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TWENTY-FOURTH LEGISLATURE  
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**TESTIMONY ON H.C.R. No. 358** – REQUESTING THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS TO ESTABLISH A TASK FORCE TO SOLICIT PUBLIC INPUT AND EXAMINE METHODS OTHER THAN THE PUBLIC PROCUREMENT CODE PROCESS TO OVERSEE PUBLIC, EDUCATION, AND GOVERNMENT ACCESS ORGANIZATIONS' EXPENDITURES AND ENSURE PROPER CHECKS AND BALANCES.

TO THE HONORABLE KYLE T. YAMASHITA, CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is Clyde S. Sonobe, and I am the Administrator of the Cable Television Division of the Department of Commerce and Consumer Affairs ("Department"). The Department generally supports the intent of this concurrent resolution requesting that a task force be established to examine alternative methods to designate or select the public, educational, and governmental ("PEG") access organizations, oversee the expenditure of funds by these PEG access organizations, and ensure that above all else, the public is protected. The Department offers the following comments and questions on the measure.

1. Effect of the Resolution

One of the purposes of the Resolution appears to be to encourage the Department to participate in the task force examination described in the Resolution in lieu of proceeding with the immediate procurement of the PEG contracts under already-initiated State Procurement Code ("Code"), HRS chapter 103D process. It is important to note, then, that the Resolution may or may not have that effect. Whether the Resolution has that effect depends on whether the State Procurement Office ("SPO")

will grant a further temporary exemption from the Code to the Department, while the Department participates in the task force.

Should the Resolution be adopted, the Department anticipates directing a request to the SPO for a further temporary exemption from the Code (presumably for one year), to allow it time to participate in the task force process without proceeding immediately under chapter 103D, but if SPO denies the request for further exemption, this committee should understand that the Department will have no alternative but to proceed with the current procurement process. Thus, the task force process may not have the effect that this committee intends it to have.

## 2. Background

For many years, the Department has had existing contracts with four PEG access organizations to manage and operate (among other things) the PEG access channels, to provide training for video production, and to cablecast programs created and submitted by producers and members of the public. These four PEG access organizations are: Olelo on Oahu, Akaku on Maui, Na Leo on the Big Island, and Hoike on Kauai. The PEG access organizations are funded primarily from fees from local cable operators that are paid by cable subscribers pursuant to the Department's cable television franchise orders (e.g., Olelo receives over \$4 million dollars annually for access operating fees and more than \$800,000 per year for facilities and equipment under these franchise orders; thus, over the past fifteen years, Olelo has received approximately \$51 million in access operating fees from the cable operators, and more than \$9 million in capital fund payments for facilities and equipment). To date, the current PEG access organizations have accumulated considerable financial assets, facilities, and equipment based upon the fees paid by cable subscribers. However, under the Department's current contracts with the PEG access organizations, these financial assets, facilities, and equipment revert to the Department when the contracts are terminated.

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

Within a short time after being issued, some of the PEG access organizations filed protests against the RFP. Once filed, these protests stayed the RFP pursuant to the Code.

Akaku subsequently filed lawsuits on Maui against the Department, and alleged in one lawsuit that (among other things) the use of the Code to designate PEG access organizations is a "rule" under HRS chapter 91. On October 4, 2007, the Honorable Joel E. August determined that the method and criteria to designate or select PEG access organizations need to be specified in an administrative rule. Since this determination, the Department has been going through the rulemaking process to promulgate a rule which specifically states that the Department will follow the applicable provisions of the Code when selecting or designating PEG access organizations. The Department is prepared to take its proposed rule to public hearing, but in view of the progress of SB1789 and this Resolution, is awaiting the results of this legislative session before doing so.

### 3. Comments

This concurrent resolution proposes to establish a task force to solicit the public's input and examine methods other than the Code to oversee PEG access organizations' expenditures and ensure the proper checks and balances. Before the Legislature passes this measure or any other measure exempting the PEG access services contracts from procurement, the Department would like to inform the Legislature of at least one PEG access organization's position regarding the PEG financial assets, facilities, and equipment.

While developing the RFP, the Department asked the PEG access organizations to provide an inventory list of their financial assets, facilities, and equipment that were funded or purchased with the fees paid by cable subscribers. The Department requested this information because these financial assets, facilities, and equipment are provided to the entities that provide PEG access services in the State for use by the public. If new entities are selected, it is the Department's intention that these financial assets, facilities, and equipment would be provided to these new entities so that they do not have to start from "scratch" and so that PEG access services provided to the public are not interrupted. Thus, the Department intended to attach the inventory lists to the RFP and inform prospective bidders that the inventory would be provided to the selected bidders.

When questioned by the PEG access organizations about the use of the inventory lists in the RFP, the Department explained that the inventory that was funded or purchased with the fees paid by cable subscribers reverts to the Department upon termination of the PEG access services contracts pursuant to the terms of the current contracts. Although the PEG access organizations eventually provided their inventory lists to the Department, at least one PEG access organization has taken the position that those facilities and equipment belong to that PEG access organization, not the Department. Additionally, that same PEG access organization has informed the Department that if the Department wants those facilities and equipment, the Department must pay "just compensation" to that PEG access organization. The Department strongly disagreed and continues to disagree with this PEG access organization's

position on the ownership of the PEG financial assets, facilities, and equipment upon contract termination. Depending on the results of this legislative session, the Department and one or more of the PEG access organizations have made plans to take this issue to mediation, in the hopes of resolving it short of formal litigation.

Two PEG access organizations initially stated that the PEG financial assets, facilities, and equipment revert to the Department upon contract termination; however, after learning of the other PEG access organization's position that that PEG access organization owns all of the financial assets, facilities, and equipment, at least one of these PEG access organizations has reserved its right change its position. The fourth and final PEG access organization has agreed that some of the financial assets, facilities, and equipment revert to the Department and some belong to the PEG access organization (although it has not been able to identify which financial assets, facilities, and equipment revert to the State and which belong to the PEG access organization).

#### 4. The Department's Position on House Concurrent Resolution No. 358

The Department believes that the above positions taken by the PEG access organizations regarding the ownership of the PEG financial assets, facilities, and equipment upon contract termination are very important for the Legislature and public to be aware of as part of this and any related proposal.

Nevertheless, the Department generally supports the intent of this concurrent resolution since a task force may bring the various constituents together and may also result in the development of a separate process to designate or select PEG access organizations, oversee the expenditure of funds by these PEG access organizations, and ensure that, above all else, the public is protected. Before proceeding, though, the Department would ask for further direction from the committee as to the intention reflected by the Resolution.

#### 5. Questions

If the Legislature intends to pass this concurrent resolution, the Department respectfully requests that the Legislature consider and provide guidance on the following:

- a. Does the Legislature want the task force to examine processes that foster or result in any sort of competition to designate or select PEG access organizations?
- b. Can those alternative processes include some of the procedures specified in the Code, or does the task force need to come up with totally new procedures (i.e., start from "scratch")?

Thank you for the opportunity to provide testimony on this proposed concurrent resolution.

Representative Kyle Yamashita, Chair  
Representative Glen Wakai, Vice-chair  
Committee on Economic Development and Business Concerns

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

Tuesday, March 25, 2008

Amendment to H.C.R. 348, Requesting the DCCA to Establish a Task Force

I represent Akaku: Maui Community Television, the access organization serving the cable subscribers and cable viewing publics of Maui County. Akaku and the people of Maui urges technical amendments and clarifications on phraseology for House Concurrent Resolution No. 348, requesting the DCCA to Establish a Task Force.

Paragraph 1 incorrectly states that the department entered into and renegotiated contracts with access organizations. The department does not have and never has had contracts with access organizations. The Department entered into agreements with the access organizations pursuant to its authority under Chapter 440G, Haw. Rev. Stat. to “designate” access organizations.

Paragraphs 3 and 4 also misstate the facts and law regarding access organizations. While the Attorney General rendered an opinion that the designation of access organization is subject to the procurement code, Second Circuit Court Judge Joel E. August, in Akaku v. Reifurth, Civ No, 07-1-0278(1), Second Circuit, has ruled that the only law that the director's authority to designate access organizations is subject to is the Hawai'i Administrative Procedure Act, Chapter 91, Haw. Rev. Stat.. He also found that the director and the department had failed to comply with Chapter 91 and has given them time to promulgate rules pursuant to law.

Akaku is of the position that in addition to there being no legal mandate to use the procurement code, that a reading of Chapter 440G, Haw. Rev. Stat. cannot lend itself to a permissive use of the procurement code as part of the director's authority to designate access organizations. Paragraphs 6 and 7 succinctly identifies one of the substantial practical problems with attempting to force the procurement code through the director's authority to designate access organizations.

Paragraphs 8 and 9 correctly note that access fee monies are assessed to the cable subscribers by the enfranchised cable operators and paid to access organizations. No public funds are received by the access organizations as part of the designation process. This has been recognized in a recent decision of the Hawai'i Supreme Court in Olelo v. Office of Information Practices, 116 Haw. 337 (2007).

Paragraph 10 then misstates the facts and the law when it concludes that access fees are “public funds”. Cable subscribers do not account for more than a quarter of the state population. The access fees the cable operators pass onto the subscribers is not collected by the government. The monies do not go to the government. The government does not have a legal or beneficial interest in the monies collected and would not be required to use general funds, in access fees absence, for access organizations. The monies acquired from cable subscribers are not even collected, held or disbursed by the government. Attorney General Opinion No. 94-4, definitely held the minimum legal requirements for monies to be “public funds.” The access fees collected by the cable operators as a pass through to cable subscribers do not meet any of the elements of “public funds.”

Paragraph 10 is also confusing in its phraseology of “alternative methods.” Currently, the

director is required to promulgate rules pursuant to Chapter 91, Haw. Rev. Stat. in setting the policy by which he will “designate access organizations.” In its twenty years of designating access organizations, this has not occurred. Given Judge August's ruling, it is difficult to understand what “alternative methods” means. Akaku supports the Hawai'i Administrative Procedure Act's intent and policy in giving clear guidance to all state agencies regarding the promulgation of rules and policies. August has ruled that the department has engaged in standardless discretion which is contrary to law. If the phraseology means alternatives to current and historical practice, Akaku supports this intent.

In Resolution 1, a task force is established to solicit public input and examine methods other than the procurement code to oversee PEG expenditures. This phraseology is also confusing as access organizations are private non-profit corporations and their expenditures are not subject to the requirements of the procurement code.

If the intended meaning of this confusing phraseology is to “oversee access organization designation”, then again, the phraseology would need to be modified since the only law that the director and the department are required to comply with is the Hawai'i Administrative Procedure Act. The state procurement office has held the consistent position that the department should use procurement principles in the designation. While Akaku is of the position that Chapter 440G does not permit designation by procurement, the task force should be free to examine all of the various ways of regulating access organizations – with special consideration to the three reports produced by the Legislative Reference Bureau and the department on this issue.

Resolution 2 is also confusing because Akaku is not aware of “PEG advisory boards” and is not clear on what exactly the task force's second charge of investigation is or should be. The phraseology of this resolution will need to be changed. Does the resolution intend that the task force examine the selection process of Cable Advisory Committee members? Or, does the resolution intend that the task force examine the selection of the boards of directors of the private non-profit corporations that are the access organizations?

Finally, Resolution 4 is also confusing. Akaku appreciates careful consideration of its First Amendment rights, however, more importantly, Akaku believes that the task force's investigation should be guided by a respect and protection of the First Amendment rights of the members of the public and the concomitant resources necessary to effectuate those rights and the purposes of access organization designation of Chapter 440G, Haw. Rev. Stat.

We urge the committee to amend House Concurrent Resolution No. 358 ***with a number of technical amendments and clarifications on phraseology as noted above.*** Thank you for the opportunity to provide testimony.



## **Concise Outline of History and Position Regarding House Concurrent Resolution 358**

PEG access are cable television channels that are allowed to be required of cable operators under federal law. This state enacted Chapter 440G, Haw. Rev. Stat. which requires the director of the DCCA to "designate" access organizations to operate access channels acquired in the franchising of a cable operator.

In Hawai'i, the DCCA participated in the formation of non-profit organizations which have increasingly become (and now wholly are) independent of the state. In December, 2007, the Hawai'i Supreme Court ruled in Olelo v. OIP, 116 Haw. 337, that the Access Organizations are not state entities and do not serve a "government function" which would put it within the ambit of Chapter 92F (which has a very broad definition of government).

Because of its particular history, the DCCA never promulgated rules regarding its "designation." There have been historical problems with that. In the mid 1990s, the LRB and the DCCA, itself, commissioned studies regarding the best way to regulate Access Organizations. These suggestions were never implemented.

### The Problem

Without rules in place, there was overwhelming confusion regarding the responsibilities and duties of access organizations. This led to significant media attention on access organizations in 2004 and 2005 including the lack of rules. The administration suddenly announced a secret opinion of the AG that indicated that the agreements the Access Organizations have with the DCCA must go through procurement.

Late last year, 2nd Circuit Court Judge, Hon. Joel E. August, ruled in Akaku v. Reifurth et al, Civ No. 07-1-0278(1), that the DCCA must promulgate a rule and that the DCCA did not have to use procurement to designate Access Organizations. The DCCA then has drafted proposed rules which have not yet gone to public notice or hearing which adopts the procurement code to designate access organizations.

### Why Procurement Won't Work

No other state or municipality uses procurement in the designation of Access Organizations. Neither the LRB study nor the DCCA's own study recommended procurement.

One of the main benefits of Access Organizations are their community outreach, education and enrichment. These are not "primary" functions of the organizations but "secondary" functions.

PEG stands for public, education and government. Government routinely issues RFPs for services to get its content onto access channels. Education has its own facilities and gets funding from both general funds and subscriber fees.

The public, however, has no other source of funding. The "secondary" function of access organizations provides this.

Procurement however would eliminate this "secondary" function because it requires a non-profit business model that can be executed over an extended period of time (similar to the cable operators franchise which is between 8 and 15 years). An example is the difference between a 15 and 30 year home mortgage. While a 15 year mortgage costs more, the benefit is that in 15 years, you own your home. A rational consumer can then weigh the costs and benefits. The problem with "front loading" in an access organization designation is that there is no house at the end of an RFP but another RFP. The instability here does not permit a non-profit organization, under the reasonable business standard, to create long term business models that allows the funding of the very important "secondary" functions.

#### How Procurement Is Inconsistent with Cable Television Statute

A competitive sealed bid also is inconsistent with the statutory framework of the Cable Television statute. That statute requires a modified contested case proceeding that permits public participation and input. Part of that process involves the extraction of no-cost benefits to the state and the public (including access channels). Competitive sealed bidding does not include meaningful or required public input into the creation of an RFP and what is important to the public nor are bids reviewed in the open. All of the RFP process is secretive and lacks and public oversight or participation.

#### Policy Context of the Regulation Overall

Because Access Organizations take on the primary role of providing public access services, proper access regulation provides access organizations and the public clear guidelines of expectations and responsibilities of each allowing every resident the opportunity to exercise their important First Amendment rights. It also provides the government with clear policy guidelines to avoid even the appearance of impropriety, favoritism or bias.