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TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE

TWENTY-FIFTH LEGISLATURE
Regular Session of 2009

Wednesday, February 18, 2009
2:00 p.m.

TESTIMONY ON H.B. NO. 984, H.D. 2, RELATING TO TECHNOLOGY

TO THE HONORABLE ROBERT N. HERKES, CHAIR, GLENN WAKAI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Ronald Boyer, Deputy Director of the Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to provide testimony in support of the intent of this bill but with strong concerns regarding several of the provisions that have been added.

This bill consolidates 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 Hawaii's residents. The Commission will be funded from existing fees and will be directed to achieve goals, including creating access on a competitive basis at reduced prices, increasing service penetration and quality, streamlining the permit

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 Department strongly supports the original intent of the bill and a number of the amendments made to it, we have identified areas of concern and have also provided suggestions to improve the bill for the Committee's consideration.

First, although the Department recognizes the importance of PEGs and has fostered an environment whereby Hawaii's PEGs in many respects have become the standard and model to which other PEGs aspire, we respectfully suggest that this bill is not the vehicle by which to attempt to resolve all issues pertaining to PEGs. The Department has supported and continues to support exempting the PEGs from Chapter 103D requirements. Nevertheless, we believe that PEG-related issues should be taken up by the Legislature separately. We are concerned that many of the PEG-related items now included in this measure will generate opposition that may adversely impact if not prove fatal to the bill. Therefore, the Department requests that the PEG-related language added to the bill in the HD2 be removed completely.

For example, section -70 (page 81) would immediately increase costs to Hawaii's cable subscribers, provide more money to the PEGs, and deny any funding to PBS Hawaii. Currently, the cable operator has not been ordered to collect from its subscribers the maximum franchise fee allowable under federal law. However, the bill requires the HCC to "assess the maximum access fees permitted under federal law..." This would have the effect of increasing the amount collected from the current 4.61% of gross to 5% and increasing fees to subscribers by approximately \$1.14 million. The bill

would also increase the PEGs' share of those fees to not less than 75% as compared to the approximate 60% of access fees they now receive. Under the current formula, in calendar year 2009, PEGs will receive approximately \$7.2 million. Under this bill's proposed language, PEGs would receive about \$11.1 million. Given the current economic and fiscal challenges faced by Hawaii's citizens, the Department believes it inappropriate to increase the fees paid by consumers. Also, PBS Hawaii currently receives 1% of the gross (approximately \$2.9 million in calendar year 2009), but this section limits the uses of the access fees collected to only the PEGs and to the HCC for administering the designation of the PEG access organizations.

The limitation on expenditure of access fees by the HCC would mean that the HCC could only use access fees to designate PEG access organizations—an extraordinary limitation on the current cable-related duties of the Cable Television Division being transferred to the HCC by this bill.

Second, the Department renews its request for several amendments to the bill:

- Section 21 of the bill (page 123) appears to provide the HCC Commissioner with the authority to determine when chapter 269, HRS, will no longer apply to telecommunications carriers. That may be an unlawful delegation of legislative authority to the Commissioner. It may be more appropriate for the Legislature to indicate a specific date when chapter 269, HRS, will no longer apply to telecommunications carriers. Consequently, the Department renews its suggestion that the effective date of those provisions relating to the regulation of telecommunications

carriers be delayed one year—until July 1, 2010, to enable the PUC to continue its work on the HawTel bankruptcy.

- The bill calls for both the Department and PUC to each transfer four positions to HCC. The Administration does not support transferring any positions from the PUC because of the PUC's increased workload with energy-related matters. The transfer of up to ten (10) general funded positions along with the four (4) positions from the Department 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.
- Section 51(c) (page 64, line 1) authorizes the HCC to impose additional fees on telecommunications carriers. Given the current economic and fiscal challenges faced by everyone, we believe it is inappropriate to increase the financial burden on businesses, and ultimately, the consumer, by imposing new fees. Consequently, the Department renews its request for the removal of that provision.
- The definition of “broadband” (page 5, line 18) is too restrictive. Broadband service is not exclusively tied to accessing the Internet, but includes a variety of other applications.

Thank you for the opportunity to submit testimony on this very important measure.



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Thank you for the opportunity to submit testimony on this very important measure.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
House Committee on Consumer Protection and Commerce
February 18, 2009 at 2:00 pm

by

David Lassner

Vice President for Information Technology/CIO, University of Hawaii

HB 0984, HD2 – RELATING TO TECHNOLOGY

Chair Herkes, Vice Chair Wakai and Members of the Committee:

I am pleased to present this testimony today not in my capacity at the University of Hawaii, but 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 appointed by the Speaker of the House and Senate President to provide recommendations on how to advance broadband within the State of Hawaii. I was honored to be elected chair by my fellow task force members.

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 made public at that time. 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 and data in our full report, which was provided to each Legislator and the Governor just before the end of the year.

Five bills were introduced this session to implement our key recommendations, including bills prepared by the House Majority, House Minority, Senate Majority and Administration. The "sausage-making" is now well underway. The HD2 before you contains our initial ideas developed in the full light of "Sunshine", which have been ornamented with many amendments to support the special interests of individual organizations. These amendments will no doubt enjoy considerable discussion and debate through the Legislative process.

I hope as this committee and many others work to move at least one measure through to enactment that we can all keep our eyes on the goals and approaches recommended by your Task Force. It would be tragic to continue to watch the future pass us by simply because we let a clear vision be hijacked by individual interests that have attached themselves to an idea whose time has come.

Written Statement of
YUKA NAGASHIMA
Executive Director & CEO
High Technology Development Corporation
before the
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Wednesday February 18, 2009
2:00 PM
State Capitol, Conference Room 325

In consideration of
HB 984 HD2 RELATING TO TECHNOLOGY.

Chair Herkes, Vice Chair Wakai and Members of the House Committee on Consumer Protection & Commerce.

The High Technology Development Corporation (HTDC) supports HB 984 HD2 which proposes to establish the Hawaii Communications Commissioner under the administrative authority of the Department of Commerce and Consumer Affairs, and defers to the recommendations of the State Broadband Task Force, created by the Legislature in 2007 to evaluate, determine and recommend best practices for implementation of this important initiative.

Thank you for the opportunity to submit testimony in support.

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Honorable Robert N. Herkes, Chairman
Honorable Glenn Wakai, Vice Chairman
House Committee on Consumer Protection & Commerce

Wednesday, February 18, 2009; 2:00 p.m.
Hawaii State Capitol, Room 325

Re: HB 984, HD2 – Relating to Technology

Aloha Chairman Herkes, Vice Chairman Wakai and Committee members:

On behalf of Oceanic Time Warner Cable (Oceanic), which provides a diverse selection of entertainment, information, and communication services to nearly 350,000 households, schools and businesses and currently employs over 900 highly-trained individuals, we appreciate the opportunity to submit testimony today. I am Nate Smith, president of Oceanic Time Warner Cable.

The legislature established the Hawaii broadband task force in 2007 to: 1) remove barriers to broadband access, including gaining wider access to public rights of way; 2) identify opportunities for increased broadband deployment and adoption; and 3) enable the creation and deployment of new advanced communication technologies in Hawaii. As noted in its final report, the task force recommended that a commission be created to, among other things: 1) create a level playing field for broadband providers by rationalizing fees and streamlining requirements to the extent permissible under federal law; 2) offer incentives that promote competitive broadband access at affordable costs; and 3) provide advocacy at all levels of government on behalf of broadband service providers to help overcome unnecessary barriers to progress.

As a member of the task force, and as a leading innovator of cable and internet technology, Oceanic continues to fully support these goals. Oceanic notes, for example, that it has continued to expand its broadband infrastructure (an additional 53,000 households were made broadband capable between 2005 and 2008), and makes broadband service available to over 97 percent of households in the state. In addition, Oceanic recently announced a major initiative to further upgrade its infrastructure this year in order to introduce a new suite of internet services that are up to twice as fast as its current Road Runner services. This initiative is the beginning of a

multi-million dollar investment by Oceanic to provide the technology that will allow it to provide the 100 mbps speeds set by the Hawaii Broadband task force's recommendation. Oceanic's willingness to invest in broadband -- a risk that has proven to Hawaii customers the value of broadband -- will go far toward achieving the goals of HB 984, HD2, and could lead other providers to follow suit, providing the further consumer benefit of marketplace competition and choice. And as the availability of broadband service grows, it spurs the development of new Internet businesses and applications, which in turn attract new broadband customers.

Oceanic also supports more direct attempts to increase the adoption of broadband services by Hawaii consumers. Government policies far too often focus only on solving the issue of increasing network deployment, when the more pervasive obstacle is that low-income households may not have the necessary equipment, training or educational opportunities to take advantage of the benefits of available Internet use. To succeed in achieving the goal of plugging more Americans into the benefits of broadband, the government must find a means of addressing these critical issues.

Upon further review and analysis of the specific language of this bill, however, the provisions of HB984, HD2 do not appear targeted to achieve these goals. Instead of implementing the laudable goal of removing barriers and creating incentives that promote competitive broadband access at affordable costs as the legislature (and task force) intended, the bill's attempt to blend together different regulatory schemes and requirements for different types of services (most of which do not relate to the provision of broadband services) goes far beyond the intended goal of the task force, and will discourage investment and innovation in the deployment of broadband services. Indeed, as currently drafted, the bill appears most likely to create significant disincentives to the further deployment and adoption of broadband service by Oceanic or any other provider in the State.

As the committee is aware, cable television is already regulated by the Cable Television Division of the Department of Commerce and Consumer Affairs, which has worked to promote the interests of consumers and the availability of service. Oceanic has concerns regarding the placement and attempted integration of the existing cable television regulatory scheme under the jurisdiction of the Hawaii Communications Commission.

By creating a vast new regulatory framework for all communications services in the State -- not only broadband services, but video and voice service as well -- HB 984, HD 2 will result in significant regulatory uncertainty and confusion. As noted in more detail in the attached appendix to our testimony, many of the bill's provisions are vague (e.g. §§16(a) (enforcement), and 70 (access fees)), others appear unenforceable due to direct conflict with federal law or intrusion into areas of law reserved for federal authorities (e.g. §§1 (definition of "broadband" / speed thresholds), 9 (Telecommunications development duties), 10 (commissions duties and powers), 16(a) (enforcement), 67(f) & (g) (PEG channels / leased access), and Section 1 (mandatory access to broadband infrastructure)), and still others appear to impose significant,

unnecessary new regulation at a time when cable operators and other service providers are already facing uncertain economic times (e.g. §§16(a) (enforcement), 67(f) & (g) (PEG channels / leased access), 69 (franchise renewal term), and 70 (access fees)). No provider can commit to risky new investments in an environment in which the cost of doing so is assuming a vague, overbroad regulatory scheme.

In fact, *any* legislation calling for government intervention in the broadband marketplace would undermine the goals of broadband deployment and adoption, and is thus a sure recipe for stifling private investment in establishing and upgrading broadband service and infrastructure in our state. The development of the Internet, expansion of broadband networks, and creation of innovative Internet applications we have seen would not have occurred if providers were heavily regulated. The government's consistent light regulatory touch since the introduction of broadband has gotten us this far.

Additional regulation of broadband service will be detrimental and would freeze innovation and investment in place. Indeed, for this reason, Congress has declared it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."^{1/} In recent years, confirmation that the government would not seek to interfere with developing Internet business models led to an explosion in investment, deployment and competition. Only by preserving regulatory freedom in Hawaii will providers be able to offer the investment and innovation that consumers have come to expect. HB 984 HD 2 fails to meet this goal, and would be a significant step *backward* in creating opportunities for increased broadband deployment and innovation by broadband providers.

Oceanic believes that HB984, HD2 will not further the goals of removing barriers and creating incentives that promote competitive broadband access at affordable costs, but instead will discourage private investment in broadband initiatives, which is exactly the *opposite* result intended by the legislature. The bill's attempt to broadly sweep cable television regulation with other types of regulatory schemes for different services under a single umbrella will result in less private investment, increased cost, and fewer initiatives in broadband technology.

For these reasons, Oceanic respectfully requests that the Committee defer action on HB984, HD2.

Thank you for the opportunity to provide testimony on this measure.

Sincerely,

Nate Smith
President

^{1/} Cf. 47 U.S.C. 230(b)(2).

APPENDIX TO TESTIMONY OF
OCEANIC TIME WARNER CABLE
RE: **HB 984, HD2 – Relating to Technology**

As noted in the attached testimony, Oceanic has concerns regarding the placement and attempted integration of the existing cable television regulatory scheme under the jurisdiction of the Hawaii Communications Commission. As the committee is aware, cable television is already regulated by the Cable Television Division of the Department of Commerce and Consumer Affairs, which has worked to promote the interests of consumers and the availability of service. The specific concerns regarding the language in HB984, HD2 include the following:

Cable Television Issues

- (§ 9, Telecommunications development duties) - Seeks to Require Multiple Services be Provided Over Same Platform. This provision contradicts federal law's franchising scheme by directing the commission to "ensure" that telecommunications networks provide "a combination of voice, data, image, and video", despite the explicit prohibition in federal law on requiring video providers to offer voice service. (47 U.S.C. § 541(b)(3)(C), (D)).
- (§§ 9, 10, Relating to commission's duties and powers) - Seeks to Regulate Rates, Terms and Conditions of Cable Service, Without Recognizing Federal Law Limitations. This provision grants the commission authority over all rates, terms and conditions of cable service, despite the explicit prohibition on State regulation of the rates, facilities, services and equipment of cable operators and service except as specifically allowed under federal law. (47 U.S.C. §§ 543, 544).
- (§ 10, Investigative powers) - Seeks to Regulate Matters Beyond State Jurisdiction. This provision grants the commission broad authority over all operations of cable providers, including, among other things, all "financial transactions," "business relations," compliance with "all applicable ... federal laws, and "all matters of every nature affecting the relations and transactions" between such providers and the public. Such authority is wholly preempted by federal law. Federal law defines the nature of the relationship between the franchising authority and the cable operator, restricting the matters over which the franchising authority has control. Moreover, a state franchising authority has no jurisdiction over interstate issues such as business relationships, nor is the state franchising authority charged with enforcing federal law, except in explicitly delineated circumstances.
- (§ 16(a) – Commission may institute proceedings to enforce chapter) - Grants Overly Broad and Unconstitutional Enforcement Authority. This provision grants the commission authority to commence enforcement proceedings not

only for rule violations, and not only where reasonable cause exists, but for in any instance where the commission “is of the opinion” that various other issues have occurred, including that “changes, additions, extensions, or repairs are desirable in its plant or service,” that any of its “rates, fares, classifications, charges, or rules are unreasonable or unreasonably discriminatory,” or that “in any way [the provider] is doing what it ought not to do.” Many of these areas are governed by federal law (e.g., rate regulation), and the broad and unpredictable nature of the provision makes it unconstitutionally vague.

- (§ 67(f) & (g) – PEG channels / leased access) - Imposes Overly Broad PEG Requirements. These provisions do not relate to increasing broadband deployment and adoption, and attempt to require excessive amounts of channels and bandwidth to be devoted for PEG use, despite explicit limitations on such requests set by federal law. These provisions also attempt to regulate commercial leased access use, a matter that is subject to exclusive regulation by the FCC. The existing requirement of HRS § 440G-8.2(f), which provides that the “cable operator shall designate three or more channels for public, educational, or governmental use” should be retained. The regulatory entity would be in the best position to research and evaluate the number of channels needed for PEG access, given advances in technology, other avenues of communication and viewer demand.
- (§ 69 – Franchise renewal term) – Changes maximum franchise renewal term from twenty to fifteen years. This provision does not relate to increasing broadband deployment and adoption and reduces the maximum franchise renewal term from twenty to fifteen years. Given the investment in infrastructure by an existing franchisee, the maximum renewal period of twenty years in the existing law should be retained.
- (§ 70 – Access fees) - Imposes Excessive PEG Access Fees. This provision does not relate to increasing broadband deployment and adoption, and provides that the amount collected shall be the “maximum access fees permitted under federal law.” This provision does not specify whether those fees are for PEG capital costs or PEG operating costs, nor does it recognize the proper offset against franchise fees for PEG support fees. This provision distributes a significant portion (possibly up to 25%) of those fees to organizations other than the PEG access organizations for the “development and production of residential cable access for television purposes” without specifying that such programming will even be used for PEG.

Broadband Issues

- State Jurisdiction. As a general matter, imposing transmission and other technical requirements on interstate broadband services is arguably beyond the authority of the State.

- (Section 1 – Goals of the Act / Mandatory Access to Broadband Infrastructure) - Promoting required “sharing of the infrastructure used to deploy broadband” is in effect an attempt to treat broadband as a common carrier service -- an attempt that already has been rejected by the FCC in a decision upheld by the Supreme Court. It would also discourage rather than promote new broadband investment given the cost and complex management inherent in shared broadband resources. Broadband providers are not required to make their facilities available to other providers.
- (§ 1, definition of “broadband” / Speed Thresholds) - By promoting broadband at a particular speed, and allowing the Commissioner to set “minimum speeds,” the bill could promote the use of particular technologies over others. Assuming the state can regulate the “minimum speed” of broadband, the speed thresholds must be set at reasonable levels that promote competitive neutrality. Efforts to encourage broadband deployment should not include unreasonable speed requirements that favor one particular type of next-generation architecture.

Telecommunications Issues

- (§ 1, definition of “Telecommunications service” or “telecommunications”) – This definition merges the definitions of “telecommunications” and “telecommunications service.” Under federal law, not all provision of telecommunications is a common carrier telecommunications service. The FCC, for example, has not determined the regulatory classification of VoIP.



Honorable Robert N. Herkes, Chair
House Committee Consumer Protection and Commerce

Honorable Glenn Wakai, Vice Chair
House Committee on Consumer Protection and Commerce

Re: HB 984 HD 2, Relating to Technology - Oppose
CPC Hearing, Wednesday, February 18, 2009, 2 pm – Room 325

Aloha Chair Herkes, Vice Chair Wakai and Committee members:

On behalf of tw telecom ("TWTC") which has operated in Hawaii since 1994 and manages approximately 25,000 access lines in the State of Hawaii, thank you for the opportunity to submit testimony today. I am Lyndall Nipps, Vice President of Regulatory Affairs for tw telecom.

Although the stated purpose of this bill is to implement key recommendations of the Hawaii Broadband Task Force by establishing the Hawaii Communications Commission (HCC) and Commissioner in the Department of Commerce and Consumer Affairs (DCCA), to transfer functions relating to telecommunications from the Public Utilities Commission to the HCC and functions relating to cable services from DCCA to the HCC, and to establish a work group to develop procedures to streamline state and county broadband regulation, franchising, and permitting and report to the legislature, passage of this bill will be a detriment to the communication industry and will have a chilling effect on any long-term expansion of the broadband initiative.

We do not object to the concept of establishing an HCC, however, we do have very serious concerns about the significant regulatory changes proposed in this bill. Among these include:

Sharing of infrastructure – This is a complex issue that should be examined in much greater detail prior to making any decision on whether it will further the goals of this initiative. Mandating that individual carriers share infrastructure at rates that may not be compensable to that carrier's investment will freeze any initiative to expand broadband capacity. Any mandatory sharing of infrastructure should be limited to infrastructure that is funded by the state and not by individual carriers.

Mandating regulation or deregulation – While TWTC does not object to a new HCC examining rate regulation, it is not necessary or appropriate to mandate that an HCC examine any form of regulation.

We acknowledge that competition has developed since the federal Telecommunications Act and rules were developed. However, we do not agree with statements that have been made in connection with this and other bills suggesting that the market for telecommunications is fully competitive, and that the existing regulatory scheme is unfair to the incumbent carrier, Hawaiian Telcom. If one were to look at Hawaii's market data, one would undoubtedly find that Hawaiian Telcom continues to dominate both the residential and business sectors in all relevant categories: number of customers, number of lines, revenue building connected to its own network, miles of fiber, etc. Further, such statements ignore the fact that there are a number of different market segments in Hawaii – residential, business, wholesale, retail, wireless, and wireline – which are not all subject to the same level of competition.

Timing & Loss of Expertise – While TWTC does not object to the formation of an HCC, we question whether the timing is correct for transfer of telecommunication regulation to a new agency especially in a time of increasing economic uncertainty. The creation of a new HCC is really not as necessary to spur the growth of the broadband industry at this time. A new commission will not have the insight or experience the PUC has with regulation and with restructuring or sale of a major telecommunication utility. A new commission may not have the historical background and may be as prepared as the PUC. Further, there are many other initiatives that the state ought to pursue in an effort to spur and to promote broadband investment and growth.

Impact on Interconnection Agreements – TWTC is a facilities-based competitive local exchange carrier (“CLEC”). We rely primarily on our own network to provide telecommunication service, but need certain facilities and services from the incumbent local exchange carrier (“ILEC”), Hawaiian Telcom. This includes the need to interconnect TWTC's calls with Hawaiian Telcom's network to enable our customers to make calls to, and to receive calls from each other. We also “collocate” equipment in Hawaiian Telcom's offices to obtain interconnection and access to certain facilities and services that we use to service our customers. Our ability to obtain interconnection and related services from Hawaiian Telcom is critical to our ability to serve our customers. We obtain these services primarily pursuant to federal law, but the PUC is responsible under both federal law and Hawaii statute to arbitrate and to enforce interconnection agreements. The way in which interconnection is provided is changing, with many ILECs migrating to an Internet Protocol (“IP”) technology. TWTC would like assurance that any changes in telecommunication laws do not adversely impact its continued ability to obtain interconnection and related services and facilities from Hawaiian Telcom, and do not affect PUC oversight of these matters, regardless of the technology being used.

Specifically, we would like assurance that any regulatory changes remain consistent with the interconnection and other policies reflected in sections 251 and 252 of the Federal Telecommunications Act.

Attached for your information and consideration is a National Association of Regulatory Utility Commissioners (NARUC) resolution that was passed last summer. NARUC sets national policy for the country's state public utility commissioners and this particular resolution is timely since it reflects the importance of these policies.

For these reasons, we respectfully request that you hold this bill.

Sincerely,

/s/

Lyndall Nipps
Vice President, Regulatory Affairs

tw telecom
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Attachment: 1

Executive Summary Interconnection Resolution

It is indisputable that interconnection between the incumbent local exchange carriers (ILECs) and other telecommunications carriers is necessary to a competitive telecommunications environment. NARUC has long supported the non-discriminatory interconnection of networks for the exchange of voice traffic as fundamental to the emergence of a "network of networks." The purpose of this Resolution is to prevent federal pre-emption of State commissions' authority to mediate, arbitrate, and approve interconnection requests for the exchange of voice traffic, consistent with the federal Telecommunications Act of 1996, as managed packet technology replaces circuit-switched technology for the transmission of voice calls.

Managed packet technology promises to accelerate the deployment of advanced networks and transform the traditional public switched telephone network into an all-packet network. Telecommunications carriers' managed packet networks do *not* use the public Internet, where packets move on a "best efforts" basis. Rather, managed packet networks are designed to identify and route voice packets using specific protocols and routing instructions to meet the real-time needs of voice services. In this way, managed packet networks avoid the quality and security issues that limit the usefulness of the public Internet to provide reliable voice services.

Initially, the deployment of managed packet voice networks occurred in the form of isolated islands which individual carriers had designed to ensure within-network quality-of-service for their voice service products. Managed packet networks are now being deployed by both ILECs and new entrants, with voice traffic volumes transported in managed packet form growing rapidly. Today, these networks must convert voice traffic to a circuit-switched format at the edge of the ILEC's network in order to complete the exchange of such voice traffic, even where both the ILEC and its competitor have deployed managed packet technology in their transport network. The nation is approaching the tipping-point, however, where it will be more efficient to exchange voice traffic in managed packet form between both carriers' networks.

Just as technologically neutral federal and state interconnection policies promoted the transformation from analog to digital transmission, these same policies should govern the transition from circuit-switched transmission to managed packet format. Preserving reliable and high-quality voice services as the nation's networks evolve to a packet-architecture must remain a public policy goal. Quality voice service is uniquely important to our lives, security, social structure and our economy. As such, assuring the efficient interconnection of managed packet networks is no less important to achieving quality voice service in the future than the interconnection of circuit-switched networks has been in the past.

The proposed Resolution makes clear that NARUC supports technologically neutral interconnection policies, under Section 251 of the federal Telecommunications Act, that do not distinguish between the legacy circuit-switched network architecture of the past over the managed packet network architecture being deployed today. Moreover, the Resolution reinforces NARUC's commitment that the important role of State commissions, set forth in Section 252, to act as the arbiter of interconnection disputes must be preserved. This Resolution will remove any uncertainty with the Federal Communications Commission that NARUC stands behind the continued application of Sections 251 and 252 to the interconnection of networks for the exchange of voice traffic irrespective of the transport technology being used.

Written Only

HB 984, HD2
Relating To Technology

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Wednesday, February 18, 2009

Rep. Robert N. Herkes, Chair
Rep. Glenn Wakai, Vice Chair
House Committee On Consumer Protection & Commerce

Comments on HB 984, HD2 Relating To Technology

My name is Robert T. Tanimura and I am testifying on behalf of Verizon on HB 984, HD2, "A Bill For An Act Relating To Technology." Verizon offers the following comments on HB 984, HD2:

Verizon supports the establishment of state policy to promote broadband access, however, some of the goals proposed in HB 984, HD2 should be modified to better achieve that objective.

First, 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 associated with partitioning those facilities. 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 broadband policy. For example, it would preclude innovative solutions such as using competitive bidding rather than infrastructure sharing. Under a bidding scenario (such as what is currently used in California), state grants are 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 requirements. 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.¹ 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.

Verizon is concerned that a fixation on infrastructure sharing could become a costly distraction. The fact of the matter is that the approach in the United States is to encourage broadband competition through platform competition, not sharing. Broadband infrastructure in this country is not like roads because we are almost totally dependent on private investment to put it in place and sharing clearly discourages that investment. While one may complain about this system, conversion from this system to one where the government provides the infrastructure or forces infrastructure sharing would involve a fundamental change in our national broadband policies and, most likely an expensive series of court battles (as our experience with UNEs and line sharing would indicate). And even if these difficult changes could be made, the issue would remain, where would the government get the money to build the infrastructure? (or more fundamentally, do we even want to depend on government to provide our broadband infrastructure?) Or, alternatively, what to do about the perverse incentives to invest caused by sharing? None of these complex and fundamental issues have even begun to be addressed. The Hawaii Communications Commission, should it come into existence, must focus on proven methods of increasing broadband access, not on plans that depend on policies that are beyond its control.

Second, 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 and the single most important thing the state can do to promote broadband is to create an environment that is conducive to private investment.

I believe we have that now on the wireless side where the industry operates free of rate regulation and government mandates. It is in this kind of environment that Verizon Wireless is willing to invest \$9.4 billion for additional wireless spectrum and billions more to build the next generation broadband network (Long Term Evolution or LTE) with download speeds of 75 megabits versus less than 5 today.

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

¹ Final Report of the California Broadband Task Force – January 2008, *The State of Connectivity, Building Innovation Through Broadband*, p. 58.

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.

Finally, comparing broadband speeds and prices in Hawaii to the top three performing countries in the world is problematic because there are too many factors in other countries that are unique to those countries and well beyond the control of Hawaii government. For instance, many of the circumstances that might have helped increase fiber penetration in Japan are not present in Hawaii, not the least of which are a dominant nationwide wireline incumbent (NTT) with financial strength due to a thriving wireless business and a powerful electric company (Kansai Electric Power Co., Inc.) that decided to aggressively enter the fiber to the home market. Goals must be related in some way to factors that are within our control or they will become meaningless.

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 policies. For this reason, a comparison of results by state would be a more meaningful measurement of the effectiveness of state policies.

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,² Hawaii is ranked 5th among the 50 states and the District of Columbia in terms of the number of residential broadband lines per household.

Thank you for the opportunity to testify.

² 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.

Robert N. Herkes, Chair
Consumer Protection and Commerce (CPC)

House of Representatives of the State of Hawaii

Jay April
President and CEO, Akaku: Maui Community Television
Member, HCR 358 Legislative Task Force

Wednesday, February 18, 2009 2:00PM Room 325
Support of HB 984, Relating to Technology with Amendments

The Hawaii State Legislature is to be congratulated for taking a bold step into the Broadband future by drafting legislation to modernize the telephone, cable and internet regulatory framework in Hawaii. On behalf of Akaku and the people of Maui, we strongly support House Bill No.984 HD2 Relating to Technology with Amendments.

It is significant that the House of Representatives in HB984 HD2 has recognized that preservation and protection of Public, Educational and Government Access to cable AND broadband is an essential component of bringing Hawaii into the forefront of the digital age. Our ability to communicate effectively with each other in a broadband future will only succeed if the fullest range of local community communications needs such as access to bandwidth, tools, skills and ideas on a fast, open internet are met for ALL residents at reasonable cost. Media literacy, digital education and open access to spectrum are the underpinnings of that success. The good news is that cost effective resources and tools to accomplish these goals are already in place. The PEG centers are the training centers that will bring digital literacy to all of our people.

Community Television operations in Hawaii are recognized as some of the best in the nation. This success is due to the fact that in 1987, the Hawaii Legislature followed the lead of the Federal Government by adopting and putting into effect a "best practice" integrated PEG model whereby independent non profits created for this specific purpose were provided channel space for unbiased gavel to gavel meeting coverage and nondiscriminatory access to the public. These nonprofits continue to provide low cost media training to the public, enable broadcast of local, state and native government affairs, fund private and public educational resources and allowed freedom of expression from diverse and varied sources.

Community Media centers have been empowering the local democratic voices of each island community without censorship, corporate control or commercial consideration for more than fifteen years and are perfectly positioned to have an immediate positive impact on Hawaii's broadband future.

The issue of cable franchise fees and, by extension, future broadband fees being

assessed for PEG, PEG 2.0 and other public interest use in exchange for the use of public rights of way is a fundamental tenet of U.S. Communications Law. This is the reason why we have public access channels on cable today. This local, non-commercial, non-corporate communications systems exist because the government intervened in the marketplace to charge monopoly cable companies "rent" for the use of our airwaves and our public property. With decades of increased concentration of ownership and corporate control over virtually all media, the same paradigm needs to apply to community broadband access as well if we are to enjoy an electronic democracy. This is why HB984 needed to be amended with specific language to guarantee that the same paradigm that currently exists with PEG access applies to community broadband access as well.

Akaku on Maui has been an early adopter of real world broadband applications. Not only were we the first media organization in Hawaii to stream video in the late nineties, we were also innovators in 2007 with the first live, simultaneous multicasts via radio, television and web broadcasts of events of public importance to the entire state. We continue to stream our channels and our "Hawaiian music themed" radio station broadcasts via the internet to the state and world at large. We were also among the first in the nation to integrate live TV broadcasts using "skype" technology from Lanai and Molokai and as far away as Washington D.C and Boston (featuring Representative Mele Carroll.) Akaku can also make claim to one of the more aggressive and innovative new media and video training educational programs in the state.

Despite these successes there are those who characterize the current PEG framework as "controversial" a reason Dr. David Lassner stated in his testimony before the Senate that PEGs were not included in the state's original Broadband Task Force Report. This is clearly an understandable oversight, that if not corrected by attaching amendments to this broadband legislation, could have done devastating harm to the health of Hawaii's community communications and broadband future.

That is why I am happy to say that in its recent report to the 2009 Legislature, the HCR 358 Task Force of which Dr. Lassner was a valued member, submitted comprehensive administrative rules that if incorporated into HB984 as amendments will resolve in one fell swoop, any perceived procurement controversy, all current regulatory "standard less discretion" issues; guarantee performance and accountability for PEGs, solve unresolved issues before DCCA, SPO and the courts as well as set metrics for PEG Access designation.

The HCR358 Task Force Report to the Legislature made recommendations that were overwhelmingly against procurement and provided a reasonable and well thought out alternative method for DCCA to follow that are modeled after the current cable franchising renewal process for the designation of access corporations.

Obviously in the broadband future, most everything will move to fiber. We will see IP based protocol for delivery of services and we want to see a healthy PEG migration to IPTV in an enlightened regulatory framework.

This will not happen by itself. Just last week we saw petitions before the FCC From the Cities of Dearborn and Lansing, Michigan and others challenging discriminatory treatment for PEG access by cable giants, Comcast and AT&T.

AT&T's U-verse service for instance is being touted as harmful to PEGs. The service delivered by IPTV takes forever to load, is difficult to find, is of exceedingly poor quality and employs a technique known in the industry as, "channel slamming" making access channels difficult to find and impossible to brand.

And problems with broadband service are not merely a mainland problem. We at Akaku are currently experiencing difficulty in obtaining acceptable service from Time Warner as well. Our own ongoing negotiations to achieve acceptable broadband service to stream our channels to your constituents have, so far, been unsuccessful due to a combination of regulatory inaction on the part of DCCA and a lack of cable company interest exacerbated I believe by less than vigorous support for our position from DCCA.

But we are encouraged by FCC Commissioner Jonathan Adelstein's words on his recent visit to Maui:

"Commissioner Copps and I have spoken about and acted upon the need for more localism in broadcasting and also the need for protection of community broadcasting. I think it is absolutely essential that we take steps to protect that in the future. Some of the recent actions by the FCC in changing the franchise process have undercut public, educational and governmental channels that are providing a local avenue expression and for accountability for government officials. I am very concerned about the direction it is taking. I believe it is time for us to review from top to bottom some of the steps that have been taken to look at how we can protect community access and protect localism in broadcasting and enhance it in this digital age."

We agree with the new FCC and the Obama administration that there is a place for non-commercial, fully local, community broadband media access as a natural extension of the PEG concept. We applaud amendments to this effect inserted into HB984 HD2 in order to protect and stabilize PEG access in Hawaii while at the same time assuring full accountability to the government and to the people in each franchise jurisdiction.

The winds of change are blowing in Washington D.C. This will bring in more financial resources to Community Media to help close the digital divide (like assistance for build out of broadband to rural areas, net neutrality and digital

inclusion issues: and percentages from internet and cable modem fees.)
Provided that neighbor island, community and public interest media are included
in the equation, this initiative can go a long way toward bringing all Hawaii
residents into a digitally inclusive future.

Representative Robert N. Herkes, Chair
Representative Glenn Wakai, Vice-Chair
Consumer Protection and Commerce Committee

House of Representatives of the State of Hawai'i

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

Wednesday, February 18, 2009
Support of HB No. 984, H.D. 2, Relating to Technology

I represent Akaku: Maui Community Television, the access organization serving the cable subscribers of Maui County. Akaku and the people of Maui strongly support House Bill No. 984, House Draft No. 2, Relating to Technology, which would give the public and access organizations a clear and meaningful process by which the administration designates and regulates cable access.

The bill provides for a clear and rationalized form of regulation and oversight of PEG access organizations. The current draft corrects the previous deficiencies of the "cut and paste" transporting of the current Chapter 440G, Haw. Rev. Stat. which has not addressed 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.

Thank you for this opportunity to provide testimony.