

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

September 11, 2009

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

Ref. No.: GLS-5264

HAWAII

Rescind Prior Board Action of April 24, 2009 (Item D-3); Mutual Cancellation of General Lease No. S-5264, HITV Operating Co., Inc., Lessee, Humuula, North Hilo, Hawaii, Tax Map Key: 3<sup>rd</sup>/ 3-8-01: 11.

PURPOSE:

Mutual Cancellation of General Lease No. S-5264, HITV Operating Co., Inc., Lessee.

LEGAL REFERENCE:

Section 171-39, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Humuula, North Hilo, Hawaii, identified by Tax Map Key: 3<sup>rd</sup>/ 3-8-01: 11, as shown on the attached map labeled Exhibit A.

AREA:

2.038 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution:  
YES \_\_\_ NO x

CHARACTER OF USE:

Microwave T.V. Relay Station purposes.

TERM OF LEASE:

25-years, commencing on July 8, 1993 and expiring on July 7, 2018. The last and final rental reopening was conducted on July 8, 2008.

ANNUAL RENTAL:

\$19,195.00 Due in semi-annual installments of \$9,975.00, on the eighth of January and July, of each and every year.

BACKGROUND:

General Lease No. S-5264, a 25-year lease for Microwave T.V. Relay Station site was awarded to Lee Enterprises, Inc., as the successful bidder at a public auction held on July 8, 1993.

At its meeting of August 12, 2005, the Board of Land and Natural Resources, under Item D-5, approved Consent to Assignment of General Lease No. S-5264, Lee Enterprises, Inc. to Emmis Television Broadcasting, LP.

At its meeting of January 25, 2008, Item D-3, the Land Board approved Consent to Assignment of General Lease No. S-5264, Emmis Television Broadcasting, LP. to HITV Operating Co., Inc.

By letter dated March 12, 2009, Mr. Craig P. Wagnild of Bays Deaver Lung Rose and Holma, attorney for HITV Operating Co., Inc. (HITV), requested consent to assignment of General Lease No. S-5264, HITV Operating Co., Inc, Assignor, to Hawaii Public Radio, Inc. (HPR), Assignee. HITV requested the assignment due to the federally mandated transition of television signal transmission from analog to digital, which rendered the tower site of no use to HITV. In attempts to assist, HITV secured a replacement lessee who expressed interest and willingness to accept and assume all of the lessee's obligations under the lease. HITV has informed staff that there is no monetary consideration being exchanged by the parties in connection with this proposed assignment and assumption of lease.

At its meeting of April 24, 2009, Item D-3, the Land Board approved Consent to Assignment of General Lease No. S-5264, HITV to HPR.

REMARKS:

In processing the above assignment, HPR notified staff that it realizes that as a non-profit organization, it could not afford the \$19,195 annual rental currently charged under General Lease No. S-5264. Upon hearing of the situation, staff initially thought a simple

solution was to amend the prior Board action to change the rents from fair market value to nominal rent since HPR is a non-profit operating under 501(c)(3) status. However, because General Lease No. S-5264 was issued through a public auction, an amendment of the lease rent is not feasible. Staff is now recommending that the Land Board rescind its prior actions of April 24, 2009, Item D-3, which approved the assignment of General Lease No. S-5264 from HITV to HPR, and to then approve the cancellation of General Lease No. S-5264, since HITV has no further use for the tower site under the lease.

By letter dated August 19, 2009, Mr. Craig P. Wagnild, attorney representing HITV Operating Co., Inc., formally requested the cancellation of General Lease No. S-5264. **(Exhibit B)**

Staff has begun direct negotiations with the two prospective lessees (Hawaii Public Radio and Medicom) on their interest to acquire a lease over the Humuula tower site. The commencement date of the new direct lease will be coordinated with the cancellation of GLS-5264 as the prospective lessees are already utilizing the tower. The prospective lessee will be issued a lease on an "as is" basis of the site, together with all responsibility and liability with respect to the tower and other equipment on the property, including any obligation to remove the improvements at the expiration/ termination of that lease. HITV will leave the tower and other improvements with the exception of its own antenna and broadcasting equipment on the site for use of the State and the prospective lessee/sublessees. DLNR will return HITV's deposit of \$39,900 upon completed cancellation of the lease. DLNR and HITV shall have no other liability or obligation with respect to each other excepting only such liabilities and obligations in the lease that expressly survive cancellation. Further, HITV will be reimbursed the pro-rated portion of the bi-annual rent payment covering the period from the date of the lease cancellation until the end of the rent period (December 31, 2009).

On August 25, 2009, staff conducted a site inspection of the subject parcel. There were no obvious signs of hazardous materials being stored or unsafe conditions observed on the property. **(Exhibit C)**


**RECOMMENDATION:** That the Board:

1. Rescind the prior Board action of April 24, 2009, under agenda item D-3.
2. Authorize the mutual cancellation of General Lease No. S-5264, HITV Operating Co., Inc., Lessee, covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current mutual cancellation lease document form, as may be amended from time to time;
  - B. HITV will leave the tower and other improvements with the exception of

its own antenna and broadcasting equipment on the site for use by prospective lessee/sublessees;

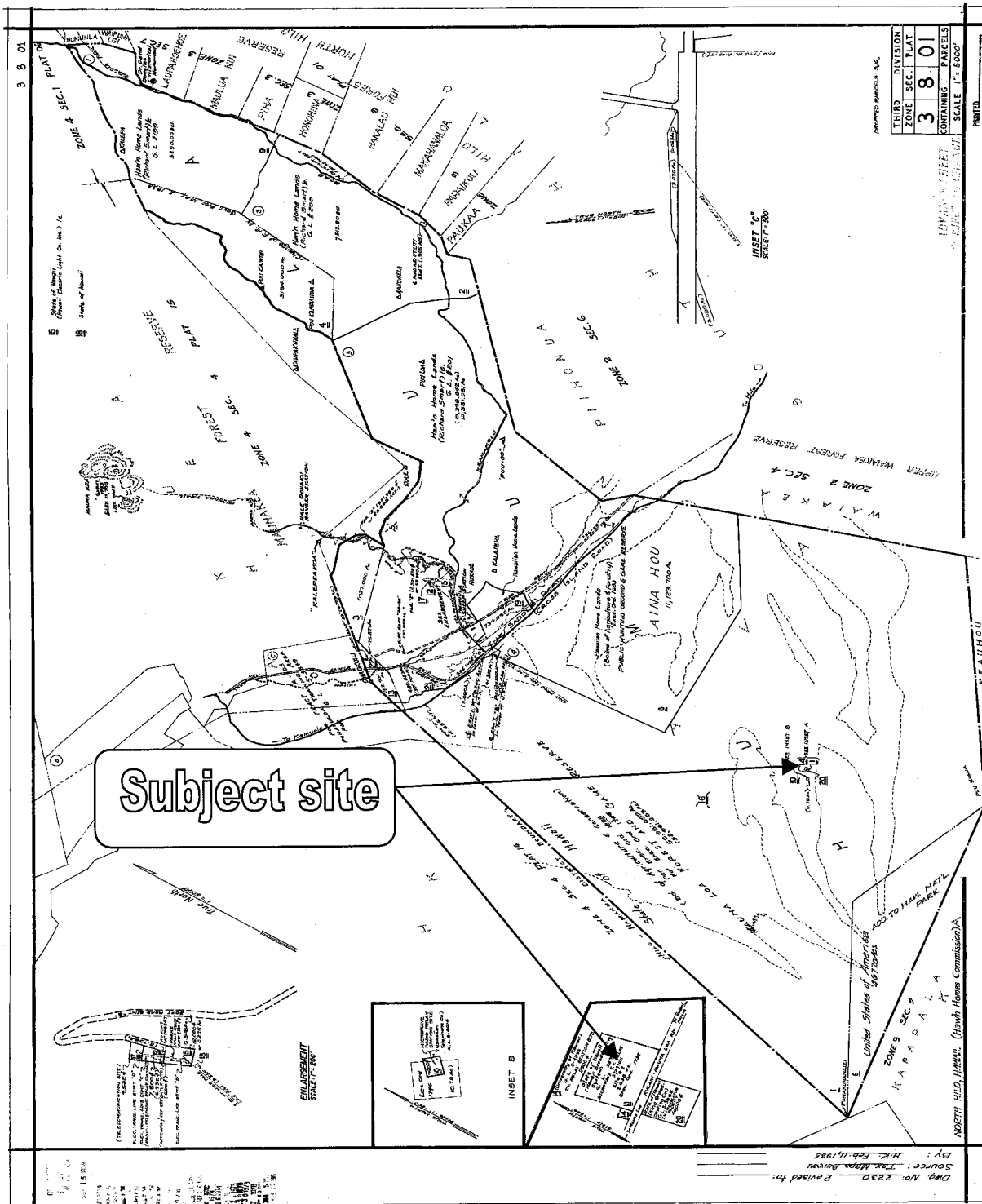
- C. Terminate the lease and all rights of Lessee and all obligations of the Lessor effective as of this board action, provided that any and all obligations of the Lessee which have accrued up to said effective date or which are stated in the lease to survive termination shall endure past such termination date until duly fulfilled, and further provided that Lessor reserves all other rights and claims allowed by law;
- D. HITV will be reimbursed the pro-rated portion of the bi-annual rent payment covering the period from the date of the lease cancellation until the end of the rent period (December 31, 2009);
- E. Review and approval by the Department of the Attorney General; and
- F. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

  
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Wesley T. Matsunaga  
Land Agent *KEM*

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
Laura H. Thiele, Chairperson *lht*



# EXHIBIT A

**BAYS  
DEAVER  
LUNG  
ROSE  
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August 19, 2009

Via e-mail (Wesley.T.Matsunaga@hawaii.gov)  
And U. S. Mail

Mr. Wesley T. Matsunaga  
DLNR-Land Division  
75 Aupuni Street, Room 204  
P. O. Box 936  
Hilo, HI 96721

Re: Request for Mutual Cancellation of General Lease No. S-5264; Humuula, North  
Hilo, Hawaii, Tax Map Key No. (3) 3-8-001-011

Dear Mr. Matsunaga:

As you know, we represent HITV Operating Co., Inc., a Delaware corporation doing business in Hawaii as KGMB9 ("HITV") and write as a follow up to our recent discussions and the prior consent of the State of Hawaii through its Board of Land and Natural Resources (the "State") to an assignment of General Lease No. S-5264 ("Lease") to Hawaii Public Radio ("HPR"). The Lease covers certain real property situated at Humuula, North Hilo, Island of Hawaii, Hawaii and indentified by Tax Map Key No. (3) 3-8-001-011 (the "Property"). HITV acquired the lessee's interest in the Property from Emmis Television Broadcasting, L.P., an Indiana limited partnership ("Emmis") on June 20, 2007. Emmis had previously acquired its interest in the Property from Lee Enterprises, Incorporated, a Delaware corporation and the original lessee under the Lease.

As discussed in HITV's prior request for consent to an assignment of the Lease to HPR, as a result of the recent federally-mandated transition from analog to digital transmission, HITV is no longer able to use the tower erected on the Property for transmission of its television signal and has no other need or use for the Property. While not contemplated by any party when the Lease was first executed in 1993, the FCC mandate to transition from analog to digital transmission which took effect January 15, 2009 has, in effect, completely frustrated the purpose of the Lease. In an effort to mitigate the damages caused by the FCC's unilateral actions, and pursuant to discussions with you, HITV made efforts to secure a replacement lessee who was interested and willing to lease the Property. HPR is a Hawaii nonprofit corporation that broadcasts radio transmissions throughout the Hawaiian Islands and is able to use the tower on the Property to broadcast its signal. Initially, HITV requested that the State consent to an assignment of its interest as lessee under the Lease to HPR, and understood that HPR desired and agreed to accept such assignment, including the assumption of all terms, conditions, and

Mr. Wesley T. Matsunaga  
August 19, 2009  
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covenants of the lessee under the Lease, and performance of all of lessee's obligations as required by the Lease.

No monetary consideration was to be exchanged between the parties in connection with the proposed assignment and assumption of the Lease, however, after the Board had consented to the proposed assignment, HPR informed HITV that as a non-profit organization, it could not afford the approximately \$19,000 annual lease rent. Subsequently, HITV and HPR, through their respective counsel, began discussing options with you whereby the State might, upon the assignment, reduce the annual lease rent from fair market to nominal rent since HPR qualifies for special rent reductions due to its 501(c)(3) status. Unfortunately, we later learned that this option was not available because the Lease was originally acquired through public auction. As a result, HITV and HPR seek to have the existing Lease (General Lease No. S-5264) mutually cancelled and a new separate lease of the Property concurrently executed between the State and HPR. We understand HPR has already submitted its request for a new lease, which lease we understand will include covenants and agreements whereby HPR will take on all obligations with respect to the tower and the improvements currently on the Property, including their removal upon termination or expiration of the new lease.

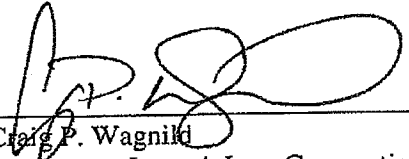
Therefore, HITV respectfully requests that the State: 1) consent to a mutual cancellation of the Lease; and 2) return to HITV the deposit amount of \$39,900 held by the State in lieu of the performance bond/improvement bond requirements set forth in Section 29 of the Lease. HITV is prepared to pay the reasonable cost of your review and approval of this cancellation request. We greatly appreciate your assistance with this matter and your efforts to help us find a solution that works for all parties.

If you have any questions regarding this matter or wish to discuss it further, please do not hesitate to contact me.

Very truly yours,

BAYS DEEVER LUNG ROSE & HOLMA

By:

  
\_\_\_\_\_  
Craig P. Wagnild  
Attorney at Law, A Law Corporation  
Its General Partner

CPW:akk

**EXHIBIT B**





## EXHIBIT C