

**TESTIMONY BY:**

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DIRECTOR

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**STATE OF HAWAII**  
**DEPARTMENT OF TRANSPORTATION**  
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HONOLULU, HAWAII 96813-5097

February 8, 2022  
3:15 P.M.  
State Capitol, Teleconference

**S.B. 2603**  
**RELATING TO TELECOMMUNICATIONS FACILITIES**

Senate Committee(s) on Government Operations & Transportation

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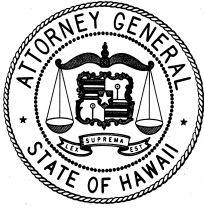
The Department of Transportation (DOT) provides **comments** on this measure that proposes a framework for the department to manage telecommunication facilities and equipment, including but not limited to cables, fiber, conduits, transmitting and receiving equipment, and power equipment, in the highway rights-of-way.

The DOT is committed to narrowing Hawaii's digital divide by expanding our state's fiber network on our transportation infrastructure. Our Broadband Pilot Project's scope of work includes the installation of equipment and infrastructure to both connect intersections to high-speed internet to improve traffic operations and deploy broadband services to digitally unserved and underserved communities. Additionally, we are incorporating the installation of fiber conduits in all future highway rehabilitation projects. These projects reflect how the department, under its existing authorities, is already maximizing highways infrastructure to support telecommunication infrastructure needed for high-speed broadband service and internet access.

The DOT acknowledges that this proposed framework may be beneficial in the future, but also recognizes it may be premature at this time. Certain provisions in S.B. 2603 raise concerns that the DOT will need to address and resolve before implementing this measure, including a review of compliance with Federal Highways Administration (FHWA) requirements and regulations, and requirements under certain sections of the Hawaii Revised Statutes not included in this measure.

The DOT respectfully requests your committee's deferral of this measure in favor of resolution of the items described, especially those impacting the FHWA and the associated federal funds and requirements.

Thank you for the opportunity to provide these comments.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTY-FIRST LEGISLATURE, 2022**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2603, RELATING TO TELECOMMUNICATIONS FACILITIES.

**BEFORE THE:**

SENATE COMMITTEES ON TRANSPORTATION AND ON GOVERNMENT OPERATIONS

**DATE:** Tuesday, February 8, 2022      **TIME:** 3:15 p.m.

**LOCATION:** State Capitol, Via Videoconference

**TESTIFIER(S):** Holly T. Shikada, Attorney General, or  
Marjorie A. Lau, Deputy Attorney General

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Chairs Lee and Moriwaki and Members of the Committees:

The Department of the Attorney General provides the following comments.

The purpose of this bill is to add a new part to chapter 206N, Hawaii Revised Statutes (HRS), relating to telecommunication facility installation. The bill allows for the lease and installation of telecommunication facilities within highway rights-of-way. The bill also amends chapter 264, HRS, to allow the Director of the Department of Transportation (DOT) to lease areas above or below state highways.

Chapter 206N is titled "Wireless Broadband and Communications Networks." Section 206N-1, HRS, expressly provides that the chapter "shall apply only to activities of a communications service provider to deploy small wireless facilities and to modified or replaced state or county utility poles associated with small wireless facilities." Section 206N-2, HRS, defines "small wireless facilities" to mean "a wireless facility or other facility providing communications service" whose antenna can fit within an enclosure of no more than six cubic feet in volume or whose other equipment (with specified exceptions) associated with the communications service facility is cumulatively no more than twenty-eight cubic feet in volume.

Section 1 of the bill would create a new part in chapter 206N titled, "Telecommunication Facility Installation." A "telecommunication facility" is defined as "any cable, line, fiber, wire, conduit, innerduct, access manhole, handhole, tower, hut,

pedestal, pole, box, transmitting equipment, receiving equipment, or power equipment or any other equipment, system, or device that is used to transmit, receive, produce, or distribute by wireless, wireline, electronic, or optical signal for communication purposes." Page 2, lines 10-16.

Based upon the limited applicability of chapter 206N, HRS, and the cited definitions, the proposed new part to chapter 206N does not fall under the activities currently authorized under chapter 206N. Therefore, we recommend amending section 206N-1 to include "activities of a provider of telecommunication facility" as part of the purpose of the chapter to address this issue.

We also note that this bill proposes addition of a "new part" to the chapter, however, the chapter does not currently have any "parts." It may be appropriate to have the existing sections 206N-1 through 206N-10 of chapter 206N designated as part I with this bill's proposed provisions in section 1 to be designated by the Revisor of Statutes as part II.

In addition, section 2 of the bill creates a new section in chapter 264, HRS, regarding the leasing of areas above or below the highways. The Director of the DOT would be able to lease areas above or below the state highways to any public agency or private persons. As the bill expressly provides, this new section would not apply to the use of the highway rights-of-way for telecommunication facility installation under chapter 206N. See page 16, lines 14-16. Section 2 may violate article III, section 14, of the Hawaii Constitution because this authority to lease areas above or below the state highways is not related to "telecommunications facilities," the subject expressed in the title of the bill, as required by article III, section 14, of the Hawaii Constitution.

Article III, section 14, of the Hawaii Constitution provides that "[e]ach law shall embrace but one subject, which shall be expressed in its title." In *Schwab v. Ariyoshi*, the court stated that the purpose of article III, section 14, is "[f]irst to prevent hodge-podge or logrolling legislation, second, to prevent surprise or fraud upon the Legislature by means of provisions in bills which titles give no intimation; and third, to apprise the people of proposed matters of legislation." *Schwab v. Ariyoshi*, 58 Haw. 25, 30-31, 564 P.2d 135, 139 (1977) (quoting *Jensen v. Turner*, 40 Haw. 604, 607-08 (1954)).

In *Territory v. Dondero*, 21 Haw. 19 (1912), the court set forth a test to be used to construe a provision similar to article III, section 14. The court stated,

[i]t is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent void.

21 Haw. at 29.

The court in *Schwab* noted that article III, section 14, of the Hawaii Constitution is mandatory and any violation thereof would render an enactment invalid. *Schwab v. Ariyoshi*, 58 Haw. at 31, 564 P.2d at 139. The court found that, because every enactment of the legislature is presumptively constitutional, to find that an enactment violated the subject-title requirements of the State Constitution, the infraction should be "plain, clear, manifest, and unmistakable." *Id.* We believe that the violation of article III, section 14, contained in the current draft of the bill could be deemed to be plain, clear, manifest, and unmistakable.

Because the subject expressed in the title of the bill is "telecommunications facilities," we believe that it is possible that a member of the public reading the title would not suspect that the bill creates a new statutory provision that explicitly does not relate to telecommunications facilities. The subject matter of section 2 of the bill is neither suggested by the title "telecommunications facilities" nor is it germane to the subject of telecommunications facilities. To address this issue, section 2 should be removed from the bill.

If, however, this new section is intended to apply to telecommunication facility installation under chapter 206N, then only subsection (e) of section 2 should be removed. If that is the case, then the title of the bill would cover the proposed new section.

As a minor clerical comment, we note that the reference on page 9, line 20, should be to subsection "(h)" instead of "(i)."

Based on the foregoing, we recommend, as provided above, amending section 206N-1 to include "activities of a provider of telecommunication facility" as part of the purpose of the chapter. We also recommend amending the bill to remove section 2 based on the constitutional analysis discussed above or alternatively remove subsection (e) of section 2. Lastly, we recommend making the clerical correction noted to page 9, line 20.

Thank you for the opportunity to testify.

DAVID Y. IGE  
GOVERNOR



CRAIG K. HIRAI  
DIRECTOR

GLORIA CHANG  
DEPUTY DIRECTOR

**STATE OF HAWAII  
DEPARTMENT OF BUDGET AND FINANCE**

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ADMINISTRATIVE AND RESEARCH OFFICE  
BUDGET, PROGRAM PLANNING AND  
MANAGEMENT DIVISION  
FINANCIAL ADMINISTRATION DIVISION  
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

**WRITTEN ONLY**  
TESTIMONY BY CRAIG K. HIRAI  
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
TO THE SENATE COMMITTEES ON GOVERNMENT OPERATIONS AND  
TRANSPORTATION  
ON  
SENATE BILL NO. 2603

**February 8, 2022  
3:15 p.m.  
Via Videoconference**

**RELATING TO TELECOMMUNICATIONS FACILITIES**

The Department of Budget and Finance (B&F) offers comments on Senate Bill (S.B.) No. 2603.

This measure adds a new part to Chapter 206N, HRS, which relates to Wireless Broadband and Communication Networks, that authorizes the Director of the Department of Transportation (DOT) (Director) to: 1) install and/or lease telecommunications facilities within, or adjacent to, an existing right-of-way of a highway; 2) expand an existing right-of-way for purposes of installing a telecommunications facility, provided that just compensation is paid to a property owner; 3) enter into contracts for management of State-owned telecommunications facilities; 4) issue permits for telecommunications providers for longitudinal access to highway rights-of-way; and 5) establish cost-sharing agreements with telecommunications providers.

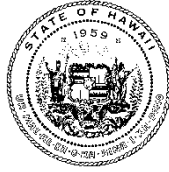
The measure also provides the Director with rulemaking authority to implement this new part and requires said rules to be promulgated no later than July 1, 2023.

As a matter of general policy, B&F does not support the creation of any special fund which does not meet the requirements of Section 37-52.3, HRS. Special funds should: 1) serve a need as demonstrated by the purpose, scope of work and an explanation why the program cannot be implemented successfully under the general fund appropriation process; 2) reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries or a clear link between the program and the sources of revenue; 3) provide an appropriate means of financing for the program or activity; and 4) demonstrate the capacity to be financially self-sustaining.

Regarding S.B. No. 2603, it is difficult to determine whether the proposed special fund would be self-sustaining given that no seed funding is provided in FY 23 and it would not receive revenues until such time as DOT promulgates program administrative rules and begins collecting compensation from telecommunications providers.

B&F defers to DOT regarding implementation and funding of this new program.

Thank you for your consideration of our comments.



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TESTIMONY  
OF  
BONNIE KAHAKUI, ACTING ADMINISTRATOR  
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEES  
ON  
TRANSPORTATION  
AND  
GOVERNMENT OPERATIONS

February 8, 2022, 3:15 P.M.

Senate Bill 2603  
RELATING TO TELECOMMUNICATIONS FACILITIES

Chair Lee, Chair Moriwaki, Vice Chair Inouye, Vice Chair Dela Cruz, and members of the committees, thank you for the opportunity to submit testimony on Senate Bill 2603. The State Procurement Office (SPO) submits the following comments:

Senate Bill 2603 should be amended to include the definition of "public agency" as shown below:

"Public agency" means any agency of the State or county.

SPO disagrees with the language on page 15, lines 19 to 20:

"(2) Make a lease with a private person or entity only after competitive sealed bidding pursuant to 103D-302."

HRS §103D-302, Competitive Sealed Bidding, states:

"(h) The contract shall be awarded with reasonable promptness by written notice to the **lowest responsible and responsive bidder** whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope to negotiate an



adjustment of the bid price, including changes in the bid requirements, with the low responsible and responsive bidder, in order to bring the bid within the amount of available funds.”

In this case, with the Department of Transportation as the lessor, awarding the contract to the lowest bidder is not in the best interest of the State.

Finally, land or the lease of real property are excluded from the procurement code, the Department of Land and Natural Resources pursuant to chapter 171, HRS is the department to determine the correct process.

Thank you