission.**

(a) H.R.S. chapter 205

The basic objectives of HRS chapter 205 are to protect, to conserve, and to rationally develop through zoning the State's urban, agricultural and conservation lands using a coordinated, balanced approach not only within each county but on a statewide basis. This approach includes an overall balance of statewide land needs for economic growth and is essential to (i) utilize the land resources in an intelligent, effective manner based upon the capabilities and characteristics of the soil and the needs of the economy; (ii) conserve forests, water resources and land, and in particular, to preserve the prime agricultural lands from unnecessary urbanization; and (iii) state the allocation of land for development in an orderly plan to meet actual needs and minimize costs of providing utilities and other services through rational development.

The site of the Project's proposed tower, antennae, and appurtenant structures affects a total of approximately 3,600 square-feet or less than three percent (3%) of a parcel of land that has approximately 130,680 square feet. The Project will allow the remaining portion of the Owner's parcel to continue to be used for agricultural purposes, including lychee and cherimoya trees. Therefore, the Project does not remove significant lands from agricultural use.

The Project provides a valuable and essential continuous cellular communication service to a large geographical area that is otherwise without such service. Accordingly, the Project's utilization of the Property's resources is a reasonable and cost-effective one and does not result in unnecessary urbanization. Cellular's island-wide communication network, of which the Project is an integral part, is an orderly plan to meet actual needs that minimizes the cost of providing the utility of telecommunications through rational development.

Accordingly, the Project is consistent with, and is not contrary to, the objectives sought to be accomplished by HRS chapter 205.

(b) HRS chapter 205A

The Project's consistency with the objectives sought to be accomplished by HRS chapter 205A is addressed above.

(c) Land Use Commission Rules

HAR section 15-15-01 states that the Land Use Commission's Rules "shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawaii." Based on the discussion above that addresses the objectives of HRS Chapter 205, the Project is not contrary to the objectives sought to be accomplished by the Land Use Commission Rules.



5. **The Project does not adversely affect surrounding property.** Based on the contested case hearing held on January 14, 2002 and March 5, 2002 by the hearing officer of the Commission, and after balancing the burden on the intervenors who are immediate neighbors and the various benefits and costs to the surrounding communities resulting from the Project, the Commission concludes that, on the whole, the benefits outweigh the costs and thus the Project does not adversely affect surrounding property.

(a) RF Emissions

The operation of the radio antennae does not present health hazards or cause interference with other electronic appliances and equipment. The cellular radio antennae have filter equipment and operate in the ultra-high frequency radio wave band, between 800-to-900 megahertz. The propagation pattern of the antennae is directed towards the horizon and not downward, and the radio frequency energy near the base of the tower is minimal.

Section 704 of the Telecommunications Act of 1996 (47 U.S.C. 332(c), as amended) recognizes the absence of health hazards from cellular radio wave transmissions and accordingly prohibits local authorities from regulating the placement of cellular towers based on environmental effects, as long as those towers comply with the FCC's guidelines. The subject tower has been designed to, and complies with, those guidelines. Thus, according to federal law, no RF emissions adversely affect the surrounding properties.

(b) Noise Impacts

The only source of noise emitted from the Project results from an air conditioner that is necessary to maintain correct temperature and humidity in the equipment building. However, the resulting noise is virtually inaudible from farther than one hundred feet except under extraordinarily quiet conditions. The noise output of the air conditioning unit is substantially

less than any number of uses permitted in this zone (e.g., generators, farm equipment, vehicles, or farm animals). Thus, there are no noise impacts that adversely affect the surrounding properties.

(c) Visual Impacts

No proposed utility facility completely avoids visual impacts without excessive expenses that prevent cost-effective delivery of the service. In In the Matter of the Application of Hawaiian Electric Company, Inc., 81 Haw. 459, 918 P. 2d 561 (1996), the Hawai'i Supreme Court upheld the PUC's finding that HECO's selected routing, location, configuration, and method of construction were "reasonable and preferable to HECO's other options," comparing certain factors, including aesthetic considerations. Id. at 464. Although the PUC found that HECO's proposed project would cause visual impacts, the PUC concluded that those visual impacts did not justify the underground placement of the transmission lines because "the utility has the responsibility to minimize the cost to ratepayers in providing reliable electric service . . . [T]he cost of placing transmission lines underground is very high and the burden of that cost ultimately falls upon the ratepayers" and aesthetics "did not constitute [a] compelling reason that would outweigh the added cost of placing the lines underground." Id.

While the HECO case involved the PUC's approval of HECO's capital expenditure, the PUC's balancing and weighing of visual impacts to the immediate neighbors against the increase in costs to the telephone user and the availability of options to HECO are equally applicable in this matter. Additionally, a single cellular telecommunication tower may make the need for additional telephone utility poles and lines unnecessary in areas that currently lack land line telephone service.

The substantial evidence offered by Cellular shows that the Owner's parcel is located about 600 feet *makai* from the intersection of Māmalahoa Highway, which is the primary traveled highway, and Nāpō'opo'o Road, which is the road used by local traffic and some visitors to Kealakekua Bay. Unless one were to drive very slowly and to seek out the proposed tower intentionally, it would not be seen from Māmalahoa Highway due to the drop in elevation between Māmalahoa Highway (elevation 1,400 feet) and Nāpō'opo'o Road (elevation 1,280 feet), the drop in elevation between Nāpō'opo'o Road and the tower site (elevation 1,200 feet), and the heavy vegetation along Māmalahoa Highway.

The proposed tower will be able to be seen from Nāpō'opo'o Road (at an approximately 90 degree angle to persons in a vehicle), from properties between Māmalahoa Highway and Nāpō'opo'o Road, and from immediately surrounding properties. It will not be seen from a substantial segment of any State highway. Accordingly, the scale of the visual impacts associated with the proposed tower is limited essentially to a few individuals with homes in the immediately surrounding vicinity.

Further, the lower portion of the tower will not be visible from Nāpō'opo'o Road because it is situated in an orchard of trees which may reach 30 feet at maturity and behind a rather large building constructed by the Owner on the Owner's parcel *mauka* of the Project site. The proximity of two existing tall trees will also minimize visual impacts. The tower will not be visible from the Ka'awaloa peninsula near Captain Cook's monument, the Hikiau heiau in the Kealakekua State Historic Park, or Manini Beach just outside the park. The tower, therefore, does not represent a significant intrusion into public views.

The tower is not obtrusive when compared to traditional telephone and power poles and lines, which are visually more predominant along the roads adjacent to the Project and are also

immediately adjacent to the tower.

6. **The Project does not unreasonably burden public agencies to provide roads, streets, sewer, water, drainage, school improvements, and police and fire protection.** The Project requires only power, which is provided by an existing power line to the Owner's parcel. No public expenditures for road, street, sewer, water, drainage or school improvements or increased police or fire protection are required. The Project enhances police and fire protection by affording cellular telephone service to remote land and ocean areas so that emergency and crime-fighting officials can be contacted where no telephone land lines or other cellular service exist, or in the event of an emergency when land lines are disrupted.

7. **Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established.** In the 1960s and the 1970s, when the State's agricultural district boundaries and regulations were first established pursuant to HRS Chapter 205, cellular telephone service was unknown, and the predominant means of audio communication was by traditional telephone service, which relies on telephone and power poles and lines. Given the expense of those poles and lines and the relatively low number of residents served in areas with large rural and agricultural tracts of land, telephone service has been unavailable to certain parts of the Island of Hawai'i.

US Cellular commenced cellular telephone service for the Island of Hawai'i in 1989. Since its commencement, the number of consumers on the Island of Hawai'i using such service has grown from zero to approximately 24,000 consumers. Further, the Project provides communication services to offshore fishermen and boaters.

Substantial evidence was introduced from area residents, community organizations, and businesses that recited the communication and safety benefits provided by the Project. Cellular

not only provides service on land but also at sea for commercial and sports fishermen and boaters. Many commercial fishermen use cellular telephones as their primary emergency communication system, especially in areas where VHF and citizens band radio communications are limited by the topography of the island. The proposed tower will service most of the off-shore areas from South Kona to south of Miloli'i, covering an open ocean area of approximately 934 square miles.

Cellular telephone usage is an unusual trend and need that arose after the State's agricultural district boundaries and regulations were established.

**8. The Project is compatible with other uses permitted within the State agricultural district, and the Property is unsuited for most of the agricultural uses permitted within the district.** The Property is suited for a variety of uses permitted in the district, including orchard use. Except for two trees, the Project will not displace the orchard use of the remainder of Owner's parcel. The construction of the Project will impact a total of 3,600 square feet out of the Owner's total parcel of 130,680 square feet. The requested use is similar in character and impact to certain uses of this parcel that are permitted under HRS chapter 205, including construction of dwellings, utility lines, and wind generating facilities.

Further, the Project will not prevent, and is compatible with, other uses permitted in the State agricultural district, to which the remainder of the Owner's parcel is utilized.

**9. The Project does not substantially alter or change the essential character of the land and the present use of the land.** The essential character of the Owner's parcel is for agricultural (orchard) use. As the portion of the Property with the tower and appurtenant structures will comprise only about 3,600 square feet or less than 3% of a 3.00 +/- acre parcel, the Project will not substantially alter or change the Owner's orchard use.

10. The Project is consistent with, and not contrary to, the current General Plan.

The Project promotes or balances, among others, each of the following relevant objectives and goals set forth in the General Plan:

A: ECONOMIC

GOALS:

*Provide residents with opportunities to improve their quality of life.*

*Economic development and improvement shall be in balance with the physical and social environments of the island of Hawaii.*

....

*The County shall provide an economic environment which allows new, expanded, or improved economic opportunities that are compatible with the County's natural and social environment.*

POLICIES:

....

*The County of Hawaii shall strive for the diversification of its economy by strengthening existing industries and attracting new endeavors.*

....

*The County shall encourage the research, development, and implementation of advanced technologies and processes in existing and potential economic endeavors.*

....

J. PUBLIC UTILITIES

GOALS:

*Ensure that adequate, efficient and dependable public utility services will be available to users.*

*Maximize efficiency and economy in the provision of public utility services.*

*To have public utility facilities which are designed to fit into their surroundings or concealed from public view.*

POLICIES:

*Public utility facilities should be designed so as to complement adjacent land uses and shall be operated so as to minimize pollution or disturbance.*

....

*Provide utilities and service facilities which minimize total cost to the public and effectively service the needs of the community.*

*Utility facilities should be designed to minimize conflict with the natural environment and natural resources.*

*Improvement of existing utility services shall be encouraged to meet the needs of users.*

....

(2) TELEPHONE

POLICIES:

*The County shall encourage underground telephone lines where they are economically and technically feasible.*

*The County shall work closely with the telephone company to provide all users with efficient service.*

STANDARD:

*In the development and placement of telephone facilities, such as lines, poles and substations, the design of the facilities shall consider the existing environment, and scenic view and vistas shall be considered and preserved where possible..*

....

## M. LAND USE

## GOALS:

*Designate and allocate land uses in appropriate proportions and in keeping with the social, cultural and physical environments of the County.*

## POLICIES:

*The county shall encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environment.*

Regarding the identified economic considerations, many residents conducting business in the vicinity of Captain Cook and along the coastline provided unequivocal letters in support of the Project to the Commission. Other letters in support of the Project indicate that, even in areas that have telephone land lines, residents still depend on the communications link that will be provided by the proposed tower. Similarly, residents consider the proposed tower as an essential service that ensures their safety and the safety of their families.

These same considerations further the goals and policies outlined in the General Plan under the heading "public utilities," as the Project helps to "[e]nsure that adequate, efficient and dependable public utility services will be available to users"; "[m]aximize efficiency and economy in the provision of public utility services"; and "[p]rovide utilities and service facilities which minimize total cost to the public and effectively service the needs of the community."

On balance, the substantial evidence offered by Applicant indicates that the visual impact of the proposed tower is not sufficiently adverse to outweigh the benefits to the community at large. The Project is an integral part of an island-wide telephone utility service, assists community members in maintaining their livelihoods, serves as a lifeline in emergencies and accidents on land and at sea, and provides critical emergency communications across the



Island of Hawai'i in the event of a natural disaster. Based upon the preceding considerations, the Project is consistent with, and not contrary to, the objectives of HRS chapters 205 and 205A and the rules of the Land Use Commission.

1. Based upon the foregoing considerations and the substantial evidence provided in these proceedings, this Commission determines that the Project constitutes an "unusual and reasonable use" under HRS section 205\_6 and that the Project promotes the effectiveness and objectives of HRS Chapter 205.

2. Intervenors' Proposed Findings of Fact, Conclusions of Law and Order have been considered by this Commission and are hereby not adopted.

3. The Department's Proposed Findings of Fact, Conclusions of Law and Order did not advocate any particular position.

4. To the extent that any of these conclusions of law constitute findings of fact, they shall be so considered and construed.

#### APPROVAL

In accordance with the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED by the Planning Commission that the Special Management Area Use Permit Application, SMA No. 00-16, and Special Permit Application, SPP No. 00-043, be approved subject to the following conditions. Should any of these conditions not be met or substantially complied with in a timely manner, the Director may initiate procedures to revoke the permits:

1. US Cellular, Cellular, or their successors or assigns shall comply with all of the stated conditions of approval.

2. Final Plan Approval for the purpose of ensuring that pertinent conditions of this approval have been implemented shall be secured from the Director.

3. Co-location of the Project's tower and antennae for other providers shall be encouraged and allowed within the parameters of the represented Project height and envelope.

4. Within 120 days of the permanent abandonment of the tower and antennas, the applicant shall remove the tower and its antennas and accessory structures (including the equipment building and the fence), down to, but not including the concrete foundation. The applicant shall immediately provide written notification to the Planning Director of the termination of the telecommunication tower and related improvements and the removal of all structures.

5. Applicant shall comply with all applicable rules, regulations, and requirements of the affected agencies for the development of the Property, including the Federal Aviation Administration and the FCC.

6. An extension of time for the performance of these conditions may be granted by the Director in the following circumstances:

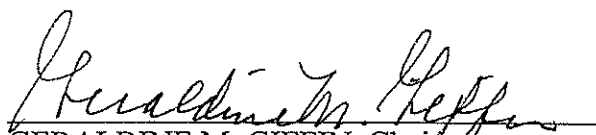
(a) Non-performance is the result of conditions that could not have been foreseen or are beyond the control of US Cellular, Cellular, or their successors or assigns, and that are not the result of the fault or negligence of US Cellular, Cellular, or their successors or assigns.

(b) Granting the extension would not be contrary to the original reasons for granting the permits.

(c) The time extension shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to an additional one year).

DATED: Hilo, Hawai'i,                     , 2002.

PLANNING COMMISSION,  
COUNTY OF HAWAI'I

  
GERALDINE M. GIFFIN, Chairperson

**BEFORE THE PLANNING COMMISSION  
OF THE COUNTY OF HAWAII, STATE OF HAWAII**

In the Matter of the Special Management  
Area and Special Permit Applications of

AT&T WIRELESS SERVICES OF  
HAWAII, INC., through its agent, USCOC  
OF FLORIDA RSA #7, INC., fka USCOC  
OF HAWAII 3, INC., dba UNITED  
STATES CELLULAR.  
(TMK (3) 8-1-9:17)

**SMA NO. 00-16  
SPP NO. 00-043**

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was duly served upon the following parties by certified mail or hand delivery on   JUL 10 2002  , 2002:

DONNA Y. L. LEONG, ESQ.  
KELLY G. LaPORTE, ESQ.  
1000 Bishop Street, 10<sup>th</sup> Floor  
Honolulu, Hawai'i 96813-4216

Attorneys for APPLICANT AT&T WIRELESS SERVICES  
OF HAWAII, INC., through its agent,  
USCOC OF FLORIDA RSA #7, INC., fka USCOC  
OF HAWAII 3, INC., dba UNITED STATES CELLULAR

LAWRENCE M. FORD  
81-6195 Nāpō'opo'o Road  
Captain Cook, Hawai'i 96704

Pro Se Intervenor and Representative for  
Intervenors BRENDA FORD, BRIAN LIEVENS, ANDREA LIEVENS,  
MARY DAY LAIRD, GEORGE A. SCHATTAUER, ERIC CURTIS,  
GUNNAR FREIVALDS, MARGARET SCHATTAUER, BARBARA  
ALLEN, NICHOLAS RANSOM and CAROLINE MAE SMITH

ROBERT D. S. KIM, ESQ.  
77-6400 Nalani Street, Suite A-1  
Kailua-Kona, Hawai'i 96740

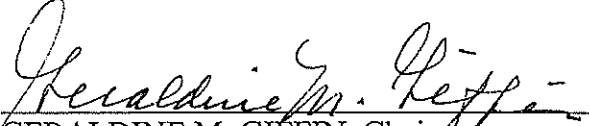
Attorney for CAPTAIN COOK (ROYAL HAWAIIAN) CO., LTD.

LINCOLN S. T. ASHIDA, ESQ.  
LESTER J. ISHADO, ESQ.  
Hawaii County Corporation Counsel  
101 Aupuni Street, Suite 325  
Hilo, Hawai'i 96720

Attorneys for CHRISTOPHER YUEN  
HAWAII COUNTY PLANNING DEPARTMENT

DATED: Hilo, Hawai'i, JUL 10 2002, 2002.

PLANNING COMMISSION,  
COUNTY OF HAWAII

  
GERALDINE M. GIFFIN, Chairperson