

TESTIMONY IN SUPPORT OF HB 984

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 984 RELATING TO TECHNOLOGY

I ask for your support of HB 984.

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. 984,
RELATING TO TECHNOLOGY**

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 21st 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 21st 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.¹ 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

¹ 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

Communications Commissioner ("Commissioner") as a division within the Department.¹ 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.

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¹ 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

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. 984 – RELATING TO TECHNOLOGY

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. 492 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.



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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. 0984 – RELATING TO RELATING TO TECHNOLOGY.

DESCRIPTION:

This measure creates the Hawaii communications commissioner to:
(1) investigate, promote, and ensure the growth and development of broadband
infrastructure within the State; (2) "champion" the State's broadband,
telecommunications and video interests; and (3) investigate the possibility of
implementing incentive regulation for telecommunications carriers to increase
investment in broadband infrastructure.

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. 492 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. 492 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 No. 984 (See section -51(a)) provide for a telecommunications fee of three-tenths of one percent. While the Legislature, of

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.

Ken H. Takayama
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LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol
415 S. Beretania Street, Room 446
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Written Testimony

HB984

RELATING TO TECHNOLOGY

Testimony by the Legislative Reference Bureau
Ken H. Takayama, Director

Presented to the House Committee on Economic Revitalization,
Business and Military Affairs

Thursday, February 5, 2009, 8:00 a.m.
Conference Room 312

Chair McKelvey and Members of the Committee:

I am Ken Takayama, Director of the Legislative Reference Bureau. Thank you very much for the opportunity to testify on H.B. No. 984. The Bureau takes no position either for or against this measure, but offers the following comments.

1. Section 58 of this bill directs the Bureau to review state and county laws relating to broadband technology, telecommunications, infrastructure, and permitting requirements, among others, with respect to how they conform to this measure or facilitate its implementation.
2. The review called for could be a big job, as the provision is drafted broadly -- and we won't know how extensive the review will be until the bill actually passes. However, if the Legislature wants us to do this study, we will do so to the best of our ability.

Thank you for this opportunity to testify. I am open to any questions you may have.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

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 984 RELATING TO TECHNOLOGY.

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

As with HB 1077 Relating to the Hawaii Communications Commission, the High Technology Development Corporation (HTDC) supports HB 984 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.

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

Thursday, February 5, 2009
Support of HB No. 984, Relating to Technology with Amendments

I represent Akaku: Maui Community Television, the access organization serving the cable subscribers of Maui County. Akaku and the people of Maui strongly support Senate Bill No. 1680, Relating to Technology, with amendments, 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. 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 with Proposed Amendments for SB 1680

§ -1 Definitions. ***

"Access organization", "Public, education, or government access organization" or "PEG 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 or any , and any officers, agents, and employees of an organization with respect to matters within the course and scope of their employment by the access organization.

~~"Public, educational, or governmental access organization" or "PEG access organization" means any person or entity that provides public, educational, or governmental access services.~~

§ -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:

- 02 The public media, community media, and/or PEG access experience of the organization and its existing or proposed staff;
- 03 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;
- 04 The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the commissioner;
- 05 The organization's short-term and long-term plans for PEG access services for a designated county;
- 06 The financial capacity of the organization;
- 07 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;
- 08 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;
- 09 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.

(f) 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.

(g) 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 designate 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.

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Marcus R. Oshiro, Chair
Finance (FIN)

House of Representatives of the State of Hawaii

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

Thursday, February 5, 2009 8:00AM Room 312
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 Relating to Technology with Amendments.

This plan has potential to do wonders for Hawaii business as well as leapfrog Hawaii into the forefront of the digital age, but it can only succeed if the fullest range of local community communications needs such as access to tools, skills and ideas on a fast, open internet are met for ALL of Hawaii's residents at reasonable cost. Media literacy, digital education and open access to spectrum are the underpinnings of that success and the good news is that cost effective resources and tools are already in place at PEG access centers.

Community Television operations, notably in Oahu and on Maui worked hard for years to become recognized as some of the best PEG Access stations in the nation. This success is due to the fact that the Hawaii Legislature adopted and put into effect a "best practice" integrated PEG model whereby independent non profits created for this specific purpose in each county were provided channel space for unbiased gavel to gavel meeting coverage, nondiscriminatory access and low cost media training to local, state and native governments, private and public educational entities and allowed freedom of expression from diverse and varied sources. Community Media in Hawaii has been empowering the local voices of each island community without censorship, corporate control or commercial consideration for more than fifteen years and they are perfectly positioned to have a positive impact on Hawaii's broadband future.

This is not just talk. 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.

But in this new digital world, no PEG Access organization or Community Technology Center can afford rest on its laurels. That is why I am happy to say that in its recent report to the 2009 Legislature, the HCR 358 Task Force submitted comprehensive administrative rules that if incorporated into SB1680 will resolve in one fell swoop, current regulatory "standardless discretion" guarantee performance and accountability for PEGs as well as set metrics for PEG Access designation.

Not clearly articulated in the broadband bills is the issue of broadband regulatory fees being assessed for PEG and PEG 2.0 in exchange for the use of public rights of way which is a fundamental tenet of U.S. Communications Law. This is the reason why we have public access channels on cable today. These 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. By extension, SB 1680 needs 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.

Obviously in the broadband future, most everything will move to fiber. We will see IP based protocol for delivery of all 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 Challenging AT&T's U-verse service as harmful to PEGs. The service delivered by IPTV takes forever to load, is difficult to find, is of exceedingly poor quality and suffers from a technique known in the industry as, "channel slamming" making it difficult to find and impossible to brand. But we are encouraged by FCC

Commissioner Jonathan Adelstein's words on his recent visit to Maui:

"Commissioner Capps 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 have worked hard on language to this effect which we would like to see inserted in SB 1680 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 language is included in an APPENDIX WITH PROPOSED AMENDMENTS FOR HB 984 on page 3 of Mr. Lance Collins' testimony.

The winds of change are blowing in Washington D.C. This will bring in more financial resources to Community Media to help close the digital divide (like percentages from internet and cable modem fees.) 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.

HR 984
Relating To Technology

Robert T. Tanimura
Director – Public Affairs, Policy & Communications
Verizon Communications
808-595-6521

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 984 Relating To Technology.

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

- Verizon supports the establishment of state policy to promote broadband access, however, some of the goals proposed in HR 984 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,¹ 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

¹ 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.² 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.

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