LATE TESTIMONY

HB 1077

RELATING TO THE HAWAII COMMUNICATIONS COMMISSION

JOHN KOMEIJI
SENIOR VICE PRESIDENT & GENERAL COUNSEL

HAWAIIAN TELCOM

February 5, 2009

Chair McKelvey and members of the Economic Revitalization, Business, & Military Affairs Committee:

I am John Komeiji, testifying on behalf of Hawaiian Telcom on HB 1077. Hawaiian Telcom supports the intent of advancing broadband services within the State of Hawaii; however, we wish to provide a few comments.

As you are aware, the Federal Communications Commission (FCC) has initiated efforts to deregulate a number of broadband services. For example, the FCC has declared telecommunications services that are used to access the Internet as exclusively interstate services, and thus not subject to state regulation. HB 1077, however, appears to require state regulation of broadband services by imposing specific and/or additional obligations on telecommunications carriers which, on its face, appear contrary to these FCC efforts. If state regulation of broadband is envisioned, federal preemption may prevent the state from regulating in this area. Moreover, the above FCC actions have served to remove unnecessary broadband regulations and provide Hawaii's consumers with an opportunity to receive a wide array of new broadband products and services at competitive prices more effectively than would be available with additional regulation.

What is missing in HB 1077 is language implementing the recommendation of *The Hawaii Broadband Task Force Final Report* supporting the consolidation of state and county permitting and other building requirements under one governmental agency to help expedite the construction of improved broadband infrastructure. The Report noted the substantial time and expense expended by providers in obtaining multiple state and county permits and approvals required for infrastructure deployment on all islands and the widely varying practices associated with gaining access to various easements and rights-of-way. HB 1077 does not provide any language implementing this goal. This issue must be addressed in this bill or a critical benefit of this improved broadband initiative will not be achieved.

Hawaiian Telcom supports the language contained in the bill intended to provide regulatory relief to telecommunications carriers in the form of pricing flexibility for

tariffed services. However, the language is not clear as to whether this pricing flexibility is immediate or whether additional procedures must be followed before pricing changes can be implemented. If the goal of this provision is to provide consumers with the full benefits of competition, including lower prices and new or different service offerings, the bill must be clarified to ensure that this pricing flexibility and the associated relief to level the playing field is intended to be permanent and immediate.

Based on the above, Hawaiian Telcom shares your interest in improving and advancing broadband and telecommunication services in Hawaii and respectfully requests a careful review of the comments raised before enacting regulatory provisions which may lead to unintended and counterproductive consequences. Thank you for the opportunity to testify.

LATE TESTIMONY

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

House of Representatives of the State of Hawai'i

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

Wednesday, February 4, 2009
Oppose HB No. 1077, Relating to Hawaii Communications Com. without Amendments

I represent Akaku: Maui Community Television, the access organization serving the cable subscribers of Maui County. Akaku and the people of Maui strongly opposes House Bill No. 1077, Relating to the Hawaii Communications Commission without amendments.

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

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

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

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

mandatory in Hawai'i.

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

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

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

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

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

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

APPENDIX on Proposed Amendments on HB No. 1077

§ -1 Definitions. ***

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

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

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

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

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

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

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

(j) The cable operator shall designate ten percent of total channel or bandwidth capacity for lease by third parties at reasonable rates or for common carrier use in addition to PEG access use as

determined by the commissioner by rule applicable to all franchises uniformly.

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

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

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

(1) The management and technical experience of the organization, and its existing or proposed staff;

(2) The public media, community media, and/or PEG access experience of the organization and its existing or proposed staff;

(3) The applicant having among its missions/purposes (as demonstrated by its articles of incorporation, bylaws, or similar corporate documents) to provide training, education and outreach to permit individuals and organizations the ability to use communication tools to effectively convey their messages;

(4) The ability of the organization, and its existing or proposed staff, to provide the PEG access services requested by the commissioner;

(5) The organization's short-term and long-term plans for PEG access services for a designated county;

(6) The financial capacity of the organization;

(7) Whether the organization agrees to expand the marketplace of ideas, and is committed to allowing members of the public to express their First Amendment free speech rights;

(8) The ability of the organization, through the use of electronic media tools, to foster and engage in civic and cultural development and engagement in communities it has served;

(9) Any other matters deemed appropriate and necessary by the commissioner.

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

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

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

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

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

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

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

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

compensate the access provider.

(d) If a designation period has ended, the designation shall be extended upon mutual agreement of the PEG access organization and the commissioner, provided:

(1) The period of each extension is coextensive with any extension of the relevant franchise or franchises;

(2) The commissioner makes a written determination that it is not practical to designation another access organization; and

(3) The terms and conditions of the designation remain the same as the original designation, or as amended by the designation; or if not the same or as amended, they are fair and reasonable.

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

§ -77 **Access fees.** The commissioner shall assess the maximum access fees permitted under federal law based upon the gross revenue of each operator. The access organizations shall receive not less than seventy-five percent (75%) of the access fees assessed 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.

Executive Summary
Interconnection Resolution

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

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

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

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

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

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

OCEANIC TIME WARNER CABLE

LATE TESTIMONY

Honorable Angus McKelvey, Chair
Honorable Isacc Choy, Vice Chair
House Committee on Economic Revitalization, Business & Military Affairs

Thursday, February 5, 2009; 8:00 a.m.
Hawaii State Capitol, Room 312

Re: HB 492 – Relating to the Hawaii Communications Commission
HB 984 – Relating to Technology
HB 1077 - Relating to the Hawaii Communications Commission
SUPPORT INTENT WITH COMMENT

Aloha Chair McKelvey, Vice Chair Choy and Committee members:

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

As a member of the Broadband Task Force, Oceanic supports the idea of having a Communications Commission to promote broadband availability and the adoption of broadband services by Hawaii consumers. This is to be achieved by streamlining and simplifying the regulation to reduce cost and time to provide new and innovative services. However, some of the provisions in the bill do not support the intent discussed by the Task Force. Specifically, the bill in some cases does not streamline or simplify the process for cable, it actually increases regulation by:

- Reducing the maximum franchise term from 20 years to 15 years; and
- Adding the ability for the Consumer Advocate to be involved with all cable regulation adds additional steps to the process.

These additional steps add time and cost to the process. Further, cable is not a regulated rate-based service and should not be regulated by the same policies as telephone service.

These bills make it a requirement for all infrastructures installed in public right-of-way to be accessed by any authorized provider at a fair-cost-based price, but it does not explain how to compensate for the risk and expense that entity underwrites for building the infrastructure. This becomes a disincentive for companies to invest in new infrastructure. This is not good for the State or its residents. The State should be pursuing policies that promote investment.

While the State is promoting more robust broadband technology for Hawaii, ultimately the Federal Communication Commission (FCC) has the authority to regulate Broadband Internet Access high speed data service (HSD). And, though the state is federally preempted from regulating HSD, it can do other things to stimulate the demand for HSD. For example, in order to meet the goal of "establishing broadband communications to all households, businesses, and organizations throughout the State by 2012 at speeds and prices comparable to the average speeds and prices available in the top three performing countries in the world," permitting should be simplified and the timeframes shortened. These bills do not contain provisions to shorten the times to approve or to respond to a permit request by government or by private entities. Currently, there is no limit. This stymies the process. Additionally, it would be helpful to see fewer requirements for obtaining permits for simple work. For example, currently replacing wiring in buildings with new coaxial cable may require obtaining permits.

Since FCC preempts states from regulating HSD, the provision to have HSD as a consideration for franchise renewal is problematic. Oceanic's franchise is to provide video - or traditional cable – and does not include HSD. This is an area that is preempted in light of the FCC's ruling that HSD is an information service and affirmed by the Supreme Court in Brand X.

Finally, while the goal of these bills is to not create any new taxes or fees for the service providers or for consumers, for the State to fund new infrastructure, it will need additional funds. Where will these funds come from?

As one of the leading countries in broadband service, the investment in South Korea to build and to promote its system was not cheap. The Korean government estimates the cost of developing the technology, building the infrastructure and marketing the system to be $30 billion between 2000 and 2005.

In Japan, they established a super-fast, nationwide fiber system via a combination of tax breaks, debt guarantees and subsidies.

In closing, if the emphasis of these bills is to reform and to streamline the current system, we should not work against these goals by adding new barriers or increasing regulatory obstacles. We ask the state to support ways to stimulate investment by streamlining and eliminating extraneous requirements that add to the cost of doing business in Hawaii.

For these reasons, there are many practical issues raised by these bills that require additional thought and consideration. We respectfully request members of the committee to consider deferring action on these bills.

Sincerely,

Nate Smith
President