

Department of Commerce and Consumer Affairs  
State of Hawaii

**HCR 358 TASK FORCE MEETING**

Date: Wednesday, August 27, 2008

Time: 1:00 p.m. – 4:00 p.m.

Place: The following State of Hawaii Video Conference Centers:

Big Island:  
Hilo State Office Building  
75 Aupuni Street, Basement  
Hilo, HI 96720

Kauai:  
Lihue State Office Building  
3060 Eiwa Street, Basement  
Lihue, HI 96766

Maui:  
Wailuku Judiciary Building  
2145 Main Street, Rm. 120  
Wailuku, HI 96793

Oahu:  
Kalanimoku Building  
1151 Punchbowl Street, Room B10  
Honolulu, HI 96813

Members of the public may attend the meeting at any of the specified above locations and for their convenience are asked to take note of the meeting chronology set forth in the Agenda. No food or drinks (including water) are allowed in the video conference centers.

**AGENDA**

- I. Call to Order (Chair)
- II. Accept Minutes from June 30, 2008 Meeting (Task Force)
- III. Accept Minutes from August 4, 2008 Meeting (Task Force)
- IV. Public Testimony (Public)
- V. Discussion and agreement re goals pertaining to HCR 358 (Task Force)
- VI. Rulemaking and alternatives to Procurement Code (Task Force)
- VII. Selection Process for PEG Advisory Board Members (Task Force)
- VIII. Applicability of Procurement Code – Pros and Cons (Task Force)
- IX. Address formal request of documents from State (Task Force)
- X. Preparation for Next Meeting (Task Force)
  - o Date
  - o Agenda
- XI. Adjournment

*Depending upon time considerations, each speaker may be limited to a specific time for public comment. Written comments may be emailed to [cabletv@dcca.hawaii.gov](mailto:cabletv@dcca.hawaii.gov) or mailed to DCCA-CATV, P.O. Box 541, Honolulu, HI 96806, Attn: HCR 358 Task Force or faxed to 808-586-2625. Persons with special needs for this meeting may call CATV at 586-2620 by August 25, 2008 to discuss accommodation arrangements.*

**HCR 358 TASK FORCE**  
**FINAL ACCEPTED MINUTES OF MEETING**

Date: August 27, 2008  
Time: 1:00 p.m.  
Place: The following State of Hawaii Video Conference Centers:

Big Island:  
Hilo State Office Building  
75 Aupuni Street, Basement  
Hilo, HI 96720

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Kalanimoku Building  
1151 Punchbowl Street, Room B10  
Honolulu, HI 96813

The Agenda for this meeting was filed with the Office of the Lieutenant Governor.

I. Call to Order (Chair) (Meeting Rules)

A. Roll

i. Present

1. Clyde Sonobe
2. Eric Knutzen
3. Jay April
4. Roy Amemiya
5. Gilbert Benevides
6. Shelley Pellegrino
7. Geri Ann Hong
8. Gregg Hirata
9. Gerald Tekase (arrived during public comment)

ii. Excused

1. Keith Rollman
2. David Lassner
3. MaBel Fujiuchi

B. Approve Agenda

i. Comment – Motion – Unanimously approved

1. Move formal request of documents from State to after Public Testimony
2. Discuss old business when discuss minutes

II. Accept Minutes from June 30, 2008 Meeting (Task Force) Accepted (7 yes, 1 abstention)

A. Future Minutes Review Procedure – Chair

- i. Draft minutes provided from Facilitator's notes then reviewed and finalized by Chair and Clyde and Jay then sent to Task Force, discussed and if appropriate accepted and then posted; no posting until accepted by Task Force

III. Old Business

- i. August 27, 2008 and June 30, 2008 Meetings
  1. Task Force member submittals will be posted absent DCCA issues
  2. Information submitted by Public will be posted on the DCCA website absent DCCA issues
  3. Posting video re Procurement
    - a. Akaku link to video to be posted ([www.akaku.org](http://www.akaku.org))
  4. Written opinion from Procurement Board re Procurement (deferred to formal request of documents)

IV. Accept Minutes from August 4, 2008 Meeting (Task Force) Accepted (Unanimous)

V. Public Testimony (Public)

A. Rules

- i. Ed Coll – **See attached written testimony and two (2) pdf files (“Current Problems” and “Non-Profit Profiteers”)**; provides what he sees as a solution to problem of commingling of funds by education and government; need to provide funds on first come first served basis.
- ii. Linda Puppolo – Advise committee that job is much more important than the time frame; don’t have necessary docs we need or information that we need has been disseminated yet, cites annual reports given DCCA, not sure how you split up education and government (creative also in public sectors); moving voice to hierarchy not venue for access; here for “voice”, need to know what happens in PEGs before you can make decisions; believes that there is accountability for funding as shown by last 15 years of good, independent audits; does not know why we are here today; transition from Akaku would be a logistical nightmare. Key – Do more homework, concerned about 4 missing task force members.
- iii. Lance Collins – Attorney representing Akaku. See two (2) previously submitted letters (August 5 and August 26). As for August 26, per Court, DCCA must go through Ch. 91 rulemaking process with no requirement that they use the Code. Also, as letter states, any time a government entity has a public hearing where public is effected they are a contested case. As Task Force considers, look at the contested case process which is the only way rights of licensee/permittee are addressed; provides public with access to intervene and full record. Re legislative intent, regardless of what one legislator thinks about an action, look to legislative intent (floor speeches, etc.). **Chair includes transcript of Court Proceeding dated October 4, 2007 as attachment entitled “doc.pdf” in minutes.**

- iv. Keali'i Lopez – Reinforce that the work of Task Force is important to Public and PEGs; with time frame lots of work to be done, suggests work done in between meetings and appreciates providing information to the point. Regarding Rulemaking, delete item "b" relating to DCCA complying with State Procurement Code as it needs not be stated. Regarding pros and cons re Procurement Code, not a simple straightforward task but is really complex.
- VI. Address formal request of documents from State (Task Force)
- i. **See HCR 358 Task Force Document Request prepared by Akaku (attached as "img001.pdf") Members/Attendees in parenthesis below to make document available to Facilitator via email who will forward via email to Task Force upon receipt.**
    - 1. RFP (Keali'i Lopez)
    - 2. See Akaku packet including Legislative Reference Bureau Report 4, Disputes over PEG Resources, and two (2) Protests attached
    - 3. Current Draft Rules re Subchapter 16 (Keali'i Lopez)
    - 4. Each PEG to submit its last annual report electronically by September 3, 2008 to David Franzel
    - 5. DCCA Draft Plan for PEG Access (1/04) (see *DCCA website*)
    - 6. Attorney General Opinion to DCCA re Procurement
      - a. per DCCA – Attorney Client Privileged, lawsuit in place, issues to be decided by Court, previously requested of DCCA who said it was protected by Attorney Client Privileged
      - b. Motion – Task Force Chair to request a formal opinion from AG re procurement for PEGS – 8 for, 1 abstains (Sonobe)
    - 7. Testimony – not requested, too voluminous
    - 8. Court Transcript (Lance Collins)
    - 9. Written Opinion of Procurement Policy Board (Chair to request from Aaron Fujii)
- VII. Discussion and agreement re goals pertaining to HCR 358 (Task Force)
- A. Agreed upon goals; at direction of Chair, Facilitator reads HCR 358 Resolution sections to Task Force and after discussion the following goals were adopted by the Task Force:
    - i. Solicit public input and examine methods other than Procurement Code process to oversee PEG expenditures and ensure proper checks and balances
    - ii. Task Force to review selection process for Board of Directors of PEG access organizations (note: instead of selection process for PEG advisory board members as set forth in HCR 358)

1. The Task Force discussed this issue at some length (*also, see David Lassner and Jay April input (attached as "Response 001001.pdf")*). Outside of the meeting, Chair Knutzen called Representative Yamashita, the signatory of the Resolution, who indicated that it was intended that PEG advisory group members means the Boards of Directors of the PEG organizations. Member April noted that the Resolution's stated goal was ambiguous and absent a review of legislative intent should be stricken. After discussion, the above goal was adopted with 8 for and 1 against (Member April dissenting).
  - iii. Recommendations by Task Force should take into account the First Amendment rights of PEG organizations.
  - iv. The Task Force shall submit a report of its findings to the Legislature no later than twenty (20) days prior to the opening of the 2009 Session (per Task Force by December 20, 2008).
  - v. Member April moved to add an additional goal re locality where the Task Force would find alternatives to Procurement Code meeting the fullest range of community communication needs of each franchise area and allow maximum public input in the designation of PEG access providers. Member Hirata suggested that localism be imbedded in discussions. After Task Force discussion, Member April withdrew his motion.
- VIII. Rulemaking and Alternatives to Procurement Code (Task Force)
- A. Code
  - B. Information for Bid
  - C. Exempt
  - D. Emergency activities
  - E. Sole Source (requires criteria, could encompass PEG structure)
  - F. **See Member April's handout entitled Statement Regarding Applicability of Procurement Code (attached as "April Code 001001.pdf"**. Member April commented that he does not believe that the Procurement Code applies to PEGs and that national experts are amazed as no other State uses Procurement Codes for PEGs, they are not advantageous to State and will not stand up in Court, and that any alternatives should be elegant and clean as opposed to rocky, contested case proceedings are a viable alternative as all members of the public can participate, and that a three (3) year bid could undo PEG work;
  - G. Other points made were that criteria should be developed regarding services that a Board fosters and an investigation as to whether they are being met.
  - H. **See written input from Members David Lassner, Jay April, and Gregg Hirata (attached as "Response 001001.pdf")**.
  - I. **See DCCA Letter and Collins Letter (attached as "Letter to HCR 358 Task Force Chair" and "Akaku Task Force Letter to Knutzen"**.

Final Minutes  
HCR 358 Task Force  
August 27, 2008 Meeting

IX. Preparation for Next Meeting (Task Force)

- Date – Wednesday, September 24, 2008 1pm – 4 pm
- Chair's "homework" for next meeting – Consider criteria for PEG services fostered by Boards and the structure of PEGs including parameters for Board participation (as part of Task Force discussion of alternatives to procurement).
- Agenda
  - Call to Order (Chair)
  - Accept Minutes from August 27, 2008 Meeting (Task Force)
  - Public Testimony (Public)
  - Review Procurement Code and if possible the State Concession Law (including alternatives within the Procurement Code) in a thirty (30) minute Q & A Session followed by a discussion of pros and cons and Alternatives to Procurement Code with the State Procurement Office present as a resource (Task Force)
  - Benchmarking regarding alternatives to procurement by other PEGS (Keali'i Lopez and Task Force)
  - Selection Process of the Board of Directors of PEG access organizations (Task Force)
  - The Report to the Legislature
  - Preparation for Next Meeting (Task Force)
    - Date – September 24, 2008 1 pm – 4 pm
    - Agenda

X. Adjournment at 4 pm

Dear Members - FYI.

"Ed Coll" <coll@kanai.net>  
Sent by: edcollenator@gmail.com

To: cabletv@dcca.hawaii.gov  
cc

08/26/2008 07:42 PM

Subject: HCR 358 Testimony of Edward Coll for Task Force 8/27/08 Meeting

Aloha HCR 358 Task Force Members,

Please consider the contents of this email and the attached PDF files as the testimony of public producer Edward Coll. Mahalo in advance for your consideration of my testimony.

**Alternative to procurement: A Modest Proposal to End outsourcing of PEG services**

Subdivisions of the State (departments, agencies, divisions etc) do not have to go out for procurement at all. I propose breaking the mandated cable subscriber funding of PEG into separate categories of Public, Education, and Government, and then allocate the state mandated cable subscriber funds to the appropriate subdivisions of the State. Here are just a few examples;

- Fund the Legislative Access Room, County Councils, etc. for Government Access services
- Fund UH, DOE for Educational Access services
- and fund the State Library system for Public Access services

Language would need to be crafted to assure the funding from the state mandated cable subscriber monies would not be diverted by these subdivisions of the State to other uses. Oversight in the forms of state open record and sunshine law as well as the ability of the State Auditor to conduct audits are already in place.

The state Library system has a long history of providing nonpartisan first-come, nondiscriminatory access to the public.

Education and Government should be in charge of disseminating their own messages.

This modest proposal would be an alternative to state procurement law and provide a level of transparency, oversight, and accountability that has been lacking for almost two decades of State procurement law violations (detailed in the two PDF files attached to this email).

**Attachments: CurrentProblems.PDF and NonProfitProfiteers.pdf--**  
Edward Coll

## **PROBLEMS WITH THE CURRENT ALTERNATIVE TO STATE PROCUREMENT LAW**

*by Edward Coll*

If the mandate of this task force is to explore alternatives to procurement law it might be instructive to examine the 17 year history of the current alternative and the problems encountered by individual public producers in gaining first-come, nondiscriminatory access to the medium of television under this current regime. One major problem is mission drift and spending the state mandated money they get from cable subscribers on ventures other than providing access to the public.

### **1. PEG Access organizations use State and public funds.**

The State of Hawaii mandates that PEGs be funded from a percentage of cable gross revenue from cable subscribers in each county. This state mandated cable subscriber money does not go through the general fund and is paid directly by the cable operator to the individual state created memberless, non-profit access entity in each county. If the state can mandate cable subscribers fund these PEGs as a condition of receiving cable TV it is not a voluntary community asset but a state mandated asset akin to a stealth user tax.

### **2. PEG Access services are broken.**

For more than 17 years we have had an alternative to following the law, and PEGs have failed at their mission to provide first-come, nondiscriminatory access to the medium of television. PEGs have used block programming and preferential scheduling techniques to service government and favored non-profits to the detriment of the individual public producer. They have spent public monies on highly questionable real estate deals. PEGs and DCCA have recieved hundreds of complaints from individual producers. It is broke and needs fixing.

### **3. Defective PEG Access for almost two decades makes it practicable or advantageous for the State to follow procurement law.**

PEGs failure in providing first-come non discriminatory access and media literacy to all segments of our community is well known. This did not happen overnight. It is a result of PEGs mission drift to providing first-come, nondiscriminatory access to "community building" with the PEGS deciding which communities to buil through a process of standardless discession and censerious actions like block programming and preferential scheduling of favored "communities" of the PEGs choosing.

### **4. Existing Hawaii PEG Access organizations are State sanctioned monopolies denying democratic media to the public.**

PEGs use the television broadcast model and provide highly restricted content in a top down, one to many, one way, autocratic communications flow. PEG access entities function like elite media espousing some viewpoints and not others. Access is tightly controlled. The simple fact is that in general, PEG access entities are following the coprpoate television paradim of block programming. They are far from a democratic media acting in the public interest. It is both practicable and advantageous for the state to follow state procurement law.

### **5. PEG Access operating experience is widely available through the RFP process.**



It is democratic to allow other entities in existence on the islands or those which may be formed to participate as potential bidders in an RFP process. The existing State created

PEG have failed to provide first come, non-discriminatory access. If given the change other non-state created non-profits have demonstrated success. On the Island of Kauai another non-profit successfully completed a contract to provide content for the government channel. The claim that the currently illegally sole sourced PEG entities are the only entities qualified is absurd and amounts to benefiting from the fruit of the poisonous tree. Using the logic of illegal sole source designation to claim superior experience is like a scam artist claiming superior knowledge in the security field.

#### **6. State Telecommunications Oversight Is Deficient.**

PEG Access in Hawaii is broke and does needs to be fixed. Good government and the public interest require intelligent legislative and local oversight to many years of unaccountable and questionable cable TV decision-making on the part of DCCA officials appointed by the executive branch. This oversight does not currently exist in Hawaii and is desperately needed if local community communications are to be fully met. A complete financial and performance audit of the DCCA cable division and all the PEG entities they created needs conducted by the legislative auditor. A comprehensive needs assessments and a transparent mechanism is needed so that powerful special interests such as state educational entities, large non-profits, Hawaii public television, and the monopoly cable TV provider itself, Time Warner do not play a heavy hand in the process. Furthermore the issuance of an RFP should prohibit existing PEG's from participating in the procurement process given their historical mission failure to provide first-come, nondiscriminatory access to public producers. We know what does not work. It is time to follow the State Procurement law.

#### **7. State government should split Public, Government, and Education access.**

Much of the dysfunctional practices of current PEG access could be solved by splitting Public, Education, and Government into three separate entities.

It is extremely heartening, to hear statements by the DCCA Cable Administrator, in public comment sessions that the Department has not ruled out for-profit or other state agencies being allowed to bid on PEG contracts. Should the Department seek these options, it would appear to be in compliance with the statute that set up the PEG's to begin with which states in Section 440G-3:

“Access organizations” means any *non-profit* organization designated by the Director to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section 440G-8...”

DCCA should allow state agencies such as UH to bid, for it would create the huge advantage of expertise from academic support services that would enhance Educational programming. For proof, consult University of Hawaii spokesman, David Lassner's written testimony to DCCA Director Mark Recktenwald regarding this issue where he strongly

advocates state control of all local programming. Should the DCCA adopt this model, education access should be split from public access due to the inherent conflicts of interests between educational access and the first-come, nondiscriminatory mission of public access. Educational access has no such mission.

State originated public access entities are the hallmark of dictatorial, autocratic regimes not becoming in a democracy. Education and Government access on the other hand are clearly a function of government and as hierarchical structures Education and Government access cannot complete government functions on a first-come, nondiscriminatory basis.

It is also troubling that the Department has not released the opinion of the Attorney General regarding its compliance with the State Procurement Code prior to conducting public comment sessions. These actions call into question whether the PEG access issues are being dealt with in an open, fair and equitable manner. This lack of transparency may be advantageous to the current PEGs, state cable monopoly provider or to certain bureaucrats and agencies, but it is definitely not advantageous to the individual public producer.

#### **8. If SPO requires and RFP process, Hawaii Public Television must be included.**

Using the same rationale for issuing an RFP for the PEGs, it would appear that KHET which receives 1% of PEG access funds annually from the DCCA should also be subject to the RFP process. Currently KHET receives more than 2 million dollars of state mandated cable subscriber monies annually.

#### **9. Splitting P, G, and E is a policy reform required as a pre-requisite to any procurement process.**

Due to the complete failure of PEG entities in Hawaii to provide first-come, nondiscriminatory access to the medium of television to the individual public producer, policy reform splitting to P,G,and E is required before the RFP process for Public access begins.

#### **10. PEGs do not represent the views of the individual public producer**

PEGs represent their own interests, government interests, and special interests. By definition the public is undifferentiated and has no special interests. Individual public producers interests are varied with one exception, **THEY ALL WANT ACCESS!** The failure of the current state created, sole sourced PEGs to provide the individual public producer with first-come, nondiscriminatory access for seventeen years is indefensible.

Mahalo to Akaku for providing a template of talking points which became the basis for these comments.

# Public Access Profiteers plunders local arts council

*By Ed Coll*

The State of Hawaii Department of Commerce and Consumer Affairs' (DCCA) created and funds Ho`ike Kauai Community TV Inc. This is the story of how the DCCA's eleven-year violation of state procurement law and lax oversight over Ho`ike TV, has resulted poor service, favoritism, misappropriation of public monies, competition with private enterprise, and the plundering of another nonprofit corporation.

Over the past several years, leaders of Ho`ike TV worked together with a limited liability corporation, the Kauai Center for Art Education, and Technology (KCAET LLC) to concoct a real estate scheme than ended up economically damaging non-profit organizations on Kauai.

Known for being one of the most generous communities for giving, people on Kauai hoped they were funding a multi-use facility for non-profits to occupy, but that dream was never realized. Ho`ike's Managing Director, J Robertson, Kauai Realtor and Ho`ike's past Board President, Rowena Cobb, and Mano Wai's CEO, Robert Kihune worked together to convince several non-profit organizations to sign documents of obligation called operating agreements, and jump on the "community building" bandwagon so in vogue among the State of Hawai'i created and cable subscriber funded a Public Education, and Government (PEG) non-profits.

The Kauai non-profits known to have been targeted by Ho`ike included: Malama Pono, Garden Island Arts Council, Boys & Girls Clubs, Boy Scouts, The Kekahu Foundation (KKCR radio) and United Way of Kauai. By 2005, two of the targeted organizations would be receiving invoices for half a million dollars.

The Ho`ike Board tried to keep their plans secret from the public by talking in "code." Board members would ask questions such as "does everyone agree with page, paragraph, sentence number x" without the public in attendance having copies of the documents as a point of reference. Nobody in the public could tell what was under discussion.

The Ho`ike board was constantly moving into executive session to discuss their secret plan to spend public monies. Ho`ike ignored a May 19th 2004 public records request for documents regarding this matter and State of Hawaii Department of Commerce and Consumer Affairs (DCCA) Director Mark Recktenwald was informed of Ho`ike's refusal to provide the requested records on March 15, 2005. Ho`ike refused public inspection of the records and Director Recktenwald did nothing.

## **THE DCCA REGULATORY SCHEME**

The State of Hawaii mandates 3% of the cable companies (Time Warner Oceanic) gross revenues be paid to the PEG entities that the director of the DCCA designates. Time Warner Oceanic passes this bill on to the cable subscriber (check your bill). This amounts to a mandated user tax on every cable subscriber in the state and amounts to well over 5 million dollars annually.

The DCCA created the PEG non-profits to receive this mandated cable subscriber money (Olelo on O`ahu, Akaku on Maui, Ho`ike on Kauai, and Na Leo O Hawai'i on Hawaii) in the early 1990s. The director of DCCA has maintained appointment authority of the board majority ever since. DCCA

contracts with these DCCA created and controlled PEG entities through non-competitive sole source contracts.

Here in a nutshell is the regulatory framework that allows such waste and plunder to occur. The first oversight function is to account for dollars in and dollars out of the access entities. The second oversight function is to avoid accountability for performance and success of the PEG's in meeting the federally mandated mission of providing "First-Come Non-Discriminatory access" as described in the federal authorizing document, the Federal Communications Act. Failing the establish a nexus between the money spent and any measurable performance evaluation in meeting their mission is designed into the DCCA contracts. Reporting requirements for performance lack specificity and definition.

First-Come Non-Discriminatory the federal mandate itself remains undefined by DCCA and has been redefined in PEG bylaws. WHAT CURRENT PEG REPORTING REQUIREMENTS DON'T TELL YOU

- 1) Hours of PEG client produced compared to in-house produced content
- 2) Number of local professionally produced programs compared to local PEG client produced content
- 3) Hours of local compared to satellite feeds (such as Deutche Wella, NASA TV, Armed Forces News, ARTS channel etc.) content.
- 4) Number of repeats of bulletin board segments per user (some repeat 3 or more times per hour for many hours)
- 5) Hours of promotion for client programs compared to in-house, satellite feeds and professionally produced content.
- 6) Hours of franchise area programming compared to neighbor island programming
- 7) Total hours of premiere franchise area PEG produced programs compared to their number of repeats.
- 8) Total hours (including repeats) of non locally produced programs (by channel [all]).
- 9) Number of hours of presented program premiere compared to repeat hours etc.

Within this broad DCCA regulatory scheme to overseeing the public's money are schemes within schemes. Any public access profiteer aware of the dysfunctional contractual requirements of DCCA can apply the same scheme to pursue their own pet projects or self-serving activities.

### ***\$72,000 FOR A PILE OF PAPER***

The following example demonstrates a specific instance of how this DCCA regulatory scheme allowed a past PEG board president and current General Manager to use a PEG entity as a launch pad to waste \$72,657.23 and plunder another non-profit. The PEG was Ho`ike Kaua'i Community TV, Inc. on the island of Kauai. The plundered nonprofit was the Garden Island Arts Council (GIAC). The Managing Director of Ho'ike is J Robertson. The past Ho'ike board president was Rowena Cobb, who also owns a Kauai realty company.

In 2003, using the same mailing address of her realty company, Cobb became the sole agent for a newly created limited liability company called Kauai Center for Arts Education and Technology LLC (KCAET). Mano Wai Corporation is listed as officers managing KCAET. On the DCCA business registry website recently, the KCAET LLC is listed as "not in good standing". Although Cobb resigned as agent in December, 2005, Cobb's mailing address is still listed as the mail contact for KCAET LLC.

The April 26, 2006, Ho`ike minutes reveal that GIAC paid \$39,000, which amounted to "a lifetime of

savings for piles of paper, and nothing to show for it." Ho`ike spent \$29,000 of the public's money, leaving the organization with over \$300,000 squirreled away, a fact not disclosed to the GIAC board members present. These minutes never mention former Ho`ike president Rowena Cobb was the agent for KCAET as the Ho`ike board attempted to distance themselves from Cobb and her role in the scheme.

According to Garden Island Arts Council representatives, the GIAC, a membership-based arts organization, was left with \$70 in the bank. Relying on Ho`ike Board minutes and other public records here is what happened:

In 2002 Ho`ike Managing Director, J Robertson, and then Ho`ike Development Committee Chair, Rowena Cobb contacted Mano Wai on Oahu and from those meetings a plan was hatched to build an \$8 million multi-use facility to house a TV studio, meeting rooms, offices and an on-site food service. Ignoring the fact that the small Ho`ike studio sat empty most of the time and that no needs analysis was conducted, Cobb and Robertson began to beat the bushes doing island-wide dog-and-pony shows for any non-profit with money to join them in their empire building. I personally witnessed one of these performances done for the Kekahu Foundation Board (the operators of the KKCR Radio station).

Kekahu failed to take the bait, but Cobb and Robertson did meet with some initial success getting partial buy-in from Kaua'i United Way, Malama Pono and even an endorsement of the idea from county of Kauai Mayor Brian Baptiste. At the October 24, 2002 Development Committee Meeting Rowena Cobb reported on a meeting to discuss a possible facility to house organizations such as Ho`ike, GIAC, Boy Scouts of America, Boys and Girls Club and United Way of Kauai. Minutes state "Rowena and J will be doing a presentation to the Mano Wai board in Honolulu."

Over the next two years, many nonprofits were targeted and pitched to by Cobb and Robertson. The minutes are sketchy around this time period, and indicate that Ho`ike board was unable to make quorum for many months. Cobb moved from Ho`ike Development chair to the position of Ho`ike Board President. With Cobb as Ho`ike board President the Kauai Center for Arts, Education, and Technology a limited liability corporation (KCAET LLC) was created to represent the interests of the non-profits that bought into the idea.

Cobb became the designated agent for the LLC and the managers of the LLC was Mano Wai. The agent for Mano Wai was Robert Kihune, who is also the organizations CEO and President ( Kihune is also a Vice President of Sandwich Isle Communications). Cobb requested and was granted power of attorney by Hoike, and was now in a position of authority to act on behalf of the LLC in concert with Mano Wai. (It should be noted that whenever a member of the public was present, the Hoike board went into Executive Meeting to discuss these details).

The subsequent actions of Cobb on behalf of KCAET LLC and Kihune on behalf of Mano Wai resulted in what Ho`ike Board member and attorney Teri Tico would describe as "so much confusion that even she who had been an attorney for 30 years didn't get it." GIAC spokesperson, Diane Sumida, concluded that, "due to the lack of clarity in the paperwork, and inability to obtain information, made it one of the most difficult tasks of her entire business career."

Both Cobb and Kihune were given authority to act on behalf of KCAET and reimburse Mano Wai for expenses incurred. Mano Wai engaged in a variety of billable activities and submitted the bills to KCAET (Cobb and Kihune) for payment. Architects were hired, unsuccessful grants were written, and as the bill came in non-profits not legally committed to the venture dropped out leaving only Ho`ike

and GIAC holding the bag.

Although members of the Ho`ike and GIAC boards all live on Kauai all interactions between members of these boards was brokered by KCAET (Cobb and Kihune), the first ever face to face meeting between Ho`ike and GIAC occurred in April of 2006 when they jointly moved to dissolve KCAET and pay a \$7,000 outstanding bill to Mano Wai.

## ***THE CULPABLE, THE GULLIBLE, AND THE CLUELESS***

### **THE CULPABLE:**

When the issue came before the board in 2006, current Hoike managing director J Robertson and Ho`ike president, Jose Bulato, act as if they had amnesia and forget how involved they were with the entire debacle from beginning to end. Cobb and Robertson were the ceaseless boosters of this scheme to other non-profits and Bulato knew or should have known what was going on.

Cobb and Kihune acting through KCAET (being billed by Mano Wai) spent the money, but where it went I do not know and no one is telling.

### **THE GULLIBLE:**

Other Ho`ike board members Mayebelle Fujiuchi, Teresa Tico, and Gabreille Dorman began asking increasingly difficult questions, but continued to vote with other board members to enter executive committee keeping the public in the dark and refused to allow the public inspection of the record.

**THE CLUELESS:** Although the entire Ho`ike board agrees the scheme is so complex that everyone is baffled they refuse to allow the public access to the \$72,657.23 pile of paper paid for by cable subscribers and art patron money.

The people that pay the bill are the most clueless of all.

The DCCA's lack of oversight and the failure to demand a contractual nexus between money spent and public service delivered was the regulatory scheme that allowed the transfer public moneys into private hands.

The significance of this story of wasted public and donated money is that while all Ho`ike money-in and money-out of KCAET can be accounted for, it is difficult to answer the central question "who benefited?"

The cable subscribers that are mandated by state law to fund Ho`ike did not benefit from this scheme. The people who donated money to GIAC did not benefit. It is apparent that agents Cobb and Kihune benefited as did Mano Wai and any subcontractors who did billable work, but exactly who got paid specific amounts are inaccessible and buried in non-public Ho`ike, KCAET, and Mano Wai files.

The lesson to be learned from this sad tale is that the DCCA regulatory scheme allowed this travesty to occur. In fact the whole scheme was working small scale model of DCCA's regulatory scheme. A state created, cable-subscriber funded non-profit (Ho`ike) took the lead in creating and soliciting the buy-in of other none profits to create KCAET LLC through which money flowed from the actions of Cobb and Kuhine. This money flowed out of the pockets of cable subscribers and art supporters, through KCAET and into the pockets of Mano Wai their agents and subcontractors.

In the case of Ho`ike public money was slushed from Ho`ike through KCAET to Mano Wai. The damage done to the public Ho`ike serves was lack of access to services such money would provide, but since Ho`ike's funding is state mandated \$36,000 is no big loss.

In the case of Garden Island Arts Council (GIAC) the consequence of this scheme was far more damaging. GIAC, a vibrant membership-based non-profit serving the needs of Kauai's art community saw their bank account shrink from \$39,000 to \$70.

Eventually, Ho`ike: Kauai Community Television Inc. and GIAC spent over \$72,000 for what was described as a worthless pile of paper. Today, they "hope for the best" that no further invoices will be demanded for payment.

It was motioned and approved to dissolve KCAET at the April 26, 2006 meeting. The consequences to Ho`ike from DCCA, the oversight agency that created Ho`ike, appoints the board majority, and mandates cable subscriber funding? Nothing, beyond DCCA administrator's consistently repeated hands-off mantra, "We don't want to micro-manage the daily activities of a nonprofit corporation."

**CONCLUSION:** This story of \$72,000 of disappeared money and the plundering of another non-profit is emblematic of what is and has been occurring at Hawaii PEG entities for more than a decade. It is not an isolated incident, but the rule under DCCA's current regulatory scheme. Unfortunately without meaningful oversight of competitive bid contracts that carry penalties for non-performance, public access predation on the public and other nonprofits will continue unabated. Keeping track of money in and money spent while ignoring PEG mission success allows the exploitation of assets and services that can be then put to use meeting the special interests of state government (including education) while claiming to be providing the public access.

DCCA contractual reporting requirements only track the flow of money in and out of the entities they created. One unanswered oversight question not asked by DCCA is "Are services being delivered to the level that funding allows?" According to Hoike's last published 990 tax forms, each year Ho`ike receives almost \$300,000 from state-mandated public funds to manage and operate PEG access on Kauai. Instead of spending it to deliver services, each year, Ho`ike has diverted more and more, and now has over \$350,000 in savings. DCCA regulatory oversight provides "plausible deniability" of any wrong doing.

If thousands of dollars in public money disappear into the pockets of third parties, the Hoike board members just vote to "...pay the bill, and hope for the best." (see Ho`ike minutes of April 26, 2006). In 2006 The State Procurement Office determined that DCCA had violated state procurement law for eleven years by sole source contracting with PEGs and by 2007 must begin to follow state procurement code and issue competitive Request for Proposals (RFP).

Hopefully, future RFPs will include a scope of services that will contractually tie the monies spent with measurable public services provided.,

[Editor's note: Ed Coll is a member of the Community Media Producers Association (CMPA), Past President of CMPA, and a former cable company appointed Ho`ike board member (2000)]

1 IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
2 STATE OF HAWAII

3  
4 AKAKU MAUI COMMUNITY TELEVISION

5 Plaintiff,

6 vs.

7 LAWRENCE REIFURTH et al.

8 Defendant.  
9

Civil No. 07-1-0273  
TRANSCRIPT OF  
PROCEEDINGS

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10 TRANSCRIPT OF PROCEEDINGS

11 before the HONORABLE JOEL E. AUGUST, Circuit Court Judge  
12 presiding Thursday, October 4, 2007. Motion For  
13 Preliminary Injunction and Motion for Order to Show Cause  
14 Why Defendant Aaron Fujioka Should Not Be Held In  
15 Contempt.  
16

17 APPEARANCES:

18 LANCE COLLINS, Esq.  
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20 Wailuku, Hawaii

Attorney for the Plaintiff

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22 RODNEY TAM, Esq  
23 Deputy Attorneys General  
24 425 Queen Street  
25 Honolulu, Hawaii

Attorneys for the Defendants

REPORTED BY:

Beth Kelly, RPR, CSR #235  
Official Court Reporter  
State of Hawaii

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State of Hawaii



1 received. And the Court's belief is that should include  
2 any administrative proceeding under Section 103D-709 which  
3 flows from a denial of the protest.

4 I'm going to remind the defendants in this  
5 case that any action that may be taken by an agency which  
6 is ultimately determined by the Court to be violative of  
7 Chapter 91 is void ab initio, and further reminded that  
8 any person aggrieved by issue pursuant to Section 103D-703  
9 may initiate an action under Section 661-1.

10 By rendering the opinion herein, this Court  
11 is not finding that following the State Procurement Code  
12 for access to organization determinations may not be  
13 appropriate once the DCCA rules providing for such are  
14 properly in place. But I don't see them in place at this  
15 time.

16 Now, if anybody has any questions about what  
17 the Court is determining here, or not doing or doing,  
18 now's your time to ask. Because if, in fact, the State is  
19 going to somehow go through the Procurement Code without  
20 going through Chapter 91, in all likelihood, I will tell  
21 you right now, that this Court will lead to a preliminary  
22 injunction. I'm not doing so at the present time. So be  
23 forewarned.

24 MS. CHARA: Forewarned -- forearmed.

25 THE COURT: Well, you've got plenty of

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1 THE COURT: Well, the DCCA can choose in its  
2 rules to decide that it is going to go through the  
3 Procurement Code. They're not prevented from doing that,  
4 if that's going to be their policy, but that's their  
5 policy, and the Court's not saying that they can't  
6 determine that the designation go through the Procurement  
7 Code.

8 MS. OHARA: But the Procurement Code says it  
9 covers everyone except if specifically exempted.

10 THE COURT: I understand what the Procurement  
11 Code shows.

12 MS. OHARA: That's what I'm a little -- I'm  
13 trying to get some understanding on my part that if the  
14 Procurement Code says it applies unless you're exempted  
15 and they're not exempted, then why would there be a need  
16 for them --

17 THE COURT: Well, the problem you've got here  
18 is this is not a classic situation that the Procurement  
19 Code was set up to deal with no matter what Mr. Fujioka  
20 may think. Mr. Fujioka's thought and what he cites to in  
21 his pleadings is that this all -- the Procurement Code has  
22 to do with basically saving the State and government's  
23 money when it procures goods and services. This is a  
24 slightly different situation.

25 MS. OHARA: Well, I beg to respectfully

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## HCR 358 TASK FORCE DOCUMENT REQUEST

1. Legislative Reference Bureau Report No. 4 1995  
Public, Education, and Government Cable Television Access in Hawaii  
Unscrambling the Signals
2. Disputes over PEG Resources: Splitting the Baby is NOT the Solution  
Prepared for DCCA Cable Division, June 1997
3. RFP
3. Protests of RFP by Olelo and Akaku filed with SPO August 6, 2007
4. DCCA Draft Plan for PEG Access. January 2004
5. Attorney General Opinion to DCCA re: Procurement October 2005
6. Written Opinion of the Procurement Policy Board (PPB) regarding Akaku and Olelo's petitions for exemption and the petitions themselves
7. Copies of all written public testimony before DCCA, PPB, SPO, SBRRB, and all legislative committees regarding matters of procurement, RFP and PEG services; Committee reports, minutes and electronic records of same.
8. Transcripts of all Second Circuit Court proceedings before Honorable Joel August regarding procurement, DCCA and SPO.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

AKAKU MAUI COMMUNITY TELEVISION	)	
	)	
Plaintiff,	)	Civil No. 07-1-0278
	)	TRANSCRIPT OF
vs.	)	PROCEEDINGS
	)	
LAWRENCE REIFURTH et al.	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JOEL E. AUGUST, Circuit Court Judge  
presiding Thursday, October 4, 2007. Motion For  
Preliminary Injunction and Motion for Order to Show Cause  
Why Defendant Aaron Fujioka Should Not Be Held In  
Contempt.

APPEARANCES:

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PATRICIA OHARA, Esq.	Attorneys for the Defendants
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Official Court Reporter  
State of Hawaii

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Official Court Reporter  
State of Hawaii

1 THURSDAY, OCTOBER 4, 2007

2 THE CLERK: Calling Civil Number 07-1-0278,  
3 Akaku Maui Community Television versus Lawrence Reifurth  
4 et al., for motion for preliminary injunction and motion  
5 for order to show cause why defendant Aaron Fujioka should  
6 not be held in contempt.

7 THE COURT: Could we have appearances,  
8 please?

9 MS. OHARA: Deputy Attorney General, Pat  
10 Ohara on behalf of defendant, Aaron Fujioka, of the State  
11 Procurement Office.

12 MR. TAM: Rodney Tam, Deputy Attorney  
13 General, on behalf of the defendants, Lawrence Reifurth  
14 and Department of Commerce and Consumer Affairs.

15 MR. COLLINS: Lance Collins on behalf of the  
16 plaintiff, Akaku Maui Community Television.

17 THE COURT: Good morning. I've got a  
18 preliminary question before we begin today. There was a  
19 motion on order to show cause why defendant Fujioka should  
20 not be held in contempt. I gather the allegation is that  
21 somehow defendant Fujioka allegedly extended the deadline  
22 for submission of proposals?

23 MR. COLLINS: Your Honor, before we get to  
24 that, could we, on the record, discuss the issue of the  
25 application for extended coverage?

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1 THE COURT: Well, I thought there was an  
2 application filed.

3 MR. COLLINS: That's right. And I was under  
4 the impression under the rules you have to grant it or  
5 deny it.

6 THE COURT: No, I think as long as the  
7 application is properly filed, the Court does not need to  
8 take action on that.

9 Has there been a response to this motion for  
10 order to show cause that's been filed by anybody? I  
11 haven't seen one.

12 MS. OHARA: There has not been a response  
13 that's been filed.

14 THE COURT: Are you agreeing that Mr. Fujioka  
15 should be held in contempt?

16 MS. OHARA: No. I had prior discussions with  
17 Mr. Collins and we had discussed the possibility of having  
18 the motion withdrawn after I had explained to him what had  
19 happened. And I am happy to explain it to the Court, as  
20 well.

21 THE COURT: Well, have you folks reached some  
22 agreement as to how this matter is going to be handled?

23 MR. COLLINS: No, we --

24 MS. OHARA: You want to go forward with this?

25 MR. COLLINS: We discussed the possibility,

1 and there was no follow-up discussion and I spoke with my  
2 clients and they said they were not amenable to that,  
3 unless the State was willing to make a concession.  
4 Because there was no further discussion and a floating  
5 possibility of agreeing to some resolution of this, we  
6 didn't agree.

7 THE COURT: Well, as Bob Dylan used to say,  
8 nothing is revealed. So you're not filing a written  
9 response?

10 MS. OHARA: I do have a declaration on behalf  
11 of the State Procurement Office explaining why the action  
12 in dispute had occurred.

13 THE COURT: Well, was that intended to be  
14 some kind of an exhibit to some kind of a response to the  
15 pleading that I was supposed to read?

16 MS. OHARA: I was under the impression that  
17 the motion was to be withdrawn and I had a declaration  
18 prepared just in case there was some confusion, and I do  
19 have a declaration. I'm prepared to argue it if the Court  
20 would so allow.

21 THE COURT: Well, I haven't read anything. I  
22 don't mind getting blindsided by stuff usually, but I like  
23 a little notice ahead of time as to what I'm going to be  
24 blindsided by.

25 MS. OHARA: The allegation is that the State

1 Procurement Office has violated the conditions of the  
2 stipulation. The stipulation was to continue this hearing  
3 to this date and that no further action would be taken on  
4 the protest.

5 The statute, HRS 103D-701 says that if  
6 there's a protest that's been timely filed, then there  
7 shall be no further action on solicitation or the award of  
8 the contract.

9 THE COURT: Right.

10 MS. OHARA: And so the State Procurement  
11 Office has an Internet web site where everything gets  
12 posted, and so for this procurement at issue, for the Paid  
13 Public Education Government Access Service Contract,  
14 there's information up there. There's notices. There's  
15 deadlines. And because of this pending lawsuit no further  
16 action was to take place.

17 So the State Procurement Office realized that  
18 the deadline for proposals was October 1st, two days ago,  
19 and so that day would have come and passed. In order to  
20 prevent that notice and information from disappearing from  
21 the web site, if they did not put in a subsequent date,  
22 they went in and said proposals are now due on December  
23 31st, 2007 pending resolution of protest. And they  
24 thought that meant that it was no further action taken on  
25 the solicitation --

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1 THE COURT: Let me ask a question. How many  
2 proposals did they receive by October 2nd?

3 MS. OHARA: None.

4 THE COURT: None?

5 MS. OHARA: October 1st, none. Because  
6 apparently the parties are aware -- or a sufficient number  
7 of them are aware that because of the protest everything  
8 had stopped. But they were afraid that the notice and  
9 everything would be dropped off the web site. So they  
10 needed to plug in the dates.

11 And I had told them that this was perceived  
12 by plaintiff to be further action, and they, in good  
13 faith, said we thought it would be okay because we said  
14 pending resolution of the protest, and they meant it as a  
15 public information thing just in case people hadn't  
16 realized that the deadline had changed.

17 So they did that prior to the October 1  
18 deadline, and the reason was just for public information,  
19 to let anyone who had -- who's not perhaps locally in the  
20 state, aware that there are proposals being considered  
21 until December 31st. This was just a date to plug in to  
22 keep the thing on the Internet so it wouldn't drop off.

23 THE COURT: Let me ask a question. Let's  
24 assume that somebody had submitted a proposal by October  
25 2nd, let's just assume that for a moment, and then all of

1 a sudden the State announces, oh, by the way, people -- or  
2 entities have another couple months to submit proposals,  
3 what do you think the response would be if that entity  
4 submitted the proposal?

5 MS. OHARA: The State would have returned the  
6 proposal back to the entity.

7 THE COURT: What if they argued, look, you've  
8 got this strict code and all these rules and you interpret  
9 the code, and we've complied with the code, and we're the  
10 only one interested, and so now you're giving more time  
11 for other people after we've complied and nobody else  
12 complied?

13 MS. OHARA: Yes, because the strict code says  
14 everything stops because of the protest. We have a  
15 protest filed by plaintiff, as well.

16 THE COURT: Right.

17 MS. OHARA: So everything stops. There can't  
18 be consideration of solicitations.

19 THE COURT: If everything stops, the question  
20 is what is the definition of everything? If everything  
21 stops, why should there be continued receipt of proposals?

22 MS. OHARA: There shouldn't be. There  
23 shouldn't be. That's why State Procurement Office felt it  
24 was necessary to inform people that there was a protest  
25 pending and no further action would be taken on the

1 solicitation or the award of a contract.

2 THE COURT: Well, look, if everything is  
3 supposed to stop, why wouldn't everything include the  
4 acceptance of any new proposals?

5 MS. OHARA: Right, but how do you stop it if  
6 someone has sent it to you? You don't know it's coming  
7 until it arrives and you receive it.

8 THE COURT: You said nothing arrived.

9 MS. OHARA: You said what if something  
10 arrived.

11 THE COURT: Nothing arrived by October 2nd.  
12 No carrier pidgin. No e-mail. No nothing.

13 MS. OHARA: No. Nothing arrived --

14 THE COURT: So you've reopened the process  
15 and reopened the invitation for other people to start  
16 submitting proposals; right?

17 MS. OHARA: No. I mean the existing RFP says  
18 proposals are due October 1st.

19 THE COURT: Doesn't there need to be a new  
20 RFP?

21 MS. OHARA: No, just a new deadline. The RFP  
22 lays it all out. This is what the State is interested in.  
23 This is the time table. This is when certain like  
24 different steps in the procurement process, that you ask  
25 for questions and the State would respond. There's

1 deadlines for that. There's deadlines for meetings.  
2 There's deadlines for when to respond.

3 THE COURT: Let me ask you a question and  
4 I'll give you my analysis in a few minutes.

5 One of the issues here is the process  
6 itself --

7 MS. OHARA: Yes.

8 THE COURT: -- right?

9 MS. OHARA: Yes.

10 THE COURT: So if the process itself may be  
11 faulty, then how do you go ahead -- and there's a protest  
12 that at least one of the aspects of it involves the  
13 process --

14 MS. OHARA: Yes.

15 THE COURT: -- then how do you then announce  
16 that you are continuing to receive proposals and  
17 continuing on with the process once there's been a protest  
18 of the process?

19 MS. OHARA: Well, the process remains in  
20 place. The procurement stays in place. The protest comes  
21 in. It stops, you know -- it precludes the State from  
22 engaging in any further action on solicitation or the  
23 award, but the procurement process remains there. It's  
24 just been suspended for the duration.

25 THE COURT: Let me ask you this. How did you

1 happen to choose or how did your client happen to choose  
2 December -- what is it, 3rd?

3 MS. OHARA: 31st.

4 THE COURT: 31st, as opposed to October 31st  
5 or, you know, November 15th or whatever?

6 MS. OHARA: It was the furthest outside date  
7 that they could put in.

8 THE COURT: You mean the computer doesn't  
9 function beyond that date?

10 MS. OHARA: I think they had an idea that the  
11 protest might be resolved by then.

12 THE COURT: Oh really. What happens if  
13 somebody appeals the results of the protest?

14 MS. OHARA: If the State would prevail at the  
15 protest level, then it can proceed with the procurement.  
16 If the State does not, then you're correct, everything is  
17 still suspended.

18 I just wanted to emphasize that the State did  
19 not do this in violation of a stipulation. It was meant  
20 more to keep the information on the Internet and to  
21 preserve the notice and all this other information about  
22 the procurement in case people who may be outside the  
23 state looked at it and said, I wonder what's going on.  
24 And that was the primary purpose of that.

25 And there was no intent to circumvent the

1 stipulation. There was no intent to violate the statute  
2 in their mind. No further action. No consideration of  
3 proposals. There were no proposals received, but so  
4 before the deadline for the proposals, they put in this  
5 thing saying that -- trying to inform people, the world at  
6 large, don't submit your proposal on October 1, in case  
7 you had not heard about the protest, don't submit your  
8 proposal by October 1 because we can't consider it. That  
9 was the point of that.

10 THE COURT: So did you say then on the web  
11 site, don't submit any proposals until the protest and any  
12 appeal is resolved?

13 MS. OHARA: No, it didn't quite spell it out  
14 to that extent. But it says, proposals are due December  
15 31, pending resolution of the protest. It didn't  
16 elaborate like protest and appeals. It just said, pending  
17 resolution of protest.

18 THE COURT: We'll come back to this.

19 MS. OHARA: It was a one line thing. The  
20 proposal due date is amended to December 3rd, 2007,  
21 pending resolution of protest. And the primary intent of  
22 that was just to preserve the information on the SPO  
23 Internet site.

24 MR. COLLINS: Your Honor, if we could add one  
25 thing. There was a two week period between the time when

1 we filed the motion for preliminary injunction and the  
2 date that our voluntary stipulation was sent to you, to  
3 the Court, for approval and order.

4 In that time, that may have probably been the  
5 appropriate time to make any adjustments to the computer  
6 in terms of -- or to file an addendum saying that there  
7 was a protest -- or to move the due date, I mean. They  
8 created a new deadline. They didn't just push the  
9 deadline off and say, until further notice.

10 They picked a particular date, and if it had  
11 to be done that way, they knew that when this was filed,  
12 and they knew that when they signed the stipulation. And  
13 so the appropriate time would have been before they  
14 stipulated to do nothing further, not a month after they  
15 agreed to do nothing further.

16 THE COURT: Let me ask counsel. If for some  
17 reason the protest is not resolved by this date of  
18 December 31, is it?

19 MS. OHARA: Yes.

20 THE COURT: Then --

21 MR. COLLINS: December 3rd.

22 THE COURT: Then what message goes on the  
23 computer?

24 MS. OHARA: I think this is sufficient to  
25 inform people pending resolution of protest they could

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1 call the office and say, has this been resolved and they  
2 would be told, no, it hasn't.

3 THE COURT: So my question is, assuming it  
4 hasn't been resolved by December 31st, what do you foresee  
5 will be the message that goes on the web site December  
6 31st? Is there going to be another date, February 29th or  
7 what?

8 MS. OHARA: I told SPO you have to figure out  
9 a way to suspend things without plugging in dates. That  
10 there may be some kind of internal metadata thing that  
11 says, protest, and everything is just, you know, the dates  
12 are suspended, but the information remains on the web  
13 site. And they said they were going to try and work on  
14 that, but for the meantime, yeah, they have to plug in a  
15 date.

16 Also counsel did try to call me that he  
17 intended to file this motion during the week of September  
18 20th or thereabouts. And at that time Hawaiian Tel in  
19 Honolulu had some kind of cable explosion and downtown  
20 phones were out. And my phone in our offices were out  
21 from September 20 till the following Monday.

22 I believe Mr. Collins tried to contact me  
23 maybe Thursday or Friday. My phone was completely dead.  
24 I got no message. And then on Monday, late afternoon, the  
25 phone comes back, and I'm calling back the voice mails and



1 one of them was from Mr. Collins. And so I immediately  
2 called him back and I said, you know, it was just bad  
3 timing. My phone was out. At which I hadn't the  
4 opportunity to explain to you what had happened regarding  
5 this addendum. And he said, oh, I'm sorry, I filed a  
6 motion, and so here we are.

7 MR. COLLINS: Your Honor, I also, as I stated  
8 in my declaration to the ex parte motion, I also did call  
9 Ms. Ohara's main office line and did leave a message with  
10 the secretary or the receptionist that morning, the Monday  
11 morning before I filed it, as I indicated in my  
12 declaration. By 1:00 o'clock I did not receive a  
13 response.

14 So I don't know about exploded telephone  
15 exchanges, but I did again attempt to contact her Monday  
16 morning through her main line and by the time I filed this  
17 at 2:00 o'clock, or whenever it was I filed -- whenever I  
18 sent it up to you, your court, I hadn't received a  
19 response, but I don't think that's particularly relevant  
20 to whether or not Mr. Fujioka has failed to comply with  
21 the stipulation and order.

22 THE COURT: Well, here's what the Court's  
23 going to do on this particular motion. The Court's going  
24 to continue this particular motion, the order to show  
25 cause, to give the State an opportunity to file whatever

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1 written response they think is appropriate, and we'll  
2 continue this to sometime around December 31st.

3 MR. COLLINS: Your Honor, also I'd like to  
4 point out that the addendum in my Exhibit 2 says that the  
5 new due date is December 3rd.

6 THE COURT: Is what?

7 MS. OHARA: I'm sorry, yeah, December 3rd.

8 THE COURT: Oh.

9 MS. OHARA: December 3rd. I'm sorry, I  
10 misread that.

11 THE COURT: What does the web site say  
12 December 3rd or 31?

13 MS. OHARA: It says 3rd.

14 THE COURT: Oh, well, then we'll continue  
15 this to sometime around December 3rd.

16 THE CLERK: Further hearing will be set for  
17 Thursday, November 29th, 8:15.

18 MS. OHARA: What time?

19 THE CLERK: 8:15.

20 THE COURT: Now, let's get to the main  
21 attraction. Although sometimes the trailers are more  
22 action packed.

23 Does anybody feel they need to add anything  
24 to the motion for preliminary injunction and the  
25 opposition to that memorandum in opposition and the reply

1 memorandum? There have been actually two memoranda in  
2 opposition, one from defendant Reifurth and the Department  
3 of the Commerce and Consumer Affairs; the other from  
4 defendant Fujioka. And the Court's read all of these and  
5 done some independent thinking on the issue.

6 But if anybody feels there's something they  
7 need to add to what they've already written, the Court  
8 would certainly like to give them the opportunity of  
9 addressing the Court. I don't need a summary.

10 MR. COLLINS: Your Honor, we are prepared to  
11 call witnesses on the issue of harm, if you feel that our  
12 submissions in writing were not sufficient.

13 THE COURT: Well, this is not an evidentiary  
14 hearing, and the Court does have some questions about  
15 that. This is not an evidentiary hearing.

16 MR. COLLINS: My understanding was that it  
17 was set for an evidentiary hearing.

18 THE COURT: Is this set for an evidentiary  
19 hearing, Ms. Hoopii?

20 THE CLERK: I do not see that it's set for  
21 evidentiary.

22 THE COURT: How many witnesses do you have?

23 MR. COLLINS: Three.

24 THE COURT: Well, that's a couple too many.  
25 We don't have this set for --

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1 MR. COLLINS: I can do one. I can just call  
2 up the president of Akaku, that should be sufficient.

3 THE COURT: Hasn't he submitted an affidavit  
4 in here or declaration? Is he going to say anything  
5 different than what's in the declaration?

6 MR. COLLINS: In addition to the declaration,  
7 and also give opposing counsel opportunity to  
8 cross-examine him, since they're attacking -- they're  
9 essentially saying what he's saying is irrelevant, it  
10 could give them the opportunity to --

11 MS. OHARA: Your Honor, plaintiff is using  
12 this as an opportunity to expand on the declarations that  
13 he's submitted with the motion and it should be limited to  
14 that declaration.

15 THE COURT: That's normally what happens,  
16 unless you have it set for an evidentiary hearing, and  
17 it's not set for an evidentiary hearing. Do you have any  
18 interest in cross-examining the declarant?

19 MS. OHARA: No, your Honor.

20 THE COURT: I didn't think so.

21 MR. TAM: We do not either, and -- but I  
22 think we would object to having to cross-examine him and  
23 turning this into an evidentiary hearing.

24 THE COURT: Well, I think that that is not  
25 what's on the schedule for an evidentiary hearing.

1 MR. COLLINS: All right.

2 THE COURT: We do set evidentiary hearings,  
3 but this is not scheduled for one. Why don't you folks  
4 have a seat and let me give you my analysis of what the  
5 Court feels is legally relevant here.

6 One of the ultimate questions in this case is  
7 whether the established method by which the Department of  
8 Commerce and Consumer Affairs designates nonprofit  
9 organizations which operate, maintain and manage the  
10 Public Educational and Government Access channels, funds,  
11 facilities and equipment for the State of Hawaii; in this  
12 case, on Maui, whether that method constitutes some agency  
13 statement of general applicability and future effect that  
14 implements policy or delineates the procedural  
15 requirements of the DCCA relative to such designations.

16 The plaintiff which has for the past, I  
17 believe, eight years been the beneficiary of some annual  
18 directly negotiated non-competitive contract between it  
19 and the director of the DCCA to perform the duties of the  
20 PEG access organization in Maui County claims that  
21 formally adopting any method or changing the method of  
22 designation is the adoption of some new policy or policy.  
23 Right now it's unclear whether there has been a policy.

24 But having it go through the Procurement Code  
25 would be the designation of a policy, which would have the

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1 potential effect on the market place of public ideas.

2           The defendants, DCCA and Reifurth, their  
3 position seems to be that the rulemaking requirements of  
4 Chapter 91 do not apply, since according to an Attorney  
5 General's opinion and a determination from the State  
6 Procurement Office, the DCCA's contracts with the PEG  
7 access organizations are subject to the statutory  
8 requirements of the Hawaii Public Procurement Code, HRS  
9 103D. And the procurement rules in Hawaii Administrative  
10 Rules Chapter 3-122, and thus any further Administrative  
11 Rules are completely unnecessary. At least those which  
12 would be promulgated under Chapter 91 by the DCCA.

13           Those defendants fallback position seems to  
14 be that the designations are matters of purely internal  
15 management of the DCCA and do not come within the  
16 rulemaking requirements of Chapter 91.

17           Defendant Fujioka, who's the administrator of  
18 the State Procurement Office, has a slightly different  
19 argument. His argument is that since the plaintiff is  
20 unlikely to prevail on the merits of its underlying  
21 Chapter 91 claim, this motion should not be granted. They  
22 claim that the plaintiff has failed to exhaust its  
23 administrative remedies by failing to complete the protest  
24 process which has begun, pursuant it HAR 3-126-3(b). They  
25 do -- or Mr. Fujioka does acknowledge that the plaintiff

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1 is an aggrieved party for purposes of the protest.

2           Secondarily, Fujioka argues that there is no  
3 need for the DCCA to adopt its own designation rules to  
4 obtain the services of a PEG access operator since  
5 procurement rules already exist pursuant to HRS 103D.

6           All of the defendants appear to argue that  
7 plaintiff has not demonstrated sufficient irreparable  
8 injury to warrant injunctive relief at this point and that  
9 the public interest does not support the granting of a  
10 preliminary injunction.

11           In defining the powers and obligations of  
12 governmental agencies, one starts with the statutory  
13 framework which is to guide the agency's discretion if  
14 there, in fact, is any discretion which the agency has.

15           Under HRS Section 440G-3 a PEG access  
16 organization is defined as any nonprofit organization  
17 designated by the director of the DCCA to oversee the  
18 operation, production or broadcasting of programs for any  
19 channels under Section 440G-8. Under 44G-8 -- 440G-8 a  
20 cable operator who holds a state franchise, currently I  
21 think it's Time-Warner, is required to designate three or  
22 more channels for PEG use.

23           Defendants admit that Chapter 440G does not  
24 contain any criteria guiding the director of the DCCA in  
25 his or her discretionary designation of the a PEG access

1 organization. That, in and of itself, of course, is very  
2 problematic, because if we're getting into the area of  
3 standardless discretion, then clearly there needs to be  
4 some rules that are going to dictate what standards will  
5 apply, other than it being a nonprofit.

6 Historically the director of the DCCA has  
7 determined that PEG access is beneficial to the outer  
8 island residents, assumedly on first amendment principles.  
9 The Court, at least, would assume that. And has admirably  
10 required the cable franchisee to provide PEG access  
11 channels and funding to various outer island access  
12 organizations, including Akaku on Maui, which the director  
13 has designated and contracted with outside the parameters  
14 of the Procurement Code, historically.

15 The defendants treat the supplying of this  
16 service to the public as a matter of internal management  
17 and, quite frankly, it sounds like noblesse oblige,  
18 wherein no private rights or procedures available to the  
19 public are legally available.

20 The question, of course, remains, once you  
21 have let the genie out of the bottle and have raised the  
22 public's expectations about what information they can  
23 receive over PEG channels that are granted by the State,  
24 does the public then have a right to have input as to what  
25 methods should be used to choose the organization that



1 assists them in utilizing the means of public  
2 communication?

3           This becomes a critical issue in the society  
4 like ours where the means of broadcasting is becoming more  
5 and more concentrated and limited to a relatively few  
6 powerful corporations, which are not always amenable to  
7 dissenting to unorthodox ideas, and these are certainly  
8 issues that the DFCC is dealing with at the present time.

9           Defendant Fujioka appears to believe that  
10 because the legislature in Section 1 of Act 8 in the  
11 Session Laws of Hawaii of 1993 has found that it is the  
12 policy of the State to foster broad based competition in  
13 the procurement by the government of goods and services,  
14 that he should be delegated the responsibility of  
15 choosing, in effect, who the PEG operators should be by  
16 means of the Procurement Code.

17           In other words, that he, in effect, should  
18 become the czar of the community based television  
19 broadcasting through PEG channels, as opposed to the  
20 director of the DCCA.

21           The entire premise of the rule of  
22 competition, however, which is cited by Mr. Fujioka, is  
23 that, and I quote, the State and counties will benefit  
24 economically with lowered costs. But in this situation  
25 the Court does not believe that we're really dealing with

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1 lower cost issues to the government.

2           The DCCA dictates, in fact, to the cable  
3 franchisee what percentage of its income must be paid to  
4 the director or his designee as access operating fees and  
5 capital fund payments. So far as the Court knows, that's  
6 money not coming out of the taxpayers of this state. In  
7 other words, public funds are not being spent in values  
8 other than the almighty dollar -- what used to be the  
9 almighty dollar until it started to fall -- seem to be in  
10 play.

11           Based upon this Court's history of applying  
12 and interpreting the Hawaii Administrative Procedure Act,  
13 and that goes back to the time of about about 30 years  
14 ago, it is the Court's conclusion that plaintiff, in fact,  
15 does have a reasonable likelihood of success on the merits  
16 of its Chapter 91 claim, and that the determination of the  
17 method by which the entity is determined to provide PEG  
18 access is something more than internal management of the  
19 DCCA and does affect potentially the rights of the public.

20           What is more problematic, the Court believes,  
21 for the plaintiff is being able at least at this time to  
22 demonstrate a sufficient basis of showing irreparable  
23 injury to justify some immediate injunctive relief.

24           Even under the relaxed standard that would  
25 apply, once there is a finding of a reasonable likelihood

1 of success on the merits, the harm that has been alleged,  
2 after reading the declaration, is that the plaintiff will  
3 have to expend some time, money and effort in submitting a  
4 bid pursuant to the request for proposal to manage the PEG  
5 access channels, funds and facilities.

6 Now, of course, if that is the method  
7 ultimately determined after some type of rulemaking, and  
8 the Court's not making any finding that it can't be,  
9 they're going to have to expend that time, money and  
10 energy at some point, very possibly, whether it's now or  
11 in the future.

12 But this particular form of injury is  
13 generally not considered to be irreparable, at least this  
14 Court has not found any cases where some time, money and  
15 effort is determined to be irreparable injury.

16 Second, if, in fact, the State Procurement  
17 Office is going to follow statutory law, and in particular  
18 103D-701(f), there should be no further action taken on  
19 the solicitation or the award of a contract unless the  
20 chief procurement officer or the director of the DCCA  
21 makes some written determination that the award of the  
22 contract without delay is necessary to protect the  
23 substantial interest of the State.

24 Given that plaintiff has been the providing  
25 the entity since 19, I believe, 88, the services that

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1 would be -- for the services that would be covered under  
2 some RFP, absent some abuse of discretion, it would be  
3 highly unlikely that such a written determination could be  
4 made by either Mr. Fujioka or the head of the DCCA.

5           The Court feels it would not be appropriate  
6 to second guess what the result of the thrust of the  
7 protest will be. While defendants have alleged that the  
8 suit is premature because of the failure to exhaust  
9 administrative remedies, it has been recognized that the  
10 futility of an administrative appeal may be a basis for  
11 not completing an administrative review.

12           Now, while the defendants have already  
13 apparently expressed their position that following the  
14 requirements of Chapter 91 is unnecessary, this Court is  
15 not going to prejudge the administrative appeal process  
16 and hope that, quite frankly, the comments of this Court  
17 will be taken back to the powers that be and will be taken  
18 seriously relative to the potential claims or the asserted  
19 claims of the plaintiff under Chapter 91.

20           Thus, at this point, the Court is not  
21 inclined to grant a motion for preliminary injunction, but  
22 I am going to deny it without prejudice, with the  
23 understanding that no new contract for PEG services on  
24 Maui is going to be executed with any entity, other than  
25 the plaintiff, until the plaintiff's protest is finally

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1 resolved. And the Court's belief is that should include  
2 any administrative proceeding under Section 103D-709 which  
3 flows from a denial of the protest.

4 I'm going to remind the defendants in this  
5 case that any action that may be taken by an agency which  
6 is ultimately determined by the Court to be violative of  
7 Chapter 91 is void ab initio, and further reminded that  
8 any person aggrieved by issue pursuant to Section 103D-703  
9 may initiate an action under Section 661-1.

10 By rendering the opinion herein, this Court  
11 is not finding that following the State Procurement Code  
12 for access to organization determinations may not be  
13 appropriate once the DCCA rules providing for such are  
14 properly in place. But I don't see them in place at this  
15 time.

16 Now, if anybody has any questions about what  
17 the Court is determining here, or not doing or doing,  
18 now's your time to ask. Because if, in fact, the State is  
19 going to somehow go through the Procurement Code without  
20 going through Chapter 91, in all likelihood, I will tell  
21 you right now, that this Court will lead to a preliminary  
22 injunction. I'm not doing so at the present time. So be  
23 forewarned.

24 MS. OHARA: Forewarned -- forearmed.

25 THE COURT: Well, you've got plenty of

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1 armaments. You've got about 132 Deputy Attorney generals.

2 MS. OHARA: So just to make sure that I  
3 understand what your Honor is saying, that declining the  
4 motion -- you're denying the motion for preliminary  
5 injunction.

6 THE COURT: Without prejudice.

7 MS. OHARA: Without prejudice. You're  
8 allowing, because you're going to wait to see what the  
9 administrative proceeding result is.

10 THE COURT: I'm waiting for two things. I'm  
11 waiting to see what happens with the protest. And I'm  
12 waiting to see what happens if that protest is denied.  
13 And I'm waiting to see if the State is going to follow my  
14 strong suggestion --

15 MS. OHARA: Regarding 91 rule.

16 THE COURT: Regarding 91 rule.

17 MS. OHARA: All right. I just wanted to  
18 clarify for the Court that you had stated that defendant  
19 Fujioka is stating that through Act 8 he is, in fact,  
20 picking the PEG access organization to provide the  
21 services. That's not really the case. He's just the  
22 administrator of the code. And as a State Procurement  
23 Office, they offer their services to various client  
24 agencies, such as DCCA.

25 THE COURT: No, I understand that.

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1 MS. OHARA: Basically it's DCCA or the client  
2 to determine what the parameters of the solicitation look  
3 like, what services are required, how the evaluation  
4 process would be done, how it would be selected. The  
5 administration of it really turned on whatever the client  
6 inputs in.

7 THE COURT: I understand that.

8 MS. OHARA: Sorry, I misunderstood when you  
9 said he was putting himself in the place of selecting it.  
10 That's not true. He helps them to put it into a form that  
11 is -- that can be solicited.

12 THE COURT: Well, he seems to be the one, the  
13 guy who everybody goes to and says, oh, what do we do now?  
14 The DCCA runs to him and he says, here's what you've got  
15 to do. You've got to go through the Procurement Code.

16 MS. OHARA: Well, you're leaving it up to him  
17 to say, are we subject to your code? And he said, yes,  
18 you are, because in the absence of anything else there's  
19 nothing in 440G to, notwithstanding any law, to the  
20 contrary. You know, this is how you do it. It's silent.

21 So like in statutory constructions, if it's  
22 silent, then you look at other things and taken as a whole  
23 you have this Procurement Code that takes over everything,  
24 and so if you don't have a means of selections in your  
25 chapter, then, you know, that's why defendant SPO says,

1 oh, then you come under our purview.

2 THE COURT: Excuse me. The silence is one of  
3 the primary reasons why you want to go through the APA  
4 because if you're going to make noise within the silence  
5 by promulgating some kind of policy or methodology by  
6 which you're going to designate who the access provider is  
7 going to be, you do that by rulemaking so that there isn't  
8 silence.

9 In other words, if you've got the  
10 discretion, I don't mean you personally, but the DCCA has  
11 the discretion to designate, which it seems like it does  
12 under the law, okay --

13 MS. OHARA: Yeah.

14 THE COURT: -- then there is some obligation  
15 to flesh that out so that that discretion is not  
16 standardless. And one of the ways that you do that is  
17 through promulgating rules pursuant to the Administrative  
18 Procedure Act and everybody gets to have their say and  
19 that it doesn't mean that. DCCA has to do what people  
20 want them to do. But you flesh out the criteria for  
21 designations and the process in the rules and that way you  
22 avoid litigation.

23 MS. OHARA: So you're saying that the vacuum  
24 isn't filled by the already preexisting procurement rule,  
25 the vacuum needs to be filled independently of that?



1 THE COURT: Well, the DCCA can choose in its  
2 rules to decide that it is going to go through the  
3 Procurement Code. They're not prevented from doing that,  
4 if that's going to be their policy, but that's their  
5 policy, and the Court's not saying that they can't  
6 determine that the designation go through the Procurement  
7 Code.

8 MS. OHARA: But the Procurement Code says it  
9 covers everyone except if specifically exempted.

10 THE COURT: I understand what the Procurement  
11 Code shows.

12 MS. OHARA: That's what I'm a little -- I'm  
13 trying to get some understanding on my part that if the  
14 Procurement Code says it applies unless you're exempted  
15 and they're not exempted, then why would there be a need  
16 for them --

17 THE COURT: Well, the problem you've got here  
18 is this is not a classic situation that the Procurement  
19 Code was set up to deal with no matter what Mr. Fujioka  
20 may think. Mr. Fujioka's thought and what he cites to in  
21 his pleadings is that this all -- the Procurement Code has  
22 to do with basically saving the State and government's  
23 money when it procures goods and services. This is a  
24 slightly different situation.

25 MS. OHARA: Well, I beg to respectfully

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1 disagree. It's like the money is fixed, true. It's not.  
2 But by saving the costs -- saving the State money that can  
3 also be expressed by getting more value for your money.

4 THE COURT: Yes.

5 MS. OHARA: So even though you're not getting  
6 lower costs or dealing with bids or whatever, the quality  
7 of the bids or the quality of the proposal results in  
8 additional services for the state.

9 THE COURT: That is correct.

10 MS. OHARA: So if you get more services, then  
11 you're getting a better cost, a better value.

12 THE COURT: You're getting a bigger bang for  
13 the bucks you've squeezed out of the franchisee.

14 MS. OHARA: Which are paid by the State  
15 subscribers.

16 THE COURT: But I will tell you that all of  
17 this, and the criteria for what you want in terms of the  
18 quality of your dollar, is the kind of thing that should  
19 be set out in Administrative Rules and that will avoid  
20 litigation in the future. This clearly is a policy and it  
21 goes beyond the typical kind of purchase order, if you  
22 will, or contract that the State makes because you are  
23 dealing with the universe of public ideas and the people's  
24 right to get ideas and obtain ideas.

25 MS. OHARA: Right.

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1 THE COURT: So there's something beyond the  
2 typical kind of contract that Mr. Fujioka normally deals  
3 with here.

4 MS. OHARA: Right. But, in effect, it can be  
5 compared to like a service contract where you hire an  
6 architect to design or build a courthouse and you say  
7 everybody knows that there's a fixed budget. CPI budget  
8 in appropriation. Everybody knows you only have X million  
9 dollars to spend and that kind of things goes out because  
10 it's whoever gives you the best value would prevail or  
11 score higher or something.

12 THE COURT: Right.

13 MS. OHARA: And, granted, you know, it  
14 doesn't involve the kind of expressive comments that we're  
15 dealing with here, but it's sort of the same thing. Who  
16 will allow the most access to their organization services?  
17 Who will allow anyone to come in? Who will have maybe  
18 perhaps a lower criteria to come in and, you know, have  
19 yourself heard?

20 THE COURT: That is correct.

21 MS. OHARA: How they developed their  
22 proposal --

23 THE COURT: That is correct. And those  
24 issues, those kinds of criteria should be set out in some  
25 rule, so that when the designation is made there is some

1 kind of a finding that whoever the designee is, in fact,  
2 meets those criteria. What we're trying to get here is  
3 some kind of transparency.

4 MS. OHARA: Uh-huh.

5 THE COURT: And I think we're trying to  
6 increase transparency and that's exactly what Chapter 91  
7 was designed to do.

8 MS. OHARA: We have the transparency in the  
9 sense that, you know, when 103D was being argued before  
10 the legislature, the public had a chance to go in and say  
11 whatever. And then when -- you know when it comes out,  
12 every year people lobby the legislature, so they exempt us  
13 because we're different.

14 Our types of procurement don't allow us -- or  
15 this is contrary to the way we want to do things or  
16 whatever. So, you know, if DCCA or organizations or  
17 whatever, they could have gone to the legislature and  
18 said, 440G is vague. It doesn't say this. Correct this  
19 or the Procurement Code shouldn't apply to us because  
20 we're different.

21 THE COURT: Yeah, but the State is  
22 acknowledging that 440G is very silent about a lot of  
23 things. That's specifically, again, the reason why you  
24 want to go through the Administrative Procedure Act.

25 MS. OHARA: My point is the due process

1 aspect is addressed in that matter they had access to the  
2 legislature. They had access to -- the procurement rules  
3 say that the award shall be done according to the criteria  
4 of the solicitation.

5 So all these things about the best value and  
6 all that sort of stuff are articulated in the  
7 solicitation. So it's hard to reconcile the due process  
8 argument when, you know, it's been sort of out in the open  
9 all this time.

10 THE COURT: I understand your argument.

11 MS. OHARA: Thank you.

12 MR. TAM: Your Honor, can I ask you a couple  
13 questions for clarification?

14 THE COURT: Yes.

15 MR. TAM: The rule that you're suggesting  
16 that DCC promulgate, the contents of the rule would  
17 include the specifications or things that they're looking  
18 for a PEG access organization to have in order to be  
19 designated the access organization for the particular  
20 County. That's one.

21 THE COURT: I would think that would be part  
22 of it.

23 MR. TAM: The second thing is, are you also  
24 suggesting that the proposed rule specify a method in  
25 which we select? It's not only what we're looking for,

1 but how we select?

2 THE COURT: Yes.

3 MR. TAM: If we go back to the way we've done  
4 it, whereby we directly contract it with the entity we  
5 gave them a sole source kind of selection, that we specify  
6 that in the rule or if we decide to change the process a  
7 little bit and follow the requirements of 103D, that be  
8 placed in rule?

9 THE COURT: Whatever they choose. The  
10 Court's not going to dictate what rule or method you've  
11 got to follow.

12 MS. OHARA: You're suggesting that the method  
13 should be in the rule.

14 THE COURT: Yes.

15 MR. TAM: What is your recommendation with  
16 respect to the timing of this rule? I'm only asking --

17 THE COURT: Yesterday.

18 MR. TAM: No, no, we're trying to find out  
19 what the effect on the RFP process is. Right now we have  
20 a protest. Everything is stayed. Let's say the protest  
21 is resolved and things start picking up again. The stay  
22 is lifted.

23 THE COURT: I don't know how long it's going  
24 to take to go through the Chapter 91 process. It would  
25 take more than a couple weeks, I can tell you that. You

1 have to have notices that appear. The public has a right  
2 to comment at some point. I think the Governor has to  
3 sign off on it. That process takes some time.

4 But in the meantime, you have a provider  
5 who's been providing services for the last eight years, or  
6 whatever it's been, and my -- and unless there is a  
7 complete failure of that provider to provide the service,  
8 such as some kind of an emergency where someone can verify  
9 in writing and give reasons as to why they need to find  
10 somebody else immediately, my suggestion would be to ride  
11 that horse until you get your Chapter 91 process in order,  
12 and if that says go by the Procurement Code, so be it. Go  
13 by the Procurement Code. If it says go by the sole source  
14 contract, go by that.

15 The Court is not going to dictate what method  
16 the DCCA chooses as to what they think is in the best  
17 interest of the public when it comes to this thing.

18 MR. TAM: We fully understand that. We just  
19 wanted to understand what is the effect of your decision  
20 that we go through rulemaking on the RFP process. Would  
21 the RFP process have to be completely stayed until we  
22 promulgated the rules? That's what it sounds like.

23 THE COURT: Well, that's what I would  
24 suggest, unless you want me to actually make a ruling on  
25 this motion for preliminary injunction, which I'm sure you

1 don't.

2 MR. TAM: We understand. Thank you.

3 THE COURT: Any other questions? Mr.  
4 Collins, you've been strangely silent. Are you well?

5 MR. COLLINS: No, we don't have any  
6 questions. Thank you.

7 THE COURT: Given that the motion is being  
8 denied without prejudice, I'm going to ask either or both  
9 of you to prepare some kind of order for Mr. Collins'  
10 review, with the understandings which the Court has  
11 indicated here. Thank you.

12 MR. COLLINS: Thank you.

13 THE CLERK: All rise, court stands in recess.

14 (At which time the above-entitled proceedings  
15 were concluded.)

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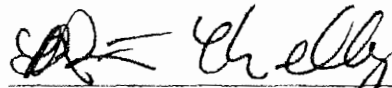


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I, BETH KELLY, an Official Court Reporter of  
the Circuit Court of the Second Circuit, State of Hawaii,  
do hereby certify that the foregoing pages 1  
through 38 inclusive comprise a full, true and correct  
transcript of the proceedings had in connection with the  
above-entitled cause.

Dated this 5th day of October, 2007.

  
BETH KELLY, RPR, CSR #235  
Official Court Reporter

Beth Kelly, RPR, CSR 235  
Official Court Reporter  
State of Hawaii

1 IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
2 WAILUKU DIVISION  
3 STATE OF HAWAII

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4 AKAKU: MAUI COMMUNITY )  
5 TELEVISION, a domestic non-profit )  
6 corporation, )  
7 )  
8 Plaintiff, )  
9 )  
10 vs. ) Civil No.  
11 ) 07-1-0278(1)  
12 LAWRENCE REIFURTH, Director, )  
13 Department of Commerce and Consumer )  
14 Affairs, State of Hawaii, )  
15 AARON FUJIOKA, Administrator, )  
16 State Procurement Office, State )  
17 of Hawaii, and DEPARTMENT OF )  
18 COMMERCE AND CONSUMER AFFAIRS, )  
19 )  
20 Defendants. )

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21 TRANSCRIPT OF PROCEEDINGS

22 before the Honorable JOEL E. AUGUST, Circuit Court  
23 judge, presiding on Thursday, January 24, 2008.  
24 Transcript of motion for summary judgment, permanent  
25 injunction, and attorneys' fees and costs.

APPEARANCES ON NEXT PAGE

REPORTED BY:  
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1 THURSDAY, JANUARY 24, 2008; MAUI, HAWAII

2

3 THE CLERK: Calling Civil No. 07-1-0278,  
4 Akaku Maui Community Television vs. Lawrence Reifurth,  
5 for motion for summary judgment, permanent injunction  
6 and attorneys' fees and costs.

7 MR. COLLINS: Good morning, your Honor.  
8 Lance Collins appearing on behalf of Akaku Maui  
9 Community Television.

10 MS. OHARA: Good morning, your Honor.  
11 Deputy Attorney General Pat Ohara appearing on behalf of  
12 the defendant Aaron Fujioka.

13 THE COURT: Good morning.

14 MR. TAM: Good morning, your Honor. Rodney  
15 Tam, Deputy Attorney General, on behalf of Lawrence  
16 Reifurth and the Department of Commerce and Consumer  
17 Affairs.

18 THE COURT: Good morning. Counsel, the  
19 Court has reviewed all of the pleadings that have been  
20 filed with regard to this motion, and I don't think I  
21 have any questions about the parties' motion at this  
22 point. The Court has done an analysis of what I think  
23 the issues are that are involved.

24 The Court would like to give the movant,  
25 first, the opportunity of providing any additional

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1 argument which has not already been made or add any  
2 additional facts which counsel thinks maybe relevant  
3 here for the Court's consideration.

4 MR. COLLINS: No, your Honor, I just -- and  
5 this doesn't have to be considered. I just received a  
6 slip opinion from the ICA about Tanaka vs. State where  
7 the ICA, by unanimous decision, has determined that when  
8 state agencies -- I mean it's not new. It's not  
9 anything that is extending our case law. It's just  
10 repeating that when a state agency has discretion to do  
11 something in the statute, that it's required to  
12 promulgate a rule. It doesn't need to be considered.  
13 But I just wanted to point out that the appellate courts  
14 are continuing down that line.

15 THE COURT: Thank you.

16 Anything from the defendants in this matter  
17 that you wish to add to any of the pleadings?

18 MS. OHARA: Yes, your Honor, just briefly  
19 in response to plaintiff's reply memo, if I may.

20 THE COURT: Go ahead.

21 MS. OHARA: Well, the State objects to the  
22 plaintiff's mischaracterization of the previous decision  
23 of the Court. The plaintiff seems to be claiming that  
24 the Court has determined that all of plaintiff's  
25 arguments have merit, and while the Court denied

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1 plaintiff's motion, the Court did say that plaintiff  
2 had, quote, a reasonable likelihood of success on the  
3 merits of it's Chapter 91 claim.

4 Now the plaintiff is introducing a new  
5 argument, extrapolating from this Claim 91 -- Chapter 91  
6 argument saying that Defendant Reifurth proposed and  
7 sent along a draft proposal to use a procurement code is  
8 a violation and --

9 THE COURT: Right, I saw that. That seems  
10 to be a -- new position from the original complaint.

11 MS. OHARA: Right. Whereas before he was  
12 arguing, as he repeated just now, that defendants needed  
13 to have a rule; and as the Court has suggested strongly,  
14 there should be a rule, given the unique circumstances  
15 of the PEG access services and the public involvement, I  
16 think the Court -- that Your Honor stated that once the  
17 genie is out of the bottle, how do you put it back with  
18 public involvement. Public participation was perhaps  
19 involved at the origin of the PEG access service  
20 organizations when it was started 10, 15 years ago. How  
21 can we just now treat it as a regular organization?

22 And so the plaintiff's original argument  
23 about the rule being required, is -- that was supported  
24 by Your Honor, the State has proceeded along this path  
25 and it's in the process of drafting a rule for

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1 adoption --

2 THE COURT: I understand that.

3 MS. OHARA: -- yeah, related to the  
4 selection, and we believe that plaintiff has claimed  
5 semantics when he's saying that the designation does not  
6 mean award or contract or procure. A clear indication  
7 of the Court was that the method of selection be put in  
8 the rule and that the Court even further stated that it  
9 was not going to dictate to the Defendant DCCA the  
10 method of selection, that it would be left to the DCCA.

11 As I said, the defendants have proceeded on  
12 this course of instruction and the plaintiff is arguing  
13 that the defendants are now violating the law of the  
14 case when the defendants would argue that it is  
15 plaintiff that has ignored the law of the case and it  
16 still remains that plaintiff has not proved its eminent  
17 authority or even any irreparable harm to warrant any  
18 injunctive relief.

19 And just to cover a few points raised by  
20 the reply memo, the DCCA is not delegating its  
21 responsibilities to the State Procurement Office.

22 The State Procurement Office's role in this  
23 matter is simply assisting the DCCA in the procurement  
24 process and assisting in the drafting of the  
25 solicitation, guiding it through the procurement

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1 process, and in no way is the SPO standing in the shoes  
2 of the DCCA to make the selection of the PEG access  
3 organization and any subsequent contract. I think  
4 that's been kind of muddled up by plaintiff's argument,  
5 that DCCA is replacing -- I'm sorry. SPO is replacing  
6 the DCCA. That's simply not the case. The final  
7 decision would be left to the DCCA. The SPO is just --

8 THE COURT: That was one thing I wanted to  
9 get clarified. The final approval would be through the  
10 DCCA?

11 MS. OHARA: Yes.

12 THE COURT: After the --

13 MS. OHARA: -- process.

14 THE COURT: -- the procurement process?

15 MS. OHARA: Because this is such a large  
16 project, the DCCA is working with the SPO, and the SPO  
17 is merely providing assistance in the form of this is  
18 what the statute requires, this is what the rules  
19 require, this is what we normally do, this is the  
20 process. The DCCA is responsible for drafting this  
21 solicitation. The solicitation --

22 THE COURT: Right. I have a few comments  
23 I'm going to make on that as well.

24 MS. OHARA: Okay. The responsibility for  
25 the scope as to the type of services that they're

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1 requiring; that would be the DCCA's responsibility. The  
2 evaluation criteria as to the selection would be the  
3 DCCA because the SPO has no business with that. It's  
4 not their area. It's not their jurisdiction. It's not  
5 their responsibility to determine what that would be.

6 They just provide the shell saying that,  
7 for example, this is how many days the notice has to go  
8 out. This is how many days you have to allow bids to  
9 come in; very mechanical, technical information.

10 THE COURT: So is there a recommendation  
11 made by the SPO?

12 MS. OHARA: No, not at all. It may provide  
13 recommendations as to, perhaps, you should make your  
14 notice a little more elaborate than what it is, maybe  
15 you should include perhaps a prebid conference that  
16 people have time to ask questions. It's more of a  
17 mechanical, technical advice to help the DCCA appreciate  
18 the process.

19 THE COURT: So it's a procedural process,  
20 not a substantive one.

21 MS. OHARA: Correct, your Honor.

22 THE COURT: So let's assume for the moment,  
23 that three entities put in proposals. Those go through  
24 the SPO process.

25 MS. OHARA: Yeah, the procurement process.

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1 THE COURT: The procurement process, and  
2 does the Procurement Office, after they've received them  
3 and made a determination at all, have fulfilled the  
4 initial criteria that's in the request for proposal?  
5 Did they hand them back to the DCCA without any  
6 recommendation?

7 MS. OHARA: Yeah, correct. I believe the  
8 proposals may come to the SPO as the issuing -- as the  
9 issuing body of the solicitation. They collect it to  
10 make sure it arrives on time, mechanical things like  
11 that. Was it timely? Was it complete? Did it have tax  
12 clearance certificates? Or whatever else is required.

13 THE COURT: Okay.

14 MS. OHARA: And they transfer it over to  
15 the evaluation committee which would be comprised of, I  
16 imagine, of DCCA employees and whoever else related to  
17 PEG access.

18 THE COURT: So the final decision is the  
19 DCCA?

20 MS. OHARA: Yes.

21 THE COURT: Well, thank you for clarifying  
22 that. And it was not clear in the documents about the  
23 nature of that process. I appreciate you --

24 MS. OHARA: I apologize for not putting it  
25 in, but the evaluation committee is the one that

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1 makes -- goes through the proposal as for the substance,  
2 matches it up against the evaluation criteria and the  
3 requirements that DCCA has structured.

4 THE COURT: Right.

5 MS. OHARA: They make recommendations, and  
6 ultimately, Defendant Reifurth would be the one  
7 selecting the access organization.

8 THE COURT: All right.

9 MS. OHARA: And then plaintiffs stated that  
10 DCCA was going to provide -- plaintiffs seem to construe  
11 DCCA's position as acting as an access organization and  
12 said this was in violation of Chapter 440G definition of  
13 access organization, about how access organization is  
14 someone designated by DCCA, blah, blah; but actually  
15 DCCA was not saying that.

16 It was saying that they could, if they  
17 wanted to, provide those services, not that it was to be  
18 an access organization. They're doing it in house as  
19 opposed to --

20 THE COURT: Well, that's how the Court  
21 understood it.

22 MS. OHARA: Yeah. And let's see.  
23 Plaintiff is characterizing that, because of its  
24 actions, the State is now behaving and not engaging, as  
25 he said, I think, in a cabaret of lawlessness. And we

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1 just want to emphasize that asking for the injunction  
2 does not mean that the State had been acting in a state  
3 of lawlessness. The State has always been in compliance  
4 with the law, has not acted on the -- always been doing  
5 the correct thing with regard to the RFP, once the  
6 protests were filed; and Your Honor might recall from  
7 the prior motion consistent with the statute, there was  
8 no action to further either the solicitation or the  
9 award of the contract.

10 And, similarly, plaintiff is confusing the  
11 issue by saying that the DCCA is upsetting the status  
12 quo by talking about renegotiation of a contract.  
13 Plaintiff refers to a meeting held by DCCA but I believe  
14 PEG access organization, and the State's position is  
15 that the status quo that the Court was talking about was  
16 that the contract remain with Akaku, the plaintiff, and  
17 that no new contract be entered into while this process  
18 is unfolding with the rule making or whatever selection  
19 process is determined, and that the contract remain with  
20 the plaintiff. That's still the case. The contract is  
21 with plaintiff. DCCA was just talking about the terms  
22 of any subsequent amendment to its ongoing contract with  
23 defendant -- with plaintiff. Sorry.

24 And, finally, plaintiff says that it's  
25 vindicating the public's rights, but the State's

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1 position is that it is only protecting its own  
2 self-interest, which is fine to protect their own  
3 self-interest, but they shouldn't be characterizing it  
4 as doing it on behalf of the public.

5           And just in closing, I just wanted to  
6 emphasize that the purpose of the procurement code is to  
7 achieve a fair and open competition, be it for goods or  
8 services. And the provision to PEG access service is  
9 just that, a service. The Code does not require one  
10 price in all instances. It does not require like a  
11 one-size-fits-all sort of contract or solicitation.

12           The State argues that the procurement code  
13 is flexible and responsive enough to accommodate many  
14 kinds, if not most things, that Government needs to  
15 procure including services such as PEG access services.

16           And so going through the procurement  
17 process, just to allow the State an opportunity to see  
18 whether another entity, or perhaps the incumbent  
19 contractor, can provide a higher quality of service, a  
20 higher level of responsiveness, service to the state,  
21 service to the community, whatever it is that the  
22 offerors can propose to the State.

23           The State is merely asking that someone can  
24 provide PEG access services, and then it behooves the  
25 offerors to come up with an attractive package saying we

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1 can do all of this for this fixed amount of money,  
2 because while the amount of money may be fixed as to  
3 what can be spent on PEG access services, the quality  
4 and the depth of the services may vary from offeror to  
5 offeror, and if we go through all that process and it  
6 turns out that no one can get better than the current  
7 level of services, then that's fine.

8           The State would have known, having gone  
9 through that, that we have the best deal we can possibly  
10 get at this point in time, and the State could not be  
11 accused of not doing its due diligence because what is  
12 at stake here are State funds. They're not taxpayer  
13 funds in the sense of taxpayers paying it, but we argue  
14 it's State funds because they're coming from the cable  
15 subscriber fees.

16           THE COURT: I'm not sure I agree, they're  
17 State funds, but I think an argument could be made as to  
18 why the State, given that there may be a diversionary  
19 interest in the assets --

20           MS. OHARA: Exactly, your Honor.

21           THE COURT: -- has an interest in -- well,  
22 I think there are a number of interests involved, but  
23 I'm not so sure at this point that I would classify the  
24 monies paid over by the person who's got the franchise  
25 as State funds as such. They certainly would be

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1 enforced to be paid by the State.

2 MS. OHARA: In addition to that, not only  
3 are they forced to pay -- if you want to have cable  
4 services, you pay the cable subscriber fees, say  
5 Oceanic, and if they -- if the State chose to provide  
6 its own PEG access services in house, those fees would  
7 be part of the payment that Oceanic owes the State.

8 It's all part of that payment and it's just  
9 been earmarked for PEG services. So in this sense,  
10 we're saying that they are State funds because they  
11 belong to the State, as you say, diversionary interest  
12 of the monies had they not been used for the PEG access.

13 And in conclusion, there has been no  
14 violation. There has been no unlawful conduct. The  
15 plaintiff is not entitled to any redress as a matter of  
16 law.

17 THE COURT: Thank you.

18 Counsel, do you want to add anything?

19 MR. TAM: Yes, your Honor. I'll be brief.  
20 I think Miss Ohara touched on all of the parts. I just  
21 wanted to address one thing that plaintiff has raised in  
22 his reply memorandum as well as throughout this lawsuit,  
23 and that's that the plaintiff alleges that the DCCA is  
24 violating the statutory and Constitutional Rights of the  
25 plaintiff. I just want to clarify some misconceptions

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1 first.

2 DCCA is not attempting to abolish PEG  
3 access, nor are they attempting to diminish anybody's  
4 First Amendment Rights. DCCA is not attempting to get  
5 rid of the current PEG access organization. They fully  
6 support PEG access. All they're trying to do is comply  
7 with the law and the State Procurement Office's  
8 determination that these PEG access contracts are  
9 subject to competitive bidding.

10 DCCA is just trying to determine if there  
11 is an entity out there that can provide the PEG accesses  
12 better than they're currently being provided.

13 Therefore, there is no harm to plaintiff or the public  
14 that is caused by DCCA by when they follow the code.  
15 Thank you.

16 THE COURT: Counsel, do you want to say  
17 anything in response, briefly?

18 MR. COLLINS: Your Honor, very briefly.  
19 First, that I think there is a mischaracterization of  
20 our motion to say that we're asking the Court to take  
21 what rule the DCCA should have provided. I think with  
22 respect to the statutory construction issue, I think  
23 what we're asking for is the Court to not dictate what  
24 can't be a rule, but to make clear what the options  
25 available to the DCCA are in terms of -- I think if you

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1 read through the reply memorandum, there is this  
2 misunderstanding that even though they're supposed to  
3 create a rule, they don't really have any choice because  
4 they can only do what they were doing before this  
5 lawsuit occurred, which is go through the procurement  
6 code.

7           And I think some guidance by the Court  
8 saying, even if it's dicta, telling them, look, you have  
9 discretion and that means you can do what you think is  
10 the best thing. Not because Mr. Fujioka says you have  
11 to use the procurement code --

12           THE COURT: I think the Court has already  
13 indicated that to them, that they're free to choose any  
14 reasonable means of designation they wish to. If they  
15 happen to choose to go through and use the SPO process  
16 as some kind of a procedural shell in order to help them  
17 before they make the ultimate decision, then I don't  
18 think there is anything illegal about that.

19           MR. COLLINS: Well, in order not to --

20           THE COURT: They seem to think it's  
21 required, but I don't -- if they do, that may be one of  
22 the reasons why they're doing that. But I certainly  
23 don't think it's illegal for them to choose that  
24 particular option.

25           MR. COLLINS: Well, your Honor, I think one

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1 of the -- I think there is two problems with just  
2 wholesale adopting the procurement codes. One is that  
3 the SPO does have some final determination. If they --  
4 if somebody files a protest under the procurement rules,  
5 the statute and the procurement code allows the  
6 procurement officer to stop -- completely stop a  
7 procurement and have it start it over from the  
8 beginning. So I think that's a little bit more than  
9 procedural. It is something that is substantive.

10 THE COURT: That may be to everybody's  
11 benefit.

12 MR. COLLINS: I am not saying it's not to  
13 everybody's benefit. But I think --

14 THE COURT: Your client may be presenting  
15 the objections.

16 MR. COLLINS: Well --

17 THE COURT: They presented a lot of -- your  
18 client is in the habit of presenting a lot of objections  
19 to a lot of things.

20 MR. COLLINS: I'm sure, your Honor, if  
21 anyone is going to be objecting, Akaku will be at the  
22 beginning of the line.

23 THE COURT: No doubt.

24 MR. COLLINS: However, I do think, though,  
25 that Director Reifurth does not have the authority to

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1 essentially delegate his designation power to the  
2 procurement office.

3 THE COURT: They just said he's not.

4 MR. COLLINS: Well, they're wholesale  
5 adopting about 300 pages of Administrative Rules that  
6 give the SPO and the Procurement Board all sorts of -- I  
7 mean they may not have the final decision to award a  
8 contract, but they can affect it tremendously. And if  
9 the Legislature wanted that, they would have said so.

10 THE COURT: Well, let me ask you a  
11 hypothetical question. If you were just a bystander,  
12 standing out there, you didn't know anything about any  
13 of this, and year after year, using his or her  
14 discretion, the -- somebody from the DCCA just sort of  
15 hands out a contract to the same organization year after  
16 year after year without anybody else at least apparently  
17 having the opportunity to sort of intervene in all of  
18 this and present another proposal for services, would  
19 you think that would give the appearance of impropriety?

20 MR. COLLINS: Oh, your Honor, absolutely.  
21 I think that the PEG regulation has been a disaster and  
22 there's been studies done by the State Auditor, by the  
23 Legislative Reference Bureau, by the DCCA, all  
24 indicating various frameworks for regulation, none of  
25 which, of course, is procurement. But the DCCA hasn't

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1 followed that. I think that's because, for an innocent  
2 bystander, they wouldn't see the gun that the DCCA has  
3 been holding to the PEG backs.

4 So that's one of the problems is that  
5 there's all sorts of agency, nonprofit intermingling  
6 over the years, that I think is repulsive to the public  
7 in general. But I don't think that the procurement  
8 process is the best way, and frankly, under the law, I  
9 don't think it's legal. But if we have to do a separate  
10 lawsuit on that, I'm sure Akaku will consider its  
11 options at that time.

12 THE COURT: It may, but they may be  
13 spinning their wheels. I don't know how they want to  
14 spend their money. I don't know if you doing this pro  
15 bono, but some of the stuff that is being argued reaches  
16 the point of strangeness.

17 MR. COLLINS: Sure. Finally, your Honor,  
18 the last point, I think, is that an extension of a  
19 contract with different terms, especially ones that  
20 change the financial position is not the status quo.

21 With respect to our argument why the  
22 Court's equitable and pastoral supervision in the form  
23 of a permanent injunction is necessary is because the  
24 status quo is being changed. There is being proposed,  
25 at least at this Cable Advisory Committee meeting, the

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1 State is in July looking to -- even though a rule will  
2 not have been promulgated by then, is looking to change  
3 the terms of the current contracts with the PEGs before  
4 a rule is in place, which goes right back to the  
5 original issue of engaging in conduct without a rule in  
6 place.

7 So that's why, at least until a rule is  
8 promptly promulgated, we're asking for the Court's  
9 equitable and pastoral supervision for a permanent  
10 injunction.

11 THE COURT: Well, I think the permanent  
12 injunction is more than a pastoral care, if you will,  
13 but certainly more harsh than that. But I share your  
14 concern that I think it is appropriate for the Court to  
15 continue some type of oversight. Well, let me --

16 MS. OHARA: Your Honor, may I just briefly  
17 respond to two items that Mr. Collins raised?

18 THE COURT: I don't think you need to.

19 MS. OHARA: Okay.

20 THE COURT: I know you want to get back at  
21 him, but we need to move on. It's like Hillary and  
22 Barack here.

23 MS. OHARA: And John Edwards.

24 THE COURT: Right. The plaintiff, I think,  
25 essentially argues that the Court's denial of the motion

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1 for preliminary injunction makes the remaining issues in  
2 this case purely questions of law. And I think there is  
3 not any genuine issue of material fact which has been  
4 articulated by the State.

5           There are essentially legal arguments; and  
6 essentially, the dispute is over the methodology to  
7 designate the PEG access organizations. The Court, as  
8 previously indicated, does not agree that the use of the  
9 public procurement code as the partial method for  
10 designation exceeds the authority of the director of the  
11 DCCA as long as it's the DCCA that creates the RFP  
12 criteria and has the right to approve of the final  
13 awardee of the contract. And that's been confirmed here  
14 this morning by counsel for the State, that it will be  
15 the DCCA who makes a final determination. It will not  
16 be the State Procurement Office.

17           Administrative agencies do have wide  
18 discretion when they are delegated authority by statute.  
19 And I think it's not for the Court to interpret the word  
20 "designate" to exclude the use of the State Procurement  
21 Office, again, as long as the DCCA is, in fact, going to  
22 ultimately designate the provider as they're apparently  
23 going to do.

24           As far as the other declarations that the  
25 plaintiff seeks, it appears that they may soon hopefully

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1 be moot to a great extent. Under 632-1, the declaratory  
2 relief statute, relief by declaratory judgment may be  
3 granted in civil cases where an actual controversy  
4 exists between contending parties, and the Court is also  
5 satisfied that it, the declaratory judgment, will serve  
6 to terminate the uncertainty or controversy giving rise  
7 to the proceeding. And I'm getting here to the issue  
8 about whether in fact there is a need for declaratory  
9 relief at this point. There may be, but the question is  
10 is there a need at this point.

11           It has been indicated by the State, through  
12 a sworn declaration, that the State has commenced the  
13 rule-making process and has apparently also granted a  
14 contract extension to allow plaintiff to continue  
15 providing PEG access services at least until June 30th,  
16 2008.

17           Once complete, there would be no  
18 controversy -- once the rule-making is complete, there  
19 would be no controversy relative to the need to have an  
20 order issued to comply with Chapter 91. The Court,  
21 quite frankly, is rather pleased that the State has  
22 taken a proactive approach towards the Court's  
23 suggestions. That has not necessarily been the Court's  
24 experience in the past. And I appreciate the fact that  
25 the DCCA seems to be doing that and is continuing that

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1 process relative to choosing the access providers.  
2 Given that the extended contract has been granted, there  
3 is no present issue of irreparable injury.

4           The Court's inclination at this point is to  
5 continue the motion pending the outcome of the  
6 rule-making process as to three claims for declaratory  
7 relief regarding the Administrative Procedure Act  
8 claims, specifically, the request for declarations that  
9 the use of current methodology and the designation of  
10 the access organizations is to be a rule within the  
11 meaning of 91-4, that there is currently no rule  
12 promulgated pursuant to 91-3 for the defendants to  
13 exercise the designating power, and any action  
14 prospectively taken by the director without promulgating  
15 a rule is void for failure to comply. Those matters  
16 will be continued by the Court, and in that sense, the  
17 Court will provide the pastoral oversight which is  
18 sought by the plaintiff in this case.

19           The Court is inclined to deny that part of  
20 the motion for summary judgment. As to the other  
21 requested declaratory relief, requesting Chapter 91,  
22 specifically, the use of the procurement code to assist  
23 in designating access organizations exceeds the  
24 authority granted to the DCCA Director by 440G. I don't  
25 think that it does exceed his authority, and the Court

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1 is going to deny at this point without prejudice the  
2 motion regarding the injunctive relief and for  
3 attorneys' fees and costs.

4           The Court reviewed with interest the  
5 transcript of the Cable Television Advisory Committee of  
6 January 9th. I thought it was a rather interesting  
7 transcript and the discussion that took place within  
8 there. I don't believe that there was a representative  
9 from Akaku present. At least when I looked at the  
10 people who are present, it looks like from all the other  
11 PEG access providers there are people there, but I don't  
12 think there was anything from Akaku. I may be mistaken  
13 about that.

14           MR. COLLINS: Your Honor, there was nobody  
15 from Akaku there.

16           THE COURT: But I did read the transcript.  
17 I think it would have, actually, given all interested --  
18 akaku is in all of this -- I would have thought they  
19 would have had somebody in there sitting in, sort of  
20 participating, and at least listening to what was going  
21 on. I found it rather interesting and enlightening.

22           You know, I looked at the criteria that was  
23 discussed. There were, I think, eight different  
24 criteria that the DCCA was talking about for its  
25 proposed model RFP to be included in that new rule, and

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1 they all seemed relevant. But they may wish to think  
2 about including, as one of the criteria, that there be a  
3 commitment of any PEG access organization chosen to  
4 expanding the marketplace of ideas, which are available  
5 to the public, both as producers and consumers. I think  
6 having that sort of spiritual, if you will, commitment  
7 of keeping the marketplace of ideas open as a criteria  
8 would be helpful and serve as a useful tool for  
9 determination which might be an appropriate PEG access  
10 provider.

11 In other words, some reference to those  
12 Constitutional values of free speech as a specific goal  
13 rather than being assumed within some nebulous, other  
14 factors, catch-all criteria. I'm not ordering that, but  
15 I certainly think it would be a good idea because it  
16 certainly seems that to the extent that there is a free  
17 speech issue with all of this, and the public having  
18 access to receive ideas and to communicate ideas, I  
19 think any PEG access provider should go into that with  
20 that understanding, they're not going to be there to  
21 limit the marketplace or to push any particular, either  
22 political or any other type of thought, you know, out  
23 there.

24 Again, I'm not ordering that. But I think  
25 it would be interesting to have that as a criteria, and

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1 I think it would be helpful, given that the DCCA is  
2 going to have the final say. And I think, you know, the  
3 DCCA, the State, again, is not required under the law,  
4 at least as the Court understood it, to even have PEG  
5 access providers out there as nonprofit organizations.  
6 I'm not sure they are required to have any of it. But  
7 this state has taken it upon itself to pursue that. I'm  
8 not sure that all states have. But it's to the State's  
9 credit. I know there are disputes among the people who  
10 are various access providers about trying to gain more  
11 rights under the plan. But at this point it's there,  
12 quite frankly, as a matter of grace, and I think it's --  
13 we're all the better for it, and I think as long as the  
14 State is interested in maintaining the marketplace of  
15 ideas, I don't think it hurts to indicate there is a  
16 commitment in writing as a criteria.

17 MR. COLLINS: Your Honor, one point that  
18 hasn't been quite clarified is the State is of the  
19 position that the RFP process that it went through and  
20 then stopped, based on the October 4th hearing, was  
21 essentially just stayed to promulgate a rule, and  
22 essentially from the transcripts that I've read, they  
23 are just going to pick up where they left off. And our  
24 position has been that they have to start over because  
25 what they've done so far is essentially void from the

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1 start.

2                   So I guess if you could clarify that for us  
3 so that we don't have to come back here. That is part  
4 of the -- part of our declaratory action complaint that  
5 has asked that, essentially, identifying the designating  
6 PEG organizations is a methodology, and therefore, a  
7 rule, that the RFP process they attempted previously is  
8 void, and they'd have to start over once they  
9 promulgated --

10                   THE COURT: I'm not going to make a ruling  
11 on that this morning. I know the State is working on  
12 trying to get the rule and everything sort of working at  
13 the same time. I am going to make a ruling today that  
14 is void ab initio at this point.

15                   MR. COLLINS: So that is what is being  
16 continued?

17                   THE COURT: I'm not going to make a ruling  
18 on that. I'm assuming that the State will go ahead with  
19 the efforts to promulgate the rule, and it will proceed  
20 under the rule.

21                   MR. COLLINS: All right.

22                   MS. OHARA: Thank you, your Honor.

23                   MR. COLLINS: Thank you.

24                   THE COURT: Thank you. Will you prepare  
25 the order on this? Well, actually, it's sort of in part

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1 denied and in part continued. If either of you or both  
2 of you can submit a proposed order on this, or at least  
3 you can agree on one, that's fine.

4 MS. OHARA: I can do that.

5 MR. COLLINS: Okay.

6 THE COURT: Thank you.

7 MR. COLLINS: Thank you, your Honor.

8 THE CLERK: All rise. Court is recessed.

9 (Whereupon a recess was taken.)

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I, HEATHER E. PITVOREC, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 29 inclusive comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 14th day of February, 2008.

  
HEATHER E. PITVOREC, RMR, CSR #456  
Official Court Reporter

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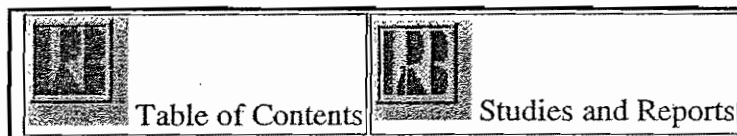
# Public, Education, and Government Cable Television Access in Hawai'i: Unscrambling the Signals

SUSAN EKIMOTO JAWOROWSKI  
Researcher

Report No. 4, 1995

Legislative Reference Bureau  
State Capitol  
Honolulu, Hawaii

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**Public, Education, and Government  
Cable Television Access in Hawai'i:  
Unscrambling the Signals**

**FOREWORD**

This study was prepared in response to Senate Resolution No. 65, Senate Draft 1 (1995). The Resolution directed the Legislative Reference Bureau to study the nonprofit public, education, and government cable access organizations in Hawai'i to determine whether their operations provide the type of access and programming intended by federal and state law. The Bureau was also directed to answer specific issues related to their management, funding, and operation. The Bureau wishes to extend its appreciation to all those who assisted in the study, including the respondents from other access organizations across the United States and in Canada. The Bureau extends special thanks to Sue Buske, Kathleen Schuler, Sanford Inouye, Ras Skelton, Darla Palmer, Richard Turner, Juergen Denecke, Brian Lee, Wendy Arbeit, Bruce Fisher, Prema Qadir, Carol Bain, Ed Coll, Andy Park, and Robbie Alm for their cooperation and assistance.

Wendell K. Kimura  
Acting Director  
November 1995



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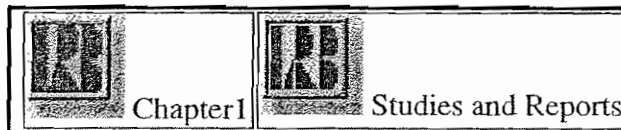
## APPENDICES

A. Senate Resolution No. 65,  
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B. Letter from Sanford T. Inouye, Cable Television Division, Department of Commerce and Consumer Affairs  
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C. Letter from Richard D. Turner, Executive Director, 'Olelo  
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**Public, Education, and Government  
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**Chapter 2**

**BACKGROUND**

In Senate Resolution No. 65, S.D. 1, the Legislature sought answers to five specific questions. In researching the issues, it became apparent that the answers would not illuminate the picture without adequate background. A significant part of this study will be a description of the issues and the structure and operations of the access organizations. This chapter describes the interrelationship between the federal and state cable television access laws and between the three major entities involved: the State, through the Department of Commerce and Consumer Affairs (DCCA), the cable companies, and the access organizations. The issue of what type of access is intended by the law will be reviewed. Chapters 3 through 6 will review the structure and functions of each of the four access organizations.

It should be stressed that this study is intended to address policy issues, and is not an audit of the public access organizations. Some people who contacted the Bureau in connection with the study reported issues relating to alleged problems such as purchase of the wrong equipment, improper use of facilities, and improper installation of equipment. These are not the issues relevant to the resolution. This study represents an examination of the philosophy behind public access, whether the access organizations are fulfilling their mission, and answers specific questions requested by the Legislature.

**The Players**

There are four entities involved in this topic.

**The Federal Government**

The federal government, through the Federal Communications Commission (FCC), regulates the cable industry. Between 1972 and 1979, the FCC required PEG (public, education, and government) programming for the larger franchise areas. That requirement was struck down in 1979. In 1984, Congress passed the Cable Communications Policy Act of 1984 (1984 Act), in which the franchising authorities of the cable companies were permitted, but not mandated, to require their franchisees (i.e., the cable

companies) to provide PEG access.

The State

[ In most locales, the franchising authority is at the county level or lower. In Hawaii, the State has taken on that function. Under chapter 440G, Hawaii Revised Statutes, the State requires its franchisees, the cable companies, to provide PEG access as a condition of granting the franchise. The Department of Commerce and Consumer Affairs (DCCA) is the state agency that handles the franchise agreements. ]

### The Cable Companies

The cable companies are the private entities that provide cable television service to their subscribers. At the time this study was prepared, those providers were: on O'ahu, Oceanic Cablevision(1) and Chronicle Cablevision of Hawaii; on the Big Island, Jones Spacelink of Hawaii, Inc., Sun Cablevision of Hawaii and Kamehameha Cablevision Cable Systems, (2) and Chronicle; on Maui, Chronicle and Hawaiian Cablevision Company; (3) and on Kaua'i, Garden Isle Cablevision and Kauai Cablevision. As discussed in detail below, the cable companies each pay a small portion of their annual gross revenue to fund the cable access organizations.

### The Access Organizations

The access organizations are known by several descriptions: "PEG access organizations", "nonprofit cable access organizations", and "access centers". This study will refer to them as the "access organizations". This term refers to the private, nonprofit companies set up solely to handle the PEG obligations of the cable companies. These access organizations are intended to be independent; they are not intended to be state agencies and they are not affiliated with the cable companies. On O'ahu, the access organization is 'Olelo: The Corporation for Community Television; on Maui, Akak-Ōu: Maui County Community Television, Inc.; on Kaua'i, H-Ōo'ike: Kauai Community Television; and on the Big Island, Na Leo 'O Hawai'i.

Each of these organizations has a written or oral contract with the State by which they agree to provide PEG services (or in the case of Maui, P services only).

The federal act is silent on the role of access organizations, as Congress did not anticipate their existence. (4) The Act does provide that cable companies may be required, in each twelve-month period, to pay the franchising authority a franchise fee of not more than five percent of gross revenues. (5) However, the legislation does not provide instruction on the use of the fee. The federal legislation also indicates that the cable companies can be required to make capital contributions to

the access organizations, which are not included in the five percent franchise fee limit.

Neither the state statutes nor state rules directly mention this franchise fee, although the statute refers to conditions that the Director of Commerce and Consumer Affairs may place on franchisees, and also specifies that each cable operator shall pay an annual fee, to be determined by the Director, to offset the costs of administering the state law. (6)

The franchise fees are mentioned explicitly in the Decisions and Orders that constitute the contract between the State and the cable operators. At the time this study was requested, 'Olelo was receiving three percent of the gross revenues and, for the most part, the neighbor island access organizations were receiving only two percent. (7) The situation has changed since that time, as documented in a letter from the Cable Television Division of the DCCA, included as Appendix B. Most of the neighbor island access organization now have access to three percent. H-Do'ike's agreement will change as of 1996 but it will not receive payment at the three percent rate until the end of 1996. See Appendix B. This change is appropriate; the neighbor island access organizations have been operating on a comparative shoestring due to their much smaller subscriber bases. While they cannot expect the kind of revenues and facilities that 'Olelo has, the disparity in resources is marked. While 'Olelo has sufficient resources with which to purchase its own building, two of the neighbor island organizations cannot even afford to rent enough space for a small studio. As they lack the economies of scale that a large organization such as 'Olelo enjoys, equity would seem to demand that they receive at least the same percentage as 'Olelo.

In addition to the two to three percent paid to the access organizations, the cable companies are required to pay to the DCCA one percent of their gross revenues for its operating expenses. Another one percent of gross revenues has been designated in some franchise areas for the Hawaii Public Broadcasting Authority (HPBA). This means that Oceanic, for example, is at its maximum 5 percent franchise fee capacity: 3 percent to PEG access, 1 percent to DCCA, and 1 percent to HPBA.

While the federal act is silent as to the uses of the franchise fee, paying a portion to HPBA is problematic. HPBA's mission is to establish and operate public broadcasting facilities, to produce or obtain programs intended to enlighten the people of the State, and to air these programs. (8) HPBA, which is also within the DCCA, is intended to be funded by a revolving fund, the sources of which include funding from the state Legislature. HPBA has had additional funding needs for a number of years, and, according to Robbie Alm, the then-director of the DCCA, in 1991, half a percent of the franchise fee was diverted to HPBA in a one-year only agreement to provide for community programming. (9) Alm saw HPBA as complementary to public access, with HPBA providing "broadcast" programs drawing a wide audience and capable of competing with commercial television, and PEG

access providing "narrowcasting," programming for more discrete audiences, such as ethnic, social, religious, and political groups. The funding lapsed until January 1993, when the DCCA required 1% of Oceanic's gross cable revenues (as part of its franchise fee) to go to HPBA. The rationale for such a decision was (1) that HPBA was a major resource to the State and that without equipment resources it would not be able to continue broadcasting; and (2) HPBA managed the Hawaii Interactive Television System (HITS), which is an integral part of the state-wide cable communications network. HITS is a closed circuit microwave television facility with two-way video and audio that can be picked up by all cable companies. HITS is the source for TEC (The Education Channel) programming in Honolulu, and is also one of the sources for educational programming in the other counties. The HITS microwave distribution system allows programming to be delivered to cable subscribers statewide, including emergency broadcasting information.

The DCCA approved three franchise transfers in 1995. Sun Cablevision, Kamehameha Cablevision Cable Systems, and Hawaiian Cablevision, were transferred to Time Warner, despite, in Hawaiian's case, opposition by Akaka-Cu. These transfers included provisions that the franchise fee also include a one percent transfer to the HPBA. (10)

However, as of January 1995, HPBA no longer administers HITS, which has been transferred to the University of Hawai'i. (11) Thus the propriety of continuing to fund HPBA should again be examined by the DCCA, as the funding acts as a barrier to increased funding for public access. This is an issue of great importance to the access organizations, as it appears that the maximum operational funding that can be required from the cable companies is five percent of gross revenues. With three percent (in most areas) of revenues already going to access, one percent going to the DCCA, and another one percent going to HPBA, there is no room for growth in the allocations for the access organizations. This may be less of a problem in Honolulu, as the subscriber base is very large, so that three percent constitutes a seven-figure sum. However, one of the neighbor island access organizations noted that they have a far smaller subscriber base, and hence a much smaller budget. This organization fears that the diversion of funds will prevent it from meeting the demand for public access services in its county.

If the State finds that HPBA still needs the funds and that another source is available, the State may choose to continue to dedicate these funds to HPBA. However, the State should weigh this concern against the potential deprivation to the access organizations. The State has warned the access organizations that "funding for PEG access via cable companies' contributions should not be viewed as permanent" and encourages access organizations to seek other funding strategies. (12) However, the feasibility of the access organizations to raise significant sums has not been determined.

Interconnections between the State, the Cable Companies,  
and the Access Organizations

The connection between the State and the cable companies is statutory and contractual: chapter 440G, Hawaii Revised Statutes, requires the cable companies to provide PEG access, and the franchise agreements between the State and the companies provide that, in exchange for the grant of the franchise, the cable companies will provide a minimum of three access channels and pay the franchise fee and make capital contributions for the access programming.

The connection between the State and the access organizations is contractual. After each access organization was created, it entered into a contract with the State to:

- (1) Manage the PEG channels;
- (2) Provide facilities and equipment for the production of PEG programming;
- (3) Train governmental, educational, and community organizations and the general public to use the facilities and equipment;
- (4) Market and promote the organization and the channels;  
and
- (5) Provide support services to the users of the channel (13) in exchange for the access fees and equipment and facilities funds paid by the cable companies in the respective counties (the "access fees" are apparently the access organizations' share of the franchise fees).

The State's part of the connection is its ability to appoint a majority of all board members by the Director of DCCA.

The relationship between the cable companies and the access organizations is less formal. The only reason for the access organizations to exist is to fulfill the cable companies' PEG requirements, yet the access organizations do not, with one important exception, have a direct interconnection with the cable companies. The moneys collected by the cable companies are transmitted to 'Olelo, which, upon approval by the DCCA of the access organization's budget, disburses a certain percentage of those funds to the access organization. The only direct contact the entities have is the ability of almost all the cable companies (14) to appoint a specified number of members, depending on the organization, to the access organization's board:

H-Do'ike: out of 11 members, 2 are appointed by Garden Isle Cable and 2 appointed by Kaua'i CableVision. (15)

'Olelo: out of 9 members, 3 are appointed by Oceanic. (16)

Akak-Ūu: out of 11 directors, 2 appointed by Chronicle



Cablevision and 1 by Hawaiian Cablevision, Inc. (17)

Na Leo: out of 11, 2 appointed by Jones Spacelink and 2  
appointed by Sun Cablevision. (18)

The propriety of having cable companies appoint board members of  
the access organizations will be discussed in detail in chapter 8.

#### **Other Issues**

One issue that reached national prominence as this report  
was finalized was a First Amendment challenge to the federal law  
that encourages access organizations (and other cable operators)  
to restrict indecent programming. (19) To date, indecent  
programming does not appear to be an issue in Hawaii.

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**ENDNOTES CHAPTER 2**

1. The Oceanic Cablevision franchise has been transferred to Time Warner Entertainment Company, L.P. DCCA Decision and Order No. 153, September 25, 1995.
2. Both the Sun and the Kamehameha franchises have been transferred to Time Warner. DCCA Decision and Order No, 173, June 30, 1995.
3. The Hawaiian Cablevision franchise was transferred to Time Warner on October 2, 1995. See DCCA Decision and Order No. 174, October 2, 1995.
4. David T. Styles, Kathleen T. Schuler, and Evelyn Pine, Community Channels, Free Speech, and the Law: A Layman's Guide to Access Programming on Cable Television (The Foundation for Community Service Cable Television: San Francisco 1988) at 36.
5. Cable Communications Policy Act of 1984, sec. 622; codified at 47 U.S.C. sec. 542.
6. Sections 440G-8(d) and 440G-15, Hawaii Revised Statutes.
7. Oceanic paid three percent of its annual gross revenue to 'Olelo, and can be assessed up to four and a half percent upon determination by the Director. DCCA Decision and Order No. 135, secs. 5.1, 5.11; DCCA Decision and Order No. 154, secs. 5.1, 5.11. Oceanic is also scheduled to pay a total of \$9,286,498 in years one through fifteen of its franchise agreement for capital funds for facilities and equipment. Id. at 5.4; c.f. DCCA Decision and Order No. 154, sec. 5.4.

Chronicle is on a schedule under which it pays the greater of either 3% for its franchises in Hawaii Kai and Maui and 2% for its franchises in Moloka'i, Lana'i, and Ka'u, or a flat fee ranging from \$273,000 due on December 31, 1991 to \$361,000 for the year ending December 31, 1995. For subsequent years, the access fee shall be a flat 3%. DCCA Decision and Order No. 148, sec. 7.2. The director may adjust the fee based on Chronicle's financial condition, community needs, and other factors. The capital contribution for the years ending December 31, 1991 through December 31, 2000 is a total of \$490,000.

Hawaiian, in its 1990 franchise agreement, was to pay the greater of two percent of its gross revenues or a fixed amount ranging from \$78,000 to \$111,000 per year for operating expenses between December 31, 1991 and December 31, 1995, and three percent thereafter. The schedule of facilities and equipment was erratic, ranging from zero to \$124,000 over the same five year period. DCCA Decision and Order No.142 dated November 23, 1990.

Kauai CableVision is slated to pay the greater of 2% for all

of Kauai except Princeville, and 1/2% for Princeville (the rate for Princeville is to rise to 2% when services to that area are offered that are identical to the services offered to the rest of Kaua'i) or a flat fee ranging from \$74,000 due on December 31, 1991 to \$116,000 due on December 31, 1995. After that date, the rate shall be 3% of gross revenues, but the Director may reconsider the rates for unspecified reasons. DCCA Decision and Order No. 152, section 6.1. The annual capital fund requirements ranges from \$8223 as of December 31, 1991, to \$14,807 as of December 31, 2000.

Garden Isle Cablevision pays a rate of two percent of its gross revenues and one lump sum of \$128,000 for capital costs for the period of its franchise through December 31, 1995 at a minimum, and, if Garden Isle meets some franchise obligations, this sum will constitute fulfillment of its obligation through December 31, 2000. DCCA Decision and Order No. 143 and 145, December 19, 1990.

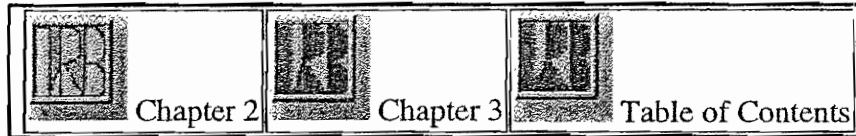
For the years 1992 and 1993, Jones Spacelink is to pay the greater of 1% of gross revenues or \$48,000 for the fiscal year ending May 31, 1992 and \$53,000 for the fiscal year ending May 31, 1993; and the greater of 2% of gross revenues or a range of between \$112,000 and \$131,000 for the ensuing three years, and a flat percentage of 3% of gross revenues for the remainder of the franchise term. Capital funds range from zero dollars per year to \$188,370, for a total of \$458,393 for the life of the franchise. DCCA Decision and Order No. 155, secs. 7.2, 7.3.

Sun Cablevision pays up to 3% of its gross revenues to the DCCA, and \$200,000 for PEG facilities and equipment for the period between July 1, 1995 and December 31, 1995, and an amount to be designated by the director of the DCCA after that date. DCCA decision and Order No. 159 (July 6, 1994).

8. Section 314-1, Hawaii Revised Statutes.
9. Interview with Robbie Alm, former director, DCCA, on October 13, 1995; see Act 87, Regular Session of 1991.
10. See DCCA Decisions and Orders No. 173 and 174.
11. The transfer was authorized by Act 272, Regular Session of 1994, sec. 31.
12. DCCA Decision and Order No. 174, October 2, 1995, at 10.
13. Agreement between the Department of Commerce and Consumer Affairs and 'Olelo: The Corporation For Community Television, signed January 19, 1990, section 4; Agreement between the Department of Commerce and Consumer Affairs and H-Ō'ike - Kaua'i Community Television, Inc., commencing October 13, 1993. The H-Ō'ike and 'Olelo agreements also require them to maintain appropriate levels of insurance. At the time this study was prepared, the contracts with Akak-Ū and Na Leo were not available, but the researcher was informed that these provisions will be the same.
14. The exception in Chronicle's Honolulu operation, which does not appoint a member to 'Olelo, the Honolulu access organization. Instead, Oceanic, the other cable company on Honolulu, appoints three members.
15. Bylaws of H-Ō'ike: Kauai Community Television, as amended

12/7/93, at sec. 7.2.

16. Bylaws of 'Olelo: The Corporation for Community Television, adopted February 28, 1990.
17. Bylaws of Maui County Community Television, Inc. at sec. 7.2.
18. Bylaws of Na Leo 'O Hawai'i at sec. 7.2.
19. See, e.g., "Justices to Consider Cable-TV Sex Curbs," Wall Street Journal, Tuesday, November 14, 1995, at B14-15.



## Public, Education, and Government Cable Television Access in Hawai'i: Unscrambling the Signals

### Chapter 5

#### AKAKU: MAUI COMMUNITY TELEVISION

##### Background

Akaku: Maui Community Television, is unique in Hawai'i in that, while it serves as the "clearinghouse" and transmission site for P, E, and G access in Maui county, it was incorporated as a public access (only) corporation. Akaku produces G programming through its contract with the county of Maui. The E element is handled by Maui Community College (MCC) and the DOE. This tripartite arrangement arose as MCC had been producing and airing its own educational programs for eight years before Akaku was formed, and had a strong interest in continuing in a leadership position with educational access. MCC also wanted to handle public access on Moloka'i and Lana'i, as it has educational centers on those islands. Akaku is responsible only for assisting in the creation of P and G programming, but its facilities are used for playback of all three PEG segments on a single PEG channel.

PEG access is thus split between these and is coordinated through a consortium composed of representatives of these organizations. The role of the consortium is discussed in more detail in the budget section.

Akaku is located in Kahului in a 1,345 square foot office. The office space includes a small (304 square foot) studio and two edit bays, separated by half-height partitions. Akaku has been operating the PEG channel on since October 1993. It has four full-time and two part-time employees and an annual operating budget of \$204,787, airing programs for a subscriber population of approximately 40,000 on the islands of Maui, Moloka'i, and Lana'i, which comprise Maui county. Akaku's funding is based on receiving between two and three percent of the gross revenue from the cable companies in its area.(1)

One of the primary components of its service is an interactive bulletin board that appears on PEG access channel between programs. The bulletin board features titles of various nonprofit, education, and government topics ranging from announcements of fundraising events to health information. Viewers see a directory of title with a number by each title, and by calling the phone number on the screen and typing in the number with any touch-tone phone, an expanded description of the

event or topic appears on the television. The service is primarily for nonprofit agencies and educational and governmental notices. Akaku program schedules and information about individual shows are also listed.

Akaku also features an "open mike" type of show, "Speak out Saturday," in which Akaku provides a single camera, studio, and staff to start and stop the recording. Individuals or organizations in the community can use the studio for a half hour to make a presentation of up to five minutes on any topic of interest to them, as long as they comply with the Akaku limitations on commercial programs, obscenity, promoting gambling, and illegal and defamatory programs or other content restricted by law. These brief commentaries can be made without the need for production training and certification.

Akaku surveyed nonprofit agencies to determine type and level of access services desired. Akaku provides two bi-monthly studio programs for nonprofit agencies to discuss services, events or interview guests. Akaku production class is provided as crew.

Another feature of Akaku is its Senior Issues program, an all-volunteer senior citizen television talk show on issues of interest to Maui senior citizens. No prior production experience is necessary.

Akaku reviews and facilitates "special project" requests that can be accommodated within budget. Special projects have included multicamera political forums and sponsorships of large nonprofit events such as "First Night Maui". Akaku has over 150 individual access producers, and over 200 nonprofit, government, and educational groups that have used Akaku's services in the past 19 months. Groups tend to be more organized and repeat users, while individuals represent 30 or so "regular, weekly" users.

### **Training**

Akaku started training in February 1994 and as of the end of July 1995 had certified 132 people in its Access Basics class. An additional 17 people have been waived in by meeting other standards. The Access Basics class is a five week course, meeting three hours per week, that covers the basics of how to produce an access show, how to use the access center, multicamera studio and control operation, graphics, directing, copyright issues, program promotion, and how to submit a program to be cablecast. Two classes are run concurrently each month, for a total of twenty-four people trained each session. Akaku also offers additional courses in field production, editing, and advanced editing. The cost of each course is \$20. Members of the class evaluate the training after every session provided. The Bureau asked for a compilation or transmittal of the course evaluations. Neither was provided Akaku stated that although evaluations are reviewed and used to improve the training

program, the information has not yet been statistically compiled.

Training at Akaku is very popular; when its doors opened in October 1993, there were over 300 people on the waiting list; there were 254 as of February 1995; and 194 as of September 1995.

Akaku publicizes its services and training opportunities in free public orientation meetings held every other month. Akaku also posts messages on its video bulletin board, airs promotional announcements, and has its staff and board members speak to individuals and community groups about access opportunities.

The Bureau asked for statistics on how many certified users produce shows that are broadcast and the number of shows each individual produces, but Akaku stated that these statistics have not been compiled. Akaku does track and report to the DCCA information such as total number of Public, Education, and Government programs produced and aired, and total number of people certified in production classes.

#### **Equipment Availability**

At present, equipment is made available on a first-come, first-served basis to any certified access user, once the user's program proposal has been approved by the staff. Akaku is considering allocating a certain amount of resource hours per month per user to allow more equitable distribution of resources and enable new users to gain access to equipment.

The only equipment that is restricted is the multicamera studio equipment when it is used outside the studio setting. In that event, it is sent out in the Akaku van with an Akaku staff member, due to insurance requirements. Akaku does not promote this type of usage as it places extra wear and tear on the equipment. Akaku cannot afford an engineer or maintenance person on staff, so remote use, with its attendant risks, is not promoted.

No organization has priority over another for public access equipment usage. MCC has been given funds for facility and equipment, and Maui High School also been given funds for a television studio for Department of Education (DOE) use. Akaku has received PEG funds to purchase equipment on behalf of the county for G use. That equipment has been made available for public access use when not in use by the county.

Defective or obsolete pieces of equipment are removed from service and repaired. Akaku's budget is limited and inadequate equipment may not be replaced, depending on the cost. Major repairs are handled by an authorized service representative. Lesser repairs are handled by by an engineer who comes in once a month on a voluntary basis, or sometimes the chief engineer at 'Olelo is able to come over and assist. Maintenance, repair, and replacement of equipment are of increasing concern to Akaku as its equipment ages. Akaku realizes that it is unrealistic to

continue to rely on the kindness and unpredictable schedules of engineering volunteers, and is seeking a source of revenue for this area.

#### Cablecast Access

Akaku divides its cablecast time into program categories, such as community service, issues, spiritual, arts and entertainment, government access, recreation, nonprofit, and various educational categories. Producers can designate the category in which their program falls, and can request a preferred cablecast time. A new program is generally scheduled to air two to four times during its premiere week, except for series, and is generally kept in Akaku's program library for up to three years for future cablecast.

Akaku submitted its programming list for the period of June 1 through July 1, 1995. While public access shows predominated during this period, governmental programming was aired every day, and educational programs aired every day except for five -- one Friday and all four Sundays. Public access shows were on various topics, such as religion, sports, politics, entertainment, cooking, astrology, comedy, health, Hawaiian issues, and the Speak Out Saturday program. The educational programming was taken from the HITS system and included courses on calculus, analytical geometry, Hawaiian language, public safety, and environmental resources for classes, and a Board of Education meeting. G programming basically consisted of a senior issues program County "What's Happening" and County Council and planning commission meetings. Akaku also submitted statistics for a more representative month, which showed more educational programming:

#### PROGRAMMING STATISTICS FOR OCTOBER 1995

HITS (DOE and UH Educational)	43%
County of Maui (Gov't Access)	9%
Arts and Entertainment	15%
Spiritual	8%
Issues	7%
Community Service (nonprofit)	7%
Sports/Recreation	7%
Bulletin Board	4%

As public access is still relatively new in Maui, no limitations had been placed on access to ensure the widest possible usage. As of July 1995, however, Akaku has sent a letter to its series producers that the number and length of series would be limited, and will also create some limitations for producers of individual shows to enable more shows to be aired.

Akaku has experienced no significant problems to date with persons who seek to use government access for political purposes.



The government access program centers around specific production projects that are agreed upon on a yearly basis. According to Akaku, this "generally prevents our County Administration and County Council from using government access production for self-serving purposes, such as political campaigning." While overt campaigning is not allowed, the free exchange of ideas and positions in political debate is acceptable. During the last election season, Akaku aired several candidate forums and helped facilitate candidate forums for a local community association and for the Office of Hawaiian Affairs, by paying for the camera crew and technicians who crewed the events.

#### Editorial Guidelines

Akaku does not pre-screen any program for content. Each producer must sign a cablecast agreement stating that the producer is aware of Akaku's policies and has abided by them. Each program is checked to ascertain whether it meets minimal technical standards. No program is rejected based on length, but Akaku does request that it be consulted in advance if the program is over two hours in length, due to the difficulty of scheduling longer programs. Akaku also asks producers for assistance in scheduling sensitive subject matter or content designed for adults only.

#### Promotion

Programs are promoted by both Akaku and the individual producer. Promoters are taught how to draft a press release and how to distribute programs to the other access centers. Akaku will schedule the program on its on-air bulletin board and in the TV Guide pull-out section of the Maui News. If the completed program is received by Akaku at least two weeks before air-time, the show will be listed by name in the newspaper. (2)

#### Viewership

Akaku does not have information on viewer statistics; however, it does receive up to 2,500 phone calls per month to its on-air bulletin board. The general manager reports that she often fields comments and requests for information about access programming, and that "there is a strong indication that community television is a popular and watched resource in the community."

#### Cablecast Scheduling

Akaku works with representatives from UH and DOE well in advance of each semester to establish an equitable distribution of channel time. Akaku has worked with the DOE on production equipment purchases so that the resources would be similar and could be loaned in the event of an equipment emergency. Akaku is

also developing a cooperative training program with DOE for students and for staff so that they can use their own production resources and the DOE studio to create programming.

Akaku updates program scheduling format on a quarterly basis. Educational programs are scheduled first since many are credit courses for the schools. Government programs are then scheduled because Akaku knows well in advance what G programs will be produced according to the G agreement. Public series programs are also scheduled in advance, and Akaku leaves "open blocks" for individual public programs produced throughout the quarter.

### Budget

Unlike the other public access organizations in Hawai'i, the P, E, and G access functions on Maui are handled by different entities, so the budget process is quite different. Akaku, MCC, DOE, and the county administration have formed a consortium, an unofficial advisory group, to handle issues relating to PEG access, including budget. (3) In the past, consortium members had jointly discussed a mutual budget. But due to conflicts of interest, for fiscal year 1995-1996, Akaku prepared the public access budget and helped to facilitate the government budget, while MCC and DOE prepared their individual educational access budgets.

Unfortunately, this method of organization has its drawbacks. Due to conflicts between the four main entities' priorities, a unified budget was not presented to the Department of Commerce and Consumer Affairs (DCCA); rather, each organization submitted its own. The total of the budgets far exceeded the moneys available, thus placing the DCCA in the awkward position of having to create the budget for Maui county PEG access. Given the State's attempts to distance itself from PEG access provision, as discussed in chapter 8, the DCCA's involvement with establishing a PEG budget is understandable but inappropriate.

The consortium's quasi-official status is another drawback to this arrangement. Consortium meetings are confidential and closed to the public. The consortium discusses and attempts to make decisions that will have a significant impact on the way that PEG access is handled. Yet there is only one board member from Akaku in the consortium, who is not authorized to speak for the whole board unless board processes, such as public notice and open hearing, are complied with. Similarly, the Maui county representatives have expressed their concern that their participation does not comply with state open meeting ("Sunshine") law requirements. The consortium does not seem to be the best method of handling these issues.

The fact that PEG access is fractured between different entities has also resulted in duplication of facilities. For example, MCC, DOE, and Akaku all have studio facilities. Given

the comparatively low number of programs generated through the Maui DOE, a more cost-effective use of funds might have been to build a larger joint studio with Akaku.

★ Another issue that has arisen is that lack of public access on the islands of Moloka'i and Lana'i. MCC proposed to provide public access on these islands as it has learning centers already established there and has been receiving funding to do so since 1993. In September 1995, an outreach coordinator was hired by MCC for public access provision on Lana'i and Moloka'i, but no equipment or training has been provided.

The Legislature asked how moneys are allocated between the areas of production, overhead, and administrative staff. A copy of the 1995-1996 PEG access budget was not available at the time this report was prepared.

One suggestion that has been made to strengthen PEG access on Maui is for the State to complete its work in setting up the PEG arrangement by finalizing the Maui plan and setting goals and deadlines. A clear articulation of responsibilities between the P, E, and G providers plus a time frame for them to carry out their responsibilities will enable all participants to fulfill their obligations in a timely manner.

It may also be timely for the State to consider requiring a central responsible entity. The consortium is unwieldy and has no separate legal standing. Its failure to come up with a combined budget has placed the DCCA in the untenable situation of having to devise Maui county's PEG budget for them, a situation which should not be allowed to continue. Akaku seems the most logical entity to be primarily responsible for PEG access, as access is the basic reason for its existence and as it programs P, E, and G on the existing channel. Akaku seems the most involved in all PEG aspects.

#### **Board Membership**

When asked whether the method of selecting the board should be changed to include the votes of users, subscribers, or both, in the area, Akaku replied in the negative. It was concerned that a membership-driven PEG access board would risk acquiring self-serving board members who may not necessarily act in the best interests of the organization or the public.

Akaku points out that it has ample opportunity for public input and participation. Its meetings are publicized and open to the public. Akaku has a policy of informing the public how they can participate in board meetings and the decision-making process. Akaku solicits county-wide input through publications, on-air promotions, outreach, and public meetings. Akaku has also held meetings in West Maui and on Moloka'i. Akaku has a number of advisory boards, standing committees, with members appointed by the board president, and other committees created by the board itself. Akaku is the only public access organization whose users

did not contact the Bureau with complaints, perhaps due to its open access.




Akaku's nominating committee seeks board members who support the general goal of community access. Akaku tries to obtain individuals with varied backgrounds, including those with legal, financial, and nonprofit backgrounds. Current board members "represent the interests of seniors, education, government, media, nonprofit groups, arts and culture," Hawaiians, and others. The nominating committee looks for complementary board members based on expertise and capacity for input, and passes on a slate to the board of directors for their review and approval. The names are then passed on to the DCCA (the cable companies appoint their own directors). The nominations submitted are advisory only; the DCCA is free to place its own choices on the board, and in fact, the DCCA has exercised that right.

Akaku notes that several AkakuAkaku board members have been access users prior to becoming a board member, and that the majority of the board members end up being access users in some capacity while on the board. AkakuAkaku takes the position that member-driven boards (where members are elected rather than selected) have had very poor results; the primary reason being attempts by elected members to sway the board for self-serving purposes, rather than considering the interests of the entire community.

#### Community Access to Channels

Cable subscribers on Maui have experienced some difficulty in receiving the PEG access to which they are entitled, due to poor signal quality and the fact that the public access channel in West Maui is on channel 50, a channel well beyond other basic service channels on the dial and not available on many older television sets. The Bureau understands that these issues were being negotiated during the fall of 1995. The public's right to hear the diversity of viewpoints is concomitant with the individual's right to be heard. The cable company's duties do not stop at the mere provision of "a" channel; the channel must be findable and useable. Each cable company should promptly meet the spirit of its obligations under its franchise agreement.

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**ENDNOTES CHAPTER 5**

1. DCCA Decision and Order No. 148, concerning Chronicle Cablevision, currently requires Chronicle to pay either the fixed rate in the franchise agreement or three percent of its gross revenues on the island of Maui, and two percent for the islands of Moloka'i and Lana'i.
2. Akaku needs the two week lead time to send its program roster to the TV data service, which is located in New York.
3. The consortium consists of one representative each from the DOE, MCC, Maui county administration, Maui County Council, a member of the Akaku board, the general manager of Akaku, and each of the cable companies serving Maui county.

COMMUNITY TELEVISION IN HAWAII 2008  
OPEN LETTER TO THE HCR 358 TASK FORCE  
SPLITTING THE BABY IS STILL NOT THE SOLUTION

By Jay April  
President and CEO  
Akaku: Maui Community Television  
August 27, 2008

In June of 1997, a report was prepared for the Cable Television Division of the DCCA. It was entitled, DISPUTES OVER PEG RESOURCES: Splitting the Baby is NOT the Solution. The State of Hawaii by and large heeded that advice and its independent Community Television operations, notably in Oahu and on Maui worked hard for years to become recognized as some of the best PEG Access stations in the nation.

This success is due in part to the fact that Hawaii PEG's adopted and put into effect a "best practice" integrated PEG model whereby independent non profits created for this specific purpose in each county provided channel space, unbiased gavel to gavel meeting coverage, nondiscriminatory access and low cost media training to local, state and native governments, private and public educational entities and a diverse and varied public. In short, Community Television in Hawaii has been empowering the local voices of each island community without censorship, editorial or state control for more than fifteen years.

By 2005, PEG Access on Maui became a victim of its own success. Private land development interests that did not like some of the messages being broadcast on these free speech venues conducted a sophisticated raid on PEG access coffers and combined with State Educational agencies to launch a privately financed lobbying campaign to split PEG funds into thirds. The end result was 25% of PEG funding for Maui's Community Television independent non-profit was re-allocated to state educational institutions with little or no accountability to the public. Previously on Oahu, a similar development took place whereby 25% of Olelo's funds were diverted to state education through a consortium known as HENC, and caps were placed on Olelo's franchise fees by order of the DCCA.

Currently, through antagonistic DCCA regulation, the use of the State Procurement Code and other means, the thoroughly discredited "Split the Baby" rubric is back in force with government bureaucrats, state agencies, UH, DOE , other vested interests and perhaps even the monopoly cable operator, Time

Warner Cable hard at work to Split the Baby again resulting in the diminishment if not outright demise of the Public Access sector in Hawaii.

Last month at the National Conference for Media Reform in Minneapolis I had the opportunity to discuss this very issue with Nicholas Johnson and George Stoney, the architects of PEG Access policy at the FCC in 1972. Back then, Nick Johnson was FCC Chairman and George Stoney was working with Red Burns at the National Film Board of Canada and running the Alternate Media Center at NYU. They saw the big cable monopolies coming and they envisioned Community Television (PEG Access) as an important social mechanism by which cable companies would pay "rent" for using public rights of way. Their vision was to democratize the dominant mass communications medium of our time by making possible a policy and infrastructure to foster true participatory localism in media. Both men told me that using the term "PEG Access" was their biggest "mistake" because over time a misconception came about in some jurisdictions that "P," "E" and "G" ought to be separated financially. They assured me that this was never the intent.

The letters in "P," "E" and "G" symbolized constituencies served ( Public, Education, Government ) and were not conceptualized as funding categories to be split. We should have just called it "Community Television," they said, "because it is really about all of us".

Be that as it may, some areas with a huge subscriber base ( i.e. New York City ) have split "P," "E" and "G" successfully because the dollars are there to do it. In most places around the country, like Hawaii's neighbor islands, they simply are not.

The reality is that smaller jurisdictions such as Maui would be devastated by such a funding scheme resulting in the diminishment if not outright destruction of the resource. Why? Because the economy of scale to support three stations (P,E and G) including studios and facilities as opposed to one PEG access station does not exist.

The real tragedy of the electronic commons here is that in best practice the "E" money in PEG was never meant to augment or replace what I call, "I" or Institutional Television which can be defined as instructional or educational television (K-12 and higher) funded appropriately by state and/or local taxes.

This is the crux of the disagreement over "E" funds that nearly destroyed PEG Access on Maui in 2005 where UH and DOE succeeded in getting 33% and currently 25% of PEG funds. Without diminishing in any way the significance and value of both "E" and "G" programming, it is fair to say that if the funding mechanism for PEG Access disappeared tomorrow, it is likely "E" and "G" would

still exist. "P" almost certainly would not.

With respect to "E", the operative word is "ACCESS. " Educational ACCESS TV ( as opposed to say, Educational or Instructional TV ) means that any and all educators, teachers, students or clients of public, private, parochial, charter, adult or any other form of education are entitled to: equal ACCESS to tools -cameras, computers, etc. – equal ACCESS to skills - the means of video production- equal ACCESS to ideas - media literacy and creative endeavor - as well as physical ACCESS to cable channels - the right to broadcast. The key difference embodied in the term "Access" is that these privileges are not the exclusive preserve of the program managers of a given educational institution or entity but are inclusive of all comers within the "E" subset of potential users.

Educational Access, therefore, in its purest sense was never intended to entitle one or two specific state institutions access to cable subscribers while ignoring the responsibility to provide tools, skills and training to all educational sectors.

A similar analogy applies to "Government Access" or "G" programming. Government Access was meant to provide citizens access to government, not the other way around. The thinking was that if citizens could observe the workings of government in action they would be more likely to engage more fully in a participatory democracy. "G" was never intended to be state-controlled TV or even municipally-controlled TV programmed by a government entity. The best practice model is more like CSPAN where an independent non profit is charged with airing unbiased public affairs programming and unedited gavel to gavel coverage of government meetings. This is not unlike the model we see employed at Akaku today. A pure "G" model in Hawaii would be inclusive of state, county, local and native government voices and would be inclusive of those who have an interest in civic issues raised in a healthy public domain.

As far as the Public or "P" is concerned, the reality is that "we" are all the public. It is "all about us" and the fully local communities we serve. The "P" sector is the most overlooked, the most disparate and the most inchoate. This is where views from diverse and often antagonistic sources are most likely to originate. This is where the sometimes untidy but necessary ferment of local electronic democracy occurs. This is the area where free speech tends to be the most vibrant. Precisely because it is so disorganized, unpredictable and unfunded, it is the most vulnerable and in need of the most protection. This is why I am a strong advocate of the integrated PEG Access model. As stated before, if cable franchise fees were to go away tomorrow, I am fairly certain state sponsored "E" and "G" channels will continue to exist. I am also quite certain that "P" channels would not.

One of the reasons there has been so much wrangling in Hawaii about all this



over the years is that it appears the stake holders and policymakers have never really sat down to sort this all out in terms of defining these resources intelligently. Instead what we have had is a sad legacy of turf wars over limited money and resources.

It may be time to revisit some fundamental questions and question old assumptions. It may be time to look at the 1% cable franchise fee allocation to KHET; whether or not there exists a compelling argument to split P,E,G in a population center like Oahu but perhaps not on neighbor islands; consider statewide revenue sharing of franchise fees among access centers to benefit rural communities; determine whether it is feasible or appropriate for UH/DOE to adopt an inclusive Educational Access model; or whether the State of Hawaii can replace derelict telecommunications regulation with meaningful reform before we all miss the digital boat. The winds of change are blowing in Washington D.C. This will bring in more financial resources to Community Media to help close the digital divide ( like percentages from internet and cable modem fees ) Whether or not Hawaii can position itself to achieve maximum public benefit from cable access, broadband, community radio and emerging community technology centers with fast internet for all at a reasonable cost remains to be seen. In any event ,I do believe these are endeavors worthy of our best efforts.

Given the politics involved, I am not sure the HCR 358 Task Force can even scratch the surface of these issues but if it is to have any purpose at all it needs to be a task force run by a chair and it's members, not by the DCCA Cable Division which is not exactly renowned for it's vision.

If people only knew the entire history of this deeply flawed RFP process, the full story of how, despite overwhelming public and legislative support, SB1789 was derailed with HCR 358 used as a decoy, they might be more inclined to be in favor of arguments for true regulatory reform

The bottom line is that the marketplace of ideas should not be subject to procurement. We deserve better than that and I am looking forward to dialogue and collaboration in order to make Hawaii a better place for all of us to communicate with one another.

Best Regards,

Jay April  
President and CEO  
Akaku: Maui Community Television

# Disputes over PEG Resources

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**Splitting the Baby is NOT the Solution**

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Prepared for  
The Cable Television Division,  
Department of Commerce and Consumer Affairs,  
State of Hawaii  
by  
Constance A. Hassell

June, 1997

## FOREWORD AND ACKNOWLEDGEMENTS

This report was prepared for the State of Hawaii, Department of Commerce and Consumer Affairs, Cable Television Division. This analysis identifies and discusses the issues underlying disputes over resources allocated to community access cable television. It is also intended to be used as a starting point for wide ranging discussion about those issues. Some matters need airing only, others require resolution.

While background material is included, the target audience is the reader with more than a passing knowledge of community access cable television. There are other recent studies that review basics and take a comprehensive look at this subject, such as that done by the Legislative Reference Bureau in 1995, to which the reader is referred for further background.

This report is made possible by the overwhelming cooperation of many people, whose knowledge of and dedication to quality community access is both enlightening and inspiring. I thank all for their candor and enthusiasm.

Constance A. Hassell  
Honolulu, Hawaii  
June, 1997

## EXECUTIVE SUMMARY

### Background

The Cable Television Division (CATV) of the Department of Commerce and Consumer Affairs (DCCA, or, the Department), State of Hawaii (the State), oversees the cable television industry in Hawaii. In its franchising agreements with cable operators, the State requires that a percentage of channel capacity and gross revenues be made available for community access.

The State delegated the oversight of these channels and funds to 501c (3) corporations, one in each of the four counties. They are referred to generally as "PEG" access organizations; "PEG" summarizes a commitment to public (P), educational (E), and governmental (G) speakers and topics. Except in Maui County, the boards of directors of the PEG access organizations determine the use of channel time and funds.

Maui does have an access organization; however, a consortium has decision-making powers over resource allocations. Although the access organization has a seat on this consortium, it is outnumbered by representatives of public institutions.

### Allocation of PEG Access Resources

Factionousness among the various parties seeking public access funds and channel time is not surprising. Once, disputes between program producers and PEG access organizations were in the fore. While these disputes continue, they have been elbowed aside by situations involving more influential institutions and individuals. The controversies getting attention now appear to have been there all along, and are surfacing due to the State's protracted economic downturn.

### Issues

Until recently, DCCA has been able to deflect formal involvement in most PEG access matters. Now, the Department is embroiled in two issue-laden and multi-player situations:

- the rancorous grant discussions between Oahu's PEG access organization and forces of the Department of Education (DOE)/ University of Hawaii (UH) concerning grants for distance learning; this situation accents both the usefulness of the cable television medium and the disparity of PEG resources among the counties
- its own resource drain due to its continued oversight of PEG access in Maui County, emphasizing the inadvisable substitution of government for community control.

The fundamental issue is: what is the vision for PEG access? Where is this concept going? Only when a vision and direction are determined, can there be any utility in continuing to discuss, argue and scheme over who should be at the helm of PEG access, and how the resources should be used.

#### Conclusion

Paradoxically, if community control remains the foundation of PEG access, the government will have to rescue PEG access from itself. DCCA will have to limit involvement by other government entities in PEG access decisions.

Although the government, as represented by the public education system, the State Legislature, and the county governments, might be appropriate beneficiaries of funds and channel time, they are not the decision makers in the current scheme; the PEG boards of directors are. DCCA should endorse and support the current model, or develop and implement another.

#### Recommendations: DCCA, Step Up to the Plate

Decisions based on turf and influence could be prevented, or at least diluted, if a shared vision for the common good could be invoked. That is not now the case, and that void is exactly where DCCA and concerned others should start working.

#### **1. Develop a statewide vision.**

A statewide vision should be arrived at, not imposed. As the authority delegating PEG matters to access organizations, DCCA should take the lead by calling interested parties together for this process.

## **2. Endorse models to support that vision.**

If it follows from a statewide vision that the counties warrant a more uniform level of PEG access, then implementing a statewide vision would have to address this imbalance. That in turn would open up a discussion of community control versus centralization.

The incentive for cooperation by stakeholders is to maintain community influence and control, the highest value shared by those involved in Hawaii's PEG access. Equality of resource allocation is not equity if community control is at stake. If control stays localized, then one county can keep its limousine, as long as the others' vehicles have four wheels, gas, maps, and regular maintenance----not now the case.

## **3. Resolve the PEG structure in Maui County.**

DCCA should resolve the situation in Maui County, where a legally nonexistent but exceptionally influential consortium allocates channel time and funds. The current arrangement is untenable; decision making has already been diffused to the point of occasional paralysis.

Moreover, DCCA's regular dealings with this consortium directly involve it in managing PEG access funds, which could make the portion it oversees a state agency for liability, sunshine law, and audit purposes.

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## INTRODUCTION

### Background

In negotiating cable television franchise agreements, federal and state law permit the State of Hawaii (the State), through the Department of Commerce and Consumer Affairs (DCCA, or the Department), to assess fees and to reserve channels for the community. Originally, the cable operators themselves scheduled community air time and offered training in program production.

DCCA planned to transfer the responsibility of administering community access from the cable operators to nonprofit, 501c (3) corporations, one in each of the four counties. The planning process to establish these four organizations was extensive, involving consultants, educators, government representatives, and many interested members of the various communities. Input from the public was encouraged, received, and used.

These nonprofit corporations are known as community, or PEG access organizations. They are charged with designing and operating systems that allow matters concerning the public (P), education (E), and government (G) to be aired on the channels set aside for community use. PEG access organizations are designed to be content-neutral, neither censoring others nor taking editorial positions.

This PEG model is in place in Kauai County, Hawaii County, and the City and County of Honolulu. The exception is Maui County's access arrangement. There, the nonprofit corporation is one member of a decision making consortium, which includes representatives of public institutions. The access organization makes decisions for the P segment only.

### The Role of DCCA

Once the PEG access organizations were established, DCCA ensured their funding through franchise agreements, and named the majority of the members of their boards of directors. The State Office of Information Practices deemed this level of involvement sufficient to maintain access organizations as independent, not state, agencies.

However, DCCA's informal involvement continues to include diplomatic

missions to settle turf and finance controversies. These controversies are characterized by an undisguised theme of entitlement among some current and prospective users of PEG resources: "our" channels, "our" cut of the revenues, "our" right to get prime time, etc.

Ordinarily, the responsibility to deal with the friction generated by entitlement language and behavior lies with the PEG access boards; DCCA need not respond. However, the boards are unprepared to quell the loudest cries of entitlement, now coming from other government entities.

DCCA is currently enmeshed in two situations emphasizing government's questionable role in PEG access matters:

- the proposed takeover of a portion of Oahu's PEG access resources by public education
- the structure and operations of PEG access on Maui.

The role of government is discussed in two following sections. "Equity" addresses the enormous difference of PEG resources by county, and how this difference surfaced in the realm of public education. "Maui" discusses the ways in which control of PEG access in Maui County is centered in government interest groups.

The last two sections discuss options and recommended action for DCCA. It is time for DCCA to restore equilibrium by affirming or redefining the purpose of the organizations to which it delegated PEG access responsibilities. If DCCA does not take the lead, it cedes it to other entities, both private and government, which will continue to alter the system to fit their needs.

## EQUITY

*The state, ideal, or quality of being just, impartial, and fair.*

### Geographical Basis for Collection and Use of Fees

The State assesses fees of up to 5 percent of gross revenues when it negotiates franchises with cable television operators. The cable operators pass these fees through to subscribers in their monthly bills. Other than the administration of the Cable Television Division (CATV) of DCCA, PEG access was initially the only intended use of such fees.

As a practical matter, the operators control geographical areas. PEG access planners decided that the PEG fees generated in each area would benefit the subscribers in that area. Linking PEG access benefits to the individual franchise area seemed to connect the fees passed through on monthly bills to the value of additional services received. It was also easier for a subscriber to assume this fee was a government requirement, rather than a cost being passed along by the operator.

In practice, the fees were pooled by county, resulting in one PEG access organization in each of the four counties, rather than one in each franchise area. For example, the two cable operators in the City and County of Honolulu fund the county's one PEG access organization.

Starting in 1993, the concept linking fees to benefits by geographical area was modified when a portion of the fees was directed to purchase and maintain equipment for the Hawaii Public Broadcasting Authority (HPBA), which operates KHET. KHET broadcasts statewide, and is the local Public Broadcasting System (PBS) affiliate.

This link among franchise areas, operators, and PEG benefits blurred further. After various transfers and purchases, divisions of Time Warner now operate four of the islands' eleven cable systems, giving it a presence in three of the four counties. TCI operates five of the remaining seven systems, with a presence in three counties.

Currently, each cable operator pays 3 percent of its gross revenues for PEG access, 1 percent for KHET's equipment and maintenance, and

approximately .5 percent for administration of CATV. The benefits of the latter two allocations are clearly statewide, and not limited to a franchise area or county.

### Size of PEG Access Organizations

Differences in PEG funding levels among the four counties is measured in the millions of dollars. The 1995, 1996, and 1997 calendar year funding levels for PEG access, rounded to the nearest \$100, are:

	<u>1995</u>	<u>1996</u>	<u>1997</u>
■ Oahu	2,699,500	3,095,200	3,170,200
■ Maui	338,800	448,100	479,900
■ Hawaii	140,400	336,700	254,000 (partial)
■ Kauai	160,500	184,800	233,000

Note: these figures are approximate in the case of Hawaii County, due to accounting records based on systems other than the calendar year; the Oahu figures were the figures used at the beginning of each calendar year, and do not reflect the end-of-the-year resolution. The reader is presented with these figures for the primary purpose of seeing the general trend in PEG revenues and the difference in funding among the counties.

### Services Provided

The different services available in the four counties are directly related to these funding differences, with the disparities often more noticeable than the similarities. At a very basic level, all four PEG access organizations offer community access via playback of a tape submitted by an individual or organization, all can film a single speaker format at their location (known as an "open mike"), and all offer training in use of cameras and editing equipment.

However, the differences in the organizations' sites, available channel time,

equipment, staff size, training programs, and ability to fund other projects are significant. For example:

- the Kauai and Hawaii Counties' entire (rented) PEG access facilities would fit together into one of the modern studios of the Oahu organization's (owned) facility
- viewers on Oahu may watch the State Legislature sessions live and at other convenient rebroadcast times throughout the week; however, the tapes of these legislative sessions are transmitted to the neighbor islands via Hawaii Interactive Television System (HITS) from 11 pm to 7 am only three times a week
- not all PEG access organizations on the neighbor islands have the capability to air legislative sessions at times other than when they come in over HITS.

The ability to fund other projects is the most dramatic difference created by geographically-based PEG funding. For example, on Kauai, the only money going from the PEG access organization directly to an educational facility is the \$12,000 per year paid to Kauai Community College for actually transmitting the signals from its facilities.

By contrast, on Oahu, the PEG access organization grants the Department of Education (DOE) and the University of Hawaii (UH) hundreds of thousands of dollars per year for the development and production of distance learning programs. Of the PEG access organizations, Oahu's is the only one in a position to make such grants; the others seek grants.

#### Focus on Education: Distance Learning

Formal education now extends beyond the traditional classroom setting, with lifelong learning now more than a dream. Degree or certificate students gain valuable flexibility in their programs by courses available through one-way and interactive television. For example, in 1996, sixteen students on Maui were awarded Masters in Business Administration (MBA) degrees from the UH, Manoa, after course work solely through distance learning.

Public education institutions, specifically DOE and UH, have worked with

grants from the Oahu PEG access organization to develop, produce, and air courses for both degree and non-degree programs. Learning via the cable television medium was made possible largely by this grant money, which while generated on Oahu, has served a statewide purpose.

Representatives of DOE and UH want to plan for and use Oahu PEG access money for the continued benefit of their statewide systems. On Oahu, discussions about the amount of and duration of such grants, as well as the details of reporting requirements, are currently at an impasse. This results in part from a tense relationship on Oahu between personnel of the public institutional entities and the Oahu access organization.

DOE and UH propose to take control of two of the five Oahu PEG access channels and a commensurate 40 percent of the Oahu PEG revenues. The proposal further calls for the money to come directly from the Oahu cable operators, bypassing the Oahu PEG access organization and its overhead costs. The public education institutions claim that they can plan their programs more efficiently and with more certainty if they control the resources. They also wish to dispense with what they consider to be the access organization's byzantine reporting requirements.

While the Oahu access organization has made a five-year commitment to the DOE and UH, and has raised its financial contribution considerably, it is not willing to part with its decision-making authority. Underlying this impasse are different assumptions, the state's revenue shortfall, and ego clashes. As a result of these turf and money tensions, the structure of PEG access has been called into question.

#### Education: Flash Point

One difference in assumptions concerns the purpose and control of the grants from the Oahu access organization to the public education institutions. Many well-intentioned people are now at a standoff since assumptions have surfaced into viewpoints, and viewpoints have hardened into positions.

One view is that:

*Public education is the responsibility of the government, and is*

*therefore to be funded through general tax revenues. To give a boost to the State for distance learning, PEG access provided seed money. Now that distance learning has been developed, the State must shoulder its responsibility to provide public education, including funding faculty positions.*

*Any additional PEG money for distance learning is supplemental, and entirely discretionary, depending on the priorities of the PEG access organization.*

*After all, a PEG access organization holds channels and money for the benefit of the community at large, a byproduct of the State's sale of public rights of way to cable operators. While education is a laudatory use of funds, and one which PEG access organizations continue to promote and support, an access board is entrusted with balancing many competing uses of these funds and channels.*

Another view is that:

*Public educational institutions were always envisioned as "speakers" with access to this forum. In fact, the potential of formal distance learning was used to promote the establishment of PEG access, which would not exist without such proposed reasons. Education is recognized as the most effective tool to prepare our citizens for coping with today's realities and for planning for a better future, and as such should be a much higher priority in allocation of PEG access funds. To label prior grants as seed money is inaccurate and perhaps disingenuous.*

*Clearly, the importance of public education and the success of distance learning warrant increased funding, not just channel time. However, in the case of the Oahu PEG access organization, more money is used for the benefit of "P" or "public", independent producers than for government and education matters combined.*

*Turning over administrative control of a portion of money and*

*channel time directly to public educational entities serves the best interest of the communities of all the counties, and helps all PEG access organizations fulfill their responsibilities to the "E" or education part of its mandate.*

Were the state coffers full, this difference in viewpoints might not have focused such attention on PEG access funds. Were the population base not on Oahu, the spotlight might not be on the Oahu PEG access organization. Were the parties able to work more easily with one another, this disruption might have been avoided. Were mediators called in to work with the parties earlier, the disruption might have been smoothed.

Instead, DCCA facilitated a truce, temporarily silencing the uproar. An increase in grants to DOE and UH has bought time for DCCA to review this proposal, and for the Oahu PEG access organization to maintain its control of channels and funding.

This controversy has triggered a review by DCCA of PEG access in general, including funding mechanisms, to determine whether any structural changes are warranted. If the basis of the current system is still valid, then tinkering with or gutting the existing structure just to dampen the latest fire would not serve the public good.

#### Policy Decisions: Disparate Resources

The above education example revives the broader issue of equity, as it highlights the previous decision linking PEG access benefits to the cable operators' gross revenue by county. Because the Oahu PEG access organization is able to provide its viewers and users with far more services than can the other three organizations, it is the only one attracting attention.

One comment on the reality of disparate resources by county is:

*Use of money paid by cable operators and subscribers to the 501c (3) organization in their county for their benefit is not of statewide or government concern. The government reserved fees and channels for community benefit when it sold the rights of way by area to cable operators. It appropriately distanced itself from liability and other responsibilities by delegating*



oversight to non-profit organizations.

*Since public education is essentially a fourth branch of government, acceding to pressure for control (not just use) of grant money and channel time constitutes unwarranted government encroachment. It threatens freedom of speech, giving the government the ability to select speakers— its own educational institutions.*

*Since the hallmark of PEG access television is access by all speakers, especially those with few or no resources, control should remain with the non-governmental, non-profit entities. Of course, PEG organizations are committed to continue their support of education— public, private, and non-institutional.*

Another view is that:

*The consumer has been left out of the list of stakeholders in the current scheme, since the State condones widely different service levels for PEG access. That the operators choose to pass these fees along to subscribers by franchise area does not transform the amount they owe for PEG access into regional pots, or restrict the State in allocating funds. To perpetuate the current situation only strengthens the view that the government approves of an Oahu-centric state.*

*Since the franchising authority is state-based, not county-based, there should be a mechanism to ensure parity among the four PEG organizations.*

*The State should centralize PEG funds to ensure that viewers and users island-wide get some sort of equal benefits, or at least baseline benefits. Hawaii's education model promotes the theory that the quality of education should not depend on the tax base of a district; the same policy should be applied to the enormous asset of public access television. Education is an appropriate place to start use of centralized PEG funds to support statewide education initiatives.*

Both views gloss over the fact that the decision of the State to use any or all of the money assessed from the cable operators for PEG access is discretionary. In franchises in some other states, the assessed fees go directly into the state general funds, and are disbursed by the legislatures to run PEG access entities at the level decided by those legislatures. In the military areas in Hawaii, cable franchise fees are used for health, morale, and welfare uses.

Were the parties in this controversy working to keep the State out of its disputes, and were the four PEG access organizations working cooperatively and finding ways to share resources in general, DCCA would likely have been able to continue its ministerial duties towards PEG access, and stay out of the fray.

The Issue: Are Equity and Equality the same?

This tug of war over money and other resources gives DCCA an opportunity to review the underlying rationale for keeping revenues within each county, and to make a policy decision to affirm, modify, or discard that basis of allocation. That decision alone will allow the many interested stakeholders to plan with some certainty.

While this decision is ultimately made by the State under the current statutory scheme, wide input is advised. The original efforts in establishing the PEG access organizations were well researched and open to comments from many interests, including public hearings.

The overwhelming message from the many persons contacted during this project was that while money is important, respect of local community control is the most important factor in reviewing PEG access funding. This was heard from educators, producers, access organization board members and employees, government employees, and elected officials. The islands comprise distinct communities. They want to determine their own programming and control their funds locally.

That said, we turn to the ultimate example of local control, Maui.

## MAUI

### Background

Distance education in Maui County was already in place when Oahu educators began to develop distance learning programs. Early on, technology was envisioned as the way to meet educational needs of the three islands served by Maui County. Maui Community College (MCC) led the way by establishing a microwave system, SkyBridge, to link the three islands and the town of Hana on the east end of the island of Maui. It also had exclusive access to one cable channel long before planning for PEG access began for Maui.

When planning did begin for PEG access, a committee was formed on Maui to work with the DCCA consultant in setting up a PEG access organization. The committee was unable to agree to the model used in the other counties, i.e., one community entity to manage P (public), E (educational), and G (governmental) programming.

Instead, the group proposed to form a consortium (the Consortium), which would determine the allocation of the funds for P, E, and G uses. A non-profit access entity would be formed to administer the programming and facilities for the P segment, with no control over E and G. This was not seen as a final arrangement, but a temporary hybrid to end a stalemate. Members of the Consortium were from the county government (both Council and the Mayor's Office), MCC, DOE, and the yet-to-be-formed access organization.

### The Consortium

Although not a legal entity, the Consortium wielded a great deal of influence and control over PEG access on Maui. Unlike board members of Hawaii's other PEG access organizations, members of the Consortium were expected to and did represent their respective interests in allocating funds among P, E, and G.

The practice of the Consortium was that action required unanimity. Therefore, since any one person had veto power, there were many occasions when no action could be taken. Since the Consortium needed a structure to implement the decisions it did make, DCCA continued to be

involved in approving budgets and other matters. As such, DCCA played an active role in perpetuating this hybrid, and in saddling itself with time and energy consuming activities arguably inappropriate for government.

### The P Access Organization

The Maui P access organization operates one of the two community access cable channels. While a third cable channel has been approved for community use, transmission has been deferred until the control and programming of that channel is decided.

Programming on the P access channel includes material from the DOE, the County Council, the Mayor's Office, the State Legislature, and tapes produced by the public. The other channel is programmed by MCC for its course work, with some fallow time being filled via satellite feed. MCC also has plans for on-site production of educational programs of interest to the community as a whole.

Although the access organization was formed as a 501c (3) corporation in 1992, the funds for the Consortium were maintained and disbursed by the Oahu access entity until March, 1997. Currently, the Maui P access organization receives funds directly from the cable operators, but only to be spent in the manner recommended by the Consortium, and to the extent approved by DCCA.

### Consortium II

Objectively, while the Consortium's decisions may have been sound, the specter of self interest and secrecy detracted from its effectiveness. Its eventual inability to agree on a budget cast DCCA into more of a decision making role.

In the fall of 1996, the Director of DCCA significantly changed the Consortium's operating practices. While the Consortium's extra-legal existence was given credibility by these changes, the Director required a fundamental change of viewpoint from its members. Instead of openly advocating for their camps, they were directed to act for the good of the community as a whole. Furthermore, the informal but unshakable unanimity practice was replaced by majority rule. As significantly, meetings were to be open to the public.

The direction to operate for the good of the community as a whole changes the Consortium's focus; now its members are being asked to make decisions as though they were members of a non-profit board, not a spoils committee, and to face public scrutiny.

The Director also asked the Consortium for a needs assessment and overall plan for PEG access for Maui County; a contractor has recently been selected for this project.

The Issue: Why is Government Involved?

To give government control of the money and channel time reserved for the community undermines the concept of community control, which is to allow access by all speakers. The issue of government encroachment arises in two aspects of the Maui arrangement.

The majority of members of the Consortium are employed by government, including the educators. They are Consortium members specifically because of their positions in various government bodies. Until recently it was understood, particularly in allocation matters, that each member represented an interest group. DCCA makes no other PEG board appointments with such clearly defined interests.

Secondly, and ironically, the involvement of government has been even higher because DCCA has been involved in fire fighting and referee activities all along, clearly a drain on its own resources.

It would be too simple to suggest that the Maui access model should conform to those of the other county access organizations, just for the sake of symmetry. However, the Consortium members have been asked to act for the good of the community as a whole, comparable to the most basic duty of directors of the other PEG access boards.

Given the history of the Consortium, the underlying objection to change does not seem to be so much that control will leave Maui, but that control will be diluted or shifted to other than the established players on Maui. Since many of the Consortium members have years of accomplishments with public access cable television, surely some of these pioneering visionaries could serve well in a new or different forum.

## CONCLUSION AND RECOMMENDATIONS

The current and potential benefits of PEG access are amazing, reaching far beyond the homes of individual cable subscribers. Combined with other technologies, such as the internet, these benefits grow exponentially.

*NET  
IS ONE*

However, growth depends on continued attention and cooperation. To the extent that the State and PEG access organizations operate responsively, growth will be limited by a failure to plan.

### Conclusions and Discussion

#### **1. Develop a statewide vision.**

The current controversy over resources points to the lack of a shared vision. DCCA should take the lead in facilitating a statewide vision for PEG access, from which strategic plans and allocation decisions would follow. DCCA has the ability to call the interested PEG parties together to develop a common vision, into which their mission statements would fit.

A common vision (rather than four county visions) will do more than put statewide coherence into PEG access. At the minimum, it will set the stage for information and resource sharing among the PEG access entities-- assisting each, detracting from none. It will provide DCCA a statement of the purpose to which it has delegated its PEG access responsibilities. With DCCA's backing, it may also shield those resources from others looking at the same money with different uses in mind.

Since PEG access funds have drawn much attention, the process of determining a vision and related planning must be discussed against the backdrop of other pressing government initiatives. If the state chooses to use its statutory hammer by cutting funding to PEG access, then the change in course should be made clear. Once the choice is made, DCCA must fully support that change.

However, under the current system, government is not permitted to appropriate money allocated for PEG purposes; to chip away at PEG access money by going around the PEG access boards is simply a holdup. Unless the plan changes, DCCA should stand firm in supporting the autonomy of the PEG access entities.

## **2. Endorse models to support that vision.**

A discussion of the optimal form of PEG access could begin with interested parties. Some options:

### **A. Leave PEG Access As Is**

If a Statewide vision can be adequately supported without restructuring the county-based system, and if the control points are clear, then there is no benefit to mustering the resources needed to recast the PEG system. It would be a labor intense response to pressures that don't warrant that level of attention--- in short, a waste of time.

One benefit of the current system is maintaining the satisfaction level with the degree of community control; this priority should not be underestimated. The parties grabbing for control of the Oahu access organization's bank accounts are NOT the other PEG entities.

A variation of the status quo would be for the State to allocate a percentage of the franchise fees to the general fund, lowering the 3 percent now going to PEG access. Only Oahu's access organization is cushioned to survive such a reduction intact.

### **B. Networking and Resource Sharing**

One of the least intrusive ways to ride out these rough times is for DCCA to bring the interest groups together to discuss and plan ways to leverage their current resources. If the richest access organization, clearly Oahu's, subsidized the other three to bring their services up to and maintain them at an agreed-upon baseline, a wholesale restructuring of funding and allocations decisions by the State would not be necessary.

This baseline could include services considered basic not only to speakers but to a well-informed citizenry, such as the ability to see the State Legislature at times other than the middle of the night.

The Oahu access organization's mission to serve Oahu seems to limit its ability to share its assets with other PEG entities or participate in statewide initiatives. Although this mission can be used as a shield, its board can modify it. To its credit, the Oahu access organization does assist other

access organizations from time to time, and encourages statewide use of its grantees' products.

**C. Centralized Funds, Centralized Organization**

This model would follow Hawaii's education model. A centralized PEG access organization would act for the good of all users, so that no county would be shortchanged because of a lower resource base.

While conceptually a convenient and seemingly fair idea, this version of centralization is widely unpopular, except with some education representatives. The much louder message from those interviewed is: it is local control, not equality in funding, that is the most important part of equity in PEG access matters.

**D. Centralized Funds, Local Organizations**

This model would pool PEG funds, making allocations to local access entities from a central point by reviewing the organizations' objectives against priorities determined from a statewide vision and related infrastructure.

The question of how the allocations would be made from a centralized pot is very, very touchy. There is suspicion that Oahu-centric decisions will prevail, and that majority rule will disadvantage one or another county. Therefore, an existing nonprofit community group, such as the Hawaii Community Foundation, might be brought in to oversee a common pot using established priorities, keeping the government and PEG cliques out of allocation decisions.

**E. Centralized Segments of Statewide Interest**

The proposal to turn over 40 percent of channel time and money to DOE and UH is based on this model. This would carve out E from PEG statewide, and turn it over to the government, i.e. public education. While it's hard to dispute the importance of education, this model is clearly a return of the public right of way to government control.

That proposal has created much frustration and enmity between public education representatives and the Oahu access organization. The Oahu access organization does give time and money, and has committed to even



more money over a longer period. Unless the foundation of community access television changes, the decisions should be the community's, not the government's. As implied earlier, a mediator might best be able to calm these waters.

### **3. Resolve the PEG structure on Maui County.**

DCCA should do its utmost to resolve and then stay clear of regular involvement with the inner workings of PEG access on Maui. The study in progress on Maui should provide an additional review of the Consortium. Whatever the study's recommendations, and whatever access model is approved, DCCA must recognize and reduce its own inappropriate level of involvement.

#### Recommendations for Action

My opinion is that local autonomy and control of PEG resources is paramount in supporting any vision. A sense of community puts a personal face on tasks, even if the task benefits a larger group.

Unless the State determines that it will allocate all resources derived from cable franchises to its own use, I recommend that:

- the original concept of community control over P, E, and G be endorsed and strengthened
- networking and resource sharing be fully explored, followed by centralized resources if local autonomy can be assured
- DCCA use its authority to deter raids by other government entities.

In order to accomplish this, I recommend that :

- DCCA convene a meeting of the chairs of the boards of the PEG access organizations and CATV/DCCA representatives to discuss policy matters, including the need for a statewide vision and possible models to implement such a vision
- DCCA consult with the PEG entities in setting a more specific agenda, after this report has been distributed; recommended reading could

include Volume I, Planning for Cable Communications in Hawaii, 1989

- a professional and disinterested facilitator must be used
- the initial group develop a method and timeline to decide upon a statewide vision, subsequent strategic plans, action items, guiding principles, benchmarks, and other appropriate facets of infrastructure
- this group discuss the range of services that residents in each county receive from PEG access, and how a statewide list of desired baseline services can be developed, concerning e.g., technology, information, training, and community outreach.
- DCCA convene further groups for decision making and planning to implement policy decisions, allowing time for the chairs to solicit feedback and suggestions from the PEG staffs and members of their constituencies
- based on the timeline, produce a statewide vision, missions, strategic plans, and guiding principles to which PEG organizations will pledge their support.

Although tempers have flared and lines have been drawn concerning resource allocation, DCCA should not overreact by retooling the whole PEG system. If DCCA convenes PEG access chairs to discuss these common issues in the context of a statewide vision, that may be all that is necessary to decide how to restore equilibrium and resolve current control issues.

In the alternative, DCCA may have to use its authority to restructure PEG access to support a statewide vision. Given the creativity of the stakeholders and the importance of this medium, I doubt that such measures will be necessary.

## APPENDIX A: CABLE OPERATORS AND ACCESS ORGANIZATIONS

Hawaii County	Access Organization:	Na Leo 'O Hawai'i (photo, p. A-3)
	Cable Operators:	Hawaiian Cable Vision of Hilo Sun Cablevision TCI

City and County of Honolulu	Access Organization:	'Olelo (photo p. A-2)
	Cable Operators:	Oceanic Cablevision TCI

Kauai County	Access Organization:	Ho'ike (photo, p. A-4)
	Cable Operators:	GardenIsle Cablevision Kauai Cablevision

Maui County	Access Organization(s):	Akaku/The Consortium (photo, p. A-5)
	Cable Operators:	Hawaiian Cablevision TCI

## **APPENDIX B: QUESTIONNAIRE USED**

1. What is your opinion of the **CURRENT** value of PEG access channels to Hawaii's residents and visitors? **POTENTIAL** value?

2. What do you see as the advantages of the current county based administration of PEG access funds and operations? disadvantages?

3. What do you see as the advantages to other management systems (e.g. a centralized system)? disadvantages?

4. In an overall review of PEG access by the Department of Commerce and Consumer Affairs (DCCA), what recommendations do you have regarding the highest and best use of PEG access for Hawaii viewers?

5. If any modifications or changes are made to the existing practice or structure for PEG access, what do you think should be considered (e.g. timing, fund disbursement, auditing, etc.)?

6. If circumstances (technology, statutes, etc.) cut off existing funding for PEG access channels, what might be done to continue to deliver this public service?

## APPENDIX C: COLLATION OF RESPONSES TO THE QUESTIONNAIRE

Although the body of this report is analysis, much of it is based on information received during interviews of a variety of persons with an interest in PEG access, a list of whom follows this summary.

The value added by reading this collation is an appreciation of the flavor, fervor, and strength of the responses, giving the reader a glimpse of how concerned many people are about the direction of PEG access. Plainly, opinions differ considerably on implementation of the ideals of community based television. The issue of control is heated, making most other issues secondary, and pointing out the lack of a common purpose, or vision.

In themselves, these comments demonstrate the value of opening the doors for input. They also provide a rich source of insights and ideas, some of which are woven into my analysis and recommendations, and many of which can serve as the basis of further discussions.

In order to gain some consistency in the areas discussed, the same format was used with almost all of the persons interviewed. The exceptions include those from whom background information and/or specialized knowledge was needed.

During the interview process, many noteworthy comments broadened the scope of the questionnaire; they appear in "Additional Suggestions" and "Additional Comments" categories after the original six questions. Of particular interest might be the comments about the history of PEG access (under Additional Comments, historical).

With the exception of those in quotation marks, an individual's comments are generally paraphrased. Not all comments are included, as I decided some were irrelevant, redundant, and/or gratuitous.

The following alphabetical list of common abbreviations may be of help in understanding the responses:

C-SPAN  
DCCA

national governmental affairs cable channel  
Department of Commerce and Consumer Affairs

DOE	Department of Education
GTE	Parent company of Hawaiian Telephone
HITS	Hawaii Interactive Television System, operated through the University of Hawaii for distance learning
HPBA	Hawaii Public Broadcasting System, which operates KHET, the local Public Broadcasting System ( PBS) station
I-NET	Institutional Network, part of the State's telecommunications infrastructure
KHET	Hawaii's Public Broadcasting System (PBS) station
MCC	Maui Community College
PEG Access	Public, Educational, and Government access
PUC	Public Utilities Commission
UH	University of Hawaii

1. WHAT IS YOUR OPINION OF THE CURRENT VALUE OF PEG ACCESS CHANNELS TO HAWAII'S RESIDENTS AND VISITORS? POTENTIAL VALUE?

Current

- Incredible value, with the potential even higher.
- The main value of community access television is the local content, which is not available on commercial television or KHET.
- PEG access is irreplaceable. It should be available to visitors [not the case in some of the larger Waikiki hotels]. We would not be able to do what we do to cover the legislature without PEG access.
- It's all local. The stunning value is being able to see what's going on in the community. Everyone is used to seeing things on television, and there is no other visual medium on the neighbor islands for local concerns.
- Having one organization for P, E, and G promotes synergy. Separate channel management would reinforce unnecessarily rigid distinctions.
- It's not public access if people can't make use of it.
- There was a huge amount spent with little to show for it due to the centralized nature of 'Olelo.
- It provides a public service function for the cable industry.
- The proof of its value in education is the number of people registering for distance learning classes; many others don't register but derive value from this method (e.g. remedial math). It's hard to measure all the benefits.
- The value is unclear; not sure just what is reaching people. There hasn't been any information since the original study.
- PEG access is more effective than the newspaper on this island; despite the quality, it's remarkable how many people watch it.
- It's amazing how many people watch it and how it helps towards a much more developed sense of community than in urban areas. People use the training, and it's socially reinforcing.

- Public interest can drive some programming by the access organization, such as coverage of the Waihole Ditch case.
- Distance learning frees teachers for more one on one with students . It also allows colleagues to watch one another, and gives them public exposure. That could make for better quality control.
- Its value is low, except in some issues, such as Hawaiian issues. The grass roots are underutilized.

#### Potential

- We now have an opportunity to leverage off other electronic resources.
- Our potential value depends on networking.
- There is a strong need for kids to see local views. Public access can help get them away from passive roles.
- More people could exercise their first amendment rights, and non-institutional education could be enhanced.
- Distance education focuses on pedagogy. It takes real planning and must be updated.
- There is potential to diversify beneficiaries.
- Business could benefit from more educational use of cable; more employees and potential employees could raise their skill and knowledge levels.
- The channels and technology could be used for videoconferencing, having testimony for government meetings and hearings from several sites.
- It could be made available in more Oahu hotels.
- Access is important because of the change in student profile. We need to schedule our classes around their lives. People do start again.
- The potential would be higher if the E function was given to the professionals; if scores are down, give professionals a chance to support learning with this medium.



- MCC can demonstrate ways to strengthen community development.
- PEG access is a pipeline to other things, and technology will make it simpler for the consumer in banking and education, for example. It's a matter of the community wanting this integration of voice, video, and digital, for example.
- The core of the school of the future is distance learning, on-air and on-line.
- For now, education can still be served more by cable than internet.
- In education, we could use as much channel time and money as we can get. There are many other uses besides student instruction, such as professional development, technology updates, compliance issues.
- Government coverage can be so much more than gavel-to-gavel of the councils or the Legislature. There are many important issues to consider, such as Hawaiian sovereignty, a Constitutional convention, water rights, etc. HITS could also be used to help with a town meeting format.
- It would be even more effective with captioning, especially for civil defense matters; we had no locally generated news during Iniki.
- From the non-profit organizations' viewpoint, the value is still largely untapped.
- It would be great to broadcast county election returns and not have to rely on Honolulu.
- DOE should be aware of possibilities on the other islands besides Oahu. They need a tech tsar.
- Web sites go along with a lot of cable courses. Cable is still a common denominator.
- In government, there is potential for department level programs, if we had resources and someone else takes the lead.

2. WHAT DO YOU SEE AS THE ADVANTAGES OF THE CURRENT COUNTY BASED ADMINISTRATION OF PEG ACCESS FUNDS AND OPERATIONS? DISADVANTAGES?

Advantages

- Autonomy. We can focus on our community. Oahu might as well be a million miles away; it's considered foreign.
- The current model serves a community of interest. People are very island/county oriented; they want to know what's happening there, not Oahu--they already hear more than they want about Honolulu. Access is even more important on the neighbor islands since there are no local broadcast stations.
- We have a good relationship with the operators.
- On Maui: DCCA adheres to the general idea of home rule.
- We get calls from visitors who see our local programming.
- We have decent people from the community on our board, who serve a noble purpose and have no single minded agenda. They work well together, and no one goes away mad.
- Home rule is best. We'd rather screw ourselves up than live with someone else's mistakes.
- Lack of central oversight is not a problem because amounts are so much smaller on the neighbor islands. Only 'Olelo makes too much.
- Even though the directors are appointed by DCCA, we really have local governance. We are conscientious as to our fiscal authority and personnel decisions.
- The consortium concept (Maui) can work, under DCCA calling it an advisory body acting for the community good.
- 'Olelo has helped share its resources by more broadly interpreting its mission.
- We would dearly love more money, but not at the loss of local control.

## Disadvantages

- The neighbor islands get shortchanged.
- Economies of scale are missing; however, rather than have a centralized access entity, perhaps one shared director.
- Everyone at the Maui Consortium's table is a beneficiary.
- DOE still doesn't have access to MCC's channel.
- We're a small kid compared to 'Olelo.
- There is no island-wide ability to access PEG facilities. We need island-wide certification or reciprocity.
- Maui is not in control of access, DCCA is. DCCA should get out.
- 'Olelo looks like another network.
- Entitlement issues come up with current system.
- Maui's Consortium is missing a networking plan. It works ad hoc, in a knee jerk manner. Hundreds of thousands of dollars have piled up because of the Consortium's dysfunction.
- Maui has chosen to split up [P, E, and G]. We don't want that scenario. It's not fixable.
- The Neighbor Islands need cable education services the most, and want programs they can't get. They need channels.
- There is a disparity in accessibility, allocation, and connectivity.
- The difference in money creates content irregularity. For example, the legislative sessions aren't available at convenient times everywhere, and can't be replayed in some counties.
- On Maui: it's difficult to decide if we're getting our fair allocation, or how much we're entitled to.

### 3. WHAT DO YOU SEE AS THE ADVANTAGES TO OTHER MANAGEMENT SYSTEMS (E.G. A CENTRALIZED SYSTEM)? DISADVANTAGES?

#### Advantages

- "Fine if fair."
- In education, productions can be shared, and achievement can be addressed and focused with performance standards.
- Networking is better than centralizing; technology will make it easier for the neighbor islands.
- The state couldn't mismanage PEG as bad as it's being mismanaged now."
- More money to the neighbor islands means airspace available to more people.
- UH/DOE take "their" percentage? That would be terrible: it separates education from other aspects of community television.
- There are economies of scale across the board in education.
- Franchising of cable is already at the state level. If the PUC is going to coordinate universal service for telecommunications, why shouldn't benefits of cable access be considered similarly? Oceanic and GTE are already in both games.
- If centralized, perhaps HPBA could be drawn in.
- A centralized system would mean better community college access to the neighbor islands.

#### Disadvantages

- Centralization would be a big task, a thankless task, as it would be hard not to have people feel cheated.
- The example of the DOE shows how the centralized concept failed.
- Responsiveness to the community would be lessened, and some communities would get overlooked.

- How would an Oahu board consider the neighbor islands fairly?
- A statewide model would create another set of deliberations and negotiations, although an allocation body might be OK.
- Centralization denies and discourages access; 'Olelo should have set up a decentralized model in neighborhoods.
- We don't want the Oahu mentality in charge. We're tired of begging.
- Why replicate the Maui mess?
- Centralized funding but at what expense? The ones with the most horsepower, the big bullies, will take the money. No one should get trampled.
- Loss of autonomy is our biggest fear. And just as we don't want to be controlled, we don't want to preclude others' right to decide in their county.
- There is a danger of commercialization since a centralized pot of money is farther away from the people without money.
- Honolulu people are myopic. They don't think of the neighbor islands as part of Hawaii.
- Although there may be more money with a different system, is worth is for the mission? The loss of autonomy for possible equity in funding?
- Another bureaucracy would be created, and would eat up funds to operate. It would be unfair for a majority to set policies as they may not know what a county is all about.
- Those of us in the trenches really don't like to travel [for centralized meetings].
- Would hate to see the Maui model for the state. There is a competing faction, which can't be good for PEG. The one who controls the funds controls the voice, which could be a direct conflict of interest.
- Sounds great to get more of the pie, but will there be strings? A centralized model implies lack of independence. There would also be less responsiveness if control was off island.

- To give money directly to UH/DOE removes community oversight.

4. IN AN OVERALL REVIEW OF PEG ACCESS BY THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS (DCCA), WHAT RECOMMENDATIONS DO YOU HAVE REGARDING THE HIGHEST AND BEST USE OF PEG ACCESS FOR HAWAII VIEWERS?

- "Stop until there is a vision."
- PEG should be part of a grander picture. "Nobody's dreaming."
- "Don't let the fringe spoil the whole."
- Local autonomy is the most important aspect of PEG access. Everything else flows from that.
- Start Over. Public media access centers should be established. Don't limit the view to just cable, think of access via many media.
- It's important to see things that influence the whole state, like legislative matters. However, the State Legislature should not be involved in funding decisions for PEG access.
- Stay speaker-centric, with multiple opportunities to speak. That drives this medium, not the viewer. The commercial and other media are viewer-centric.
- Clarify the intent. The original intent is best, public access is a medium for speakers, benefiting the general public. If the intent has shifted, make it clear.
- Create something that makes the original intent functional. If the institutions are cut out, so be it. It's the public's access that's important.
- It's a natural tendency for government to want to restrict access. Government will try to regulate PEG to do that, so PEG is under attack. PEG should have its freedom.
- There should be a statewide vision that fits in nationally and globally. Then get intranet for all access entities so they can be connected to one another. Keep common information up in cyberspace, such as schedules, bylaws,

minutes, etc. Next, add interactive teleconferencing. Join the digital mainstream; buy an interactive digital media server for each entity.

- Keep in mind that it's the local nature of PEG that's more important than technical quality. Keep the community emphasis.
- Keep it public access. Do not give it to institutional G and E.
- 'Olelo could take on more statewide stuff.
- Interactivity is the highest and best use.
- Define whose access is involved in public access. It's a matter of honoring the original intent. Make a decision on formal education, and have government buy its airtime [if it needs more than allocated].
- On Maui: there should be a lot of P and E overlap. MCC could still be a hub without damaging Akaku's mission.
- Connectivity, then marketing; DCCA should sell the product.
- We should revisit the original intent; the model has become hazy.
- Have individual budgets submitted to a central entity for approval. Lower the percentage for Oahu subscribers.
- Why make any changes when things are going well, and community needs are being met? We're not sure what DCCA wants.
- PEG should be kept non-political, non-commercial, and away from special interests.
- Awareness and education should be most important--distance learning and watching our lawmakers. There is a hobby aspect to P, which gives a voice to minority fringes; that can label a channel and hurt its credibility. Channel programs should be balanced.
- To be accountable, PEG access organizations should undergo an outside audit every year.

- Boards should be a representative sample of the community served; an elected board can lose that overview and diversity of thought.
- It is imperative to keep autonomy and resource control in the hands of the community. Full control, not censorship.
- Where are the State's priorities? The State should exercise its authority, and reserve money for other than PEG use, e.g. education. Use what is now PEG money to focus on State priorities, with perhaps a sunset term of two to three years.
- There needs to be a real refocus on what E can and should do. Allow more channel space and funding for E. E already has the infrastructure; E belongs to the people who know E. The programs are deliberate, not just covering something. Also, we would like consistency on all islands, an equity issue.
- It's important to have an independent body doing allocations; that's better than self-interested persons or entities.
- Give channel time but not money to the UH and DOE.
- PEG access needs to be defined; it doesn't serve anyone to draw lines in the sand.
- Maui is an example of how a consortium doesn't work; that's not the direction to go but we can learn from it. People need to have respect for access organizations.
- We need to recognize our interdependency, and not just focus on autonomy.
- Keep the hawks away from the funding, and keep it county.
- Keep P, E, and G together.
- Retain funds locally; design flexibility into the system for growth and responsiveness to the community.
- Cable subscribers should have a say.



- The fewer layers between the under and the user the better. The 'Olelo layer does not provide value, and so funding to E should be direct.
- We should be repositioning into access centers, with more than just cable TV.
- PEG should be private, not in state hands.
- Our goal should be to leverage resources.
- PEG should be under state control, and oversee budgets funded centrally but developed by the communities.
- Allocation problems could be resolved by connecting the cable companies, with everyone tied in to them. There are roundabout ways now, but interconnectivity would be better.
- Community television was not meant to be an extension of government or other institutions.
- Further marketing is needed. We need to know the choices of consumers, so we don't show lopsided programming by default . We need to create awareness on how consumers can access this medium.
- An advisory board for all the access boards should be formed to look at the money. Oversight by a non-government body is essential, a group like the Hawaii Community Foundation. We need protection from the concept of majority rules.
- Broaden the decision making base to include the public, P segment. Government and education are already have voices. Strengthen the policy advisory committees, set up outreach, and set up satellites.
- DCCA should just divide the money three ways on Maui as a default percentage, unless the Consortium arranges it otherwise.

5. IF ANY MODIFICATIONS OR CHANGES ARE MADE TO THE EXISTING PRACTICE OR STRUCTURE FOR PEG ACCESS, WHAT DO YOU THINK SHOULD BE CONSIDERED (E.G. TIMING, FUND DISBURSEMENT, AUDITING, ETC.)?

- DCCA's original vision is still valid; the question is, can pressure to change it be resisted?
- Lead time.
- There is a difference between communication needed to be received and free speech., i.e. content or access communication. The unanswered question is whom should PEG access serve? speakers, listeners, or both?
- "If it ain't broke, ....." Be careful about monkeying with the system, especially when the monkeying is from outside.
- The transient accommodation tax (TAT) is one example of money generated mainly by certain areas but spent for a wider good.
- We should consider that we're all in the same lifeboat; the lifeboat concept is not clear.
- Avoid an Oahu-centric concept. First, see what services are needed across the board, such as equipment and channel time. Second, see what PEG organizations can get from one another. Third, decide what unique pieces we have on each island.
- We wouldn't like a raid on funds, anymore than 'Olelo would.
- If any changes are made, the issue of representation should be carefully examined (how to break ties, etc.). Someone always loses when cliques form and deals are cut.
- Society is in a period of fragmentation, but we're still operating with a big system sense. We need to look at the ways to link pieces; it takes work to do that.
- The organizations should remain content neutral.

- Uncertainty is a problem [for E]. We don't want to invest in programming without air time. If we are going to grow programs, there should be funding coming in, and we shouldn't have to beg for money, getting a few carrots here and there with no guarantees
- Some other organizations give E air time only; we now have an entitlement issue with the UH. Don't forget that UH gets paid for its courses.
- "Beware of Oahu dominance."
- We should be reluctant to encourage "entitlement" thinking.
- Keep the greed out. We should be working as equal partners.
- Loss of channels hurts cable operators; they will look to the regulators for relief.
- 'Olelo may have the ability to accommodate statewide concerns such as education and government coverage, without having to redo the whole system.
- We must look out for our neighbors. The agencies affected by changes are not just those using PEG now.
- Keep in mind that producers often demand and get their way, regardless of the system, skewing the system towards P.
- E needs the commitment of long term funding and certainty, i.e. budget control.
- If money comes from one pot or not, allocation decisions should be made to bring access organizations to a basic standard.
- We need independent thinkers on the boards.
- The system now is speaker oriented. Whose access are we talking about? The government's access to people, or the people's access to government? or both?
- Some people see changing the composition of the boards as a solution. However, that can create new problems.

6. IF CIRCUMSTANCES (TECHNOLOGY, STATUTES, ETC.) CUT OFF EXISTING FUNDING FOR PEG ACCESS CHANNELS, WHAT MIGHT BE DONE TO CONTINUE TO DELIVER THIS PUBLIC SERVICE?

- It would be a disaster.
- We should be planning how to share telecommunication resources, and partnering.
- There is no source of funding; funding operations is not popular.
- Maybe the state would fund it, but nothing will match the current service.
- For Kauai it would be a complete crash.
- If PEG disappears, then the government is saying that the people have no right to know.
- For E, we already have a commitment to a distance AA degree. We'd probably have to take money from live classes. We also need to get on the "on-line wagon".
- "We can't wait for money to fall out of heaven." Don't abandon the electronic roads; we need to pay even more attention to this highway across the Pacific.
- Maybe we could have a bulletin board only, no training or editing. Education would find money somehow, and the vanity factor would keep G on air. P would suffer. How would the public voice get heard?
- Maybe some stuff would stay. But you can forget self-sufficiency; the board is not interested. The concern is for the P sector. G has I-NET and the Hawaiian system. UH has HITS.
- Three islands would turn off the lights and give the keys to DCCA. Maybe an indulgent cable company would help a little.
- There is no other funding mechanism, as PEG is a function of franchising. Any other funding would bring pressure to regulate content.

## 7. ADDITIONAL SUGGESTIONS:

- Hawaii needs something like C-SPAN, proactively covering press conferences, speeches and all aspects of government and public affairs. It should be independent, and not a tool to propagandize; there was friction over the previous Mayor's [City and County of Honolulu] use of public access television.
- 'Olelo gives grants. Keep the money in the public access family.
- Access organizations bylaws and practices should be fairly consistent.
- Could the Maui supercomputer help out? Maybe someone there could be on the Maui access entity or Consortium.
- Set up access centers, not just for cable. Make them part of community centers, with internet access and video conferencing too. The schools could be used for sites.
- Equalize the tools with certification reciprocity so producers can work at all access centers.
- The public should be involved more, like in a real 501c(3). Right now there is little volunteerism, everyone is paid.
- A public affairs channel for Hawaii, on the C-SPAN model, would be a useful addition. It could cover all the counties.
- It would be OK to fold the Consortium into Akaku.
- Boards should be membership driven, and run democratically.
- Someone should stand up to MCC.
- Define "public access". To what? to whom? What is public to DCCA? The public producer or the man on the street?
- Why not give the neighbor island PEG entities the full 5% from the operators?

- Put the money in a special fund.
- Oahu people don't travel. There should be access centers around Oahu, decentralizing the current model.
- Put users on the boards.
- Akaku could fill up excess MCC time.
- Clear up definitions. Break out E and G.
- Perhaps access board members nominated by DCCA could be subject to confirmation, like commission members are.
- There are many good speakers that come to town for speeches to business, government, and non-profit groups. Assuming the speaker agrees, why not tape them and make their comments available to many more via public access?
- Sharing resources could be in-kind, equipment and technical support for example.
- Middle schools could all be linked and show one another their stuff on cable. There's no link to their family or wider community now.
- PBS programs are available for educational use on public channels. Why not use them?
- We need to pull in other agencies to work as partners.
- The PEG entities could make telephone or video conference call with one another.

## 8. ADDITIONAL COMMENTS:

- There is a fallacy in distinctions among P, E, G; e.g., education from a community standpoint includes preschool, kapuna, etc., not just institutional education.
- While 'Olelo does have a function, what value is there to go through 'Olelo to get to Oceanic just to get to a head-end? This is double tasking.
- The other islands are really outer islands, not neighbor islands. We really feel it.
- Making the UH/DOE independent within PEG will make that situation worse.
- There were no community members on Maui's original planning committee.
- We could have gotten a far more manipulative appointing authority for our board members.
- Is 'Olelo PEG or only P?
- There are three definitions of access: 1) by "speakers" to tools (equipment and training); 2) by "speakers" to tools and channels; and 3) by speakers' access to tools and channels, as well as access by the community to a diversity of views.
- There is no plan, there are no definitions.
- The Maui Council won't allow an arbitrary group to dilly dally. The Consortium was designed to fail, and the issue should be forced one way or another.
- Sometimes it's a gray line, but educational television and educational access are not the same thing. Educational TV is KHET and HITS. Educational access extends the reach of education, allowing access by other institutions and individuals.
- DCCA holds Maui at arm's length, which has resulted in inaction and the accrual of a large reserve account.
- 'Olelo changed from partnerships to grants, which leave out responsiveness.

- In government matters, the Frank Fasi experience shows that content depends on who controls the camera, which is not the purpose of PEG access.
- Having public access television in the Waikiki hotels would blow the aloha/HVB image.
- There are varying degrees of paranoia among faculty members about being replaced by distance learning coming in from another campus.
- Maybe TV is outdated; we should be moving into the internet for education.
- All we get is more studies.
- Technology can stretch things. It's important for 'Olelo to share with the community, and develop partners and friends.
- Education is driving the system wide thinking for PEG. A statewide plan will need coordination.
- 'Olelo is asking for more channels, taking valuable time away from the cable companies, but showing things over and over.
- Changing technology alters the time horizon. Now, time is an issue. As we shift to video on demand, including distance learning, time will be less of an issue.
- 'Olelo has millions of dollars in operating reserves. Why?
- The interim rules for Maui's Consortium from the Director of DCCA take a larger view; there's hope.
- The notion of cable television as optional or entertainment is past. It's now a basic service.



## Historical

- PEG was a tradeoff for the public when rate authority was taken away from the State. It was supposed to serve the broadest community purposes--to provide a way for persons and communities without resources to have an effective way to be heard.
- It's important to understand that PEG was never intended to be broadcast quality.
- Using public education and a C-SPAN- like service were envisioned during PEG planning.
- Maui's problem is a lack of planning. The preliminary plan was not followed by a final plan.
- After the Telecommunications Act of 1996, the industries were free to get into one another's businesses. They decided to protect their main markets rather than capitalize expensive merged systems; it became easier for a phone company to just buy a cable system.
- Education never believed PEG money was seed money. Ongoing, institutional education was part of the case to implement the franchise in the first place.
- The original pilot project with the legislature was 'Olelo's idea.
- On Maui, Education was unwilling to consider an umbrella organization. Vested interests and personalities forged an awkward compromise, leaving a number of issues unresolved. Guidelines for budgets were unclear. "MCC's channel" was not part of the original agreement.
- The "C-SPAN for Hawaii" idea was floated in a Honolulu Community-Media Council meeting discussing potential abuse in covering legislative matters by the party in power.
- Access money was a supplement to assist education. What the UH heard was that PEG would subsidize what it wanted to do. That was not the intent--- to replace general funds.
- It was the demand by users that created the PEG strategy. The term "PEG" was suggestive, without rigid distinctions. The purpose was to perpetuate diversity

of speech, and give back to the community some of those rights of way sold to the cable operators.

- The University looked to KHET and HITS as its educational arm, and DOE only became a player in cable during the Oceanic refranchising talks, which is also when independent access organizations were planned.
- On Maui, nothing happened after the original five year budget period ended because of the Consortium's unanimity requirement.
- There was stratification on Oahu. The public users ended up in a hallway, the mayor got better equipment, and the State Legislature got the P-bomb [camera equipment].
- PEG was never meant to only be for institutional education; that's a misappropriation of intent. Maybe the colleges weren't given enough money by the funders.
- The original PEG planning process created balance. Left alone, the independent producers would have dominated, as there was only some interest from E and none from G.
- The mission of PEG access is similar to the community colleges, since the public is our student body. The UH and HITS have a narrower audience as those courses are designed for upper level students.
- The cable operators paid fees for the value of an area. That's the nexus of returning the benefit to that area, and having it managed by that community.
- MCC used to get all the PEG resources. It thinks it gave up money for Akaku.
- On Oahu, we envisioned satellite facilities, since a centralized facility would not serve the many Oahu people who won't travel.
- 'Olelo is protecting and spending down its endowment, rather than figuring out how to broaden its funding base; 'Olelo was formed with an endowment, and never figured out how to build a base.
- Community colleges [Oahu] would not have been in cable without the PEG funding.

- It was originally advised to keep P, G, and E together, thinking that an arbiter might be needed between UH and DOE. As it turns out, they cooperated, and see no value added to funds going through 'Olelo.
- 'Olelo is a "private country club"
- PEG was never public because the government was always in charge.
- Congress was naive to think that P producers would be doing it for the love of it all. There are those that try to make their living that way.

## APPENDIX D: LIST OF PERSONS INTERVIEWED

<u>Name</u>	<u>Relevant Affiliation(s)</u>
✓ Robbie Alm	'Olelo Board Member; former DCCA Director
✓ Alan Arakawa	Council Member, Maui County
Richard Argus	General Manager, Kauai Cablevision
Carol Bain	Independent Producer, Kauai
Kimo Brown	Director of Public Access, Hawaii State Legislature
Don Carroll	President, Oceanic Cablevision
Ed Coll	Independent Producer, Kauai
Juergen Denecke	Executive Director, Na Leo 'O Hawaii'i
Keola Dowling	Independent Producer, Hawaii
Susan Doyle	Former DCCA Deputy Director, former Cable Television Division Administrator
✓ Kalani English	Council Member, Maui County
✓ Ken Fukuoka	Director of Council Services, Maui County; Consortium Member
Jeff Garland	Independent Producer, Oahu
William Harkins	General Manager, Garden Isle Cablevision; Ho'ike Board Member
Helen Hemmes	Board Chair, Na Leo 'O Hawaii'i
Donald Ikeda	County Clerk, Hawaii County
D.Q. Jackson	Board Chair, Ho'ike
Susan Jaworowski	Author of the 1995 Legislative Reference Bureau report on PEG access
Daisy Kaetsu	Comptroller, Hawaii County
✓ Sol Kahooanahana	Council Member, Maui County
Gerald Kato	Board Chair, 'Olelo
Walter Kunitake	Na Leo 'O Hawaii'i Board Member; Director, University of Hawaii-West Hawaii
David Lassner	Director of Information Technology, University of Hawaii, Manoa
Brian Lee	Independent Producer; former CTPA president
James Loux	Board Chair, Akaku
Curt McCosco	Independent Producer, Kauai
✓ Sean McLaughlin	Executive Director, Akaku; former 'Olelo Board Member; Independent Producer
Richard Miller	Chair, Honolulu Community-Media Council
Robert Mullens	Administrative Assistant to the Mayor, Kauai County

Sharon Narimatsu	Vice Chancellor, Community Colleges, University of Hawaii
Hae Okimoto	Manager of Distance Learning and Instructional Technology, University of Hawaii, Manoa
Robert Okuda	Board Member, Na Leo 'O Hawaii'; Coordinator of Media Services, University of Hawaii-Hilo
Diana Oshiro	Assistant Superintendant, Department of Education, Office of Information and Telecommunications Services
✓ Darla Palmer	Former Executive Director, Akaku
Mike Pecsoc	Coordinator of Media Services, Leeward Community College; former 'Olelo Board Member
Prema Qadir	Independent Producer, Hawaii
Robert Riggan	Acting Executive Director, Ho'ike
Marcia Reynolds	Public Information Officer, Mayor's Office, Hawaii County
Don Robbs	Executive Director, HPBA
✓ Clyde Sakamoto	Consortium Member; Provost, Maui Community College
✓ Kathleen Schuler	Consultant for the State's original PEG access plans
Helen Sina	Board Member, Ho'ike; Assistant Dean, Kauai Community College
✓ Chuck Totto	Consumer Advocate, State of Hawaii
Richard Turner	Executive Director, 'Olelo
Dan Watanabe	Executive Director, Hawaii Community Services Council
Stan Yates	Former Chair, Ho'ike
Lloyd Yonenaka	Public Information Officer, Mayor's Office, Maui County
Marilyn Yoza	Vice President, Oceanic Cablevision; former 'Olelo Board Member

*No Security Exam*



America's Most Litigious Cities

August 6, 2007

Via Hand Delivery

Ms. Ruth E. Yamaguchi  
Procurement Officer  
State Procurement Office  
Kalanimoku Building  
1151 Punchbowl Street, Room 416  
Honolulu, HI 96813

TERRY E. THOMASON  
BARBARA A. KRIEG

Honolulu, Hawai'i  
E-MAIL:  
[tthomason@ahfi.com](mailto:tthomason@ahfi.com)  
[bkrieg@ahfi.com](mailto:bkrieg@ahfi.com)

Re: **Protest Against The Content Of The Solicitation** –  
Request For Proposals No. RFP-07-043-SW; Sealed  
Proposals To Operate, Maintain, And Manage Public,  
Educational, And Governmental (PEG) Access Channels,  
Funds, Facilities, And Equipment For The State Of Hawaii

Dear Ms. Yamaguchi:

On behalf of our client, 'Ōlelo Community Television ("Ōlelo"), we submit this Protest against the content of the solicitation designated as RFP-07-043-SW (the "RFP"), subject as described above.

A. Summary Of Protest Claims.

This Protest is submitted pursuant to Hawaii Revised Statutes § 103D-701, Hawaii Administrative Rules ("HAR") § 3-126-3 and SPO General Provisions, para. 27 (pg. 18).

As addressed in the discussion below, the RFP is legally deficient because it is formulated in a manner that will not create a binding and enforceable contract.

Its principal legal deficiencies are:

1. The RFP lacks performance standards.
2. The RFP cannot identify what property, if any, will be provided to the successful offeror.

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3. The RFP is fatally uncertain as to the pricing of the contract.
4. The RFP impermissibly designates a non-competed subcontractor to provide educational services.
5. The RFP unlawfully requires offerors to provide information whose disclosure is unauthorized and/or protected.
6. The RFP seeks to establish a relationship that is not arms-length.
7. The RFP documents do not convey a reasonable understanding of the terms and conditions of performance of the work.

B. ʻŌlelo's Address And Contact Information.

ʻŌlelo's business address is:

ʻŌlelo Community Television  
1122 Mapunapuna Street  
Honolulu, HI 96819

All correspondence, instructions, and inquiries related to this Protest should be directed to this office on behalf of ʻŌlelo.

C. Remedy Requested.

ʻŌlelo requests that the Procurement Officer exercise her powers under HRS § 103D-706 and related authorities to amend the RFP to remedy the defects identified in this Protest. To accomplish this, ʻŌlelo requests that the Procurement Officer stay all further action on this procurement pending amendment of the solicitation to remove the legal deficiencies. See HAR § 3-126-5.

Corrective action must be sufficient to ensure the RFP provides a fair basis for competition and will result in the award of a legally binding and enforceable contract. If the Procurement Officer is unable to overcome the defects in this RFP, it should be referred to the Chief Procurement Officer for action to exempt the contract from competitive requirements under HRS § 103D-102.

D. Standing and Timeliness.

ʻŌlelo is the current provider of public, educational and governmental ("PEG") access services for the City and County of Honolulu. ʻŌlelo intends to submit a proposal in response to the RFP and has registered with the Hawaii Electronic Procurement System (HePS). Thus, ʻŌlelo is a prospective offeror within the meaning of HRS § 103D-701(a) and has standing to assert this Protest.

A protest based upon the content of the solicitation is timely if it is submitted in writing within five working days after the aggrieved party knows or should have known of the facts giving rise thereto, and prior to the date set for the receipt of offers. HRS § 103D-701(a). The RFP was issued on July 30, 2007, and the date for receipt of offers is set as October 1, 2007. 'Ōlelo will deliver this protest to the contracting officer on August 6, 2007. Thus, the Protest is timely.

E. Reasons For Protest.

1. The RFP lacks performance standards.

Every procurement must include performance standards. HAR § 3-122-13(a). However, the RFP admittedly contains no such standards for the stated reason that the resulting contract for PEG access services will be "unique" and quantifiable standards are "difficult to establish." See RFP § 8.12.2.b [p.41]. The lack of performance standards renders the RFP unlawful, creates fatal uncertainty for potential offerors and will result in an unenforceable contract.<sup>1</sup>

'Ōlelo agrees with the State's characterization of PEG access services as "unique," and fully appreciates the difficulty of crafting standards that, if accurate, would necessarily have to reflect amorphous concepts such as community building and community services. The State's admitted inability to craft definable standards for successful contract performance demonstrates that, because of their unique nature, PEG access services contracts should be exempt from the competition requirements of HRS Chapter 103D. The impossibility of defining performance standards the contractor must meet to be successful renders the competition of PEG access services contracts simply not practicable.

2. The RFP cannot identify what property, if any, will be provided to the successful offeror.

The RFP instructs potential offerors that their proposals should be based on the assumption that the State will provide the selected contractor(s) the property identified in the respective inventory lists of the current PEG access providers, although not the cash assets of such entities. See RFP §§ 2.02 [p. 6], 3.02.2 [p.8], 3.03.2 [p.21], 4.07.1 [pp.24-25], 4.09.3 [pp.25-26], 5.01.3, 4 [pp.27-28]. However, the RFP also states that there is no certainty that the property and/or cash reserves will be available to the contractor. Id. Absent certainty about what property, if any, will be provided to the

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<sup>1</sup> See also 'Ōlelo's Response to Request for Information dated December 26, 2006 attached at Tab A, which is incorporated herein by reference ("Response to First RFI"); 'Ōlelo's Response to Request for Information dated April 13, 2007 attached at Tab B, which is incorporated herein by reference ("Response to Second RFI").



successful offeror, no offeror can make a meaningful estimate of the cost of performing the contract. Consequently, there can be no effective and fair competition and no legally binding contract can be awarded.

As disclosed in the RFP, the current PEG access providers dispute the State's position about their ownership of the listed property. RFP §§ 3.02.2 [p.8]. With respect to 'Ōlelo, a dispute about the State's right to take its property in connection with the competed contract has been the subject of ongoing communications with the Department of Commerce and Consumer Affairs (DCCA) for the past eleven months. 'Ōlelo's position, for the reasons stated in the enclosed correspondence, is that the RFP is premature and should not have been issued until the disputes about the PEG contractors' property rights have been resolved. See July 31, 2007 letter to Lawrence M. Reifurth attached at Tab C, which is incorporated herein by reference; May 2, 2007 letter to Lawrence M. Reifurth and referenced letters 1 through 15 attached at Tab D, which are incorporated herein by reference; see also Response to First RFI at p.3; Response to Second RFI at pp.2-3.

Compounding these defects, the RFP states that if the identified property cannot be provided to the successful offeror at the start of the competed contract, or if the property provided to the contractor is different from the listed property, the parties will negotiate about the services to be provided by the contractor and the compensation paid by the State for such services. See RFP § 4.09 [pp.25-26]. In effect, the RFP states that, if the State cannot execute a fundamental and material term of the competed contract, the State will merely negotiate (without further competition) a new contract with materially different terms.

This RFP section violates the fundamental concepts of competition for government contracts and the very reason for the RFP's issuance. The Hawaii Procurement Code does not allow the State to negotiate, without competition, a new contract whose terms differ materially from the contract awarded through competition.

The RFP also contains unlawful provisions with respect to any property that may be purchased by the selected contractor, during the term of the contract, with a combination of both PEG access fees and the contractor's own funds. The RFP requires the contractor to transfer the title to any such property to the State at the end of the contract, but fails to provide any compensation to the contractor for its private funds used for the purchase. See RFP §§ 3.02.2.g(2) [p.9], 3.02.4.b(3) [p.12]. This provision, if enforced, would constitute an unlawful taking in violation of the United States and Hawaii Constitutions.

The provision of government-owned property, if any, is a material term of the contract and, unless and until there can be certainty about the property, the RFP process should not proceed because it cannot result in a binding and enforceable contract.

3. The RFP is fatally uncertain as to the pricing of the contract.

The RFP cannot result in a binding and enforceable contract due to the lack of certainty about pricing and compensation to the contractor. The primary reason for the uncertainty is that the RFP is nominally structured as a "fixed-price" contract, but neither the price nor the services are "fixed". Many of the deficiencies with respect to pricing are detailed in 'Ōlelo's Response to First RFI and Response to Second RFI. The RFP contains additional terms that compound the previously-identified deficiencies, to which 'Ōlelo maintains its objections.

a. Additional uncertainty about the level of funding

The funding and compensation scheme for the PEG access services RFP is inherently uncertain. Actual funding is dependent on the number of cable subscribers who pay fees to the cable operator. The State knows that, through the course of the contract, the number of subscribers will vary. Consequently, the funding available to compensate the contractor is necessarily subject to change.

The RFP requires an offeror to offer its performance at a fixed price for the term of the contract. However, the State cannot guarantee that the fixed price accepted as the contractor's compensation will be funded by available subscriber fees at any time during the contract's term. Therefore, if the number of cable subscribers is insufficient to generate the agreed-upon contract price, the selected contractor is nevertheless obligated to provide all of the services included in its proposal, without any offset for diminished funding.<sup>2</sup>

The RFP also requires potential offerors to provide an estimate of "the initial amount of funding required at the start of the contract" but disclaims the availability of any initial funding due to the unresolved property ownership issues. See RFP § 5.01.3 [p.27]. This creates additional uncertainty about the funding available to compensate the selected contractor. The resulting undefined level of initial funding and potential compensation makes it impossible for offerors to provide a cost proposal critical to meaningful competition.

In addition, as previously identified, the RFP provides for monthly payments from the cable operators to the PEG contractors. This term will result in reduced funding for PEG access services compared to the current payment arrangement. See RFP § 5.01.3 [pp.27-28]; 'Ōlelo's Response to Second RFI, p.4. The stated reason for the change to a monthly payment schedule is not consistent with business reality,

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<sup>2</sup> The RFP permits renegotiation only if the number of cable subscribers falls to below 50 percent of the households within a county. See RFP § 7.04.2 [p.34]. With respect to the City and County of Honolulu, the contractor would experience over a \$1 million annual shortfall before reaching the designated threshold.

especially with respect to the payment of capital contributions, which are fixed annual sums. Thus, there is no possibility of "over-and under-payments by the cable operator" of capital contributions and no "after-the-fact examination of the cable operator's records," complicated or otherwise, to determine the correct amount of such payments. See RFP § 5.01.3 [p.27].

The RFP also provides that the monthly payments will be made at the end of the calendar month in which the revenues are received by the cable operators. RFP § 5.01.3 [pp.27-28]. This provision operates to reduce contractor compensation and deprives contractors of available funding. To illustrate this point, the PEG funding paid to the selected contractor at the end of January 2008 would represent the fees paid by subscribers to the cable operator in January 2008. However, the cable operators currently pay fees to the PEG access service providers in the year after the revenues have been collected. Therefore, by January 2008, the cable operators will have collected millions of dollars in PEG access fees throughout the entire calendar year 2007. Under the new payment schedule established in the RFP, those fees would never be used to provide PEG access services, contrary to their authorized purpose and to the detriment of the recipients of such services.

In the context of this competition, the provision in question requires contractors to include in their cost estimate start-up costs when the State has available funding but declines to give offerors assurance of compensation.

b. Increase in performance requirements without commensurate compensation.

The RFP form is economically flawed and will prevent meaningful competition because it does not provide for equitable adjustments to contract price and performance requirements. The RFP contemplates the creation of an economically impossible contract because (1) it requires that the selected contractor provide additional services that are not provided by the current contractors, and (2) at the same time, requires the performance of those services (in addition to all of the currently-provided services) within the same, if not diminished, funding limits. The RFP also permits DCCA to demand unlimited additional services, in its sole discretion, also without additional compensation, and prohibits the selected contractor from charging any fees for its services. These concerns were identified by 'Ōlelo in its Response to First RFI and Response to Second RFI. Although informed of these economic flaws in the RFP, the State has included additional terms to the RFP that compound the economic impossibilities created. These additional errors are as follows.<sup>3</sup>

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<sup>3</sup> The RFP even provides a mechanism for the State to take away funds from PEG client services by instituting fines for a contractor that makes a late production to DCCA of its annual audited financial statements. See RFP § 3.02.16.b(5) [p.20].

The RFP requires the selected contractor to fund the production costs and staffing for the government meetings that are cablecast on the PEG access channels. RFP § 3.02.5.c [p.14].<sup>4</sup> However, under the current contracts for PEG access services, production services are not provided free of charge – and contrary to the RFP's representation, the governmental entities have other approved sources of funding to support the production of programming for the PEG access channels. Compliance with this new requirement would also result in fundamental inequity in the provision of PEG access services, as the current providers do not fund the production costs for public programming.

The RFP's unfunded mandate for governmental services would require the Oahu contractor to allocate at least \$500,000 annually from the PEG access fees to fund these additional services and would have a similar effect on the other area providers. It is economically infeasible for the contractors to add the additional service without compensation.

4. The RFP impermissibly designates a non-competed subcontractor to provide educational services.

The RFP requires the selected contractor for the City and County of Honolulu to "provide the same level of services/benefits to HENC [Hawaii Educational Networking Consortium]" as currently provided by 'Ōlelo. RFP § 3.02.5(b) [p.13.] 'Ōlelo currently passes through to HENC and its designees 25 percent of the PEG access fees that it receives from Time Warner Oceanic Cable Co., as required by DCCA Decision & Order No. 261 ("D&O 261"). The total payments to HENC and its designees in 2007 amount to \$1,080,000.

These RFP-mandated payments are for HENC to continue its performance of the education component of the PEG access services. By requiring the selected contractor for the City and County of Honolulu to use HENC for the performance of the education component and make payments as the State designates, the State is effectively appointing HENC, a non-government entity, as the subcontractor to provide the education component of the PEG access services contract -- without requiring HENC to compete for the contract.

There is no lawful basis for the State to appoint HENC as the education component provider here. In this case, the State decided earlier that it must compete the PEG access services contract. The logic applied in this initial determination means the State must compete all aspects of the PEG access contract. Consequently, (1) the State could not award a contract for education access services directly to HENC without

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<sup>4</sup> The RFP also prohibits the contractor from charging any governmental entities for any services provided under the resulting contract. RFP § 5.01.6 [p.28].

competition; and (2) the State cannot indirectly order a contractor to award a subcontract for the same services to HENC. The RFP scheme here violates Hawaii Procurement Code competition requirements and, at a minimum, gives the perception of impermissible favoritism.<sup>5</sup>

In addition, the RFP misleads potential offerors because it fails to disclose the terms of D&O 261, which superseded the arrangements established by the contract attached as Exhibit E to the RFP.

5. The RFP unlawfully requires offerors to provide information whose disclosure is unauthorized and/or protected.

Section 4.02 [p.23] of the RFP ("Offeror's Qualifications") seeks a wide array of information about potential offerors, their officers, directors and employees. These inquiries are unlawful, unnecessary and intrusive.

As stated in 'Ōlelo's Response to Second RFI (at p. 11), the State has no right or legal authority to require any offeror to provide the identified information except in response to a questionnaire prepared and authorized by the Procurement Policy Board. One reason for the limitation on the collection of such information is so that it can be kept confidential. See HRS § 103D-310(d).

The RFP not only seeks the information in an unauthorized manner, it also requires an offeror's directors, officers, managers and key employees to waive their confidentiality rights in such information. RFP § 4.02.11. To submit a proposal, an offeror must inquire into personal matters of its directors, officers, managers and key employees, including arrest and court records and other information which is entirely unrelated to the offeror's ability to provide PEG access services. The offeror's inquiry into such matters, as well as any actions taken in response to an individual's refusal to supply the requested information, could subject the offeror to liability for violation of HRS section 378-2.5. The disclosure of such information in connection with a proposal, and the subsequent release of the information into public record, could violate the constitutional privacy rights of the offeror's directors, officers, managers and key employees. These are not permissible or reasonable consequences, and the offensive provisions must be deleted to conform to the legal limitations the Hawaii Procurement Code imposes on the government.

6. The RFP seeks to establish a relationship that is not arms-length.

As stated in 'Ōlelo's Response to First RFI (pp. 5-6) and Response to Second RFI (pp. 10-11), the RFP is designed to result in a contractual relationship that is

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<sup>5</sup> The perception is heightened by the DCCA Cable Television Division's past, if not current, participation in HENC's Advisory Board.

inconsistent with the arms-length relationship that should be the result of the procurement process. The RFP's terms, like the previous drafts, require unwarranted and inappropriate DCCA involvement in the governance of the selected contractor. See, e.g., RFP § 3.02.3.a(2)(c) [p.10] (requiring the contractor to deposit all rental income or revenue from all buildings and real estate, even if privately owned, in the PEG trust account); § 16.a(1) [p.19] (requiring the contractor to use the accrual method of accounting); see also section E.7 below (authorizing unlimited intrusion by DCCA into the contractor's business).

The RFP also impermissibly requires the current contractors to respond to inquiries from potential competitors regarding PEG access services and to host a "guided tour" of the contractors' private property. See RFP § 8.04 [pp.37-38]. This requirement reflects a fundamental misconception about the procurement process, as it is the duty of the State – and not the private contractors – to provide all necessary information in connection with a request for proposals. Compliance with the RFP's requirement also creates a risk of liability of the current contractors with respect to information that they provide to potential offerors who may later assert claims against the current contractors. The current contractors have no duty to "educate" their competitors, and the RFP impermissibly attempts to create such a duty.

7. The RFP documents do not convey a reasonable understanding of the terms and conditions of performance of the work.

The RFP provides that the submission of a proposal "shall constitute an incontrovertible representation by the Offeror . . . that the RFP documents are sufficient in scope and detail to indicate and convey a reasonable understanding of all terms and conditions of performance of the work." RFP § 6.03.8 [p.30]. As currently drafted, the conflicting, uncertain, and economically illogical RFP provisions prevent any offeror from making such a representation.

As detailed in 'Ōlelo's Response to First RFI and Response to Second RFI, the RFP contains numerous open-ended requirements that grant unlimited discretion to DCCA to require that the contractor perform additional services during the term of the contract, without a corresponding right to receive additional compensation. See, e.g., RFP § 3.02.15.b(1)(j) [p.18] (DCCA right to receive reports on unlimited subjects); § 3.02.15.e [p.19] (requiring contractor to provide unlimited information to DCCA within 30 days of request); § 3.02.16.c [p.20] (contractor must pay for as many as two financial audits per year when required by DCCA); § 7.04.3.c(4) [p.36] (permitting DCCA to require unlimited accounting audits or reviews). The RFP even requires the contractor to "provide all other PEG Access Services, facilities, and equipment" requested by DCCA – but without any limit or definition. RFP § 3.02.18 [p.21]. Potential offerors cannot reasonably determine the scope and detail of such additional services.

Ms. Ruth E. Yamaguchi  
August 6, 2007  
Page 10

In addition, the scope of one of the contractor's basic responsibilities – the management of the PEG access channels – is not clear because the RFP does not fix the number of channels within the contractor's responsibility. See RFP § 3.02 [p.7]. This uncertainty is compounded by the DCCA's unilateral right to change the number of channels managed by the contractor. Id.

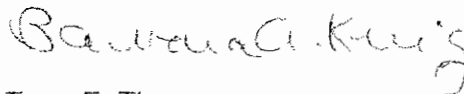
As another example of the RFP's deficiencies in conveying a reasonable understanding of its terms, the evaluation factors are not clear; there are separate scoring categories for "alternative services" and "other services" but no definition to provide a distinction between them. RFP § 7.02 [p.32]. Likewise, the PEG Chart of Accounts are unclear (including apparent duplicates), undefined and unlawful (with respect to HENC). See Exh. G to RFP.

Finally, the RFP omits any description of the vital community-building aspect of PEG access services. See Response to First RFI, p.4; Response to Second RFI, pp.7-8. Thus, it is impossible for potential offerors to reasonably understand the scope of PEG access services and the terms and conditions of their performance under any contract resulting from the RFP.

F. Conclusion.

This protest is made in good faith with the intention of preserving for all offerors, including `Ōlelo, a fair opportunity to compete for award of a legally binding and enforceable contract. We fully appreciate the Procurement Officer's duty to protect the public's interests by ensuring competition in awarding contracts. If the Procurement Officer grants the remedy `Ōlelo seeks, effective competition will be assured without disadvantaging any of the offerors that would compete for the award.

Very truly yours,



Terry E. Thomason  
Barbara A. Krieg

Enclosures

cc: Keali'i Lopez (w/encls.)

TET/BAK:fmk  
652992/1

BEFORE THE STATE PROCUREMENT OFFICE  
STATE OF HAWAII

In the PROTEST )  
of )  
Akaku: Maui Community Television )  
Of Request for Proposals To Operate, )  
Maintain, and Manage Public, Educational )  
and Governmental (PEG) Access Channels, )  
Funds, Facilities, and Equipment for the State )  
of Hawaii, RFP-07-043-SW )  
\_\_\_\_\_ )

**PROTEST**

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Attorney for Protestor  
Akaku: Maui Community Television



BEFORE THE STATE PROCUREMENT OFFICE  
STATE OF HAWAII

In the PROTEST )  
of )  
Akaku: Maui Community Television )  
Of Request for Proposals To Operate, )  
Maintain, and Manage Public, Educational )  
and Governmental (PEG) Access Channels, )  
Funds, Facilities, and Equipment for the State )  
of Hawaii, RFP-07-043-SW )  
\_\_\_\_\_ )

PROTEST

COMES NOW Protestor Akaku: Maui Community Television (hereafter 'Akaku') of 333 Dairy Road, Suite 104, Kahului, Hawai'i 96793, a prospective offeror, by and through its counsel, and hereby protests Request for Proposals to Operate, Maintain, and Manage Public, Educational and Governmental (PEG) Access Channels, Funds, Facilities, and Equipment for the State of Hawaii, RFP-07-043-SW (hereafter the 'RFP'). This protest is made pursuant to Haw. Rev. Stat. 103D-701(a) and Haw. Admin. Rules 3-126-3.

Statement of Reasons

1. Protestor protests the definition of "General Public" in Section 1.01. The definition does not reflect best practice nationwide, goes against the principles of public procurement and exceeds the authority delegated in Chapter 440G, Haw. Rev. Stat. General

Public represents all unaffiliated individual residents of a franchise including individuals and groups who may or may not be members of organizations, non profits, businesses, employees and constituents of private and public schools, and many forms of government entities. There is not, nor should there be implied or proscribed entitlement for “governmental and educational agencies” within the definition of General Public.

2. Protestor protests the definition of “Educational Institutions” in Section 1.01.

The definition reflects a clear bias toward state sponsored education and discriminates against individuals employees and constituents of private and parochial schools, non-traditional schools, charter and home schools, educational non-profits, adult education, and many alternative forms of education.

3. Protestor protests the definition of “Educational Programming” in Section 1.01.

The definition does not reflect best practice nationwide, goes against the principles of public procurement and exceeds the authority delegated in Chapter 440G, Haw. Rev. Stat. The definition fails to acknowledge that the Honolulu, Maui and Lahaina cable franchises currently have conditions attached to PEG access designation that provide 25% - 33% of franchise fees to be turned over to the University of Hawai'i (hereafter 'UH') and the Department of Education (hereafter 'DOE') through uncodified practice of the Department of Commerce and Consumer Affairs (hereafter 'Department'). There is no requirement that these state institutions provide any financial accountability for these funds. As a consequence of the interrelated definition, Educational Programming also does not include non UH or non DOE institutions.

4. Protestor protests the definition of “Governmental Entities” in Section 1.01.

The definition does not reflect best practice nationwide, goes against the principles of public procurement and exceeds the authority delegated in Chapter 440G, Haw. Rev. Stat. The definition does not include all governmental entities including but not limited to international governmental entities, federal and independent federal government entities, and unrepresented governmental entities (e.g. Native Hawaiian governmental entities.)

5. Protestor protests the introductory coverage of the RFP in Section 1.02: “The DCCA is seeking nonprofit organizations to manage PEG access finances and operate the PEG channels, funds, facilities, and equipment in the various franchise locations throughout the State.” The RFP as a process for the Director of the Department to exercise his authority under Chapter 440G, Haw. Rev. Stat. to designate access organizations is a rule within the meaning of Chapter 91, Haw. Rev. Stat. but the process has not been legitimated through the rule promulgation process and therefore, the RFP violates Chapters 91 and 440G, Haw. Rev. Stat.

6. Protestor protests the introductory commentary in Section 1.02. The RFP does not restrict or put value on tax-exempt non-profit corporation with verifiable PEG access programming experience generally and specifically for the markets in which the RFP seeks to award designation. PEG access organization designation is derivative of the enfranchisement of cable operator pursuant to Haw. Rev. Stat. 440G-8. Without legislative authority, lawfully promulgated rules or clear and unambiguous justification to the contrary, the Hawaii Cable Communications Systems Law did not contemplate one statewide access organization. PEG Access is a fully local community communications medium designed to enhance local electronic democracy and encourage local public discourse from diverse and often antagonistic

sources.

7. Protestor protests the discussion of the background of designation of access organizations in Section 2.01. Skills necessary to maintain and operate an access organization are not widely available within the State of Hawai'i. The skills set necessary to operate a successful PEG access entity are unique and not easily attainable. They require an expertise that is the opposite of commercial, institutional, educational or public television. Whereas conventional television broadcast entities provide highly restricted content in a one to many, one way, autocratic communications flow where success is measured by ratings, PEG access entities are a television anomaly that function according to a different paradigm. PEG access is the only form of television that facilitates and programs communication and information from and by the community by and for the community. They are not primarily content providers, they are facilitators. There is a many to many communications flow where diversity of viewpoint, localism, and empowering the communities voice is of paramount importance. No other form of television in the State does that. It is not practicable or advantageous to the state to interfere with the local autonomy of community communications or to replace the existing PEG's without taking into account the required social capital, community building and built-up trust that can take many years to develop and nurture.

8. Protestor protests the issuance of the RFP as discussed in Section 2.02. The RFP as a process for the Director of the Department to exercise his authority under Chapter 440G, Haw. Rev. Stat. to designate access organizations is a rule within the meaning of Chapter 91, Haw. Rev. Stat. but the process has not been legitimated through the rule promulgation

process and therefore, the RFP violates Chapters 91 and 440G, Haw. Rev. Stat.

9. Protestor protests the coverage of the RFP as defined in Section 3.02: "This RFP covers PEG Access Services to the counties of Hawaii, Kauai and Honolulu, and the islands of Maui, Molokai and Lanai. In this RFP, the reference to Maui County means the islands of Maui, Molokai and Lanai." The RFP does not pattern itself or give justification for deviated from the geographical limits of the cable franchises. Access organization designation is derived from the cable enfranchisement of Haw. Rev. Stat. 440G-8. This exceeds the authority of the Director of the Department.

10. Protestor protests the ontological requirements for all access organizations in Section 3.02. Since marketplace forces are deficient in meeting the fullest range of community communications needs, citizen participation at every level is essential. Just as the federal government should not preclude state government from acting in the best interests of it's citizens, state government should not preclude access organizations from acting on needs and interests of all their residents and common requirements for all PEG access organizations is unnecessary, overly burdensome and not practicable or advantageous to the residents of each franchise area or to the state. Finally, this exceeds the authority of the Director of the Department.

11. Protestor protests the assertion that all PEG Access Facilities and Equipment contain a reversionary future interest with the state in Section 3.02. Only PEG Access Facilities and Equipment that contain a reversionary future interest have a reversionary future interest.

12. Protestor protests the disclosure of Protestors in Section 3.02(2)(b)(4) and

attached Exhibit "D" trade secrets and other proprietary information in violation of the Hawai'i Uniform Information Practices Act and applicable common law protections against the disclosure of trade secrets.

13. Protestor protests the requirement of Department involvement in the selling, purchasing and acquisition of new PEG Access Facilities and Equipment in 3.02(2)(d) as in opposition to the Department's previous requirements of self-sustainability of designated access organizations.

14. Protestor protests the assertions and conditions of Section 3.02(2)(g) as a taking of property without just compensation. The Department cannot condition the awarding of a public contract on the requirement that offerors waive their Fifth and Fourteenth Amendment rights to the protection of their property.

15. Protestor protests the conditions of Section 3.02(3)(a)(2) as a taking of property without just compensation and a condition exceeding the delegated authority of the Public Procurement Code and the Hawaii Cable Communications Systems Law. The Department is not necessarily entitled to rental income or revenue derived from corporate assets and therefore cannot condition the awarding of a public contract on what amounts to a kickback by forcing offeror to commingle franchisee fee derived funds and unrelated corporate funds. This condition also violates the Fifth and Fourteenth Amendment rights to the protection of private property.

16. Protestor protests the conditions of Section 3.02(4) as a taking of property without just compensation and a condition exceeding the delegated authority of the Public Procurement Code and the Hawaii Cable Communications Systems Law. The Department

cannot condition the award of a public contract on the basis that offeror must give up title to interest in realty and personalty that it holds in common with itself as trustee of operating or capital franchisee fees.

17. Protestor protests the conditions of Section 3.02(5)(b) . The condition reflects a clear bias toward state sponsored education and discriminates against individuals employees and constituents of private and parochial schools, non-traditional schools, charter and home schools, educational non-profits, adult education, and many alternative forms of education. This unlawful discrimination is in excess of the statutory authority granted the Director of the Department by Chapter 440G, Haw. Rev. Stat.

18. Protestor protests the conditions of Section 3.02(5)(c). The condition does not include all governmental entities including but not limited to international governmental entities, federal and independent federal government entities, and unrepresented governmental entities (e.g. Native Hawaiian governmental entities.) The condition also includes governmental entities outside the cable franchises from which the Director has authority to designate access organizations. This condition is simultaneously overinclusive and underinclusive, is arbitrary and capricious and lacks statutory authority.

19. Protestor protests the condition of Section 3.02(5)(c)(1)-(2). The condition amounts to interference with the programming of government access materials in violation of the First and Fourteenth Amendments of the U.S. Constitution. The condition also amounts to intervention in the marketplace in contravention of the principles of public procurement as market forces and public interest will not dictate government access content but rather the Department.

20. Protestor protests the condition of Section 3.02(6) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code.

21. Protestor protests the condition of Section 3.02(10)(c)-(d) as arbitrary and capricious. The RFP requires offerors to accept the conditions of the assignment of franchise fees and delegation of duties to provide content and broadcasting services to Educational Institutions yet does not impose the same requirements of this Section on those institutions. The 'bracketing' of Educational Institutions from the requirements of the RFP violates the principles of the Public Procurement Code and exceeds the statutory authority of the Department delegated in Hawai'i Cable Communications Systems Law.

22. Protestor protests the conditions of Section 3.02(11) as requiring as a condition of being awarded a public contract, offeror must agree to disclose trade secrets and other proprietary information that is otherwise protected by the Hawai'i Uniform Information Practices Act and common law protection of trade secrets.

23. Protestor protests the condition of Section 3.02(14) as overly burdensome and unnecessary to effectuate the requirements of the RFP.

24. Protestor protests the condition of Section 3.02(16)(2)(a) as overly burdensome and unnecessary to effectuate the requirements of the RFP. This condition also violates the Fifth and Fourteenth Amendment rights to the protection of private property.

25. Protestor protests the condition of Section 3.02(16)(c) as overly burdensome and unnecessary to effectuate the requirements of the RFP and is arbitrary and capricious. The RFP already requires quarterly financial reporting requirements and audit requirements if



the Department suspects mishandling of monies. Additional audits are unnecessarily burdensome. Also, the RFP requires offerors to accept the conditions of the assignment of franchise fees and delegation of duties to provide content and broadcasting services to Educational Institutions yet does not impose the same requirements of this Section on those institutions. The 'bracketing' of Educational Institutions from the requirements of the RFP violates the principles of the Public Procurement Code and exceeds the statutory authority of the Department delegated in Hawai'i Cable Communications Systems Law. The condition also does not qualify at what other times that possible financial mismanagement and regular reporting times it may invoke its discretion. This requirement is over broad and excessive of the Departments statutory authority and violates the First and Fourteenth Amendments of the U.S. Constitution.

26. Protestor protests the conditions of 3.03(2) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems. Access markets in each franchise is unique empirically and statutorily and not generalizable as a matter of law statewide.

27. Protestor protests the conditions of 3.03(3) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems. Access markets in each franchise is unique empirically and statutorily and not generalizable as a matter of law statewide.

28. Protestor protests the conditions of 4.02(11) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code by requiring as a condition of being awarded a public

contract, offeror must agree to disclose trade secrets and other proprietary information that is otherwise protected by the Hawai'i Uniform Information Practices Act and common law protection of trade secrets.

29. Protestor protests the conditions of Section 4.03 as failing to require non-profit organizations that have the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance of the contract. There is no discussion, requirement, condition or qualification that offerors have experience in cable access or public television markets or the social capital or involvement in the community necessary to successfully perform under the contract.

30. Protestor protests the conditions of Section 4.05(4) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code by requiring as a condition of being awarded a public contract, offeror must agree to disclose trade secrets and other proprietary information that is otherwise protected by the Hawai'i Uniform Information Practices Act and common law protection of trade secrets.

31. Protestor protests the conditions of Section 4.06 as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code by requiring as a condition of being awarded a public contract, offeror must agree to disclose the names of subcontractors. First, the RFP does not require the use of subcontractors and the use is also not required by statute or rule. Second, the market for cable television and network television production does not lend itself to such "advance notice" listing. Most subcontracting is "project" specific and because the Department

and the RFP do not include particular projects to be done, such projects are generally foreseeable but specifically unknown/unknowable at present.

32. Protestor protests the conditions of Section 5.01(1) as arbitrary and capricious. Currently, funds from the cable franchise go to Hawai'i Public Television in excess of the authority of the Department under the Hawai'i Cable Communications Systems Law which remain unaccounted and unjustified. (See 1995 Senate Reso. No. 65 and Legislative Reference Bureau Report No. 95-4, Public, Education and Government Cable Television Access in Hawai'i: Unscrambling the Signals.)

33. Protestor protests the condition of Section 5.01(3) as arbitrary and capricious. Monthly payments would significantly reduce the ability to adapt and respond to the community need especially since much of the operating budget may be front loaded to pay for annual fixed costs like insurance. Monthly payments would not only create "uncertainty" it would complicate long range planning and would create a financial hardship. It would also deprive the PEG organization of potential interest income that has been a valuable part of the finances.

34. Protestor protests the condition of Section 5.01(3)(b) as arbitrary and capricious. The Department may acquire up to five percent (5%) of the gross revenue of the franchise for access organizations.

35. Protestor protests the condition of Section 5.01(3)(c) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. The Department may not sidestep the requirements of Chapters 91 and 440G, Haw. Rev. Stat. by binding on access organizations as a condition of

their designation, the Departments ability to exceed its authority.

36. Protestor protests the condition of Section 5.01(5) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. It violates the offerors freedom to contract and unlawfully restricts Government Entities from paying for additional coverage and access content to be broadcast.

37. Protestor protests the condition of Section 5.01(6) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. It violates the offerors freedom to contract and unlawfully restricts Government Entities from paying for additional coverage and access content to be broadcast. This condition also disproportionately impacts neighbor island franchise access organizations due to the fee structure's basis on subscribers and the similar amount of access content potential in this area.

38. Protestor protests the condition of Section 6.03(4)(d). The RFP does not pattern itself or give justification for deviated from the geographical limits of the cable franchises. Access organization designation is derived from the cable enfranchisement of Haw. Rev. Stat. 440G-8. This exceeds the authority of the Director of the Department.

39. Protestor protests the condition of Section 6.03(6) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code by requiring as a condition of being awarded a public contract, offeror must agree to disclose trade secrets and other proprietary information that is otherwise protected by the Hawai'i Uniform Information Practices Act and common law

protection of trade secrets.

40. Protestor protests the condition of Section 6.03(10) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code by requiring as a condition of being awarded a public contract, offeror must agree to disclose trade secrets and other proprietary information that is otherwise protected by the Hawai'i Uniform Information Practices Act and common law protection of trade secrets. The implied meaning of trade secrets is unlawfully and unnecessarily narrow and contrary to the statutory definition of Chapter 482, Haw. Rev. Stat.

41. Protestor protests the condition of Section 7.01(1) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. Chapter 440G, Haw. Rev. Stat. defines the requirements of an access organization and the Department and the Procurement Officer have no statutory authority to modify, change, narrow or enlarge that definition. Therefore, any derivation from the advertised specifications that are contrary to the statutory definition of access organization cannot be characterized as a substantial deviation – one that affects either the price, quantity, or quality of the service offered.

42. Protestor protests the condition of Section 7.01(2) as unsubstantiated by the evidence available and utterly self-serving and false. There is no evaluation committee. The State Procurement Office has an interest in seeing that its misinformed (or uninformed) decision regarding the position of access organization designation as subject to the Public Procurement Code is not challenged. Therefore, the Procurement Officer as an inferior to the Chief Procurement Officer can hardly be characterized as fair or impartial on that basis alone.

43. Protestor protests the condition of Section 7.01(3) as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. The RFP does not pattern itself or give justification for deviated from the geographical limits of the cable franchises. Access organization designation is derived from the cable enfranchisement of Haw. Rev. Stat. 440G-8. This exceeds the authority of the Director of the Department.

44. Protestor protests the condition of Section 7.02 as exceeding the statutory authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. The RFP is to procure PEG access services not cablecast or broadcast services. By analogy, a solicitation for building-construction electrical services would not list as meaningful evaluative criteria "construction related experience." Additionally, broadcast, cable, institutional, instructional, public or educational television experience is only part of the skill set necessary and cannot account for the community building expertise necessary for successful PEG access operation. The omission of PEG experience is a detriment to the evaluation process. Current criteria does not include points for community building and relations which is a necessary component of access organization services including special training and project consultation. This condition utterly fails to recognize the distinction between PEG access and other forms of television. Cable access is a democratic television anomaly in that it is the only form of television that incorporates a two-way communication flow, the community programming for the community. It is not a one way, autocratic system where a programmer or institution decides what the community sees.

45. Protestor protests the condition of Section 7.04(1) as exceeding the statutory

authority of the Department as delegated by the Hawaii Cable Communication Systems Law and the Public Procurement Code. Because access organization designation is derivative of the Departments authority to enfranchise cable operator-applicants, contracts should be coterminous with the period of the enfranchisement.

WHEREFORE, NOW, Protestor Akaku: Maui Community Television requests the Chief Procurement Officer or a designee find that the RFP fails for the reasons aforementioned and cancels Request for Proposals to Operate, Maintain, and Manage Public, Educational and Governmental (PEG) Access Channels, Funds, Facilities, and Equipment for the State of Hawaii, RFP-07-043-SW and any other remedies fair and equitable.

Dated: Wailuku, Maui, Hawai'i

August 6, 2007

---

LAW OFFICE OF LANCE D COLLINS  
LANCE D. COLLINS  
Attorney for Protestor Akaku

BEFORE THE STATE PROCUREMENT OFFICE  
STATE OF HAWAII

In the PROTEST )  
of )  
Akaku: Maui Community Television )  
Of Request for Proposals To Operate, )  
Maintain, and Manage Public, Educational )  
and Governmental (PEG) Access Channels, )  
Funds, Facilities, and Equipment for the State )  
of Hawaii, RFP-07-043-SW )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on a copy of the foregoing will be served upon the following parties at his last known address by hand-delivery:

AARON FUJIOKA  
Chief Procurement Officer  
State Procurement Office  
State of Hawai'i  
1151 Punchbowl Street  
Honolulu, HI 96813

LAWRENCE REIFURTH  
Director  
Dept. Commerce and Consumer Affairs  
State of Hawai'i  
335 Merchant Street  
Honolulu, HI 96813

Dated: Wailuku, Maui, Hawai'i

August 6, 2007

\_\_\_\_\_  
LAW OFFICE OF LANCE D COLLINS  
LANCE D. COLLINS  
Attorney for Protestor Akaku



**David Franzel**

**From:** Eric Knutzen [eknutzen@kauai.gov]  
**Sent:** Tuesday, September 02, 2008 11:04 AM  
**To:** David Franzel  
**Subject:** FW: Task Force Members' Mailing Address

**From:** Patti.K.Kodama@dcca.hawaii.gov [mailto:Patti.K.Kodama@dcca.hawaii.gov]  
**Sent:** Thursday, August 28, 2008 4:33 PM  
**To:** Eric Knutzen  
**Subject:** Task Force Members' Mailing Address

Hi Eric,

Attached is the mailing address list for the respective TF members, including David. Let me know if you need additional information or if you have any questions. Thank you.

Aloha,  
Patti Kodama  
State of Hawaii

12/12/2008

HCR 358, H.D. 1 Task Force Members' Mailing Address List

<p>Roy K. Amemiya, Jr. SVP &amp; Director – Government Relations Central Pacific Bank 220 South King Street, 4<sup>th</sup> Floor Honolulu, HI 96813</p>	<p>Mr. David Lassner Vice President for Information Technology &amp; Chief Information Officer University of Hawaii 2532 Correa Road Honolulu, HI 96822</p>
<p>Mr. Jay April President and CEO Akaku – Maui Community Television 333 Dairy Road, Suite 104 Kahului, HI 96732</p>	<p>Ms. Shelley Pellegrino Office of the Mayor County of Maui 200 South High Street, 9<sup>th</sup> Floor Wailuku, HI 96793</p>
<p>Mr. Gilbert Benevides County of Hawaii Purchasing Division 891 Ululani Street Hilo, HI 96720</p>	<p>Mr. Keith Rollman 41 Niuhi Street Honolulu, HI 96821</p>
<p>Mr. David Franzel 217 Prospect Street, Apt. B-11 Honolulu, HI 96813</p>	<p>Mr. Clyde S. Sonobe Cable Television Administrator Cable Television Division P. O. Box 541 Honolulu, HI 96809</p>
<p>Ms. Mabel Fujiuchi Kauai Economic Opportunity, Inc. 2804 Wehe Road Lihue, HI 96766</p>	<p>Mr. Gerald Takase 101 Aupuni Street, Suite 325 Hilo, HI 96720</p>
<p>Mr. Gregg Hirata Mayor's Office 530 South King Street Honolulu, HI 96813</p>	
<p>Ms. Geri Ann Hong 1122 Mapunapuna Street, #201 Honolulu, HI 96819</p>	
<p>Mr. Eric Knutzen HCR 358 Task Force Chair County of Kauai 4444 Rice Street, Suite 427 Lihue, HI 96766</p>	

**David Franzel**

**From:** Roy.Amemiya@centralpacificbank.com  
**Sent:** Wednesday, September 03, 2008 2:26 PM  
**To:** Eric Knutzen  
**Cc:** Clyde.Sonobe@dcca.hawaii.gov; David Lassner; David Franzel; gbenevides@co.hawaii.hi.us; Geri\_Ann\_Hong@notes.k12.hi.us; ghirata@honolulu.gov; Glen.WY.Chock@dcca.hawaii.gov; gtakase3@hotmail.com; Jay April; keo@keoinc.org; krollman@honolulu.gov; Laureen.K.Wong@dcca.hawaii.gov; shelly.pellegrino@co.maui.hi.us  
**Subject:** RE: HCR 358 Task Force September 24, 2008 Q and A Session

Chair Eric - It is disappointing that Aaron will not be there. Can anyone else from his office be present to answer questions that may come up in discussions - not necessarily questions that we can submit in advance. I feel it would be helpful to have an expert there to share past experiences.

One area that I would like the SPO to discuss is the "Concession Law". It would be good if we could get an overview of the law including methods used to analyze the qualifications of bidders. If you need this is the form of a question, "Please provide an overview of the concession law and include methods used to analyze bidder qualifications".

However, it would be helpful if Aaron or his designate could do an oral power point presentation similar to the one he did on the procurement law rather than provide this in writing.

Thank you and Aloha,

Roy K. Amemiya, Jr.  
 Director - Governmental Relations  
 220 S. King St., 4th Floor  
 Honolulu, Hawaii 96813  
 Phone: (808) 535-2555 Cell: (808) 372-7744

"Eric Knutzen" <eknutzen@kauai.gov>

09/03/2008 10:19 AM

To "Jay April" <jay@akaku.org>

cc <keo@keoinc.org>, <gtakase3@hotmail.com>, <roy.amemiya@centralpacificbank.com>, <gbenevides@co.hawaii.hi.us>, <shelly.pellegrino@co.maui.hi.us>, <ghirata@honolulu.gov>, <Geri\_Ann\_Hong@notes.k12.hi.us>, "David Lassner" <david@hawaii.edu>, <krollman@honolulu.gov>, <Clyde.Sonobe@dcca.hawaii.gov>, <Laureen.K.Wong@dcca.hawaii.gov>, <Glen.WY.Chock@dcca.hawaii.gov>, "David Franzel" <davidfranzel@hawaii.rr.com>

Subject RE: HCR 358 Task Force September 24, 2008 Q and A Session

12/16/2008

**From:** Jay April [mailto:jay@akaku.org]  
**Sent:** Tuesday, September 02, 2008 2:50 PM  
**To:** Eric Knutzen  
**Cc:** keo@keoinc.org; gtakase3@hotmail.com; roy.arnemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; Eric Knutzen; shelly.pellegrino@co.maui.hi.us; ghirata@honolulu.gov; Geri\_Ann\_Hong@notes.k12.hi.us; David Lassner; krollman@honolulu.gov; Clyde.Sonobe@dcca.hawaii.gov; Laureen.K.Wong@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov; David Franzel  
**Subject:** Re: HCR 358 Task Force September 24, 2008 Q and A Session

Aloha Eric,

We appreciate Mr. Fujioka's offer to participate in the HCR 358 Task Force work to "examine methods other than the Public Procurement Code" in relation to PEG Access. I believe it was the sense of the Task Force to ask SPO for a 30 minute Q&A to discuss real alternatives, or what in the view of SPO would constitute his experience of same. What we need is a free and open discussion here especially in view of the fact that procurement of PEG Access simply does not exist anywhere else in the nation. If Mr. Fujiyoka requires written questions there is no need for him to be present. We can supply written questions and he can supply written responses and the Task Force can then supply written follow up questions and so forth. It would not be appropriate for Mr. Fujioka to simply present his answers to the Task Force without a free exchange including follow up questions. This Task Force needs to decide one way or the other.

Warm Regards,

Jay April

On Sep 2, 2008, at 10:35 AM, David Franzel wrote:

**From:** Jay April [mailto:jay@akaku.org]  
**Sent:** Tuesday, September 02, 2008 2:50 PM  
**To:** Eric Knutzen  
**Cc:** keo@keoinc.org; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; Eric Knutzen; shelly.pellegrino@co.maui.hi.us; ghirata@honolulu.gov; Geri\_Ann\_Hong@notes.k12.hi.us; David Lassner; krollman@honolulu.gov; Clyde.Sonobe@dcca.hawaii.gov; Laureen.K.Wong@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov; David Franzel  
**Subject:** Re: HCR 358 Task Force September 24, 2008 Q and A Session

Aloha Eric,

We appreciate Mr. Fujioka's offer to participate in the HCR 358 Task Force work to "examine methods other than the Public Procurement Code" in relation to PEG Access. I believe it was the sense of the Task Force to ask SPO for a 30 minute Q&A to discuss real alternatives, or what in the view of SPO would constitute his experience of same. What we need is a free and open discussion here especially in view of the fact that procurement of PEG Access simply does not exist anywhere else in the nation. If Mr. Fujiyoka requires written questions there is no need for him to be present. We can supply written questions and he can supply written responses and the Task Force can then supply written follow up questions and so forth. It would not be appropriate for Mr. Fujioka to simply present his answers to the Task Force without a free exchange including follow up questions. This Task Force needs to decide one way or the other.

Warm Regards,

Jay April

On Sep 2, 2008, at 10:35 AM, David Franzel wrote:

Chair Knutzen has asked Aaron Fujioka for his office to participate in a Q&A session.

To address this, we would like to pursue the following steps:

2) I'll consolidate these questions and submit them no later than Friday, September 12 to Aaron

--- Scanned by M+ Guardian Messaging Firewall ---

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12/16/2008

## David Franzel

---

**From:** Eric Knutzen [eknutzen@kauai.gov]  
**Sent:** Wednesday, September 03, 2008 11:21 AM  
**To:** David Franzel  
**Subject:** FW: Letters out today



Procurement



Attorney

Policy Board.pdf (General.pdf (45 KB)

Hi, David

Pls distribute these to the Task Force members the next time you send out material to them all, for their information,

Eric

Eric Knutzen  
IT/Communications and Projects Manager  
County of Kaua'i  
4444 Rice St., Suite 427  
Lihu'e, Hawai'i, USA, 96766  
Tel: (808) 241-4406  
Fax: (808) 241-6266  
E-mail: eknutzen@kauai.gov  
www.kauai.gov

-----Original Message-----

From: Clyde.Sonobe@dcca.hawaii.gov [mailto:Clyde.Sonobe@dcca.hawaii.gov]

Sent: Wednesday, September 03, 2008 10:58 AM  
To: Eric Knutzen  
Cc: David Franzel  
Subject: Re: Letters out today

Hi Eric,  
I have no comments.

Clyde

"Eric Knutzen"

<eknutzen@kauai.g

ov>

To

<Clyde.Sonobe@dcca.hawaii.gov>

09/03/2008 08:46

cc

AM

"David Franzel"

<david@davidfranzel.com>

Subject

Letters out today

Hi, Clyde

Unless you find that I need to make any material changes to the attached, I plan to mail them today.

Pls let me know if you advise of any changes by around 2 pm today,

Eric

Eric Knutzen  
HCR 358 Task Force Chair  
County of Kaua'i  
4444 Rice St., Suite 427  
Lihu'e, Hawai'i, USA, 96766  
Tel: (808) 241-4406  
Fax: (808) 241-6266  
E-mail: [eknutzen@kauai.gov](mailto:eknutzen@kauai.gov)  
[www.kauai.gov](http://www.kauai.gov)

(See attached file: Procurement Policy Board.pdf) (See attached file: Attorney General.pdf)



**Bill "Kaipo" Asing**  
Acting Mayor

**Gary Heu**  
Administrative Assistant



**Wallace Rezentes, Jr.**  
Director of Finance

**Belma Baris**  
Deputy Director of Finance

COUNTY OF KAUA'I

September 3, 2008

Pamela Torres  
Chairwoman  
Procurement Policy Board  
1151 Punchbowl Street  
Honolulu, Hawaii 96813

Re: Requests from H.C.R. 358 H.D. 1 (2008) Task Force

Dear Madam,

On behalf of the H.C.R. 358 H.D. 1 (2008) Task Force as its chairman, the Task Force requests copies of the Procurement Policy Board's written decisions regarding Olelo: Corporation for Community Television's H.R.S. 91-8 petition for a declaratory order regarding "access organizations" as "utility services" and copies of the Procurement Policy Board's written opinion regarding Akaku: Maui Community Television's H.R.S. 91-8 petition for a declaratory order regarding "funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs" and the applicability of the Procurement Code "to services for providing public educational and governmental cable services."

The Task Force is under the information or belief that the Procurement Policy Board rendered decisions on these petitions in early 2007.

The Task Force has determined that this information will help assist it in fulfilling its charge from the Hawai'i State Legislature. Your thoughtful consideration in expediting this request and preferably submitting your response by September 22, 2008 is greatly appreciated by the H.C.R. 358 H.D. 1 Task Force, the Hawai'i State Legislature and the public we all serve.

Sincerely,

Eric Knutzen  
Chairman  
H.C.R. 358 H.D. 1 (2008) Task Force

**Bill "Kaipo" Asing**  
Acting Mayor

**Gary Heu**  
Administrative Assistant



**Wallace Rezentes, Jr.**  
Director of Finance

**Belma Baris**  
Deputy Director of Finance

COUNTY OF KAUAI

September 3, 2008

Mark Bennett, Esq.  
Attorney General  
425 S. Queen St  
Honolulu HI 96813  
Re: Requests from H.C.R. 358 H.D. 1 (2008) Task Force

Dear Sir,

On behalf of the H.C.R. 358 H.D. 1 (2008) Task Force as its chairman, the Task Force requests an opinion from you regarding the applicability of Chapter 103D, Hawai'i Revised Statutes, to the Director of the Department of Commerce and Consumer Affairs' power to designate "access organizations" under Chapter 440G, Hawai'i Revised Statutes.

If in your opinion the Director of the Department of Commerce and Consumer Affairs is required to comply with Chapter 103D in the designation of access organizations under Chapter 440G, does the designation of access organizations fall under any of the applicable exemptions, and if so, please identify these exemptions and the rationale for the exemption.

The Task Force has determined that this information will help assist it in fulfilling its charge from the Hawai'i State Legislature. Your thoughtful consideration in expediting this request and preferably submitting your response by September 22, 2008 is greatly appreciated by the H.C.R. 358 H.D. 1 Task Force, the Hawai'i State Legislature and the public we all serve.

Sincerely,

Eric Knutzen  
Chairman  
H.C.R. 358 H.D. 1 (2008) Task Force

-----Original Message-----

From: 'Clyde.Sonobe@dcca.hawaii.gov' [mailto:Clyde.Sonobe@dcca.hawaii.gov]  
Sent: Thursday, September 11, 2008 5:52 PM  
To: David Franzel  
Cc: 'Eric Knutzen'; 'Jay April'; 'Lawrence M Reifurth';  
Laureen.K.Wong@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov;  
Patti.K.Kodama@dcca.hawaii.gov  
Subject: RE: HCR 358 Next Task Force Meeting and Video Report Posting

We are working on it.

Thanks.

"David Franzel"  
<david@davidfranz  
el.com>

09/10/2008 05:27  
PM

"Jay April" <jay@akaku.org> To  
"Eric Knutzen" cc  
<eknutzen@kauai.gov>,  
<Clyde.Sonobe@dcca.hawaii.gov>,  
"Lawrence M Reifurth"  
<lawrence.m.reifurth@dcca.hawaii.go  
v>

Subject

RE: HCR 358 Next Task Force  
Meeting and Video Report Posting

Aloha, all.

Jay, that is with DCCA.

Clyde, do you have an update on that item?

Thanks.

David.

-----Original Message-----

From: Jay April [mailto:jay@akaku.org]  
Sent: Wednesday, September 10, 2008 2:44 PM  
To: David Franzel  
Cc: 'Eric Knutzen'; Clyde.Sonobe@dcca.hawaii.gov; 'Lawrence M Reifurth'  
Subject: Re: HCR 358 Next Task Force Meeting and Video Report Posting

David,

Thank you for this but in a related matter, what is the status of the long standing request to post a link to the HCR358 Video Report to the Task Force on the DCCA website?

Jay

On Sep 10, 2008, at 5:43 AM, David Franzel wrote:

> I spoke with Clyde Sonobe and the 12 disks will be copied and  
> mailed by  
> DCCA. If Clyde does not have the disk in his office, I will drop  
> off the  
> disk that I received this week on Friday when I return from the  
> mainland.

<shelley.pellegrino@co.maui.hi.us>,  
<ghirata@honolulu.gov>,  
<Geri\_Ann\_Hong@notes.k12.hi.us>,  
"David Lassner"  
<david@hawaii.edu>,  
<krollman@honolulu.gov>,  
<Clyde.Sonobe@dcca.hawaii.gov>

Subject

RE: HCR 358

Thank you for your comments.

I also added Clyde Sonobe to your list as I did not see his name above.

Clyde, could you please post these comments?

See you next week!

David Franzel

From: Jay April [mailto:jay@akaku.org]  
Sent: Wednesday, August 20, 2008 5:00 PM  
To: David Franzel  
Cc: Jay April; keo@keoinc.org; gtakase3@hotmail.com;  
roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; Eric  
Knutzen; Shelley Pellegrino; ghirata@honolulu.gov;  
Geri\_Ann\_Hong@notes.k12.hi.us; David Lassner; krollman@honolulu.gov  
Subject: HCR 358

Aloha David,

These are the bullet points requested in your August 5 email to Task Force members.

Thanks. See you next week.

Jay April  
President and CEO  
Akaku: Maui Community Television

1. Solicit public input and examine methods other than the Public Procurement Code process to oversee PEG expenditures and ensure proper checks and balances; and

Since PEG Access Organizations in Hawaii were established by statute

for the narrow and specific purpose of providing community television services, community building training and outreach in each local franchise area and the state created these non-profit entities to operate at arms length, there are in fact no other qualified entities or prospective bidders. According to the law and to best practice everywhere in the nation, these organizations are clearly sole source entities and not subject to Procurement Code.

With regard to oversight of PEG expenses and proper checks and balances:

Currently checks and balances and oversight of expenditures are already in place with independent audits, DCCA audits and DCCA Annual Reports

- Qualified Independent Community Access Policy Consultants/Analysts\* could, if required based on a FINDING OF FACT be retained by Legislature to:

Audit DCCA Cable Division

LINDA LINGLE  
GOVERNOR



PROCUREMENT POLICY BOARD  
DARRYL W. BARDUSCH  
LESLIE S. CARREN  
DARRELL ANN HO  
YETHI MATSUMOTO  
RUSSELL SAITO  
PAMELA A. TORRES

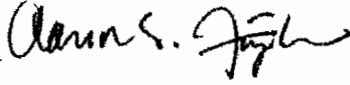
AARON S. FUJIOKA  
ADMINISTRATOR

**STATE OF HAWAII**  
**STATE PROCUREMENT OFFICE**  
P.O. Box 119  
Honolulu, Hawaii 96810-0119  
Tel: (808) 587-4700 Fax: (808) 587-4703  
www.spo.hawaii.gov

SPO 09-053

September 22, 2008

TO: Mr. David Franzel, Facilitator  
HCR 358 Task Force

FROM: Aaron S. Fujioka 

SUBJECT: HCR 358 Task Force Questions for SPO

The following is in response to your 9/15/08 email on the subject task force questions.

1. *Please provide an overview of the concession law and include methods used to analyze bidder qualifications.*

If your reference to 'concession law' is on HRS Chapter 102, Concessions on Public Property, the State Procurement Office (SPO) does not have authority or oversight for this chapter.

2. *What alternatives are there to procurement?*
3. *Does SPO know of other exceptions to the procurement law?*

Questions 2 and 3 are vague. However, if the questions are seeking SPO's input on alternative procurement methods or ways to be exempt from the Hawaii Public Procurement Code, we offer the following:

The SPO's position presented during each Legislative session is that statutory exemptions are contrary to the Hawaii Public Procurement Code (Code), section 103D-102, HRS, on the applicability of the chapter that states in part "... shall apply to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, ..." Any governmental agency with the authority to expend funds should be in compliance with chapter 103D, which promotes the policy of fair and equitable treatment of all persons who deal with the procurement system; fosters effective broad-based competition; and increases public confidence in public procurement.

The SPO is against statutorily exempting specific purchases from the Code, as it is not in the best interest of government, the business community, and the general public. The Code establishes a time-tested, fair, and reliable set of rules and processes for award of contracts. The competitive procurement processes of the Code are to insure that all potential providers are afforded the opportunity to compete for the required services.

To the extent agencies may need specific purchases to be exempted from Code requirements, the Code provides an exemption process. This includes exemptions authorized by a Chief Procurement Officer on a case-by-case bases for an agency's specific requirements, in accordance with HRS section 103D-102(b)(4)(L).

The Code should not be viewed as an obstacle to a purchasing agency's mission, but rather as the single source of public procurement policy to be applied equally and uniformly to obtain its requirements. It was the legislature's intent for the Code to be a single source of public procurement policy. If individual agencies are exempted and allowed to develop their own individual processes, it becomes problematic for operational purposes and for vendors/contractors who must comply with a variety of processes. Fairness, open competition, a level playing field, and government disclosure and transparency in the procurement and contracting process are vital to good government. For this to be accomplished, we must participate in the process with one set of statutes and rules.

4. *How many bidders responded to the recent RFP? Were they qualified?*

This question is vague. If the question is "How many qualified offerors responded to RFP-07-043-SW for *Services to Operate, Maintain, and Manage Public, Educational, and Governmental (PEG) Access Channels, Funds, Facilities, and Equipment for the State of Hawaii*, issued by the SPO on behalf of the Department of Commerce and Consumer Affairs, Cable Television Division, that was released on July 30, 2007?" the following is provided. Subsequent to the release of this RFP a protest was received by the SPO on August 6, 2007 that stayed the procurement process.

If you have any further questions, please contact me.

c: The Honorable Lawrence Reifurth, Director, DCCA  
Ron Boyer, Deputy Director, DCCA  
Clyde Sonobe, Administrator, DCCA, CATV

**David Franzel**

**From:** Roy.Amemiya@centralpacificbank.com  
**Sent:** Monday, September 22, 2008 5:35 PM  
**To:** David Franzel  
**Cc:** aaron.fujioka@hawaii.gov; Clyde.Sonobe@dcca.hawaii.gov; david@hawaii.edu; eknutzen@kauai.gov; gbenevides@co.hawaii.hi.us; Geri\_Ann\_Hong@notes.k12.hi.us; ghirata@honolulu.gov; Glen.WY.Chock@dcca.hawaii.gov; gtakase3@hotmail.com; jay@akaku.org; keo@keoinc.org; krollman@honolulu.gov; laureen.k.wong@dcca.hawaii.gov; shelly.pellegrino@co.maui.hi.us  
**Subject:** RE: HCR 358 Task Force - Questions for SPO Consideration

**David, Eric -**

I must say that as a taskforce member, I am frustrated with the vagueness of answers in the attachment. It appears to me that our taskforce is not being given full cooperation for information and candid answers that I believe we are entitled to and will need if we are to make informed decisions.

Which brings me to my request. Can we get someone that is an authority on the concession chapter to be present at Wednesday's meeting so that we can learn about these alternative procurement measures? Thank you.

**Aaron -**

If Chair Knutzen is agreeable to my above request, whom would you recommend as person(s) that can knowledgeably discuss procurement of concessionaires with the taskforce?

Also, I'm not sure whether you misunderstood question #3, but I believe we would like a listing and description of exemptions that have been granted to the procurement law. This will allow us to examine these and see if they can be applied to PEG access procurement. Please provide us with such a list?

Sincerely,

Roy K. Amemiya, Jr.  
 Phone: (808) 535-2555 Cell: (808) 372-7744

"David Franzel" <davidfranzel@hawaii.rr.com>

09/22/2008 04:49 PM

To <aaron.fujioka@hawaii.gov>  
 cc <jay@akaku.org>, <keo@keoinc.org>, <gtakase3@hotmail.com>, <roy.amemiya@centralpacificbank.com>, <gbenevides@co.hawaii.hi.us>, <eknutzen@kauai.gov>, <shelly.pellegrino@co.maui.hi.us>, <ghirata@honolulu.gov>, <Geri\_Ann\_Hong@notes.k12.hi.us>, <david@hawaii.edu>, <krollman@honolulu.gov>, <Clyde.Sonobe@dcca.hawaii.gov>, <Glen.WY.Chock@dcca.hawaii.gov>, <laureen.k.wong@dcca.hawaii.gov>

Subject RE: HCR 358 Task Force - Questions for SPO Consideration

12/12/2008



11/12/2008 10:03 AM

----- Forwarded Message -----

**From:** David Franzel [mailto:davidfranzel@hawaii.rr.com]  
**Sent:** Monday, September 15, 2008 10:03 AM  
**To:** 'aaron.fujioka@hawaii.gov'  
**Cc:** 'jay@akaku.org'; 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelly.pellegrino@co.maui.hi.us'; 'ghirata@honolulu.gov'; 'Geri\_Ann\_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'krollman@honolulu.gov'; 'Clyde.Sonobe@dcca.hawaii.gov'; 'Glen.WY.Chock@dcca.hawaii.gov'; 'laureen.k.wong@dcca.hawaii.gov'  
**Subject:** HCR 358 Task Force - Questions for SPO Consideration

Aloha Aaron,

The HCR 358 Task Force has several questions for you. I understand that you will not be present at our next meeting so your written response to the questions by Monday, September 22, 2008 would be much appreciated.

1. Please provide an overview of the concession law and include methods used to analyze bidder qualifications.
2. What alternatives are there to procurement?
3. Does SPO know of other exceptions to the procurement law?
4. How many bidders responded to the recent RFP? Were they qualified?

Your response will be discussed at the upcoming September 24, 2008 meeting and follow up questions on these and other topics will be directed to you, thereafter.

Mahalo.

David Franzel, Facilitator.

--- Scanned by M+ Guardian Messaging Firewall ---

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12/12/2008

**From:** Gilbert Benevides [mailto:gbenevides@co.hawaii.hi.us]

**Sent:** Wednesday, September 24, 2008 8:58 AM

**To:** Roy.Amemiya@centralpacificbank.com; 'David Franzel'; eknutzen@kauai.gov

**Cc:** 'Clyde Sonobe'; 'David Lassner'; 'Eric Knutzen'; 'Geri Ann Hong'; ghirata@honolulu.gov; Glen.WY.Chock@dcca.hawaii.gov; gtakase3@hotmail.com; 'Hae Okimoto'; 'Jay April'; keo@keoinc.org; krollman@honolulu.gov; 'Laureen Wong'; shelly.pellegrino@co.maui.hi.us

**Subject:** RE: HCR 358 Task Force - Questions for SPO Consideration

Chair Eric,

I agree with Roy and David, the core issue is in fact whether or not competition is applicable. And if it is applicable, it would seem to follow that some form of procurement competition would need to be used to determine which organization could best provide the services.

I cannot think of anything other than some form of procurement process to address the competition, quantify it against the criteria set forth therein, and subsequently, based on those quantifiable measures determine best offer, which would then lead to the award(s).

I realize that the resolution asks for alternatives to procurement, but in the end if it is subject to competition wouldn't any method decided upon come close to what the request for proposal process already offers under HRS and HAR?

Thanks,  
Gil Benevides

**From:** Jay April [mailto:jay@akaku.org]  
**Sent:** Monday, September 22, 2008 7:40 PM  
**To:** Roy.Amemiya@centralpacificbank.com  
**Cc:** David Franzel; aaron.fujioka@hawaii.gov; Clyde.Sonobe@dcca.hawaii.gov; david@hawaii.edu; eknutzen@kauai.gov; gbenevides@co.hawaii.hi.us; Geri\_Ann\_Hong@notes.k12.hi.us; ghirata@honolulu.gov; Glen.WY.Chock@dcca.hawaii.gov; gtakase3@hotmail.com; keo@keoinc.org; krollman@honolulu.gov; laureen.k.wong@dcca.hawaii.gov; shelly.pellegrino@co.maui.hi.us  
**Subject:** Re: HCR 358 Task Force - Questions for SPO Consideration

Aloha Mr Chair and Task Force Colleagues,

I agree with Roy. Asking SPO to comment on alternatives to this RFP is a lot like asking the Fox to come and redecorate the hen house. As underscored by the testimony of national experts provided to the Task Force, ( video still not posted on the DCCA website as ordered by Task Force) and by the hundreds who have testified before government committees on this matter, this RFP exercise is on its face blatantly political. The record clearly shows that the real agenda is simply to harm or diminish PEG Access as evidenced by SPO's initial RFP, the accompanying protests, the agencies subsequent comments and actions, the DCCA tacit acceptance of the Attorney General's highly disputable secret opinion, and by the refusal of the drafter of HCR 358 to even hear the bill (SB1789) that the Reso was designed to derail. Akaku's attorney, Lance Collins has submitted well thought out draft rules for access organizations as a viable alternative to procurement. These were handed out at our last meeting. Along with Roy's request, so they do not get buried in the paper shuffle, I would like to propose that we spend some quality time discussing these draft rules as a group in the 30 minute time frame originally allotted to Mr. Fujiyoka for Q&A. It is getting late, Let's get some real alternatives on the table.

Respectfully,

Jay April  
President and CEO  
Akaku: Maui Community Television