HCR 358 TASK FORCE
MINUTES OF MEETING

Date: August 4, 2008
Time: 1:00 p.m
Place: The following State of Hawaii Video Conference Centers:

Big Island: Hilo State Office Building 75 Aupuni Street, Basement Hilo, HI 96720	Kauai: Lihue State Office Building 3060 Eiwa Street, Basement Lihue, HI 96766
Maui: Wailuku Judiciary Building 2145 Main Street, Room 120 Wailuku, HI 96793	Oahu: Kalanimoku Building 1151 Punchbowl Street, Room B10 Honolulu, HI 96813

The agenda for this meeting was filed with the Office of the Lieutenant Governor.

I. Call to Order --The meeting was called to order at 1:00 p.m. by Acting Task Force Chair Eric Knutzen. Notes were taken by the Facilitator; no verbatim transcript was made of the Meeting; it was recorded. Acting Chair Knutzen took roll and asked that attendees adhere to some communication guidelines such as no interruptions, one person speaks at a time and asked Task Force members to monitor adherence to the guidelines at each Conference Center.

II. Introduction of Task Force Members (Clyde Sonobe informed the Task Force that Muriel Taira (CAC) resigned her membership and was replaced by Keith Rollman)

A. Present

1.	MaBel Fujiuchi	Hoike
2.	Eric Knutzen	County of Kauai
3.	Gil Benevides	County of Hawaii
4.	Jay April	Akaku
5.	Roy Amemiya	Olelo
6.	Keith Rollman	CAC
7.	Gerri Ann Hong	DOE
8.	Clyde Sonobe	DCCA
9.	Gregg Hirata	City and County of Honolulu
10.	Shelley Pellegrino	County of Maui
11.	Gerald Takase	Na Leo

B. Excused

1.	David Lassner	UH

C. The Acting Chair went through the Agenda and a motion was made to approve the meeting agenda with some amendments to (i) take public testimony before choosing the permanent Chair (approved unanimously

by those present)(Task Force Member Gerri Ann Hong not yet present) and (ii) to delete the Agenda item to discuss arguments for use of the Procurement Code (after discussion Member Benevides suggested changing the item to discuss the applicability of the Procurement Code and the amendment was approved unanimously by those present (Task Force Member Gerri Ann Hong not yet present) and was later revised by the Chair to specify pros and cons.

D. Public Testimony

i. Ed Call – Indicated that he believes in free speech and suggests that the Procurement Code be followed; asks that E911 be considered which uses first come access and goes out for Procurement Code which works; argument against use of the Procurement Code do not seem to be correct for PEG Access as Code works for E911

ii. Michael Duberstein – delegate to Alliance Meetings in DC; lots of concern there for changing the system in Hawaii; the feeling is that Hawaii has one of the best systems so why is the State intending to change it? It is disturbing that a system that has worked well will be tinkered with and it must be a political decision that has nothing to do with free speech

iii. Linda Puppolo – Overall, the Task Force should not rush the process, should educate themselves regarding procurement; approves Eric Knutzen as Chair, appreciates his fairness; most Task Force members are involved with procurement, suggests that they be open to other alternatives and she is surprised that nothing else has been mentioned. Linda proposes the following alternatives to procurement:

1. By invitation
2. Sole source entity
    a. Lowers administrative costs
    b. Better promotes continuity
    c. Improves products and services
3. Look for entity that is capable of providing the services
4. Consider a specialized agency like Akaku

5. Performance based alternative (ask, can anyone else do it?)

iv. David DeLeon – Saw that an RFP would hamstring organizations, goal should be independent entities not dependent on cable fees, don't hamstring and keep from functioning; an electronic soapbox is not appropriate for a procurement code but is unique to America and is not susceptible to process

v. Lance Collins, Esq. – Eric Knutzen is a good choice for Chair; Refers Chair to his 7/31/08 testimony which is attached to these minutes. Lance indicated that a change in the Statute is needed to follow the Procurement Code and that a contested case will be required, anyway. Eric asked that the issue raised by Lance above be raised when discussing the Procurement Code Agenda items.

vi. Sam Epstein – *See written testimony when received*

E. Choose Task Force Chair – Members voted unanimously to choose a Chair; Eric Knutzen and Roy Amemiya were nominated and Eric Knutzen was approved by a vote of nine (9) to one (1).

F. Rules re Public Testimony – The following rules were approved by a vote of ten (10) to one (1).

1. Leave to discretion of Chair of when Chair would call for public testimony within each of the items voted on.
2. Three (3) minutes per speaker with additional time for questions
3. Testimony should be within topic
4. Testimony will be recorded
5. Encourage but don't require written submissions
   i. Public comments via email should be directed to the Task Force at cabletv@dcca.hawaii.gov with HCR 358 Task Force included on any subject line
6. Task Force approved minutes and attachments will be posted on the CATV website at http://hawaii.gov/dcca/areas/catv/
7. HCR 358 Task Force Members should transmit all emails and information to all Task Force Members and the Facilitator with HCR 358 Task Force in any subject line.
8. The Chair suggested a format where a motion would be made, it would be seconded, Task Force discussion would ensue, public

testimony would be called for at discretion of Chair, and a vote taken.

G. Acceptance of Minutes
   1. Deferred to August 27, 2008 meeting so that Chair and Jay April can confer on Mr. April's suggested changes to the Facilitator's submitted minutes.

H. Facilitator – Members voted unanimously to use the Facilitator working under the Chair's direction with the following scope of responsibilities: take minutes and notes of public testimony, roll, and votes, member follow up (e.g. approved homework between meetings), draft final report, work with Chair to address procedural issues as they arise.

I. Sunshine Law Compliance – OIP determined that compliance not required here, motion made for compliance with spirit of Sunshine Law; after discussion, the Task Force unanimously agreed to be transparent and to maintain public participation and that:
   1. There would be written communication shared with all Task Force members
   2. Agenda would be posted one week in advance of each meeting
   3. Public participation and testimony would be encouraged
   4. A majority of the twelve (12) Task Force members (at least seven (7) votes in favor or against the proposed action) are required for all Task Force decisions

J. Discussion and Agreement re Goals Pertaining to HCR 358
   1. Examine alternatives to the Procurement Code process
   2. Consider selection process for PEG advisory board members
      i. Task Force member Clyde Sonobe indicated that he had spoken with Representative Yamashita, the Representative who signed HCR 358, for clarification as to what was intended by the reference to the "PEG advisory board". Clyde Sonobe said that Rep. Yamashita indicated that his references to committees/boards contained in HCR358 were to the "Cable Advisory Committee (CAC)" and the "Boards of Directors" of the 4 PEG access organizations (Olelo, Hoike, Na Leo, Akaku).
   3. Submit report to the Legislature by December 20, 2008
   4. Take into account the First Amendment rights of PEG
   5. Task Force member April suggested adding a goal that would recognize PEGs as a local public asset not a state asset thereby embedding localism; there was discussion both pro and con on this subject

6. Task Member Sonobe indicated that DCCA wanted the Task Force to also look at the ownership of assets currently used by PEG entities
7. No vote was taken on this item as the Task Force ran short on meeting time and needed to address the Agenda for the next meeting; the item will be addressed as Item v. on the next Agenda

K. Preparation for the Next Meeting

1. Agenda

i. Call to Order (Chair)
ii. Accept Minutes from June 30, 2008 Meeting (Task Force)
iii. Accept Minutes from August 4, 2008 Meeting (Task Force)
iv. Public Testimony (Public)
v. Discussion and agreement re goals pertaining to HCR 358 (Task Force)
vi. Rulemaking and alternatives to Procurement Code (Task Force)
vii. Selection Process for PEG Advisory Board Members (Task Force)
viii. Applicability of Procurement Code – Pros and Cons (Task Force)
ix. Address formal request of documents from State (Task Force)
x. Preparation for Next Meeting (Task Force)
    1. Date
    2. Agenda
xi. Adjournment

2. Date of Next Meeting – August 27, 2008, 1 pm – 4 pm

III. Adjournment -- The meeting adjourned at 4:00 pm.

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July 31, 2008

Eric Knutzen
Interim Chairman
H.C.R. 358, H.D. 1 Task Force
4444 Rice Street Ste 427
Lihue, HI 96766

Re: Brief History and Context of PEG Access Organization Designation

Dear Mr. Knutzen and Members of the Task Force,

Please allow this to serve as written testimony to the Task Force as brief history and context of PEG access organizations and their designation by the State. Every attempt has been made to avoid or minimize the use of arcane legal jargon. There are a number of points to consider while reading this. First, as determined by the Hon. Joel E. August, Judge of the Second Circuit Court, whatever method the Director chooses to designate access organizations, the method must be determined by rule. The Attorney General has argued that the Public Procurement Code must be followed. Others argue that the use of the procurement code exceeds the authority of the director delegated to him by the statute.

Where Does PEG Access Come From?

Although cable has been around since World War II, the Federal Communications Commission (FCC) first assumed jurisdiction over cable television in 1965 when microwave antennae began being used. This assumption of jurisdiction was upheld because, as the U.S. Supreme Court noted, "the Commission has reasonably concluded that regulatory authority over cable television is imperative if it is to perform with appropriate effectiveness certain of its

responsibilities." United States v. Southwestern Cable Co., 392 U.S. 157 (1968) These responsibilities included assuring the preservation of local broadcast service and to effect an equitable distribution of broadcast services among the various regions of the country.

Over the next twenty years, the FCC went from stringent regulation of cable television operators to almost no regulation at all. This included an FCC rule in 1972 that required cable systems in the top 1000 U.S. television markets to provide three access channels – one each for education, government and public use. The rule was amended in 1976 to include communities with 3500 or more subscribers. This was subsequently struck down by the U.S. Supreme Court in FCC v. Midwest Video Corp., 440 U.S. 689 (1976).

The trend toward cable deregulation led the U.S. Congress to amend the Communications Act of 1934 with the Cable Franchise Policy and Communications Act of 1984. Many of the features of cable regulation that we are familiar with today were included: areas of ownership, channel usage, franchise provisions and renewals, subscriber rates and privacy, obscenity and lockboxes, unauthorized reception of services, equal employment opportunity, and pole attachments. The Act also spelled out jurisdiction of the federal government and jurisdiction of state and local governments.

Included in this act was the provisions that allowed state or local governments to require PEG access channels, barred cable operators from exercising editorial control over PEG access content, and absolved them from any liability for PEG access content. 47 U.S.C. 521 et. seq. State or local franchising authorities also have the power to assess up to a five percent fee on revenue to support PEG access channels.

While the federal law gives discretions to states about whether or not to have PEG access, our state legislature, in 1987, amended the cable television statute to require PEG access channels as part of the enfrachisement of a cable operator: "The cable operator shall designate three or more

channels for public, educational, or governmental use." Haw. Rev. Stat. 440G-8.2(f) Under a modified contested case process as established under Chapter 440G, Haw. Rev. Stat., five PEG access channels have been required by the Director for all franchises issued by the State through the so-called "Decisions and Orders."

The Public Access Television movement operates under a number of basic principles. Generally, PEG access television stations are run by private non-profit corporations or local grassroots organizations. Services are available at a low cost or free of charge to the public. Services and cablecast time is offered in an inclusive, content neutral, non-discriminatory manner that supports the idea of maximizing opportunities for the public to exercise important Free Speech rights. Education, training and technology are available free of charge or at a low cost to any member of the community to assist in the production of cablecast content. Access organizations may engage in special production/journalism activities that cover community matters not otherwise covered.

The Hawai'i Administrative Procedure Act

Government agencies that are delegated specific responsibilities by the legislature engage in government activity that is characteristic, in different cases, of all three branches of the government: the legislative, executive and judicial.

Since World War II, administrative procedure acts were developed for four basic purposes: (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review.

Administrative action is organized into two types: (1) rule-making and (2) adjudication. Hawai'i has adopted an administrative procedure act at Chapter 91, Haw. Rev. Stat.

"'Rule' means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency." However, excluded from the definition of a 'rule' are "regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda." Haw. Rev. Stat. 91-1(4)

Adjudicated procedures are called 'contested cases.' "'Contested case' means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Haw. Rev. Stat. 91-1(5)

Under rule-making, an agency is required to give thirty days' notice for a public hearing of rule-making. The notice must include (1) a summary of the proposed action, (2) a copy of the proposed rule after action, (3) notice of where the proposal may be inspected and (4) the date time and place where the public hearing will be held. Haw. Rev. Stat. 91-3(a)(1)

Additionally, the agency must "[a]fford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule." Haw. Rev. Stat. 91-3(a)(2)

A Rule Is Required

Generally, when circumstances allow for some thing to be accomplished by more than one method, a rule ought to be adopted to guide the agency and the public. There must be an accepted manner of doing things even where the same thing reasonably might be done a number of different ways. When a state or county agency is delegated authority to do something by the legislature and it has discretion to choose a particular method over another, a rule is required. Haw. Rev. Stat. 91-1

In Aluli v. Lewin, 73 Haw. 56, the Department of Health argued that it was not required to

promulgate rules to determine the methodology of issuing air pollution permits. The Intermediate Court of Appeals reversed holding that the methodology of issuing air pollution permits involves "an integral part of the quality of life and the public should have input in the matter." The Court held, "These procedural requirements ensure fairness by providing public notice, an opportunity for all interested parties to be heard, full factual development and the opportunity for continuing comment on the proposed action before a final determination is made."

In Hawaii Prince Hotel Waikiki Corp. v. City and County of Honolulu, 89 Haw. 381, the Hawai'i Supreme Court ruled that the tax assessor's unwritten methodology for making a determination as delegated to him by county ordinance was a rule within the meaning of Chapter 91, Haw. Rev. Stat. and the process for promulgating rules must be followed.

In Aguiar v. Hawaii Housing Authority, 55 Haw. 478, the Hawai'i Supreme Court ruled that the Hawaii Housing Authority's amendments to its master management resolution governing scheme under which public housing tenants paid rent and governing their right to continued occupancy in public housing were "rules" within meaning of Chapter 91, Haw. Rev. Stat. and the process for promulgating rules must be followed.

Most recently, our appellate courts, in Tanaka v. State, 117 Haw. 16, ruled that the Department of Land and Natural Resources was required to amend its rule incorporating the permissible days for game-bird hunting, pursuant to Chapter 91, Haw. Rev. Stat., before it could add two extra days to each week of the game-bird hunting season.

Access Organization Designation and the Requirement of a Rule

The regulation of "access organization" derives from the Director of the Department of Commerce and Consumer Affairs (DCCA) authority to enfranchise and regulate cable operators. Haw. Rev. Stat. 440G-1(1) states, in part, "Access organization means any nonprofit organization

designated by the director to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section 440G-8[.]" As noted above, Haw. Rev. Stat. 440G-8.2(f) requires access channels be provided by cable operators. Chapter 440G, Haw. Rev. Stat. provides a modified process for the enfranchisement of cable television system operators that can be characterized as a "beefed up" contested case proceeding.

The DCCA has utilized modified "contested case" proceeding to deal with the designation of access organizations as an extension of the contested case proceedings for enfrachising cable operators. The DCCA's basis for this procedure has been to allow "maximum flexibility" in the overseeing of access organizations. In 2005, the DCCA and the State Procurement Office opined that access organization designation was subject to Chapter 103D, Haw. Rev. Stat., also known as the Public Procurement Code, because the DCCA had regularly characterized the terms of its designation of access organizations as an "agreement."

In Akaku v. Reifurth et al, Civil No. 07-1-0278(1), the Hon. Joel E. August, Judge of the Second Circuit Court, determined that "designation" of access organizations "by the director" was subject to rule-making and that the use of the Procurement Code without promulgating rules violated the procedural requirements of Chapter 91, Haw. Rev. Stat. The Court declined to rule on the question of whether the Director may promulgate rules adopting the Public Procurement Code as the method of designation. Akaku's position is that the Public Procurement Code is an unlawful delegation of the Director's authority to designate and that it is inconsistent with the statutory framework of cable television regulation in general.

The Aluli Court went further to explain the importance of the rule-making process: "When an agency is accorded unbridled discretion in issuing permits as here, the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe the determination process. The public and interested parties are without

any firm knowledge of the factors that the agency would deem relevant and influential in its ultimate decision. The public has been afforded no meaningful opportunity to shape these criteria which affect their interest." (internal citations omitted)

What Kind of Rule Is Preferable

Because of these developments in access organization designation, the State Senate approved Senate Bill No. 1789 and transmitted it to the House of Representatives for consideration this last year. Senate Bill No. 1789 attempted to clarify that designation of "access organizations" was not subject to, nor appropriate for the Public Procurement Code and it also assisted the director by specifying the range of policy choices the Director had in crafting a process for designating access organizations.

As part of the legislative machinations, Senate Bill No. 1789 was killed and House Concurrent Resolution No. 358 was adopted in its place to have a task force study the various alternatives to the Public Procurement Code. Rule-making is not an alternative to the Public Procurement Code but is a requirement for the Director to designate access organizations. The question of alternative methods of designating access organizations is the question precisely before the task force. One alternative of questionable legality, which is not for consideration by this Task Force, is the use of the Public Procurement Code.

The Contested Case Process

The alternative presented and adopted by the Senate, through Senate Bill No. 1789, is a modified contested case proceeding similar to the enfranchisement of cable operators. "For purposes of distinction between administrative agency rule-making and adjudication, "rule-making" is essentially legislative in nature because it operates in future, whereas, "adjudication" is concerned

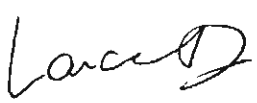
with determination of past and present rights and liabilities of individuals where issues of fact often are sharply controverted." Application of Hawaiian Electric Co., Inc., 81 Haw. 459

The contested case process is preferable to other methods of designation for a number of reasons. First, the designation of access organizations is an integral part of the cable enfranchisement process and should not be separated from the process of enfranchisement. Second, it is the most familiar government process to most people – whether by seeking a variance for a home improvement project, zoning change, building within the coastal zone management area, resolving disputes between management and workers, water permits, public utility permits. Third, the contours of the process have been well litigated throughout the United States for over sixty years allowing the Director to bypass "reinvention of the wheel."

Fourth, the contested case process is the most concise well-known process which requires the decision-maker to consider the complete record. Interested parties may intervene and present evidence and argument that can help the decision-maker make the best decision based upon a full and complete record. The contested case process supports transparency, rationality and consistency.

Unlike the Public Procurement Code, issues of social or community capital and the First Amendment rights of the public cannot be easily or adequately quantified or compared in the competitive sealed bidding process. These types of necessary considerations in designation of access organizations require open and thorough qualitative analysis of the particular and unique contexts of the various access organizations.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS



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