

LATE

HB984

LINDA LINGLE
GOVERNOR



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RUSS K. SAITO
PAMELA A. TORRES

AARON S. FUJIOKA
ADMINISTRATOR

**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

P.O. Box 119
Honolulu, Hawaii 96810-0119
Tel: (808) 587-4700 Fax: (808) 587-4703
www.spo.hawaii.gov

COMMENTS
OF
AARON S. FUJIOKA
ADMINISTRATOR
STATE PROCUREMENT OFFICE

LATE

TO THE
SENATE COMMITTEE
ON
WAYS AND MEANS

April 6, 2009

9:30 AM

HB 984, HD 4, SD 1

RELATING TO TECHNOLOGY.

Chair Kim, Vice-Chair Tsutsui and committee members, thank you for the opportunity to comment on HB 984, HD 4, SD 1. The State Procurement Office (SPO) comments are limited to SECTION 3, PART III, page 76 and page 81.

Page 76, lines 5 to 7, the SPO recommends deleting subsection (j) as we do not support language to exempt from HRS Chapter 103D, the acquisition of PEG access services. The access services contracts are agreements between a governmental body, the Hawaii Broadband commissioner (HBC), and access organizations that are private, non-profit corporations. Under these contracts, HBC is acquiring services to manage and operate the access channels.

Open procurement procedures assure that the State obtains value, and potential vendors/contractors are treated fairly and that no preferential treatment is provided. It is vital to good government to have a fair and consistent process to award government contracts that hold agencies responsible and accountable for their actions. Open bidding promotes the fair and equitable treatment of all persons who deal with the procurement system, fosters effective broad-based competition; and by doing so, increases public confidence in public procurement and thus in local government.

Chapter 103D is the single source of public procurement policy to be applied equally and uniformly. It was the legislature's intent for the Code to be a single source of public procurement policy. Fairness, open competition, a level playing field, and government disclosure and transparency in the procurement and contracting process are vital to good government. Competition produces innovation and excellence. For this to be accomplished, participation in the process with one set of statutes and rules is necessary.

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Page 81, lines 18 to 21, the SPO recommends deleting subsection (f).

The SPO understands the purpose of this proposed language is to provide a temporary measure to assist the HBC in expediting the implementation of the American Recovery and Reinvestment Act of 2009 (ARRA) as envisioned by President Obama. Part of the vision on the effects to the economy the ARRA proposes to bring to the States, is the underlining need for transparency and accountability to the people. This proposed exemption provision would not fulfill these requirements.

To meet these concerns the SPO understands SB 21, SD 1 and HB 1184, HD 2 address similar concerns faced by various agencies anticipating receiving ARRA funds, therefore this language on page 81, subsection (f) appears unnecessary.

Thank you

LATE

200 Akamainui Street
Mililani, Hawaii 96789-3999
Tel: 808-625-2100
Fax: 808-625-5888



Honorable Donna Mercado Kim, Chair
Honorable Shan S. Tsutsui, Vice Chair
Senate Committee on Ways & Means

Re: HB984, HD4, SD1 – Relating to Technology
Senate Committee on Ways & Means, Monday, April 6, 2009 - 9:30 a.m.,
Conference Room 211

Chair Kim, Vice Chair Tsutsui and Members of the Committee:

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 comments on HB984, HD4, SD1.

Oceanic supports several of the amendments made by the Senate Economic Development and Consumer Protection Committees to this bill, including clarifying that Section 2 pertains to “voluntary sharing” of infrastructure and amending Section -7(b) (general powers of the commissioner) to include the clause “as permitted by federal law”.

As noted in the discussions with various members, the Department of Commerce and Consumer Affairs, and the Consumer Advocate, however, Oceanic continues to have concerns regarding various provisions of this bill. Oceanic respectfully requests that the Committee defer action on HB984, HD4, SD1 to allow stakeholders to come up with a workable solution over the interim period. However, if the Committee decides to move this bill forward, we respectfully ask that the Committee consider amendments offered by Oceanic that have been discussed with various members and the DCCA, including amendments to Section -1 (eliminating the clause “at minimum speeds set by the commissioner” in the definition of “Broadband” and clarifying the definitions of “Telecommunications service” and “telecommunications”); Section -15 (pertaining to overbroad powers of the Commissioner); Sections -38 and -54 (to ensure continued oversight of intrastate switched and special access with respect to wholesale customers); and various sections to clarify that the commissioner may only act as permitted by federal law.

Accordingly, Oceanic respectfully requests that the Committee consider these and all other amendments that Oceanic has discussed with various members, the DCCA and the Consumer Advocate, or defer action on HB984, HD4, SD1 to allow for further discussion of this bill over the interim period.

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

Sincerely,

Nate Smith
President



LATE

April 6, 2009

Honorable Donna Mercado Kim, Chair
Honorable Shan S. Tsutsui, Vice Chair
Senate Committee on Ways & Means

Re: HB 984, HD4, SD1, Relating to Technology - Oppose
Senate Committee on Ways and Means - Hawai'i State Capitol, Room 211, 9:30 AM

Aloha Chair Kim, Vice Chair Tsutsui and Members of the Committee:

On behalf of tw telecom 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 Nipp, 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 PUC 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.

While we do not object to the concept of establishing an HCC, we prefer that the committee defer action on this bill to allow stakeholders more time over the interim to work out many of the serious concerns we have with the legislation. However, if the committee chooses to move this bill forward, we respectfully request the following changes be made to address some of the very serious concerns about the bill. Among these include:

1. **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.
2. **Mandating regulation or deregulation** – TWTC recommends that all language relating to telecommunications rates be deleted from this bill. The stated purpose of the bill is to advance Hawaii broadband capabilities and use, and the regulation or deregulation of telecommunications rates is unrelated to that purpose. As this committee may know, other bills

have been introduced that deal specifically with telecommunications rate deregulation, and TWTC believes that those bills are the appropriate vehicle to address regulatory issues.

§ -38 Regulation of telecommunications carrier rates; ratemaking procedures. TWTC has some concerns about § -38 of this bill as it relates to rates for both wholesale and retail services.

Wholesale Services, Facilities and Functions. Any bill which seeks to deregulate telecommunications rates must include a complete exception for all wholesale services, functions and facilities. TWTC is a facilities-based competitive provider of local telephone service, also known as a competitive local exchange carrier ("CLEC"). TWTC relies primarily on its own network to provide telephone service, but it also needs certain facilities and services from the Hawaiian Telcom, the incumbent local exchange carrier ("ILEC"). Most importantly, TWTC and other CLECs need to interconnect their networks with Hawaiian Telcom's network to enable their customers to make calls to, and receive calls from, each other. TWTC and other CLECs also "collocate" equipment in the incumbents' central offices, both to obtain interconnection and to access certain incumbent facilities and services that the CLECs use to provide service to their own customers. TWTC's ability to obtain interconnection and related services from Hawaiian Telcom is critical to its ability to offer consumers a viable alternative source of telecommunications services.

It is therefore essential that any deregulation bill contains a complete exception for "wholesale" facilities, functions and services provided by one telecommunications carrier to another, and that this exception be technologically neutral, i.e. that it will continue to apply even if HT migrates its services to internet protocol or other "next generation" facilities. While this bill contains a limited exception for switched and special access, that language doesn't cover all necessary services and facilities. TWTC requests that any bill which deregulates telecom rates contain the following exception:

Add Subsection ____ shall apply to retail rates charged for services to end-user consumers only and shall not apply to wholesale rates charged for services, functions or facilities provided by a telecommunications carrier to another telecommunications provider, a wireless communications provider, a voice over internet protocol communications provider, or other similar communications provider, including, without limitation switched network access rates or other intercarrier compensation rates for interexchange services, special access, or interconnection and other wholesale obligations, and the commission shall continue to have authority to regulate such wholesale rates, interconnection rights and traffic exchange obligations without regard to the technology used to provide such services, functions or facilities.

Retail Rates. TWTC also has concerns about language relating to deregulation of retail rates that has been proposed in this and other bills. By way of background, price regulation for the ILEC prior to the existence of full competition is necessary both to ensure that prices are not too low and that they are not too high. The ILEC is in the unique position of having "captive customers" who do not have other options to obtain

telephone service. Without regulation, the ILEC can raise its rates for services to these customers, and use the revenues from these rates to subsidize any losses it incurs from its more competitive services. Thus, some level of regulation is required to ensure that prices are not too high. There are also concerns with pricing that is too low. First, if the ILEC prices its services too low, it will drive away its competition. The ILEC is in a unique position to be able to charge prices for more competitive services below its costs, and to subsidize any losses it incurs from its competitive services with rates charged to customers of non-competitive services. Because CLECs face competition for all of their services, they do not have this same opportunity, and must cover all of their costs through the prices for their services if they are to survive. If the ILEC is able to price its services below its costs, it can drive away competition.

Second, if the ILEC prices its service too low, it will not have sufficient funds to maintain its network, which is of critical importance to the State. For example, "technical difficulties with Hawaiian Telcom caused a phone outage" for about 2-1/2 hours this past New Year's Eve. This caused flights in and out of Honolulu International Airport to be disrupted for several hours because they were unable to electronically process and check in customers.

In general, if this committee wishes to address telecommunications rates in this bill, TWTC believes that the language in this bill is preferable to the language contained in Section 38 of SB 1680, SD2 HD 1, the companion to this bill, which would completely deregulate retail rates. Section 38 of this bill requires the commissioner to examine rate regulation alternatives, and allows the commissioner to order pricing flexibility for services that the commissioner determines to be effectively competitive. This approach is generally consistent with the the Public Utilities Commission's (PUC) existing rules relating to Competition in Telecommunications Services Rules, and provides for implementation of pricing flexibility based on factual findings of the extent of competition in various market segments. TWTC believes that this is the correct approach. The legislative process is simply not designed for making the types of detailed factual findings that are required to determine the extent of competition in different market segments, and blanket statements that there is robust or effective competition are simply not supported. For example, TWTC only provides service to business customers, providing managed network services, specializing in Ethernet, transport data networking, Internet access, local and long distance voice, VoIP, VPN and security, to large organizations and communications services companies in Hawaii. However, for smaller business that require fewer than lines and services, the only current alternative to Hawaiian Telcom's service is VOIP or wireless, where they are available, and these services don't meet the service quality and reliability needs that many businesses require. There are likely many other market segments that likewise do not have effective competition. The approach contemplated under subsections (a) through (c) of §-38 of this bill would allow the commissioner to determine the extent of competition faced in various market segments. TWTC therefore believes that this language is the best way to address the issue of telecommunications pricing flexibility.

3. **Hawaii Communications Commission** – TWTC believes that a Hawaii Communications Commission (HCC), is preferable to a single commissioner.

For these reasons, we respectfully request that you consider deferring action on this bill.

Sincerely,

/s/

Lyndall Nipps
Vice President, Regulatory Affairs

tw telecom
(AZ, CA, CO, HI, ID, NM, OR, UT, WA)
Office: 760-832-6275
Email: Lyndall.Nipps@twtelecom.com

LATE

Testimony of Sean McLaughlin for Hawaii Consumers
Regarding HB 984 HD4 SD1 "Relating to Technology"
Establishing the Hawaii Communications Commission
April 6, 2009, 9:30am
Senate Ways & Means Committee, State Capitol Room 211

Committee Chair Kim, Vice Chair Tsutsui, and Committee Members -

Thank you for considering these comments opposing HB984 as proposed. While we support the intent of this measure, the bill was flawed and deficient as introduced and it has been substantively diminished through various amendments and revisions.

If you choose to advance this measure, please give thoughtful consideration to the Findings of U.S. Senator Daniel Inouye from his broadband policy initiative in 1994, which are submitted here on behalf of Hawaii Consumers.

By creating a Hawaii Communications Commission, the proposed legislation HB 984 makes radical changes to Hawaii laws governing communications providers. While HB 984 has the potential to address deficiencies and liabilities of the current State regulatory regimes for communications in Hawaii, it could also further entrench the corruption of State regulation by special interests.

The measure's intent for an ethical and progressive reform could position Hawaii to regain leadership with regard to development of broadband media access. Unfortunately, as the measure has moved through the Legislature, this result doesn't appear likely. The current version of HB 984 creates a "Communications Commissar" without checks or balances to ensure ethical and competent regulation to protect consumers and the public interest.

Our immediate challenge is the incompetence and corruption of DCCA's cable TV regulation over the past decade. With no independent review or audit in its entire history, a national reputation for inept and unethical cable regulation in Hawaii continues to be a source of real shame for our State.

Unfortunately, the Governor's Broadband Task Force is tainted by the controlling participation of corrupt self-interested State bureaucracies and special interests, and a complete lack of independent vision and local community voices. While meetings were technically 'open,' the Task Force did not hold a single public hearing nor invite informed community representation.

Because the underlying goals of HB 984 are important, it may be worth salvaging this legislation to establish a Hawaii Communications Commission. Perhaps if ethical leadership would step forward to correct the process deficiencies, there is still hope? Sadly, given the back room manipulations to date, this does not appear likely.

If you do choose to advance this radical regulatory initiative, Hawaii Consumers' recommends that you make substantial revisions to include consumer protection provisions and public interest obligations for diverse local communities on each island - and guarantee a deciding role for local jurisdictions and community voices.

Senator Daniel Inouye's initiative fifteen (15) years ago may prove instructive. He drafted legislation, the "National Public Telecommunications Infrastructure Act of 1994," to secure public, education and government interests in the development of broadband infrastructure. The term "broadband" was not in common use at the time, so similar capacity was called "all appropriate available telecommunications distribution technologies."

We fully endorse US Senator Inouye's Findings in S.2195 (1994) and recommend them to you for consideration of the public policy issues for broadband access you are seeking to address for the State of Hawai'i.

Findings in S.2195 (1994)

"National Public Telecommunications Infrastructure Act of 1994"

(1) The United States Government has consistently encouraged the development and dissemination of public telecommunications services in broadcast and nonbroadcast technologies through, among other things, the Public Broadcasting Act of 1967, the Public Telecommunications Financing Act of 1978, and the Public Telecommunications Act of 1992, wherein Congress found that 'it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies. . . '.

(2) The Government has a compelling interest in ensuring that all citizens of the United States have access to noncommercial governmental, educational, informational, cultural, civic, and charitable services through all appropriate telecommunications networks.

(3) New telecommunications technologies will enhance the ability of schools, libraries, local governments, public broadcast institutions, and nonprofit organizations to deliver and receive noncommercial governmental, educational, informational, cultural, civic, and charitable services throughout the United States.

(4) It is in the public interest that these entities be granted access to capacity on telecommunications networks for the purpose of disseminating and receiving noncommercial governmental, educational, informational, cultural, civic, and charitable services throughout the United States.

(5) It is necessary and appropriate that these entities have access, without charge, to the capacity on telecommunications networks to enable the public to have affordable access to the governmental, educational, informational, cultural, civic, and charitable services provided by such entities.

(6) Telecommunications services, including cable television programming, basic telephone service, and telecommunications services not yet available, are likely to become an increasingly pervasive presence in the lives of all Americans.

(7) Most Americans are currently served by telecommunications networks that lack sufficiently open architecture, sufficient capacity, and adequate nondiscriminatory access terms necessary to provide open access to a diversity of voice, video, and data communications.

(8) Private telecommunications carriers are likely to control access to telecommunications networks that lack sufficiently open architecture, sufficient capacity, and adequate nondiscriminatory access terms. Without narrowly tailored governmental intervention, the existence of these private 'gatekeepers' is likely to restrict access to these networks.

(9) Private telecommunications carriers respond to marketplace forces, and therefore are most likely to exclude those members of the public and institutions with the fewest financial resources, including but not limited to small town and rural residents, low income people, minorities, individuals with disabilities, the elderly, and noncommercial organizations such as schools, libraries, public broadcasters, and nonprofit community and civic organizations.

(10) To facilitate widespread public discourse on a range of public concerns between and among all Americans, the Government has a compelling interest in providing broad access to telecommunications networks for a diversity of voices, viewpoints, and cultural perspectives, including access for members of the public whose voices are most likely to be excluded by private telecommunications carriers.

(11) Assuring access to a diversity of voices, viewpoints, and cultural perspectives over telecommunications networks benefits all members of the public who use telecommunications networks to disseminate or receive information.

(12) Government support and encouragement of a diversity of voices, viewpoints, and cultural perspectives over telecommunications networks furthers a compelling governmental interest in improving democratic self-governance, and improving and facilitating local government services and communication between citizens and elected and unelected public

officials.

(13) Telecommunications networks make substantial use of public rights-of-way in real property and in spectrum frequencies.

(14) Because of the Government's compelling interest in ensuring broad and diverse access to telecommunications networks for the purposes of disseminating and receiving noncommercial educational and informational services, and in exchange for the use of public rights-of-way accorded telecommunications networks, it is appropriate for Congress (through the assertion of concurrent Federal jurisdiction over rights-of-way held or controlled by State or local governments) to require that owners and operators of telecommunications networks reserve capacity on such networks for public use.

(15) The least restrictive means to ensure that those members of the public whose voices are most likely to be excluded from telecommunications networks can access those networks is to require those networks to reserve a portion of their capacity for that access.

(16) It is in the public interest that reserved network capacity for public use be accompanied by funding to facilitate use of such capacity to provide noncommercial governmental, educational, informational, cultural, civic, and charitable services for the public.

If the Hawaii Legislature chooses to completely rewrite State laws governing communications in Hawaii, through a measure such as HB984 or SB1680, these essential findings must be addressed.

Thanks to US Senator Daniel Inouye for his historic and continuing leadership with regard to broadband media policy!

Feel free to contact Sean McLaughlin, cel: 808-283-3174 or tel: 808-447-9610, or via e-mail at sean808@earthlink.net if you would like more information.

30

WAM HB 984 HD4 SD1 Monday, April 6, 2009 9:30 a.m. Conference Room 211

CMPA

Community Media Producers Association

1658 Liholiho #506

Honolulu, Hawaii 96822

808 239-8842

cmpa@hawaiiintel.net

LATE

Aloha Chair Kim, Vice chair Tsutsui, and members of the Ways and Means committee,

PEG funds are **public funds**. Read the SUPREME COURT OF THE UNITED STATES DENVER AREA EDUCATIONAL TELE COMMUNICATIONS CONSORTIUM, INC., PETITIONERS 95-124 v. FEDERAL COMMUNICATIONS COMMISSION et al. ALLIANCE FOR COMMUNITY MEDIA, et al., PETITIONERS 95-227

and note no one has contested that reality.

"Access channel activity and management are **partly financed with public funds**--through franchise fees or other payments pursuant to the franchise agreement, or from general municipal funds, see Brenner, ¶6.04[3][c]; Aufderheide, App. 59-60--and are commonly subject to supervision by a local supervisory board. See, e.g., D. C. Code Ann. §43-1829 (1990 and Supp. 1996); Lynchburg City Code §12.1-44(d)(2) (1988). " (emphasis added)

Not even the petitioner Alliance for Community Media, of which 'Olelo \$110,000.00 a year CEO Keali'i Lopez is vice chair of their board of directors, has contested it. I thought this broadband bill was to get Hawai'i up to speed in current technologies and it appears one intent is to foster competition, making way for innovation and excellence. Competition is good for broadband providers, but not for those that should have already taught citizens to utilize it?! All Hawai'i PEG access organizations "has no members" ¹ (ARTICLES OF INCORPORATION). If you look at 'Olelo's 990 IRS tax returns you can see they refer to the millions of dollars of public funds they receive annually as "Government contributions (grants)". By Legislation and DCCA's decision, We The People shall pay a franchise fee (aka a tax) which is a fee assessed to cable operators in exchange for the use of our public right of ways, so in essence we pay for the cable operators' use of our public property. If we don't pay the fee, the state monopoly cable operator, Oceanic Time Warner Cable, will disconnect our cable. Do not exempt the PEG organizations from the state procurement code. We The People deserve the very best nondiscriminatory free speech provider our money can buy! Especially now that we are dead last in the country regarding most broadband related issues.

CMPA is **in support of the intent** of HB 984 HD4 SD1 RELATING TO TECHNOLOGY Hawaii Broadband commissioner; Broadband Regulation; Broadband Franchising; Broadband Permitting **with the following amendments:**

on page 5 lines 15 - 21

PART I. GENERAL PROVISIONS

§ -1 **Definitions.** As used in this chapter, unless the context otherwise requires:

"Access organization" means any nonprofit organization **with voting members under part VI of chapter 414D** designated by the commissioner **to provide for the first amendment rights of Hawai'i citizens, and** to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section -67, 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.

and

Remove **PART III. CABLE** section -67 (j) on page 76 lines 5 - 7 in its entirety:

~~" (j) The expenditure of cable franchise fee revenues by a PEG access organization shall not be subject to the requirements set forth in chapter 103D."~~

If you amend the definition of "Access organization" to include voting members, it would remove the appearance of taxation without representation by giving voluntary as well as involuntary contributors a real stake in the organizations. This should provide a place at the table for all to share and implement their ideas. It is not appropriate to exempt the PEGs from procurement without providing for the openness and accountability DCCA believes are crucial,

CMPA was the first registered Public Access Television related nonprofit corporation in the state, and is the only nonprofit media access corporation in the state advocating for at least one specially designated "Public Access Channel" (as defined in HAR 16-131-32), individual Public producers' rights, and membership and transparency in PEG organizations. As such CMPA is in opposition to exempting public, education and government (PEG) access organizations' contracts from the procurement code unless PEGs are required to adhere to state law providing for true openness and accountability to citizens. We do, however, support the overall intent of the measure which is to lower the impediments to broadband users, providers, and the marketplace of ideas. We can not support a measure that makes the current state government created PEGs the only choice for a free speech provider for the people in perpetuity.

To date there has been no compelling argument provided for why PEG organization contracts should be exempt, quite the contrary. The AG, Chief Procurement Officer, and most recently the Procurement Policy Board, have all opined that competing for the contracts would provide for innovation and excellence, which are **essential** tools to catch up from being 10 years behind the cutting edge, and on 12/23/2005 DCCA signed a Procurement Violation.

Those familiar with procurement law are aware that reports and studies have recognized that exemptions increase the possibility of litigation that would be unlikely if there were strict adherence to the procurement code. Since the State Procurement Office (SPO) granted DCCA its first exemption in 2005, hundreds of thousands of dollars have gone to 'Olelo & Akaku's attorneys rather than towards their real purpose (aka "mission") in their articles of incorporation.

CMPA and SPO believe competition fosters innovation and excellence. "DCCA believes openness

and accountability are crucial", as stated in DCCA's yet unimplemented 2004 PEG Plan, but perhaps DCCA doesn't really want PEGs to be open, accountable, innovative or successful and that is the reason they haven't implemented the plan after almost 5 years and now want the standardless Hawai'i PEG organization contracts exempt from the procurement code.

The attached PDF is 'Olelo's minimal 2009 annual budget and operating plan for the millions of dollars of public funds required by their virtually standardless agreement with DCCA. It was approved in a closed executive session by their board of directors as minimally noted in their agenda and minutes. This has been done for at least the last four years!

Please stop Keeping the Public Out of Public Access Hawaiian Style.

Mahalo for doing what's pono.

Sincerely,

Jeff Garland

Secretary, Community Media Producers Association

"The inherent potential of information technology can restore democracy in America
if people will become skilled with information tools"

Michael Shamberg form "Guerrilla Television" (the title of his **1971** book)

Every fury on earth has been absorbed in time, as art, or as religion, or as authority in one
form or another.

The deadliest blow the enemy of the human soul can strike is to do fury honor.
Swift, Blake, Beethoven, Christ, Joyce, Kafka, name me a one who has not been thus
castrated.

Official acceptance is the one unmistakable symptom that salvation is beaten again,
and is the one surest sign of fatal misunderstanding, and is the kiss of Judas.

- James Agee -

In the beginning of a change, the patriot is a scarce man brave, hated, and scorned.
When his cause succeeds, however, the timid join him, for then it costs nothing to be a patriot.

Samuel Clemens

WRITTEN ONLY

TESTIMONY OF CARLITO P. CALIBOSO
CHAIRMAN, PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE
SENATE COMMITTEE ON WAYS & MEANS
APRIL 6, 2009

LATE

MEASURE: H.B. No. 984 H.D.4 S.D.1
TITLE: Relating to Technology

Chair Kim and Members of the Committee:

DESCRIPTION:

This bill creates the Hawaii Broadband Commissioner ("HBC") as an independent agency administratively attached to the Department of Commerce and Consumer Affairs by consolidating the regulation of telecommunications carriers and cable operators under the HBC by removing these carriers from the jurisdiction of the Public Utilities Commission ("Commission") and the Cable Television Division of the Department of Commerce and Consumer Affairs, respectively.

POSITION:

The Commission appreciates the intent of this bill, to consolidate the regulation of all forms of modern communications in an effort to facilitate the development of broadband infrastructure in the State, and defers to the Legislature's judgment on how best to consolidate regulatory functions and equalize regulatory schemes, provided it does not disrupt the other functions and operations of the Commission. The Commission would, however, like to offer the following comments.

COMMENTS:

- This Committee should be aware that section -54 of this bill, as amended, requires the Hawaii Broadband Commissioner to classify the State's local exchange intrastate services as "fully competitive" with respect to services related to costs, rates, and pricing, and would effectively remove rate regulation from telecommunications services as enacted to protect consumers.

- The Commission defers to the Legislature with respect to the issue of whether rates for telecommunication services should no longer be regulated, but would like to point out that many factors are currently used by the Commission to determine the level, if any, of competition in the telecommunications market, including, but not limited to: whether there are multiple providers of the service who can enter or exit the particular market with ease and without being dominant in that market; whether there is access available to all customers relating to information about prices and service quality; the extent to which service of comparable quality is readily available from more than one carrier in the relevant market; the ability of alternative carriers to make equivalent or substitute services available at competitive rates, terms, and conditions, and other factors relevant in determining whether and to what extent competition exists.
- These factors used in determining the level of competition in the market were, again, enacted to protect the consumer, and by mandating the existence of full competition, those protections are no longer available. The Commission would recommend that the issue of competition be studied using the above and other related factors prior to a declaration being made that full competition exists.

Thank you for the opportunity to testify.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committee on Ways and Means
April 6, 2009 at 9:30 am

by

David Lassner

Vice President for Information Technology/CIO, University of Hawaii

LATE

HB 984, HD4, SD1 – RELATING TO TECHNOLOGY

Chair Kim, Vice Chair Tsutsui 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, which developed the recommendations at the core of this proposed legislation.

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.

The Task Force gratefully acknowledges the work 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 approved 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, intermediate drafts of our final report were publicly available on the web.

Summary of Report and Proposed Legislation

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, streamlines permitting and access to public infrastructure, promotes sharing to reduce costs, collects data including broadband maps in support of Hawaii's progress 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 data and detail in our full report, which was provided to each Legislator and the Governor just before the end of last year.

By the time we completed our work it was quite clear that we were facing our most difficult financial condition in decades. While the Task Force had many ideas on public support that would advance Hawaii's broadband capabilities in ways that could aid our economic revitalization, we realized that new public investments would be nearly impossible this Session. We therefore worked with the Administration to develop legislation that would be completely revenue neutral. Thus, the legislation before you implements only the Task Force's first and second recommendations. In a remarkable sign of consensus, similar bills were introduced this session by the House Majority, House Minority, Senate Majority and State Administration.

In addition, since the completion of the Task Force report the Federal Government has enacted the American Recovery and Reinvestment Act (ARRA), which include several significant activities related to broadband investment. The Bills now under consideration also vest in the proposed new Hawaii Broadband Commissioner the responsibility for those broadband activities delegated by the ARRA to state governments.

Comments on the Issues that Have Arisen

As the bills worked their way through each Chamber, many entities shared their concerns and recommendations. I'd like to share my perspective on the general themes of the testimony that was presented, as I ask you to continue to support legislation to implement the recommendations provided to you by your Task Force.

There was one set of comments about the specific recommendations of the Task Force as implemented in the proposed legislation. I'd like to describe four recurring concerns expressed:

- **Shared Infrastructure**

A number of private providers expressed concern in their testimony about the goal of increasing sharing of infrastructure for broadband. In particular, they expressed grave concern at the possible "taking" of infrastructure built with private investment and the chilling effect this would have on the kinds of future investments needed to advance.

Nothing in the Task Force report or proposed legislation proposes such a "taking." Rather, the Legislation would establish increased sharing of infrastructure as a policy objective. This recommendation stems from the observation that shared infrastructure is a common element in places that have capabilities far beyond those found in Hawaii or the U.S. We also heard many concerns from Hawaii's providers, incumbents and competitors alike, about the unfairness and difficulty of sharing certain utility infrastructure, such as poles and access to governmental facilities. It is important to note that broadband infrastructure is not just fiber optic cabling and wires, but also the towers, poles, conduits and submarine fiber landing stations that are necessary to deploy and provide services. Neither Hawaii nor our providers benefit when our providers must compete and invest to dig up roads and put up poles and pull duplicative bundles of fiber down our streets. When done well, shared infrastructure reduces costs to providers, reduces time to deployment, stimulates innovation, increases competition and results in lower prices and increased choice for consumers. Late last year the International Telecommunications Union issued a major report recommending the sharing of infrastructure as a key to economically viable advancement of broadband capabilities. There are many policy approaches to achieve this that do not involve "taking," and the Hawaii Communications Commissioner will be well-positioned to work with the providers and the community to identify strategies that are appropriate for Hawaii. The Task Force would have no objection to any clarification in the Bill that would make it clear that we are not advocating the "taking" of purely private assets.

- Power of the Hawaii Communications Commissioner

A number of private providers expressed concern in their testimony about the potential power that would be vested in one commissioner. The Task Force recognizes the discomfort that may be caused by a shift from the current model of 3 fulltime PUC Commissioners and one fulltime DCCA Cable Administrator. We modeled our recommendation on the Hawaii Insurance Commissioner. We believe this kind of proven approach will support our goal of a streamlined and consolidated process that maintains revenue neutrality but is supportive of the kind of fast action and advocacy we heard the industry request. We note that the proposed single Commissioner could be selected for her or his expertise in this specific domain, unlike the PUC commissioners who must balance an extraordinarily broad scope of responsibility. We also note that the proposed legislation reformulates the current Cable Advisory Council as the Communications Advisory Council. The Task Force would be very supportive of further improvements in the Legislation that would make it clear that this Advisory Council must be broadly representative and purposefully consulted to provide meaningful input on all key decisions. One idea might be the creation of a broad-based selection committee to prepare nominations to submit to the Governor.

While appreciative of the concerns expressed, we believe that Hawaii must have proactive, professional and cost-effective broadband leadership to achieve Hawaii's goals.

- Concern over New or Increased Fees

A number of testifiers expressed concern that the proposed legislation would increase fees. Your Task Force worked hard to provide recommendations that would be revenue-neutral in these difficult financial times. We would urge that all fees be kept static during the transition to the new regulatory structure, and that all authority available to the PUC or DCCA under current statute be transferred to the Hawaii Broadband Commissioner intact.

- Concern over Broadband Data Collection

Several testifiers have expressed concern over language that would allow the Commissioner to require providers to furnish data about their services and infrastructure, which would be protected from disclosure under UIPA other than in summary form. In general, providers would prefer an approach in which all data collection is voluntary and in which they furnish the data to a non-profit organization of their choice. Several federal laws, including Senator Inouye's Broadband Data Improvement Act and the ARRA, have highlighted the importance of state-level broadband data. Your Broadband Task Force attempted to collect such data as part of our work and included the results we were able to produce in our Final Report. As a result of our efforts, we realized the importance of making this important task someone's job rather than leaving it to chance, and included this task in the portfolio of the Commissioner. We can appreciate the concerns from providers that this requirement not become excessively costly or put their proprietary data at risk. But we believe the Commissioner will be in the best position, in consultation with the providers and consumers, to execute Hawaii's mission under federal law and determine what data is appropriate to advance Hawaii's vision of world-class broadband for all at affordable prices. Case law indicates that the provisions suggested will protect proprietary provider data from unwarranted disclosure.

- Concern over Attempts to Pre-empt Federal Regulation

A number of private providers expressed concern in their testimony that the proposed legislation would pre-empt federal regulation. The Task Force clearly understands this would be illegal and proposed no such thing. The proposed legislation simply consolidates and merges the various authorities that currently flow down from the federal government and which Hawaii currently assigns independently to the PUC and to DCCA. We believe this consolidation of current authorities and responsibilities will position Hawaii to be more effective now and better-positioned for a future that will likely be based on new approaches to federal regulation under a new federal administration that has placed a new emphasis on broadband. The Task Force would have no objection to any amendments that make it clear that Hawaii is not attempting to illegally pre-empt any federal law or regulation.

- Concern that the Bill Does Not Streamline Permitting

A number of private providers expressed concern in their testimony that the proposed legislation

does not actually streamline permitting. The Task Force spent quite a bit of time listening to our private providers describe their frustrations at the costs of the current processes in time and money. We began to meet with County officials, since much of the work must involve both State and County agencies. Nobody had every tried to do this before, and the Task Force observes that, at present, there is no public official at any level in any office with the mission, responsibility or authority to even attempt to streamline the broad range of permitting involved in the deployment of broadband infrastructure. Unfortunately, the time and budget available to the Task Force were simply insufficient for us to redesign the permitting processes that hinder timely and cost-effective progress. We therefore urge that the Hawaii Broadband Commission be established and empowered with this responsibility so that this important work can begin as soon as possible.

Another set of comments requested changes to the proposed legislation on matters that were not part of the Task Force deliberations at all.

- PEG Access

Your Hawaii Broadband Task Force did not address the contentious issues around PEG Access that have been unresolved for several years. We were well-aware that an independent Task Force was at work on these issues. The Broadband Task Force proposal was to simply take the existing PEG responsibilities from DCCA and move them over as-is to the Hawaii Communications Commissioner, with the assumption that any changes the Legislature adopted could be independently rolled into the final statute.

Testifiers have passionately brought their concerns about PEG to this bill, including whether or not the designation of PEG entities should be subject to Chapter 103(D), what the commitment of the PEG entities should be to the first amendment rights of their communities, how the Boards of the PEG entities should be structured, whether there should be more or fewer PEG channels assigned, whether cable franchise fees should be higher or lower, whether more or less of the cable franchise fees should be assigned to PEG entities, and whether new video franchises should be subject to the same requirements as established providers.

The Task Force did not address these issues in our work, and views it as unfortunate that the Broadband bills have become the focus of these difficult, longstanding and contentious PEG conversations that were originally addressed in other measures this session. We urge the Legislature to ensure that Hawaii move forward to create our broadband future regardless of whether or how you choose to resolve these longstanding PEG issues this session.

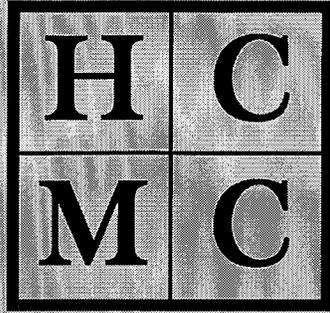
- Regulation of the Incumbent Carrier

Finally, there has been substantial testimony regarding whether the incumbent carrier should be provided with certain kinds of relief from the current regulatory requirements. We note that these issues have also been the subject of separate legislation. The Task Force did urge movement toward a more level playing field for all providers. However, the Task Force did not do the analysis necessary to make any specific proposals. Our hope was that the establishment of the Hawaii Broadband Commissioner would provide Hawaii with an expert consolidated regulator who could consider all perspectives across what are currently both the PUC and DCCA arenas in a reasoned manner. As with the PEG issues, if the Legislature chooses to make changes at this time we hope you do so in a manner that does not endanger the passage of legislation to enact the recommendations of your Task Force.

Closing

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."

I hope the Legislature can maintain a focus on the goals and approaches recommended to you by your Task Force to pass a meaningful broadband bill. If Hawaii is able to enact the basic recommendations of the Task Force this year we will be well-positioned for the future, including with the help of federal stimulus funds that will be available for competitive award through the American Recovery and Reinvestment Act.



Honolulu Community Media Council

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March 3, 2009

To: The Honorable Donna Mercado Kim, Chair, and Members of the
Ways and Means Committee

Fr: Chris Conybeare, President HCMC

Re: HB 984 HD4 SD1 "Relating to Technology"
Hearing Date: April 6, 2009

The Honolulu Community-Media Council expresses concern that strong language needs to be inserted to ensure public interest protections and protection for PEG Access channels and their continued operation for the benefit of the people of our state.

Hawaii's PEG Access operators have received high marks from numerous sources for their ability to enhance freedom of expression and communication in the public interest. As we find ourselves firmly in the digital age, these channels and the use of associated cutting-edge technology by PEG operators will be of increasing importance.

The Honolulu Community-Media Council strongly urges that the recommendations of the HCR358 Task Force Report and the PEG Access protection language included in 440G be fully incorporated into this proposed legislation. Thank you.

Article 19 of the Universal Declaration
of Human Rights:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.