

SB 1680

LRE

**Appendix to Comments of Oceanic Time Warner Cable
Re: SB1680, SD1**

Cable Issues

As a general matter, the State already has a successful regulatory scheme for the regulation of cable operators and cable service that has worked well to promote the availability of service at competitive terms and prices. There is no need for wholesale, all-inclusive revision of this statute, as SB1680, SD1 seeks to do. Introducing significant regulatory uncertainty and confusion into the market at a time when cable operators and others are already facing difficult financial decisions would most likely lead to a halt in investment, expansion and innovation, directly contrary to the goals of the statute. Moreover, many of the bill's provisions are explicitly preempted by federal law, as well as preempted by federal cable law's explicit reservation of all authority over cable operators except as specifically delegated to the States.

Given the numerous preemption and other regulatory issues, the cable title from bill should be deleted and the existing cable regulatory scheme should be retained.

If the bill is going to include a cable title, a number of significant issues must be recognized and resolved:

- ***Seeks to Require Multiple Services be Provided Over Same Platform.*** Contradicts federal law's franchising scheme by directing the commission to "ensure" that telecommunications networks provide "a combination of voice, data, image, and video" (§ 8, Telecommunications development duties), despite the explicit prohibition in federal law on requiring video providers to offer voice service. (47 U.S.C. § 541(b)(3)(C), (D)).
 - **Proposed amendment:** Strike reference to requiring multiple services to be made available over the same facilities. The commissioner's authority must be exercised in a manner compatible with federal law.

- ***Seeks to Regulate Rates, Terms and Conditions of Cable Service, Without Recognizing Federal Law Limitations.*** Grants the commission authority over all rates, terms and conditions of cable service (§§ 8 and 9), despite the explicit prohibition on State regulation of the rates, facilities, services and equipment of cable operators and service except as specifically allowed under federal law. (47 U.S.C. §§ 543, 544).
 - **Proposed amendment:** Strike the provision as it relates to cable service. The Commission's authority must be exercised in a manner compatible with federal law.

- ***Seeks to Regulate Matters Beyond State Jurisdiction.*** Grants the commission broad authority over all operations of cable providers, including, among other things, all "financial transactions," "business relations," compliance with "all applicable ... federal laws, and "all matters of every nature affecting the relations and transactions" between such providers and the public. (§ 9). Such authority is wholly preempted. Federal law defines the nature of the relationship between the franchising authority and the cable operator, restricting the matters

over which the franchising authority has control. Moreover, a State franchising authority has no jurisdiction over interstate issues such as business relationships, nor is the State franchising authority charged with enforcing federal law, except in explicitly delineated circumstances.

- **Proposed Amendment:** Strike the provision as it relates to cable service. The Commission’s authority must be exercised in a manner compatible with federal law.

- ***Grants Overly Broad and Unconstitutional Enforcement Authority.*** Grants the commission authority to commence enforcement proceedings not only for rule violations, and not only where reasonable cause exists, but for in any instance where the commission “is of the opinion” that various other issues have occurred, including that “changes, additions, extensions, or repairs are desirable in its plant or service,” that any of its “rates, fares, classifications, charges, or rules are unreasonable or unreasonably discriminatory,” or that “in any way [the provider] is doing what it ought not to do.” (§ 15(a)). Many of these topics are governed by federal law (*e.g.*, rate regulation), and the broad and unpredictable nature of the provision makes it unconstitutionally vague.
 - **Proposed Amendment:** Strike the provision and replace with one that is limited to authority to enforce rules and regulations of the commission.

- ***Imposes Overly Broad PEG Requirements.*** Attempts to require excessive amounts of bandwidth to be devoted for PEG use (§ 67(f)), despite explicit limitations on such requests set by federal law. Current statute (HRS § 440G-8.2(f) provides that “The cable operator shall designate three or more channels for public, educational, or governmental use.” SB1680, SD1 increases the minimum number of PEG channels to five.
 - **Proposed Amendment:** Limit PEG requirements to a reasonable request as determined through the franchise negotiation process. PEG channel requirements are not to be imposed by statute, but are to be negotiated between the State and the franchisee through the franchise process.

Broadband/Telecom Issues

The provisions in SD1680, SD1 that purport to regulate broadband should be deleted from the bill since the FCC has classified broadband as an interstate information service, which was affirmed by the Supreme Court. The FCC’s rationale in classifying broadband as an interstate information service was to promote and encourage the increased deployment of broadband. Accordingly, imposing transmission and other technical requirements on interstate broadband services is beyond the authority of the State.

As one example, promoting required “sharing of the infrastructure used to deploy broadband” (Section 1) is in effect an attempt to treat broadband as a common carrier service -- an attempt that already has been rejected by the FCC and upheld as noted above. It would also discourage rather than promote new broadband investment. Broadband providers are not required to make

their facilities available to other providers. (*See also* related discussion in telecommunications issues, below.)

Although federal law does not permit the regulation of broadband, Oceanic supports the legislature's and the task force's original intent to remove barriers to broadband access and identify opportunities for increased broadband deployment and adoption without creating a regulatory scheme that is preempted by federal law. Accordingly, Oceanic supports provisions in the bill that support the deployment of broadband, including promoting flexible, timely and responsible access to public rights-of-way and public facilities to facilitate additional deployment of broadband, maintaining close working relationships with stakeholders to ensure that the state's interests and concerns are understood, and examining policies relating to the provision of broadband communications services and interstate and international communications services and facilities serving or transiting through the state.

- **Proposed Amendment:** Delete all provisions that purport to regulate broadband, but retain provisions in the bill that support the deployment of broadband without creating a new regulatory scheme preempted by federal law.

Telecommunications Issues (see also certain shared issues with cable, above)

- **Facilities-Sharing Obligations are Unhelpful and Potentially Unlawful.** The bill seeks to enhance broadband deployment by imposing network facilities sharing obligations on all telecommunications carriers. *See, e.g.,* §§ 1(4); 8(b); 36. To the extent that the bill imposes unbundling obligations on new broadband infrastructure, the legislation is federally preempted. The FCC has ruled that incumbent carriers need not make their new fiber available on an unbundled, forward-looking cost basis. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003). The state's effort to impose sharing obligations on facilities will be preempted. *See, Illinois Bell Telephone Company v. Box*, 548 F.3d 607 (7th Cir. 2008) (state commission could not impose cost-based unbundling obligation on elements precluded from unbundling by the FCC). Moreover, the FCC has declared that broadband Internet access services are an interstate, information service. To the extent that the bill seeks to regulate the price or terms of service for broadband Internet access, or to require carriers to share information services, the bill will be preempted on that ground as well.
 - **Proposed Amendment:** To foster broadband deployment, the state should eliminate any obligation to share broadband facilities, consistent with federal law. Rather than expand the existing antiquated and highly regulatory structure to broadband networks and services, the bill should modernize regulations to take into account the advent of competition. The legislation should also be modified to remove any requirements that telecommunications carriers share or provide access to their information services.
- **Potentially Imposes Rate Regulation on the "Triple Play."** Section 8(a) of the bill requires the commission to ensure that high quality "telecommunications network facilities" with sufficient capacity to "access information service that provide a combination of voice, data, image and video, and that are available at just, reasonable and nondiscriminatory rates."

As written, the bill appears to call for state rate regulation of not only voice services, but also broadband Internet access and video services, which would be contrary to federal law as noted above.

- **Proposed Amendment:** Strike reference to rate regulation, or clarify that rate regulation does not apply to facilities used to provide broadband Internet access services.
- **Encourages or Requires Broadband Infrastructure Sharing.** Sections 8(b) and 8(c) further call for plans that encourage, or with respect to state-owned property, mandate “requiring the sharing of new infrastructure used for broadband services.”
 - **Proposed Amendment:** Strike reference to broadband sharing requirements as preempted by federal law.
- **Rate Deregulation.** Section 38 of the bill deregulates retail and other rates of all telecommunications carriers, including incumbent carriers, with the exception of switched and special access services provided on a wholesale basis to other carriers. The latter services would remain subject to the requirement that rates be just and reasonable. Somewhat confusingly, however, section 269-16(h) of the bill deregulates *all* ILEC rates, apparently including switched and special access. Continued rate regulation of switched and special access provided on a wholesale basis is vitally important to competitors who rely on those inputs. The inconsistency between section 38 and 269-16(h) should be resolved. Similarly, the premature deregulation of ILEC rates in any market or for any service that is not effectively competitive potentially exposes consumers to excessive rates, or, alternatively, may allow ILECs to cross-subsidize and artificially lower rates, thus driving out efficient competitors. Continued regulation of ILEC rates, while warranted, underscores the need to clearly exclude the provision of VoIP by non-ILECs from regulation as a telecommunications service, as discussed above.
 - **Proposed Amendment:** Limit rate deregulation to competitive carriers. Any ILEC rate deregulation should specifically exclude switched and special access. If ILEC rates are to be deregulated, such deregulation should only apply to demonstrably competitive services. ILEC retail rate deregulation should be preceded by a proceeding to determine whether the affected services are competitive and that deregulation is in the public interest.

In addition to maintaining general rate regulation over switched access, consider reducing intrastate switched access charges to the lower of current rates or the interstate rate. A number of states have capped or are considering capping ILEC intrastate access charges to the interstate levels.

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

Thursday, February 26, 2009; 9:00 a.m.
Hawaii State Capitol, Room 211

Re: SB1680, SD1 – Relating to Technology

Chair Kim, Vice Chair Tsutsui 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 comments on SB1680, SD1.

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

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

provide the 100 mbps speeds set by the Hawaii Broadband task force's recommendation. Oceanic's willingness to invest in broadband -- a risk that has proven to Hawaii customers the value of broadband -- will go far toward achieving the goals of SB1680, SD1, and could lead other providers to follow suit, providing the further consumer benefit of marketplace competition and choice. And as the availability of broadband service grows, it spurs the development of new Internet businesses and applications, which in turn attract new broadband customers.

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

Upon further review and analysis of the specific language of this bill, however, the provisions of SB1680, SD1 do not appear targeted to achieve these goals. Instead of implementing the laudable goal of removing barriers and creating incentives that promote competitive broadband access at affordable costs as the legislature (and task force) intended, the bill's attempt to blend together different regulatory schemes and requirements for different types of services (most of which do not relate to the provision of broadband services) goes far beyond the intended goal of the task force, and will discourage investment and innovation in the deployment of broadband services. Indeed, as currently drafted, the bill appears most likely to create significant disincentives to the further deployment and adoption of broadband service by Oceanic or any other provider in the State.

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

By creating a vast new regulatory framework for all communications services in the State -- not only broadband services, but video and voice service as well -- SB1680, SD1 will result in significant regulatory uncertainty and confusion. As noted in more detail in the attached appendix to our testimony, many of the bill's provisions are vague (e.g. §§15(a) (enforcement)), others appear unenforceable due to direct conflict with federal law or intrusion into areas of law reserved for federal authorities (e.g. §§1 (definition of "broadband" / speed thresholds), 8 (Telecommunications development duties), 9 (commissions duties and powers), 15(a) (enforcement), and Section 1 (mandatory access to broadband infrastructure)), and still others appear to impose significant, unnecessary new regulation at a time when cable operators and other service providers are already facing uncertain economic times (e.g. §§15(a)

(enforcement)). No provider can commit to risky new investments in an environment in which the cost of doing so is assuming a vague, overbroad regulatory scheme.

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

Additional regulation of broadband service will be detrimental and would freeze innovation and investment in place. Indeed, for this reason, Congress has declared it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."^{1/} In recent years, confirmation that the government would not seek to interfere with developing Internet business models led to an explosion in investment, deployment and competition. Only by preserving regulatory freedom in Hawaii will providers be able to offer the investment and innovation that consumers have come to expect. SB1680, SD1 fails to meet this goal, and would be a significant step *backward* in creating opportunities for increased broadband deployment and innovation by broadband providers.

Oceanic believes that SB1680, SD1 will not further the goals of removing barriers and creating incentives that promote competitive broadband access at affordable costs, but instead will discourage private investment in broadband initiatives, which is exactly the *opposite* result intended by the legislature. The bill's attempt to broadly sweep cable television regulation with other types of regulatory schemes for different services under a single umbrella will result in less private investment, increased cost, and fewer initiatives in broadband technology.

For these reasons, Oceanic respectfully requests that the Committee defer action on SB1680, SD1.

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

Sincerely,

Nate Smith
President

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

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February 25, 2009

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

Re: SB 1680 SD 1, Relating to Technology – Oppose in Part
WAM Hearing, Thursday, February 26, 2009, 9:00 am – Room 211

Aloha Chair Kim, Vice Chair Tsutsui, and Committee members:

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

The stated purpose of this bill is to implement key recommendations of the Hawaii Broadband Task Force by establishing the Hawaii Broadband Commission (HBC) in the Department of Commerce and Consumer Affairs (DCCA), to transfer functions relating to telecommunications from the Public Utilities Commission to the HBC and functions relating to cable services from DCCA to the HBC, and to establish a work group to develop procedures to streamline state and county broadband regulation, franchising, and permitting and report to the legislature. However, TWTC believes that certain portions of this bill are unnecessary and will be a detriment to the communication industry.

We do not object to the concept of establishing an HBC, however, we do have very serious concerns about the significant regulatory changes proposed in this 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. **Telecommunications rate deregulation** – While TWTC does not object to a new HBC examining rate regulation, TWTC strongly objects to portions of the bill that provide that the rates of all telecommunications carriers (Section 3, § - 38) or the rates of the incumbent local exchange carrier (“ILEC”), Hawaiian Telcom (Section 24, §269-16(h)) will no longer be subject to rate regulation.

We also do not agree with statements that have been made in connection with this and other bills suggesting that the market for telecommunications is fully competitive, and that the existing regulatory scheme is unfair to Hawaiian Telcom. While we acknowledge that competition has developed since the federal Telecommunications Act and state telecommunications laws and rules were developed, if one were to look at Hawaii’s market data, one would undoubtedly find that Hawaiian Telcom continues to dominate both the residential and business sectors in all relevant categories: number of customers,

number of lines, revenue building connected to its own network, miles of fiber, etc. Further, such statements ignore the fact that there are a number of different market segments in Hawaii – residential, business, wholesale, retail, wireless, and wireline – which are not all subject to the same level of competition.

Determining the extent of competition is dependent on factual findings, and doesn't necessarily follow from the availability of VOIP and wireless services, or the loss of retail lines. For example, in "forbearance" proceedings before the FCC, the FCC must determine the level of competition faced by an ILEC for purposes of relieving an ILEC from federal tariffing and other requirements. In a recent forbearance request by Qwest with respect to markets in Denver, Minneapolis – St. Paul, Phoenix, and Seattle, the FCC conducted a detailed factual inquiry of the levels of competition in different segments of each market and denied the petition. The FCC expressly rejected the position that a reduction in the number of retail lines demonstrates competition and recognized that wireless was not a perfect substitute for wireline service. (See *In re Petition of Qwest Corporation*, WC Docket No. 07-97, Memorandum Opinion and Order adopted July 25, 2008). Finally, in at least one local market – Omaha, Nebraska – the premature deregulation of the rates of the ILEC resulted in a competitive local exchange carrier leaving the market, thus decreasing in competition. TWTC therefore respectfully requests that all provisions of this bill that seek to deregulate rates be deleted.

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

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

Sincerely,

/s/

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UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committee on Ways and Means
February 26, 2009 at 9:00 am

by

David Lassner

Vice President for Information Technology/CIO, University of Hawaii

SB 1680, 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. The Hawaii Broadband Task Force was established by the 2007 Legislature with a mix of public and private sector members appointed by the Speaker of the House and Senate President to provide recommendations on how to advance broadband within the State of Hawaii. I was honored to be elected chair by my fellow task force members.

As the task force completed its work at the end of last year, we greeted with great enthusiasm the words of then President-Elect Obama on December 6, 2008: "It is unacceptable that the United States ranks 15th in the world in broadband adoption. Here, in the country that invented the Internet, every child should have the chance to get online, and they'll get that chance when I'm President - because that's how we'll strengthen America's competitiveness in the world."

We gratefully acknowledge the support of the State Auditor and her office in facilitating our work. We fulfilled our duties under full Sunshine, through public meetings that were fully noticed and with our minutes published on the web. One interim report was provided to the Legislature before the 2008 Session and made public at that time. And as we neared completion last fall, numerous intermediate drafts of our final report were publicly available on the web.

While there wasn't enough time or money to do everything we had hoped, the Task Force unanimously put forward four key recommendations, summarized as follows.

- 1) **Broadband is Vital to Hawaii**
Broadband is critical infrastructure for Hawaii's 21st century advancement in education, health, public safety, research & innovation, economic diversification and public services. One national study estimated the positive economic impact of advanced broadband in Hawaii at \$578 million per year. The task force recommends that Hawaii establish an aggressive and forward-looking vision that positions the State for global competitiveness.

- 2) **Driving Broadband Deployment**
The task force found that the U.S. as a whole is dramatically lagging the leaders in the developed world in our broadband capabilities and pricing, and is falling farther behind each year. While Hawaii is doing well on some measures relative to some other parts of the U.S., the State also falls to the bottom in many national broadband studies. The task force recommends that the State consolidate all relevant regulatory and permitting responsibilities in a new, one-stop, broadband advancement authority that promotes Hawaii's policy objectives and provides advocacy at all levels of government.
- 3) **Maximize Hawaii's Connectivity to the World**
Hawaii's "lifeline" for broadband to the rest of the world is expensive submarine fiber. While Hawaii was once the crossroads for trans-Pacific telecommunications, all of the new fiber systems built across the Pacific since 2001 have bypassed Hawaii. The task force recommends that Hawaii aggressively promote the landing of new trans-Pacific submarine fiber in Hawaii, including a shared access cable station that reduces barriers to fiber landing in Hawaii.
- 4) **Stimulate Broadband Adoption and Use**
The task force believes supplying advanced broadband at affordable prices is just one side of the equation. The task force recommends that Government lead by example in demonstrating the value of broadband to our citizenry, deploying broadband services to the public, and ensuring that we do not leave behind the economically disadvantaged members of our communities who may be inhibited from full participation in the 21st century.

There is much more detail and data in our full report, which was provided to each Legislator and the Governor just before the end of the year.

Five bills were introduced this session to implement our key recommendations, including bills prepared by the House Majority, House Minority, Senate Majority and State Administration.

The "sausage-making" is now well underway. While there are many ways this Bill will continue to be improved throughout the legislative process, there are also nay-sayers and special interest requests that could make it more difficult to enact meaningful legislation that advances our broadband capabilities to those of the world's leaders.

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