

LATE

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 2524, H.D. 2, RELATING TO THE REGULATION OF
TELECOMMUNICATIONS AND CABLE TELEVISION SERVICES.

BEFORE THE:

SENATE COMMITTEES ON ECONOMIC DEVELOPMENT AND TECHNOLOGY
AFFAIRS AND ON COMMERCE AND CONSUMER PROTECTION

DATE: Friday, March 16, 2012 **TIME:** 1:15 p.m.
LOCATION: State Capitol, Room 016
TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chairs Fukunaga and Baker and Members of the Committees:

The Department of the Attorney General (the "Department") has strong concerns about section 2 of the bill, at pages 22-23, regarding the new section entitled "Commission may compel attendance of witnesses, etc." Although this bill is an Administration measure, changes were subsequently made that would give the commission more power and authority than the Attorney General, the Department of Taxation, and the Insurance Commissioner, as well as power and authority equal to our circuit courts. We respectfully suggest that the major changes on pages 22-23 are unwarranted and could lead to serious unintended consequences.

The section entitled "Commission may compel attendance of witnesses, etc." provides the new telecommunications and cable television services commission with powers to compel the attendance of witnesses and the production of documents, examine witnesses, and punish contempt "as are possessed by circuit courts." It requires any circuit court, upon mere application of the commission, to compel obedience to any order of the commission or any subpoena issued by it. It provides that no person shall be excused from testifying or producing records when ordered to do so upon the ground that the testimony or records may tend to incriminate the person or subject the person to penalty or forfeiture. It also provides that "no person shall be prosecuted for any crime, punished for any crime, or subjected to any criminal penalty or criminal forfeiture for or on account of any act, transaction, matter, or thing concerning which the person shall under oath have testified or produced documentary evidence."

The Department has strong concerns about these provisions because they appear to be usurping the authority of the courts and prosecutors, and providing greater subpoena power to the new commission than has even been granted to the Attorney General (section 28-2.5, Hawaii Revised Statutes (HRS)), the Director of Taxation (section 231-7, HRS), and the Insurance Commissioner (section 431: 2-204 and 2-207, HRS). This bill also apparently confers absolute immunity from prosecution for any witness who responds to a commission subpoena and testifies about any crime the person may have committed.

On page 22 of the bill, at line 9, the commission is conferred the same power as is possessed by the circuit courts to punish contempt. This could mean that the commission is being given the court's authority to prosecute any noncompliant witness for contempt and sentence the witness to incarceration.

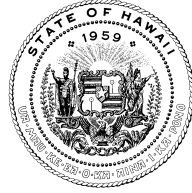
On page 22 of the bill, at lines 14-17, any circuit court, upon mere application of the commission, is required to compel obedience to any order of the commission or any subpoena issued by it. A court should not be required to comply with a commission application. As with any motion to compel filed with the court, the court must have the ability to consider the merits of the motion and rule appropriately on the issue of compliance. As proposed the provision would implicate the separation of powers doctrine.

On page 22, at lines 17-22, and page 23, at lines 1-6, the bill provides that no person shall be excused from testifying or producing records when ordered to do so upon the ground that the testimony or records may tend to incriminate the person or subject the person to penalty or forfeiture. The bill addresses this issue of violating the person's privilege against self-incrimination by further providing that the person may not be prosecuted for any crime that is disclosed in the person's testimony. This bill forces a person to testify and grants that person absolute immunity for any crime the person decides to disclose.

On page 23, at lines 6-8, this bill does provide, "Nothing herein shall be construed as in any manner giving to any telecommunications carrier or any person immunity of any kind;" but this statement is meaningless in light of the specific directive that the person "shall not be prosecuted."

The Department respectfully recommends that the Committee delete this part of section 2 of the bill, at pages 22-23, and replace it with the wording on pages 22-23 of the original H.B. No. 2524, in the section entitled, "Commissioner's power to subpoena; contempt proceedings."

LATE



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TO THE SENATE COMMITTEES ON
ECONOMIC DEVELOPMENT AND TECHNOLOGY
AND
COMMERCE AND CONSUMER PROTECTION

TWENTY-SIXTH LEGISLATURE

Regular Session of 2012

Date: March 16, 2012

Time: 1:15 p.m.

TESTIMONY ON HB 2524 HD2 - RELATING TO THE REGULATION OF
TELECOMMUNICATIONS AND CABLE TELEVISION SERVICES

TO THE HONORABLE CAROL FUKUNAGA AND ROSALYN H. BAKER, CHAIRS,
AND MEMBERS OF THE COMMITTEES:

I am Keali`i Lopez, Director of the Department of Commerce and Consumer Affairs (DCCA). The DCCA continues to support of this bill, but believes that the more flexible structure of the original bill establishing a communications division within DCCA headed by a single commissioner is preferable.

H.B. 2524, its original form, was intended to provide the DCCA with the authority, structure and means to leverage the Department's strengths and mission to advance the Governor and the Legislature's clear, ambitious broadband goals. Consolidation of telecommunications and cable television regulation was considered a key first step in streamlining and harmonizing the regulatory environment to expedite development of broadband infrastructure, recognizing the convergence of technologies used to provide

voice, data and video services through wireline, wireless, cable and satellite infrastructure.

The original bill purposefully consolidated regulation with minimal amendment to allow time for thoughtful change to regulatory processes. However, to streamline regulatory processes, the bill granted a single Communications Commissioner the authority and flexibility, utilizing specialist staff, to provide oversight and to carry out broadband development duties outlined, including working with stakeholders to develop innovative policies and programs. These duties and authority were consistent with DCCA's assignments under the Governor's Hawaii Broadband Initiative (HBI) and under Act 199 (SLH 2010), which include the development of a modern regulatory and permitting environment to advance development of broadband infrastructure, and creation of a broadband advancement authority within DCCA to provide leadership through short-term and long-term strategies to achieve the broadband vision set out by Act 2 (SLH 2007) and the Hawaii Broadband Task Force established thereunder.

H.B. No. 2524 HD2 (HD2) proposes a more cumbersome structure than is proposed under the original bill and that exists today with DCCA's current, flexible method of negotiated cable television regulation under one administrator. DCCA also notes that HD2 eliminates most of the broadband duties for which regulatory consolidation was originally proposed.

Thank you for the opportunity to testify on this critical piece of legislation in our joint mission to secure our State's economic future and to enhance the quality of life for our residents.

LATE

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Honorable Carol Fukunaga, Chair
Senate Committee on Economic Development and Technology

Honorable Senator Rosalyn H. Baker, Chair
Senate Committee on Commerce and Consumer Protection

RE: HB 2524 HD2 - Relating to the Regulation of Telecommunications and Cable Television Services - Comments

March 16, 2012 – 1:15 PM, Hawaii State Capitol Room 016

Aloha Chairs Fukunaga and Baker and members of the committees,

On behalf of Oceanic Time Warner Cable (Oceanic), which provides a diverse selection of entertainment, information, and communication services to over 425,000 Hawaii households, schools and businesses and currently employs more than 1,000 highly-trained individuals, we appreciate the opportunity to offer comments on HB 2524 HD2.

We support the intent to move the authority over cable television from Department of Commerce and Consumer Affairs (DCCA) – a regulatory agency – to the Department of Business Economic Development and Tourism (DBEDT) – an economic development agency – with the understanding that this change in responsibility does not alter or expand how voice and video services are currently regulated, and with the further understanding that this legislation does not impose regulations upon cable high speed data services, as is currently the case today. Accordingly, Oceanic requests that the Committees consider Oceanic's proposed changes to this draft as noted in the attachment.

In addition, the proposed inclusion of the Consumer Advocate with respect to cable television related proceedings before the commission is contrary to the intent of this bill to streamline the regulatory process, as it imposes a new regulatory requirement. Cable television is currently directly regulated by the DCCA through the Cable Television Administrator, and this practice has been in place since the inception of Chapter 440G. As the intent of this bill is to move the authority to DBEDT without imposing new or expanded regulations, the proposed inclusion of the Consumer Advocate with respect to cable television should be omitted from this draft.

Finally, we respectfully request the inclusion a provision and definition for VoIP/IP/Wireless in this bill. This pre-emption language is recognized in other states and addresses the differing regulatory structure for VoIP/IP/Wireless services.

We appreciate the opportunity to offer our testimony and are available for any questions.

Sincerely,

Bob Barlow
President of Oceanic Time Warner Cable

Attachment

Oceanic Time Warner Cable's Proposed Amendments to HB 2524 HD2 - Relating to the Regulation of Telecommunications and Cable Television Services

1. To ensure that the legislative intent to move existing cable regulation to an economic development agency without imposing new or expanded regulation is clear (and is effectuated by the new commission), Oceanic respectfully requests that the Committees consider amending the second to the last sentence of the last paragraph of Section 1 (page 2, lines 14-16) of the proposed draft to state (additional language is underscored): "This Act provides for transitional provisions to ensure that there is no gap in the interpretation and application of existing statutes, rules, orders and similar regulatory authority caused by the transition."
2. Oceanic further respectfully requests that the Committees consider amending Section 61 (page 194, line 14) of the draft to state (additional language is underscored): "SECTION 61. Transfer of functions. (a) All rules, regulations, policies, procedures, decisions, orders, exemptions, waivers, certificates of authority, certificates of registration, certificates of public convenience and necessity, charters, franchises, guidelines, tariffs, informational filings, and other material adopted, issued, or developed by the department of commerce and consumer affairs or public utilities commission to implement and interpret certain applicable provisions of the Hawaii Revised Statutes which are in effect on the effective date of this Act, reenacted or made applicable to the telecommunications and cable television services commission by this Act, shall remain in full force and effect until amended or repealed, as applicable, by the telecommunications and cable television services commission. . . ."
3. For VoIP/IP/Wireless, Oceanic respectfully requests the following language be included as an amendment to this bill:

"No department, agency, commission or political subdivision of the state shall exercise regulatory jurisdiction or control over VoIP or other IP-enabled service providers or Wireless service providers, or enact, adopt or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order or other provision having the force or effect of law that regulates or has the effect of regulating the market entry of VoIP or other IP-enabled service providers or Wireless service providers, or the rates, terms or conditions of VoIP service or other IP-enabled service or Wireless service."

The following definitions should be included:

"Voice over Internet Protocol (VoIP) service" means a service that does all of the following:

- (1) Uses Internet Protocol or a successor protocol to enable real-time, two-way voice communication that originates from or terminates at the user's location in Internet Protocol or a successor protocol.
- (2) Requires a broadband connection from the user's location.
- (3) Permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

“Internet Protocol (IP) enabled service” means any service, capability, functionality, or application using Internet Protocol, or any successor protocol, that enables an end user to send or receive a communication in Internet Protocol format, or any successor format, regardless of whether the communication is voice, data or video.

“Wireless service” means commercial mobile radio service, as defined in title 47 Code of Federal Regulations section 20.3, and any ancillary, auxiliary or incidental service provided by the provider of the commercial mobile radio service.

Finally, we request the following provision to be included in the is bill to clarify that nothing in this section affects or supersedes any of the following:

- (1) Any Emergency Telephone Users Surcharge or any State universal service program.
- (2) Any requirement for a provider to secure a franchise, license or other authorization before providing video service, including cable service as defined under federal law.
- (3) The Commission’s authority to implement and enforce Sections 251 and 252 of the federal Communications Act of 1934, as amended.
- (4) The Commission’s authority to address or affect the resolution of disputes regarding intercarrier compensation, including for the exchange of traffic that originated, terminated, or was translated at any point into Internet Protocol format.