

Attachment "C"

Draft Rules

HAWAII ADMINISTRATIVE RULES

TITLE 16

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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SUBCHAPTER 1

GENERAL PROVISIONS

§16-____ - 1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Access organization" means any nonprofit organization designated by the director to oversee the development, operation, supervision, management, production, or broadcasting of programs for any public, educational and governmental ("PEG") channels obtained under section 440G-8, and any officers, agents, and employees of such an organization with respect to matters within the course and scope of their employment by the access organization.

"Applicant" means a nonprofit organization which initiates an application or proposal.

"Application" means an unsolicited filing.

"Cable advisory committee" means the cable advisory committee established pursuant to Haw. Rev. Stat. §440G-13.

"Cable franchise" means a nonexclusive initial authorization or renewal thereof issued pursuant to Haw. Rev. Stat. Chapter 440G, whether the authorization is designated as a franchise, permit, order, contract, agreement, or otherwise, which authorizes the construction or operation of a cable system.

"Designation" means selection of a PEG access organization as referenced in Haw. Rev. Stat. §440G-3 including an initial selection by application or proposal as well as selection on a renewal basis.

"Department" means the department of commerce and consumer affairs.

"Director" means the director of commerce and consumer affairs.

"Person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental agency.

"Proposal" means a filing solicited by the director.

"PEG access facilities" means (1) channel capacity designated for public, educational, or governmental uses and (2) facilities and equipment for the use of that channel capacity.

"Service area" means the geographic area for which an access organization has been designated to provide services.

§16-____ - 2 Application or proposal for designation of access organization.

(a) No access organization shall be initially designated except upon written application or proposal therefor to the director, and following public hearing upon notice, as provided in this chapter.

(b) An application or proposal for designation shall be made in a form prescribed by the director and shall set forth the facts as required by the director to determine in accordance with this chapter whether an access organization should be designated, including facts as to:

- (1) The management and technical experience of the organization, and its existing or proposed staff;
- (2) The demonstrated public media, community media, and/or PEG access experience of the organization and its existing or proposed staff;
- (3) The applicant having among its missions/purposes (as demonstrated by its articles of incorporation, bylaws, or similar corporate documents) to provide training, education and outreach to permit individuals and

organizations the ability to use communication tools to effectively convey their messages;

- (4) The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the director;
- (5) The organization's short-term and long-term plans for PEG access services for a designated county;
- (6) The financial capacity of the organization;
- (7) Whether the organization agrees to expand the marketplace of ideas, and is committed to allowing members of the public to express their First Amendment free speech rights;
- (8) The demonstrated ability of the organization, through the use of electronic media tools, to foster and engage in civic and cultural development and engagement in communities it has served;
- (9) Any other matters deemed appropriate and necessary by the director.

(c) A proposal for designation of an access organization shall be accepted for filing in accordance with this chapter only when made in response to the written request of the director for the submission of proposals.

§16-___ - 3 Designation of access organizations; criteria; content.

- (a) The director is empowered to designate access organizations upon the terms and conditions provided in this chapter.
- (b) The director, after a public hearing as provided in this chapter, shall designate an applicant as an access organization when the director is convinced that it is in the public interest to do so. In determining whether to designate an access organization, the director

shall take into consideration, among other things, the content of the application or proposal, the public need for the services, the ability and experience of the applicant to provide PEG access services, the suitability of the applicant, the financial responsibility of the applicant, the technical and operational ability of the applicant to perform efficiently the services for which designation is requested, any objections arising from the public hearing, the cable advisory committee established by this chapter, or elsewhere, and any other matters as the director deems appropriate in the circumstances.

(c) In determining the area for which an applicant is to be designated, the director shall take into account the cable franchise and local needs within each county.

(d) There shall be no more than one entity designated to provide PEG services in each county during any specified time period.

(e) The period of an initial designation shall be not less than five nor more than twenty years.

§16-___ - 4 Requirement for adequate service; terms and conditions of service.

(a) Every access organization shall provide safe, adequate, and reliable service in accordance with applicable laws, rules, and contract requirements.

(b) The director shall require each access organization to enter into a contract containing a statement of services to be provided, performance standards for such services, fees for such services, and all terms and conditions of service, in the form and with the notice that the director may prescribe. Prior to finalizing the terms of the contract, the director or his/her designee shall seek input from the cable advisory committee regarding the appropriate terms.

(c) The director shall ensure that the terms and conditions upon which PEG access services are provided are fair both to the public and to the access organization, taking into account the appropriate service area, particular circumstances of that service area, input received during the designation process and the resources available to compensate the access provider.

(d) If a contract has exhausted its provision for extension(s) of time of performance, or if the contract does not include a provision for extension(s) of time of performance, the contract may be extended upon mutual agreement of the PEG access organization and the director, provided:

- (1) The period of each extension is for one hundred eighty calendar days or less;
- (2) The director makes a written determination that it is not practical to award another contract at the time of the expiration of the contract for stated reason(s) to include but not be limited to the inability to execute a new contract by the time the contract expires; and
- (3) The terms and conditions of the contract remain the same as the original contract, or as amended per the contract; or if not the same or as amended, they are fair and reasonable.

§16-___ - 5 Complaints; violations; revocation, alteration, or suspension of access organization designation; penalties.

(a) Complaints regarding the operation of an access organization may be made orally or in writing to the director. The director shall resolve complaints informally when possible.

(b) Any designation issued hereunder may be revoked, altered, or suspended by the director as the director deems necessary on any of the following grounds:

- (1) For making material false or misleading statements in, or material omissions from, any application or proposal submitted to the department;
- (2) For any sale, lease, assignment, or other transfer of contract without consent of the director;
- (3) For material breach of the terms of the access services contract, following notice and reasonable opportunity to cure;
- (4) For repeated failure to comply with this chapter or any rules or orders prescribed by the director; and
- (5) For engaging in any unfair or deceptive act or practice as prohibited by Haw. Rev. Stat. § 480-2.

(c) In lieu of or in addition to the relief provided by subsection (b), the director may fine an access organization for violations of subsection (b)(1) through (5) in an amount not less than \$50 nor more than \$1,000 for each violation. Each day's continuance of a violation may be treated as a separate violation pursuant to rules adopted by the director. Any penalty assessed under this section shall be in addition to any other costs, expenses, or payments for which the access organization is responsible under other provisions of the law.

§16-____ - 6 Renewal of access organization designation. The designation of any access organization pursuant to this chapter may be renewed by the director as provided in subchapter 3 herein. The periods of renewal shall be not less than five nor more than twenty years each.

§16-____ - 7 Transfer of access organization designation.

(a) No access organization designation or contract therefor, including the rights, privileges, and obligations thereof, may be assigned, sold, leased, encumbered, or otherwise transferred, voluntarily or involuntarily, directly or indirectly, including by transfer of control of any access organization, whether by change in ownership or otherwise, except upon written application to and approval by the director.

(b) A transfer of an access organization designation shall authorize the new access organization to provide services for the remainder of the term of the existing contract.

§16-____ - 8 Oversight of access organization.

(a) The director or the director's designated representatives may from time to time visit the places of business and other premises and examine the records and facilities of any access organization to ascertain if all laws, rules, contract provisions, and orders of the director have been complied with.

(b) The director shall conduct a compliance review no less than once every seven years and no more than once every three years, the purposes of which shall be:

- (1) to obtain input from the recipients and/or potential recipients of PEG access services regarding their satisfaction/dissatisfaction with the designated access organization's performance under the contract;
- (2) to review PEG access services provided by the designated access organization(s) in light of previously identified community needs and interests in order to determine whether community media needs of the community are being met by the access organization (considering the resources available to meet those needs) and the existing technology's

ability to meet those needs, including whether the needs, technology or other aspect of services have changed in any material respect since the start of the contract;

- (3) any other compliance matter the director deems appropriate; and/or
- (4) to determine, based on any of the information obtained in the course of the compliance review, whether the terms of the then-current contract should be modified.

(c) The process for each compliance review shall include, at a minimum, a public hearing to afford interested persons the opportunity to submit views, data, or arguments, orally and in writing. Notice thereof shall be given as provided in section 16-____-14 herein.

(d) In the event that the director determines, based on the results of a compliance review, that the terms of the then-current contract should be modified, the director shall consult with the cable advisory committee to identify the modified terms. The director shall also consult with the access organization to determine the feasibility and appropriateness of any identified modifications, the resulting costs and community impact. However, the decision of the contract terms to be modified and the extent of modification shall be the ultimate responsibility of the director. In the event of any contract modification resulting in additional or different services to be provided by the access organization, the compensation paid to the access organization pursuant to the contract shall be adjusted accordingly.

§16-____-9 Reports. Each access organization shall file with the director reports of its financial, technical, and operational condition. The reports shall be made in a form

and on the time schedule as specified in the contract and shall be kept on file open to the public.

§16-____-10 Time.

(a) The computing of any period of time shall be in accordance with section 16-201-14, Hawaii Administrative Rules.

(b) The time limits set by this chapter may be waived or extended by mutual written agreement between the director and the applicant.

SUBCHAPTER 2

PROCEDURES FOR NEW AND TRANSFER APPLICATIONS

§16-____ - 11 Filing of application or proposal.

(a) Within thirty days of receipt of an application or proposal, the director shall review the application or proposal and notify the applicant in writing that it is acceptable for filing or inform the applicant that it fails to provide certain information. The applicant shall be given at least fifteen days to submit the required information. If the director finds the application or proposal to be complete, the director shall issue notice of acceptance for filing. If no additional information is received or if the application or proposal is still not complete, the applicant's submittals shall be returned, with a statement indicating that the application or proposal as submitted is not acceptable for filing.

(b) The date of the notice of acceptance shall be deemed the filing date of the application or proposal.

§16-____ - 12 Requests for additional information or documentation. To facilitate the review of the application or proposal, the director may informally and at anytime during the process request the applicant to submit additional information or supporting documentation to clarify or supplement the information already contained in the application or proposal.

§16-____ - 13 Investigations, examinations, and audits. In addition to requesting supporting documentation or clarifying information from the applicant, the director may initiate or require any investigation, examination, and audit to be performed as deemed appropriate.

§16-____ - 14 Public hearing. Within thirty days after the issuance of a notice of acceptance for filing, the director shall hold a public hearing on the application or proposal to afford interested persons the opportunity to submit data, views, or arguments, orally or in writing. Notice thereof shall be given to the governing council and mayor of the county and to the holder of any cable franchise in the county in which the proposed service area is located. The director shall also give public notice of the application or proposal and hearing at least once in each of two successive weeks in the county in which the proposed service area is located. The last notice shall be given at least fifteen days prior to the date of the hearing.

§16-____ - 15 Approval or denial. After holding a public hearing, the director shall approve the application or proposal in whole or in part, with or without conditions or modifications, or shall deny the application or proposal, with reasons for denial sent in writing to the applicant. The director has the discretion to require the applicant to attend a show cause hearing after the public hearing but prior to making the decision on the application or proposal.

§16-____ - 16 Request for reconsideration. Within ten working days of issuance of the decision, an applicant may request the director to reconsider its decision. The request shall be in writing, shall specify the reasons why the director should reconsider the decision, and set forth any relevant and substantial information that for good cause was not previously set forth in the application or supplemental information, together with an explanation of why the information was not previously presented. The request may also state specifically what points of fact or law the director may have overlooked or misunderstood, together with brief arguments on the points raised. Only one request for

reconsideration may be filed by the applicant. The director shall make a determination on the request and issue a decision affirming or amending the initial decision.

§16-____ - 17 Contested case hearing. The applicant may petition the director for a contested case review hearing within sixty days following the decision. The director may transfer the petition together with the documents concerning the application to a hearings officer for further proceedings pursuant to sections 16-201-26 to 16-201-47.

§16-____ - 18 Construction. To the extent not inconsistent with the procedures described in this chapter, the procedures described in chapter 16-201, Hawaii Administrative Rules shall apply. Should any provision of this chapter be invalidated, all other provisions shall remain in full force and effect.

SUBCHAPTER 3

PROCEDURES FOR RENEWAL APPLICATIONS

§16-____ - 19 General. To the extent not inconsistent with the provisions of this subchapter, all of the provisions stated in subchapters 1 and 2, with the exception of sections 16-____-2 and 16-____-11, together with the sections in this subchapter shall apply to all renewal applications.

§16-____ - 20 Initiating the renewal process.

(a) An access organization seeking renewal shall submit to the director a written notice of intent to renew no later than twelve months prior to the expiration of its existing contract.

(b) Within thirty days of receipt of the notice of intent to renew, the director shall issue a written notice to the access organization stating that the renewal has been either accepted for further processing or rejected. The permissible grounds for rejection shall be limited to those set forth in section 16-____-5 herein and shall, in the event of rejection, be identified in the director's notice. The date of the director's notice shall be the date of filing for the purpose of further proceedings as provided herein.

(c) If the notice of intent to renew is accepted, the director shall process the request for renewal in the same manner as for applications and proposals, as provided in Subchapter 2 herein.

(d) If the notice of intent to renew is rejected, the access organization may seek reconsideration and/or review of the decision as provided in sections 16-____-16 and 16-____-17 herein.

§16-____ - 21 Alternative renewal procedures. Nothing in this chapter shall preclude an access organization from submitting an application for renewal at any time. Likewise, nothing shall preclude the director from granting or denying such an application, after affording the public adequate notice and opportunity for comment.