AGENDA

I. Call to Order.

II. Approval of Minutes – Meeting of March 19, 2009.

III. Communication from Gifford K.F. Chang dated April 4, 2009 regarding HRS Chapter 103D, Certified Payroll.

IV. Request by Member Darryl Bardusch for:

   a) The State Procurement Office (SPO) to give a presentation on how protests are conducted/handled and what the board has the authority to do concerning this process; and
   b) A discussion on restricting the SPO’s authority to delegate the authority to resolve protests.

V. Executive Session to consult with the Board’s attorney on powers, immunities, and liabilities pursuant to HRS section 92-5(a)(4); regarding two appeals of the PPB’s Declaratory Order, in the Circuit Court of the First Circuit by Olelo Community Television and in the Circuit Court of the Second Circuit by Akaku: Maui Community Television.

VI. Announcements.

VII. Adjournment.

Agenda may be viewed at www.spo.hawaii.gov/procurement-policy-board-minutes-of-meeting. Individuals may present testimony on matters on the Procurement Policy Board’s agenda when the agenda item is being discussed by the Board. Individuals intending to testify should contact the State Procurement Office at (808) 587-4700 at least 48 hours before the scheduled meeting. Written testimonies will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, April 14, 2009. Testimonies received after the April 14, 2009 deadline will be forwarded to the board as time permits. Individuals submitting written testimony at the meeting and would like the written testimony distributed to the board at this meeting, are requested to provide 12 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., April 13, 2009 to discuss accommodation arrangements.
Agenda Item III
April 4, 2009

Sent via fax: 587-4703
Followed by Regular U.S. Postal Mail
3 pages

State of Hawaii
Procurement Policy Board
Board of Directors
Kalanimolu Bldg.
1151 Punchbowl St.
P.O. Box 119
Honolulu, Hawaii 96810-0119

Attention:

Board Members:

Darryl Wayne Bardusch
Leslie S. Chinen
Daryle Ann Ho
Keith T. Matsumoto
Russ Saito
Pamela Torres

Re: HRS Chapter 103D
Certified Payroll

Dear Members of the Board:

We have noticed that many contracts are being issued based upon Chapter 103D. Our concern is regarding Certified Payroll. We have been informed by former employees from other companies that they have worked on certain projects for services and have not been paid the proper wages when they were employed.

We were informed that many private companies that are awarded contracts submit certified payroll to various governmental agencies for payment, but certain companies truly list their top managers or higher paid employees as the employees on site performing the work. Truly these high paid employees are merely temporarily and do not truly reflect the correct employees performing the work on site. That would mean that majority of the employees working on site is not being paid the true wage
scale as the State and Federal law is trying to implement. This is truly fraudulent and is hurting the employees. The principals of the companies, the upper and middle management of these companies should be scrutinized, prosecuted for cheating and lying to the government. As we understand, any company that submits a certified payroll signs their name and attest to the payroll as being true and not falsified.

We feel that the government staff that is responsible for monitoring the job or contract and the government staff member that is also responsible for verifying the certified payroll should actually do periodic checks with the workers on site by interviewing the workers on site of the following:

1. How long have they worked on this project in the last 2 weeks or the week period in effect, etc.

2. What is their pay wage that they are receiving;

3. Have they been paid their pay wage properly in accordance with the Federal government wage standards;

4. Were they informed by their employee that this project is a government project and that their wage check will reflect such pay wage.

With such information, the staff should cross reference this against the submitted certified payroll documents prior to processing payment.

There are many projects that are being placed for bid. We are trying to figure out how certain companies are able to perform the work at such a low bid and being awarded the contract. After interviewing many of the site workers or former site workers, they have told me that they did not get the pay scale and were not informed by their employer. In fact, some workers were afraid of losing their job and just accepted the straight pay or lower pay wages for non-governmental projects. Such fears of "unemployment" for these workers are the true victims and such company principals shall be held accountable for such "slavery manners". Truly, entities and the principals of these entities that fail to follow the terms of this labor law matter should be disqualified from all government bids and prosecuted in Court. This law was made for the workers and employees, NOT for business entities that find loop holes or are cheaters against the minority workers.

Your attention into this matter is greatly appreciated. Additionally, please inform me whether the Board will be taking specific measures on implanting procedures within the State and County contract laws and its staff members in stopping entities that abuse the system. If you wish to speak with me, you are welcome to contact me.
In the event I addressed this matter to the wrong Procurement Policy Board, please forward this letter to the proper governmental agency or department that could address this matter properly, effectively, swiftly and enforceably.

Sincerely,

[Signature]

Giford K. F. Chang
Agenda Item V
Olelo
Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

TERRY E. THOMASON 5417-0
BARBARA A. KRIEG 8483-0
ZACHARY A. McNISH 8588-0
American Savings Bank Tower
1001 Bishop Street, 18th Floor
Honolulu, Hawai‘i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591

Attorneys for Appellant
‘ÖLELO COMMUNITY TELEVISION

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI‘I

‘Ölelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. 09-1-0751-04
(Agency Appeal)

NOTICE OF APPEAL TO CIRCUIT COURT; STATEMENT OF THE CASE;
DESIGNATION OF THE RECORD ON APPEAL; ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD;
REQUEST FOR WRITTEN BRIEFS AND ORAL ARGUMENT;
EXHIBIT A; CERTIFICATE OF SERVICE

NOTICE OF APPEAL TO CIRCUIT COURT

Notice is hereby given that Appellant ‘Ölelo Community Television ("‘Ölelo"), pursuant to Hawai‘i Revised Statutes (HRS) §§ 91-8 and 91-14 and Hawai‘i Rules of Civil Procedure Rule 72, hereby appeals to the Circuit Court of the First Circuit from Appellee
Procurement Policy Board's denial of ‘Ôlelo's Petition for a Declaratory Ruling filed September 12, 2006 ("Petition"), as set forth in the "Declaratory Order Re: Akaku's Petition for Adoption of a Rule Filed February 24, 2006; Akaku's Petition for Modification of a Rule filed February 24, 2006; ‘Ôlelo's Petition for a Declaratory Ruling Filed September 12, 2006; Akaku's Petition for a Declaratory Ruling Filed February 23, 2006; and Akaku's Petition for a Declaratory Ruling Filed January 25, 2007," which is attached as Exhibit "A" and herein referred to as the "Declaratory Order."

The Declaratory Order, which was signed by the Procurement Policy Board on February 24, 2009 and mailed to ‘Ôlelo on March 6, 2009, was issued more than two years after the Procurement Policy Board (the "Board") voted on the matter. In reaching its decision to deny ‘Ôlelo's Petition by a vote of just 3-2, the Board failed to comply with HRS § 92-15, which requires the approval of a majority of the seven members to which the Board is entitled to carry any action. In addition, the Board's Declaratory Order failed to adequately state its reasons for denying ‘Ôlelo's Petition, as required by Hawai‘i Administrative Rules § 3-121-32(d) and applicable law. Meanwhile, during the years-long pendency of ‘Ôlelo's Petition, significant new evidence has come to light which is material to the Board's determination of ‘Ôlelo's Petition.

Accordingly, ‘Ôlelo appeals the denial of its Petition on the grounds that the Declaratory Order is: (1) in violation of statutory provisions; (2) in excess of the statutory authority and jurisdiction of the agency; (3) made under unlawful procedure; (4) affected by
error of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence in
the whole record; and (6) arbitrary, capricious, and characterized by abuse of discretion pursuant
to HRS § 91-14(g).

DATED: Honolulu, Hawai‘i, April 2, 2009.

TERRY E. THOMASON
BARBARA A. KRIEG
ZACHARY A. MCNISH

Attorneys for Appellant
‘Ōlelo Community Television
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

‘Ōlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. __________________________
(Agency Appeal)

STATEMENT OF THE CASE

‘Ōlelo Community Television ("‘Ōlelo"), through its attorneys, Alston Hunt
Floyd & Ing, and pursuant to Rule 72 of the Hawaiʻi Rules of Civil Procedure and § 91-14 of the
Hawaiʻi Revised Statutes ("HRS"), hereby submits its Statement of the Case relating to its appeal
from the denial of its Petition for a Declaratory Ruling Filed September 12, 2006, as set forth in
the Procurement Policy Board's "Declaratory Order Re: Akaku's Petition for Adoption of a Rule
Filed February 24, 2006; Akaku's Petition for Modification of a Rule Filed February 24, 2006;
Olelo's Petition for a Declaratory Ruling Filed September 12, 2006; Akaku's Petition for a
Declaratory Ruling Filed February 23, 2006; and Akaku's Petition for a Declaratory Ruling Filed
January 25, 2007," which is attached as Exhibit "A" and herein referred to as the "Declaratory
Order".

PARTIES

1. Appellant ‘Ōlelo is a Hawaiʻi non-profit corporation, registered and
authorized to do business in the State of Hawaiʻi.
2. Appellee Procurement Policy Board (the "Board") is a statutory board created under the authority of HRS Chapter 103D, Part II and is an agency within the meaning of HRS § 91-1 and a Board within the meaning of HRS § 92-2.

JURISDICTION

3. The Circuit Court has jurisdiction to hear this Appeal pursuant to HRS § 91-14.

BACKGROUND AND FACTS

4. ‘Ōlelo and the State of Hawai‘i, Department of Commerce and Consumer Affairs are parties to a contract whereby ‘Ōlelo manages and administers public, educational and governmental ("PEG") access channels and services on the island of Oahu.

5. On September 12, 2006, ‘Ōlelo filed with the Board a "Petition For a Declaratory Ruling Pursuant to HRS § 91-8" (the "Petition") requesting that the Board issue a declaratory ruling stating that the State's contracts with entities to manage and administer PEG access channels are exempt from application of the State Procurement Code because they are contracts for "utility services" within the meaning of HRS § 103D-102(b)(4)(F) and for which the competitive award procedures of HRS Chapter 103D are neither practicable nor advantageous to the State.

6. For the purpose of receiving public testimony, the Board considered ‘Ōlelo's Petition with two rulemaking petitions filed by Akaku: Maui Community Television ("Akaku") that sought a Procurement Code exemption for the PEG access services contracts on other grounds.

8. The minutes of these meetings reflect that the Board anticipated the PEG access contracts could be competed successfully through the standard Request for Proposal ("RFP") process, and requested periodic updates regarding the progress of the State's attempt to draft an RFP for the PEG access contracts.

9. On January 18, 2007, the Board voted not to grant `Ölelo's Petition by a vote of 3-2. Only five of the seven Board members to which the Board is statutorily entitled were present for the vote on `Ölelo's Petition.

10. The vote to deny `Ölelo's Petition on January 18, 2007 was not a valid board action because it was not carried by a majority of the seven members to which the Board is entitled, as required by HRS § 92-15.

11. Upon its denial of `Ölelo's Petition, the Board was required to issue a written decision "with reasonable promptness . . . , stating the reasons therefore." HAR § 3-121-32(d). Nevertheless, more than two years passed with no written ruling from the Board regarding its decision to deny `Ölelo's Petition. The Board did not hear any additional evidence during this time, and there is no indication in the Board's minutes or otherwise that the Board ever received any of the updates it requested on the PEG access RFPs.

12. Meanwhile, during the two years following the hearings, significant additional evidence came to light regarding the advantages of exempting PEG access contracts from the competitive selection provisions of the State Procurement Code, including:
a. Notwithstanding the representations made by the Administrator of the State Procurement Office during testimony to the Board, it has become evident that an RFP cannot be successfully crafted for the PEG access contracts, as the only PEG access RFP issued in the last two years was withdrawn following the filing of protests;

b. A 2008 task force appointed by the Hawai‘i Legislature issued a report recommending that the PEG access contracts should be exempted from the competitive provisions of the State Procurement Code at either a statutory or administrative level; and,

c. An opinion letter from the Attorney General was made public by Court order, stating (among other things) that the Board has the authority to determine that the PEG access contracts are exempt from the State Procurement Code on the grounds that procurement by competitive means is either not practicable or not advantageous to the State.

13. In addition, one of the three members who voted against Ōlelo’s Petition on January 18, 2007 left the Board in June of 2008 (eight months before the issuance of the Declaratory Order) and there are two current Board members who were not on the Board at the time of the vote to deny ‘Ōlelo’s Petition.

14. Finally, on February 24, 2009 (although not mailed to ‘Ōlelo until March 6, 2009), more than two years after the vote was taken, the Board produced the written Declaratory Order denying Ōlelo’s Petition that is the subject of this appeal.¹

¹ The Declaratory Order addresses four petitions filed by Akaku in addition to ‘Ōlelo’s Petition. Two of Akaku’s petitions (one of which was not filed until after the Board’s vote on ‘Ōlelo’s Petition) are the subject of an agency appeal filed by Akaku in Case No. 2CC09-1-000189 pending before Judge August. Akaku's petitions and ‘Ōlelo's Petition, as well as the respective appeals, raise different issues for determination. However, out of an abundance of caution and because the appeals are from the same Declaratory Order, ‘Ōlelo has identified Akaku's agency appeal as a "related case" on the Civil Information Sheet in this action.
15. With respect to its decision to deny ‘Ōlelo’s Petition, the Declaratory Order states only that "the Board was not persuaded that it would be practicable or advantageous to exempt contracts for PEG services from the Procurement Code, and was not persuaded that the provision of PEG access services were comparable to the provision of utility services and thus exempt from the Procurement Code."

16. The Declaratory Order gives no other reason or justification for the Board's decision, nor does it specify what arguments and/or evidence for and against ‘Ōlelo’s Petition the Board relied upon in reaching its decision.

17. This conclusory statement by the Board is not sufficient to meet the requirements of Hawai‘i Administrative Rules § 3-121-32(d), which requires the Board to provide reasons for denying a petition for a declaratory ruling. It is also contrary to applicable law that requires the Board to document its findings in sufficient detail to permit the reviewing court to determine the basis for the decision and to conduct a meaningful review.

**RELIEF REQUESTED**

‘Ōlelo prays this Court find and rule as follows:

a. That the matter be remanded to the Procurement Policy Board with the following instructions:

(i) That the Board, as presently constituted, reconsider ‘Ōlelo’s Petition and the record that has already been developed;

(ii) That the Board accept and consider additional evidence of matters that are material to the issues for determination and that have taken place in the more than two years since the vote purportedly denying ‘Ōlelo’s Petition;
(iii) That the Board vote to grant or deny 'Ōlelo's Petition by a majority of the seven directors to which the Board is entitled;

(iv) That the Board issue a written decision either granting the Petition or denying the Petition and, in the event of denial, state in detail the reasons for the decision, including findings of fact and conclusions of law; and,

(v) That the Board's written decision in this matter be issued no later than 120 days after remand;

b. That 'Ōlelo be awarded its attorneys' fees and costs incurred in pursuing this Appeal; and

c. That the Court award 'Ōlelo such other relief as it deems just and proper.

DATED: Honolulu, Hawai‘i, April 2, 2009.

[Signature]
TERRY E. THOMASON
BARBARA A. KRIEG
ZACHARY A. MCNISH

Attorneys for Appellant
'Ōlelo Community Television
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

ʻŌlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. ____________________________
(Agency Appeal)

DESIGNATION OF THE RECORD ON APPEAL

Appellant ʻŌlelo Community Television ("ʻŌlelo"), pursuant to Hawaiʻi Rules of
Civil Procedure Rule 72(d)(1), hereby designates the following as the Record on Appeal:

All pleadings, motions, memoranda, letters, exhibits, notices, declarations,
affidavits, testimony, tape recordings (subject to Court reporter transcription on request),
transcripts, decisions and orders (including any and all documents filed under seal) filed with or
by, or otherwise maintained by the State of Hawaiʻi, Procurement Policy Board regarding the
proceedings on ʻŌlelo's Petition for a Declaratory Ruling filed on September 12, 2006, and all
other evidence concerning this action, including this Notice of Appeal, Statement of the Case and
Exhibits attached thereto and this Designation.


TERRY E. THOMASON
BARBARA A. KRIEG
ZACHARY A. MCNISH

Attorneys for Appellant
ʻŌlelo Community Television
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

'Ōlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. __________________________
(Agency Appeal)

ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD

TO: THE PROCUREMENT POLICY BOARD, STATE OF HAWAIʻI

Pursuant to Hawaiʻi Revised Statutes § 91-14(d) and Hawaiʻi Rules of Civil Procedure Rule 72(d), you are hereby ordered to certify and transmit to this Court, within twenty (20) days of the Order, or within such further time as may be allowed by the Court, all pleadings, motions, memoranda, letters, exhibits, notices, declarations, affidavits, testimony, tape recordings (subject to Court reporter transcription on request), transcripts, decisions and orders (including any and all documents filed under seal) filed with or by, or otherwise maintained by the State of Hawaiʻi, Procurement Policy Board regarding the proceedings on ‘Ōlelo Community Television's Petition for a Declaratory Ruling filed on September 12, 2006, and all other evidence concerning this action.

DATED: Honolulu, Hawaiʻi, __________________________

APR - 2 2009

F. OTAKE
CLERK OF THE ABOVE-ENTITLED COURT

707425v2
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

'Ōlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. __________________________
(Agency Appeal)

REQUEST FOR WRITTEN BRIEFS AND
ORAL ARGUMENT

REQUEST FOR WRITTEN BRIEFS AND ORAL ARGUMENT

Pursuant to Hawai'i Revised Statutes § 91-14(f), Appellant 'Ōlelo Community Television hereby requests that the Court receive written briefs from the parties and hear oral argument on this Appeal.

DATED: Honolulu, Hawai'i, April ___ , 2009.

TERRY E. THOMASON
BARBARA A. KRIEG
ZACHARY A. MCNISH

Attorneys for Appellant
'Ōlelo Community Television
BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAI'I

IN THE MATTER OF THE PETITIONS OF

AKAKU: MAUI COMMUNITY TELEVISION
 FOR ADOPTION OF A RULE
 FOR MODIFICATION OF A RULE
 FOR DECLARATORY ORDER #1
 FOR DECLARATORY ORDER #2

OLELO COMMUNITY TELEVISION
 DECLARATORY RULING

DECLARATORY ORDER RE: AKAKU'S PETITION FOR ADOPTION OF A RULE
FILED FEBRUARY 24, 2006; AKAKU’S PETITION FOR MODIFICATION OF A
RULE FILED FEBRUARY 24, 2006; OLELO’S PETITION FOR A DECLARATORY
RULING FILED SEPTEMBER 12, 2006; AKAKU’S PETITION FOR A
DECLARATORY RULING FILED FEBRUARY 23, 2006; AND AKAKU’S
PETITION FOR A DECLARATORY RULING FILED JANUARY 25, 2007

This Declaratory Order disposes of five petitions submitted to the Policy
Procurement Board (“PPB”). Akaku: Maui Community Television (“Akaku”) filed four
petitions: (1) Petition for a Declaratory Order on February 23, 2006; (2) Petition for
Adoption of a Rule, and (3) Petition for Modification of a Rule, on February 24, 2006;
and (4) a second Petition for a Declaratory Order on January 25, 2007. Olelo Community
Television (“Olelo”) filed its Petition for Declaratory Ruling on September 12, 2006.

For the reasons stated below, Akaku’s Petition for Adoption of a Rule, Akaku’s
Petition for Modification of a Rule, and Olelo’s Petition for Declaratory Ruling are
addressed together in part I, then Akaku’s Petition for a Declaratory Order filed February
23, 2006 is treated in part II, and finally, Akaku’s Petition for a Declaratory Order filed
January 25, 2007 in part III.
I. AKAKU’S PETITION FOR ADOPTION OF A RULE, AKAKU’S PETITION FOR MODIFICATION OF A RULE, AND OLELO’S PETITION FOR DECLARATORY RULING

On February 24, 2006, Akaku filed two petitions: “Petition for the Adoption of a Rule” (“Petition 1”); and “Petition for the Modification of a Rule” (“Petition 2”), pursuant to Hawaii Revised Statutes (“HRS”) §91-6.

In Petition 1, Akaku requested the adoption of a new rule it identified as “§3-120-6.”

§3-120-6 Code Not Applicable to PEG Access Provider Contracts. The State Procurement Code does not apply to Public Education Government Access Provider Contracts which direct the cable franchisees to cause payments from the cable franchise fees to the several Public Education Government Access Providers as provided by law.

In Petition 2, Akaku requested Hawaii Administrative Rules (“HAR”) §3-120-4, exhibit A, “Procurements Exempt from chapter 103D, HRS,” be modified to include a new exemption, identified as exemption 17, to be exempted from HRS chapter 103D:

17. Services of non-governmental non-profit corporations to provide public, educational and governmental cable access.

PROCEDURAL MATTERS

1. On February 24, 2006, Petitioner filed both Petition 1 and Petition 2.

2. Due to vacant positions on the Procurement Policy Board (“Board”) and lack of quorum, the first Board meeting subsequent to the submission of the Petitions was on July 13, 2006.

3. Petitions 1 and 2 were placed on the agenda of the July 13, 2006 Board meeting, under the heading, “New Business, For Information.”

4. On July 13, 2006, the Board considered Petitions 1 and 2 at its meeting. Board members Gregory King, Gordon Ing, Russ Saito, and Leslie Chinen were present.
Mr. King chaired the meeting. Lance D. Collins, Esq. appeared on behalf of Petitioner.

The following individuals appeared and provided oral testimony in support of the

Petitions:

Kealii Lopez - Olelo
Larry Geller – Kokua Council
DeGray Vanderbilt – Akaku (Molokai)
Gerry Silva - Olelo
Terry Thomason – attorney for Olelo
James “Sparky” Rodrigues

5. The Board received written testimony in support of the petitions from Cassy Husted, and written testimony opposed to the petitions from Carol Bain. Jeff Garland, on behalf of the League of Women Voters, also submitted written testimony in opposition to the petitions.

6. A motion was made and the Board approved to submit both the rule proposed in Petition 1 and the rule amendment proposed in Petition 2, to the Governor as the initial step of the rulemaking process.

7. The Board met on September 22, 2006. Present at the Board’s meeting were Gregory King, Gordon Ing, Russ Saito, Leslie Chinen, Daryle Ann Ho, and Richard Totten. Mr. King chaired the meeting.

8. The Board was informed at its September 22, 2006 meeting that the Office of Information Practices (“OIP”) had advised and recommended that the State Procurement Office (“SPO”) reconsider Petition 1 and Petition 2. OIP was concerned that because the two petitions were listed on the Board’s July 13, 2006 agenda under the heading “For Information,” action should not have been taken on the informational items, there being the possibility of confusion among members of the public who would have testified had they known action would be taken on these informational items. OIP
recommended the Board to consider as void, the actions taken concerning Petitions 1 and 2 at the PPB’s July 13, 2006 meeting.

9. The September 22, 2006 agenda included Petitions 1 and 2 for the PPB’s consideration and action, and invited public testimony, in the event the Board agreed to accept OIP’s advice. The Board agreed to accept OIP’s recommendation and agreed the actions taken at its July 13, 2006 meeting with regard to the two petitions to be void.

10. On September 12, 2006, Olelo Community Television (“Olelo”) filed a “Petition for Declaratory Ruling Pursuant to H.R.S. §91-8” (“Petition 3”). In its petition, Olelo requested a declaratory ruling stating:

Contracts with entities to manage and administer public, education and government (“PEG”) access channels are contracts for “utility services” within the meaning of H.R.S. § 103D-102(b)(4)(F) and, for which the competitive award procedures of H.R.S. Chapter 103D are neither practicable nor advantageous to the State. On that basis, such contracts are exempt from the application of the State Procurement Code.

11. Petition 3 was listed on the PPB’s September 22, 2006 agenda for consideration and action by the PPB. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made.

12. The Board agreed to hear public testimony on all three petitions at the same time because of the common subject matter of the three petitions - exemption of PEG access services contracts from the Procurement Code. Aaron Fujioka, Administrator of the SPO, and Clyde Sonobe, Administrator of the Department of Commerce and Consumer Affairs, Cable Television Division, responded to questions from the Board. The following individuals appeared and provided oral and written testimony in support of the Petitions.

Kealii Lopez - Olelo
Gerry Silva – Olelo
James Rodrigues - Olelo
Michele Van Hessen – Olelo
Shannon McMonagle – Kaiser High School
Vic Lambert – Kaiser High School
Alfred Ekau, Jr. – Queen Liliuokalani Children’s Center
Ao Rodenhurst – Head of Spiritual Nation of Ku Hui‘ea Council
Wes Akamine
Mark Helmburger – Olelo
Sam Makua – Waimanalo Hawaiian Homestead
Gerri Watanabe – Olelo
Robert Stiver – Olelo
M.P. “Andy” Anderson – Hina Mauka

The following individuals appeared and provided oral testimony in support of the Petitions.

Terry Thomason – Attorney for Olelo
Lance Collins – Attorney for Akaku
Kalani Akana
Lynette Cruz - HPU
Kenny Mersburgh - Olelo
Leslie Gil - Olelo
Ipo Rossiter
Lucie Rodenhurst
Pookela Rodenhurst
DeGray Vanderbilt
Jay Robertson – Ho Ike
Michael Shockley – Olelo
Desiree Husted – Olelo
David Husted – Olelo
Dena Jimenez – Olelo
Michael Bowen – Olelo
Ramona Heitzman - Olelo

The following individuals provided written testimony in support of the Petitions.

Colette Young-Pohlman - teacher
Gary Pak - UH
Sharran Langford – Olelo producer
Mark Lutwak
Nancy Hedlund
Clara Batongbacal
Gerry Kaman – Olelo
Maile Shimabukuro – State Representative 45th district
Joan Lander
John A. Hoag – Church of Jesus Christ of Latter-Day Saints

13. The Board recessed the meeting for the day, and continued the meeting on October 5, 2006. Present at the Board’s meeting were Gregory King, Gordon Ing, Russ Saito, and Richard Totten. Leslie Chinen and Daryle Ann Ho were excused from the meeting. Mr. King chaired the meeting.

14. The Board requested testimony be limited to the issue of whether it would or would not be advantageous or practicable to compete the PEG access services, and each testimony to be limited to five to seven minutes, because there were numerous members of the public present who wished to testify, and the previous testimony had been overwhelmingly about why Olelo’s contract with DCCA should be extended. Despite its requests, the Board heard testimony that exceeded the time limit and focused on extending Olelo’s contract with DCCA.

15. The following individuals appeared and provided oral and written testimony in support of the Petitions.

Larry Geller – President, Kokua Council
Ruby Maunakea, individually and for Connie Burchett, David Oclinaria, and Hokulei Crew – Olelo
Reyanne Maunakea – Olelo
Piilani Kaopuiki
Bert Fishman for Jo Yasutake – City and County Recreation Director, Palolo
Meredith Nichols for Sharon Narimatsu – Olelo Board of Directors
Donna Wylan for Angela Meixell – Chancellor, Windward Community College
Bob Farell – Olelo
Naturalee Puou - Olelo
Shirley P. Nabooji
Sherry Ann Hooehui – Olelo
Bronson Garcia – Olelo
Christian P. Nahoopii-Hose – Olelo
Kaleo Keliikiapi-Poe – Olelo
Sharlette Poe - Olelo
Lynn M. Corneau – Olelo
Colby Corneau – Olelo
Jordan Kila – Olelo
Fuschia Keliikipi-Kamakani – Olelo
Kourtney Kaaihue – Olelo
Rodney Paguirigan – Olelo
Kauhi Maunakea-Forth – Olelo
Alan Ibanes – Olelo
Tuli Leota – Olelo
Jamie Deguzman – Olelo
Ambree Hauiho – Olelo
Thorne Fontanilla – Olelo
Gary Supnet
Steven Barsamin
Kenneth and Hannah Barsamin – Olelo
Ruth Hsu – UHM, Dept of English, Assoc. Professor
Neal Rivera for Josephine Feiteira-Kahue – NaKupuna O Hawaii, Olelo
Dennis Callan
Akemi Carter
Shirley Sypert

The following individuals appeared and provided oral testimony in support of the petitions.

Gerry Silva
Will Haynes
BJ Protho – Kupuna Coalition Network
Noyita Saravia – Olelo
Gail Nakamoto – Olelo
Leslie Gil – Olelo
Tom McCrea – The Open Door Academy
Sabine Deringer – HPU
Keith Akana – Olelo
Casina Waterman – Oahu Council
Soloaia Faalepo – Samoa Mo Samoa
Molesi Sagapolutele – Samoa Mo Samoa
Aloha Davis – Olelo
Aki Carter - Olelo
Bokdong Yoon
Aloa Kaneaukahi – Olelo
Michael Bailey – Greenpeace
Hans Peter Jensen – Olelo
Betty Ann Leslie – Olelo
Kawika Nahoopii – Olelo
Anela Casauran – Olelo
Tammy Toma
Meredith Nichols - Olelo
Kaimanaaloa Samson
Bert Fishman - City & County of Honolulu
Alaine Ko
Pat Patterson
Ernie Pascual
Diego Cadiente, Jr.
Andrew Germinaro
Evera Williams
Erin Malone
James Nakapaahu
Angela Breene
Kuuleilani Reyes

The following individuals provided written testimony in support of the Petitions.

Frances Corcoran – Kahuku Public and School Library
Ben Shafer – Friends of Kahana Defend Oahu Coalition
Stuart McKinley – HGEA/AFSCME, Local 152
Oren Tsutsumi
Kalua Dung
Daniel Connelison
Shane Hoohui
Patrick Perry
Henry Roman
James Taylor
Leandra Wai
Angel Naivalu
Stacy Trinh – Amitabha Educational Center
Heidi Ramseyer
Kim Langley
Bruno Lemos
Duane Char
Lisa DeLong
Carol Phillips
Daniel Skaf
Bonnie Murakami
Warren Houghtaling
Margaret Brezel – Kauai Historical Society
Joshua Primacio
Fay Uyeda – Communities in School, YMCA
Dennis Young
Kay Yonemori – Parent Outreach Counselor, Waipahu High School
Doreen Redford
Rochelle Kalili
Kylie Manaku-Kalili
Kyson Manaku-Kalili  
Makana Shook  
Bev Van Kinkle  
Suivaia Soosenuu  
Taclasse Soosenuu  
Ramona Soosenuu  
Tracey Soosenuu  
Cornelia Kawamata – Waipahu Elementary School  
Shelley Zamborelli  
Kyle Kajihiro – American friends Service Committee  
Romelia Shiroma  
Robert Bailey  
Matt Yamashita – Akaku  
Joanne Flannery – Kailua Historical Society  
Sean McLaughlin  
Gwendolyn Kim  
Jeanne L. Lee  
Cory Harden

The following individuals provided written testimony in support of the Petitions.

Tanielle Hughes  
Pastor Jay Amina  
Leiolani De Lima  
Gabriela Borges  
Lilah Akin  
Torey Nakamura  
Christine Ho  
J. Garcia

The following individuals appeared and provided oral and written testimony against the Petitions.

Carol Bain – Community Media Producers Association

The following individuals provided written testimony against the Petitions.

Jeff Garland  
Wendy Arbeith

16. The Board asked follow up questions of Carol Bain, Clyde Sonobe, and Gerry Silva.
17. The three petitions, while each worded differently and pursuing alternate
theories, all request that contracts for PEG access services not be subject to the
requirements of the Hawaii Public Procurement Code, HRS chapter 103D.

18. Mr. King stated the presumption of the Procurement Code and the Board
is that everything should be bid, unless it is shown that it is neither practicable nor
advantageous to do so, and the testimony has not made a convincing presentation that it
was neither practicable nor advantageous to exempt contracts with PEG access
organizations from the Procurement Code.

19. Although there were objections and concerns raised by the public
regarding the application of the Procurement Code, HRS chapter 103D, to contracts with
PEG access service organizations, the Board was not persuaded that it would be
practicable or advantageous to exempt contracts for PEG access services from the
Procurement Code, and was not persuaded that the provision of PEG access services were
comparable to the provision of utility services and thus exempt from the Procurement
Code.

20. The Board voted unanimously to deny Akaku’s Petition for the Adoption
of a Rule (Petition 1), Akaku’s Petition for The Modification of a Rule (Petition 2), and
Olelo’s Petition for Declaratory Ruling (Petition 3).

21. Because of concerns of the public, the Board questioned Clyde Sonobe
and Aaron Fujioka about the Request for Proposal (“RFP”) process that DCCA intended
to use for contracts to obtain PEG access services. The Board voted unanimously to have
Mr. Fujioka to provide the Board an update of the RFP process, and to inform the Board,
if, during the RFP process it became evident that it was neither practicable nor
advantageous to continue the RFP process.

22. On October 27, 2006, the Board met. Board members Gregory King, Russ
Saito, Richard Totten, Leslie Chinen, Daryl Ann Ho, Wendy Imamura, and Pamela
Torres were present. Gregory King chaired the meeting.

23. Russ Saito informed those present that the SPO was notified on October
20, 2006, that two new Board members, Wendy Imamura and Pamela Torres, were
appointed by the Governor on an interim basis effective September 29, 2006. Their
appointments meant Gordon Ing, whose term had expired prior to September 29, 2006,
was not a member on October 5, 2006, and thus there was no quorum at the Board’s
October 5, 2006 meeting which had been continued from the September 22, 2006
meeting.

24. The Board considered the actions taken at its October 5, 2006 meeting
given the lack of quorum at that meeting. SPO had been informed of the two new
appointments after the agenda for the October 27, 2006 meeting had been published. The
Board agreed to reconsider the three petitions at its next meeting. Olelo did not object to
the Board’s proceeding under and reviewing its petition under HRS chapter 92, part I.

25. The Board met on December 21, 2006. Board members Gregory King,
Russ Saito, Leslie Chinen, and Pamela Torres were present. Richard Totten and Daryl
Ann Ho were excused. Mr. King chaired the meeting.

26. The three petitions acted upon by the Board at its October 5, 2006
meeting, were again treated together. The Board requested testimony be limited to five
minutes each, but allowed the time limit to be exceeded. The following individuals appeared and provided oral testimony in support of the Petitions.

    Robert Stiver
    Gerry Silva
    Meredith Nichols
    Terry Thomason
    Jim Brewer

The Board requested that when the meeting is reconvened, to limit oral testimony only to those who were present at the October 5, 2006 meeting and did not have the opportunity to testify.

27. The Board recessed the meeting for the day, and continued the meeting on January 18, 2007. Present at the Board's meeting were Gregory King, Russ Saito, Leslie Chinen, Pamela Torres, and Daryle Ann Ho. Richard Totten was excused from the meeting. Mr. King chaired the meeting.

28. The Board continued to receive testimony. The Board did not strictly enforce the time limit, and allowed all those present who wished to testify, to testify. The following individuals appeared and provided oral testimony in support of the Petitions.

    Jay April – Akaku
    Christian Nahoopii-Hose – Olelo
    Naturalee I. Puou – Olelo
    Renee Ing – Olelo
    Gerry Silva – Olelo
    Lance D. Collins – attorney for Akaku
    Barbara Krieg – attorney for Olelo
    Kealii Lopez – Olelo
    Ruth Hsu – UHM
    Kawika Nahoopii – Olelo
    Aloha Davis – Olelo
29. The Board conducted a question and answer session with representatives of Olelo, Akaku, DCCA, and those who use the Olelo facilities and services. Mr. Fujioka reported: the Request for Information ("RFI") and RFP processes initiated to select contractors for the new PEG access services contracts were proceeding; comments received from the public were being considered by DCCA and SPO for incorporation into a new RFP; and another RFI would be issued to further solicit public comment.

30. Again, although there were objections and concerns raised by the public regarding the application of the Procurement Code, HRS chapter 103D, to contracts with PEG access service organization, the Board was not persuaded that it would be practicable or advantageous to exempt contracts for PEG access services from the Procurement Code, and was not persuaded that the provision of PEG access services were comparable to the provision of utility services and thus exempt from the Procurement Code.

DEcision

After careful consideration of the written submittals, arguments of the parties and the live and written testimonies, and good cause appearing therefrom, the Board voted unanimously to deny Akaku’s Petition for the Adoption of a Rule (Petition 1) and Akaku’s Petition for The Modification of a Rule (Petition 2), and Olelo’s Petition for Declaratory Ruling Pursuant to H.R.S. §91-8 (Petition 3) failed to win approval.

II. AKAKU’S PETITION FOR A DECLARATORY ORDER FILED ON FEBRUARY 23, 2006

On February 23, 2006, Akaku had filed a “Petition for a Declaratory Order” pursuant to HRS §91-8.
In its Petition, Akaku requested the following.

That funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not ‘public funds’ within the meaning of Haw. Rev. Stat. 103D-102; and

That the State Procurement Code does not apply to services for providing public educational and governmental cable access.

**PROCEDURAL MATTERS**


2. Due to a misunderstanding by counsel for the SPO and the Board, Deputy Attorney General Patricia Ohara, this Petition was not considered until the December 21, 2006 Board meeting. She previously had understood Lance D. Collins, attorney for Akaku, to have agreed to set aside the Petition for Declaratory Order because of the other two petitions for rule adoption and modification he filed on Akaku’s behalf on February 24, 2006 (Petitions 1 and 2 discussed above), and the lawsuit he filed on December 4, 2006, *Akaku v. Aaron Fujioka, et al.*, Civil No. 06-1-0443(3).

3. The Board met and considered this Petition at its January 18, 2007 meeting, which was continued from the December 21, 2006 meeting. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made. Board members present were Gregory King, Russ Saito, Leslie Chinen, Pamela Torres, and Daryle Ann Ho. Richard Totten was excused from the meeting. Mr. King chaired the meeting.

4. The Board received testimony from Mr. Collins. A lengthy discussion followed about the funding of PEG access organizations, the relationship between PEG access services and cable franchises, and these fees being subject to procurement but not capital fees. The Board conducted an extensive question and answer session with
representatives of Olelo, Akaku, DCCA, and those who use Olelo’s facilities and services.

5. The Board was not persuaded that the funds collected and disbursed by the cable franchisees pursuant to DCCA rules and orders were not public funds, and was not persuaded that the Procurement Code did not apply to services providing PEG cable access.

DECISION

After careful consideration of the written submittals, arguments of the parties and the live and written testimonies, and good cause appearing therefrom, the Board voted unanimously to deny the Petition.

III. AKAKU’S PETITION FOR A DECLARATORY ORDER FILED ON JANUARY 25, 2007


In its Petition, Akaku requested the Board make a declaratory order regarding:


b. Whether contracts entered into by the cable franchisee with businesses, required by the enfranchisement decision and order, that benefit the state in-kind or otherwise are subject to Chapter 103D, Haw. Rev. Stat.; and

c. Whether PEG access services as a derivative and fixed part of the cable franchise decision and orders are subject to Chapter 103D, Haw. Rev. Stat.

PROCEDURAL MATTERS


15
2. The Petition was included on the agenda for the Board’s February 15, 2007, but the meeting subsequently was cancelled because of a lack of quorum.

3. The Board next met on April 5, 2007 and considered the Petition. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made. Board members present were Gregory King, Russ Saito, Leslie Chinen, and Daryl Ann Ho. Mr. King chaired the meeting.

4. The Board received testimony from Mr. Collins and Jay April stating that as cable franchises are governed by HRS chapter 440G and exempt from HRS chapter 103D, the franchisees’ contracts should also be exempt, including contracts for the provision of PEG access services. Gerry Silva, Chief Operating Officer of Olelo, submitted written testimony supporting the view that PEG access is a derivative of the cable franchise, and PEG access providers should have the same contractual relationship with the State as a cable company. Clyde Sonobe of DCCA provided the Board with an explanation of HRS chapter 440G.

5. The Board engaged in a lengthy discussion, considering the responses to its questions from Mr. Sonobe, Mr. Collins, Mr. April, and Ms. Ohara.

6. The Board determined that the issuance of cable franchises are governed by HRS chapter 440G, that cable franchises are governed by chapter 440G and not HRS chapter 103D. The Board determined there is no reference to chapter 103D in chapter 440G, and thus the legislature did not intend cable franchises to be subject to chapter 103D.

7. The Board determined contracts entered into by cable franchises with businesses as required by the enfranchisement decision and order that benefit the state,
in-kind or otherwise, are not subject to HRS chapter 103D because the cable franchises, such as Time Warner, are not governmental bodies subject to chapter 103D.

8. The Board determined that PEG access services are subject to HRS chapter 103D because the contracts for PEG services were entered into by DCCA, a governmental body subject to chapter 103D, and the contracts were not otherwise exempted by chapter 103D, the Chief Procurement Officer, or the Board.

DECISION

After careful consideration of the written submittals, arguments of the parties and the live and written testimonies, and good cause appearing therefrom, the Board voted unanimously that: (1) the issuance of cable franchises granted pursuant to HRS chapter 440G are not subject to HRS chapter 103; (2) contracts entered into by the cable franchisee with businesses required by the enfranchisement decision and order that benefit the state in-kind or otherwise are not subject to HRS chapter 103D; and (3) Peg services are subject to HRS chapter 103D.

PROCUREMENT POLICY BOARD

By: [Signature]
PAMELA TORRES, CHAIR

Dated: Feb 24, 2009
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

'Ōlelo Community Television,
           Appellant,

vs.

Procurement Policy Board,
       Appellee.

Civil No. ____________________________
(Agency Appeal)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly
served on the following parties at their respective addresses by hand delivery, U.S. mail, postage
prepaid or fax, as indicated below:

MARK BENNETT
PATRICIA OHARA
Department of the Attorney General
425 Queen Street
Honolulu, Hawai‘i 96813

Attorneys for Appellee
Procurement Policy Board
State of Hawai‘i

U.S. MAIL   HAND-DELIVERY   EMAIL
( X )        ( )           ( )
Pamela Torres, Chair  
Procurement Policy Board  
c/o Mr. Aaron Fujioka  
State Procurement Office  
Department of Accounting and General Services  
Kalanimoku Building  
1151 Punchbowl Street, Room 230A  
Honolulu, Hawai`i 96813

DATED: Honolulu, Hawai`i, April 2, 2009.

TERRY E. THOMASON  
BARBARA A. KRIEG  
ZACHARY A. MCNISH

Attorneys for Appellant  
‘Ōlelo Community Television
Akaku
Law Office of Lance D. Collins
Lance D. Collins 8246
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808.243.9292

Attorney for Petitioners-Appellants

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAI'I

AKAKU: MAUI COMMUNITY TELEVISION,

Petitioner-Appellant

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

Docket No. 09-1-0189 (1)
(Agency Appeal)
NOTICE OF APPEAL; CERTIFICATE OF SERVICE

NOTICE OF APPEAL

Notice is hereby given that AKAKU: MAUI COMMUNITY TELEVISION, by and through its attorney, the Law Office of Lance D Collins, pursuant to Sections 91-8 and 91-14, Hawai'i Revised Statutes, and Rule 72 of the Hawai'i Rules of Civil Procedure appeals to the Circuit Court of the Second Circuit from the final order of the Procurement Policy Board of the State of Hawai'i signed February 24, 2009 and mailed March 8, 2009 entitled "DECLARATORY ORDER RE: AKAKU'S PETITION FOR ADOPTION OF A RULE FILED FEBRUARY 24, 2006; AKAKU'S PETITION FOR MODIFICATION OF A RULE FILED FEBRUARY 24, 2006; OLELO'S PETITION FOR A DECLARATORY RULING FILED SEPTEMBER 12, 2006; AKAKU'S PETITION FOR A DECLARATORY RULING FILED FEBRUARY 23, 2006; AND AKAKU'S PETITION FOR A DECLARATORY RULING FILED JANUARY 25, 2007", and attached hereto as Exhibit "A".

DATED: Wailuku, Maui, Hawai'i

March 12, 2009

I hereby certify that this is a full, true and correct copy of the Original.

Clerk, Second Circuit Court

LAW OFFICE OF LANCE D. COLLINS
LANCE D COLLINS
Attorney for Appellant
IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION,

) Docket No. ______________________

) (Agency Appeal)

) CERTIFICATE OF SERVICE

Petitioner-Appellant

vs.

 PROCUREMENT POLICY BOARD

) 

 ) Agency-Appellee.

) 

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing will be served upon the following party at his last known address by U.S. mail, postage pre-paid:

MARK BENNETT, ESQ.
PATRICIA OHARA, ESQ.
Department of Attorney General
425 S. King Street
Honolulu, HI 96818
Attorneys for Appellee

DATED: Wailuku, Maui, Hawaii

March 12, 2009

LAW OFFICE OF LANCE D. COLLINS
LANCE D COLLINS
Attorney for Appellant
Law Office of Lance D. Collins
Lance D. Collins 8246
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808.243.9292

Attorney for Petitioners-Appellants

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY
TELEVISION,

Petitioner-Appellant

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

Docket No. 09-1-0189 (1)

( Agency Appeal)

STATEMENT OF THE CASE;

CERTIFICATE OF SERVICE

STATEMENT OF THE CASE

Of Counsel:
LAW OFFICE OF LANCE D COLLINS
LANCE D COLLINS 8246
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808 243 9292 (tel)
808 242 1412 (fax)

Attorney for Petitioners-Appellants
IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION,

Petitioner-Appellant

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

Docket No. ____________________
(Agency Appeal)

STATEMENT OF THE CASE

PROCEEDURAL BACKGROUND


2. The Agency did not take action on the First Petition for Dec Order until after Petitioner filed a mandamus action against the Agency and Aaron Fujioka, Chief Procurement Officer and staff to the Agency, in Civ No. 06-1-0443(3), Second Circuit Court.

3. On or about January 18, 2007, the Agency conducted a meeting and considered the petition. The Agency thereafter voted unanimously to deny the Petition.


5. The Agency signed its final order on February 24, 2009 and sent said order on March 8, 2009.
POINTS OF ERROR

6. The monies collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not 'public funds' within the meaning of Haw. Rev. Stat. 103D-102.


8. The Agency failed to adopt administrative rules regarding the procedure upon which it received and considered the First Dec Order Petition, were made upon unlawful procedure and therefore violated the procedural due process rights of Petitioner found in the Fourteenth Amendment of the U.S. Constitution.

9. The delays in determining the petitions and issuing a final order were made after the deadlines set in Chapter 91, Haw. Rev. Stat. and therefore made upon unlawful procedure.

PRAYER FOR RELIEF

Wherefore Appellants pray this Honorable Appellate Court as follows:

A. That judgment be found in favor of Appellant and against Appellee;
B. That reverse the determinations in the First Dec Order Petition;
C. That reverse the third determination in the Second Dec Order Petition;
D. That Appellee be admonished for failure to comply with statutory deadlines;
E. That Appellant be award attorney's fees and costs in prosecuting this appeal; and
F. All other remedies this Honorable Appellate Court deems fair and just.

DATED: Wailuku, Maui, Hawai'i March 12, 2009

LAW OFFICE OF LANCE D. COLLINS
LANCE D COLLINS
Attorney for Appellant
IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION,

Petitioner-Appellant

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

Docket No. _______________________
(Agency Appeal)
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing will be served upon the following party at his last known address by U.S. mail, postage pre-paid:

MARK BENNETT, ESQ.
PATRICIA OHARA, ESQ.
Department of Attorney General
425 S. King Street
Honolulu, HI 96818
Attorneys for Appellee

DATED: Wailuku, Maui, Hawai‘i

March 12, 2009

LANCE D. COLLINS
Attorney for Appellant

LAW OFFICE OF LANCE D. COLLINS
LANCE D COLLINS
Law Office of Lance D. Collins
Lance D. Collins 8246
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808.243.9292

Attorney for Petitioner-Appellant

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION,

Petitioner-Appellant

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

Docket No. 09-1-0189 (1)
(Agency Appeal)
DESIGNATION OF THE RECORD ON APPEAL; ORDER TO CERTIFY RECORD ON APPEAL OR COUNTERDESIGNATE

DESIGNATION OF THE RECORD ON APPEAL

Of Counsel:
LAW OFFICE OF LANCE D COLLINS
LANCE D COLLINS 8246
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808 243 9292 (tel)
808 242 1412 (fax)

Attorney for Petitioners-Appellants

I hereby certify that this is a full, true and correct copy of the Original.

[Signature]
Clerk, Second Circuit Court
IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION, Docket No. ________________

Petitioner-Appellant (Agency Appeal)

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

DESIGNATION OF THE RECORD ON APPEAL

PROCEDURAL BACKGROUND

Petition for A Declaratory Order (February 26, 2006) 1

Petition for A Declaratory Order (January 27, 2007) 6

Declaratory Order re: Akaku's Petition for Adoption of a Rule filed
February 24, 2006; Akaku's Petition for Modification of a Rule filed
February 24, 2006; Olelo's Petition for A Declaratory Ruling filed
September 12, 2006; Akaku's Petition for A Declaratory Ruling filed
February 23, 2006; and Akaku's Petition for A Declaratory Ruling filed
January 25, 2007 12
BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition

of

Akaku: Maui Community Television

For a Declaratory Order

PETITION FOR A DECLARATORY ORDER

OF Counsel:
LANCE D COLLINS 8216
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808 243 9292 (tel)
808 242 1412 (Fax)

Attorney for Petitioner
Akaku: Maui Community Television
BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition
of
Akaku: Maui Community Television
For a Declaratory Order

PETITION FOR A DECLARATORY ORDER

1. Petitioner Akaku: Maui Community Television (hereafter 'Akaku'), by and through its counsel, hereby petitions the Procurement Policy Board, State of Hawai'i (hereafter 'the Board') for a declaratory order pursuant to Haw. Rev. Stat. 91-8.

Akaku Is An Interested Party

2. Petitioner Akaku is an interested party within the meaning of the statute. Petitioner Akaku is the sole Public Education Government Access ('PEG Access') provider for Maui County, encompassing both the Maui County and Lahaina Cable franchises. It does and has historically been the sole provider party to the Department of Commerce and Consumer Affairs PEG access contract for Maui County and Lahaina Cable franchises.
Requested Action

3. Petitioner hereby requests that the Procurement Policy Board make a declaratory order pursuant to Haw. Rev. Stat. 91-8 as follows:

   a. That funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not 'public funds' within the meaning of Haw. Rev. Stat. 1030-102; and

   b. That the State Procurement Code does not apply to services for providing public educational and governmental cable access.

Support for a Declaratory Order

4. Cable television in the United States is regulated by the federal Cable Television Consumer Protection and Competition Act of 1992, as amended. This act delegates to the states broad discretion to regulate cable television as franchising authorities. In addition to the regulation of the profitable aspects of cable television such as channel capacity, system configuration, and institutional and subscription networks, 47 U.S.C.A. § 531 permits cable operators to designate channel capacity of franchises to carry public, educational and government access (hereafter 'PEG access').

6. Attorney General Opinion No. 94-4 wrote, in part:

"There are no cases from Hawaii which are helpful in construing "public funds," and the legislative history of the Code is similarly not enlightening as to whether the term was intended to encompass moneys which must belong to the State in order that the State may offer an additional non-core fringe benefit to its employees. Other courts have, however, determined whether moneys owed individuals by government in other contexts are "public funds." In Arizona, the Supreme Court has concluded that federal funds which by federal law are available to private parties only when a state agency serves as the disbursing agency are not "public funds," even though they are held by a state agency. To be "public funds," the state must have "equitable" and "legal" rights to them. A distinction must be drawn between money over which a state has control, e.g., money collected as rent from a source and used to pay an obligation owed by a state to another, which are public funds, and money which the state merely collects, holds, or disburses. (citations omitted)

7. PEG access service providers are not funded by general funds or by any funds from the state. The cable franchisee as part of the grant of the cable franchise is required to collect from cable subscribers and disburse to PEG access service providers. The money is never received by any state agency and never passes through any state deposit accounts.

8. There is uncertainty about whether PEG Access contracts fall under the requirements of the Code because of certain statements made by various state agencies. However, because public funds are not used, and even if the funds were to be collected and disbursed by the state, they are not public funds within the meaning of Haw. Rev. Stat. 1980.

Requested Action

10. Petitioner Akaka hereby requests that the Board conduct an open meeting to deliberate and decide on a declaratory order as proposed herein.
11. In conjunction with the request of Paragraph 10, Petitioner notes that the Board has not adopted rules governing the procedure for requests for declaratory orders as required by Haw. Rev. Stat. 91-8. Petitioner also notes that Haw. Rev. Stat. 92 requires the Board to conduct an open meeting in which testimony from the public is received in order to deliberate towards and/or make a decision regarding the ordering a declaratory order or denying this petition.

12. Petitioner Akaku hereby requests that the Board grant the petition's request and make a declaratory order declaring (1) that funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not 'public funds' within the meaning of Haw. Rev. Stat. 1030-102; and (2) that the State Procurement Code does not apply to services for providing public educational and governmental cable access.

Dated:  Waikiki, Maui, Hawaii  
February 21, 2005

[Signature]

JANCE D. COLLINS
Attorney for Petitioner Akaku
BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition

of

Akaku: Maui Community Television

For a Declaratory Order

PETITION FOR A DECLARATORY ORDER

Of Counsel:
LANCE D COLLINS 8246
2070 W Vineyard St, Ste 5
Wailuku, HI 96793
808 243 9292 (tel)
808 242 1412 (fax)

Attorney for Petitioner
Akaku: Maui Community Television
BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

In the Petition of Akaku: Maui Community Television For a Declaratory Order

PETITION FOR A DECLARATORY ORDER

1. Petitioner Akaku: Maui Community Television (hereafter 'Akaku'), by and through its counsel, hereby petitions the Procurement Policy Board, State of Hawai‘i (hereafter 'the Board') for a declaratory order pursuant to Haw. Rev. Stat. 91-8.

Akaku Is An Interested Party

2. Petitioner Akaku is an interested party within the meaning of the statute. Petitioner Akaku is the sole Public Education Government Access ('PEG Access') provider for Maui County, encompassing both the Maui County and Lahaina cable franchises. It does and has historically been the sole provider party to the Department of Commerce and Consumer Affairs PEG access contract for Maui County and Lahaina cable franchises.
Requested Action

3. There is confusion regarding the applicability of the State Procurement Code and its implications on Petitioner's rights. Petitioner hereby requests that the Procurement Policy Board make a declaratory order pursuant to Haw. Rev. Stat. 91-8 as follows:
   a. Whether the issuance of cable franchises granted pursuant to Chapter 440G, Haw. Rev. Stat. and those franchises are subject to Chapter 103D, Haw. Rev. Stat.;
   b. Whether contracts entered into by the cable franchisee with businesses, required by the enfranchisement decision and order, that benefit the state in-kind or otherwise are subject to Chapter 103D, Haw. Rev. Stat.; and
   c. Whether PEG access services as a derivative and fixed part of the cable franchise decision and orders are subject to Chapter 103D, Haw. Rev. Stat.

Support for a Declaratory Order

4. Cable television in the United States is regulated by the federal Cable Television Consumer Protection and Competition Act of 1992, as amended. This act delegates to the states broad discretion to regulate cable television as franchising authorities. In addition to the regulation of the profitable aspects of cable television such as channel capacity, system configuration, and institutional and subscriber networks, 47 U.S.C.A. § 531
permits cable operators to designate channel capacity of franchisees to carry
public, educational and government access (hereafter 'PEG access').

5. Haw. Rev. Stat. 440G has designated the Department of Commerce
and Consumer Affairs as the cable television franchising authority for the
State of Hawai'i. The Department of Commerce and Consumer Affair has carried
out its PEG access authority pursuant to Haw. Admin. Rules §16-131-32, §16-
131-33, §16-131-34, and other orders.

6. Haw. Rev. Stat. 103D-102 states that the Hawai'i Procurement
Code:

shall apply to all procurement contracts made by governmental bodies
whether the consideration for the contract is cash, revenues,
realizations, receipts, or earnings, any of which the State receives or
is owed; in-kind benefits; or forbearance; provided that nothing in
this chapter or rules adopted hereunder shall prevent any governmental
body from complying with the terms and conditions of any other grant,
gift, bequest, or cooperative agreement.

Haw. Rev. Stat. 103D-104 defines procurement as follows:

"Procurement" means buying, purchasing, renting, leasing, or otherwise
acquiring any good, service, or construction. The term also includes
all functions that pertain to the obtaining of any good, service, or
construction, including description of requirements, selection and
solicitation of sources, preparation and award of contracts, and all
phases of contract administration.

7. The cable franchisee as part of the grant of the cable franchise
is required to collect from cable subscribers and disburse to PEG access
service providers. Additionally, the cable franchisee is required by the
enfranchisement to carry out a variety of upgrades and other benefits to the
State.

8. There is uncertainty about whether the cable franchises, PEG
Access services and other contracts fall under the requirements of the Code because of statements made by various state agencies including, but not limited to the State Procurement Officers refusal to grant an exemption to the PEG access service contracts, granting sole source exemption to Hawai‘i Public Television, and the segmenting of PEG access services from the entire cable franchises.

9. Because of this uncertainty, Petitioners rights are in question as to whether it is subject to the Code.

Conclusion

10. Petitioner Akaku hereby requests that the Board conduct an open meeting to deliberate and decide on a declaratory order as proposed herein.

11. In conjunction with the request of Paragraph 10, Petitioner notes that the Board has not adopted rules governing the procedure for requests for declaratory orders as required by Haw. Rev. Stat. 91-8. Petitioner also notes that Haw. Rev. Stat. 92 requires the Board to conduct an open meeting in which testimony from the public is received in order to deliberate towards and/or make a decision regarding the ordering a declaratory order or denying this petition.

12. Petitioner Akaku hereby requests that the Board grant the petition's request and make a declaratory order determining:

   a. Whether the issuance of cable franchises granted pursuant to Chapter 440G, Haw. Rev. Stat. and those franchises are subject to Chapter 103D, Haw. Rev. Stat.;
b. Whether contracts entered into by the cable franchisee with businesses, required by the enfranchisement decision and order, that benefit the state in-kind or otherwise are subject to Chapter 103D, Haw. Rev. Stat.; and

c. Whether PEG access services as a derivative and fixed part of the cable franchise decision and orders are subject to Chapter 103D, Haw. Rev. Stat..

Dated: Wailuku, Maui, Hawai'i January 22, 2007

[Signature]

LANCE D. COLLINS
Attorney for Petitioner Akaku
BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAI'I

IN THE MATTER OF THE PETITIONS OF

AKAKU: MAUI COMMUNITY TELEVISION
FOR ADOPTION OF A RULE
FOR MODIFICATION OF A RULE
FOR DECLARATORY ORDER #1
FOR DECLARATORY ORDER #2

OLELO COMMUNITY TELEVISION
DECLARATORY RULING

DECLARATORY ORDER RE: AKAKU'S PETITION FOR ADOPTION OF A RULE FILED FEBRUARY 24, 2006; AKAKU'S PETITION FOR MODIFICATION OF A RULE FILED FEBRUARY 24, 2006; OLELO'S PETITION FOR A DECLARATORY RULING FILED SEPTEMBER 12, 2006; AKAKU'S PETITION FOR A DECLARATORY RULING FILED FEBRUARY 23, 2006; AND AKAKU'S PETITION FOR A DECLARATORY RULING FILED JANUARY 25, 2007

This Declaratory Order disposes of five petitions submitted to the Policy Procurement Board ("PPB"). Akaku: Maui Community Television ("Akaku") filed four petitions: (1) Petition for a Declaratory Order on February 23, 2006; (2) Petition for Adoption of a Rule, and (3) Petition for Modification of a Rule, on February 24, 2006; and (4) a second Petition for a Declaratory Order on January 25, 2007. Olelo Community Television ("Olelo") filed its Petition for Declaratory Ruling on September 12, 2006.

For the reasons stated below, Akaku's Petition for Adoption of a Rule, Akaku's Petition for Modification of a Rule, and Olelo's Petition for Declaratory Ruling are addressed together in part I, then Akaku's Petition for a Declaratory Order filed February 23, 2006 is treated in part II, and finally, Akaku's Petition for a Declaratory Order filed January 25, 2007 in part III.
I. AKAKU'S PETITION FOR ADOPTION OF A RULE, AKAKU'S PETITION FOR MODIFICATION OF A RULE, AND OLELO'S PETITION FOR DECLARATORY RULING

On February 24, 2006, Akaku filed two petitions: "Petition for the Adoption of a Rule" ("Petition 1"); and "Petition for the Modification of a Rule" ("Petition 2"), pursuant to Hawaii Revised Statutes ("HRS") §91-6.

In Petition 1, Akaku requested the adoption of a new rule it identified as "§3-120-6."

§3-120-6 Code Not Applicable to PEG Access Provider Contracts. The State Procurement Code does not apply to Public Education Government Access Provider Contracts which direct the cable franchisees to cause payments from the cable franchise fees to the several Public Education Government Access Providers as provided by law.

In Petition 2, Akaku requested Hawaii Administrative Rules ("HAR") §3-120-4 exhibit A, "Procurements Exempt from chapter 103D, HRS," be modified to include a new exemption, identified as exemption 17, to be exempted from HRS chapter 103D:

17. Services of non-governmental non-profit corporations to provide public, educational and governmental cable access.

PROCEDURAL MATTERS

1. On February 24, 2006, Petitioner filed both Petition 1 and Petition 2.

2. Due to vacant positions on the Procurement Policy Board ("Board") and lack of quorum, the first Board meeting subsequent to the submission of the Petitions was on July 13, 2006.

3. Petitions 1 and 2 were placed on the agenda of the July 13, 2006 Board meeting, under the heading, "New Business, For Information."

4. On July 13, 2006, the Board considered Petitions 1 and 2 at its meeting. Board members Gregory King, Gordon Ing, Russ Saito, and Leslie Chinen were present.
Mr. King chaired the meeting. Lance D. Collins, Esq. appeared on behalf of Petitioner.

The following individuals appeared and provided oral testimony in support of the Petitions:

Kealii Lopez - Olelo
Larry Geller – Kokua Council
DeGray Vanderbilt – Akaku (Molokai)
Gerry Silva – Olelo
Terry Thomason – attorney for Olelo
James “Sparky” Rodrigues

5. The Board received written testimony in support of the petitions from Cassy Husted, and written testimony opposed to the petitions from Carol Bain. Jeff Garland, on behalf of the League of Women Voters, also submitted written testimony in opposition to the petitions.

6. A motion was made and the Board approved to submit both the rule proposed in Petition 1 and the rule amendment proposed in Petition 2, to the Governor as the initial step of the rulemaking process.

7. The Board met on September 22, 2006. Present at the Board’s meeting were Gregory King, Gordon Ing, Russ Saito, Leslie Chinien, Daryle Ann Ho, and Richard Totten. Mr. King chaired the meeting.

8. The Board was informed at its September 22, 2006 meeting that the Office of Information Practices (“OIP”) had advised and recommended that the State Procurement Office (“SPO) reconsider Petition 1 and Petition 2. OIP was concerned that because the two petitions were listed on the Board’s July 13, 2006 agenda under the heading “For Information,” action should not have been taken on the informational items, there being the possibility of confusion among members of the public who would have testified had they known action would be taken on these informational items. OIP
recommended the Board to consider as void, the actions taken concerning Petitions 1 and 2 at the PPB’s July 13, 2006 meeting.

9. The September 22, 2006 agenda included Petitions 1 and 2 for the PPB’s consideration and action, and invited public testimony, in the event the Board agreed to accept OIP’s advice. The Board agreed to accept OIP’s recommendation and agreed the actions taken at its July 13, 2006 meeting with regard to the two petitions to be void.

10. On September 12, 2006, Olelo Community Television ("Olelo") filed a “Petition for Declaratory Ruling Pursuant to H.R.S. §91-8” (“Petition 3”). In its petition, Olelo requested a declaratory ruling stating:

Contracts with entities to manage and administer public, education and government ("PEG") access channels are contracts for "utility services" within the meaning of H.R.S. § 103D-102(b)(4)(F) and, for which the competitive award procedures of H.R.S. Chapter 103D are neither practicable nor advantageous to the State. On that basis, such contracts are exempt from the application of the State Procurement Code.

11. Petition 3 was listed on the PPB’s September 22, 2006 agenda for consideration and action by the PPB. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made.

12. The Board agreed to hear public testimony on all three petitions at the same time because of the common subject matter of the three petitions - exemption of PEG access services contracts from the Procurement Code. Aaron Fujioka, Administrator of the SPO, and Clyde Sonobe, Administrator of the Department of Commerce and Consumer Affairs, Cable Television Division, responded to questions from the Board. The following individuals appeared and provided oral and written testimony in support of the Petitions.

Kealii Lopez - Olelo
Gerry Silva – Olelo
James Rodrigues - Olelo
Michele Van Hessen – Olelo
Shannon McMang – Kaiser High School
Vic Lambert – Kaiser High School
Alfred Ekau, Jr. – Queen Liliuokalani Children’s Center
Ao Rodenhurst – Head of Spiritual Nation of Ku Huiea Council
Wes Akamine
Mark Helmburger – Olelo
Sam Makua – Waimanalo Hawaiian Homestead
Gerri Watanabe – Olelo
Robert Stiver – Olelo
M.P. “Andy” Anderson – Hina Mauka

The following individuals appeared and provided oral testimony in support of the Petitions.

Terry Thomason – Attorney for Olelo
Lance Collins – Attorney for Akaku
Kalani Akana
Lynette Cruz - HPU
Kenny Mersburgh - Olelo
Leslie Gil - Olelo
Ipo Rossiter
Lucie Rodenhurst
Pookela Rodenhurst
DeGray Vanderbilt
Jay Robertson – Ho Ike
Michael Shockley – Olelo
Desiree Husted – Olelo
David Husted – Olelo
Dena Jimenez – Olelo
Michael Bowen – Olelo
Ramona Heitzman - Olelo

The following individuals provided written testimony in support of the Petitions.

Colette Young-Pohlman - teacher
Gary Pak - UH
Sharran Langford – Olelo producer
Mark Lutwak
Nancy Hedlund
Clara Batongbacal
Gerry Kaman – Olelo
Maile Shimabukuro – State Representative 45th district
Joan Lander
John A. Hoag – Church of Jesus Christ of Latter-Day Saints

13. The Board recessed the meeting for the day, and continued the meeting on October 5, 2006. Present at the Board’s meeting were Gregory King, Gordon Ing, Russ Saito, and Richard Totten. Leslie Chinen and Daryle Ann Ho were excused from the meeting. Mr. King chaired the meeting.

14. The Board requested testimony be limited to the issue of whether it would or would not be advantageous or practicable to compete the PEG access services, and each testimony to be limited to five to seven minutes, because there were numerous members of the public present who wished to testify, and the previous testimony had been overwhelmingly about why Olelo’s contract with DCCA should be extended. Despite its requests, the Board heard testimony that exceeded the time limit and focused on extending Olelo’s contract with DCCA.

15. The following individuals appeared and provided oral and written testimony in support of the Petitions.

Larry Geller – President, Kaua‘i Council
Ruby Maunakea, individually and for Connie Burchett, David Oclinaria, and Hokule‘i Crew – Olelo
Reyanne Maunakea – Olelo
Piilani Kaopuiki
Bert Fishman for Jo Yasutake – City and County Recreation Director, Palolo
Meredith Nichols for Sharon Narimatsu – Olelo Board of Directors
Donna Wylan for Angela Meixell – Chancellor, Windward Community Collège
Bob Farell – Olelo
Naturalee Puou – Olelo
Shirley P. Nabooji
Sherry Ann Hoohui – Olelo
Bronson Garcia – Olelo
Christian P. Na hoopii-Hose – Olelo
Kaleo Keliikipi-Poe – Olelo
Sharlette Poe – Olelo
Lynn M. Corneau – Olelo
Colby Corneau – Olelo
Jordan Kila – Olelo
Fuschia Keliikipi-Kamaskani – Olelo
Kourtney Kaaihue – Olelo
Rodney Paguirigan – Olelo
Kauhi Maunakea-Forth – Olelo
Alan Ibanes – Olelo
Tuli Leota – Olelo
Jamie Deguzman – Olelo
Ambree Hauhio – Olelo
Thorne Fontanilla – Olelo
Gary Supnet
Steven Barsamin
Kenneth and Hannah Barsamin – Olelo
Ruth Hsu – UHM, Dept of English, Assoc. Professor
Neal Rivera for Josephine Feiteira-Kahue – NaKupuna O Hawai‘i, Olelo
Dennis Callan
Akemi Carter
Shirley Sypert

The following individuals appeared and provided oral testimony in support of the petitions.

Gerry Silva
Will Haynes
BJ Protho – Kupuna Coalition Network
Noyita Saravia – Olelo
Gail Nakamoto – Olelo
Leslie Gil – Olelo
Tom McCrea – The Open Door Academy
Sabine Deringer – HPU
Keith Akana – Olelo
Casina Waterman – Oahu Council
Solaaii Faalopo – Samoa Mo Samoa
Molesi Sagapolutele – Samoa Mo Samoa
Aloha Davis – Olelo
Aki Carter – Olelo
Bokdong Yoon
Aloa Kaneaukahui – Olelo
Michael Bailey – Greenpeace
Hans Peter Jensen – Olelo
Betty Ann Leslie – Olelo
Kawika Nahoopii – Olelo
Anela Casauran – Olelo
Tammy Toma
Meredith Nichols - Olelo
Kaimanaloa Samson
Bert Fishman – City & County of Honolulu
Alaine Ko
Pat Patterson
Ernie Pascual
Diego Cadiente, Jr.
Andrew Germinaro
Everal Williams
Erin Malone
James Nakapaahu
Angela Breene
Kuuleilani Reyes

The following individuals provided written testimony in support of the Petitions.

Frances Corcoran – Kahuku Public and School Library
Ben Shafer – Friends of Kahana Defend Oahu Coalition
Stuart McKinley – HGEA/AFSCME, Local 152
Oren Tsutsumi
Kalua Dung
Daniel Connelison
Shane Hoohui
Patrick Perry
Henry Roman
James Taylor
Leandra Wai
Angel Naivalu
Stacy Trinh – Amitabha Educational Center
Heidi Ramseyer
Kim Langley
Bruno Lemos
Duane Char
Lisa DeLong
Carol Phillips
Daniel Skaf
Bonnie Murakami
Warren Houghtailing
Margaret Brezel – Kauai Historical Society
Joshua Primacio
Fay Uyeda – Communities in School, YMCA
Dennis Young
Kay Yonemori – Parent Outreach Counselor, Waipahu High School
Doreen Redford
Rochelle Kalili
Kylie Manaku-Kalili
The following individuals provided written testimony in support of the Petitions.

Tanielle Hughes
Pastor Jay Amina
Leiolani De Lima
Gabriela Borges
Lilah Akin
Torey Nakamura
Christine Ho
J. Garcia

The following individuals appeared and provided oral and written testimony against the Petitions.

Carol Bain – Community Media Producers Association

The following individuals provided written testimony against the Petitions.

Jeff Garland
Wendy Arbet

16. The Board asked follow up questions of Carol Bain, Clyde Sonobe, and

Gerry Silva.
17. The three petitions, while each worded differently and pursuing alternate theories, all request that contracts for PEG access services not be subject to the requirements of the Hawaii Public Procurement Code, HRS chapter 103D.

18. Mr. King stated the presumption of the Procurement Code and the Board is that everything should be bid, unless it is shown that it is neither practicable nor advantageous to do so, and the testimony has not made a convincing presentation that it was neither practicable nor advantageous to exempt contracts with PEG access organizations from the Procurement Code.

19. Although there were objections and concerns raised by the public regarding the application of the Procurement Code, HRS chapter 103D, to contracts with PEG access service organizations, the Board was not persuaded that it would be practicable or advantageous to exempt contracts for PEG access services from the Procurement Code, and was not persuaded that the provision of PEG access services were comparable to the provision of utility services and thus exempt from the Procurement Code.

20. The Board voted unanimously to deny Akaku’s Petition for the Adoption of a Rule (Petition 1), Akaku’s Petition for The Modification of a Rule (Petition 2), and Olelo’s Petition for Declaratory Ruling (Petition 3).

21. Because of concerns of the public, the Board questioned Clyde Sonobe and Aaron Fujioka about the Request for Proposal (“RFP”) process that DCCA intended to use for contracts to obtain PEG access services. The Board voted unanimously to have Mr. Fujioka to provide the Board an update of the RFP process, and to inform the Board,
if, during the RFP process it became evident that it was neither practicable nor
advantageous to continue the RFP process.

22. On October 27, 2006, the Board met. Board members Gregory King, Russ
Saito, Richard Totten, Leslie Chinen, Daryle Ann Ho, Wendy Imamura, and Pamela
Torres were present. Gregory King chaired the meeting.

23. Russ Saito informed those present that the SPO was notified on October
20, 2006, that two new Board members, Wendy Imamura and Pamela Torres, were
appointed by the Governor on an interim basis effective September 29, 2006. Their
appointments meant Gordon Ing, whose term had expired prior to September 29, 2006,
was not a member on October 5, 2006, and thus there was no quorum at the Board’s
October 5, 2006 meeting which had been continued from the September 22, 2006
meeting.

24. The Board considered the actions taken at its October 5, 2006 meeting
given the lack of quorum at that meeting. SPO had been informed of the two new
appointments after the agenda for the October 27, 2006 meeting had been published. The
Board agreed to reconsider the three petitions at its next meeting. Olelo did not object to
the Board’s proceeding under and reviewing its petition under HRS chapter 92, part I.

25. The Board met on December 21, 2006. Board members Gregory King,
Russ Saito, Leslie Chinen, and Pamela Torres were present. Richard Totten and Daryle
Ann Ho were excused. Mr. King chaired the meeting.

26. The three petitions acted upon by the Board at its October 5, 2006
meeting, were again treated together. The Board requested testimony be limited to five
minutes each, but allowed the time limit to be exceeded. The following individuals appeared and provided oral testimony in support of the Petitions.

Robert Stiver
Gerry Silva
Meredith Nichols
Terry Thomason
Jim Brewer

The Board requested that when the meeting is reconvened, to limit oral testimony only to those who were present at the October 5, 2006 meeting and did not have the opportunity to testify.

27. The Board recessed the meeting for the day, and continued the meeting on January 18, 2007. Present at the Board's meeting were Gregory King, Russ Saito, Leslie Chinen, Pamela Torres, and Daryle Ann Ho. Richard Totten was excused from the meeting. Mr. King chaired the meeting.

28. The Board continued to receive testimony. The Board did not strictly enforce the time limit, and allowed all those present who wished to testify, to testify. The following individuals appeared and provided oral testimony in support of the Petitions.

Jay April – Akaku
Christian Nahoopii-Hose – Olelo
Naturalee I. Puou – Olelo
Renee Ing – Olelo
Gerry Silva – Olelo
Lance D. Collins – attorney for Akaku
Barbara Krieg – attorney for Olelo
Kealii Lopez – Olelo
Ruth Hsu – UHM
Kawika Nahoopii – Olelo
Aloha Davis – Olelo
29. The Board conducted a question and answer session with representatives of Olelo, Akaku, DCCA, and those who use the Olelo facilities and services. Mr. Fujioka reported: the Request for Information ("RFI") and RFP processes initiated to select contractors for the new PEG access services contracts were proceeding; comments received from the public were being considered by DCCA and SPO for incorporation into a new RFP; and another RFI would be issued to further solicit public comment.

30. Again, although there were objections and concerns raised by the public regarding the application of the Procurement Code, HRS chapter 103D, to contracts with PEG access service organization, the Board was not persuaded that it would be practicable or advantageous to exempt contracts for PEG access services from the Procurement Code, and was not persuaded that the provision of PEG access services were comparable to the provision of utility services and thus exempt from the Procurement Code.

**DECISION**

After careful consideration of the written submittals, arguments of the parties and the live and written testimonies, and good cause appearing therefrom, the Board voted unanimously to deny Akaku's Petition for the Adoption of a Rule (Petition 1) and Akaku's Petition for The Modification of a Rule (Petition 2), and Olelo's Petition for Declaratory Ruling Pursuant to H.R.S. §91-8 (Petition 3) failed to win approval.

II. **AKAKU'S PETITION FOR A DECLARATORY ORDER FILED ON FEBRUARY 23, 2006**

On February 23, 2006, Akaku had filed a "Petition for a Declaratory Order" pursuant to HRS §91-8.
In its Petition, Akaku requested the following.

That funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not "public funds" within the meaning of Haw. Rev. Stat. 103D-102; and

That the State Procurement Code does not apply to services for providing public educational and governmental cable access.

**PROCEDURAL MATTERS**


2. Due to a misunderstanding by counsel for the SPO and the Board, Deputy Attorney General Patricia Ohara, this Petition was not considered until the December 21, 2006 Board meeting. She previously had understood Lance D. Collins, attorney for Akaku, to have agreed to set aside the Petition for Declaratory Order because of the other two petitions for rule adoption and modification he filed on Akaku's behalf on February 24, 2006 (Petitions 1 and 2 discussed above), and the lawsuit he filed on December 4, 2006, *Akaku v. Aaron Fujiioka, et al.*, Civil No. 06-1-0443(3).

3. The Board met and considered this Petition at its January 18, 2007 meeting, which was continued from the December 21, 2006 meeting. The Board conducted its proceeding under HRS chapter 92, part 1. No objection to the procedure was made. Board members present were Gregory King, Russ Saito, Leslie Chinen, Pamela Torres, and Daryle Ann Ho. Richard Totten was excused from the meeting. Mr. King chaired the meeting.

4. The Board received testimony from Mr. Collins. A lengthy discussion followed about the funding of PEG access organizations, the relationship between PEG access services and cable franchises, and these fees being subject to procurement but not capital fees. The Board conducted an extensive question and answer session with
representatives of Olelo, Akaku, DCCA, and those who use Olelo’s facilities and services.

5. The Board was not persuaded that the funds collected and disbursed by the cable franchisees pursuant to DCCA rules and orders were not public funds, and was not persuaded that the Procurement Code did not apply to services providing PEG cable access.

DECISION

After careful consideration of the written submittals, arguments of the parties and the live and written testimonies, and good cause appearing therefrom, the Board voted unanimously to deny the Petition.

III. AKAKU’S PETITION FOR A DECLARATORY ORDER FILED ON JANUARY 25, 2007


In its Petition, Akaku requested the Board make a declaratory order regarding:


b. Whether contracts entered into by the cable franchisee with businesses, required by the enfranchisement decision and order, that benefit the state in-kind or otherwise are subject to Chapter 103D, Haw. Rev. Stat.; and

c. Whether PEG access services as a derivative and fixed part of the cable franchise decision and orders are subject to Chapter 103D, Haw. Rev. Stat.

PROCEDURAL MATTERS

2. The Petition was included on the agenda for the Board’s February 15, 2007, but the meeting subsequently was cancelled because of a lack of quorum.

3. The Board next met on April 5, 2007 and considered the Petition. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made. Board members present were Gregory King, Russ Saito, Leslie Chinen, and Daryle Ann Ho. Mr. King chaired the meeting.

4. The Board received testimony from Mr. Collins and Jay April stating that as cable franchises are governed by HRS chapter 440G and exempt from HRS chapter 103D, the franchisees’ contracts should also be exempt, including contracts for the provision of PEG access services. Gerry Silva, Chief Operating Officer of Olelo, submitted written testimony supporting the view that PEG access is a derivative of the cable franchise, and PEG access providers should have the same contractual relationship with the State as a cable company. Clyde Sonobe of DCCA provided the Board with an explanation of HRS chapter 440G.

5. The Board engaged in a lengthy discussion, considering the responses to its questions from Mr. Sonobe, Mr. Collins, Mr. April, and Ms. Ohara.

6. The Board determined that the issuance of cable franchises are governed by HRS chapter 440G, that cable franchises are governed by chapter 440G and not HRS chapter 103D. The Board determined there is no reference to chapter 103D in chapter 440G, and thus the legislature did not intend cable franchises to be subject to chapter 103D.

7. The Board determined contracts entered into by cable franchises with businesses as required by the enfranchisement decision and order that benefit the state.
in-kind or otherwise, are not subject to HRS chapter 103D because the cable franchises, such as Time Warner, are not governmental bodies subject to chapter 103D.

8. The Board determined that PEG access services are subject to HRS chapter 103D because the contracts for PEG services were entered into by DCCA, a governmental body subject to chapter 103D, and the contracts were not otherwise exempted by chapter 103D, the Chief Procurement Officer, or the Board.

DECISION

After careful consideration of the written submittals, arguments of the parties and the live and written testimonies, and good cause appearing therefrom, the Board voted unanimously that: (1) the issuance of cable franchises granted pursuant to HRS chapter 440G are not subject to HRS chapter 103; (2) contracts entered into by the cable franchisee with businesses required by the enfranchisement decision and order that benefit the state in-kind or otherwise are not subject to HRS chapter 103D; and (3) PEG services are subject to HRS chapter 103D.

PROCUREMENT POLICY BOARD

By: __________________________
PAMELA TORRES, CHAIR

Dated: Feb 24, 2009
IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAI'I

AKAKU: MAUI COMMUNITY
TELEVISION, ) Docket No. ________________________

Petitioner-Appellant ) (Agency Appeal)

vs. ) ORDER TO CERTIFY RECORD ON

PROCUREMENT POLICY BOARD ) APPEAL OR COUNTERDESIGNATE

Agency-Appellee.


ORDER TO CERTIFY RECORD ON APPEAL OR COUNTERDESIGNATE

TO THE NAMED APPELLEE:

You are hereby ORDERED and COMMANDED to certify the foregoing papers, transcripts, minutes and exhibits to the Circuit Court of the Second Circuit within 20 days of the date of this order and to serve a copy of said certification upon the Law Office of Lance D. Collins, A Law Corporation, whose address is 2070 W. Vineyard Street, Wailuku, Maui, Hawai'i 96793.

You may, within 10 days after service of the designation and statement of the case, prepare and present to the Clerk of the Circuit Court a counter designation, which shall specify additional papers, transcripts, minutes and exhibits which you desire to be filed in the Circuit Court.

DATED: Wailuku, Maui, Hawai'i

MAR 1 2 2009

/sgd/ N. MARTINS (seal)

CLERK OF THE ABOVE-ENTITLED COURT