

**CABLE ADVISORY COMMITTEE (CAC)
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII**

MINUTES OF MEETING

Date: March 9, 2006, Thursday
Time: 10:00 a.m. – 12:00 p.m.
Place: Queen Lili'uokalani Conference Room
Department of Commerce & Consumer Affairs
335 Merchant Street, 1st Floor
Honolulu, Hawaii 96813

CAC MEMBERS Present: Sam Aiona, Dave DeLeon
Excused: Jenny Fujita, Gay Porter, Keith Rollman

OTHERS: Mark Recktenwald, Director; Clyde Sonobe, CATV Administrator;
Laureen Wong, Staff Attorney CATV; and Glen Chock, CATV Staff.

AGENDA: The agenda for this meeting was filed with the Office of the
Lieutenant Governor, as required by Hawaii Revised Statutes
§92-7(b).

- I. CALL TO ORDER --The meeting was called to order at 10:10 a.m.
- II. MINUTES OF THE JANUARY 19, 2006 MEETING -- Minutes of the
January 19, 2006 meeting were duly posted, and there being no questions or
comments were accepted.
- III. UPDATE ON PENDING MATTERS
 - A. Olelo 6th Channel -- Channel 49 Transferred to Olelo for programming on
February 9, 2006 and CSPAN-2 and Game Show moved to Channel 78

Mr. Sonobe reported that as of February 9, 2006, Olelo was provided a 6th
analog channel for its programming. Channel 49 was transferred to Olelo
for programming, and the programming formerly on Channel 49, CSPAN-2
and Game Show, was moved to Channel 78.
 - B. PEG Contracts -- Results of February public comment meetings and the
next step in process: RFP or request for exemption

Director Recktenwald stated that the Department of the Attorney General (AG) and the State Procurement Office (SPO) informed DCCA that the Procurement Code applied to PEG contracts unless an exemption for the PEG access contracts was granted. Director Recktenwald explained that there were 2 options available at the present time – to seek an RFP or to seek an exemption. Before making a decision on how to proceed, DCCA felt that it was important to obtain public comment on the current PEG access system and RFP process. Five public comment meetings were conducted throughout the state. The Director is reviewing the hundreds of pages of written comments and viewing the recordings of the meetings. The Director anticipates that a decision will be made soon as he believes it to be in the public interest to move forward quickly.

Mr. Sonobe stated that he attended the five public meetings, which were held in Hilo, Kauai, Kahului, Molokai and on Oahu. 208 people signed in on the attendance sheets, and 113 presented oral comments. In the hundreds of written statements submitted, approximately 90% supported the current PEG access system.

Director Recktenwald expressed his regret that some persons on Maui were not able to speak due to time constraints for the public meeting. The written comments will be considered so there are other avenues open for the public to submit their views on the issues.

Director Recktenwald stated that there were many arguments advanced in support of requesting an exemption and proceeding with an RFP. Some of the reasons given to proceed with an RFP were: current PEG services were not adequate; current PEGs had strayed from their mission to provide programming on a first come, first serve basis; PEGs were not adhering to the open records law; current services were a floor and additional services were desired; and there were other qualified bidders out there. Director Recktenwald also stated that other persons strongly supported the existing access entities and/or supported a request for an exemption, for reasons including: the current system is working; a new bidder may favor a particular point of view; there would be service disruption in the transition from the current access provider to a new provider; staff retention may be an issue; community relations may be lost; there may be no other qualified bidders; volunteers may be lost; current PEGs are sensitive to local community needs; the decision-making time for exemption is very tight.

Mr. DeLeon expressed his concern that access organizations should be non-profit entities. He stated that if a RFP is sought, it should be based upon island by island needs. He thanked DCCA for holding a public

comment meeting on Molokai. Director Recktenwald stated that due to tight scheduling, a public comment meeting on Molokai was not initially scheduled, but since there was high interest on the island, a public comment hearing was set and Mr. Sonobe attended. Mr. Aiona asked if the Department were to go the route of an RFP, would it start June 30, 2006? Director Recktenwald stated that the DCCA may ask the SPO to extend the current contracts beyond the June 30, 2006 deadline to allow for additional time to comply with the competitive procurement requirements. It would be up to SPO to decide whether to grant more time. Mr. Aiona commended DCCA for going out to the public since it was not a required procedure. Mr. Aiona expressed that most of the comments were from supporters of existing PEG access entities, and this was to be expected. When the DCCA considers its decision, the DCCA must look at what is fair for the general public. Mr. Aiona expressed that if the DCCA were to do an RFP, it may open up a Pandora's Box. While there is always room for improvement, an RFP is cumbersome and preparing scope of services specs is not easy. Mr. Aiona stated that PEGs need to be held accountable since essentially they are receiving taxpayers' money when the public is assessed a fee to fund access services. As long as it can be assured that there is accountability and adequate evaluations, then there is no need for an RFP. Mr. Aiona stated that the Director had done an excellent job in letting the public voice its concerns and the decision to seek an exemption or proceed with an RFP was up to him.

Director Recktenwald stated that the accountability of the PEGs is an ongoing concern of the DCCA. Even if an exemption is granted by SPO, if the DCCA felt that a PEG access entity was not being accountable, the DCCA in its discretion could end the PEG contract and issue an RFP for competitive bid. This discretion could be exercised on a case by case basis.

Mr. Aiona asked whether there was any indication by SPO as to whether it would grant an exemption or not. Director Recktenwald stated that this was a unique situation and the other exemptions granted by SPO are distinguishable. Mr. Aiona stated that if SPO determined that an exemption was not granted, then the DCCA would end up with no discretion.

Mr. DeLeon asked if SPO would be able to receive the public comments submitted on PEGs and RFP. Director Recktenwald informed him that the comments were posted on DCCA's website and he would make this known to SPO but it would be up to SPO to consider them.

Mr. DeLeon asked if the DCCA was able to prepare performance criteria for PEGs now. Director Recktenwald stated that to draft an RFP was a complex task, and DCCA must spend time to determine what types of access services were desirable. With the present model, the DCCA gives significant discretion to the PEGs. For example, certain PEGs facilitate productions of programs. Should PEGs use their resources to create programming? PEGs are given the discretion to decide this. Some critics have opposed this and propose that PEGs provide training but not produce programs. To draft an RFP, the DCCA must resolve these issues, and DCCA would end up making decisions for PEGs, who historically have made decisions in the context of their local communities. Director Recktenwald also stated that some of the public comments suggested that an RFP should be island specific which would add to the magnitude of the task.

Mr. Aiona stated that he had had experience writing, scoring and evaluating, which can be a complex task. From his experience, the community may never be completely happy with an RFP, but he trusted that the DCCA would make the right decision. If the Department decides not to go with an RFP, he would expect that the PEGs would still be held accountable since the public needs to get its moneys worth.

C. Akaku – Board mediation and lawsuit filed by Akaku against Director and Department

Mr. Sonobe stated that Akaku has been involved in an ongoing governance dispute. In April 2005, there was a contract signed between Akaku and E-partners (MCC and MDOE). Under this Education Agreement, E-partners were allotted a certain number of board seats and also were allocated a certain amount of funding. One of the Board factions subsequently invalidated this agreement. The dispute over funding for educational access has been an ongoing issue on Maui for the past 10 years. In a Letter Order in January 2006, the DCCA instructed Time Warner to pay 50% of 2006 access operating fees to the PEGs. Because of the disputed issues on Maui, Akaku was paid 16.75%, and Time Warner was directed to pay 8.25% to the E-partners. On January 31, 2006 DCCA received a lawsuit filed by Akaku against the Department. Payment to Akaku had already taken place, but Time Warner was then instructed to hold payment to the E-partners. On February 6, 2006, the Department received Akaku's Motion for Preliminary Injunction. A hearing on this motion was set for February 23, 2006. Judge August denied the Motion for Preliminary Injunction, which kept the Letter Order in place.

Akaku and the E-partners then informed the DCCA that they had reached a mediated settlement. As part of the mediated settlement, the parties were to sign off on a Supplemental Agreement to the April 2005 Education Agreement. As of this date, the Department has not yet received a signed copy of the Supplemental Agreement. Once the Department receives the Supplemental Agreement, then it will release funds (up to 50%) to Akaku. All PEGs would then be in the same position of having received 50% of the 2006 Access Operating Fees.

In the lawsuit filed by Akaku against the DCCA, there are 2 pending motions. Time Warner filed a Motion to Dismiss, which will be heard on March 16 and Akaku filed its Motion for Summary Judgment which is set for hearing on March 23.

Director Recktenwald stated that pending the final documentation that the DCCA was ready to order Time Warner to release additional funds to Akaku, who was then per the mediated settlement going to disburse the agreed upon amounts to the E-partners.

D. Cable and PEG access bills -- 2006 Legislative Session

Mr. Sonobe reported that there were five non-administration bills being tracked. At this point in the Session, these bills are dead.

E. Status of Neighbor Island Franchise Fee Reports – Findings of Fact

Mr. Sonobe reported that Findings of Fact were posted on the DCCA website on February 17, 2006. Time Warner was found to have overcollected franchise fees for the Maui and Hilo franchise areas, and undercollected in Lahaina and Kona. This was a result of the billing and payment process utilized by Time Warner. The DCCA is inclined to order that TWE refund the overcollected amounts and deny its ability to recoup the undercollected amounts. There is a one month comment period. The DCCA is working with the consultant on the franchise review for the Kauai franchise.

Director Recktenwald stated that the rationale behind the DCCA's inclination with regard to the overcollections was that a substantial amount of time had passed since TWE collected the franchise fee amounts from subscribers. At this point in time, it would be cost prohibitive to figure out who paid franchise fees and the amount that each person paid. So the DCCA determined that a refund to current subscribers would be a better alternative. Regarding the undercollected amounts, Time Warner could have addressed this issue earlier since it was in control of the billing

process and it had the opportunity to do so. The DCCA felt that it was not fair in such circumstances to allow Time Warner to go back and collect undercollected amounts from subscribers now.

Mr. Sonobe reported that the reviews were based upon when Time Warner took over the various franchise systems. The DCCA plans to conduct reviews every 2 years. Director Recktenwald noted that Time Warner changed its billing methodology and now charges exact amount for franchise fees based upon the amount billed. The situations addressed in the Findings of Facts therefore should not reoccur.

Mr. Sonobe explained that previously, Time Warner charged every subscriber the same amount irrespective of the bill amount. Under the new methodology, each subscriber is charged on the invoice amount which results in a more equitable allocation of fee assessment. Mr. Sonobe stated that refunds can be expected for: Maui -- \$3 and Hilo -- \$2. Oahu subscribers already received approximately \$2.

IV. New Matters

A. Report on Meeting with FCC Commissioner Jonathan Adelstein, Director Recktenwald and CATV Administrator Sonobe

Mr. Sonobe reported that on January 26, 2005, Director Recktenwald, PUC Chair Carl Caliboso, Consumer Advocate John Cole, and he met with Commissioner Adelstein, upon his invitation, in Senator Inouye's office. Com. Adelstein expressed interest in how the state regulates cable communications, telecom and wireless. Hawaii is unique in that there exists a statewide cable television franchise authority, and PEG access encompasses all three sectors. A statewide franchise authority has resulted in significant benefits to the state in the form of INET which can interconnect all the islands with submarine fiber.

B. Competition in the Marketplace – Cable, Broadband, IPTV, and Satellite TV

Mr. Sonobe stated that the FCC and Congress are both looking at cable franchising issues. The FCC has published a NPRM (Notice of Proposed Rule Making) on obstacles to franchising. Telecom operators have complained that they are facing obstacles because they have to deal with lots of local franchising authorities before they can roll out their video services. One alternative being considered by the FCC and Congress is statewide franchising as opposed to national franchising. DCCA's Washington D.C. attorneys are monitoring the situation. The expectation

is that new legislation will be introduced later this year, although it may be delayed. CATV continues to track cable competition such as DBS service. In the latest FCC report on Video Competition, subscribers are moving away from cable to DBS.

Mr. Sonobe stated that if local telcom operator were to provide video service, the DCCA's position is that the operator must obtain a franchise. Mr. DeLeon expressed concern about what would be the PEG requirements if there was another cable television provider. Mr. Sonobe stated that if the local telcom operator applies for a franchise, it would be required to adhere to the same requirements as existing cable operator.

C. Olelo's Archiving Programming for On-Demand Access

Ms. Kealii Lopez, CEO of Olelo, discussed Olelo's archive streaming of Legislative programming. At the present time Olelo streams its programming on the Internet, and for certain legislative programs, a viewer can go back later to view this programming on the Internet. Ms. Lopez indicated that the ongoing cost for data archive storage is very expensive -- the extra equipment cost is over \$100,000 and staff time for encoding is prohibitive. Olelo is looking for help from local government to help pay for storage costs for legislative programming. In addition Olelo cannot provide tech support for the web site. The Internet activity is complementary of Olelo's primary service, which is cable television.

IV. Public Comments

A. Handout – Matt Yamashita

Director Recktenwald stated that the crux of the proposed legislation referenced in Mr. Yamashita's written testimony had already been introduced in the Legislature twice before with no action. Under existing law, the statute does not allow the DCCA to fund PEG access.

B. J Robertson thanked the DCCA for holding a public comment meeting on Kauai. Mr. Robertson was recently elected as Chair of the ACM, Western Region Chapter. He invited everyone to attend the ACM Western Region conference on October 27-28 in San Jose, California. The focus will be on program development and interaction with individual producers.

C. Jeff Garland voiced his concern about DCCA posting notice of request for exemption on a bulletin board that was not easily viewed by the public. Mr. Garland asked if a PEG access bidder has to be a non-profit organization. Director Recktenwald stated that the Department would

have to consult with the Attorney General as to whether other than non-profits would be allowed to bid for PEG access contracts.

- D. DeGray Vanderbilt passed out four handouts. He asked why the RFP process appeared to be rushed. He requested a copy of the Attorney General's opinion provided to the DCCA regarding PEG access contracts being subject to the State Procurement Code. Director Recktenwald stated that a Governor's office email referred to by Mr. Vanderbilt did not reflect a determination of whether an exemption from the procurement law was appropriate. Mr. Vanderbilt stated that he spoke to Aaron Fujioka, Chief Procurement Officer. Mr. Vanderbilt reported that Mr. Fujioka stated that he would deny an exemption from the Procurement Code if there was one person who would bid on an RFP. Director Recktenwald stated that the DCCA wanted to solicit public input during the public comment meetings. There was a need to explain this complex issue to the public, and with each meeting, the DCCA learned how better to explain things. There was no pre-conception by the DCCA as to what it would do regarding the RFP. The State Procurement Office is a separate department with separate responsibilities, and SPO will have to consider any exemption in light of the law it has to apply. Mr. Vanderbilt expressed his support for H.B. 2738. Director Recktenwald stated that the DCCA had concerns with the bill earmarking money for Molokai. DCCA's position is that the CAC should be permitted to provide advice on where additional funds for access should go. Mr. Recktenwald also stated that the annual fee funding is used for administrative purposes and cannot be used to fund PEG access unless the law is changed. The DCCA is not willing to charge cable subscribers higher fees for PEG access at this time.
- E. Kealii Lopez stated that Hawaii is seen as a national role model for its approach to PEG access. She referred to Mr. Aiona's concern as to how an RFP scope of service can encompass all what PEGs do. She expressed concern that although CATV has interest in improving service, it would be difficult to effectively develop a scope of service for PEG access services contracts and there could arise many unintended results. If DCCA were to submit an exemption request to SPO, SPO would rely heavily on whether there were any competitors who were serious bidders. Ms. Lopez reported that FCC Com. Adelstein visited the Waianae satellite center for Olelo. Ms. Lopez stated that only 1 out of 5 states are regulated by state LFA, and the FCC appears to be on the verge of assuming a bigger role in regulating cable television. Ms. Lopez referenced that Hawaiian Telcom is poised to offer IPTV in August 2006. She encouraged the DCCA to have dialog with Hawaiian Telcom to ensure that there is parity in the cable franchises.

Ms. Lopez invited everyone to attend the national ACM conference in Boston, Massachusetts, on July 6-8, 2006, and Olelo's Youth Exchange on April 13, 2006.

VI. Announcements -- None

VII. Adjournment --The meeting was adjourned at 11:52 a.m.

Taken and recorded by:



Laureen K.K. Wong
Dated: April 10, 2006