

Department of Commerce and Consumer Affairs  
State of Hawaii

**HCR 358 TASK FORCE MEETING**

Date: Monday, August 4, 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, First Floor  
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 (Franzel)
- II. Choose Task Force Chair (To be facilitated by Eric Knutzen)
- III. Accept Minutes from June 30, 2008 Meeting (Task Force)
- IV. Public Testimony (Public)
- V. Rules re Public Testimony (Task Force)
- VI. Decision re Facilitator (Task Force)
- VII. Vote to decide Task Force compliance with Sunshine Law (Task Force)
- VIII. Discussion and agreement re goals pertaining to HCR 358 (Task Force)
- IX. Rulemaking and alternatives to Procurement Code (Task Force)
- X. Arguments for Procurement Code (Task Force)
- XI. Address formal request of documents from State (Task Force)
- XII. Preparation for Next Meeting
  - o Agenda
  - o Date
- XIII. 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 July 31, 2008 to discuss accommodation arrangements.*

**HCR 358 TASK FORCE  
MINUTES OF MEETING**

Date: August 4, 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

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

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

Oahu:  
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 --The meeting was called to order at 1:00 p.m. by Acting Task Force Chair Eric Knutzen. Notes were taken by the Facilitator; no verbatim transcript was made of the Meeting; it was recorded. Acting Chair Knutzen took roll and asked that attendees adhere to some communication guidelines such as no interruptions, one person speaks at a time and asked Task Force members to monitor adherence to the guidelines at each Conference Center.
  
- II. Introduction of Task Force Members (Clyde Sonobe informed the Task Force that Muriel Taira (CAC) resigned her membership and was replaced by Keith Rollman)
  - A. Present

1.	MaBel Fujiuchi	Hoike
2.	Eric Knutzen	County of Kauai
3.	Gil Benevides	County of Hawaii
4.	Jay April	Akaku
5.	Roy Amemiya	Olelo
6.	Keith Rollman	CAC
7.	Gerri Ann Hong	DOE
8.	Clyde Sonobe	DCCA
9.	Gregg Hirata	City and County of Honolulu
10.	Shelley Pellegrino	County of Maui
11.	Gerald Takase	Na Leo
  
  - B. Excused
    1. David Lassner UH
  
  - C. The Acting Chair went through the Agenda and a motion was made to approve the meeting agenda with some amendments to (i) take public testimony before choosing the permanent Chair (approved unanimously)

by those present )(Task Force Member Gerri Ann Hong not yet present) and (ii) to delete the Agenda item to discuss arguments for use of the Procurement Code (after discussion Member Benevides suggested changing the item to discuss the applicability of the Procurement Code and the amendment was approved unanimously by those present (Task Force Member Gerri Ann Hong not yet present) and was later revised by the Chair to specify pros and cons.

D. Public Testimony

- i. Ed Call – Indicated that he believes in free speech and suggests that the Procurement Code be followed; asks that E911 be considered which uses first come access and goes out for Procurement Code which works; argument against use of the Procurement Code do not seem to be correct for PEG Access as Code works for E911
- ii. Michael Duberstein – delegate to Alliance Meetings in DC; lots of concern there for changing the system in Hawaii; the feeling is that Hawaii has one of the best systems so why is the State intending to change it? It is disturbing that a system that has worked well will be tinkered with and it must be a political decision that has nothing to do with free speech
- iii. Linda Puppolo – Overall, the Task Force should not rush the process, should educate themselves regarding procurement; approves Eric Knutzen as Chair, appreciates his fairness; most Task Force members are involved with procurement, suggests that they be open to other alternatives and she is surprised that nothing else has been mentioned. Linda proposes the following alternatives to procurement:
  1. By invitation
  2. Sole source entity
    - a. Lowers administrative costs
    - b. Better promotes continuity
    - c. Improves products and services
  3. Look for entity that is capable of providing the services
  4. Consider a specialized agency like Akaku

5. Performance based alternative (ask, can anyone else do it?)
  - iv. David DeLeon – Saw that an RFP would hamstring organizations, goal should be independent entities not dependent on cable fees, don't hamstring and keep from functioning; an electronic soapbox is not appropriate for a procurement code but is unique to America and is not susceptible to process
  - v. Lance Collins, Esq. – Eric Knutzen is a good choice for Chair; Refers Chair to his 7/31/08 testimony which is attached to these minutes. Lance indicated that a change in the Statute is needed to follow the Procurement Code and that a contested case will be required, anyway. Eric asked that the issue raised by Lance above be raised when discussing the Procurement Code Agenda items.
  - vi. Sam Epstein – See written testimony when received
- E. Choose Task Force Chair – Members voted unanimously to choose a Chair; Eric Knutzen and Roy Amemiya were nominated and Eric Knutzen was approved by a vote of nine (9) to one (1).
- F. Rules re Public Testimony – The following rules were approved by a vote of ten (10) to one (1).
  1. Leave to discretion of Chair of when Chair would call for public testimony within each of the items voted on.
  2. Three (3) minutes per speaker with additional time for questions
  3. Testimony should be within topic
  4. Testimony will be recorded
  5. Encourage but don't require written submissions
    - i. Public comments via email should be directed to the Task Force at  
with HCR 358 Task Force included on any subject line
  6. Task Force approved minutes and attachments will be posted on the CATV website at
  7. HCR 358 Task Force Members should transmit all emails and information to all Task Force Members and the Facilitator with HCR 358 Task Force in any subject line.
  8. The Chair suggested a format where a motion would be made, it would be seconded, Task Force discussion would ensue, public

testimony would be called for at discretion of Chair, and a vote taken.

- G. Acceptance of Minutes
1. Deferred to August 27, 2008 meeting so that Chair and Jay April can confer on Mr. April's suggested changes to the Facilitator's submitted minutes.
- H. Facilitator – Members voted unanimously to use the Facilitator working under the Chair's direction with the following scope of responsibilities: take minutes and notes of public testimony, roll, and votes, member follow up (e.g. approved homework between meetings), draft final report, work with Chair to address procedural issues as they arise.
- I. Sunshine Law Compliance – OIP determined that compliance not required here, motion made for compliance with spirit of Sunshine Law; after discussion, the Task Force unanimously agreed to be transparent and to maintain public participation and that:
1. There would be written communication shared with all Task Force members
  2. Agenda would be posted one week in advance of each meeting
  3. Public participation and testimony would be encouraged
  4. A majority of the twelve (12) Task Force members (at least seven (7) votes in favor or against the proposed action) are required for all Task Force decisions
- J. Discussion and Agreement re Goals Pertaining to HCR 358
1. Examine alternatives to the Procurement Code process
  2. Consider selection process for PEG advisory board members
    - i. Task Force member Clyde Sonobe indicated that he had spoken with Representative Yamashita, the Representative who signed HCR 358, for clarification as to what was intended by the reference to the "PEG advisory board". Clyde Sonobe said that Rep. Yamashita indicated that his references to committees/boards contained in HCR358 were to the "Cable Advisory Committee (CAC)" and the "Boards of Directors" of the 4 PEG access organizations (Olelo, Hoike, Na Leo, Akaku).
  3. Submit report to the Legislature by December 20, 2008
  4. Take into account the First Amendment rights of PEG
  5. Task Force member April suggested adding a goal that would recognize PEGs as a local public asset not a state asset thereby embedding localism; there was discussion both pro and con on this subject

6. Task Member Sonobe indicated that DCCA wanted the Task Force to also look at the ownership of assets currently used by PEG entities
  7. No vote was taken on this item as the Task Force ran short on meeting time and needed to address the Agenda for the next meeting; the item will be addressed as Item v. on the next Agenda
- K. Preparation for the Next Meeting
1. 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)
      1. Date
      2. Agenda
    - xi. Adjournment
  2. Date of Next Meeting – August 27, 2008, 1 pm – 4 pm
- III. Adjournment -- The meeting adjourned at 4:00 pm.



LINDA LINGLE  
GOVERNOR

JAMES R. AIONA, JR.  
LIEUTENANT GOVERNOR

STATE OF HAWAII  
OFFICE OF THE LIEUTENANT GOVERNOR  
OFFICE OF INFORMATION PRACTICES

NO. 1 CAPITOL DISTRICT BUILDING  
250 SOUTH HOTEL STREET, SUITE 107  
HONOLULU, HAWAII 96813  
Telephone: (808) 586-1400 FAX: (808) 586-1412  
E-MAIL: oip@hawaii.gov  
www.hawaii.gov/oip

PAUL T. TSUKIYAMA  
DIRECTOR

FAX TRANSMITTAL

DATE: JULY 30, 2008 NO. OF PAGES: 3  
Page(s) to follow

TO: Mr. Clyde S. Sonobe Fax: (808) 586-2625  
Administrator  
Cable Television Division  
Department of Commerce  
and Consumer Affairs  
P.O. Box 541  
Honolulu, HI 96809

FROM: Linden Joesting, Staff Attorney (808) 586-1412 fax  
Office of Information Practices (808) 586-1400 phone

RE: Request for Opinion (S RFO-G 08-11)

Attached is S Memo 09-1 re: DCCA Cable TV Task Force and the Sunshine Law, dated July 29, 2008.

Original is being mailed to you.

Original will NOT be mailed to you, unless requested.

If there are any problems receiving this message, please contact:

CONTACT: Dawn Shimabukuro

PH. #: 586-1400

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LINDA LINGLE  
GOVERNOR

JAMES R. AIONA, JR.  
LIEUTENANT GOVERNOR

**STATE OF HAWAII**  
**OFFICE OF THE LIEUTENANT GOVERNOR**  
**OFFICE OF INFORMATION PRACTICES**

PAUL T. TSUKIYAMA  
DIRECTOR

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[www.hawaii.gov/oiip](http://www.hawaii.gov/oiip)

The Office of Information Practices ("OIP") is authorized to issue this advisory opinion concerning compliance with part I of chapter 92, Hawaii Revised Statutes ("HRS") (the "Sunshine Law") pursuant to section 92F-42(18), HRS.

**MEMORANDUM OPINION**

**Requester:** Department of Commerce and Consumer Affairs, Cable TV Division  
**Board:** Public, Education, and Government Access Task Force  
**Date:** July 29, 2008  
**Subject:** DCCA Cable TV Task Force and the Sunshine Law (S RFO-G 08-11)

**Request for Opinion**

Requester sought an advisory opinion on whether the Public, Education, and Government Access Task Force ("Task Force") is subject to the Sunshine Law. The Task Force was created by House Concurrent Resolution 358 HD1 during the 2008 regular session. Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's letter of June 17, 2008, and its attached House Concurrent Resolution; and telephone conversations with the Division's attorneys, Laureen Wong and Rod Tam.<sup>1</sup>

**Opinion**

OIP concludes that the Task Force is not a board or commission subject to the Sunshine Law. The Task Force was not created by "constitution, statute, rule, or executive order," nor was it created by an agency which is vested with specific statutory authority to create a board or commission.

**Statement of Reasons for Opinion**

The Legislature, by House Concurrent Resolution ("HCR"), requested that the Hawaii Department of Commerce and Consumer Affairs ("DCCA") create a Task Force to

<sup>1</sup> OIP provided an advisory opinion on June 23, 2008 about the Task Force which was withdrawn on June 26, 2008. OIP issues this revised opinion in response to the request.



solicit public input and examine methods other than the Public Procurement Code process to oversee PEG expenditures and ensure proper checks and balances; and . . . examine the selection process for PEG advisory board members; . . . and that recommendations made by the task force should take into account the first amendment rights of PEG; and . . . submit a report of suggested policy changes to the Legislature no later than 20 days prior to the convening of the Regular Session of 2009.

H. Con. Res. 358, H.D. 1 (24<sup>th</sup> Leg. 2008).

Nothing in the language or legislative history of H. Con. Res. 358 discusses the applicability of the sunshine law to this Task Force. No paperwork approving or implementing the Resolution was done by the Director of the DCCA nor the Governor. The Task Force is being administered through the DCCA's Cable TV Division.

In order to determine whether the Task Force is a "board or commission" subject to the Sunshine Law, we first looked to the definition of the term "board" in the Sunshine Law. The Sunshine Law defines a "board" as:

any agency, board, commission, authority, or committee of the State or its political subdivisions *which is created by constitution, statute, rule, or executive order*, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

Haw. Rev. Stat. § 92-2(1)(1993)(emphasis added).

More specifically, in order to be a "board or commission" a body must have five elements. It must be: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) created by constitution, statute, rule, or executive order; (3) have supervision, control, jurisdiction or advisory power over specific matters; (4) required to conduct meetings; and (5) required to take official actions. Haw. Rev. Stat. § 92-2(1); OIP Op. Ltr. No. 01-01 at 11.

The first question is whether concurrent resolution 358 is equivalent to "constitution, statute, rule or executive order". Where the language of a statute is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. *Olelo: The Corporation for Community Television v. Office of Information Practices*, 116 Haw. 337, 344 (2007). Implicit in the task of statutory construction is the obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. *Id.*

The plain and obvious meanings of the terms "constitution, statute, rule or executive order" do not generally include "resolution". A resolution, whether simple or concurrent, is a formal expression of a legislative body's opinion or desired action that does not have the force of law. OIP Op. Ltr. No. 08-02.

While OIP has recognized instances in which a resolution could come within the definition of "statute" and could have the force and effect of law, it is clear that Concurrent Resolution

358 does not fall within that category as it was not subject to the review and approval of the chief executive. OIP Op. Ltr. No. 08-02, n. 6. *See also, Consumer Energy Council v. Fed. Energy Reg. Comm'n.*, 673 F.2d 425, 459 n. 140 (D.C. Cir., 1982). We thus conclude that the Task Force created pursuant to Concurrent Resolution 358 was not created by "constitution, statute, rule or executive order".

Finally, OIP reviewed whether the Director of the DCCA has the specific statutory authority to create a board or commission. OIP has recognized that creation of a board pursuant to specific statutory authority is creation pursuant to statute. . OIP Op. Ltr. No. 01-01 at 12. However, the Director of the DCCA was not given such authority in chapters 26 (Executive and Administrative Departments) or 440G (Cable Television Systems), Hawaii Revised Statutes. In Chapter 440G the Director is only provided,

the power and jurisdiction to supervise and regulate every cable operator . . . so far as may be necessary to carry out the purposes of this chapter, and to do all things which are necessary or convenient in the exercise of this power and jurisdiction.

Haw. Rev. Stat. § 440G-12(a)(1993).

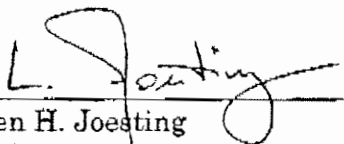
Chapter 26, Hawaii Revised Statutes, describes the powers and duties of the DCCA. The department is headed by a single executive known as the director. Haw. Rev. Stat. § 26-9(a). Nothing in section 26-9, HRS specifically grants the director or department the authority to create a board or commission.

Because the Task Force was not "created by constitution, statute, rule, or executive order," it falls outside the scope of the Sunshine Law.

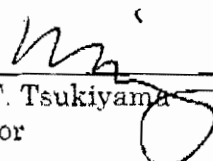
### Conclusion

OIP concludes that this Task Force is not a board subject to the sunshine law.

### OFFICE OF INFORMATION PRACTICES

  
\_\_\_\_\_  
Linden H. Joesting  
Staff Attorney

APPROVED:

  
\_\_\_\_\_  
Paul T. Tsukiyama  
Director

## David Franzel

---

**From:** Jay April [jay@akaku.org]  
**Sent:** Monday, July 28, 2008 11:10 AM  
**To:** David Franzel  
**Cc:** 'keo@keoinc.org'; 'gtakase3@hotmail.com'; 'roy.amemiya@centralpacificbank.com'; 'gbenevides@co.hawaii.hi.us'; 'eknutzen@kauai.gov'; 'shelley.pellegrino@co.maui.hi.us'; 'ghirata@honolulu.gov'; 'Geri\_Ann\_Hong@notes.k12.hi.us'; 'david@hawaii.edu'; 'Clyde.Sonobe@dcca.hawaii.gov'; John Bruce; Ellen Pelissero; Richard Michaels; Michael Duberstein; Jim & Lei; Linda Puppolo; staff@akaku.org; Dave DeLeon; Sen. J. Kalani English; Sen. Shan Tsutsui; Rep. Mele Carroll; repmckelvey@capitol.hawaii.gov; Ireifurth@dcca.hawaii.gov; Laureen.K.Wong@dcca.hawaii.gov; Glen.WY.Chock@dcca.hawaii.gov; Patti.K.Kodama@dcca.hawaii.gov; Rodney.J.Tam@hawaii.gov  
**Subject:** Re: Final HCR 358 Task Force Agenda - August 4, 2008 Meeting

Aloha David,

Thank you for your response. I am looking forward to a productive meeting on Monday.

Please understand that although this is not at all personal and I believe you are a very good facilitator, the fact remains that a facilitator was never approved by Task Force members even at the beginning and therefore it seems only logical that Eric would facilitate until a chair is chosen whereby the members can decide.

Nevertheless, the agenda item stating "arguments for procurement" is questionable. If we are to follow the mandate of the Reso, wouldn't it be more appropriate to discuss "arguments against procurement," what PEG Access is and why it is a "sole source" virtually everywhere else in America?

The Reso specifically asks us to look at alternatives to procurement not having an agenda item to argue for it.

Finally, there are a few housekeeping areas where you or DCCA can be of assistance. I cannot speak for other teleconference venues but it would help if the official meeting agenda could include a room number on the first floor for the Maui meeting. It would also be extremely helpful if DCCA could provide prior notification to venue personnel and give us the name of a local contact with phone number. A technician should also be made available on Maui to ensure all equipment for filming and transmission are set up properly. At the last meeting no one was there and the Akaku film crew and members of the public had difficulty getting access because the Sherrif on duty was unaware that a state meeting was scheduled or about to take place.

This issue is important to us and to our Maui Nui public. Thank you for attention to these and other Task Force matters.

Best Regards,

Jay April  
President and CEO  
Akaku: Maui Community Television

4.  
On Jul 28, 2008, at 7:00 AM, David Franzel wrote:

> Jay, other Task Force Members, and email recipients,  
>  
> At the Task Force's request, Eric Knutzen and I facilitated the Agenda  
> which was put together during the meeting from the suggestions of Task  
> Force members (except for my suggestion to add Public Comment to the  
> Agenda) in  
> the exact order as shown. The Agenda was read out loud at least once

> for the Task Force members and there were no objections made at that  
> time.  
> Without Task Force action to revise the Agenda, I'll need to circulate  
> the Agenda as it was discussed at the last meeting.  
>  
> I don't believe that a decision was made that Eric would facilitate  
> the next meeting except for the Chair/Vice Chair and facilitator  
> discussion. This is why I noted myself, as facilitator, as the person  
> to call the meeting to order. If, before the meeting, the Task Force  
> has another understanding  
> then whomever it decides should call the meeting to order.  
> Likewise, if the  
> Task Force decides to take Public Comment prior to the Chair/Vice  
> Chair item or any other item and decides on the allocation of public  
> speaking time, etc. I would welcome their guidance and will follow  
> their instructions.  
>  
> I remain committed to assisting the Task Force in addressing the  
> Resolution by acting as your facilitator until completion of the  
> Report and understand that I serve at the pleasure of the Task Force  
> until told otherwise.  
>  
> The Final Agenda is attached and the Draft Minutes will follow.  
>  
> Thanks very much for your consideration and I look forward to working  
> with you on this project.

> David Franzel, Facilitator

> -----Original Message-----

> From: Jay April [mailto:jay@akaku.org]  
> Sent: Thursday, July 24, 2008 5:37 PM  
> To: David@DavidFranzel.com  
> Cc: keo@keoinc.org; gtakase3@hotmail.com;  
> roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us;  
> eknutzen@kauai.gov; shelley.pellegrino@co.maui.hi.us;  
> ghirata@honolulu.gov; Geri\_Ann\_Hong@notes.k12.hi.us; david@hawaii.edu;  
> David@DavidFranzel.com; Clyde.Sonobe@dcca.hawaii.gov; John Bruce;  
> Ellen Pelissero; Richard Michaels; Michael Duberstein; Jim & Lei;  
> Linda Puppolo; staff@akaku.org; Dave DeLeon; Sen. J. Kalani English;  
> Sen. Shan Tsutsui; Rep. Mele Carroll; repmckelvey@capitol.hawaii.gov  
> Subject: Re: Fwd: Proposed HCR 358 Task Force Agenda - August 4, 2008

> Dear Cable Television Division,

> As a member of the task force, I have exceptions on the proposed  
> Agenda items as follows. First, it was agreed that Mr. Eric Knutzen  
> would act as interim chairperson of the task force for purposes of  
> calling the next meeting to order and choosing a permanent task force  
> chairperson. Mr. David Franzel is not a member of the task force and  
> the task force has not voted or otherwise approved his participation  
> as facilitator or presiding officer. Mr. Franzel acknowledged this and  
> even commented that he had other things to do with his time if the  
> task force didn't approve his facilitatorship.

> Second, it was agreed that public testimony would occur before the  
> choosing of a task force chair as members of the public may wish to  
> comment on that before action is taken. Third, the task force has not  
> set rules regarding the administration of oral testimony and the  
> proposed agenda's statement that speakers may be limited is false and  
> misleading. Rules for the administration of oral testimony are  
> important to complete the business of the task force, but the task  
> force has not adopted rules yet and to include that statement would be

> to impliedly adopt a rule.  
>  
> Fourth, there was no agreement that "Arguments for Procurement Code"  
> would be an agenda item and that is not within the substantive or  
> procedural purview of the task force's charge. Rulemaking is an  
> alternative to the Procurement Code but there are others and the task  
> force did not agree to lump all of them together and then give  
> "Arguments for Procurement Code" its own agenda item.  
>  
> For these reasons and others I believe it is important that the call  
> to order on the agenda be amended to defer to a member of the task  
> force and not Mr. Franzel and that the second item on the agenda be to  
> amend the agenda.  
>  
> Respectfully,  
>  
> Jay April  
> President and CEO  
> Akaku: Maui Community Television  
>  
>  
> Jay April wrote:  
>  
>> Begin forwarded message:  
>>  
>>> \*From: \*cabletv@dcca.hawaii.gov <mailto:cabletv@dcca.hawaii.gov>  
>>> \*Date: \*July 23, 2008 4:32:04 PM HST  
>>> \*To: \*jay@akaku.org <mailto:jay@akaku.org>, keo@keoinc.org  
>>> <mailto:keo@keoinc.org>, gtakase3@hotmail.com  
>>> <mailto:gtakase3@hotmail.com>, roy.amemiya@centralpacificbank.com  
>>> <mailto:roy.amemiya@centralpacificbank.com>,  
>>> gbenevides@co.hawaii.hi.us <mailto:gbenevides@co.hawaii.hi.us>,  
>>> eknutzen@kauai.gov <mailto:eknutzen@kauai.gov>,  
>>> shelley.pellegrino@co.maui.hi.us  
>>> <mailto:shelley.pellegrino@co.maui.hi.us>, ghirata@honolulu.gov  
>>> <mailto:ghirata@honolulu.gov>, Geri Ann Hong@notes.k12.hi.us  
>>> <mailto:Geri Ann Hong@notes.k12.hi.us>, david@hawaii.edu  
>>> <mailto:david@hawaii.edu>, David@DavidFranzel.com  
>>> <mailto:David@DavidFranzel.com>, Clyde.Sonobe@dcca.hawaii.gov  
>>> <mailto:Clyde.Sonobe@dcca.hawaii.gov>  
>>> \*Subject: \*\*Proposed HCR 358 Task Force Agenda - August 4, 2008\*  
>>>  
>>>  
>>> Dear Task Force Members:  
>>>  
>>> Attached is the proposed agenda for the next task force meeting to  
>>> be held on Monday, August 4, 2008. The agenda items were agreed to  
>>> at the June 30, 2008 meeting as documented by Facilitator, David  
>>> Franzel.  
>>>  
>>>  
>>>  
>>> If you have any comments or concerns on the agenda items, please  
>>> contact the Facilitator at David@DavidFranzel.com  
>>> <mailto:David@DavidFranzel.com> and copy Cable Television Division  
>>> by \*Friday, July 25, 2008, 12 NOON.\*  
>>>  
>>> Thank you.  
>>>  
>> -----  
>> -  
>> --  
>>  
>  
> --

July 31, 2008

Eric Knutzen  
Interim Chairman  
H.C.R. 358, H.D. 1 Task Force  
4444 Rice Street Ste 427  
Lihue, HI 96766

Re: Brief History and Context of PEG Access Organization Designation

Dear Mr. Knutzen and Members of the Task Force,

Please allow this to serve as written testimony to the Task Force as brief history and context of PEG access organizations and their designation by the State. Every attempt has been made to avoid or minimize the use of arcane legal jargon. There are a number of points to consider while reading this. First, as determined by the Hon. Joel E. August, Judge of the Second Circuit Court, whatever method the Director chooses to designate access organizations, the method must be determined by rule. The Attorney General has argued that the Public Procurement Code must be followed. Others argue that the use of the procurement code exceeds the authority of the director delegated to him by the statute.

#### **Where Does PEG Access Come From?**

Although cable has been around since World War II, the Federal Communications Commission (FCC) first assumed jurisdiction over cable television in 1965 when microwave antennae began being used. This assumption of jurisdiction was upheld because, as the U.S. Supreme Court noted, "the Commission has reasonably concluded that regulatory authority over cable television is imperative if it is to perform with appropriate effectiveness certain of its

responsibilities.” United States v. Southwestern Cable Co., 392 U.S. 157 (1968) These responsibilities included assuring the preservation of local broadcast service and to effect an equitable distribution of broadcast services among the various regions of the country.

Over the next twenty years, the FCC went from stringent regulation of cable television operators to almost no regulation at all. This included an FCC rule in 1972 that required cable systems in the top 1000 U.S. television markets to provide three access channels – one each for education, government and public use. The rule was amended in 1976 to include communities with 3500 or more subscribers. This was subsequently struck down by the U.S. Supreme Court in FCC v. Midwest Video Corp., 440 U.S. 689 (1976).

The trend toward cable deregulation led the U.S. Congress to amend the Communications Act of 1934 with the Cable Franchise Policy and Communications Act of 1984. Many of the features of cable regulation that we are familiar with today were included: areas of ownership, channel usage, franchise provisions and renewals, subscriber rates and privacy, obscenity and lockboxes, unauthorized reception of services, equal employment opportunity, and pole attachments. The Act also spelled out jurisdiction of the federal government and jurisdiction of state and local governments.

Included in this act was the provisions that allowed state or local governments to require PEG access channels, barred cable operators from exercising editorial control over PEG access content, and absolved them from any liability for PEG access content. 47 U.S.C. 521 et. seq. State or local franchising authorities also have the power to assess up to a five percent fee on revenue to support PEG access channels.

While the federal law gives discretions to states about whether or not to have PEG access, our state legislature, in 1987, amended the cable television statute to require PEG access channels as part of the enfranchisement of a cable operator: “The cable operator shall designate three or more

channels for public, educational, or governmental use.” Haw. Rev. Stat. 440G-8.2(f) Under a modified contested case process as established under Chapter 440G, Haw. Rev. Stat., five PEG access channels have been required by the Director for all franchises issued by the State through the so-called “Decisions and Orders.”

The Public Access Television movement operates under a number of basic principles. Generally, PEG access television stations are run by private non-profit corporations or local grassroots organizations. Services are available at a low cost or free of charge to the public. Services and cablecast time is offered in an inclusive, content neutral, non-discriminatory manner that supports the idea of maximizing opportunities for the public to exercise important Free Speech rights. Education, training and technology are available free of charge or at a low cost to any member of the community to assist in the production of cablecast content. Access organizations may engage in special production/journalism activities that cover community matters not otherwise covered.

### **The Hawai'i Administrative Procedure Act**

Government agencies that are delegated specific responsibilities by the legislature engage in government activity that is characteristic, in different cases, of all three branches of the government: the legislative, executive and judicial.

Since World War II, administrative procedure acts were developed for four basic purposes: (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review.

Administrative action is organized into two types: (1) rule-making and (2) adjudication. Hawai'i has adopted an administrative procedure act at Chapter 91, Haw. Rev. Stat.



“Rule’ means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.” However, excluded from the definition of a ‘rule’ are “regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.” Haw. Rev. Stat. 91-1(4)

Adjudicated procedures are called ‘contested cases.’ “Contested case’ means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” Haw. Rev. Stat. 91-1(5)

Under rule-making, an agency is required to give thirty days’ notice for a public hearing of rule-making. The notice must include (1) a summary of the proposed action, (2) a copy of the proposed rule after action, (3) notice of where the proposal may be inspected and (4) the date time and place where the public hearing will be held. Haw. Rev. Stat. 91-3(a)(1)

Additionally, the agency must “[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule.” Haw. Rev. Stat. 91-3(a)(2)

### **A Rule Is Required**

Generally, when circumstances allow for some thing to be accomplished by more than one method, a rule ought to be adopted to guide the agency and the public. There must be an accepted manner of doing things even where the same thing reasonably might be done a number of different ways. When a state or county agency is delegated authority to do something by the legislature and it has discretion to choose a particular method over another, a rule is required. Haw. Rev. Stat. 91-1

In Aluli v. Lewin, 73 Haw. 56, the Department of Health argued that it was not required to

promulgate rules to determine the methodology of issuing air pollution permits. The Intermediate Court of Appeals reversed holding that the methodology of issuing air pollution permits involves “an integral part of the quality of life and the public should have input in the matter.” The Court held, “These procedural requirements ensure fairness by providing public notice, an opportunity for all interested parties to be heard, full factual development and the opportunity for continuing comment on the proposed action before a final determination is made.”

In Hawaii Prince Hotel Waikiki Corp. v. City and County of Honolulu, 89 Haw. 381, the Hawai'i Supreme Court ruled that the tax assessor's unwritten methodology for making a determination as delegated to him by county ordinance was a rule within the meaning of Chapter 91, Haw. Rev. Stat. and the process for promulgating rules must be followed.

In Aguar v. Hawaii Housing Authority, 55 Haw. 478, the Hawai'i Supreme Court ruled that the Hawaii Housing Authority's amendments to its master management resolution governing scheme under which public housing tenants paid rent and governing their right to continued occupancy in public housing were "rules" within meaning of Chapter 91, Haw. Rev. Stat. and the process for promulgating rules must be followed.

Most recently, our appellate courts, in Tanaka v. State, 117 Haw. 16, ruled that the Department of Land and Natural Resources was required to amend its rule incorporating the permissible days for game-bird hunting, pursuant to Chapter 91, Haw. Rev. Stat., before it could add two extra days to each week of the game-bird hunting season.

### **Access Organization Designation and the Requirement of a Rule**

The regulation of “access organization” derives from the Director of the Department of Commerce and Consumer Affairs (DCCA) authority to enfranchise and regulate cable operators. Haw. Rev. Stat. 440G-1(1) states, in part, “Access organization means any nonprofit 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[.]” As noted above, Haw. Rev. Stat. 440G-8.2(f) requires access channels be provided by cable operators. Chapter 440G, Haw. Rev. Stat. provides a modified process for the enfranchisement of cable television system operators that can be characterized as a “beefed up” contested case proceeding.

The DCCA has utilized modified “contested case” proceeding to deal with the designation of access organizations as an extension of the contested case proceedings for enfranchising cable operators. The DCCA's basis for this procedure has been to allow “maximum flexibility” in the overseeing of access organizations. In 2005, the DCCA and the State Procurement Office opined that access organization designation was subject to Chapter 103D, Haw. Rev. Stat., also known as the Public Procurement Code, because the DCCA had regularly characterized the terms of its designation of access organizations as an “agreement.”

In Akaku v. Reifurth et al, Civil No. 07-1-0278(1), the Hon. Joel E. August, Judge of the Second Circuit Court, determined that “designation” of access organizations “by the director” was subject to rule-making and that the use of the Procurement Code without promulgating rules violated the procedural requirements of Chapter 91, Haw. Rev. Stat. The Court declined to rule on the question of whether the Director may promulgate rules adopting the Public Procurement Code as the method of designation. Akaku's position is that the Public Procurement Code is an unlawful delegation of the Director's authority to designate and that it is inconsistent with the statutory framework of cable television regulation in general.

The Aluli Court went further to explain the importance of the rule-making process: “When an agency is accorded unbridled discretion in issuing permits as here, the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe the determination process. The public and interested parties are without

any firm knowledge of the factors that the agency would deem relevant and influential in its ultimate decision. The public has been afforded no meaningful opportunity to shape these criteria which affect their interest.” (internal citations omitted)

### **What Kind of Rule Is Preferable**

Because of these developments in access organization designation, the State Senate approved Senate Bill No. 1789 and transmitted it to the House of Representatives for consideration this last year. Senate Bill No. 1789 attempted to clarify that designation of “access organizations” was not subject to, nor appropriate for the Public Procurement Code and it also assisted the director by specifying the range of policy choices the Director had in crafting a process for designating access organizations.

As part of the legislative machinations, Senate Bill No. 1789 was killed and House Concurrent Resolution No. 358 was adopted in its place to have a task force study the various alternatives to the Public Procurement Code. Rule-making is not an alternative to the Public Procurement Code but is a requirement for the Director to designate access organizations. The question of alternative methods of designating access organizations is the question precisely before the task force. One alternative of questionable legality, which is not for consideration by this Task Force, is the use of the Public Procurement Code.

### **The Contested Case Process**

The alternative presented and adopted by the Senate, through Senate Bill No. 1789, is a modified contested case proceeding similar to the enfranchisement of cable operators. “For purposes of distinction between administrative agency rule-making and adjudication, “rule-making” is essentially legislative in nature because it operates in future, whereas, “adjudication” is concerned

with determination of past and present rights and liabilities of individuals where issues of fact often are sharply controverted.” Application of Hawaiian Electric Co., Inc., 81 Haw. 459

The contested case process is preferable to other methods of designation for a number of reasons. First, the designation of access organizations is an integral part of the cable enfranchisement process and should not be separated from the process of enfranchisement. Second, it is the most familiar government process to most people – whether by seeking a variance for a home improvement project, zoning change, building within the coastal zone management area, resolving disputes between management and workers, water permits, public utility permits. Third, the contours of the process have been well litigated throughout the United States for over sixty years allowing the Director to bypass “reinvention of the wheel.”

Fourth, the contested case process is the most concise well-known process which requires the decision-maker to consider the complete record. Interested parties may intervene and present evidence and argument that can help the decision-maker make the best decision based upon a full and complete record. The contested case process supports transparency, rationality and consistency.

Unlike the Public Procurement Code, issues of social or community capital and the First Amendment rights of the public cannot be easily or adequately quantified or compared in the competitive sealed bidding process. These types of necessary considerations in designation of access organizations require open and thorough qualitative analysis of the particular and unique contexts of the various access organizations.

Very truly yours,  
LAW OFFICE OF LANCE D COLLINS



LANCE D COLLINS  
Attorney for Akaku: Maui Community Television

**David Franzel**

**From:** Eric Knutzen [eknutzen@kauai.gov]  
**Sent:** Monday, August 18, 2008 11:13 AM  
**To:** Jay April  
**Cc:** David Franzel; jay@akaku.org; keo@keoinc.org; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; shelley.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  
**Subject:** RE: Next Task Force Meeting and DCCA CATV Cooperation with HCR 358 Task Force

Aloha, Jay

**Task Force Member Access, Research in Advance of Meeting**

Pls feel free to email the link off of Akaku's site now to all Task Force members members. In this way, we'll have time to have viewed the material and can vote to include or not include the video link in the minutes to be posted, for greater public viewing and participation.

This is a practical solution, as viewing in our next meeting itself exhausts too much precious time - of which we have all too little to accomplish our goals.

We'll treat the viewed video identical to Task Force submitted material in our next meeting for potential inclusion in our minutes, subject to the outcome of our vote (as mentioned above). Viewing the material in advance will ensure that each of us is fluent in the material and its relevance to our goals as a Task Force.

**Wider Public Access (equally important)**

I know that Clyde is reviewing his department's policies, and in our next meeting when reviewing prior minutes of our last meeting - let's make sure that we we receive from Clyde a confirmation as to whether or not they can post such links going forward.

Mahalo,

Eric

-----Original Message-----

**From:** Jay April [ ]  
**Sent:** Thursday, August 14, 2008 2:31 PM  
**To:** Eric Knutzen  
**Cc:** Clyde.Sonobe@dcca.hawaii.gov; Lawrence M Reifurth; David Franzel; keo@keoinc.org; clyde.Sonobe@dcca.hawaii.gov; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; Shelley Pellegrino; ghirata@honolulu.gov; Geri\_Ann\_Hong@notes.k12.hi.us; David Lassner  
**Subject:** Next Task Force Meeting and DCCA CATV Cooperation with HCR 358 Task Force

Aloha Eric,

Thank you for your dedication to the work of the HCR 358 Task Force and your leadership as Chair. I can find no notice of the next Task Force meeting on the DCCA website nor have I been able to locate a link to the posted Video Report to the HCR 358 that brings national expertise and valuable perspective to this very important issue. This lack of action on the part of DCCA Cable Administration adversely affects the ability of the Task Force to get some meaningful work done between meetings and frustrates our mandate to provide significant outreach to the public from which we have been directed by the legislature to solicit comment. I am concerned that the Department is not making enough of an effort to make information available to Task Force members or the public which I do not believe is consistent with the intent of the Reso and the will of the Task Force. If you can, I would like to request that you discuss this matter with Director Reifurth to see if these issues can be addressed in a timely fashion well in advance of our next meeting which I believe, is less than two weeks away. I am also

12/14/2008

willing to take the time to send the video report via U.S. Mail if the cable division can provide Task Force member addresses. In the meantime the report can be viewed in it's entirety on the internet at akaku.org. Dissemination, however, via the HCR 358 section of the DCCA website would provide appropriate distribution to TF members and have the potential to reach wider and more diverse publics.

Respectfully,

Jay April  
President and CEO  
Akaku: Maui Community Television

12/14/2008

**From:** Eric Knutzen [mailto:eknutzen@kauai.gov]  
**Sent:** Wednesday, September 03, 2008 10:20 AM  
**To:** Jay April  
**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; 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

Hi, Jay

After speaking with Aaron yesterday, it's clear that Aaron will not be present whatsoever in a Q&A forum.

All that we can expect at this point is written responses to our written questions.

Hope this clarifies Aaron's position,

Eric

**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:

Aloha, Task Force Members

Chair Knutzen has asked Aaron Fujioka for his office to participate in a Q&A session.

Aaron respectfully responded today that he would appreciate receiving the questions in writing.

To address this, we would like to pursue the following steps:

- 1) Please email any questions you have to me within just over a week, by Wednesday, September 10, 2008
- 2) I'll consolidate these questions and submit them no later than Friday, September 12 to Aaron
- 3) For his response by Monday, September 22
- 4) For our review in our next meeting on Wednesday, September 24 at 1 pm

Appreciatively,

David

**MAUI MEDIA LAB  
FOUNDATION**

CLERK OF COURT DIVISION  
OFFICE OF THE CLERK OF COURT  
HONOLULU, HI

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A. F. S.  
FILE

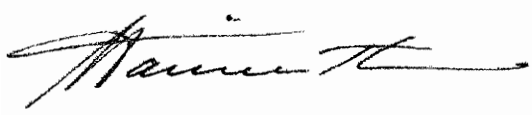
Mr. Clyde Sonobe  
DCCA - CATV  
P.O. Box 541  
Honolulu, HI 96809

September 16, 2008

Dear Mr. Sonobe,

As requested; enclosed please find Mr. Epstein's public testimony to the HCR358 Task Force, August 4, 2008.

Mahalo!



Susan Fairweather  
Executive Administrator

4 August, 2008

Public Testimony of  
Sam Epstein  
Executive Director,  
The Maui Media Lab Foundation  
to the HCR358 Task Force  
Exploring Alternatives to the  
Legal Procurement of  
Public, Educational and Governmental  
or "PEG" Access Services

Aloha Members of the Committee and to the Public,

Thank you for providing the community with an opportunity and a forum to discuss alternatives to the Legal Procurement of Public, Educational and Governmental or "PEG" Access Services. Fortunately, it does not take a teacher, nor student of media and governance, nor a self-appointed task force to identify the alternative to the legal procurement of Public, Educational and Governmental or "PEG" Access Services. Simple definition shows the alternative to be the illegal procurement of Public, Educational and Governmental or "PEG" Access Services. In fact, The State of Hawaii has been illegally procuring Public, Educational and Governmental or "PEG" Access Services for years now, according to the opinions, letter orders, request for exemptions, and "exemptions" issued, respectively, by the Supreme Court of the State of Hawaii, Attorney General, Second Circuit Honorable Judge August, the Department of Commerce and Consumer Affairs, the State Procurement and even the incumbent non-profit PEG Access Organizations themselves.

It can be fairly argued that illegal procurement in this case should be moot because of the excellent quality of Public, Educational and Governmental or "PEG" Access Services being provided to the majority of Hawaiian residents despite the ongoing illegal procurement process. However, this has been only one of the possible outcomes of the illegal procurement process and what may be true for the majority of the public, living and residing on O`ahu, being provided Public, Educational and Governmental or "PEG" Access Services by Olelo: Corporation for Community Television, has not been true, on our outer islands, in our more remote communities.

I have been fortunate to have had the opportunity to study Media and Governance as an invited visiting researcher to Keio University in Fujisawa, Japan. One of things I learned was a very old chinese proverb, "The Sky is Very Tall, and the Emperor is Far Away." It is indeed unfortunate, that the professionalism, insistence on accountability, and emphasis on self-management, stewardship and community outreach exemplified personally by Keli`i Lopez' leadership of Olelo and by her entire community television team on the Island of O`ahu has not been followed by the executive management of the incumbent PEG Access organizations on the Islands of Maui, Molokai, Lanai, Kauai nor the Big Island of Hawaii.

In fact, illegal procurement has produced an entire spectrum of alternatives including an acknowledged lack of operational and fiscal accountability (read fraud, misappropriation, theft of public resources, embezzlement of non-profit funds, illegal campaign financing) and even physical altercations by board members, filmed and broadcast by the staff of Akaku: Maui Community Television on the Island of Maui. Malahini Chief Executives, Board Members and Lawyers that misperceive the proud Hawaiian tradition of personal responsibility, self awareness and self policing as "non-enforcement" and an opportunity to steal are not only making a huge mistake, they are having a significant negative impact on the remote communities of our outer Hawaiian Islands by withholding the resources, facilities and training, that they were entrusted to provide.

I have learned as a teacher that students tend to ask really good questions that quite often cut right to the point.

"How is it not corruption that no opportunity is being provided for outer islanders to testify by teleconference from Hana, Molokai or Lanai when one of the big issues is the lack of public access resources, not being shared with Hana, Molokai and Lanai?"

"How is it not theft for Jay April, CEO and President of Akaku: Maui Community Television to spend more public access television money on junkets to the mainland, jet airplanes, meals and hotels and meals in minnesota than he authorizes for public access television for the entire Island of Lanai?"

"How is it not theft for Jay April, CEO and President of Akaku: Maui Community Television to spend more public access television money on health insurance for himself than he authorizes for public access television for the entire community of Hana?"

"How is it not theft for Jay April, CEO and President of Akaku: Maui Community Television to authorize payments in excess of \$130,000.00, one hundred and thirty thousand dollars to Lance Collins, the Political Media Chair for Maui's Democratic Party, more many than he authorizes for public access television for the entire Island of Molokai."

Akaku: Maui Community Television is allegedly a 501(c)(3) non-profit corporation and as such has very specific limits on how money they receive may be spent. We all know that non-profit money and assets can not be transferred to a private LLC, nor can non-profit money be used to produce or distribute propoganda, or to lobby for or against an a candidate for office, or pending legislation.

How did Akaku, a non-profit, legally transfer millions of non-profit dollars into a privately held LLC, that then purchased private property, a shopping center, with a bar that even last month was busted again for serving alcohol to minors, just feet away from Akaku's studios and summer kids camp and a Minit Stop, that also was busted again recently for selling cigarettes to underage youth.

Why is the law against production and distribution of propaganda by a officers of a non-profit not being enforced with regard to the Save Akaku propaganda created and repeatedly broadcast by CEO/President Jay April and Counsel to Akaku's Board of Directors, Lance Collins, on Akaku's public access cable channels?

Why is the law against illegal lobbying and campaigning by a officers of a non-profit not being enforced with regard to CEO/President Jay April and Counsel to Akaku's Board of Directors, Lance Collins, whom are both registered as Lobbyists with the State of Hawaii during the year 2008, whose notable efforts resulted in the legislation "authorizing" this task force.

It is well known throughout the community, that the Maui Media Lab Foundation media, arts & science high school class of 2007 constructed a facility and response to the RFP for PEG Access Services issue by the State Procurment Office that met and or exceeded every cability critera, state and federal certification called for by the Department of Commerce and Consumer Affairs, however Akaku CEO/President Jay April and Counsel to the Board of Directors of Akaku Lance Collins still try to insist that there is no other option than the incumbent PEG Access organizations.

It is my opinion that these are cynical actions taken by cynical individuals that have taken advantage of our tradition of expectation of self management, self awareness, and even self restraint, apparently, to divide and distract the public, and even this task force, from what is really happening in Maui County while they continue to smugly take, take and more take.

However, what is really happening is that community members across our entire socio-economic strata are coming together, in realization, that our future as a community is built, together, with cooperation, on limu, lepo, and loi not lawyers, lawsuits and legal fees. Steal money can. Steal opportunity...cannot.

I have had the privilege to watch as Hana kids, denied access to Akaku build their own radio station and digital television studio, with no PEG money.

I have had the privilege to watch as Upcountry Kids, denied Access to Akaku, hand build their own HDTV community television station and studios and multi-track recording facility in Paia's old plantation department store and then provide professional rerecording and looping services on "broadcast" television shows and even two Hollywood movies, with no PEG money.

I have had the privilege this last week to watch a 30 foot, Heavily Equipped Educational Vehicle and mobile digital community television production facility, delivered to the Island of Mōlokaʻi. Rebuilt and reconstructed by hand by volunteer students from Hana to Haiku with donated money, out of a retired MEO bus, by the COMMUNITY of MAUI for the residents and keiki of Mōlokaʻi, with no PEG money.

It has become fashionable again to promote science, technology, engineering and mathematics ("STEM") as skills kids might want to consider learning, and maybe even employing in their daily lives, their careers, even. However when we stand mute as public officials, non-profit executives and greedy lawyers entrusted with millions of public dollars to provide this public service -- this public opportunity -- and instead practice ("STEM") Systematic Theft by Exemption from Mandate, to line their own pockets and promote their personal and political agendas, we can at best be said to be sending a mixed message to our youth.

It is my opinion that Akaku's CEO/President Jay April, and Litigator Lance Collins and all involved in the illegal -- continued illegal -- procurement, litigation, request for exemptions, granted exemptions, misappropriation of public funds, funds provided for public access television in exchange for easements upon a public right of way, and defiance of court instructions to follow the law should not only be ashamed of their actions, they should be ashamed of their actions in public.

Thank you for providing the community with an opportunity and a forum to discuss alternatives to the Legal Procurement of Public, Educational and Governmental or "PEG" Access Services. Speaking for myself and for many members of the community I look forward to an end to the illegal procurement of Public, Educational and Governmental or "PEG" Access Services and the application of the legal, fair and public procurement process.

With Much Aloha,

Sam Epstein  
Executive Director  
Maui Media Lab Foundation

## David Franzel

---

**From:** Jay April [jay@akaku.org]  
**Sent:** Monday, August 11, 2008 7:20 PM  
**To:** Eric Knutzen  
**Cc:** David Franzel; keo@keoinc.org; clyde.Sonobe@dcca.hawaii.gov; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; Shelley Pellegrino; ghirata@honolulu.gov; Gerri\_Ann\_Hong@notes.k12.hi.us; David Lassner; krollman@honolulu.gov  
**Subject:** VIDEO REPORT TO HCR 358 TASK FORCE

Aloha Eric,

As agreed at the Aug 4 HCR 358 Task Force meeting, I have posted a VIDEO REPORT to the HCR 358 TASK FORCE on akaku.org, the Akaku:Maui Community Television website (akaku.org) for viewing. The video is a conversation with three of the nation's top PEG access experts on the issue of procurement. As I recall, DCCA Task Force member and cable administrator, Clyde Sonobe agreed to embed the video on the DCCA website if this could be accomplished by his IT staff or as an alternative he would provide a link to the video from the DCCA website so TF members and members of the public could access it there.

Please consider this email as a formal request to the Chair to instruct the DCCA cable administration to comply with this request on behalf of HCR358 Task Force members. It would also be helpful if you could notify members when the video will be accessible from the DCCA Cable Division site. Please let me know if you require further assistance with posting of the video or if members would prefer DVD copies mailed to them in addition to the official posting so they will have an opportunity to review prior to our next meeting.

Thank you for your attention to this very important matter.

Jay April  
President and CEO  
Akaku: Maui Community Television

-----Original Message-----

From: Clyde.Sonobe@dcca.hawaii.gov [mailto:Clyde.Sonobe@dcca.hawaii.gov]  
Sent: Wednesday, August 13, 2008 9:42 PM  
To: Eric Knutzen  
Cc: Clyde.Sonobe@dcca.hawaii.gov; David Franzel  
Subject: Re: FW: VIDEO REPORT TO HCR 358 TASK FORCE

Eric,

As an alternative, you as chair can direct task force members to the Akaku website; according to Jay the video is already available there.

Please call me if you have any questions.

Regards,  
Clyde Sonobe

"Eric Knutzen" <eknutzen@kauai.gov>	To
08/13/2008 12:07 PM	<Clyde.Sonobe@dcca.hawaii.gov>
	cc
	"David Franzel" <david@davidfranzel.com>
	Subject
	FW: VIDEO REPORT TO HCR 358 TASK FORCE

Hi, Clyde

Pls let me know if you're able to add a link to your website.

It would be great if your staff could even provide a link not immediately available to the public, for internal Task Force "extranet" viewing, prior to discussion and potential inclusion in the official minutes of the next meeting.

Eric

From: Eric Knutzen  
Sent: Wednesday, August 13, 2008 12:05 PM  
To: 'Jay April'  
Subject: RE: VIDEO REPORT TO HCR 358 TASK FORCE

Thank you, Jay

DCCA Policy

As I recall, Clyde was going to first verify with DCCA's IT staff if posting of such a link to a video would comply with their Department practice / policy etc.

I do believe that technically it's not a challenge, buy I will request Clyde to reply regarding DCCA's policy on this matter.

Review by Task Force

Normally when attaching documents to meeting minutes, we review such material as a Task Force and then include the material as attachments. For material such as this, a member could request a vote to affirm that the

material is relevant etc.

I'd like to make the video immediately internally available to all Task Force members, either through the DCCA website by providing a link first to Task Force, or as you discussed by mailing a copy on a DVD.

Please let me know if you plan on sending our DVD copies to Task Force members.

I can ask all Task Force members to kindly view the video for our discussion in our next meeting, and potential "attachment to the official final minutes of our next meeting".

Thanks for being so proactive with this, Jay  
Eric

-----Original Message-----

From: Jay April [mailto:jay@akaku.org]  
Sent: Monday, August 11, 2008 7:20 PM  
To: Eric Knutzen  
Cc: David Franzel; keo@keoinc.org; clyde.Sonobe@dcca.hawaii.gov;  
gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com;  
gbenevides@co.hawaii.hi.us; Shelley Pellegrino; ghirata@honolulu.gov;  
Gerri\_Ann\_Hong@notes.k12.hi.us; David Lassner; krollman@honolulu.gov  
Subject: VIDEO REPORT TO HCR 358 TASK FORCE

Aloha Eric,

As agreed at the Aug 4 HCR 358 Task Force meeting, I have posted a VIDEO REPORT to the HCR 358 TASK FORCE on akaku.org, the Akaku:Maui Community Television website (akaku.org) for viewing. The video is a conversation with three of the nation's top PEG access experts on the issue of procurement. As I recall, DCCA Task Force member and cable administrator, Clyde Sonobe agreed to embed the video on the DCCA website if this could be accomplished by his IT staff or as an alternative he would provide a link to the video from the DCCA website so TF members and members of the public could access it there.

Please consider this email as a formal request to the Chair to instruct the DCCA cable administration to comply with this request on behalf of HCR358 Task Force members. It would also be helpful if you could notify members when the video will be accessible from the DCCA Cable Division site. Please let me know if you require further assistance with posting of the video or if members would prefer DVD copies mailed to them in addition to the official posting so they will have an opportunity to review prior to our next meeting.

Thank you for your attention to this very important matter.

Jay April  
President and CEO  
Akaku: Maui Community Television



## David Franzel

---

**From:** Clyde.Sonobe@dcca.hawaii.gov  
**Sent:** Thursday, August 14, 2008 4:41 PM  
**To:** eknutzen@kauai.gov  
**Cc:** david@davidfranzel.com; Lawrence.M.Reifurth@dcca.hawaii.gov  
**Subject:** Fw: Next Task Force Meeting and DCCA CATV Cooperation with HCR 358 Task Force

Eric,

Please refer to my emails to you dated 1) 8-11-08 at 9:55PM and 2) 8-13-08 at 9:41PM.

My email of 8-11-08 inquires as to task force logistics before any item is posted to the DCCA website. These issues, in my opinion, need to be discussed and voted on at a task force meeting. I have not received a response.

My email of 8-13-08 proposes an alternative to Jay April's request - by referring task force members to the Akaku website.

Also, a word of caution to Jay April from you as task force chair is warranted based on the excerpt from his attached email that follows:

"This lack of action on the part of DCCA Cable Administration adversely affects the ability of the Task Force to get some meaningful work done between meetings and frustrates our mandate to provide significant outreach to the public from which we have been directed by the legislature to solicit comment. I am concerned that the Department is not making enough of an effort to make information available to Task Force members or the public which I do not believe is consistent with the intent of the Reso and the will of the Task Force."

I request that you inform members of the task force regarding the contents of my two emails to you dated 8-11-08 and 8-13-08; and address Jay April's attempt to disparage the Department and members of the CATV division.

Regards,  
Clyde Sonobe

----- Forwarded by Clyde Sonobe/DCCA on 08/14/2008 04:25 PM -----

Jay April  
<jay@akaku.org>

08/14/2008 02:28  
PM

To  
Eric Knutzen <eknutzen@kauai.gov>  
cc  
Clyde.Sonobe@dcca.hawaii.gov,  
Lawrence M Reifurth  
<lawrence.m.reifurth@dcca.hawaii.gov>, David Franzel  
<David@DavidFranzel.com>,  
keo@keoinc.org,  
clyde.Sonobe@dcca.hawaii.gov,  
gtakase3@hotmail.com,  
roy.amemiya@centrapacificbank.com,  
"gbenevides@co.hawaii.hi.us"  
<"mailto:gbenevides"@co.hawaii.hi.us">, Shelley Pellegrino  
<Shelley.Pellegrino@co.maui.hi.us>,  
ghirata@honolulu.gov,  
Gerri\_Ann\_Hong@notes.k12.hi.us,

David Lassner <david@hawaii.edu>  
Subject  
Next Task Force Meeting and DCCA  
CATV Cooperation with HCR 358 Task  
Force

Aloha Eric,

Thank you for your dedication to the work of the HCR 358 Task Force and your leadership as Chair. I can find no notice of the next Task Force meeting on the DCCA website nor have I been able to locate a link to the posted Video Report to the HCR 358 that brings national expertise and valuable perspective to this very important issue. This lack of action on the part of DCCA Cable Administration adversely affects the ability of the Task Force to get some meaningful work done between meetings and frustrates our mandate to provide significant outreach to the public from which we have been directed by the legislature to solicit comment. I am concerned that the Department is not making enough of an effort to make information available to Task Force members or the public which I do not believe is consistent with the intent of the Reso and the will of the Task Force. If you can, I would like to request that you discuss this matter with Director Reifurth to see if these issues can be addressed in a timely fashion well in advance of our next meeting which I believe, is less than two weeks away. I am also willing to take the time to send the video report via U.S. Mail if the cable division can provide Task Force member addresses. In the meantime the report can be viewed in it's entirety on the internet at akaku.org. Dissemination, however, via the HCR 358 section of the DCCA website would provide appropriate distribution to TF members and have the potential to reach wider and more diverse publics.

Respectfully,

Jay April  
President and CEO  
Akaku: Maui Community Television

## David Franzel

---

**From:** Jay April [jay@akaku.org]  
**Sent:** Thursday, August 14, 2008 2:31 PM  
**To:** Eric Knutzen  
**Cc:** Clyde.Sonobe@dcca.hawaii.gov; Lawrence M Reifurth; David Franzel; keo@keoinc.org; clyde.Sonobe@dcca.hawaii.gov; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; Shelley Pellegrino; ghirata@honolulu.gov; Gerri\_Ann\_Hong@notes.k12.hi.us; David Lassner  
**Subject:** Next Task Force Meeting and DCCA CATV Cooperation with HCR 358 Task Force

Aloha Eric,

Thank you for your dedication to the work of the HCR 358 Task Force and your leadership as Chair. I can find no notice of the next Task Force meeting on the DCCA website nor have I been able to locate a link to the posted Video Report to the HCR 358 that brings national expertise and valuable perspective to this very important issue. This lack of action on the part of DCCA Cable Administration adversely affects the ability of the Task Force to get some meaningful work done between meetings and frustrates our mandate to provide significant outreach to the public from which we have been directed by the legislature to solicit comment. I am concerned that the Department is not making enough of an effort to make information available to Task Force members or the public which I do not believe is consistent with the intent of the Reso and the will of the Task Force. If you can, I would like to request that you discuss this matter with Director Reifurth to see if these issues can be addressed in a timely fashion well in advance of our next meeting which I believe, is less than two weeks away. I am also willing to take the time to send the video report via U.S. Mail if the cable division can provide Task Force member addresses. In the meantime the report can be viewed in it's entirety on the internet at akaku.org. Dissemination, however, via the HCR 358 section of the DCCA website would provide appropriate distribution to TF members and have the potential to reach wider and more diverse publics.

Respectfully,

Jay April  
President and CEO  
Akaku: Maui Community Television

-----Original Message-----

From: Clyde.Sonobe@dcca.hawaii.gov [mailto:Clyde.Sonobe@dcca.hawaii.gov]  
Sent: Wednesday, August 20, 2008 10:07 AM  
To: Eric Knutzen  
Cc: David Franzel; Laureen.K.Wong@dcca.hawaii.gov;  
Glen.WY.Chock@dcca.hawaii.gov; Parti.K.Kodama@dcca.hawaii.gov  
Subject: Re: FW: Next Task Force Meeting

Hi Eric,

As I've told you before, the VCC's are ICSD's resource; the DCCA is a "user of this resource" and does not set usage policies for the VCCs. Members of the public can provide their own video and audio recording equipment, with the understanding that such recording does not interfere with the meeting. CATV has already provided contact info for each island - Maui's contact is Mike Sone 243-5152. As I informed you previously, Mike has replaced the VCR in the VCC which is available to any public member.

If you as Chair wish to utilize other venues, as suggested by Linda Pupuolo, CATV will ensure that future agendas / notices reflect this change.

CATV has already provided you and David with the room number which is now included in notices/agendas relating to task force meetings. Why is this issue being resurrected?

I hope this review of information is helpful to you.

Regards,  
Clyde Sonobe

"Eric Knutzen"  
<eknutzen@kauai.gov>

08/20/2008 09:15  
AM

To  
<Clyde.Sonobe@dcca.hawaii.gov>

cc  
"David Franzel"  
<david@davidfranzel.com>

Subject  
FW: Next Task Force Meeting

Hi, Clyde

Pls let me know what polices there are regarding the below,

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

From: Linda Puppolo [mailto:linda@akaku.org]  
Sent: Wednesday, August 20, 2008 8:39 AM  
To: Eric Knutzen  
Subject: RE: Next Task Force Meeting

Aloha Eric,  
Thank you very much for your prompt answer. Is it possible to get some help to tap into the audio feed? They have not let us due to some "mysterious" policy so I asked if we could possibly change to a venue that is a little more cooperative with the media at the last meeting and directly to the DCCA (I even gave an alternative venue that one of the non-profits I am on the Board uses regularly that is very cooperative). No answer to date. I don't know why this is so hard. These meetings are crucial in deciding the futures of four valuable, long-standing non-profits that serve their communities.

Also, if we are stuck with this venue, can at least the room number be posted for Maui and some type of announcement and posting go out to alert the folks? I don't even think it is posted on the DCCA website. Maybe ads could be run? Press Release? How can the public be involved if they are not informed?

Thank you so much for taking on this formidable task. We really appreciate you.

Linda Puppolo  
Admin Director  
Akaku: Maui Community Television

From: Eric Knutzen [mailto:eknutzen@kauai.gov]  
Sent: Tuesday, August 19, 2008 4:20 PM  
To: linda@akaku.org  
Cc: Patti.K.Kodama@dcca.hawaii.gov  
Subject: RE: Next Task Force Meeting

Hello, Linda  
The next task force meeting is on Wednesday, August 27, at 1 pm.  
Hope you can attend,  
Eric Knutzen

From: Patti.K.Kodama@dcca.hawaii.gov  
[mailto:Patti.K.Kodama@dcca.hawaii.gov]  
Sent: Tuesday, August 19, 2008 4:14 PM  
To: Eric Knutzen  
Subject: Fw: Next Task Force Meeting

Hi Eric,

I received the below inquiry. Would you mind responding directly to her on her inquiry.

Thank you,  
Patti Kodama  
State of Hawaii  
DCCA - Cable Television Division  
Phone (808) 586-2620  
Fax (808) 586-2625

----- Forwarded by Patti K Kodama/DCCA on 08/19/2008 04:12 PM -----

Patti K Kodama/DCCA

08/19/2008 04:11 PM

linda@akaku.org

To

cc

Subject  
Next Task Force Meeting

Hi Linda,

I received your message inquiring about the next task force meeting. This responsibility lies with the task force chair. I will forward your inquiry to him.

Aloha,  
Patti

## David Franzel

**From:** Jay April [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
- Audit Time Warner Cable franchise compliance
- Evaluate current PEG entities according to established "best practice" criteria
- Recommend improvements if needed

\*Historically DCCA Cable Division has retained the Seattle CPA Accounting firm, Merina and Company to conduct inventories, community ascertainments and "financial reports". Although this company may have experience in financial matters, Merina and Company has virtually no track record and is not recognized as experienced or proficient in the area of PEG access operation and policy. Merina and Company representatives, by their own admission at recent DCCA sponsored cable TV franchise renewal proceedings in Oahu admitted as much by professing the fact that no one from their firm had attended the recent Alliance for Community Television National Conference held in Washington D.C this past July. This is the country's premiere cable access industry trade conference

8/31/2008

and exhibition attended by virtually all leading community television consultants working in the field today.

Contested case process is currently the most viable process for PEG Access designation

- Consistent with other related procedures of Chapter 440G
- Public is familiar with the process of a contested case
- Provides maximum public and regulatory oversight in an orderly manner
- Balances flexible regulation with notice to the public
- Contours of process well-litigated avoiding need to “reinvent wheel”

-

2. The selection process for PEG Advisory Board Members.

+ There are three possible interpretations of the resolution request for PEG advisory board

1. examine the selection of the cable advisory committee members (position one)
  - CAC members were to have advisory role in PEG designation per SB 1789
- + 2. examine policy changes to the designation of access organizations (position two)
  - Consistent with the rest of the language of the resolution
- + 3. examine policy changes to the nonprofit corporation act regarding election of directors of nonprofit corporate boards (position three)
  - Unlikely because it would require Task Force to analyze non-profit statute



## David Franzel

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**From:** David Lassner [david@hawaii.edu]  
**Sent:** Tuesday, August 19, 2008 9:17 PM  
**To:** David Franzel; Eric Knutzen; Clyde Sonobe  
**Cc:** David Lassner; Hae Okimoto  
**Subject:** Reflections on the Two Questions

Comments on the two questions.  
best, david

-----  
I. Solicit public input and examine methods other than the Public Procurement Code process to oversee PEG expenditures and ensure proper checks and balances; and

Given where we are today, there are two basic options, each of which have many variations:  
A) Continue the roles of the current 4 PEG entities as-is; or  
B) Create an open and fair process other than the Public Procurement Code by which alternative organizations could be considered to become PEG entities in one or more counties for one or more of the P, E and/ or G sectors.

If a decision is made to go with A, then there are a number of issues that should be addressed. This list might include such considerations as: obligations of the entities with respect to openness of records and meetings, financial and programmatic reporting requirements, ownership of assets purchased with PEG funding, commitments to community (P) producers, commitments to Educational (E) programming by accredited educational institutions, commitments to governmental (G) programming, expectations of providing training & education, selection of Board members, and contract termination. These issues could be addressed in Rules and enshrined in standard agreements between DCCA and the PEG entities.

If a decision is made to go with B then the same issues need to be addressed. The issues probably still need to be addressed in Rules, along with the selection process to be applied. The expectations for oversight could then be embodied in the call for proposals for entities interested in providing P, E and/or G services in one or more counties.

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II. The selection process for PEG Advisory Board Members

A reasonable interpretation of this phrase is that "PEG Advisory Board Members" refers to Members of the Boards of the PEG entities created as a result of the current franchises. Under that interpretation:

The crafters of the current process sought to ensure adequate oversight while still keeping the PEG entities at arms length from the State DCCA and Cable Company in order to minimize potential constraints on freedom of speech for community (P) producers. Any replacement process should strive to do the same for the Public (P) component of PEG Access.

General stakeholders in PEG include: the State (DCCA) as the Franchising Authority, the Cable Company as the provider of carriage, and cable subscribers who underwrite the cost of PEG and are the viewers. Specific stakeholders by PEG segment include community (P) Producers, accredited educational (E) programmers, and governmental (G) entities such as the Legislature, County Councils and Neighborhood Boards. In an ideal scenario, the Boards of the PEG entities would not be highly stratified with specific representatives of each stakeholder but would be composed of community members committed to:

public service, responsible stewardship of PEG resources, appropriate Board-level oversight of a complex operational entity, and a shared vision with equal respect for all segments of P, E and G Access programming for which the entity is responsible.

Unfortunately, in the current contentious environment it is increasingly difficult to recruit and retain such Board members. The most interested parties are likely to be driven by their interest in some particular aspect of PEG rather than a holistic concern for the nuanced enterprise and its many distinct roles and stakeholders. So while there may be limited trust in the current appointment process, the more complex and onerous the selection process, the more difficult it may prove to recruit the best candidates for service.

Alternatively, should there be a process through which other organizations might propose to become P, E and/or G entities, it would be expected that the proposers' Board or other governance structures would be evaluated in the context of objectives similar to those noted above as desirable for PEG entities.

## David Franzel

**From:** Hirata, Gregg [ghirata@honolulu.gov]  
**Sent:** Tuesday, August 19, 2008 11:37 AM  
**To:** davidfranzel@hawaii.rr.com  
**Subject:** Request for Comments

David:

My thoughts regarding your message of Aug. 5:

Methods other than the procurement code, checks and balances, etc.

- a) Would like Task Force to see the books of all the PEG organizations to see revenues and expenditures, inventories, etc.
- b) Did State Procurement Office receive responses to its RFP? If so, does that mean there are nonprofits "out there" that could take over PEG?
- c) Would like to see AG opinions that PEG should be open to bid, as well as any legal opinions on whether the assets of the PEGS are public property.

PEG selection process:

Wouldn't this be in the by-laws of each PEG? Can't each PEG be requested to provide an organization chart or something similar, with officers, board members, and the like, with an explanation of how and why each board member was selected?

Gregg Hirata  
City and County of Honolulu

## STATEMENT REGARDING APPLICABILITY OF PROCUREMENT CODE

Dear Task Force Members:

Many people often ask, why wouldn't the competitive bidding process be the best for PEG access and the public. A lot of good has come to the state by requiring contracts go through the competitive bidding process.

First, the competitive bidding process was not permitted by the State Legislature. The legislature delegated the Department of Commerce and Consumer Affairs the authority to designate access organizations are part of decade long cable operator franchises. No other benefit from the cable operator franchises go through competitive bidding. In fact, the DCCA's regulation of access organizations and reports by the DCCA, the Legislative Reference Bureau and the State Auditor all recommend a very public, collaborative approach to access regulation.

Competitive sealed bidding is not public and not collaborative. A secret committee evaluates offerors and any collaboration is immediate cause to be debarred from competing. For example, unlike the permit process in the coastal zone, there is no room for the public to intervene, produce a full record for decision makers to ensure that the permit is fair and takes into consideration the diversity of interests that need to be examined in designating access organizations. Instead, only offerors that can show a violation of procurement principles can protest and file suit

The difference between these two processes is clearly why the legislature did not want access television services "procured" but instead access organizations "designated." Also, cable subscriber fees are not public funds according to state law.

Second, nationally, no access organization is subject to procurement. The providing of access television services involves inherent non-commercial activities that cannot be adequately and accurately quantified.

Finally, requiring a one or three year bidding process would divert the small amount of funding access organizations have to put to community education and enrichment. Not everyone has the money to attend UH's Academy for Creative Media or an expensive school in California. The modest fees PEGs charge the public to take classes and seminars hardly covers the true cost of these programs. However, these educational and enrichment programs are necessary for meaningful access. A community without adequate educational and enrichment opportunities for producers and producers-to-be is like driving a car without fuel. It may look nice and shiny, but it amounts to a 1500 pound paperweight.

Some ask, how does the competitive bidding process do this? While Olelo may have a lot of funding, Maui, Kauai and the Big Island don't. There are minimum funding requirements to operate a television station (especially one with several channels). This does not change. However, funding is based upon the number of subscribers in the County. So, Maui is barely able to run a television station with its money. It is barely able to provide community education and enrichment opportunities for the public to produce programming.

Part of any business's ability to squeeze out extra money has to do with how long-term expenses are financed. The longer expenses can be spread over time, the more money is available in this moment. In fact, this is the reason why people get car loans and home mortgages -- because we don't usually have all the cash up front.

However, unlike a car loan or a home mortgage, Access organizations' expenses never end. However, they can spread expenses over longer periods of time, they are able to make pockets of run available in their budgets for community training and education. An RFP would force access organizations to reformat their budget process to expense all costs over one or three years. If you normally had 5 years to pay for your car, would you still have the same amount of disposable income if you had to do it in 3 years? Doubt it.

Jay April  
August 27, 2008

LINDA LINGLE  
GOVERNOR

JAMES R. AIONA, JR.  
LT. GOVERNOR



LAWRENCE M. REIFURTH  
DIRECTOR

CLYDE S. SONOBE  
CABLE TELEVISION ADMINISTRATOR

STATE OF HAWAII  
CABLE TELEVISION DIVISION  
DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS  
335 MERCHANT STREET  
P. O. BOX 541  
HONOLULU, HAWAII 96809  
(808) 586-2620  
FAX (808) 586-2625

August 25, 2008

Mr. Eric Knutzen, Chairperson  
and Members of the Task Force  
H.C.R. No. 358, H.D. 1, Task Force  
4444 Rice Street, Suite 427  
Lihue, Hawaii 96766

Dear Mr. Knutzen and Task Force Members:

Re: Lance Collins, Esq.'s July 31 and August 5, 2008 Letters

You recently received July 31 and August 5, 2008 letters from Lance Collins, Esq., attorney for Akaku: Maui Community Television ("Akaku"), in which he expressed his proposed method to designate public, educational, and governmental ("PEG") access organizations and his interpretation of certain terms in House Concurrent Resolution No. 358, H.D. 1 ("HCR"), respectively.

To assist Task Force members to further understand the parameters of the Legislature's request in the HCR, the Department of Commerce and Consumer Affairs ("DCCA") provides the following general comments on the points raised in Mr. Collins' letters.<sup>1</sup>

I. The July 31, 2008 Letter

In his July 31, 2008 letter, Mr. Collins explains his understanding of rulemaking and contested case proceedings under Hawaii Revised Statutes ("HRS") chapter 91 and recommends that the designation of PEG access organizations should be done through a contested case proceeding.<sup>2</sup> To put his arguments into perspective, DCCA provides the following background information.

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<sup>1</sup> DCCA notes that Mr. Collins' letters are lengthy. Instead of commenting on every point raised by Mr. Collins, DCCA limits its comments to the major points. DCCA's lack of comment on any specific point is not intended to, and does not constitute, agreement or approval by DCCA.

<sup>2</sup> In his letter, Mr. Collins asserts that administrative action is organized into two types: rulemaking and adjudication. To the extent he is arguing that these are the only two types of actions an administrative agency may take, DCCA disagrees. It is my understanding that administrative action involves more than just rulemaking and adjudication: it also involves entering into contracts, making declaratory rulings, making informal interpretations,

Mr. Eric Knutzen  
and Task Force Members  
August 25, 2008  
Page 2

In late 2005, DCCA was advised that its contracts with the PEG access organizations were subject to the requirements of the Procurement Code (“Code”) in HRS chapter 103D. DCCA then sought an exemption from HRS chapter 103D from the State Procurement Office (“SPO”). SPO declined granting a permanent exemption and determined that these contracts should be awarded in accordance with the Code. DCCA worked with the SPO and the Department of the Attorney General to develop a request for proposal (“RFP”) for PEG access services. After twice going out for public comments on drafts of the RFP, DCCA issued the final RFP on July 30, 2007.

Within a short time of the RFP’s issuance, Akaku and Olelo each filed separate protests against the RFP. Once filed, these protests stayed the RFP pursuant to the Code.

Mr. Collins, on behalf of his client Akaku, subsequently filed lawsuits on Maui against DCCA and alleged in one lawsuit that (among other things) the use of the Code to designate PEG access organizations is a “rule” under the Hawaii Administrative Procedure Act in HRS chapter 91. On October 4, 2007, the Honorable Joel E. August suggested that the method and criteria to designate or select PEG access organizations need to be specified in an administrative rule. In light of Judge August’s statements, DCCA began the rulemaking process with the intention of promulgating a rule that specifically states that DCCA will follow the applicable provisions of the Code when selecting or designating PEG access organizations.<sup>3</sup>

During the 2008 legislative session, bills were introduced to specifically exempt DCCA’s contracts with the PEG access organizations from the Code. Because these bills could potentially impact DCCA’s proposed rule, DCCA put the rulemaking process on hold pending the outcome of the 2008 legislative session. Ultimately, the Legislature did not exempt DCCA’s contracts with the PEG access organizations from the Code, nor address how DCCA should designate or select PEG access organizations. Once the 2008 legislative session was over,

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etc. Thus, not every action taken by an administrative agency needs to be done pursuant to a rule or a contested case proceeding.

<sup>3</sup> In his letter, Mr. Collins asserts that “[t]he Court declined to rule on the question of whether [DCCA] may promulgate rules adopting the Public Procurement Code as the method of designation.” DCCA notes that in his May 27, 2008 Order, Judge August states:

“The use of the public Procurement Code in Hawaii Revised Statutes (“HRS”) chapter 103D to designate public, educational, and governmental (“PEG”) access organizations does not exceed the authority of the Director of DCCA when DCCA creates the Request for Proposals criteria, and has the right to approve the final awardee. Administrative agencies have wide discretion when they are delegated authority by statute, and it is not for this Court to interpret the word, “designate” in HRS chapter 440G to exclude DCCA’s use of the Procurement Code when DCCA ultimately designates the PEG access organizations. Therefore, the Court denies Plaintiff’s [Akaku’s] claim for declaratory relief that the use of the public Procurement Code to designate PEG access organizations exceeds the authority granted to the Director of DCCA under HRS chapter 440G.”

Thus, Judge August is aware of DCCA’s proposed rule amendment and has not expressed any objection to DCCA’s proposed use of the Procurement Code to designate and select PEG access organizations.

DCCA resumed its rulemaking process and is prepared to take its proposed rule to public hearing in accordance with HRS chapter 91.

Mr. Collins now suggests that the designation or selection of PEG access organizations should be done through a contested case proceeding. This proposal lacks merit. It is my understanding that, generally, a contested case is one in which an administrative agency performs an adjudicative, as compared to an administrative function.<sup>4</sup> Adjudication typically involves a determination as to whether past conduct was unlawful so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Thus, it is adversarial in nature. Conversely, as Mr. Collins notes, rulemaking is essentially legislative in nature.

The designation or selection of PEG access organizations does not involve any adjudication because there is no allegation of wrongdoing or disciplinary action involved. It also does not include any adversarial dispute. The designation or selection of a PEG organization is a contract matter, and an adjudicatory process is not applicable. Thus, a contested case proceeding does not and should not apply to DCCA's designation or selection of PEG access organizations,<sup>5</sup> and the Task Force should not consider it to be a viable alternative process to oversee PEG expenditures and ensure proper checks and balances over the PEG access organizations.

## 2. The August 5, 2008 Letter

In his August 5, 2008 letter, Mr. Collins cites some general rules of statutory construction, and argues that the term "PEG advisory board members" in the HCR means the Cable Advisory Committee (rather than the directors of the PEG access organizations) and the term "Cable Access Committee" in the HCR does not mean the Cable Advisory Committee.

Mr. Collins argues that concurrent resolutions are like statutes and that statements by individual legislators after the passage of legislation are generally ignored by the courts.<sup>6</sup> It appears that his argument is in reaction to my explanation to the Task Force members on August 4, 2008 of my conversation with Representative Kyle Yamashita, the legislator who introduced the HCR. Representative Yamashita informed me on May 29, 2008 that he intended the term "PEG advisory board members" to mean the directors of the PEG access organizations and that the intent was to have the Task Force examine how these directors are selected.

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<sup>4</sup> For purposes of this letter, citations to applicable case law have been omitted.

<sup>5</sup> Contrary to Mr. Collins' assertion, DCCA disagrees that DCCA has utilized a modified contested case proceeding to deal with the designation of PEG access organizations as an extension of the contested case proceedings for enfranchising cable operators. Under HRS section 440G-7, DCCA has held public hearings on cable franchise applications. These public hearings can hardly be characterized as being adjudicative.

<sup>6</sup> DCCA does not agree with Lance Collins' analysis that a concurrent resolution is equivalent to a statute.



The Task Force's mandate and only authority is to make recommendations to the Legislature. Therefore, to comply with the HCR's intent as described by its introducer, I propose that the Task Force discuss how PEG access organization directors are selected in the context of advising the Legislature whether that process should be modified to ensure proper checks and balances over the PEG access organizations.<sup>7</sup>

With respect to Mr. Collins' second argument, DCCA agrees that there is no "Cable Access Committee" in HRS chapter 440G, or in the areas of cable television or in PEG access of which DCCA is aware. However, HRS chapter 440G specifically establishes the Cable Advisory Committee. As I indicated on August 4, 2008, Representative Yamashita told me that he intended the "Cable Access Committee" to mean the Cable Advisory Committee. It would appear that the term "Cable Access Committee" is a typographical error and Representative Yamashita confirmed this to me. Clearly, interpreting "Cable Access Committee" to refer to the Cable Advisory Committee is much more logical and reasonable than interpreting "PEG advisory board members" to refer to the Cable Advisory Committee.

Finally, DCCA notes that the Task Force's primary charge is to review alternative methods (other than the Code) to oversee PEG expenditures and ensure proper checks and balances over PEG access organizations. If the Task Force is able to identify viable alternatives to the Code, DCCA requests the Task Force to specify the following for each alternative identified:

1. The process to designate and select PEG access organizations;
2. The criteria to designate and select;
3. How the designation and selection is made;
4. Suggested terms and conditions in any resulting contract regarding the PEG access services to be provided;
5. How to oversee the funds DCCA orders the cable operator to collect from subscribers and pay to the PEG access organizations;
6. Ownership of the PEG assets purchased with these funds and disposition of any unused balances when the contracts are terminated;<sup>8</sup> and

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<sup>7</sup> Historically, DCCA appointed a majority of the directors of the boards of the four PEG access organizations. It is DCCA's understanding that this was done to allow DCCA to have more oversight of the PEG services provided to the public and the funds DCCA orders the cable operator to collect from subscribers and pay to the PEG access organizations. Over time, the PEG access organizations began to oppose DCCA's appointment power, and DCCA eventually relinquished this power (with some reservations) by letter dated September 19, 2006 from Director Mark Recktenwald to the PEG access organizations.

<sup>8</sup> DCCA notes that the current contracts clearly state that all PEG assets purchased with the funds collected from subscribers and any unused balances revert to DCCA upon termination of the contracts. In spite of this language, Olelo has taken the position that PEG assets belong to Olelo (not DCCA), and if DCCA wants those PEG assets, DCCA must pay "just compensation" to Olelo. DCCA strongly disagrees and continues to disagree with Olelo's position on the ownership of the PEG assets upon contract termination.

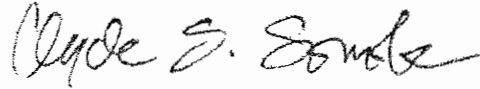
Na Leo and Hoike initially stated that the PEG assets revert to DCCA upon contract termination; however, after learning of Olelo's position, Na Leo and Hoike each has reserved its right change its position. Akaku has admitted that some of the PEG assets revert to DCCA and some belong to Akaku (although it has not been able to identify which PEG assets revert to the State and which belong to Akaku).

Mr. Eric Knutzen  
and Task Force Members  
August 25, 2008  
Page 5

7. How DCCA should address challenges under the new process.

Thank you for allowing DCCA to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Clyde S. Sonobe". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Clyde S. Sonobe  
Cable Television Administrator

c: Lawrence M. Reifurth  
Department of the Attorney General

## David Franzel

**From:** Jay April [jay@akaku.org]  
**Sent:** Monday, August 25, 2008 9:19 PM  
**To:** cabletv@dcca.hawaii.gov  
**Cc:** keo@keoinc.org; gtakase3@hotmail.com; roy.amemiya@centralpacificbank.com; gbenevides@co.hawaii.hi.us; eknutzen@kauai.gov; shelley.pellegrino@co.maui.hi.us; ghirata@honolulu.gov; Geri\_Ann\_Hong@notes.k12.hi.us; david@hawaii.edu; David@DavidFranzel.com; krollman@honolulu.gov; Clyde.Sonobe@dcca.hawaii.gov  
**Subject:** Re: Lance Collins, Esq.'s July 31 & August 5, 2008 Letters

Aloha Task Force Members,

Regarding Mr. Sonobe's communication sent to all of you (below) : Mr. Collins' letters clearly outline some very well thought out ALTERNATIVES to procurement which include maximum public participation. It is curious why DCCA would expend the effort to draft this very strong rebuttal. It would appear that the agency wishes to steer the train back on the procurement track instead of seeking meaningful alternatives as called for in the HCR 358 Reso itself.

Sincerely

Jay April

On Aug 25, 2008, at 4:51 PM, wrote:

To All,

The attached correspondence is being forwarded at the request of Clyde Sonobe.

Thank you.

<Letter to HCR 358 Task Force Chair and Members.PDF>

August 26, 2008

Eric Knutzen  
Chairman  
H.C.R. 358, H.D. 1 Task Force  
4444 Rice Street Ste 427  
Lihue, HI 96766

Re: Mr. Clyde Sonobe's August 25, 2008 Letter

Dear Mr. Knutzen and Task Force Members,

I. What Did the Court Say In the Akaku Chapter 91 Lawsuit?

Contrary to Mr. Sonobe's characterizations, Judge August has not made any affirmative rulings in the Akaku v. Reifurth case. The following is part of the transcript of October 4, 2008 where Judge August denied Akaku's motion for a preliminary injunction without prejudice:

THE COURT: I don't know how long it's going to take to go through the Chapter 91 process. It would take more than a couple weeks, I can tell you that. You have to have notices that appear. The public has a right to comment at some point. I think the Governor has to sign off on it. That process takes some time.

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

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

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

THE COURT: Well, that's what I would suggest, unless you want me to actually make a ruling on this motion for preliminary injunction, which I'm sure you don't.

MR. TAM: We understand. Thank you. (Transcript, pp. 35-37)

The key to understanding why the DCCA is being required to undergo rule-making is that Judge August has not decided what method is best for designating access organizations, leaving it, as Chapter 91 allows, to the discretion of the DCCA to determine what's in the best interest of the public. With respect to the January 24, 2008 hearing that resulted in the May 27, 2008 Order, Judge

August stated: "And I think it's not for the Court to interpret the word "designate" to exclude the use of the State Procurement Office, again, as long as the DCCA is, in fact, going to ultimately designate the provider as they're apparently going to do." (Transcript, p. 21)

Contrary to Mr. Sonobe's insistence, Judge August has made it clear that the issue of awarding contracts is epiphenomal to the issue of the method of designating access organizations. The fact that the DCCA has discretion to make rules means that it is not required to comply with Chapter 103D, also known as Act 8 of the Sessions Laws of Hawai'i of 1993. Judge August stated at the October 24, 2007 hearing:

[THE COURT:] Defendant Fujioka appears to believe that because the legislature in Section 1 of Act 8 in the Session Laws of Hawaii of 1993 has found that it is the policy of the State to foster broad based competition in the procurement by the government of goods and services, that he should be delegated the responsibility of choosing, in effect, who the PEG operators should be by means of the Procurement Code.

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

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

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

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

Judge August has unequivocally indicated that the DCCA's designation of access organizations and the method for such designation is not legally required to comply with the Procurement Code since the designation of access organizations and the method thereof are not the subject matter of the state procurement code. While he has not passed judgment on whether utilizing a method similar to procurement is a good one, he has, in dicta, suggested that it does not exceed the authority of the director. This is not, however, the subject matter of the lawsuit and has not been fully argued.

## II. Contest Case Proceedings Determine the Rights of Parties with A Full Record

Contrary to the DCCA's assertions, a contested case proceeding is not necessary an adversarial or disciplinary proceeding. Many people who build their homes within the coastal zone

are required to go through a contested case process in order for the Planning Commission of the particular island to have a complete record upon which to determine the appropriateness of a special management area permit and the appropriateness of various conditions. In some cases, neighbors and others who have some kind of interest in the development intervene allowing decision-makers a full record upon which to make their decisions.

Similarly, public utilities and water carriers are required to go through a contested case process in order to get certificates and permits to engage in their business of providing public utilities. Sometimes these processes can become adversarial when the Office of the Consumer Advocate or another with standing to intervene objects to a particular proposal. However, these contested case proceedings are done because it is the only lawful process currently available that allows an orderly method of creating a complete record for the decision-maker to rely upon.

Most recently, the Hawai'i Supreme Court reversed the Intermediate Court of Appeals for holding that the statutory requirement for a "public hearing" in liquor licensing cases was not a "contested case." E & J Lounge Operating Co., Inc. v. Liquor Commission, 189 P.3d 432 (July 29, 2008). The Hawai'i Supreme Court noted that whenever an administrative agency is required by law to hold a public hearing, it is a contested case under Chapter 91. The Hawai'i Supreme Court overruled the Intermediate Court specifically on the point that contested cases are only those public hearings which are "adversarial in nature." Designation of access organizations, like a permit to develop within the coastal zone or a liquor license, confers legal rights and duties on a party, in this case, an access organization, and determines the rights and privileges of the public.

It is possible that the Mr. Sonobe is not aware of the most recent developments in Hawai'i case law and may be under the same mistaken understanding of what a contested case is like the overruled Intermediate Court of Appeals.

In the situation of access organizations, the designation of access organizations is a process

in which the legal rights, duties or privileges of an access organization and the public's right to access channels is implicated. Allowing a carefully crafted public hearing process that allows all stakeholders a place at the table is not only appropriate, but the most widely understood process of determining rights, duties and privileges in general, in Hawai'i. Mr. Sonobe's contention that the enfranchisement process which requires a public hearing to determine the rights, duties and privileges of cable operators is not a contested case is wrong according to the Hawai'i Supreme Court.

Judge August has already ruled that the designation of access organizations is not a contract matter but is a policy matter that requires rules. The contested case process is one alternative to the Frankenstein-like approach to grafting parts of the procurement code onto the method of designation but there may be others. Mr. Sonobe has not provided any other alternatives to access organization designation but is simply opposed to a contested case. His argument that all contested cases are "adversarial" which is not accurate and not passed on law.

### III. Legislature Adopts Concurrent Resolutions Not An Individual Legislator

Mr. Sonobe urges this task force to ignore the committee reports of the committees that recommended passage of the concurrent resolution to the full House of Representatives and the Senate and instead accept what one legislator "really intended." However, there is no evidence that this one legislator ever communicated that to the rest of the legislators who voted on the resolutions. It is the legislature that has requested the establishment of the task force and set its charges. One of the purposes of committee reports and floor speeches is to allow individual legislators to express their intent so that other will know, when there is an ambiguity in phraseology, what was meant. The committee reports do not support Mr. Sonobe's second-hand contention of what one legislator privately thought the resolution meant and Mr. Sonobe's contentions cannot overrule the record that the other 75 legislators had before them.

If we are to accept that a number of phrases were typographical errors and a number were privately meant to mean something else, as Mr. Sonobe argues, then the Task Force can conclude that absent an intent to deceive other legislators, the resolution was poorly drafted and that there are a number of areas where it is unclear what the task force has been asked to do – at least with respect to “PEG advisory boards” if not also to “Cable Access Committee.” Courts typically, when confronted with poorly drafted legislation, will disregard sections that are equally susceptible to more than one meaning and their meaning is impossible to determine without engaging in “further legislating.”

IV. What Rules Providing Maximum Public Input Could Look Like

Please find attached as “Appendix A”, potential rules for designation, that show what rules could look like that incorporate the alternative proposed by Akaku. Akaku has adequately addressed each of the concerns raised by Mr. Sonobe's letter and has also include clear and strong provisions for public involvement and oversight in the process ensuring that governmental entities have standing to participate in designation as a matter of right and other interested members of the public have the opportunity to participate.

Akaku is happy to provide copies of complete transcripts of Court hearings referred to above upon request. Please contact me if you have any questions.

Very truly yours,  
LAW OFFICE OF LANCE D COLLINS



LANCE D COLLINS  
Attorney for Akaku: Maui Community Television



## APPENDIX A

§16-132-70 Purpose. The purpose of these rules is to implement Hawai'i Revised Statute chapter 440G, relating to the designation of access organizations and to establish application procedures for such designation, time periods within which hearings must be held, and procedures to provide notice to individuals who may be affected. The rules further the policy of the state to ensure access to cable television. The rules also assist the director in giving full consideration to the state policy of access stations.

§16-132-71 Scope of Designation and Area of Designation. (a) The rules contained in this chapter shall apply to all access organization designations within the state of Hawai'i wherever the director has enfranchised a cable operator pursuant to Hawai'i Revised Statute chapter 440G.

(b) The director shall designate one access organization for each county irrespective of the number of franchises granted within a particular county.

§16-132-72 Notice of Application. (a) The applicant shall prepare a notice of application. The form of the notice shall be provided to the applicant by the director. Prior to publication, the department shall review the notice of application for completeness. The applicant shall submit the notice of application for publication once in a daily newspaper of general circulation in the county of access organization area.

(b) A public hearing before the director shall commence within ninety days, or as soon thereafter, after the director has determined the application complete.

(c) When a public hearing is required to be held pursuant to these rules, the department shall notify the applicant of the date of the public hearing at least forty-five days prior to the public hearing date.

(d) Not less than thirty days prior to the public hearing date the director shall publish a notice of public hearing twice in a daily newspaper of general circulation in the county of access organization area. The notice shall state the nature of the application, the date, time and place of the hearing, and all other matters of importance.

(e) The director may authorize the consolidation of the hearing with any other hearing required pursuant to any of these rules.

§16-132-73 Designation review guidelines. The selection of an access organization shall include, but not be limited to, consideration of the following factors or criteria:

(1) The management and technical experience of the organization, and its existing or proposed staff;

(2) The broadcast or cablecast media and telecommunications experience of the organization and its existing or proposed staff;

(3) The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the director;

(4) The organization's short-term and long-term plans for PEG access services for a designated franchise area;

(5) The financial capability of the organization;

(6) The ability of the organization to provide reports, audits, and other information to the director;

(7) The non-economic value of the organization like goodwill, community involvement and other social capital; and

(8) Other factors or criteria deemed applicable or necessary by the

director.

§16-132-74 Application procedures. (a) Any organization who seeks a designation shall file an application with the department on a form provided by the department, which shall require:

- (1) All information and documentation required pursuant to section 16-132-73,
  - (2) True and correct copies of the organizations current Articles of Incorporation and Bylaws, if any,
  - (3) State and Federal tax clearances,
  - (4) Verification of federal tax exempt status, and
  - (5) List of current officers, directors and employees,
- (b) Upon review of the application for completeness, the director shall review the application based on the criteria and factors set forth in this chapter, and, if necessary, request that the applicant provide any additional data or information as may be required for review of the proposed development. The application shall not be deemed complete until the director is satisfied that the application has addressed the criteria and factors.

(c) The director shall submit the application, with all relevant information, to the cable advisory committee for review and comment within forty five days from the date on which the application was transmitted for review and shall request the cable advisory committee to address issues of the public interest consistent with the objectives and policies of this chapter and Hawai'i Revised Statutes chapter 440G.

(d) Upon receipt of comments from the cable advisory committee, the application shall be deemed complete by the director and shall be scheduled for public hearing.

(e) The director shall designate an access organization, subject to terms and conditions, necessary and proper for the policy objectives of cable access and chapter 440G, HRS.

(f) Findings of fact, conclusions of law, and decisions and order shall be issued in accordance with these.

(g) Conditions of designation including regular reporting requirements shall be attached as an exhibit to the findings of fact, conclusions of law, and decision and order.

§16-132-75 Designation term and extension. (a) The term of designation shall end six months after the expiration of the cable franchise for the access organization area. In the event that more than one cable franchise exists in one access organization area, the expiration of the last cable franchise shall be used to compute the term.

(b) If the term of any cable franchises within the access organization area are extended or renewed before their expiration, the term of designation shall extend to six months after the new expiration of the cable franchise unless the director conducts a public hearing to determine good cause for keeping the original term of designation.

§16-132-76 Emergency designation. The director has the power to designate an incumbent access organization as the access organization for a term of six months, that may be renewed once, when no access organization would otherwise be designated. Within seven days of such designation, the director shall notify the cable advisory committee.

§16-132-77 Petition to intervene. (a) Petitions to intervene may be filed in accordance with the provisions of this part in proceedings relating to access organization designation.

(b) Petitions to intervene shall be in conformity with these rules and shall be filed with the director and served upon the applicant no less than fourteen days before the first public hearing date. Untimely petitions will not be permitted except for good cause, but in no event will

intervention be permitted after the director has issued his final decision.

(c) Intervenor.

(1) All departments and agencies of the state and the county shall be admitted as parties upon timely application for intervention.

(2) All other parties may apply to the director for leave to intervene as parties.

(3) Leave shall be freely granted, provided that the director or his hearing officer, if one is appointed, may deny an application to intervene when in the director's or hearing officer's sound discretion it appears that:

(i) The position or interest of the applicant for intervention is substantially the same as a party already admitted to the proceeding;

(ii) The admission of additional parties will render the proceedings inefficient and unmanageable; or

(iii) The intervention will not aid in development of a full record and will overly burden broad issues.

(d) If more than one intervenor is admitted to a contested case proceeding, the hearing officer and/or director may require intervenors to assign responsibilities between themselves for the examination and cross-examination of witnesses. The hearing officer or director shall have the right to impose reasonable subject matter, as well as time, limitations on examination and cross-examination of witnesses, whether or not parties are represented by counsel.

(e) If any party opposes the petition to intervene that a party files, within five days after being served, his or her motion opposing the petition on the director, all other parties and the petitioner for intervention.

(f) All petitions to intervene shall be heard and ruled upon prior to the director taking final action on an application.

(g) A person whose petition to intervene has been denied may appeal such denial to the circuit court pursuant to chapter 91-14, HRS, as amended.

§16-132-78. Contents of Petition to Intervene. (a) The petition shall contain the following:

(1) The nature of the petitioner's statutory or other right to intervene;

(2) The nature and extent of petitioner's interest in the proceeding; and

(3) The effect of any decision in the proceeding on petitioner's interest.

(b) If applicable, the petition shall also make reference to the following:

(1) Other means available whereby petitioner's interest may be protected;

(2) Extent petitioner's interest may be represented by existing parties;

(3) Extent petitioner's interest in the proceeding differs from that of the other parties;

(4) Extent petitioner's participation can assist in development of a complete record;

(5) Extent petitioner's participation will broaden the issue(s) or delay the proceedings; and

(6) How the petitioner's intervention would serve the public interest.

§16-132-78. Formal requirements for filing of documents. (a) Time and place. All documents required to be filed with the director in any proceeding shall be filed with the office of the director at Honolulu, O'ahu, Hawai'i, within the time limit prescribed by law on business days between 7:45 a.m. and 4:30 p.m. or as otherwise ordered by the director. Unless otherwise ordered, the date on which the documents are received shall be regarded as the date of filing. However, applicants, petitioners for intervention and intervenors who do not reside on the island of O'ahu may mail, U.S. first-class mail, postage pre-paid to the director with the words "ACCESS ORGANIZATION DESIGNATION DOCUMENTS" on the outside cover, and the postmark shall be accepted as the date of filing.

(b) Format

(1) Form and size. Documents shall be bound at the top and typewritten upon paper 8.5 x 11 inches in size. Tables, maps, charts, exhibits or appendices may be larger and shall be folded to that size where practical. The impression shall be on one side of the paper only and shall be double spaced, except that footnotes and quotations in excess of a few lines may be single spaced. Copies shall be clear and permanently legible.

(2) Title and number. Petitions, pleadings, briefs, and other documents shall show the title of the proceeding before the director and the name and address of the person or attorney.

(3) Signatures. The original of each application, petition, complaint, answer, motion or amendment shall be signed in black ink by each party or his or her counsel. If such party is a corporation or association, the pleading may be signed by an officer thereof.

(c) Copies. Unless otherwise required by these rules or the director, there shall be filed with the director an original and one copy of each pleading or amendments thereof. Additional copies shall be provided if the director so requests. The original shall be on bond paper to distinguish it from copies or shall be identified as the "original."

(d) Extensions of time. Whenever a party is required to file a pleading within the period prescribed or allowed by these rules, by notice given hereunder or by an order or regulation, the director may:

(1) For good cause before the expiration of the prescribed period, with or without notice to the parties, extend such period;

(2) Pursuant to a stipulation between all of the parties, extend such period; or

(3) Permit the act to be done after the expiration of a specific period where the failure to act is clearly shown to be the result of excusable neglect. Unless it is made during the course of a hearing all requests for continuances shall be by written motion.

(e) Amended pleading. All pleadings may be amended at any time prior to hearing. Amendments offered prior to hearing shall be served on all parties and filed with the director. All parties shall have the opportunity to answer and be heard on amendments filed after hearing commences, and the director shall decide whether such amendments shall be allowed.

(f) Retention of documents by the director. All documents filed with or presented to the director shall be retained in the files of the director. However, the director may permit the withdrawal of original documents upon submission of properly authenticated copies to replace said original documents.

§16-132-79. Service; effective date. (a) By whom served. The director shall cause to be served all orders, notices and other papers issued by the director together with any other papers required by law to be served by the director. Every other paper shall be served by the filing party.

(b) Upon whom served. All papers served by either the director or any other party shall be served upon all counsel of record at the time of such filing and upon all parties not represented by counsel or upon their designated agents, in fact or by law. Any counsel entering an appearance subsequent to the initiation of the proceeding shall so notify all other counsel then of record and all parties not represented by counsel.

(c) Service upon parties. The final order and any other papers required to be served by the director upon a party shall be served upon such party or his or her representative authorized to receive service of such papers

(d) Method of service. Service of papers shall be made by first-class certified mail, return receipt requested, or other means authorized by law.

(e) When service completed. Service by mail shall be regarded as complete when deposited in the United States mail properly addressed and stamped.

## David Franzel

**From:** Jay April [jay@akaku.org]  
**Sent:** Tuesday, August 26, 2008 10:19 PM  
**To:** 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; Clyde.Sonobe@dcca.hawaii.gov  
**Cc:** David Franzel; Lance D Collins, Esq; staff@akaku.org  
**Subject:** RE: HCR 358 STATEMENT RE: APPLICABILITY OF PROCUREMENT CODE

Aloha Task Force Members,

This is one of the better statements I have seen to put applicability of procurement in a framework that is understandable and coherent.

Thanks

Jay

### STATEMENT REGARDING APPLICABILITY OF PROCUREMENT CODE

Dear Task Force Members,

Many people often ask, why wouldn't the competitive bidding process be the best for PEG access and the public. A lot of good has come to the state by requiring contracts go through the competitive bidding process.

First, the competitive bidding process was not permitted by the State Legislature. The legislature delegated the Department of Commerce and Consumer Affairs the authority to designate access organizations are part of decade long cable operator franchises. No other benefit from the cable operator franchises go through competitive bidding. In fact, the DCCA's regulation of access organizations and reports by the DCCA, the Legislative Reference Bureau and the State Auditor all recommend a very public, collaborative approach to access regulation.

Competitive sealed bidding is not public and not collaborative. A secret committee evaluates offerors and any collaboration is immediate cause to be debarred from competing. For example, unlike development processes in the coastal zone, there is no room for the public to intervene or to be

12/14/2008

a full record for decision makers to ensure that the permit is fair and takes into consideration the diversity of interests that need to be examined in designating access organizations. Instead, only offerors that can show a violation of procurement principles can protest and file suit.

The difference between these two processes is clearly why the Legislature did not want access television services "procured" but instead access organizations "designated." Also, cable subscriber fees are not public funds according to state law.

Second, nationally, no access organization is subject to procurement. The providing of access television services involves inherent non-commercial activities that cannot be adequately and accurately quantified.

□

Finally, requiring a one or three year bidding process would divert the small amount of funding access organizations have to put to community education and enrichment. Not everyone has the money to attend UH's Academy for Creative Media or an expensive school in California. The modest fees PEGs charge the public to take classes and seminars hardly covers the true cost of these programs. However, these educational and enrichment programs are necessary for meaningful access. A community without adequate educational and enrichment opportunities for producers and producers-to-be is like driving a car without fuel. It may look nice and shiny, but it amounts to a 1500 pound paperweight.

Some ask, how does the competitive bidding process do this? While Olelo may have a lot of funding, Maui, Kauai and the Big Island don't. There are minimum funding requirements to operate a television station (especially one with several channels). This does not change. However, funding is based upon the number of subscribers in the County. So, Maui is barely able to run a television station with its money. It is barely able to provide community education and enrichment opportunities for the public to produce programming.

Part of any business's ability to squeeze out extra money has to do with how long-term expenses are financed. The longer expenses can be spread over time, the more money is available in this moment. In fact, this is the reason why people get car loans and home mortgages -- because we don't usually have all the cash up front.

However, unlike a car loan or a home mortgage, Access organizations' expenses never end. However, they can spread expenses over longer periods of time, they are able to make pockets of run available in their budgets for community training and education. An RFP would force access organizations to reformat their budget process to expense all costs over one or three years. If you

normally had 5 years to pay for your car, would you still have the same amount of disposable income if you had to do it in 3 years? Doubt it