

# SCR75

**Measure Title:** URGING HAWAII'S CONGRESSIONAL DELEGATION TO ADVOCATE FOR LOCAL FRANCHISING AUTHORITIES TO RECEIVE GREATER CABLE TELEVISION REGULATING POWER AND FOR THE FEDERAL COMMUNICATIONS COMMISSION TO PROVIDE CLARITY AND ALLOW LOCAL FRANCHISING AUTHORITIES MORE DISCRETION REGARDING THE REGULATION OF CABLE OPERATORS AS IT RELATES TO PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS.

**Report Title:** Local Franchising Authorities; Federal Communications Commission; Public, Educational, and Governmental Access Channels

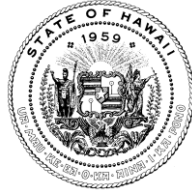
**Description:**

**Companion:**

**Package:** None

**Current Referral:** CPH

**Introducer(s):** BAKER, ENGLISH, ESPERO, INOUYE, KEITH-AGARAN, NISHIHARA, S. Chang, Dela Cruz, Ihara, K. Kahele, Kidani, Kim, Taniguchi



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TO THE SENATE COMMITTEE ON  
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-NINTH LEGISLATURE  
Regular Session of 2018

Friday, March 23, 2018  
9:00 am.

**TESTIMONY ON SENATE CONCURRENT RESOLUTION NO. 75, URGING HAWAII'S CONGRESSIONAL DELEGATION TO ADVOCATE FOR LOCAL FRANCHISING AUTHORITIES TO RECEIVE GREATER CABLE TELEVISION REGULATING POWER AND FOR THE FEDERAL COMMUNICATIONS COMMISSION TO PROVIDE CLARITY AND ALLOW LOCAL FRANCHISING AUTHORITIES MORE DISCRETION REGARDING THE REGULATION OF CABLE OPERATORS AS IT RELATES TO PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of S.C.R. 75. My name is Ji Sook "Lisa" Kim, and I am the Administrator of the Department's Cable Television Division.

S.C.R. No. 75 urges the Hawaii Congressional Delegation to advocate for the expansion of the abilities of local franchising authorities to regulate cable television and for the Federal Communications Commission ("FCC") to change current federal law to allow local franchising authorities more discretion, and to provide clarity, regarding the regulation of cable operators as it relates to public, educational, and governmental ("PEG") access channels. The lack of clarity, especially regarding the authority over

channel assignments of PEG access channels, may limit and cause uncertainty regarding a local franchising authority's ability to assess and make decisions that protect the interest of the public. The Department urges the FCC to consider the limitations of local franchising authorities and address these shortcomings, and it also urges Hawaii's Congressional Delegation to introduce federal legislation that will help alleviate concerns over cable operators and PEG access channels.

Thank you for the opportunity to testify in support of this measure.

**SCR-75**

Submitted on: 3/21/2018 6:45:14 PM

Testimony for CPH on 3/23/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	Testifying for Oahu County Committee on Legislative Priorities of the Democratic Party of Hawai'i	Support	No

Comments:



**TESTIMONY OF CHARTER COMMUNICATIONS**

**Senate Committee on Commerce, Consumer Protection, and Health**

**Hawai‘i State Capitol, Conference Room 229**

**RE: S.C.R. 75**

**FRIDAY, MARCH 23, 2018**

**9:00 AM**

Aloha Chair Baker, Vice Chair Tokuda and Members of the Committee,

I am Myoung Oh, Director of State Government Affairs, here on behalf of Charter Communications offering **comments** on S.C.R. 75, urging Hawaii’s Congressional Delegation to advocate for local franchising authorities to receive greater cable television regulating power and for the Federal Communications Commission to provide clarity and allow local franchising authorities more discretion regarding the regulation of cable operators as it relates to public, education, and government access channels.

With Charter’s transition to all-digital technology, new channels will be added and the line-up and locations of some channels will be moved. We recognize that change can be unsettling, but we are confident that viewers will easily navigate the channel locations and place favorites to the new channel positions.

We note that channel placement is a negotiated provision within cable franchise agreements which pursuant to bilateral negotiation, as recently as 2016, has left discretion on channel location with the cable operator. The Department of Commerce and Consumer Affairs (DCCA) and Charter negotiate license agreements balancing community interest--including current public access programming—among others. This includes channel location that is negotiated between operators and regulators.

There is no rate change associated with the movement of these channels, nor any impact on the content or availability of PEG services. Charter notes that, in response to this change, there has been a lot of mis-information being circulated regarding the impacts of this change.

Spectrum has been very supportive and will continue to support PEG organizations in Hawai‘i.

Mahalo for the opportunity to offer comments on S.C.R.75.

**SCR-75**

Submitted on: 3/21/2018 10:46:08 PM

Testimony for CPH on 3/23/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Rachel L. Kailianu	Testifying for Ho`omana Pono, LLC	Support	Yes

Comments:

In STRONG SUPPORT.

**SCR-75**

Submitted on: 3/19/2018 6:41:17 PM

Testimony for CPH on 3/23/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Javier Mendez-Alvarez	Individual	Support	No

Comments:

**SCR-75**

Submitted on: 3/20/2018 10:26:02 PM

Testimony for CPH on 3/23/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Evern Williams	Individual	Support	No

Comments:

I strongly support this! I applaud. your efforts to stop corporate media from dominating over PEG access channels. This is a tactic they have used across the country to eventually shut down PEG organizations. They must NOT be allowed to do it in Hawaii. "No Aloha for a Corporate Bully.!"



**Statement of Sanford Inouye  
President and CEO, Olelo Community Media  
Before the  
Senate Committee on Commerce, Consumer Protection and Health  
March 23, 2018  
At 9:00 am  
State Capitol, Conference Room 229**

**In consideration of  
SCR 75  
Relating to Cable Communications**

Chair Baker, and Vice-Chair Tokuda, and Members of the Committee.

Olelo Community Media respectfully supports the intent of SCR 75, “Urging Hawaii’s Congressional Delegation to Advocate for Local Franchising Authorities To Receive Greater Cable Television Regulating Power and For the Federal Communications Commission to Provide Clarity and Allow Local Franchising Authorities More Discretion Regarding the Regulation of Cable Operators As It Relates to Public, Educational and Governmental Access Channels.”

We appreciate the support of the many introducers of SCR 75 and members of this committee for protecting the public interest with respect to public, government and education (PEG) access channels here in Hawaii. As noted in SCR 75, these channels are “critical to government transparency and open access to broadcasts of state legislative and county council proceedings and neighborhood board meetings .... provide programming that offers valuable information to viewers ... and serve an important consumer protection function by broadcasting information to the public during natural disasters and emergencies.”

Here in Hawaii, the current PEG access channel locations have been on the cable system for decades. Channel locations that are well known to viewers, branded by our local community producers for their diverse, cultural, civic and community programs and for essential local government

programming such as state, county and neighborhood proceedings and meetings. If these long standing programs are unilaterally relocated at the whim of a cable operator, it will cause confusion for viewers, loss of viewership, and will be difficult and cost prohibitive for local community producers to rebrand their programs. Clearly that is not in the public interest.

We understand that federal law does not pre-empt local franchising authorities' ability to regulate the channel designations of PEG access channels as both California and Illinois have statutes in place to that effect. SB 36 SD2 which was recently approved by the Senate is similar to both statutes. As such, we respectfully request that SCR 75 be amended accordingly.

Thank you Chair Baker and committee members for your support of this very important consumer protection matter that touches every aspect of our unique local communities.

## TESTIMONY OF JAY APRIL

### PRESIDENT & CEO OF AKAKU MAUI COMMUNITY MEDIA

RE: SCR75

March 23, 2018

Akaku would like to applaud the resolution and strongly supports its intent. There is however a strong difference of opinion regarding the authority of the DCCA to regulate in the area of channel placement. The structure of the agency makes it one of the strongest LFA's in the country and it is our belief that DCCA has a sad history of not asserting its proper authority. This is not merely an issue of a breach of "contract law" as Charter has incorrectly indicated in previous testimony before the committee. Clear language in most DCCA writings allow DCCA to amend cable franchises for "good cause" in the interest of the public. Had the agency acted in the public interest in the past, and if it would assert its authority in the present, we would not be here today essentially begging Charter Communications to give us access on the cable system to our own access channels, to our own elected representatives, to our own beloved island communities and to each other.

First of all the public rights of way that Charter/Spectrum uses to conduct its monopoly business -a business that takes nearly a billion dollars of revenue out of Hawaii every year - belongs to us, the people. The law says that providing support for these non-commercial, uncensored channels that give voice to the voiceless is how Spectrum is supposed to pay the rent for the privilege. Hawaii's local cable franchise authority, the Department of Commerce and Consumer Affairs (DCCA) is the government entity that is charged with enforcing the law.

Historically, DCCA has always defined a cable TV "Channel" as a, "minimum of six megahertz (6 MHz) on the electromagnetic spectrum." In a Decision and Order that renewed the Oceanic Time Warner franchise for Oahu in 2010, the Big Island in 2012, and subsequent Decisions in 2012 that allowed the digital migration of education channels to hard to find three digit channel locations, the DCCA ( it should be noted under a previous administration ) waived the definition of "Channel" expunging any reference to the 6MHz specification. Why is this significant? This extremely important distinction precipitated the transfer of a massive amount of public benefit electromagnetic spectrum into private hands, namely the cable operators, for commercial use.

To put it another way, picture quality being relative, using video compression technology allows a cable operator to fit four, six or even twelve digital channels into the electronic real estate provided by one six megahertz analog channel. There is nothing inherently wrong with this. The real question is why would DCCA give away six, twelve, eighteen or twenty four megahertz of our public benefit analog bandwidth to the cable operator in

exchange for “digital bandwidth” of far less than equal value without getting something in return?

SEC.612(6) of the Federal Cable Act states that "Any channel capacity which has been designated for public, educational or governmental use may not be considered as designated under this section for commercial use" Yet, by severely reducing PEG channel capacity, DCCA enabled this classic electronic real estate land grab to happen. Kind of like the state giving away prime public beachfront property for free to a developer to build a shopping mall.

These public educational access channels that were intended to be available to all became inaccessible to nearly 40% of subscribers who did not even know how to request or pay for special set top boxes to view. Bottom line is that for most people, these channels and a good amount of your public electronic real estate simply disappeared. This happened despite the fact that these channels are supposed to be available to all subscribers at no charge on the lowest, most widely available tier of service.

Although this decision may have been well intentioned, even trendy, it foolishly allowed the cable operator to reclaim significant public bandwidth without compensation to the PEGs. Furthermore, it allowed Oceanic to reduce its payment of "rent" on public rights of way without proper regulatory review and deliberation.

In its defense, DCCA cited a trend of digital migration in the industry whereby cable operators were being allowed to reclaim bandwidth due to changes in technology that in theory would benefit subscribers because Oceanic would be able to offer, “enhanced services, greater choices in HD, more efficient means of viewing programs and videos, and substantial increases in broadband speeds.”

The DCCA took these industry claims at face value. It provided no assurances and made no provisions that any of those benefits would apply to local community public, education and government access channels. In a classic case of “standard less discretion”, the Department established no hard evidence to assess that claim or to monitor the performance of the cable operator. DCCA conducted no study or analysis of how it would affect PEG channels and set no benchmarks or performance standards. DCCA did not ask for or receive a quid pro quo from the cable company in exchange for surrendering public benefit bandwidth and may have violated the spirit if not the letter of the federal prohibition against commercial use of PEG channel spectrum.

As a matter of fact in March of 2012, the DCCA, under a previous regime, repeated this blunder in Decision and Orders and in Notices of Findings of Fact mainly affecting neighbor island franchises where the Director published statements such as:

“Under Section 11.8 of D&O,291 the Department has the authority to waive any requirement of the franchise order for “Good Cause” and, “ based on the benefits to Subscribers as a result of the digital migration of the TEC and TEACH Educational

Channels, as well as TWE's efforts to utilize the increased bandwidth, "good cause" exists under Section 11.8 of D&O 291 to waive the 6 MHz requirement in the definition of "Channel" in D&O 291 ***for these two channels*** "(emphasis in bold italics are mine)

It is important to note that a close reading of this language may not mean that all PEG channels have actually had their 6MHz requirement waived, but only the Educational Access Channels which sheds a vastly different light on our present condition. That one may be for lawyers and judges to sort out. Regardless, it is precisely this questionable decision that this "digital migration" provided "good cause" that brings us to where we are today.

As it turns out , the Finding of Fact that "good cause" existed is not a "fact" at all and may have been premature at best. This waiver was not in the public interest because DCCA made no effort to negotiate an appropriate quid pro quo for surrendering significant public interest bandwidth to the cable operator. DCCA did not protect the public interest or the PEGs by imposing any actual requirements on the operator.

Instead, what we got almost immediately were a suite of on demand pornography channels and slow as molasses broadband. We are here today because Charter's plan is to render our PEG Access channels irrelevant to favor its own commercial local origination offerings. But it is not too late for this DCCA to do something about it.

Just because previous DCCA administrations made a mistake does not mean the current DCCA has to perpetuate them. This DCCA is not powerless. There is some things they can do. They can take decisive action today on several fronts:

### **1. DCCA can strictly interpret and enforce existing regulation**

DECISION AND ORDER NO.241 issued in May of 1999 and signed by then DCCA Director, Kathryn Matayoshi in Section IV. FRANCHISE AMENDMENTS; OTHER MATTERS/Public, Educational, and Government Access stated:

*"Several testimonies raised the concern of the PEG access channels managed by Akaku: Maui Community Television, Inc. ("Akaku") being placed nonsequentially on the TCI of Hawaii Maui cable system, and on different channels on TCI's Lanai and Molokai systems, and TWE's Hawaiian Cablevision system in Lahaina. For example, educational programming from Maui Community College is on TCI's Maui system channel 12, and public access and government programming from Akaku are on channels 44 and 45. PEG access programming on TWE Hawaiian Cablevision cable system is on channel 6 (Akaku access), channel 12 (educational access), and channel 13 (Akaku access).*

*The Director notes that cable operators are required to place, among other programming, PEG access channels within the cable operators' lowest tier of service or basic service tier for purposes of rate regulation." The Director understands that actual placement of such channels within the basic service tier lies with the cable operator. However, with the acquisition of the TCI of Hawaii systems serving Maui Lanai and Molokai TWE will control all duly franchised cable*

*systems serving Maui County. As such, it would not be unreasonable for TWE to make consistent the placement of PEG access channels managed by Akaku on the same channels for all of its cable systems within Maui County.*

*This would provide consistency and eliminate subscriber confusion as to PEG access programming within Maui County. **Accordingly, TWE, in consultation with Akaku, shall provide consistent locations on its Maui, Molokai and Lanai cable systems for PEG access programming no later than September 30, 1999.*** (emphasis mine)

As you can see, the DCCA has clearly referenced in D&O 241 and in other D&O's that an identified need for consistent channel placement for PEG channels is in the public interest. In several other D&O's the DCCA (i.e. D&O 291, etc.) has discussed and explicitly referenced the desire and willingness of the operator (TWE) to standardize channel placement statewide and notes that *"TWE places PEG access channels contiguously from channels 52-56."*

**It is our understanding that Charter, as a condition of the transfer of franchise was required to honor all previous Decisions and Orders meaning that a preponderance of evidence exists to require that the PEG access channels remain at their current locations.**

Furthermore, PEG channels are required to be available at no charge to all subscribers at no charge on the lowest, most widely available tier. It is not at all clear that Charter's plan to slam channels into the 180's requiring set top boxes and/or DTA adaptors will meet that standard. Not to provide universal access and not ensure that PEG channels are available to every subscriber on the system without charge is a violation of the Cable Act and of D&O 241

**2. DCCA can revisit and reinstate the definition of Channel as six megahertz (6MHz) on the electromagnetic spectrum "for good cause".**

The Department can then negotiate a straightforward deal. In exchange for changing the definition of Channel and the release of public bandwidth back to the operator, we can achieve "status quo". Charter would agree to keep existing PEG channel locations where they are and guarantee that PEG Access Channels be presented in the same manner and HD signal quality as local broadcast channels such as PBS. Furthermore any changes going forward would be subject to mutual agreement by DCCA, Charter and the PEGs.

**3. DCCA can hold public hearings and re-examine suitability of Charter with respect to franchise renewal on Maui and Kauai until our demands for channel equality are met.**

As noted in the letter that Maui County Mayor Arakawa sent to Charter in February:

*“Since there appears to be no compelling technical reason to move these channels, I would like to respectfully recommend to the DCCA that Charter’s Kahului and Lahaina franchise renewals be held in abeyance until this matter is resolved to the complete satisfaction of Maui County and of Akaku Maui County Community Television.”*

#### **4. Charter’s franchise can be revoked**

As Mayor Arakawa noted in his letter:

*“In every cable related public hearing, including Franchise renewal and Transfer of ownership to Charter - and noted in the DCCA’s Community Ascertainment Report of 2013 - hundreds of Maui County residents testified as a top priority that Charter be required to cablecast Akaku channels with equivalent signal quality as local broadcast channels in high definition and that channel identification numbers be kept in the same locations so they can be easily found by viewers.”*

Charter’s current channel slam and their performance taken as a whole calls into question the company’s “suitability” as a franchise holder in our state. DCCA has the authority to refuse to renew or even terminate existing franchises for “good cause” based on Charter’s character issues which are a matter of record all across America.

Thank you all for the resolution and for all your good and hard work on this issue.