

**TESTIMONY IN SUPPORT OF HB 492**

From

REPRESENTATIVE JOE BERTRAM III

February 4, 2009

Aloha Representative Angus L.K. McKelvey, Chair, Economic Revitalization, Business and Military Affairs, and Committee members.

I write in strong support of HB 492 RELATING TO THE HAWAII COMMUNICATIONS COMMISSION

I ask for your support of HB 492.

Thank you.



LINDA LINGLE  
GOVERNOR  
JAMES R. AIONA, JR.  
LT. GOVERNOR

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LAWRENCE M. REIFURTH  
DIRECTOR  
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TO THE HOUSE COMMITTEE ON  
ECONOMIC REVITALIZATION, BUSINESS, & MILITARY AFFAIRS

TWENTY-FIFTH LEGISLATURE  
Regular Session of 2009

Thursday, February 5, 2009  
8:00 a.m.

**TESTIMONY ON H.B. No. 492,  
RELATING TO THE HAWAII COMMUNICATIONS COMMISSION**

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR, AND MEMBERS OF THE  
COMMITTEE:

My name is Lawrence M. Reifurth, Director of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to provide testimony in strong support of H.B. No. 1077, H.B. No. 984, and H.B. No. 492. My testimony on all three bills is identical.

In her 2006 inaugural address, Governor Lingle said, "The magnitude and speed of change and innovation in the world today is so great, that if we fail to move forward, by definition, we will be going backwards. When it comes to global economic waves, we want to be riding them ... not sitting on the sand and watching others ride."

More recently, in his inaugural address, President Obama said "For everywhere we look, there is work to be done. The state of our economy calls for action, bold and

swift, and we will act -- not only to create new jobs, but to lay a new foundation for growth.

"We will build the roads and bridges, the electric grids and digital lines that feed our commerce and bind us together. We will restore science to its rightful place, and wield technology's wonders to raise health care's quality and lower its cost.

"We will harness the sun and the winds and the soil to fuel our cars and run our factories. And we will transform our schools and colleges and universities to meet the demands of a new age. All this we can do. All this we will do."

The State Legislature also showed much foresight when you established the Hawaii Broadband Task Force in 2007. The Task Force has provided a roadmap that will help guide us into a future where the availability and accessibility of high speed, affordable broadband is the norm in Hawaii.

These bills will go far in fulfilling the vision of both the Governor, the President, and the Legislature in ensuring that Hawaii and the nation are moving into the 21<sup>st</sup> century purposefully and intelligently. I believe that these bills will position Hawaii in the forefront of national efforts to regain America's primacy in the development, implementation, and widespread availability and use of technology, particularly as it relates to broadband and the applications served by broadband.

Many across the nation and around the world have come to the conclusion that an indispensable requirement for a strong and diversified economy is an advanced communications structure. This is the backbone of a true information economy. We need to hook up our hospitals and empower telehealth. We need to interconnect our

schools and make on-line classes a reality. We need to have the infrastructure in place so that Bishop Street and Front Street communicate seamlessly with Wall Street.

This 21<sup>st</sup> Century infrastructure is essential to creating the kind of high-paying jobs we are striving for in the coming years. What we have in place today meets today's needs. What we need to do, though, is to plan for tomorrow's needs. We can't be limited in our thinking by what we have in place today. We need to dream about tomorrow and lay the groundwork for getting there. What we need is a communications structure that will allow us to achieve competitive advancements in education, health care diagnosis and treatment, public safety, research and innovation, civic participation, creative media, e-government, and overall economic development.

In planning for that future, we have worked with the Broadband Task Force to craft a measure that recognizes the convergence of technologies that are used to provide voice, data and video services through wireline, wireless, cable and satellite infrastructure.

These bills consolidate regulation of communications services under one regulator, a new Hawaii Communications Commission ("HCC" or "Commission"), in order to expedite the availability of the latest communications services at the earliest possible time to the residents of Hawaii. The Commission will be funded from existing fees and will be directed to achieve various goals, including creating access on a competitive basis at reduced prices, increasing service penetration and quality, streamlining the permit approval process, and providing access to businesses and

residents by 2012 at prices and speeds that will make us world leaders, attract investment and empower our people.

Although the bills are very similar, there are several important differences that the Department wishes to bring to the Committees' attention.

My testimony will focus on differences related to those issues affecting the overall structure or general operations of the HCC, while Cable Television Administrator Clyde Sonobe's testimony addresses differences relating to cable television regulation and Division of Consumer Advocacy Executive Director Cat Awakuni's testimony addresses differences relating to telecommunications regulation.

H.B. No. 1077 and H.B. No. 492 are virtually identical with one exception. Whereas H.B. No. 1077 allows the HCC to investigate any person acting in the capacity of or engaging in the business of a telecommunications carrier within the State without having a certificate of public convenience and necessity or other authority "Beginning July 1, 2010" (page 19, line 3), H.B. No. 492 allows such investigations "One year following the effective date of this chapter" (page 19, line 3).

All differences between H.B. No. 1077 and H.B. No. 984 as outlined below equally apply between H.B. No. 492 and H.B. No. 984.

First, H.B. No. 1077 attaches the HCC to the Department for administrative purposes only (page 11, line 21). In comparison, H.B. No. 984 establishes a Hawaii

Communications Commissioner ("Commissioner") as a division within the Department.<sup>1</sup>

This distinction is significant in that under H.B. No. 1077, the HCC would be an independent decision-making body separate from the Department and analogous to the Hawaii Public Utilities Commission (PUC), which, although attached to, is independent of, the Department of Budget and Finance. Since the Department's Division of Consumer Advocacy ("Consumer Advocate") represents consumers in telecommunications matters, having both the Commissioner and the Consumer Advocate within the same Department would create a conflict of interest.

Second, H.B. No. 1077 includes provisions for the transfer to the HCC special fund of moneys collected by the PUC from telecommunications carriers and deposited in the PUC special fund and unencumbered balances in the CATV subaccount in the compliance resolution fund and provides for an appropriation for the next 2 years (Section 52, page 153, starting at line 7,). H.B. No. 984 does not specifically provide for the transfer of moneys from existing funds. Adequate funding is crucial for the work of the HCC.

Third, H.B. No. 984 calls for both the Department and PUC to each transfer four positions to HCC (page 155, Section 55), whereas H.B. No. 1077 provides that the Department shall transfer four (4) positions to HCC and no positions are transferred from the PUC (page 155, line 20). The Administration does not support transferring any positions from the PUC because of the PUC's increased workload with energy-related

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<sup>1</sup> In the introductory section, page 3, subpara (b), it states that the purpose of this Act is to establish the commissioner under the administrative authority of DCCA. But when it comes to the statutory section, there is

matters. H.B. No. 1077 provides that up to ten (10) general funded positions shall be transferred to HCC to be funded from the HCC special fund (page 156, line 3). These positions, along with the four (4) positions H.B. No. 1077 transfers from the Cable Television Division, will provide the HCC with up to fourteen (14) positions – an amount we believe to be sufficient and necessary for HCC to accomplish its goals of promoting and ensuring the growth of broadband infrastructure as well as continuing the regulation of telecommunications carriers and cable operators in the State.

Fourth, H.B. No. 984 establishes a work group to develop procedures to streamline regulatory, franchising and permitting functions (page 157, section 56) whereas H.B. No. 1077 does not call for the establishment of a work group. Instead, H.B. No. 1077 adds a “Communications Infrastructure Permitting” section (Section -10, page 17) that assigns this responsibility to the Commissioner. Under H.B. No. 1077, the Commissioner has the option to form a work group to assist in resolving these issues. Unless the Committee believes that a work group is the only way to address permitting issues, it is our preference that the Commissioner be given the discretion to evaluate whether a work group is necessary.

Finally, H.B. No. 984, Section 58 (page 158) calls for the Legislative Reference Bureau to review all relevant laws in Hawaii Revised Statutes relating to broadband technology, telecommunications, and related areas, and make recommendations before the 2010 session, on how these laws may be amended to conform to this Act or the

implementation of this Act. Although we believe that H.B. No. 1077 addresses all relevant laws in the Hawaii Revised Statutes, we have no objection to this provision.

Thank you for the opportunity to testify on H.B. No. 1077, H.B. No. 984, and H.B. 492. I will be happy to answer any questions that the members of the Committee may have.



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TWENTY-FIFTH LEGISLATURE  
Regular Session of 2009

Thursday, February 5, 2009  
8:00 a.m.

**TESTIMONY ON H.B. 492 – RELATING TO THE HAWAII COMMUNICATIONS  
COMMISSION**

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR, AND MEMBERS OF THE  
COMMITTEE:

My name is Clyde S. Sonobe, Administrator of the Cable Television Division (CATV), Department of Commerce and Consumer Affairs (DCCA). This testimony is identical to my testimony on House Bill Nos. 984 and 1077.

CATV strongly supports H.B. 492, H.B. 984 and H.B. 1077. Under all three bills, the regulation of cable operators and telecommunication providers will be transferred to the Hawaii Communications Commission (HCC).

DCCA Director Lawrence Reifurth's testimony addresses differences related to those issues affecting the overall structure or general operations of the HCC and DCCA's Division of Consumer Advocacy Executive Director Cat Awakuni's testimony addresses differences relating to telecommunications regulation. My testimony focuses on how the bills differ with respect to functions related to cable television regulation.

In all three bills, the provisions in Hawaii Revised Statutes (HRS) chapter 440G, relating to cable services, are incorporated into a new chapter and chapter 440G is repealed.

A major difference in the bills concerning cable television relates to the general authority over public, educational or governmental ("PEG") access organizations. H.B. 492 and H.B. 1077 provide the HCC with the authority to designate and select PEG access organizations and to enter into and enforce contracts with them whereas H.B. No. 984 does not. This authority should be provided to the HCC in order to avoid confusion and litigation in the future.

Under all three measures, the cable operator will still be required to designate a minimum of three television channels or video streams for PEG use. At the present time, programming is transmitted by cable operator Oceanic Time Warner via channels to its subscribers. In the future, changes in technology and different cable franchise operators may result in video programming being transmitted to subscribers via protocols that are different than channels as defined today. Irrespective of how programming is delivered to viewers, what is important is the amount of programming authorized by the HCC Commissioner. As is currently the case with the Director of Commerce and Consumer Affairs, the HCC Commissioner will have the authority to require additional channels or streams of programming for PEG use if requested and appropriate justification is provided.

Thank you for the opportunity to testify on H.B. 492, H.B. 984 and H.B. 1077. I will be happy to answer any questions that the members of the Committee may have.



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TO THE HOUSE COMMITTEE ON ECONOMIC REVITALIZATION, BUSINESS, AND  
MILITARY AFFAIRS

THE TWENTY-FIFTH LEGISLATURE  
REGULAR SESSION OF 2009

THURSDAY, FEBRUARY 5, 2009  
8:00 A.M.

TESTIMONY OF CATHERINE P. AWAKUNI, EXECUTIVE DIRECTOR, DIVISION OF  
CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER  
AFFAIRS TO THE HONORABLE REPRESENTATIVE McKELVEY, CHAIR, AND  
MEMBERS OF THE COMMITTEE

**HOUSE BILL NO. 0492 – RELATING TO THE HAWAII COMMUNICATIONS  
COMMISSION.**

**DESCRIPTION:**

This measure creates the Hawaii Communications Commission to: (1) be responsible for the consolidated regulation of telecommunications carriers and cable operators; (2) "champion" the State's broadband, telecommunications and video interests; (3) develop State policies relating to broadband communication services and facilities; and (4) examine how to expedite the availability of communications services to the residents of Hawaii.

**POSITION:**

The Division of Consumer Advocacy ("Consumer Advocate") strongly supports H.B. No. 492, H.B. No. 984, and H.B. 1077.

**COMMENTS:**

Testimony for this measure and for House Bill Nos. 984 and 1077 are identical (but for the house bill number and the descriptions). DCCA Director Lawrence Reifurth's testimony addresses differences related to those issues affecting the overall structure or general operations of the HCC and DCCA's Cable Television Division

Administrator Clyde Sonobe's testimony addresses differences relating to cable television regulation. My testimony focuses on how the bills differ with respect to functions related to telecommunications regulation.

The Consumer Advocate supports the adoption of either bill, and offers a few comments on the measures generally and highlights a few of the differences between the measures as they relate to telecommunications regulation.

Increasingly, the United States lags behind the rest of the industrialized nations in next-generation broadband deployment and subscription. As recognized by the National Association of State Utility Consumer Advocates, deficiencies in broadband deployment and subscription in the U.S. can be broadly summarized as:

*Lack of access.* Rural, low population density areas in the United States have little or no access to broadband service, even "first generation data" service, and market conditions do not justify private investment in the infrastructure necessary to bring next generation broadband to households and businesses in unserved and underserved areas.

*Low penetration rates even where access is available.* Even where next generation broadband is available, subscription to such service is relatively low, usually due to a combination of factors, e.g., lack of a home computer, lack of education regarding accessing and using broadband service, high recurring and non-recurring costs of broadband service, unreliable network facilities. Low-income, minority and elderly consumers are particularly affected by these issues.

*Limited broadband competition.* Past federal and state policy decisions have effectively created a duopoly for broadband service, i.e., broadband is provided either by the incumbent telephone company or by the regional cable provider, stymieing innovation and reducing market constraints on pricing or service quality.

Having a commission specifically tasked to champion broadband issues and develop policies relating to broadband communication services and facilities will address the deficiencies outlined above and expand access to broadband services throughout the State.

The measures require the commissioner to promptly examine rate regulation alternatives including price cap regulation. The most recent studies indicate that Hawaii is one of just six jurisdictions utilizing rate of return regulation. Alternative forms of regulation, such as price cap regulation, allow the various carriers to better meet customer needs in terms of market-based rates and in a streamlined fashion. Under traditional rate of return regulation, telecommunications companies are subject to more

rigid and time-consuming guidelines, which inhibit the ability for these companies to act efficiently and expeditiously.

A portion of these measures should provide for greater regulatory flexibility for all local exchange carriers operating in Hawaii, which should eventually help stimulate competition. The greater regulatory flexibility for all carriers, however, does not occur immediately. Specifically, the measures propose to keep the existing regulatory structure in place to allow for certain current events and conditions to be resolved.

The measures adopt a similar approach in that they both extract the telecommunications regulation from chapter 269, Hawaii Revised Statutes, to consolidate such regulation with cable providers under a new commissioner. A few differences in the telecommunications sections are observed when comparing House Bill Nos. 492 and 1077 with House Bill No. 984.

House Bill Nos. 984 and 1077 (See section -9) include a requirement that the commissioner investigate the extent to which telecommunications services provided to residential and business customers are available from multiple providers in Hawaii and whether to reclassify telecommunications services provided to residential and business customers as "fully competitive" communications services. Such a review, if not completed sooner by the Hawaii Public Utilities Commission, may provide greater understanding of the current telecommunications market. If certain services are found to be fully competitive, such a finding should mean that all carriers would be able to offer market-based tariffs to customers through a less regulated process, which might allow customers to enjoy these service offerings sooner rather than later.

Another observed difference between the bills relates to the regulator's ability to recognize that the telecommunications industry and markets continue to evolve and change. As a result, it is necessary to recognize that exemptions of or waivers from some of the proposed requirements may be necessary. In the exemption section of House Bill No. 984 (See section -34(a)(1)) the commissioner is tasked, among other criteria, with evaluating the "responsiveness of the exemption to changes in the structure and technology of the State's telecommunications industry" (emphasis added). House Bill Nos. 492 and 1077 (See section -34(a)(1)) instead ask the commissioner to determine the "appropriateness of the exemption in view of changes in the structure and technology of the State's telecommunications industry" (emphasis added). In my opinion, the commissioner considering the "appropriateness of the exemption" appears to be more reasonable for determining whether exemption to regulation is within the public interest. I defer to the judgment of the Committee, on this provision, however, and merely note some differences.

Finally, House Bill Nos. 492 and 1077 (See section -51(a)) provides for a telecommunications fee of three-tenths of one percent. While the Legislature, of

H.B. No. 0492

House Committee on Economic Revitalization, Business, and Military Affairs

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course, has the authority to change this fee, I would recommend the use of the existing fee, one-fourth of one percent, which is included in House Bill Nos. 492 and 1077 (See section -23(a)). Since the telecommunications carriers are allowed to recover, via surcharge, the amount above one-eighth of one percent of gross income, there is the potential for greater amounts being passed on to consumers.

The competition in telecommunications industry and the markets themselves have developed far beyond the paradigms that existed when the original language in the existing statutes and rules were adopted. If the proposed statutory language is adopted, it should better recognize the current market conditions, allow customers to experience even more robust competitive offerings from existing and future carriers, and also allow all certified telecommunications carriers to operate under more flexible and streamlined regulatory regimes. As such, it is hoped that the telecommunications carriers in Hawaii's market will strive to maximize their investments to better serve all of Hawaii's customers by introducing more advanced services that meet Hawaii's needs at competitive prices.

Thank you for this opportunity to testify.



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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Testimony Presented Before the  
House Committee on Economic Revitalization, Business & Military Affairs  
February 5, 2009 at 8:00 am

by

David Lassner

Vice President for Information Technology/CIO, University of Hawaii

\*HB 0492 – RELATING TO THE HAWAII COMMUNICATIONS COMMISSION  
HB 0984 – RELATING TO TECHNOLOGY  
HB 1077 – RELATING TO THE HAWAII COMMUNICATIONS COMMISSION

Chair McKelvey, Vice Chair Choy and Members of the Committee:

I am pleased to testify today as Chair of the Hawaii Broadband Task Force. The Hawaii Broadband Task Force was established by the 2007 Legislature with a mix of public and private sector members to provide recommendations on how to advance broadband within the State of Hawaii.

As the task force completed its work at the end of last year, we greeted with great enthusiasm the words of then President-Elect Obama on December 6, 2008: "It is unacceptable that the United States ranks 15th in the world in broadband adoption. Here, in the country that invented the Internet, every child should have the chance to get online, and they'll get that chance when I'm President - because that's how we'll strengthen America's competitiveness in the world."

We gratefully acknowledge the support of the State Auditor and her office in facilitating our work. We fulfilled our duties under full Sunshine, through public meetings that were fully noticed and with our minutes published on the web. One interim report was provided to the Legislature before the 2008 Session, and as we neared completion last fall, numerous intermediate drafts of our final report were publicly available on the web.

While there wasn't enough time or money to do everything we had hoped, the Task Force unanimously put forward four key recommendations, summarized as follows.

- 1) **Broadband is Vital to Hawaii**  
Broadband is critical infrastructure for Hawaii's 21st century advancement in education, health, public safety, research & innovation, economic diversification and public services. One national study estimated the positive economic impact of advanced broadband in Hawaii at \$578 million per year. The task force recommends that Hawaii establish an aggressive and forward-looking vision that positions the State for global competitiveness.

2) **Driving Broadband Deployment**

The task force found that the U.S. as a whole is dramatically lagging the leaders in the developed world in our broadband capabilities and pricing, and is falling farther behind each year. While Hawaii is doing well on some measures relative to some other parts of the U.S., the State also falls to the bottom in many national broadband studies. The task force recommends that the State consolidate all relevant regulatory and permitting responsibilities in a new, one-stop, broadband advancement authority that promotes Hawaii's policy objectives and provides advocacy at all levels of government.

3) **Maximize Hawaii's Connectivity to the World**

Hawaii's "lifeline" for broadband to the rest of the world is expensive submarine fiber. While Hawaii was once the crossroads for trans-Pacific telecommunications, all of the new fiber systems built across the Pacific since 2001 have bypassed Hawaii. The task force recommends that Hawaii aggressively promote the landing of new trans-Pacific submarine fiber in Hawaii, including a shared access cable station that reduces barriers to fiber landing in Hawaii.

4) **Stimulate Broadband Adoption and Use**

The task force believes supplying advanced broadband at affordable prices is just one side of the equation. The task force recommends that Government lead by example in demonstrating the value of broadband to our citizenry, deploying broadband services to the public, and ensuring that we do not leave behind the economically disadvantaged members of our communities who may be inhibited from full participation in the 21st century.

There is much more detail in our full report, which was provided to each Legislator and the Governor just before the end of the year.

The Task Force is delighted to see multiple bills introduced to implement our key recommendations this year. With our Report as a base, we now stand ready to listen to your ideas and those of others so that together we can all create the best possible broadband future for Hawaii.

Written Statement of  
**YUKA NAGASHIMA**  
**Executive Director & CEO**  
High Technology Development Corporation  
before the  
**HOUSE COMMITTEE ON ECONOMIC REVITALIZATION, BUSINESS, &  
MILITARY AFFAIRS**  
Thursday February 5, 2009  
8:00 AM  
State Capitol, Conference Room 312

In consideration of  
**HB 492 RELATING TO THE HAWAII COMMUNICATIONS.**

Chair McKelvey, Vice Chair Choy and Members of the House Committee on Economic Revitalization, Business, & Military Affairs.

The High Technology Development Corporation (HTDC) defers to the recommendations of the Hawaii Broadband Task Force which was created by the Legislature in 2007 with the primary purpose of 1) removing the barriers to broadband access, including gaining wider access to public rights-of-way; 2) identifying opportunities for increased broadband development and adoption, including very high speed broadband services; and, 3) enabling the creation and development of new advanced communication technologies in Hawaii.

In a report to the Legislature dated December 2008, the Hawaii Broadband Task Force recommended the creation of a one-stop broadband advancement authority. Quoting from the report, *“Enact legislation that consolidates any and all State and County, wired and wireless, voice, data and video regulation, franchising and permitting functions into a one-stop self-funded expert broadband advancement authority in the State Department of Commerce and Consumer Affairs that provides primary leadership for achieving Hawaii’s broadband vision*

*through both short-term and long-term strategies. Headed by a Broadband Commissioner and guided by a statewide advisory group including County representation, this office would:*

- Consolidate all broadband-related activities currently in the PUC (telephony) and DCCA (cable TV) along with applicable County functions to serve as a one-stop shop that expedites processing for all regulatory, franchising and permitting functions normally available to state and local governments,*
- Create a level playing field for broadband providers by rationalizing fees and requirements to the extent permissible under federal law,*
- Promote maximum sharing and equitable access to all elements of broadband infrastructure through permitting, regulation, building codes and other means permissible under federal law,*
- Implement efficient, consistent and equitable policies on behalf of the state and all counties while remitting revenue for all leases and easements to the appropriate entities,*
- Offer incentives that promote competitive broadband access at affordable costs,*
- Provide advocacy at all levels of government on behalf of broadband service providers to help overcome unnecessary barriers to progress,*
- Implement an ongoing program of data collection and mapping to enable Hawai'i's policy-makers to monitor progress in achieving the committee's broadband vision, and*
- Proactively develop new partnerships with the federal government to implement modern approaches to advancing broadband infrastructure and services throughout Hawai'i, including in rural and underserved areas."*

Thank you for the opportunity to submit testimony.

Representative Angus L.K. McKelvey, Chair  
Representative Isaac Choy, Vice-Chair  
Economic Revitalization, Business, & Military Affairs Committee

House of Representatives of the State of Hawai'i

Lance D. Collins, Esq.  
Attorney for Akaku: Maui Community Television

Wednesday, February 4, 2009  
Oppose HB No. 492, Relating to Hawaii Communications Com. without Amendments

I represent Akaku: Maui Community Television, the access organization serving the cable subscribers of Maui County. Akaku and the people of Maui strongly opposes Senate Bill No. 895, Relating to the Hawaii Communications Commission without amendments.

The bill provides for a clear and rationalized form of regulation and oversight of PEG access organizations. However, the "cut and paste" transporting of the current Chapter 440G, Haw. Rev. Stat. does not address the underlying long-term problems in the area of regulation and oversight of PEG access organizations.

The Cable Communications Policy Act of 1984 (hereafter '1984 Cable Act') amended the federal Communications Act to explicitly allow cable franchising authorities to require cable operators to set aside channel capacity for PEG use and to provide adequate facilities or financial support for those channels. While the federal law leaves to the discretion of cable franchising authorities the discretion to require channel capacity for PEG use, Hawai'i state law requires it: "The cable operator shall designate three or more channels for public, educational, or governmental use." Haw. Rev. Stat. 440G-8.2(f)

Consistent with its erratic and politically motivated interpretations of the Public Procurement Code (hereafter 'Code'), the Administration attempted to radically change public policy regarding access organization designation – claiming the director's power was subject to the Code. Aside from the illegal delegations of power necessary to fulfill this policy change, the underlying intent of the Code and the 1984 Cable Act's PEG provisions are inherently incompatible.

Federal law's inclusion of PEG access in the powers of local franchising authorities was intended to recognize that access to media and exercise of other First Amendment rights simply are not supported by free market conditions or the structure of the commercial television market. To counteract the problems of concentrated ownership of media, the federal law was amended to allow local franchising authorities to require PEG access. In 1987, the Legislature made PEG access

mandatory in Hawai'i.

The principles of public procurement is intended to remove barriers and open up new, non-discriminatory and competitive markets through a legal and rational process offering the State and the people of Hawai'i the highest quality goods and services at the lowest reasonable price.

However, there are no instances where the free market supports PEG access services. The requirement of access channels and services is a direct intervention in the free-market by the federal and state government to provide a public benefit that the market simply cannot provide. There are a number of reasons for this, including the complex and indirect way that consumers "buy" programming and the power of cable operators to control content.

This is also exacerbated by the structure of the current cable television or broadcast television paradigm that are unable to support the types of programming access provides because the mechanisms for attracting capital to viewpoints that are not popular, minority, minoritarian, fringe or unfamiliar. Even popular viewpoints in small communities cannot compete with nationally distributed cable networks. For this reason, the logic of highest quality, lowest price does not work for these services.

Some have argued that the services themselves can be subject to the free market model. This is also not supported by the evidence. Market-based television and cable network stations are supported by the capital their programming attracts from advertisers through viewership. Yet, the government has intervened in the marketplace to require PEG access because PEG programming is not likely to attract the kind of capital necessary to support itself.

The result is that the use of procurement in the long-term, will likely undercut the public benefit the original market intervention intended to support. The original intent of providing funding to access organizations linked to the profits and rates of the cable franchisee is a rational method of funding access in proportion to the overall use of the cable franchise.

Cost-effectiveness and cost-savings are not the same policy consideration. While cost-savings is not appropriate for the access model, cost-effectiveness can be appropriate. This is an issue of proper regulation and oversight. By treating access organizations under the same rational principles of oversight as cable operators, cost-effectiveness can be achieved without undercutting the purpose of PEG access by subjecting it to the very conditions the market intervention was designed to avoid.

APPENDIX on Proposed Amendments on SB No. 895

§ -1 Definitions. \*\*\*

"Public, educational, or governmental access organization" or "PEG access organization" or "access organization" means any nonprofit organization designated by the commissioner to oversee the development, operation, supervision, management, production, production-training for or broadcasting of programs for any channels obtained under section -67, and provide PEG access services or any officers, agents, and employees of an organization with respect to matters within the course and scope of their employment by the access organization.

§ -8 General powers and duties. (a) The commission shall have the authority expressly conferred upon the commission by, or reasonably implied from, the provisions of this chapter.

(b) The commission shall have general supervision over all telecommunications carriers and cable operators, and shall perform the duties and exercise the powers imposed or conferred upon it by this chapter.

(c) The commission has the authority to adopt rules pursuant to chapter 91 necessary for the purposes of this chapter.

(d) The commission shall have ~~the authority to designate and select PEG access organizations, the authority to contract with the PEG access organizations and enforce the terms and conditions of the contracts, and general supervision over PEG access in the State.~~ general supervision over public, educational, or governmental access facilities and public, educational, or governmental access organizations.

§ -67 Cable system installation, construction, operation, removal; general provisions. \*\*\*

(f) The cable operator shall designate ~~three~~ seven or more television channels ~~or and~~ video streams of not less than equal value to the television channels for public, educational, or governmental use as directed by the commissioner, up to ten percent of the total bandwidth capacity for public, educational, or governmental use as directed by the commissioner by rule applicable to all franchises uniformly. \*\*\*

(j) The cable operator shall designate ten percent of total channel or bandwidth capacity for lease by third parties at reasonable rates or for common carrier use in addition to PEG access use as determined by the commissioner by rule applicable to all franchises uniformly.

§ -75 Access organization designation, generally. (a) The commissioner shall designate for each county one access organization to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section -67.

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

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

- (1) The management and technical experience of the organization, and its existing or proposed staff;
- (2) The public media, community media, and/or PEG access experience of the organization and its existing or proposed staff;
- (3) The applicant having among its missions/purposes (as demonstrated by its articles of incorporation, bylaws, or similar corporate documents) to provide training, education and outreach to permit individuals and organizations the ability to use communication tools to effectively convey their messages;
- (4) The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the commissioner;
- (5) The organization's short-term and long-term plans for PEG access services for a designated county;
- (6) The financial capacity of the organization;
- (7) Whether the organization agrees to expand the marketplace of ideas, and is committed to allowing members of the public to express their First Amendment free speech rights;
- (8) The ability of the organization, through the use of electronic media tools, to foster and engage in civic and cultural development and engagement in communities it has served;
- (9) Any other matters deemed appropriate and necessary by the commissioner.

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

submission of proposals.

(d) The commissioner is empowered to designate access organizations upon the terms and conditions provided in this chapter.

(e) After public hearing, the commissioner shall designate an applicant as an access organization in accordance with the public interest. In determining the designation of an access organization, the commissioner shall take into consideration, among other things, the content of the application or proposal, the public need for the services, the ability of the applicant to provide PEG access services, the suitability of the applicant, the financial responsibility of the applicant, the technical and operational ability of the applicant to perform efficiently the services for which designation is requested, any objections arising from the public hearing, the local needs of each community within each county, the communications advisory committee and any other matters as the commissioner deems appropriate in the circumstances.

(e) The period of an initial designation shall be for the period of the franchise or franchises granted under section -67 and any renewal periods granted thereto unless the designation be revoked for cause. In such cases of mid-term revocation of designation, the subsequent designation shall be for a period of the remaining time of the franchise or franchises granted.

(f) The commissioner shall promulgate rules consistent with this chapter for the designation and regulation of access organizations.

§ -76 Access services, terms of designation. (a) Every access organization shall provide safe, adequate, and reliable service in accordance with applicable laws, rules, and designation requirements.

(b) The commissioner shall include in each access organization designation a statement of services to be provided, performance standards for such services, fees for such services, and all terms and conditions of service, in the form and with the notice that the commissioner may prescribe. Prior to finalizing the terms of the designation, the commissioner shall seek input from the communications advisory committee regarding the appropriate terms.

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

(d) If a designation period has ended, the designation shall be extended upon mutual agreement of

the PEG access organization and the commissioner, provided:

- (1) The period of each extension is coextensive with any extension of the relevant franchise or franchises;
- (2) The commissioner makes a written determination that it is not practical to designation another access organization; and
- (3) The terms and conditions of the designation remain the same as the original designation, or as amended by the designation; or if not the same or as amended, they are fair and reasonable.

(e) No access organization designation or contract therefor, including the rights, privileges, and obligations thereof, may be assigned, sold, leased, encumbered, or otherwise transferred, voluntarily or involuntarily, directly or indirectly, including by transfer of control of any access organization, whether by change in ownership or otherwise, except upon written application to and approval by the director. A transfer of an access organization designation shall authorize the new access organization to provide services for the remainder of the term of the existing contract.

§ -77 Access fees. The commissioner shall assess the maximum access fees permitted under federal law based upon the gross revenue of each operator. The access organizations shall receive not less than seventy-five percent (75%) of the access fees assessed except that the commissioner may cap access fees distributed to access organizations serving counties with more than 500,000 residents, as provided by rule. Whatever fees are not distributed to access organizations and not used by the commissioner for administering the designation of access organizations shall be distributed to institutions of higher learning, schools, the state legislature, and the counties, as provided by rule, for development and production of residential cable access television purposes.

HR 492  
Relating To The Hawaii Communications Commission

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Thursday, February 5, 2009

Rep. Angus L.K. McKelvey, Chair  
Rep. Isaac W. Choy, Vice Chair  
House Committee On Economic Revitalization, Business, & Military Affairs

Proposed Amendments to HR 492 Relating To The Hawaii Communications Commission.

My name is Robert T. Tanimura and I am testifying on behalf of Verizon on HR 492, "A Bill For An Act Relating To The Hawaii Communications Commission." Verizon offers the following comments on HR 492:

- Verizon supports the establishment of state policy to promote broadband access, however, some of the goals proposed in HR 492 should be modified to better achieve that objective. First, comparing broadband speeds and prices in Hawaii to the top three performing countries in the world is problematic if nothing else because of different national policies, which are well beyond the control of Hawaii government. A more meaningful benchmark would be the top quartile of states within the U.S. or something similar since all states are operating under the same national broadband policy. For this reason, a comparison of results by state would be a more meaningful measurement of the effectiveness of state policy. In addition, the metrics should include a measurement of broadband penetration since the percentage of people that actually subscribe to broadband is as important as speed and price. I would note that in this regard, Hawaii is doing relatively well. Based on the FCC's latest Broadband Report and Census Bureau figures,<sup>1</sup> Hawaii is ranked 5th among the 50 states and the District of Columbia in terms of the number of residential broadband lines per household.
- Second, Verizon recommends that all references to the "sharing" of infrastructure be deleted from the bill. The sharing of telecommunications and broadband infrastructure is a complex and costly proposition, as the FCC found out with its now mostly rescinded policies for unbundled network elements (UNEs) and line sharing. While sharing might seem to be a logical way to lower average network costs, this is not necessarily true because sharing comes at a high cost, in terms of creating a disincentive to invest, in the complex management inherent in shared use of a common resource, and potential inefficiencies. These trade-offs must be taken into consideration by state policy. Including sharing as an explicit goal as this bill does would needlessly hamstring state

<sup>1</sup> FCC, *High-Speed Services for Internet Access: Status as of December 31, 2007*, January 2009, Table 13; U.S. Census Bureau, American FactFinder, 2007 American Community Survey, Selected Social Characteristics in the United States.

broadband policy. For example, it would preclude innovative solutions such as using competitive bidding rather than infrastructure sharing. Under a bidding scenario, state grants would be provided for projects in unserved areas based on a ranking of various criteria such as cost, price, and number of customers served. In essence, this approach promotes competitive deployment of advanced networks via the bidding process, not through the sharing of the resultant infrastructure. Through this process, more areas can be served on a competitive basis but without a costly or cumbersome sharing requirement. Indeed, a sharing requirement would be a significant deterrent for a carrier to bid for grants. Another example of a potential program that would be precluded by a sharing requirement is a proposal outlined in California's Broadband Task Force Report to encourage the deployment of wireless broadband in unserved areas by providing access to state rights-of-way at cost for wireless infrastructure.<sup>2</sup> A sharing requirement in the statute would preclude this solution and numerous others from even being considered. Hawaii needs to consider the entire panoply of potential broadband solutions and not box itself into only certain types of solutions, especially unproven ones such as infrastructure sharing. For these reasons, infrastructure sharing should not be a state goal.

- Finally, Verizon applauds the intent of the provisions to "promptly examine rate regulation for telecommunications carriers" and "[i]nvestigate the possibility of implementing incentive regulation for telecommunications carriers to increase investment in broadband infrastructure within the state." This acknowledges that the vast majority of new broadband infrastructure will continue to come from private investment. In order to ensure that carriers have an incentive to pursue innovation and invest in broadband, they must have the ability to earn a return on that investment. A good example of this is wireless communications, which is not rate regulated or subject to regulatory infrastructure mandates. Because it operates in an environment that is conducive to private investment, Verizon Wireless is spending \$9.4 billion on new wireless spectrum and billions more to build the next generation broadband network with download speeds of 75 megabits versus less than 5 today. Similarly, wireline carriers like Hawaiian Telcom, which is one of the most tightly regulated local exchange carriers in the nation, must have the financial strength and incentive to spend capital and invest in network upgrades. The examination of telecom rate regulation and incentive regulation will help to address this issue. While I cannot tell the state government how it should organize and structure its operations, I do wonder whether creating a new commission at this time would distract resources from the regulatory reviews that are urgently needed. I am also concerned about the concentration of power in a single individual. A multi-person panel such as the current Public Utilities Commission allows for a greater diversity of backgrounds and ideas and provides for an appropriate balance in decision making. For that reason, it is extremely rare in this country that an agency responsible for telecommunications policy is headed by a single person.

Thank you for the opportunity to testify.

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<sup>2</sup> Final Report of the California Broadband Task Force – January 2008, *The State of Connectivity, Building Innovation Through Broadband*, p. 58.