PROCUREMENT POLICY BOARD MEETING
January 21, 2010
1:00 pm
Aloha Stadium, Hospitality Room
99-500 Salt Lake Boulevard
Honolulu, Hawaii 96818

Members Present

Pamela Torres, Chair
Darryl Bardusch, Vice-Chair
Russ Saito, Secretary
Daryle Ann Ho, member
Keith Matsumoto, member

Others

Pat Ohara, Deputy Attorney General
Aaron Fujioka, State Procurement Office
Ruth Yamaguchi, State Procurement Office
Terry E. Thomsen, counsel for Olelo
Gerry Silva, Olelo Volunteer
Kealii Lopez, Olelo Community Media
Justin Billinger, Olelo
Michael Paz, Olelo
Wayne Yun, Olelo
Randy Gomoban, Olelo
Jay April, Akaku: Maui Community TV
Kevin Takaesu, State Procurement Office
Stanton Mato, State Procurement Office
Patricia Ann Campbell, Certified Shorthand Reporter

Agenda Item I - Call to Order

Chair Pamela Torres called the meeting to order at 1:02 PM.

Agenda Item II - Minutes

Mr. Darryl Bardusch made a motion, seconded by Mr. Russ Saito, to approve the minutes of the October 15, 2009 meeting.

The motion was unanimously approved.
Agenda Item III – Executive Session, to consult with the Board’s attorney on the Board’s powers and liabilities pursuant to HRS §92-5(a)(4); regarding agenda items IV below.

Mr. Bardusch made a motion, seconded by Mr. Saito, to go into executive session, to consult with the Board’s attorney on the Board’s powers and liabilities pursuant to HRS §92-5(a)(4); regarding agenda item IV below.

The motion was unanimously approved and the Board went to executive session at 1:08 pm.

The Board exited executive session and reconvened at 1:23 pm.

Chair Torres explained briefly that the Board had decided to put a limitation on public testimony of four minutes per testimony.

Agenda Item IVa - Petition for Declaratory Ruling submitted by Olelo Community Television - Olelo Community Television petitions the Procurement Policy Board, pursuant to Hawaii Revised Statues (HRS) §91-8, for a declaratory ruling stating that contracts with entities to manage and administer public, education and government (PEG) access channels 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, and so on that basis, such contracts are exempt from the application of the State Procurement Code.

Terry Thomason, counsel for Olelo, stated Olelo stands by its written filings in support of the petition. Mr. Bardusch asked how many access providers are there. Mr. Thomason replied four. Mr. Saito asked if HRS § 103D-102(b)(4)(F) referenced in the filings, contains the definition of utility services. Mr. Thomason replied no, the definition was from HRS § 269-1. Mr. Thomason then argued Olelo’s reasons why contracts for PEG services are contracts for utility services.

Mr. Bardusch asked Mr. Thomason about Olelo’s current contract with the Department of Commerce and Consumer Affairs (“DCCA”). Mr. Thomason gave a history of Olelo’s establishment and its contract with DCCA.

Mr. Saito asked whether recent legislation regarding the regulation of PEG access service providers is reflected in Olelo’s petition. Mr. Thomason replied it is not, but that recent legislative developments regarding PEG regulation are discussed in its second petition. Mr. Saito asked if approval of the petition would conflict with the legislative direction. Mr. Thomason replied no, and in response to questions from Mr. Saito, discussed further the interplay between legislative acts and rules concerning the regulation and procurement of PEG access providers.
Chair Torres asked about the task force. Mr. Thomason deferred to Ms. Lopez, president and CEO of Olelo, who explained the history of the task force and its recommendations to the legislature and its proposed legislation. Mr. Saito asked Mr. Thomason about DCCA’s role in the regulation of the PEG access service providers and Mr. Thomason confirmed DCCA’s authority.

Mr. Bardusch asked Mr. Thomason if DCCA had ever not approved any application for access providers. Mr. Thomason replied DCCA has the authority over PEG access organizations as the PUC does with utilities. Ms. Lopez added her reasons in support of Mr. Thomason’s statements.

Chair Torres stated that letters from DCCA and the PUC indicated DCCA and the PUC did not consider the PEGs as utilities. Mr. Thomason replied that he disagreed and provided his reasons why he believed the PEGs are utilities. Chair Torres asked Mr. Thomason about the definition of public utilities. Mr. Thomason responded and Mr. Saito joined the discussion.

A brief recess was taken at 2:20 p.m., and the meeting called to order at 2:30 p.m.

Mr. Bardusch asked Mr. Thomason whether cable franchises were awarded through a competitive process. Mr. Thomason replied cable franchises are awarded under a different process. Chair Torres asked Mr. Thomason how he envisioned a new contract would take place if the petition were approved. Mr. Thomason replied the exemption would be as to selection, but that the other requirements of the procurement code would still apply. Mr. Bardusch asked Mr. Thomason what was lacking in the performance standards of the RFP. Mr. Thomason replied there were none that recognized the free speech aspect of the current contract. Mr. Bardusch asked Mr. Thomason about the property problem. Mr. Thomason replied there was a dispute with DCCA regarding ownership of property. There were no further questions for Mr. Thomason.

Chair Torres asked Mr. Fujioka if he had any comments. Mr. Fujioka replied he would stand on his written comments and added PEG access services are management services and competitive and that granting an exemption is contrary to open and fair government.

Chair Torres asked Mr. April, president and CEO of Akaku: Maui Community Television, if he wished to make a statement. Mr. April gave his objections to the RFP process. There were no questions for Mr. April.
Chair Torres asked if Olelo wished to make any comments. Mr. Thomason argued that there is no competition for PEG access services. Ms. Lopez provided her reasons in support of the petition, disagreeing there was competition, and commented on the creation of Olelo, the services provided by Olelo, the unique nature of PEG access organizations, and the resulting difficulty in drafting performance standards for the RFP.

Mr. Matsumoto asked Ms. Lopez what kind of nonprofit corporation is Olelo. Ms. Lopez replied Olelo is a 501(c)(3) tax exempt, private nonprofit. Mr. Bardusch asked Ms. Lopez to explain how Olelo would become competitive if it were to compete for a contract. Ms. Lopez replied she had no idea, not having done it before.

Chair Torres called for a ten minute recess at 3:20 p.m. The Board reconvened at 3:30 p.m.

Chair Torres stated her concern that the Board should not be hearing hypothetical issues such as the ownership of property under the current contract and the details of any future RFP. Chair Torres stated while the Board could speculate about competition, until an RFP is issued, there is really no way to know whether there is competition. Ms. Lopez stated because the ownership issue was unresolved, it seemed impracticable to compete the contracts.

Mr. Saito commented Olelo’s petition acknowledges there is competition because it is requesting an exemption for services for which there are multiple sources, and so the argument should focus on why it is not practicable or advantageous to the State to compete the contract.

Mr. Matsumoto asked Ms. Lopez if the Olelo contract was with DCCA or Oceanic. Ms. Lopez replied it was with DCCA and that there was no contractual relationship between Olelo and Oceanic. There were no further questions for Ms. Lopez.
Chair Torres asked Mr. April if he would like to comment. Mr. April gave his reasons in favor of the petition, including an explanation that a developer had threatened to submit a bid in response to the RFP and shut down Akaku because Akaku's programming was critical of land development. Mr. April stated DCCA had said that if there were any fees in excess of the contract, the excess fees would be returned to Time Warner. Mr. April said this sent the message that the contract would go to the lowest bidder and that Time Warner would get a back door relief. There were no questions for Mr. April.

Chair Torres asked Mr. Fujioka if SPO have any comments. Mr. Fujioka replied in the negative.

Mr. Bardusch made a motion, seconded by Mr. Saito that they approve the [agenda item IV(a)] petition for declaratory ruling submitted by Olelo on the grounds set forth in paragraph a.

Mr. Bardusch stated this petition should be supported because over the years, the Board has approved other exemptions he found to be questionable. Mr. Saito stated the PEG acts as a provider of a utility and should be exempt. Mr. Matsumoto stated DCCA clarified in its letter that cable TV services are not included in the definition of telecommunications and so such services could not be considered as a utility. Mr. Saito stated the Board is being asked to make a determination regardless of what another agency has determined, and PEG access services qualify as a utility. Mr. Bardusch stated it was not advantageous for the State to compete this contract. Mr. Saito stated DCCA should make it clear that the PEG access providers have a franchise which is a more effective method of regulating the PEG access providers than to periodically compete the contract. Mr. Matsumoto agreed with Mr. Saito that it should be a franchise.

Mr. Bardusch and Mr. Saito voted in favor of the motion. Chair Torres, Ms. Daryle Ann Ho and Mr. Keith Matsumoto voted against. The motion failed.

Mr. Bardusch made a motion, seconded by Mr. Saito to approve the [agenda item IV(b)] petition for declaratory ruling submitted by Olelo based on the reasons set forth in paragraph b.

Mr. Saito asked for those who voted against the agenda IV(a) petition to state their reasons for opposing it. Chair Torres stated her position was made clear throughout the discussion, but repeated Olelo does not meet the definition of a utility and that there was no proper structure for Olelo to be a utility. Mr. Matsumoto stated he voted “no” because if Olelo were designated a franchise there may be more linkage that the PEG access services were utility or utility-like, but because Olelo has to use its own resources to operate, the nature of the agreement is more of a competitive sourcing and not a franchise. Mr. Matsumoto stated it was probably not fair that Olelo does not have a franchise. Ms. Ho stated she agrees with Mr. Matsumoto and Chair Torres, and that as one of the original Board members she had heard the testimony from the prior hearing and that if she were in Olelo’s position would feel as Olelo did, but as a Board member concludes that Olelo is not a utility. Olelo is not regulated.
Mr. Saito asked how the determination was made that Olelo was not a utility and what was being relied upon because the only definition of utility was provided in the petition and that definition says that a telecommunications service provider is a utility. Chair Torres stated the PEGs do not fall within the normal plain understanding of a utility and that utilities have an infrastructure that no one else has and so there can be no competition. Chair Torres added she was not sure she agreed with the logic presented in the petition, did not accept the definition in the petition and that parts of the definition were deleted. Mr. Bardusch stated DCCA totally controls the PEGs and the fact that DCCA has not done its job is not a basis to conclude the PEGs are not utility-like. Chair Torres stated the three letters from the PUC, DCCA, and Consumer Advocate went a long way to convince her that Olelo was not a utility and the service it provides is not a utility.

Mr. Saito asked Chair Torres if she would ask the Board members whether they would consider changing their votes or whether they are standing by their votes.

Mr. Matsumoto stated the PUC’s letter states the definition of telecommunications services set forth in HRS § 269-1 specifically excludes cable services from the definition of a public utility. Mr. Bardusch stated he didn’t think the PUC looked at the fact that the PEG providers were providing more services than that normally provided by cable service providers.

Chair Torres asked the Board members if they would consider changing their votes, and they all answered in the negative. Chair Torres asked if there was any discussion of agenda item IV(b). Mr. Saito stated this is not a service paid for by the viewing audience it is intended for, and given the nature of the PEG business, it would be difficult to bid and not advantageous to subject this procurement to the Code. Chair Torres stated her reasons for not supporting the agenda item IV(b) petition are the same as for the agenda item IV(a) petition. Mr. Bardusch stated the ownership of the property remained an issue, and given the testimony, should not go through the competitive process but instead allow DCCA to handle the PEGs as it has in the past. Ms. Ho stated her reasons are the same as why she voted for the agenda item IV(a) petition. Mr. Matsumoto stated these are hard questions and it may be impractical to rebid, but also felt the ability to outsource and compete may resolve some of the discrepancies that currently exist such as forcing DCCA to develop performance standards and to address the asset issues. Mr. Matsumoto stated the need to resolve this long term and that there are positives to both sides of the issues.

Chair Torres stated she did not believe the Board could conclude whether or not bidding was practicable or advantageous to the State until the State goes through with the competition and see what comes out of the process.
Mr. Bardusch stated that if the Board were willing to grant exemptions that were based on unsupported arguments, the Board should grant one here when there is a valid argument, and it may be just too complex to compete. Chair Torres stated she was agreeable to leaving those other exemptions on the book because traditionally, exemptions are determined through a trial basis and if there is no competition, then it's not advantageous to compete; past history shows whether an exemption would be warranted. Mr. Saito stated the exemptions in the Hawaii procurement code were granted without being tried because they were logically determined not to be practicable and not advantageous to bid. Chair Torres stated her experience is with the federal government and noted the general trend of the Board is going in the direction of the federal procurement. Ms. Ho stated it is not right to not compete on the basis that it is overly complex because unless it is put out to bid, it won't be known if there is competition or not. Mr. Saito stated complexity is one factor in determining if it's not practicable or advantageous, and his conclusion that this is not practicable or advantageous is based on the totality of the arguments presented. Mr. Bardusch stated the exemption should be granted on the same basis as previous exemptions and not on a higher standard. Chair Torres stated exemptions should not be granted across the board under the same standards, and that there are many different standards for granting exemptions. There was no further discussion.

Mr. Bardusch and Mr. Saito voted for the motion, Chair Torres, and Ms. Ho voted against, and Mr. Matsumoto abstained. The motion failed.

Agenda Item VI - Announcements

Mr. Aaron Fujioaka announced that the next board meeting is tentatively scheduled for February 18, 2010 at 1:00 pm.

Agenda Items VI - Adjournment

Mr. Bardusch made a motion, seconded by Mr. Saito to adjourn the meeting. The motion was unanimously carried. The meeting was adjourned at 4:57 pm.

(Please refer to the PPB transcript of January 21, 2010 for more details of these matters.)

Respectfully submitted,

[Signature]

Date 2/25/10

RUSK K. SAITO, Secretary
Procurement Policy Board

Attachments: January 21, 2010 PPB Agenda
Transcript of January 21, 2010 PPB Meeting
AGENDA

I. Call to Order

II. Approval of Minutes – Meeting of October 15, 2009

III. Executive session, to consult with the Board’s attorney on the Board’s powers and liabilities pursuant to HRS §92-5(a)(4); regarding agenda items IV and V below.

IV. Items for Board Action

a. Petition for Declaratory Ruling submitted by Olelo Community Television

Olelo Community Television petitions the Procurement Policy Board, pursuant to Hawaii Revised Statutes (HRS) §91-8, for a declaratory ruling stating that contracts with entities to manage and administer public, education and government (PEG) access channels 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, and so on that basis, such contracts are exempt from the application of the State Procurement Code.

b. Petition for Declaratory Ruling submitted by Olelo Community Television

Olelo Community Television petitions the Procurement Policy Board, pursuant to Hawaii Revised Statutes (HRS) §91-8 and Hawaii Administrative Rules (HAR) §3-121-32, for a declaratory ruling stating that contracts with entities to manage and administer public, education and government (PEG) access channels and services are contracts for which the competitive award procedures of HRS Chapter 103D are either not practicable or not advantageous to the State, and so on that basis, such contracts are exempt from the application of the State Procurement Code within the meaning of HRS §103D-102(b)(4)(L).

V. Announcements

VI. Adjournment

Agenda and available agenda items may be viewed at http://hawaii.gov/spo/procurement-policy-board-minutes-of-meeting. Individuals may present testimony on matters on the Procurement Policy Board’s agenda when the agenda item is taken up 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 testimony also will be accepted through e-mail at procurement.policy.board@hawaii.gov or faxed to (808) 587-4703 until 1:00 pm, January 19, 2010. Testimony received after the January 19, 2010 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 10 copies.

Individuals requiring special assistance or services may call (808) 587-4700 by 1:00 p.m., January 18, 2010 to discuss accommodation arrangements.
PROCUREMENT POLICY BOARD
Aloha Stadium, Hospitality Room
99-500 Salt Lake Boulevard
Honolulu, Hawaii 96818

REGULAR MEETING
Held before the Procurement Policy Board at the Aloha Stadium, Hospitality Room, 99-500 Salt Lake Boulevard, Honolulu, Hawaii 96818, commencing at 1:00 p.m., on Thursday, January 21, 2010, pursuant to Notice.

BEFORE:  PATRICIA ANN CAMPBELL, CSR 108
Certified Shorthand Reporter
Notary Public, State of Hawaii

Ralph Rosenberg Court Reporters, Inc.
2460 American Savings Bank, 1001 Bishop Street
Honolulu, Hawaii 96822 (808) 524-2090
APPEARANCES:

For the Procurement Policy Board:

PATRICIA OHARA, ESQ.
Deputy Attorney General
Department of the Attorney General,
State of Hawaii
Administration Division
425 Queen Street
Honolulu, Hawaii 96813

Procurement Policy Board:

Chairperson Pam Torres
Vice-Chairperson Darryl Bardusch
Board Member Leslie S. Chinen
Board Member Russ K. Saito
Board Member Keith Matsumoto
Board Member Daryle Ann Ho
Aaron S. Fujioka, Administrator
Ruth E. Yamaguchi, Assistant Administrator
Cheryl Oho, Assistant Administrator

Also present:

Terry E. Thomason
Keali'i S. Lopez, 'Olelo Community Media
Jay April, Akaku Maui Community Television
Also present (continued):

Justin Billings
Michael Paz
Stanton Mato
Kevin Takesu
Wayne Yun
Randy Gomoban
Michele Paz
CHAIRPERSON TORRES: I would like to call the meeting to order at this point, and before we begin with the official agenda items, I would like to mention to everyone that we do have a court reporter here with us today, and she will be taking down all testimony verbatim. So it is going to be very important that everyone speak clearly, that they identify themselves before they speak, and that only one person at a time speaks so that we can get down all of the testimony accurately. So if you have any questions about that, please raise them at this point.

Okay, no questions, so we will begin with the item two of the agenda, which is approval of the minutes from the meeting of October 15th, 2009. Do we have any additions or changes to be made to the minutes?

Okay, could I have a motion to approve the minutes as written and submitted?

(Vice Chairperson Bardusch motioned.)

CHAIRPERSON TORRES: Darryl has made the motion. Do we have a second?

(Russ Saito seconded the motion.)

Thank you, Russ. Russ has seconded the motion. All in favor.
(Everyone raised their hands.)

CHAIRPERSON TORRES: I can't see very well to the end of the table, so is there anybody opposed? No.

Moving on to the next item, agenda item, it is going to be to call an executive session to consult with the Board's attorney on the Board's powers and liabilities pursuant to HRS 92-5(a)(4) regarding agenda items four and five below. So at this time, the Board would like to -- where are we going to actually meet? Okay, the Board would like to have a quick executive session, and we will return when the session is completed. Thank you.

Move that we adjourn for the executive session?

BOARD MEMBER SAITO: Second.

CHAIRPERSON TORRES: And we have a second. All in favor?

BOARD MEMBER HO: Aye.

BOARD MEMBER MATSUMOTO: Aye.

BOARD MEMBER SAITO: Aye.

VICE CHAIR BARDUSCH: Aye.

(Recess was taken.)

CHAIRPERSON TORRES: Okay, the meeting is called to order again after the executive
The next item on the agenda for Board action is item four A, which is petition for declaratory rulings submitted by Olelo Community Television. Do I need to read this, or do we want this in the record? I guess we do. Let me read it.

Olelo Community Television petitions the Procurement Policy Board pursuant to Hawaii Revised Statutes HRS, paragraph 91-8, for a declaratory ruling stating that contracts with entities to manage and administer public, education, and government, PEG, access channels are contracts for utility services within the meaning of HRS paragraph 103 D-102(b)(4)(F) and for which the competitive award procedures of HRS Chapter 103 D are neither practicable nor advantageous to the State, and so on that basis, such contracts are exempt from the application of the State Procurement Code.

Now, before we go into any testimony, I would like to just discuss very briefly how we are going to proceed with testimony at this point. When we begin again with the actual testimony, we will have Olelo's representative go first to explain the petition to the Board, and then there may be discussion and questions after that point. After
discussion and questions are completed, at that time
we will ask for any public comments. At this time,
it does not look like we have a lot of people
testifying, but in order to maintain fairness to
everyone, we have decided to put a limitation on
public testimony of four minutes per actual
testimony.

We do have a court reporter here today
who is taking notes, taking -- actually taking
verbatim testimony, so it is very important that
before you testify that you identify yourself, that
you speak clearly, loudly so that she can get all of
the details down at that time.

So we will not limit the topic of the
testimony in any way, but we do appreciate it if you
would stay on topic. We do have two individual
petitions here, and we would like you to stay on
petition A for your first presentation so that we
can limit it to that section. So that is the
request. We will take each issue separately.

And because of our court reporter and
just because it is good general practice for
meetings, we will take a break every hour after
approximately fifty minutes, and it will be a
ten-minute break.
Okay, we would like to begin the testimony with Olelo's representative.

MR. THOMASON: My name is Terry Thomason. I am not a witness. I am counsel for Olelo and am here as a representative. We stand by our written filings, and we raise only a concern and desire to emphasize in our view, the Board has an obligation to consider the testimony, not necessarily the attorney's comments, but the testimony and evidence and the law that applies to each findings of fact and conclusions of law to support any determination on the petition that may result.

With that, we stand on our written filings, and trust that the diligence and the hard work in order to obtain the result we believe should lead to exempt PEG access contracts from the competitive purchase requirements of procurement.

CHAIRPERSON TORRES: Thank you. Are there any questions from the Board?

VICE CHAIRPERSON BARDUSCH: I guess the question that I would have is that, how many access providers are there? I would think Olelo is the only one; is that correct? Or do you know? That's why I don't know whether it is correct even to ask
the person.

MR. THOMASON: We would submit there are four separate PEG access entities that serve under DCCA agreements to service geographic areas. I am aware that an Olelo representative is available here, an executive from Olelo, Ms. Kealii Lopez, and an executive from Akaku, the Maui County service provider, is available to respond to your questions at this time.

BOARD MEMBER SAITO: I have a question, Mr. Thomason. Where you cite HRS 103D-102(b)(4)(F) as the reference, is that the paragraph in which utility services are defined?

MR. THOMASON: No. The definition of utilities we draw from, we point to a parallel statute that assigns to Procurement Utilities Commission or, I'm sorry, Public Utilities Commission authority to regulate certain utilities. On page three of our petition, we identify HRS Section 269-1, and we quote the definition which specifically states transmission of telecommunications messages as among those activities that are defined as a public utility.

However, that same statute does not assign to PUC regulatory authority over the
transmission of telecommunications messages, so what
we are saying is it is a utility, because they
transmission -- they are transmitting
telecommunications. It has not been assigned to the
PUC to regulate, and that's what, in a separate
letter, we commented to the Chair that we feel that
PUC's opinion is not relevant to the Board's
consideration.

The consideration is that the activity
is a public utility, then within the procurement
code, there is authority for the Board to determine
that a public utility need not be regulated or need
not follow the competitive purchase procedures of
the procurement code unless there is some advantage
to the State. In this case, although the PUC does
not regulate PEG access channels, DCCA directs,
controls, oversees, and regulates the activities of
each of the PEG access entities.

The point, to distill it down into a
single sentence, is because DCCA regulates
everything from how much the PEGs are paid to how
the PEGs conduct their activities, you are not able
through competitive practices procedures of the
procurement code to gain any advantage in price or
quality of performance or changes in performance.
That's all done through DCCA's activities and authority under a separate statute.

So the definition of a public utility flows from the part of the Hawaii statutes that address the conduct of public utilities, and we point to the section of the procurement code that empowers the Board to decide that since this is regulated by other entities, there's no advantage to the State to conduct competitive procedures.

BOARD MEMBER SAITO: Thank you.

VICE CHAIRPERSON BARDUSCH: It says here that -- I guess one of the thoughts I had is that, when was your client awarded the current contract?

MR. THOMASON: The current agreement I believe was signed in 1998.

VICE CHAIRPERSON BARDUSCH: Okay, and looking at these rules that I have which are Title 16 440 that they just passed out, it says that the director, I'm assuming, of DCCA can continue this agreement for like five, a minimum of five years and a maximum of twenty years.

MR. THOMASON: That is correct.

VICE CHAIRPERSON BARDUSCH: Is it twenty years?

MR. THOMASON: I believe also in many
papers that the Board has had submitted to it in various stages of this process, I think over three years now, was a legislative panel that was established two legislative sessions ago that addressed the authority of the director of DCCA and submitted their own findings and conclusions recommending legislative action to make the PEG access agreements not subject to procurement procedures.

VICE CHAIRPERSON BARDUSCH: Okay, who awarded the contract to your client?

MR. THOMASON: The DCCA created our client in --


MR. THOMASON: 1988, the DCCA created a not-for-profit called Olelo to include appointing members and the Board of Directors, entered into an agreement with that not-for-profit to conduct the public, education, government transmission activities, and periodically through the course of this relationship, updated and finally in 1998 entered into a new agreement, none of which were awarded through competitive procedures. But the entity with whom DCCA was negotiating was created by DCCA specifically to operate the PEG channel here on
Oahu.

VICE CHAIRPERSON BARDUSCH: Okay, so the initial agreement wasn't awarded with competitive procedures, and looking at -- I guess at the Board, if I am looking at page four, it seems to say that prior to finalizing the terms of the contract, the director, the designee, shall seek input from the cable advisory committee regarding appropriate terms.

This doesn't seem to be the normal type of contracting type procedures which if we are using the competitive practices of the State Procurement Code, why is this in here saying that the cable advisory committee can move about the terms? What terms can they change?

It seems to me a little bit of a disconnection to be sitting there saying at this point in time, competitive procedures of the State Procurement Code would be utilized, and at the same time, if we look in the procedures more directly on the PEG access services, it seems to say that maybe those terms in the State Procurement Code are subject to the DCCA person consulting with the cable advisory committee to come up with the correct terms of the contract, which seems to be contrary to
having the State Procurement Code. I'm done, so.

CHAIRPERSON TORRES: Any other questions from the Board?

BOARD MEMBER SAITO: Mr. Thomason, as I recall, there has been recent legislation passed regarding regulation of the PEG access service providers. Is that legislation reflected anywhere in your arguments in your petition?

MR. THOMASON: Actually, the petition that you are considering is -- the Chair has identified as petition A was filed four years ago. At that time, that legislation, that legislative committee that proposed legislative changes had not even been created, so our petition, as identified as petition A, does not address those changes.

However, we did in 2009 file the second petition B, and we have attached to that petition a number of the developments that occurred, including efforts to look at regulation of PEG access in a different manner through a legislative change. But I'm not prepared at this moment to speak about the substance of changes that have been made or pending legislation that may be adopted in the 2010 legislative session.

BOARD MEMBER SAITO: Are you referring
specifically to legislation as in Hawaii Revised Statutes or rules as in Hawaii Administrative Rules that are pending?

MR. THOMASON: I'm not sure I can answer effectively the question you have asked. There was a committee that was created in the past legislative session that did a study and came up with recommendations for legislative changes that would empower the director of DCCA to regulate and control without restriction and without reliance on the procurement code.

However, I am also aware that there was a suit on Maui by one of the fellow -- one of the other PEG providers that resulted in a directive from the Circuit Court on Maui that the director of the DCCA promulgate rules pursuant to our State administrative procedures act. I am not informed about the results of that.

BOARD MEMBER SAITO: Okay, so on that basis, if we were to rule on this petition one way or the other, that would conflict the direction given by the Legislature regarding the regulation of the PEG access channels. How does the conflict sort of pay off?

MR. THOMASON: I don't believe there
would be a conflict. Whichever way the legislative process would go or the administrative rule process would go, the process that they are involved in, the Legislature and the administrative body, is to create the rules that govern the administration of the PEG channel providers. The administrative PEG channel providers would not be affected in any way without a determination by this Board that it is not advantageous to conduct competitive procedures to select the competitive provider.

So I don't believe there is a conflict created at all, and if in fact DCCA or the Attorney General in reviewing whatever changes may occur, if there's something that occurs that I am not anticipating, then what I would anticipate would happen is that the Attorney General or DCCA would return the award and inform them that due to changed conditions, the exemption that we hope results from these petitions should be reconsidered in allowing you to review again with something hard in front of you. I don't assume to know what course the legislative process or rule making process may take.

BOARD MEMBER SAITO: I'm still not sure I understand what the answer was. If this Board were to approve your petition to exempt the PEG
access providers from the procurement code, and if
the Hawaii Administrative Rules then are established
to manage the access providers, that is still not
inconsistent. The selection would have been outside
of the exemption code, but the regulation would be
subject to the rules of the statutes. Is that
basically what you are saying?

MR. THOMASON: What I am saying is the
rules as I understand them and the legislative
initiatives that have been prompted deal with how
the DCCA administers the PEG process. The
procurement code and the competitive procedures deal
only with selection of the provider. If these rules
as they are promulgated or any legislative changes
that may occur in the future require some form of
competitive selection of the provider, then I say
DCCA and the Attorney General will notify you of
that change in legal status.

If, however, everything that we have
seen in the past, that these rules and the statutory
efforts are being promulgated with a focus on
insuring that the disenfranchised members of the
community, the folks that need a platform for their
free speech, that the DCCA director will resource
through cable funds and oversee the conduct of the
PEG program without regard -- they can use the
existing PEG providers. These rules do not address
or relate to a demand that there be some competitive
selection of PEG providers.

In the history of the PEG program, DCCA
actually created these entities specifically to
perform this work. These were not commercial
enterprises that came in and competed for the
opportunity. This was the government that created
not-for-profits and caused them to be stood up
specifically to perform this work.

BOARD MEMBER SAITO: Thank you.

CHAIRPERSON TORRES: Now, I have a
question regarding the letter at the end of your
submission from DCCA and about the task force that
was created, I am assuming, by the Legislature. How
did that task force come to be?

MR. THOMASON: You are referring to the
-- may I defer to, like I said, we have two
executives from the PEG providers. As an attorney,
I can tell you what I think. I am not a competent
witness though. These folks are.

CHAIRPERSON TORRES: Okay, that would be
fine.

MS. LOPEZ: Hello. I am Kealii Lopez,
president and CEO of Olelo Community Television.

The task force, that was basically a
resolution adopted by the Legislature asking for a
task force to be created, partly because the issue
of an exemption for the PEG access organizations had
been presented to the Legislature, and my sense, and
Jay April would have a good idea of this as well, he
was a member of the task force, was to in fact
collect more information regarding this issue for
the Legislature, and what they did was appointed
representatives from each of the access
organizations as well as County representatives, the
DCCA, University of Hawaii, and Department of
Education were also members of the task force, and
they had a facilitator.

What the task force primarily looked at
was whether the PEG access contracts should be
subject to the State Procurement Code, and if so, in
what way? What I recall was a big part of that
discussion, they had at least eight meetings that
were approximately two hours or so long, was they
looked at the different forms of procurement.
Everything from concessions to the exemption list to
RFP as well as grants and aid, looked at all of
those different procurement applications, and then
locked at them as related to the PEG access services.

In the end, what the group voted to -- or as a whole was to in fact recommend several issues. One was to in fact request that there be an exemption through the Procurement Policy Board process administratively as first, and then if not that, then to do that through the Legislature, and Jay might remember the others if that -- if those weren't successful which also related to, I think, having the DCCA adopt rules as requested by Judge August as to how the selection would occur for PEG access providers.

It is a task force. It did not have any, you know, per se, legal standing to require these things and could only recommend them. So from that perspective, that's what the task force primarily recommended was that in fact the PEG access services ought to be exempted from the procurement code, and the group was very clear that exemption is part of the procurement code. It is not to say, you know, by giving an exemption, somehow the group was proposing to not follow the State Procurement Code since exemptions are in fact a part of the State procurement process or code, and
that's my recollection.

If you have questions, I can speak to that. I would like to actually speak to a comment perhaps that Mr. Saito asked regarding the legislation and how that relates to PEG access and telecommunications, but I can do that afterwards if you have any more questions on this issue of the task force.

CHAIRPERSON TORRES: I think I do have another question or two. After that group was formed, that task force was formed, I see that in your package, there was another letter that was issued, a report back to the Legislature --

MS. LOPEZ: Yes.

CHAIRPERSON TORRES: -- that talked about the recommendations and so on, and towards the end of that letter they have a special paragraph there that is related to the PEG access, and essentially, the DCCA seems to be saying that even though they understand the importance of this particular issue, because of the complexity of it or the difficulties we have had in the past, you know, coming to resolution on this issue, it sounded like they pretty much washed their hands of this issue and suggested that it be addressed in a separate
bill. Did that separate bill ever materialize?

    MS. LOPEZ: Yes, there was a bill that
was introduced, actually two companion bills, one in
the House, one in the Senate, and that's where we
actually get -- that actually comes to the
telecommunications issue that Mr. Saito asked.

    What occurred in one of the houses, the
Senate specifically, was that exemption bill was
folded into the State's broadband bill, and that
broadband bill basically brought together the
regulation of telephone and cable and PEG access
into one document and in fact, had all the
provisions that were required, whether it relates to
fines, fees, regulation of fees, all of the
requirements that, one, the State has through the
PUC and the cable providers were also required of
the PEG access organizations, you know, including
fees up to $25,000 or more.

    I mean, basically, it was -- that bill
handled the PEGs no differently than it did the
cable company, no differently than it did the
telephone company. That bill did not pass. It's in
-- it didn't die. It's in -- it's still active.
The director of the DCCA did report to the house
finance committee that they are eager to push that
forward. It's in conference committee.

So to answer Mr. Saito's question is if this body does in fact provide the exemption based on PEG access services being utilities, it would in fact not be inconsistent with the bill should it be passed. I think, you know, Mr. Thomason is correct in knowing what the final bill is, but at least if it passes in its current form, it would not be inconsistent with the action you would take at this time.

CHAIRPERSON TORRES: Russ, does that answer your question?

BOARD MEMBER SAITO: I have a question for Mr. Thomason. I think the motion is inconsistent in that it suggests that the regulation of the PEG access service providers is not in lieu of a full blown procurement process. It is more -- it is similar to how the PUC actually regulates the utilities. The way it's now structured the second part of it where DCCA would administer or manage the PEG access service providers is similar to how the PUC is currently regulating the other utilities.

So this is essentially saying that at least it is a two step process, first of all, declaring that it is a utility, and that the
regulation or the management of a utility would be
by this process that they set up where DCCA would
govern the terms and conditions and everything else
of this -- that basically is how I understand the
process that is involved.

MR. THOMASON: That is correct, and I
would emphasize that this effort to clarify the law
is really, as discussed in the task force report, is
really a recognition that the DCCA in its current
activities does do the regulation, but the law's
changes would make it clear and more precise, and
then the rules that are developed would provide to
the public clear notice of the standards that DCCA
will follow in conducting its administration. So
the point we tried to make nearly four years ago now
in our original petition was fundamentally that DCCA
in its activities regulates the PEG access, the same
way the PUC regulates HECO.

However, in the time between when we
filed our petition and now, these efforts through
the task force and other legislative initiatives
have arisen, and they are focused on just confirming
that that is true, that DCCA is empowered by statute
to regulate the PEGs, is empowered by statute to
dictate how much money is going to go to the PEGs,
how the PEGs operate their facilities, and as Mr. Bardusch points out, is very free, more free than under the procurement code to impose changes in fundamental terms and conditions of the contract.

CHAIRPERSON TORRES: Does anyone else have a question on the Board? Okay.

VICE CHAIRPERSON BARDUSCH: I do.

CHAIRPERSON TORRES: Okay.

VICE CHAIRPERSON BARDUSCH: Okay, I am back. It appears that these rules that I am now reading for the first time, this is the 440, Title 16. It seems that the DCCA director is empowered to, at any time he wants to, approve any application for a new access provider. Has this been your client's experience as far as -- I guess the question being, has, to your client's knowledge, the DCCA administrator ever not approved any application for an access provider? Or you don't know?

MR. THOMASON: I believe the history of the PEG access program is that the DCCA created the entities that exist now, and those entities have remained stable through -- from 1988 to now. The rules, my understanding of the rules, and obviously the Attorney General interprets these rules, but my understanding of the rules is that although the
director of the DCCA may have the power to sever out
maybe different jurisdictions, right now it's by
County, and the example I would give is I believe
that these rules empower the director of DCCA to
establish a PEG access provider on Maui and a
separate on Molokai if the director of the DCCA
determines that that is an appropriate allocation of
the public airways.

I don't think that that really affects,
though -- you could write an RFP to create a
jurisdiction. So the question we have posed to you
is however these entities are administered and
overseen, we believe that their -- the nature of
their activities as a utility and the nature of the
DCCA oversight and authority makes it not
advantageous to the State. There is no advantage to
price, quality, performance, scope of work to be
gained by going through a procurement process when
the -- a competitive procurement process when the
director of the DCCA has the power to essentially do
everything that the PUC does with a utility.

MS. LOPEZ: So, Kealii Lopez again, I
just want to add to that because of some other new
developments which I apologize we actually don't
have copies of the most recent franchise that the
Department of Commerce and Consumer Affairs issued
last week for Oceanic's cable franchise on Oahu, but
in fact, as a part of that franchise, the DCCA has
in fact done exactly what Mr. Bardusch is asking,
which is can it add providers?

And it has in fact added an educational
access provider on Oahu as a part of the franchise
agreement, and that's the Hawaii Educational Network
Consortium which then allocated two channels for
that purpose, has made clear resources from Olelo
are required to be provided to that organization, so
in fact I would say the answer to that is, yes, the
DCCA can do that and in fact has done that through
the cable franchise. And I think that's another
document, although its purpose is to regulate cable,
television. Much of the provisions in the franchise
impact or provide regulatory direction for the DCCA
in its regulation of the PEG access organizations.

Consistent with what Mr. Thomason has
said, it makes very clear that the director of the
DCCA can change the amount of funding provided to a
PEG, increase, decrease, change the frequency in
which the payments occur. If they were annual, they
reduced them to semiannually. It makes clear that
they can choose to suspend the payments to the PEGs.
They can change that to monthly payments. They can authorize Oceanic to discontinue payment to the PEGs. There's a lot of, again, direction related to PEG oversight, PEG access oversight in the franchising document which is a part of DCCA's regulation of cable television, so I just wanted to say that, yes, that can happen, and it has.

VICE CHAIRPERSON BARDUSCH: Okay, and when you say that they make these changes, each and every time they make these changes, do they issue a separate contract modification to do that?

MS. LOPEZ: No. It's part of the franchise.

VICE CHAIRPERSON BARDUSCH: So --

MS. LOPEZ: Not that I am aware of, not at all.

VICE CHAIRPERSON BARDUSCH: So when DCCA is actually interacting with your organization, they really -- it doesn't, from my view, seem like they treat you as a contractor.

MS. LOPEZ: Our contracts have not been modified in any way to reflect any of those changes.

VICE CHAIRPERSON BARDUSCH: Okay. I have a few questions on -- I guess this is your petition of -- this is -- I don't have a date here.
on this petition, but it talks about the impracticable state of the RFP, it says the RFP lacked any performance standard. We don't have a copy of the RFP. This is on page five of the report.

CHAIRPERSON TORRES: Doesn't this go to paragraph B, to petition B rather than petition A?

VICE CHAIRPERSON BARDUSCH: Okay, I will wait till then.

CHAIRPERSON TORRES: Okay, great. You know, I have a couple of concerns too. I mean, I understand the relationship as much as I can through these meetings with DCCA, but at the same time I am concerned about the letters that the Board submitted to DCCA and the PUC, and I know there was another entity, I don't recall who that was, but we can just talk about DCCA and PUC at this time, and really both of them, both of those entities seemed to reject the idea that the PEGs are utilities, and that seems to be, you know, a very critical point in this particular petition.

MR. THOMASON: I would submit to you that the question as we wrote to the Chair, you can get a question that is misleading if you ask an incorrect question. The question is not whether the
PUC regulates cable or whether the PUC regulates the funded PEG channels that come from the cable franchises. The question is whether a procurement, a competitive procurement procedure is advantageous to the State in pursuing this type of service.

We are not arguing that this is a utility subject to the PUC. What we are presenting to the Board is by analogy saying like any other public utility, telephone, electrical, that these activities are shared by the community, and they are not likely to be a commercially provided service. There's only the capital resources necessary for power, making it unlikely that you will have more than one power company or two or three power companies, depending on the size of the community.

There will only be one or two television stations, depending upon the size of the demographics of the community that is served. We are pointing out that this activity is a public utility within the meaning of the procurement code. It is not regulated by the PUC. It doesn't fall within the PUC. If you ask PUC is this a utility that you regulate, they are going to say no.

But the question is yours, as procurement professionals, of whether this type of
activity which is consistent with the very statutory
definition of utility is conducive -- or is the
State's interest served by asking for competition in
providing something that is essentially expression
of first amendment rights according to members of
the community?

What we have done historically
successfully for two decades is to have DCCA oversee
directly the conduct of the PEG access activities,
how much money they receive, how the boards are
structured, what their activities involve, and then
through what they call D and Os, directives and
orders, not contract changes, they direct and change
the amount of money the PEG receives, how the money
is going to be distributed among the E portion, the
education portion and the government portion.

The point we are trying to make in
petition number A is that there is no advantage
gained, this is like a utility, it is not regulated
by the PUC, but it is directly regulated by DCCA,
and as we tried to point in our letter, we believe
the question was unwisely asked and framed in an
improper way.

We believe that the question before this
Board is is there an advantage to be gained by a
competitive process wherein a separate government entity, DCCA, regulates every aspect, everything from the creation of the entities that are now PEG providers to how much money they are going to get next year and when they are going to get paid.

CHAIRPERSON TORRES: Does the DCCA have published regulations for PEGs?

MR. THOMASON: Well, that's one of the problems, ma'am. The rules that are supposed to be promulgated that provide the public notice and an opportunity to comment on how the PEGs are conducted are supposed to be published by the DCCA. They are supposed to be provided to the public so the public can comment, and then they are supposed to be promulgated through a process where there is approval at the governor's office. That was pointed out in the lawsuit on Maui that the DCCA had not done that, and the court, the Circuit Court on Maui required that the rules be promulgated.

The rules are -- I believe, that's what the draft that Mr. Bardusch is looking at. These rules are focused on insuring that the public is aware and understands how DCCA can exercise its power over the PEGs and that its conduct is consistent with the rules as they are written. None
of those will change whether there is an advantage
or not of competing the PEGs, the PEG entities for
the right to provide this service.

CHAIRPERSON TORRES: Okay, I think, you
know, regardless of how you feel that letter was
written or stated, I think the responses were pretty
clear that DCCA did not recognize you as a utility,
nor did they talk about any regulations that they
had for controlling the PEGs, and the PUC was very
clear that they did not consider the PEG to be a
utility either. So I would have to rely heavily on
the fact that there are no regulations, and even if
you are talking about, you know, a utility, I just
-- I cannot get from here to there that the PEG is a
utility.

MR. THOMASON: And all I can say is that
the statute that defines public utilities says
telecommunications services, I think.

CHAIRPERSON TORRES: You know, do you
have that definition, the entire definition?

MR. THOMASON: On page three of our
petition, it is quoted and underlined.

CHAIRPERSON TORRES: I think it is
pretty highly revised, isn't it? I mean, there are
large sections of it that are removed.
MR. THOMASON: I beg your pardon?

CHAIRPERSON TORRES: Some ellipses there.

MR. THOMASON: The statute that governs the Public Utilities Commission defines what a public utility is in one place, and then later it assigns to the PUC the power to regulate certain of those utilities, not all, so.

BOARD MEMBER SAITO: Okay, I think on the same line, so I just noticed that this is actually a definition in the statutes that cover the Public Utilities Commission. Is there a similar definition in the statutes that cover the oversight by the DCCA?

MR. THOMASON: No.

BOARD MEMBER SAITO: So the definition is in the statutes related to the PUC. PUC essentially regulates the utilities under its control, right? So how, if applied to the cable companies, would the cable companies be determined to be a utility by this definition?

MR. THOMASON: Well, the definition of a public utility is any plant equipment facilities directly or indirectly for public use for transmission of telecommunications messages. So our
effort is to ask you to interpret a statute that is placed in your power, the procurement code is subject to your interpretation and your application as experts.

There is no definition of utility, but the procurement code says that if it is a utility in your opinion, and there is no advantage to the State, then you are empowered by the procurement code to exempt these services from competitive procurement. I don't know what else to say. There is a statute that defines this activity as a public utility. It is not regulated by the FUC.

If you interpret 103 D to mean the plain meaning of a statutory word, the general process of the basic statute is not providing a definition, then you can look at statutes that cover similar activities and see what they say. That's a method of legal argument, and that's what we have done here. There's no definition in 103 D. We have pointed to a different statute and asked that at least the plain meaning of those undefined words in 103 D be used here by you in determining whether this falls within the section of the code, procurement code, that allows for an exemption.

BOARD MEMBER SAITO: I think what you
are saying is that regardless of the determination
made by DCCA, that if this Board reads this
definition of a utility, and it is convinced that
the PEGs are indeed utilities, then we go from there
with an exemption from the procurement code --

MR. THOMASON: That is correct.

BOARD MEMBER SAITO: -- saying that such
utilities may be exempt from the procurement code,
if not being exempt, if that's a disadvantage to the
State, et cetera, so the argument is to start with
the definition of the utility and then go from there
to the exemption.

MR. THOMASON: That's correct. I would
submit that the Hawaii Supreme -- in this capacity
when you are ruling on a petition, you are
performing an intenticatory (phonetic) function.
You are acting like a court. The Hawaii Supreme
Court doesn't ask Montana to reads its statute. 103
D belongs to this Board, not to the DCCA and not to
the PUC.

We point to that accompanying statute
only to assure you that the definition of utility is
fairly broad and does include telecommunications.
Your job is to determine what the word utilities
within 103 D is. What we are asking you to do is

Ralph Rosenberg Court Reporters, Inc.
2460 American Savings Bank, 1001 Bishop Street
Honolulu, Hawaii 96822 (808) 524-2090
refer to another statute that looks like utilities
covers telecommunications in a different statute so
in applying your own decision on what 103 D says, we
ask that you apply the plain meaning. We weren't
asking and we have never argued that it is
appropriate to ask the PUC to interpret for you what
103 D says.

CHAIRPERSON TORRES: You know, you talk
about the plain meaning of the word utility, and you
say that the procurement code does not define
utility, and I think the reason it doesn't define
utility is that there's a very common understanding
of what a utility is out there. You can go in many
dictionaries, you can go to all kinds of different
sources, and they will define utilities, and
generally speaking, they do not include
telecommunication. In fact, the Federal Acquisition
Regulation, for example, excludes cable television
and that type of service from utilities
specifically.

MR. THOMASON: That's correct.

CHAIRPERSON TORRES: And I believe that
the reason for that, the reasoning, and, you know, I
am making a jump in logic here, the reasoning is
that when you are talking about a utility and you
are granting exemptions, you are not concerned about how that group is pricing and how that service is handling its business, and the reason you are not concerned is because their prices are regulated, their conduct is regulated, and when I say regulated, that means defined, formal, regulations, public reviews, all sorts of controls that are in place that make, you know, other definitions and that make other controls unnecessary, and certainly, competition is generally not required for that reason as well.

MR. THOMASON: That's correct.

CHAIRPERSON TORRES: So, you know, when I see a word like that utility, and it has no definition, then you correct me if I am wrong, but what is the legal standard in that case? You would go to the most common meaning of that word. You would not look for esoteric definitions of it.

MR. THOMASON: No.

CHAIRPERSON TORRES: You would look for the most commonly understood definition.

MR. THOMASON: No, ma'am. Generally, there's a concept called statutes en pari materia, meaning statutes that cover similar or the same things. The reason we point to this instead of
Black's Law Dictionary is that the statute that the
Legislature wrote using the same or a similar word
in one area defines a utility as including
telecommunications.

What we are saying is that body, the
Hawaii Legislature, that wrote the statute Chapter
269 also wrote 103 D. They didn't refer to the FAR
because that distinction you are making with the
Federal Acquisition Regulations has a great deal to
do with constitutional structure. Local governments
regulate, for the most part, public utilities in
their jurisdictions.

So the Federal Acquisition Regulation
sets up special rules for the purchase of utilities
at, say, an Army installation that may have access
to grids governed by two states, so the PUC in one
state and the PUC in another state may be providing
the same power at a different rate. Same thing with
telephone communications, and actually in that
context, you can compete, and they do compete.

Infrequently, I agree. I respect --

CHAIRPERSON TORRES: No, I agree with
you that they compete telecommunications frequently.

MR. THOMASON: But the reason I -- the
point I am making is that when lawyers speak, they
don't speak as witnesses. Lawyers are advocates. A legal construct argument that is preferred by the courts is if you have two statutes written by the same body that regulates similar and the same activities, one has a definition and the other doesn't, then you ask the deciding body, the trial court or in this case the Procurement Policy Board, to look at the word the Legislature used in one statute if they didn't provide a definition in the other.

That is more arguably stronger logic than to say what is in Black's Law Dictionary or in Webster's Dictionary is a more precise determination of what the Legislature meant when they wrote Chapter 103 D.

CHAIRPERSON TORRES: I did ask you the correct meaning, and I appreciate it. That was --

MR. THOMASON: Please don't take it as correcting you.

CHAIRPERSON TORRES: No, that's okay.

VICE CHAIRPERSON BARDUSCH: I am presenting an advocate's position. I want you to understand the nature of the argument we are presenting and why it has been crafted the way it is.
CHAIRPERSON TORRES: There may be a misunderstanding, though. I didn't understand that the Legislature has written 103 D. Is that correct?

BOARD MEMBER SAITO: That's correct. The Legislature writes all legislation, and Chapter 103 D is a statute that resulted from legislation.

CHAIRPERSON TORRES: Okay, so by the fact that it was made into a law, by the fact that it was made into a law, we can say that the Legislature wrote it, when in fact they may not have actually been the parties that drafted it?

MR. THOMASON: In this case, the Legislature used in large part the 1978 ADA model procurement code. But in this section, the section that deals with exemptions, the Legislature did write this. They did not adopt the terms because the model procurement code only provides very limited exceptions, and our Legislature wrote a very detailed section, Section 102, 103, 102, much more precise.

So please accept -- I am presenting an advocate's position explaining to you that the Legislature that wrote both of these statutes used the term in one and then the same or a similar term in another and only defined one. So we are asking
you to look and see if the word utility -- if the Legislature's use of the word utility, meaning telecommunications, warrants your adopting it as a definition within 103 D.

But although I recognize that you want to do these in sequence, please remember that this petition A was written four years ago. We have submitted a new petition, and I think the greatest emphasis that I can put to assist the Board is the real question you have to address, even if you don't think it is a utility, even if you disagree that it is a utility, the process we have gone through four years of expense, this Board has sat for many days hearing testimony here in this room and in downtown Honolulu and taken a great deal of time.

My client has expended a great deal of resources in answering the Board's questions, presenting testimony to the Board, in responding to requests for information from procurement staff, addressing -- submitting protests to address what we feel are significant flaws in the solicitation ultimately. That solicitation was subsequently withdrawn. So for a period of three years, the procurement staff and the Board have struggled with this.
We believe that all of this effort provides you evidence by itself that there is nothing to be gained by imposing a competitive scheme on what appears to be a successful operation regulated in cost and in content by a government body, and we ask that the Board consider that there does not appear on the evidence in front of you to be any advantage to go through this competitive process, and on that basis we ask for the exemption to be granted.

CHAIRPERSON TORRES: I would like to take a break, but can I make a --

BOARD MEMBER SAITO: That sounds good.

CHAIRPERSON TORRES: Yeah, I would like to do that, but if I could make one final comment here. I guess even if I could accept the definition or lack of definition of utility, the part that concerns me the most is that there is no formal regulation by any body. There is no formal regulation by DCCA, there is no real control, there is none by the PUC, and that is a serious concern. In that case, I would think that your regulation would be coming through a formalized contract. That would be the direction, that would be where all of the direction would come from.
So I would like to end on that note. We have abused our court reporter, so let's take about a fifteen minute break. Okay, let's a ten-minute break, and we will be back at 2:30. Thank you.

(Recess was taken.)

CHAIRPERSON TORRES: Okay, the meeting is called to order, and I believe that we have some continued questions for you, Mr. Thomason, so if you don't mind, we will turn it over to --

MR. THOMASON: May I? At the close of the initial session before this meeting, you had made a comment expressing your concern about the absence of firm contract conditions. There is an agreement.

CHAIRPERSON TORRES: Oh, I'm sorry, let me just make a correction there. It wasn't about the firm contract conditions that I was commenting on. It was the firm written regulations for the DCCA or the PUC that would control the PEGs.

MR. THOMASON: Yes, ma'am, and the Circuit Court agreed with your concern and directed that the rules be promulgated, so that process is underway.

One of the earlier comments to Mr. Saito's question, though, even with these...
additional rules, the question that we are posing for the Board, we argue, would not conflict with the rules as they are being developed now, and to the extent that they may conflict, the Board certainly has every right, power and responsibility to reconsider any previous decision where a change in the law might cause that decision to be inappropriate under the change conditions.

So we are asking for the exemption from the competitive procedures, not from an exemption of regulation and control by DCCA or the rules that may come up, just an exclusion from the application of the competitive award procedures, and I hope that clarifies any misleading argument I may have presented.

CHAIRPERSON TORRES: Okay, I'm not sure you can separate those two things, but let me consider that. In the meantime, I will turn it over to Darryl.

VICE CHAIRPERSON BARDUSCH: Was the cable franchise, to your knowledge, awarded using competitive procedures?

MR. THOMASON: To date, the DCCA cable franchise is awarded under a different procedure that is not necessarily the competitive procedures
as included in a procurement situation where you have two bidders, but they do determine whether the
cable operator is qualified and certainly responsibility as you mentioned.

VICE CHAIRPERSON BARDUSCH: Okay, and
what exemption do they use to award that contract, a non-procurement code?

MR. THOMASON: It is a public utility.
I don't know that there has ever been any specific exemption. Because my client's interests are not served in that --

VICE CHAIRPERSON BARDUSCH: Okay.

MR. THOMASON: -- I have never addressed that question.

VICE CHAIRPERSON BARDUSCH: Okay, I guess it is more to the Board. It seems to me that we have a subsector or subpart of the cable process, of the cable provider, and the big cable providing agreement contract being awarded by this State and not using our procurement code, not using the competitive procedures or under an exemption, it just seems to operate outside of the rules. It, to me, seems a fair comment then if that was something that is going on, that if that's good enough for the big person, the question is why is that not good
enough for the smaller person that's involved?

And I guess one final comment, in this petition we have listed as four A what your client wants is basically for the current exemption for utility services to be interpreted to include the pay, that's simply just all they want, right?

MR. THOMASON: All Olelo is asking for in this petition is that the competitive procedures of the procurement code be -- the contract process be made exempt from the competitive procedures of the procurement code, that's the substance and bottom line of the petition.

And we believe that based upon the arguments we have presented and the kind of difficulty we've seen, even in crafting the RFP that addresses how you do it, even in crafting the request for proposals for this current service, the difficulty that you have seen already is evidence that the advantage to be gained is not there. It is not advantageous for the State to pursue a competitive awards procedure for something that is regulated like PEG access services.

CHAIRPERSON TORRES: Okay, I guess I would disagree that there is no advantage to be gained by going through the competitive process. I
think there are other advantages in competition. I mean even just determining what is out there in the market, perhaps even refining requirements. I think there are many kinds of advantages that can come through competition.

I guess my question to you is if we agree that you are exempt from the competition requirements of the procurement code, you earlier stated that you would still be under the procurement code, you would just be exempt from the competitive procedures. How would you envision that taking place? How would you envision that whole process of a new contract being completed?

MR. THOMASON: This contract was awarded through negotiations with, in essence, a sole source, and among the problems that are accompanying the solicitation that is -- that was withdrawn is a question about property. I know a great deal about your experience in the Federal government, and I am confident you are very comfortable with government furnished property and a government owned contract or operated facilities.

CHAIRPERSON TORRES: The ugliest clause in the FAR.

MR. THOMASON: The ugliest clause in the
FAR, but it can be written, and it is duly accepted and has been accepted since 1943. The problem we have is that was never done because they didn't use those other sections of the procurement code to define changes, to define general conditions and special conditions that relate specifically to how the funds are used, who owns the property once the funds are used to purchase new equipment and buildings.

And then what happens if you have a competition but the contractor owns the facility? Does the State have to purchase a new building for the studios? These are issues that are unresolved because they did not use the other portions of the procurement code to define, for instance, changes.

Our view is an exemption by the Board seeks only to exclude that requirement of the competitive award procedure, but it includes all of the other things like certification of the availability of funds before directing a change. Those kinds of things I believe should be included, and, as you described, the regulations that govern how DCCA does its job in overseeing the PEGs are really important. There should be a contract created that's consistent with the rules and
consistent with good -- best practices in procurement, in administration of the procurement contract.

CHAIRPERSON TORRES: So you would envision a negotiated sole source contract with a RFP that was written by us both?

MR. THOMASON: Well, I would anticipate the State Procurement Office, the assigned procurement official from the State Procurement Office working with DCCA would try to write a more precise statement of work with standards of performance, so you can tell whether it is at fault or not, and then defining those procedures or payment for the right to claim the funds, the right to dispute or deny a claim, all of those kinds of general terms and conditions you would find in a procurement contract.

CHAIRPERSON TORRES: Okay. Does anybody else on the Board --

VICE CHAIRPERSON BARDUSCH: I do.

CHAIRPERSON TORRES: There we go.

VICE CHAIRPERSON BARDUSCH: Yes, I would have to say that when I previously asked about the questions I had on paragraph or page five, you said that was only on item four B, but in fact, it is
four A because four A has both the utilities
services issue and the competitive award issue in
that, and since you brought up your comments about
whether, you know, there's value to competition, I
think it is fair that I could ask your client to
provide information about what was lacking in the
performance standards of the RFP that was withdrawn?

MR. THOMASON: There were none, and I
say that without -- in full recognition that the
great difficulty presented by these types of
contracts is that they provide a free speech avenue
for segments of our community that are traditionally
underserved. The Hawaiian community has a large
segment of programming on all of the PEG channels.
There are also environmental groups and other public
interest groups whose statements and views and ideas
are not necessarily susceptible or acceptable on a
commercial television.

These PEG programs provide those people,
to include high school students at various high
schools in the community, an opportunity to express
their views and create programming that is the
essence of our constitutional right of free speech.
These PEG providers are the first amendment window
for large segments of our community.
The Supreme Court has struggled for more than a century trying to define when is free speech okay, and how is free speech to be regulated directed? And the idea that we have difficulty writing an RFP that does something the Supreme Court hasn't been successful in yet, I think is not surprising. I think it is really difficult to make a competitive award on something that is as difficult to grasp and quantify as the public's right of access to their own airways to exercise the right of free speech.

CHAIRPERSON TORRES: Excuse me, I am sorry, I want to interrupt here just for a moment and say that I want us all to be careful not to get into too deep a discussion of the previous RFP's or future RFP's because it's not the Board's job to discuss particular procurements and the details about that.

VICE CHAIRPERSON BARDUSCH: Okay, I will concede that issue, but when the petition asks whether it is practicable or advantageous for the State to award a contract or convene for a contract on this subject matter, I think that the past effort and what the State did is very relevant in making a decision on that subject.
So moving to the second issue would be
there was a problem with the property identified.
Can you explain what the property problem was?
MR. THOMASON: The property problem
remains. The DCCA's interpretation of the current
1998 contract is that all of the PEGs property used
to operate the current facilities -- or the current
facilities they are now operating belong to the
State. However, under the earlier '88 agreement
through 1998, there was no government provided
property clause. And it is not -- it doesn't
contain any of those government owned contract or
operating type clauses that you see in an Army
ammunition plant contracts.
So right now we have a circumstance
where the PEGs think they own and they do have title
to real estate. They have -- at least in some
instances, the counsel for Akaku represented that
some of those facilities have been made subject to a
mortgage and were providing collateral for a loan,
so commercial banks have an interest in this
property. DCCA is very confident that the State
owns everything, and the reality is the Board
members who have been appointed to the Board
pursuant to a statute that governs the conduct of
Board members for not-for-profits have the fiduciary
duty to insure that they protect the property of
their not-for-profit.

So we have people who have the fiduciary
duty to resolve and protect the property on the side
of the PEGs, and you have State administrators who
are saying that because they believe it to be true,
the PEGs should turn over millions of dollars of
property that may or may not be used as collateral
for commercial bank loans and turn it over to the
State. That is unresolved. That remains
unresolved, and I don't think it can be resolved
easily.

So we are not talking about an
individual procurement, and I recognize the Board
does not have and should not ever address a single
procurement. But what you are looking at is
systemic. This is a general industry issue
presented to the Board to determine whether this
type of contract should be exempt from competitive
procedures, and in this type of contract, because of
the history of the contracting parties'
relationship, and the way they treated each other,
the parties, PEG parties, believe they own their
property. The government believes they don't.
It is not easy to resolve, and neither party can just give up. As of now, there is no determination, and the last RFP reflecting this systemic problem indicated in apportionment that the State couldn't give assurance that any competitor coming in who would be replacing the incumbent would receive the studio facilities.

VICE CHAIRPERSON BARDUSCH: Okay, and just one more, without going too far, there's, I guess, the complaint that in the competitive process, the State was designating a non-competitive subcontractor, and any concept of how the State does that in compliance with its own competitive procurement rules?

MR. THOMASON: Obviously -- I believe you are in petition B. Part of petition B was addressing a protest that was filed by our client, and there was a separate and different protest filed by Akaku, the Maui County provider, and among the points that we made is the procurement specifically directed the winner, the awardee of the contract, to subcontract with the -- what they call HANK. These are the education network folks.

So in effect, it was a directed subcontract which in our view is not consistent with
the competitive process, and in effect the
government is, by doing that, making a directed
award without competition through an agent and
telling the prime you have to give the contract to a
sub that we decide, and we protested that. I think
I mentioned though that that RFP was subsequently
withdrawn.

VICE CHAIRPERSON BARDUSCH: Thank you.
CHAIRPERSON TORRES: Okay, are there any
other questions from the Board members?
Okay, I should have done this earlier,
but I would like to get some comments from SPO. I
think this is probably as good a time as any because
we are getting into your area very heavily now.
Aaron, do you have any comments that you
would like to make?

ADMINISTRATOR FUJIOKA: Thank you, Chair. I have submitted written comments and our
earlier recommendation on these petitions, and we
will stand on those comments, but I would like to
add that the State Procurement Office on a regular
basis makes recommendations to the Board regarding
exemptions that are not practicable or not
advantageous to the State to be procured.

In this instance, the contracted
service, which is to manage and operate the PEG
access channels, is subject to competition, and
competition for the service exists. The State wants
to procure these management services, and we are
planning on behalf of the DCCA to issue the RFP
shortly.

Approving either of these petitions will
establish an uneven playing field and provide a
non-competitive or non-bid process that is contrary
to open and fair competition and does not contribute
to good government. There is no compelling reason
to exempt these management services from the
procurement code, and we ask that these two
petitions be disapproved. Thank you.

CHAIRPERSON TORRES: Okay. Unless there
are any other questions from the Board?

I believe, Mr. April, you have some
comments that you have -- written comments that you
provided. Did you have any statements that you
would like to make here in front of the Board?

MR. APRIL: Yes, yes, I would. Thank
you.

CHAIRPERSON TORRES: Okay, please
identify yourself and try to stay within the time
limits.
MR. APRIL: Okay, thank you. My name is Jay April. I am president and CEO of Akaku Maui Community Television. I came all the way over here from Maui, so respectfully, Ms. Chair, I do object to the time limitation because of the expense that it took for me to come over here and the five years that I have spent with this process including membership on the HCR 358 Task Force. This process has been long, it has been difficult, and so the time limitation is rather restrictive.

The fundamental flaw of an RFP process is that it applies a market driven methodology, 103 D, to a non-market based reality. When PEG access was first set up by the Federal government in 1972, Nicholas Johnson and the FCC realized that the marketplace forces were deficient in meeting the needs of the community communications, and so the Federal government intervened in the marketplace to create these entities. The Hawaii Legislature did the same thing when they created 440 G.

Nowhere in that legislation does it say procure. It says designate. And as one of the members pointed out, PEG access is a subset of the cable television franchise. Procurement has no business in this area. It purports to replace a
mature existing workable electronic commons with
unknown, unproven, and nonexistent entities or
existing entities with different or even conflicting
agendas. There are no other vendors. This resource
was set up specifically to do public, education,
government access. There is no other entity.

Case in point: San Francisco recently
this past December awarded a PEG contract to the Bay
Area Video Coalition, a well-respected video and
arts organization that took over the PEG access
function for the City of San Francisco due to a
cascading series of lack of funding from the
original provider. The first thing that
organization did, and like I did said, they are a
respected and well-intentioned organization, was
impose their own agenda on the public access
paradigm. That's what any organization would do who
would bid against the existing PEGs, impose their
own agenda. That's what they are supposed to do.

The PEGs are unique. They are sole
sources in each island. There is no other entity.
It is like if another bidder comes in with a
conflicting agenda, it would be like tearing down a
thriving force ecosystem of community communications
that was planted for that purpose twenty years ago
and replacing it with astroturf and expecting the
grass for the lost social capital to grow up again
on its own with no seeding, no philosophy, no
community building netposts to nurture and sustain
it.

The simple fact is the Procurement
Policy Board could solve the problem today,
especially in view of the fact there are already in
existence complete and thorough administrative rules
proposed by the HCR 358 Task Force that will totally
solve the so-called PEG access designation dilemma.
These rules were submitted as attachments to my
testimony, the draft rules that were drafted by the
task force.

The task force met at least eight times.
A lot of the members of the task force were
procurement officers and voted to -- the two
recommendations that Kealii referred to, one, that
this problem be solved administratively, and you are
one of the bodies that can do that, and the other
was that it be solved legislatively.

This is a public good. It is a public
good that can be accountable. The administrative
draft, the administration rules that you have in
front of you basically solved any question that any
legislator had. Thousands of people have testified against procurement. The bills sailed through both houses in the last two or three years and never made it out of committee at the last minute for a number of reasons.

The task force really was the last stop on, I think, a long journey that was extremely positive, and I think that this body would be very astute to honor the petitions from Olelo, which I think are very well written. The arguments are extremely well drafted.

I am not an expert in utilities, but I am from a state years ago, State of Connecticut, that did regulate cable through the Public Utilities Commission. There was discussion back in the '80's of cable being an information utility. Those words were actually used in proceedings. As we all know, cable became something less than that in terms of when we turn on the tv, but the bottom line is our statute that was quoted by the Olelo attorney today does mention telecommunications, so I think that that petition does have bearing.

I can reserve the rest of my comments for the second go around in the other petition because I have more, and I will just leave it there.
So thank you very much, unless you have any questions --

CHAIRPERSON TORRES: Anybody?

MR. APRIL: -- regarding the task force or Akaku's position?

BOARD MEMBER SAITO: I don't have a question. I have a statement. We are an authorized sunshine law organization, and we have to follow the agenda, and so I would suggest to you that even though you feel that four minutes is a relatively short time, time limit, comments, I think, need to be related to these two particular petitions that we need to vote on today. That's my . . .

MR. APRIL: Thank you.

CHAIRPERSON TORRES: Okay, if there are no further questions, let's move on to the second petition which is actually very similar to the first petition, but if I understand correctly, it has expanded. I will read it as it is stated here in the agenda. This would be petition B under the major paragraph heading four, petition for declaratory ruling submitted by Olelo Community Television.

Olelo Community Television petitions the Procurement Policy Board pursuant to Hawaii Revised
Statutes HRS paragraph 91-8 and Hawaii Administrative Rules, HAR, paragraph, or I'm sorry, is that section, section 121-32 for a declaratory ruling stating that contracts with entities to manage and administer public, education, government, PEG, access channels and services are contracts for which the competitive award procedures of HRS Chapter 103 D are either not practicable or not advantageous to the State, and so on that basis such contracts are exempt from the application of the State Procurement Code within the meaning of HRS Section 103 D-102(b)(4)(L).

Does Olelo have any comments or any presentation you would like to make on this particular petition?

MR. THOMASON: Ms. Kealii Lopez is here to provide testimony, and if I could, as attorney for Olelo, the comments you receive from an attorney and, I would submit, also from the SPC about good government and how things should be done are statements of legal argument of opinion. The testimony is the evidence, and we would submit that among the problems that we have had, these petitions have been pending four years.

One of the problems we have is that
there is a constitutional right on the part of every
citizen, and that includes corporate citizens, to
petition for the redress of grievances. Every state
includes -- implements that constitutional provision
by providing a statutory right. Among those rights
are the right for these petitions, this petitioner
Olelo, to come before you as a Board, to ask for you
to rule based upon the legal arguments and evidence
that has been submitted, and have the Board make
specific findings in fact based upon evidence and
conclusions of law.

We would disagree that there's
competition. The testimony you may have heard
earlier was a statement from one of the executives
from Akaku saying that's one of the reasons this
entity -- this circumstance was created. There was
no one. The commercial cable television companies
will not and cannot economically make available air
time for the people that use the PEG access
services. These entities are not commercially
available. The only reason they exist in Hawaii now
is because DCCA created them in 1988, and I would
ask that we have an opportunity to hear evidence
related to how these entities were created and what
services are being provided in the community.
MS. LOPEZ: Hello, I am Kealii Lopez, president and CEO of Olelo Television. I am going to provide some general comments related to this particular petition, and specifically, our concern is that public -- we believe public, education, and government access services cannot be competed or are not practicable or advantageous to the State to compete them.

Specifically, the reason behind that is the fact that, as Mr. Thomason indicated, over two decades ago, Olelo was created through the direction of the Department of Commerce and Consumer Affairs as part of the franchise renewal of Oceanic Cable. Prior to that franchise renewal, community access was actually managed by the cable operator. Oceanic Cable provided these services.

As part of its franchise renewal process, the State required that that function be shifted to a not-for-profit organization that did not exist at that time. The State then convened a group of public representatives, you know, representatives from the community to, in fact, create Olelo, incorporate Olelo, and then the State entered into a contract specifically with Olelo in 1989 to begin delivering those services. The assets
held by Oceanic Cable at that time to provide those services were transferred to Olelo. Franchise fees and capital funds were then provided to Olelo each year to deliver these PEG access services.

The contract at that time, and I believe still even the contract we have today does not make clear, as I'm sure many of you are familiar with, that the government necessarily owns those assets, so our argument is up until every asset that we have up until today belongs to Olelo Community Television.

I disagree that it is in fact in the public's interests or good government to in fact procure these services or compete these services and imagine that there is an access organization or non-access organization that could effectively deliver the services that Olelo provides to date without the assets that Olelo holds.

I would then say that it is very much so impracticable and disadvantageous to the State to then compete this contract and imagine that someone who would be starting from ground zero can in fact manage six PEG access centers, seven community media centers to the public and education and government here on the Island of Oahu.
We provide facilities to the State Legislature. We provide facilities to the City Council, City administration. We provide those resources and some funding. We provide funding to the University of Hawaii and their Department of Education to create their content. All of those resources, well over $10,000,000 worth of assets, are held by Olelo.

It is inconceivable that anyone from a good government perspective could compete with contract on Oahu to another competitor, and I do not believe it is in the public's interests when in fact those fees that have been received by Olelo to deliver those services would all of a sudden, if awarded, if the contract were awarded to another competitor, that $10,000,000 of assets would no longer be available for use by the public. That does not seem to be good government, in my humble opinion. Given that, I think until that issue is resolved, I think it would be very difficult to compete the PEG access contracts.

The other thing that I am concerned about is there was no, that I am aware of, market survey to identify competitors. So I understand that there is a concept that there are competitors.
If the concept is that the PEG access organizations on each of the islands are potential competitors, I would at least make very clear that no PEG access organization in good conscience would bid on a contract for another island. No PEG access organization in good conscience would compete for a PEG access contract on another island. Community access is community based.

On Oahu, we understand the diversity and mix of the community on Oahu, which is why we have community media centers throughout the island. Those needs for the community out in Waianae versus Kaneohe versus Palolo are different, and the centers and services we provide there are adjusted to meet those community needs. I, representing Olelo, could by no means know what the needs are for residents on Kauai, residents on Maui, residents on the Big Island.

Now, I do understand that there are businesses like, you know, Bank of Hawaii, for example, has branches everywhere. That's a consistent kind of delivery of service that they provide. It's the same all across. You go to an ATM, you go wherever, the fees are the same, the interest is the same. It's different with PEG
access. They aren't the same. The services even on Oahu, again, are very customized. So that's the other thing, so I don't know who the competitors are. So I mean, so, that's my one issue there.

The other thing, I think, when we look at the issue of -- and I apologize -- you know, it is too bad that in 2006 and 2007, this body was able to hear from many of the public beneficiaries that talked about their concern about community building and the efforts that PEG access organizations provide.

The problem is that one sees it very -- I would -- the only thing I can look at it as is very clinical, providing access to PEG access channels. The channels are the tool, the channels are not the service, and that's where the problem lies. The channels are not the service. The channel is a tool. The service that we provide is empowering people to use the media to make a difference in their lives and the lives of the communities they represent, that's the service.

If the question is can someone else run the television, you know, put programming on the channel? Sure, anyone can do that. That's not what PEG access services are. That's the misnomer, if
anything, that it is really just to manage a channel. But I would also say to manage a channel, you have to have experience, but you also have to have access and resources to manage six channels, which is what we have.

The concern really is, our central theme of many of those citizens was really the ability to effectively capture and successfully secure the services provided by Hawaii's PEG access providers. As Mr. Thomason mentioned before, the first amendment right opportunities are central to PEG access services, and that RFP must necessarily address performance standards which, again, I know we can't get into detail, was not as effective as a past RFP and presumably would be part of a future one.

However, our concern is that Olelo and the other access organizations provided input, and I hope I am not stepping out of line, to at least three, two RFI's before the final RFP came out. We made clear the problems all along the way, and once that final RFP was issued, they still had not been fixed. So hopefully, rather than the third time is a charm, I hope the fourth time is the charm.

And, again, it is not reflective of, I
think, the SPO's ability. I think they absolutely
have the ability to provide and be involved in
procuring services as they have for the State. The
point we are making is that the business and
services with which we are engaged in are difficult
to develop.

One of the challenges, and why I believe
it was difficult to have performance standards, is
the PEG access organizations were created to deliver
these services. The expertise needed to develop
those performance standards are held by the existing
PEG access organizations because we developed them
and evolved them over time, and I think that's why
that makes it very difficult to incorporate that.
Especially if one looks at the concept that one of
the positions in the RFP in the past, and again it
may change, was that the services currently provided
by Olelo were the minimum baseline starting point
for the level of services to be provided.

That's economically infeasible because
Olelo has been providing these services for five
years at a minimum of a million dollar deficit from
the funds that we get from the State. We have been
offsetting that deficit with our own reserves.
Olelo has, in fact, spent about $10,000,000 of its
own funds over the last twenty years in the delivery
of these services. It is a not-for-profit. We
deliver the services, even at a deficit.

So it seems again because you have a
contract where in fact the fees proposed to pay for
the services do not even meet that minimum
requirement to me makes it at least impracticable in
my understanding of that term. And, again, perhaps,
you know, that will change. I don't know.

I mentioned earlier that the State --
Oceanic -- DCCA did issue a franchise to Oceanic,
and in that made very clear that the cable -- that
the State regulator, DCCA, at the director's sole
discretion can -- unrestricted discretion, actually
-- increase, reduce, and terminate payments or the
timing to PEG access providers with no regard to
whether the amount of PEG access payments is
sufficient to compensate the PEG access provider for
the services being delivered. Again, how that's
going to be incorporated effectively into a competed
contract, I would be intrigued to see how one
incorporates that provision into a completed
contract.

Again, no reflection on what the SPO
staff is capable of. I am speaking to strictly the
parameters in which PEG access is regulated. Again, I think that is economically impracticable.

I think another significant issue with regards to impracticability or, again, disadvantageous nature is that unless there are what I would say competitors, I mean, we can have anyone off the street say I will compete for Olelo's contract. I would hope that a market survey done effectively would determine the merits and potential, real potential that anyone could compete.

I would say nationally there is no other access organization in the country that has managed the amount of assets Olelo has, has managed the amount of inventory Olelo has, has run the number of centers that Olelo has. You can put it up for bid, and just so we are clear, Olelo's concern regarding exemption has nothing to do with competing, has nothing to do with competing, and I know Terry might say what you are saying.

My point there is that the part that's disadvantageous is what does that contract end up looking like? From Olelo's perspective, we are very clear we would be successful because we do not believe that there is competition. The problem is if the final contract looks anything like the last
RFP, it is disadvantageous to the people we provide services to.

In summary from my perspective, at this time, I do believe that it is impracticable, very disadvantageous to the State, and more importantly, I do not believe the public is served. I mean in the end, I realize that that's who we all are looking to serve, and I might not be someone appointed to be on such a distinguished group, a panel such as yourself, or employed by the State to provide public service, but I do believe that that's the role of community media. It is something we have done for twenty years.

Our interest really is what in the end and in what way does the public benefit by these contracts being put up for competitive bid? And, again, I do believe it is impracticable for many of the reasons that I spoke of as well as economically infeasible, which I hope equates to disadvantageous.

Thank you.

CHAIRPERSON TORRES: Are there any other questions, any questions from the Board? I do have one over here.

BOARD MEMBER MATSUMOTO: What kind of nonprofit corporation is Olelo?
MS. LOPEZ: Olelo is a 501 C 3 tax exempt nonprofit organization, independently managed.

BOARD MEMBER MATSUMOTO: It's a private nonprofit?

MS. LOPEZ: It is a private nonprofit.

VICE CHAIRPERSON BARDUSCH: My brain is working again. Can you give us, I guess, educate the Board as far as if forced to compete based on price, how do you become competitive? Because in my mind, you become competitive by either you cut your costs, you cut your costs either in what you are providing, how you are paying your people, or the services that you are going to put forth? Could you please explain that?

MS. LOPEZ: In truth, I am uncertain as to how a competed contract, if based on lowest bidder -- and my understanding from past discussions with the DCCA, that the issue of lowest bidder would not be the primary focus. I think in our particular case, the challenge really would be for any competitor to know what the baseline is. I think at that particular point, I would imagine that if Olelo were required to bid, we would bid based on those services that weren't at a deficit. I mean, if we
were to be able to recoup costs that were above that and including the deficit would be helpful.

The reality is there is really right now even a cap on Olelo's funding and has been. In fact, we increased our expenses by over six percent last year, and that's all just part of managing business. It was not a contract requirement. So from that perspective, I really don't know.

I think one of the challenges is when we looked at, and I know we don't want to get into details, but when we looked at the RFP that was since withdrawn, it was very difficult to imagine how one would go about in fact structuring one's proposal as to what were the services being required, how one would identify, you know, the fee structure for those, and in truth, I don't know that I can answer that question.

Terry might have a good sense of how one could go about competing, you know, if it were brought to bid, how he would advise Olelo to in fact engage in that. I just, not having done it before, I would not -- I have no idea.

CHAIRPERSON TORRES: Okay, I'm sorry, Terry, I would like to take a break right now, a ten minute break, so let's come back at 3:30, and then
we will pick up with additional questions.

(Recess was taken.)

CHAIRPERSON TORRES: Okay, the meeting is called to order again. I do have a comment that I would like to make on the last testimony that we had, and I think that many of the issues that you brought out were very interesting, you know, and it provides great background, but in some ways, I feel that it's not something that this Board can really hear because, first of all, we are talking about many hypothetical issues.

It is your -- it is Olelo's position that they are the owners of the property. That has not really been decided, and I'm not sure that that's something that the Board can decide. It is not really on the table at this point. It is not something that Olelo can really say with certainty that that's how it will turn out. I think it is an issue that needs to be addressed outside of this particular forum.

The other thing that we talked about was -- and I am trying to remember what it was that I was going to say on that. The RFP, I think our discussion on the RFP is also really very hypothetical. It talks about what has happened in
the past, previous RFP's, and we heard from the SPO that there's a brand new RFP coming out next week. At this point, really, none of us know what the terms and conditions of that particular RFP will be.

The other hypothetical thing that I was listening to was whether there is truly competition out there or not. We can all speculate on whether there is competition, but until a requirement goes out for a bid, there is really no way to know with certainty. In many cases when we have decided that a requirement should be sole source, and I am speaking generically procurement-wise, it is as the result of going through competition and learning as a result of competition that there was no competition out there.

And you are right, market surveys can tell us a certain amount, but really, you never know the true story until you put something out on the street and let industry come back and respond to it. So that's one of the -- some of the issues that I would like the Board to consider when we are reviewing that testimony, and I wanted to be open with you and let you know what our thinking was or what my thinking is on some of those issues.

MS. LOPEZ: Can I just clarify?
CHAIRPERSON TORRES: Yes, ma'am.

MS. LOPEZ: And I understand that the issue of the ownership is in the dispute, so I would agree that we cannot 100 percent say we own everything we do. The point there, though, is that there is a dispute and that the ownership issue is unresolved, and because it is unresolved, it would seem impracticable at this time until such time as it is resolved to compete the contracts out even.

The other thing that is fact, and again, yes, perhaps there is a way that it can be incorporated into a competitive process, the fact is what is contained in the cable franchise that was issued by the DCCA that makes very clear the kind of authority they have to reduce, suspend, and terminate funding to the PEGs, PEG access organizations. That is a fact.

There is also a provision in that franchise that allows the DCCA, if they believe it is in the public's interests, to eliminate payment entirely to the PEG access organizations, so that's irrespective of that, and I just want to make sure those pieces were hopefully at least clear with regards to that, but I understand what you are saying with regards to the rest of it, so thank you.
CHAIRPERSON TORRES: Sure.

BOARD MEMBER SAITO: That's the reason why I made my comments about there are two petitions on the agenda, and the arguments and the testimony in my mind should most effectively be focused in. There has been a lot of dialogue about all of this competition or not, but I was pointing out to you that your own petition points out, it says the legal basis for the request of declaration ruling, and I will read from it on page one. You cite in your petition itself, essentially, the code that enables you legally to form this petition, and I will read from this petition.

It says the Hawaii State Code HRS Chapter 103 D, parentheses, code, excludes from its coverage contract for services which the Board determines are available from multiple sources but for which procurement by competitive means is either not practicable or not advantageous to the State.

So the very basis of your petition assumes that the Board has determined that there is competition.

MS. LOPEZ: I understand.

BOARD MEMBER SAITO: You understand?

MS. LOPEZ: I understand.
BOARD MEMBER SAITO: Okay, and I think your argument is basically saying that it is not practicable and unadvantageous to the State, so I think that's what the argument, that's where the testimony should focus, why it is not practicable or advantageous to the State. I think that would be the most effective way to do it.

MS. LOPEZ: Sure, and that would be correct. My comment was more that there wasn't a market survey, but you are right, it is not related specifically to the petition and for that same reason does not apply, I would agree.

BOARD MEMBER MATSUMOTO: I have a question for the record. Is the agreement for Olelo to provide these services with DCCA or with Oceanic?

MS. LOPEZ: Our agreement to provide these services are with the Department of Commerce and Consumer Affairs. The funding mechanism from which we're paid is through an agreement between the State and the cable operator.

BOARD MEMBER MATSUMOTO: So there's no contractual relationship between Olelo and Oceanic Time Warner?

MS. LOPEZ: Correct.

CHAIRPERSON TORRES: You know, that's
kind of an interesting point because on one hand, we are saying DCCA is the regulator of the service, but at the same time, they are the people that you are providing the service for, they are like the requiring activity. So in some ways, and this is just a thought that just occurred to me, and it almost sounds like a conflict there. And, you know, usually when you have a contract, you have a requirer, somebody who needs that service, and then you would have another body that would be regulating like the PUC. Just a line of thought.

Darryl?

VICE CHAIRPERSON BARDUSCH: Okay, I guess I am a little bit frustrated from the standpoint that, like what you said previously, is that, you know, when the petitioner puts forth ideas, that's speculation, but when the SPO comes forward and says I will have the RFP out next week, you know, that -- and I am sure we are not able to question him on what's in that RFP, but I am pretty sure that the property issue is not resolved, nor do I believe that the issue of what is in the franchise agreement with Oceanic giving the DCCA the ability to unilaterally ignore any contractual rules that were written in playing with the money is
incorporated into the RFP, so I mean it's --

BOARD MEMBER HO: That's irrelevant, Darryl. That's a different topic.

VICE CHAIRPERSON BARDUSCH: It's not irrelevant when you look --

BOARD MEMBER HO: We are talking about those for an action here. That's not what the petition is.

VICE CHAIRPERSON BARDUSCH: Okay, then I will read the petition. And for which competitive award -- this is under four A. And for which the competitive award process of HRS 103 D are neither practicable or advantageous to the State, and on such basis the contracts are exempt. That's under there. Now, the second one, it talks about a declaratory ruling because of the same reason, so I don't know how you can say what I am saying isn't relevant to those two issues. They are directly relevant.

BOARD MEMBER MATSUMOTO: How?

VICE CHAIRPERSON BARDUSCH: I will listen to why you think it is not.

BOARD MEMBER MATSUMOTO: Because there's no contractual relationship between Olelo and Oceanic, number one. It states for the record.
VICE CHAIRPERSON BARDUSCH: That has nothing to do with the question here of whether it is practicable for the State to issue a competitive contract with the PEG provider.

CHAIRPERSON TORRES: Okay, again, I have to say that what is in the RFP is just purely speculation on our part. We don't really know what it is going to say.

MR. THOMASON: May I respond to that?

CHAIRPERSON TORRES: Sure.

MR. THOMASON: We have not raised, we have not discussed what is in the RFP. What we have told you and what we believe you need to consider in determining whether it is practicable to write any kind of RFP is that those essential facilities for providing the PEG services are owned in title by the PEGs. The State claims that they own it. Neither party legally can give it away to the other, so there has to be a legal process to resolve it. That has not occurred yet.

I believe the most important aspect that you can take from that, whatever the RFP says, one group of competitors, if there are any, has the facilities, studios, cables, cameras. The government wants to compete to others who are not
the incumbent and don't have that cable system and ask them to provide the same service without that property. That makes it not advantageous to the State at this point until that property is resolved. So please recognize, we are not -- the SPO has worked for four years on a very complex RFP. It is still not on the street. That by itself is evidence that this is extremely hard to do and not practicable.

The second aspect is the property issue cannot yet be resolved. We are not saying it won't be resolved sometime in the future. If that happens, the Board can reconsider its position, but we ask that at least to the extent that these issues affect practicability, please consider it. Thank you.

CHAIRPERSON TORRES: Thank you. Any other questions from the Board members?

Okay, Mr. April, as the public representative, would you like to give your testimony?

MR. APRIL: Thank you. We went over some of this ground before, so I won't repeat, but I wanted to give you a real world example of what happened when the RFP came out last time. It's not
a hypothetical. I don't know if you are aware, but
in 2005 there was a power struggle over public
access in Akaku on Maui. Basically, land
development interests were threatened by some of the
first amendment programming that was put on by some
of our community producers. Land development is, of
course, a big issue all over our islands, and there
were some programs that were somewhat critical of
the development.

A very powerful developer told a
previous ED that if he could shut Akaku down, he
would because there were people on there that just
don't represent his interests. He was invited to
come in and do whatever he wished to do, but he said
I can buy media, and I just want to shut you down.
A whole series of events occurred which I am not
going to get into, but, essentially, the Board -- it
was a huge Board dispute. People were fighting.
The judge ended up appointing a new board.

Soon after that, this RFP construct came
out of the State. This developer told me that he
spent $300,000 on this project. One of our senators
told me it was somewhere near a million dollars to
essentially shut down and take over Akaku. A bill
was floated at the State Legislature that would
split Akaku into thirds, according to the letters of
PEG, a sort of Sesame Street approach, I call it.
And there were quite a few donations going to the
administration. I'm not making the connection that
that was the reason for the RFP, but I am just
saying the timing was rather interesting.

When the RFP came out -- as a matter of
fact, the first time I heard of the RFP was this
land developer whom I had never met that crossed the
street and came up to me and said you are going to
have to put up with this RFP, and I said what RFP?
And he said you are going to have to put up with the
RFP just like everybody else. And I said what RFP?
That's the first I had heard of it.

Soon after, the land developer financed
an organization called Maui Media Lab, which was
positioning to bid on the RFP, and this is the kind
of thing that happens that proves that in this
instance, procurement doesn't work.

Another thing that happened during the
RFP hearings that were going around the State and
are in the RFI stage, cable administrator Clyde
Sonobe had a meeting on Molokai that was televised
on Akaku, and one of the Molokai people said to
Mr. Sonobe, well, what happens if this successful
bidder wins the contract but only says that they
only need $650,000 instead of the $850,000 that's
allocated for franchise fees? Mr. Sonobe replied,
and this is on tape, he said, well, we probably
would just return it to the consumer.

That's sent two very public messages.
The first message was the lowest bidder could be the
person who wins based on price, and that Time Warner
would receive some kind of back door rate relief of
$200,000, actually, as a result of that proceeding.
It also sent another message to people like this
developer, for instance, that if a sugar daddy came
along and decided to subsidize an access
organization to the tune of, let's say, $200,000,
they could essentially buy themselves a PEG access
entity.

This is not a hypothetical. This is a
real world situation. That's one of the problems
that we have with a procurement process. It doesn't
work, and I think we have heard today the fact that
it has taken this many years to even get an RFP out,
it is proving that it doesn't work. If you look at
the protests, the record of the solicitation, and
the RFP's themselves, I think that on its face I
think you can see what I mean.
The other thing I wanted to mention is about the courts, Akaku versus Rieffer (phonetic). Director Rieffer stated before the Legislature last March and actually several times that he was in favor of an exemption for the PEGs, and that that was his position. He also stated that according to the Attorney General, that he has to follow the instructions of the SPO, that he has no choice but to promulgate rules that adopt the State Procurement Code of Chapter 91 in order to designate access corporations.

Well, in these court cases, Judge August clearly stated that the director had discretion in determining the method by which he designated access to corporations. However, as late as January 8th, before the House Finance Committee in an informational briefing last week, Director Rieffer stated that he has to follow the instructions of the SPO and use procurement for the designation of access corporations.

Now, that to me is somewhat disingenuous. We have the court who says he can use any reasonable method. We have the HCR 358 Task Force that has actually created an extremely reasonable accountable method and put that forth,
and I just find this process to be somewhat
contradictory. I mean, how can the director say one
thing in one forum and another thing in another
forum?

To wrap it up, the main points, again,
this is a market intervention on the part of
government to protect the first amendment rights of
people who don't have a voice. That's what this is
about. This is not a commercial operation. This is
not to save money for the State. This is to give
people a voice. There are no viable competitors. I
have been in this business 30, 35 years. I know
what I am talking about. There are people who would
make believe that they are competitors but don't
have the experience that Olelo has that Kealii was
talking about. That experience simply is not an
off-the-shelf item. It takes years to develop that
kind of social capital and that kind of experience.

Number two, if all television stations
are buildings, if MTV sells you music, HBO sells you
movies, PBS sells you Ken Burns, there's a program,
there's a boss at the top floor telling the audience
what it is going to see. We are the public park.
Olelo is the park, the green space, the green space
in the middle of all of those buildings where the
people who come in are the people who program the channel. It is an entirely different animal. It is a level playing field for everybody. It is not a building.

So there are television companies, but television companies aren't the same thing as a park. If you open Central Park in New York up to the marketplace, how long do you think it would take for buildings to be built there? That's a pretty good analogy.

Number three, I mentioned that procurement doesn't work. It is subject to a great deal of abuse.

Number four, this whole issue of discretion on the part of the director whether to use procurement or another method, and then he says he must follow the instructions of the SPO. Well, the court said he didn't, so that doesn't seem to add up.

Number five, the HCR 358 Task Force has a solution. It is on the table. It is in your packet in Exhibit C.

Number six, there are other entities, you heard about this today, the Hawaii Educational Network Consortium, PBS, that aren't subject to
procurement in this paradigm.

And then the other question that relates to what one of the members were saying here before. What if Time Warner was the access provider? Would they be subject to procurement with just the access portion of the franchise? Isn't access derivative of the cable television franchise? Seems to me it is.

And number seven, the public in Oahu, Maui, Molokai, Hawaii, all across the Big Island, all across the State overwhelmingly, and I personally listened to maybe a thousand testimonies over the past couple of years, the public does not want procurement. Thank you.

CHAIRPERSON TORRES: Thank you. Are there any comments or additional questions from the Board?

Any comments from anybody in the public that we may have missed?

Does the SPO have any comments or questions?

ADMINISTRATOR FUJIOKA: No.

CHAIRPERSON TORRES: Okay, I think we are ready for -- possibly for a vote before we have a vote, though, we need -- what do we need?
(Discussion off the record.)

CHAIRPERSON TORRES: I will call for additional discussion. I think we did call for discussion, though.

MS. OHARA: Ask for a motion.

CHAIRPERSON TORRES: I'm sorry, there is still discussion.

MS. OHARA: No, you ask for the motion, and then you have the motion, and then you discuss it.

CHAIRPERSON TORRES: Okay, thank you, thanks for clarifying that.

Okay, do we have a motion on the floor for petition A? Yes, Darryl?

VICE CHAIRPERSON BARDUSCH: I will the motion that we approve the petition for declaratory rulings submitted by Olelo on the grounds set forth in paragraph A.

CHAIRPERSON TORRES: Is there a second to the motion?

BOARD MEMBER SAITO: (Raised his hand.)

CHAIRPERSON TORRES: Okay, would you please reread the motion, and we want to ask the court reporter, okay, could you please reread --

You want me to ask her to reread it?
Okay, please reread the motion, and I caution the people on the Board to understand what you are really voting for, whether you are voting in the affirmative or the negative. If you could please reread that?

(The record was read back by the court reporter.)

CHAIRPERSON TORRES: Thank you. Okay.

ADMINISTRATOR FUJIOKA: Who seconded the motion?

CHAIRPERSON TORRES: We have a second from Russ.

Okay, now, let's see if there is any discussion required? Yes, Darryl?

VICE CHAIRPERSON BARDUSCH: Okay, in supporting and asking you to support this approval of this petition, I would say that in looking at all of the exemptions we have, and I know we have over the years, we have exemptions for some rather silly things like dog food, and that really, really annoys me, but I think that when we can stretch the meaning of an exemption such as reference books to include children's books that the term utility services is broad enough to include the services that are being provided by the PEG organizations such that it would
be just a valid interpretation of the existing utility services exemption that would fit the PEG services.

And then the second part on the first paragraph is that at this point in time, it really isn't neither practicable nor advantageous for the State to try to compete these items, these services, when it is quite clear that no one knows who owns the equipment, and the equipment is a major part of this whole process. Thank you.

CHAIRPERSON TORRES: Any other comments?

BOARD MEMBER SAITO: The reason why I second the motion is because I think we have two petitions in front of us, and the only difference I see between the two of them is really that the first one is based first on the assumption on the interpretation that the PEG acts as a service provider for the utility, and in my mind it is easier to argue for an exemption because it specifically put in in one of the exemptions utilities.

In the second petition, the same disadvantageous arguments are made, but it doesn't have the added value in my mind of being interpreted as a utility, and that was the main -- I think you
have a stronger case to prove relative to being, well, being disadvantageous to the State. If I read the definition of the utility that was offered in the petition, I think that Olelo could very well fit within the definition of a telecommunications service provider, so I think that the test is passed in my mind as far as the definition of utility, and I think from that point on, it is a matter of is it advantageous to the State to give them the exemption?

And I did not consider the ownership of that, although I think that was offered in one of the reasons. I think just all the other reasons that Olelo put down, my sense of that is it is sufficient reason to grant them an exemption.

BOARD MEMBER MATSUMOTO: You know, I beg to offer a different opinion primarily because I think, number one, the use of the definition under the public utilities guidelines is somewhat clear and yet unclear, and in the clarifying statement in testimony that we had received from the cable tv administrator clarifies the fact that cable tv services is exempted from telecommunications definition, and I don't believe the PUC is the jurisdiction or agency when it comes down to cable
DCCA offers a franchise and the basis of cable organization contracts or franchise, and while Oceanic today is the only franchisee in the State, that doesn't mean that a competing franchise can't come in that DCCA will similarly require PEG type services for which it may or may not offer to Olelo, therefore, offering additional competing services on public access channels.

Is there a question of PEG value? In my mind, no. What Olelo offers is significant in terms of the community, that's without question in my mind, and this is not -- my statement about utility has to do with what's been submitted and the definition therefore, okay? And I just in good conscience cannot view this service as being utility or utility-like primarily because of what's been submitted and documented from other government agencies as well, and to be honest, carrying it forth, I honestly believe that if Olelo were to compete for this, Olelo would likely win because of many of the factors raised, similarly to the other PEG organizations, but that's a separate issue.

But relating to this particular request, I just cannot in good conscience find it in support
of a utility or utility-like service.

BOARD MEMBER SAITO: I think I agree with you that that's what the DCCA will find. I think what we are being asked in this petition is as a Board to make our own determination about the definition regardless of what some other agency had determined, being the regulating agency or not, and so I took a plain reading of that statute, that statute, and my plain reading as a Board member, I see that it qualifies as a utility.

VICE CHAIRPERSON BARDUSCH: I would also put forward the idea that, you know, what are we trying to, you know, to do for the State? We have a service, which the testimony goes to, that directly has no meaning monetarily. The value of the service is providing a voice to those that don't have the money to do that.

So this ties into the other concept of DCCA has a proven track record of never treating the PEG contractor as a contractor but rather as just, for a better word, another government agency which it can dictate whatever it wants to, withhold money, provide money, do this, take away channels, all in violation of the contracts such that it seems to me that to then try to say we will compete, and it is
advantageous for the State to compete for who will provide this service through the competitive process and then turn around that having made that, with the knowledge of having done that, we are then going to ignore the contractual relationship that we establish because that's not what we want to do.

And it is clear that's not what the State wants to do because they have incorporated into these the current overriding agreement with Oceanic the right to take away the money and do whatever they want to with the PEGs, so it is clear that they want to continue this basically free for all government agency type of activity with the PEGs, so it is that -- how is that advantageous to try to find somebody through a competitive process using the State Procurement Code to then turn that entity into a State agency?

BOARD MEMBER SAITO: I think I want to address the notion of a franchise. In here, the DCCA, I think we all pretty much agree whether it is legally stated or not, what they grant Oceanic is a franchise, and by their regulation of Oceanic, if they are not convinced that Oceanic is doing the job that it should be doing in providing cable service, they can take away the franchise.
I think maybe the unfortunate thing is that they haven't done that formal a process with the PEG access service provider as they should, and in the regulation that it has to provide, they should include service standards, something along those lines. They should also have the ability and make it clear to the access service providers that what they have is a franchise as an access service PEG, and if they don't fulfill the requirements, the franchise is going to be taken away. I think that's how to regulate this thing, and I think that is a more effective method than periodically competing it.

BOARD MEMBER MATSUMOTO: I personally agree with that system. I mean, if they were to change, DCCA, and this is not a session to be commenting on DCCA's performance or lack thereof, but I think if they were to look at their statutes or rules and regulations and look at a PEG contract as franchisees, that's a totally different -- that's a different situation, and should that happen, coming before the Board would be a totally different circumstance in my opinion.

BOARD MEMBER SAITO: That's one of the reasons for my questioning on Mr. Thomason. Again,
all we are approving here -- approve this appeal is to exempt them from the source selection methods part of the procurement code. They are still going to be subject to oversight by DCCA by law, and so what we need to do is give DCCA some direction or whatever you want to call it to exercise that responsibility in a more, you know, structured way so that they can have assurance of the kind of service that we are hoping to get out of a PEG access service provider.

I think that's a very doable process, and I think if they concentrate their efforts not on generating administrative rules, per se, but establishing the standards that will govern the performance of the franchise, I think everybody will benefit from that.

CHAIRPERSON TORRES: Any additional comments?

Okay. Could we ask the court reporter to once again reread the motion?

(Discussion off the record.)

MS. OHO: Motion asked to approve the petition for declaratory rulings submitted by Olelo on the grounds set forth in paragraph A.

CHAIRPERSON TORRES: Okay, so vote in
the affirmative if you support the petition as it is written and in the negative if you do not support the petition. Let's go ahead and take the vote. All in favor of supporting the petition, please say aye, raise your hands.

VICE CHAIRPERSON BARDUSCH: Aye.

BOARD MEMBER SAITO: Aye.

CHAIRPERSON TORRES: Opposed? Nay?

(Chairperson Torres, Board Member Matsumoto and Board Member Ho raise their hands.)

CHAIRPERSON TORRES: Two nays and two ayes, so petition letter A fails, the motion fails for that petition.

Now let's again with petition B, is there any additional discussion for petition B?

BOARD MEMBER MATSUMOTO: A motion.

CHAIRPERSON TORRES: I'm sorry, you are right, thanks. By the time I leave here, I will finally get that right.

Okay, could we get a motion, please, on petition B?

VICE CHAIRPERSON BARDUSCH: I will make a motion to approve the petition submitted by Olelo based on the reasoning set forth in paragraph four.
B.

CHAIRPERSON TORRES: Okay, all in favor of supporting petition B --

(Discussion off the record.)

CHAIRPERSON TORRES: Okay, she was correcting me, so she is helping me.

Okay, do we have a second to the motion?

BOARD MEMBER SAITO: I will second the motion.

CHAIRPERSON TORRES: Thank you, Russ.

Any additional discussion?

BOARD MEMBER SAITO: So now my discussion is that I thought that within the first petition, because we would have agreed that they are a utility or fulfill the definition of a utility and that that definition would entail some oversight by DCCA as a franchisee, that was to be a very solid basis for granting the exemption.

Here now if we grant them the exemption, who provides the oversight or how do they get treated? You know, as a utility, they can be treated as a franchisee, and oversight can be very tight. Here, the oversight is going to be a little bit harder to exercise, but I think all the arguments from the previous discussion on the fact
that it is not advantageous to the State I think still apply.

VICE CHAIRPERSON BARDUSCH: I would just request that I think the reason we are here is because the simple statement of, no, we don't approve the petitions A or B, that's not the end of the story, but I would advise the other Board members that having voted such way, that then it is on you to come forward with your rationale and for reasons why not and such that, you know, the denial of the petition can be supported by the State Department of State Attorney General because just saying no is not going to answer our problem.

BOARD MEMBER SAITO: Well, I have a point of order for the deputy attorney general. There was no argument, I don't think, or there was very limited argument on why the State was opposed, among who opposed the petition, so not having a public record as to why we voted -- I think we established a record between Mr. Bardusch and myself as to why we voted for the petition, but I don't know that we have established a record as to why we would voting against it, so do we need to revisit the first petition to establish on the record why we voted against it?
MS. OHARA: It would be helpful.

BOARD MEMBER SAITO: So I would move to reopen the discussion on petition one so that the people who are opposed to the petition can put on the record why they oppose the petition.

CHAIRPERSON TORRES: Well, I think throughout the discussion and the question period and so on that has gone by previously, I have made my position very clear that I do not support the petitions, number one, because I don't believe that Olelo meets the definition of a utility in my mind, and I also don't believe that there is the proper structure for them to be a utility in this state.

Whether that will happen in the future or not, I really can't say, but at this time, there is no structure for that, there is no regulation of public review, there's no procedures in place for the -- for the management of a utility, and that concerns me greatly that there's really nothing in place that would control this entity as they need to be if they are considered to be a utility. That's the value of having a utility and having an entity designated as a utility, that there are -- you know, there is structure, there are regulations, there are formalized procedures in place, and none of that is
in place at this time.

BOARD MEMBER MATSUMOTO: For me, again, I think I made it clear in my original comments and discussion about the basis of utility or utility-like. I think, quite honestly, if the existing designation of DCCA was a franchise, there would have been some level of linkage into a utility-like definition very clearly. The lack of that is problematic for me, okay, number one.

Secondly, I think that as a utility or as a franchise, I am putting myself in Olelo's place, in many respects, working towards that is beneficial because the purpose of the commission is also to protect the best interests of the public utilities, the best interests of the consumer which is also you have a consumer advocate advocating on behalf of the consumer to, number one, maintain rates in an appropriate manner but also to insure that the utility service is provided on an ongoing basis.

And there were comments made in testimony that concerns me where Olelo has to put out their own resources just to keep operating, and on that basis, you know, it tells me that the nature of the agreements are much more of a competitive
sourcing rather than the type of franchise type
arrangement that I believe exists with Oceanic.

Do I believe it's fair? Probably not.

But my responsibility here is to make an opinion
based on testimony and the information submitted
that we can consider relative to what's before us,
you know, and basically, again, if it was a
franchise type designation, which I don't believe
the contract is, I don't believe that as being
linked into the utility or utility-like provision,
and, therefore, that's why I voted no.

BOARD MEMBER HO: Yes, I agree with
Keith and Pam. I was one of the original Board
members, and I have heard all the testimony before.
It was heart wrenching, and we sat here and listened
to everything, and if I were in your position, I
would feel the same way you do, but like the rest of
the Board members, I have to take a look at it and
say, you know, really, you are not a utility. It is
a contract. It is un-utility-like. It is not
regulated. I mean, you know, the same thing, go
down the row, and that's just why I voted against
it.

BOARD MEMBER SAITO: Okay, so my other
comment to that question is that, as I said, we had
to first determine whether or not they are a utility, so I think we could without -- the only
definition that has been made available to us and has been presented in the record is out of the statutes, so I think I would like to have a definition from the rest of you as to how you are making the determination that it is not a utility unless you are relying simply on the opinion of the DCCA that they are not because they did not explain what the definition was.

The only definition that we have was in this petition, so I am very curious as on to how you made the determination that they are not a utility and if you are relying on something other than the definition in the petition because the definition in the petition clearly states that a telecommunication service provider is a utility. Okay.

CHAIRPERSON TORRES: Well, I really don't have any more comments on that. I think you mentioned a couple of things, though, and here I am making a comment. You mentioned a couple of things that went into my decision process. One of them was the three letters that were sent out, and essentially DCCA pretty much, as I said earlier, seemed to wash their hands of the situation. They
took no responsibility for being the regulator of
the PEGs. They said, you know, we don't want to
address it in this one bill. We are going to
address it in a future bill. It's just too complex
for us to deal with at this point.

And, again, the structure is not there.
It doesn't fall under the normal plain understanding
of what I think of as a utility. I think one of the
advantages of the utility is an entity that has
infrastructure that essentially nobody else has, so
there can be no competition. I don't see the
structure. I don't see the regulation part of it.

I think I have made my comments
throughout the testimony, and I don't think there
can be any question why I feel this way. I think,
you know, when we take a vote here, then my vote
will speak for itself. We have not voted on the
item two.

VICE CHAIRPERSON BARDUSCH: I was just
asking where we were in this whole process, I guess,
is what I was asking.

BOARD MEMBER SAITO: So that's a
question from earlier. I think it was stated
earlier on and we are reminded that our decisions
are to be based on the evidence that's presented in
the record, and, again, I point out that on the record and on the evidence, the only definition of a utility was in this petition, so we need to rely on the record and the evidence that was provided to us.

So I would just ask the question, given that, whether the Board would consider taking another vote, or whether it is just the discussion has been reopened, the vote stands?

CHAIRPERSON TORRES: Well, first of all, I don't wholly accept the definition that was provided by the petitioner. You know, they have taken a definition, and I am not sure that I totally agree with the logic that was provided and who the drafter was on that particular document. They state that the procurement regulation, and that's what I am concerned with right now, does not provide a definition of utility for procurement purposes, so that's my rationale. Whether you accept that or not, that is my rationale for it.

I don't accept that definition, and the definition is -- I don't know, what's the proper word? There are parts of it that are taken out of the definition. I understand that was probably done for convenience sake, but I think it is an important definition, and I'm not sure that if we had the
entire definition in front of us we would all feel so strongly about it. Parts of it have been excerpted, and I have mixed feelings about that.

VICE CHAIRPERSON BARDUSCH: I think you are missing the point that he is trying to make is that in order to defend the decision, if the decision is based on things that weren't presented into evidence, then that's going to be very difficult, and that's I think, number one, that's why I think -- where he is trying to go with.

As far as, you know, the idea that there is no regulation, that's kind of contrary to what the DCCA is doing, and the fact that, you know, your comments was he doesn't want to treat it as a utility. Well, of course, if the only people that can think of this as utility means that you have to be regulated by the PUC, DCCA doesn't want it to go over there because then they lose one of their toys. If they lose their toy, they don't have much fun playing.

They are controlling, totally controlling the PEGs, and the fact that they are not doing their job and have not done their job and set forth the regulations that they are supposed to have set forth I don't think is a penalty or provides a
valid reason to say that the PEG is not really
utility-like because of the fact that they are
regulated, they are regulated by a public entity,
just like with the PUC, not the PUC, but like the
private entity.

And some of the differences might be the
PUC regulated entities, they charge their customers
directly. They go directly to the person. The PEG
doesn't charge the people directly. The PEG gets
the money from whatever the overall franchise
agreement negotiated between Oceanic and the State
says, and they get their money from how much the
State doles out to them. The State isn't even
guaranteeing how much they are going to dole out to
them.

So it's a different concept between, you
know, utilities as set forward under the PUC and the
utilities as the definition was provided, and it's
difficult to try to defend an action when you come
-- when you have a definition put forward, and then
to come up with a definition on your own that's not
provided for in the testimony. That I think is what
Russ is trying to say.

CHAIRPERSON TORRES: Okay, I think it is

in evidence that we have three letters from

Ralph Rosenberg Court Reporters, Inc.
2460 American Savings Bank, 1001 Bishop Street
Honolulu, Hawaii 96822 (808) 524-2090
different organizations. One of them happens to be
the PUC, which stands for the Public Utilities
Commission, which states that Olelo is not a
utility, the service is not a utility. We have one
from DCCA, and if I remember correctly, the
petitioner when questioned stated that there are no
written regulations from DCCA that guide them. I'm
sorry. I saw a look of . . .

MR. THOMASON: I believe the record will
reflect that we said that the regulations were found
to be insufficient by a Circuit Court, and that they
are now under draft.

CHAIRPERSON TORRES: You did say that
later, but earlier you did say that there were no
written regulations.

MR. THOMASON: There is a written
agreement that the DCCA uses to administer a
relationship between DCCA and a PEG, so there is a
body of written text, it is not sufficient to meet
our administrative procedures act rules, however, it
is not in absence, and to the extent I may have said
there was an absence of rules or written
regulations, that was incorrect.

CHAIRPERSON TORRES: Okay, I'm sorry if
I misunderstood that. What we have is insufficient
text. We don't have formalized regulations; is that correct? Am I correct in saying that?

MR. THOMASON: I cannot say for a fact. My understanding is that the DCCA has begun the process of promulgating rules. It is a time consuming process, and it involves public hearings. I am not sure where in that process they are, but they are diligently pursuing the issuance of regulations.

CHAIRPERSON TORRES: Okay, thank you for that clarification. I appreciate it.

So that goes to my decision process as well, that the primary organizations, and I apologize, I can't remember who the third organization was that we sent that letter to. Do you remember, Cheryl?

MS. OHO: It is with the minutes, the records are with the minutes, and it is an attachment.

BOARD MEMBER HO: It is the PUC, it is the PUC.

MS. OHO: Division of consumer advocacy --

ADMINISTRATOR FUJIOKA: And cable television.
MS. HO: -- and cable television.

CHAIRPERSON TORRES: Okay, so we have three letters that are a part of the record and a part of the file and the evidence, and that has gone a long way to convince me also to vote the way that I have voted on the first petition and the way that I may vote on the second one. Any further comments and questions? Any discussions of the Board?

VICE CHAIRPERSON BARDUSCH: I would just say that in the PUC letter, while they say it is not regulated by the PUC, and I quote here, it says, however, PEG access providers generally conform to the description of utilities under the definition provided in HRS 269-1 because they manage equipment for public use or, and, you know, as politely as I can say it, wait a minute, just like in Mr. Thomason's comments, dot, dot, dot, the transmission of telecommunication messages. So, you know, I just let it go at that.

CHAIRPERSON TORRES: All right, I hate to ask one more time. It looks like the discussion is complete, unless anybody else wants to make a comment? Yes, Pat?

MS. OHARA: The comptroller had sort of reopened petition number one. Are you now done with
the petition number one and moving back to petition number two?

CHAIRPERSON TORRES: Are you saying, then, that our vote on petition number one is invalid?

MS. OHARA: No. I'm saying that you already voted on petition number one and --

CHAIRPERSON TORRES: So, yes, we are moving on to petition, I think it is listed as B, petition B.

MS. OHARA: Four B.

CHAIRPERSON TORRES: Correct.

MS. O'HARA: Thank you.

CHAIRPERSON TORRES: Yes, thank you.

BOARD MEMBER SAITO: Before we do that, there's a question raised, so could I ask the Chair to ask all Board members whether given the reopening of the discussion whether it will consider changing their vote or whether they are standing by their vote of the first time?

BOARD MEMBER MATSUMOTO: Can I clarify something? Member Bardusch, Vice-Chair Bardusch mentioned that the Public Utility's letters stated that they believed that Olelo generally conformed to the description, and if you read what it says in
subparagraph three, it says Olelo in their petition reasons that it, A, stands in place of Oceanic for the designated PEG access channels, and, B, generally conforms to the description of utilities under the definition provided in HRS Chapter 269-1 because it manages equipment for public use for the transmission of telecommunication messages.

Continuing on the second page, it says in response, we note that the definition of the telecommunication services set forth in HRS Chapter 269-1 specifically excludes cable services from the definition of a public utility.

CHAIRPERSON TORRES: Thank you. Okay. Do we have, point of order, I guess, we have a motion for paragraph B; is that correct? And we have a second, and it is time to call for the vote unless there are any other comments.

VICE CHAIRPERSON BARDUSCH: I do.

CHAIRPERSON TORRES: Okay.

VICE CHAIRPERSON BARDUSCH: I think that in reading that, I think it is without question that the PUC's comments that it is not a utility is because it is not cable services because they can't change the form or content of information sent and received, this stuff, it is quite clear that
what the PEG providers are doing on many times is
providing an open form whereby viewers call in and
transmit verbal and electronic, electromagnetic
transmissions back and forth between the speakers
who are sitting in the place talking with their
viewers such that it is not just the example of
cable tv where you pay your money and get a movie in
return, but these are actually open forum where the
transmissions that are going through the telephone
and then out over the transmission lines will in
fact be telecommunications service regardless of how
they have structured their comments because I don't
think that they took that into account when they
were giving their opinion because of the fact that
the services provided by the PEG providers are in
fact more than what is being normally provided by
cable services that they are looking at.

CHAIRPERSON TORRES: Okay, there are any
other comments or questions from the Board?

Okay, let's call for the vote. This is
the vote for paragraph four B.

BOARD MEMBER SAITO: I asked if the
Chair would consider asking for another vote or if
the vote stands, so the Chair has decided not to
call for another vote.
CHAIRPERSON TORRES: Well, I actually just forgot. I got lost somewhere here along the way. Okay, I have been requested to ask all of the Board members whether they would consider changing their vote based on additional discussion for paragraph four A. I am not quite sure how we would do this, but is this an informal questioning?

MS. OHARA: I think you can just ask each member.

CHAIRPERSON TORRES: Okay, Darryl, would you consider changing your vote?

VICE CHAIRPERSON BARDUSCH: No.

CHAIRPERSON TORRES: Okay, I will not consider changing my vote.

BOARD MEMBER SAITO: I wouldn't consider changing my vote.

CHAIRPERSON TORRES: I'm sorry, you would or would not?

BOARD MEMBER SAITO: Would not.

BOARD MEMBER MATSUMOTO: (Mr. Matsumoto shakes his head from side to side.)

BOARD MEMBER HO: (Ms. Ho shakes her head from side to side.)

CHAIRPERSON TORRES: Okay, so the voting remains the same on that paragraph, and, again, that
motion has failed.

Okay, moving on to paragraph four B, please be sure that you are voting in the affirmative if you support --

BOARD MEMBER SAITO: Chair? I think we have opened the -- we made a motion and seconded it and started the discussion. I don't think we necessarily concluded the discussion and, again, for the purposes of putting on the record the rationale behind the votes when we finally vote because we haven't talked about specifically the second petition.

CHAIRPERSON TORRES: I thought we did talk about it specifically.

BOARD MEMBER SAITO: Not when we opened up the first motion. The first motion was for the first petition. It has to be voted on. Now we are on motion for the second petition.

BOARD MEMBER MATSUMOTO: (Inaudible.)

CHAIRPERSON TORRES: Okay, as a correction, let's begin discussion on item four B. Is there any discussion, any questions, or any comments from the Board members?

BOARD MEMBER SAITO: Okay, again, my understanding is that we have to put on the record
the judge based on this, whatever agreement they are
it is more advantageous to the state to operate with
them as an agency, to me speaks loud and clear that
in the past contractual actions, basically treating
and the state through the DCCA's conduct
from the state's standpoint.

is trying to figure out what are we trying to do
just one of the key problems, but the other problem
this that the ownership issue of the equipment is
would say that I would add that in voting to approve

VICE CHAIRPERSON BARROSCHE: OKAY, I
are essentially the same as for paragraph four A.

CHAIRPERSON TORRES: My comments on this
the business. That's my thinking.

to have them subject to the code given the nature of
that it is not advantageous to the state necessarily

viewing audience that it is intended for, I think
this is not a service that would be paid for by the
the fact that as a result of that and the fact that
et cetera, but iteratively the difficulty would be and
to the arguments, and not necessarily the ownership.
franchise once looked into it, but having listened
part to because it doesn't have the determination of a
this is not quite as strong an argument for a
what our thinking is when we vote, so in my mind,

25
24
23
22
21
20
19
18
17
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1
doing and however they are doing it, than it is to
try to pretend now at this last minute we can
establish some kind of competitive award and
procedures to go forward that when the whole concept
is, here, we give you money, and you allow everybody
to access the equipment, and at this point in time,
we don't even know who owns the equipment.

And to me, I don't see how based on all
the testimony given that we can say that it is more
advantageous to the State to go through the
competitive process rather than just let DCCA handle
this whole matter the way they have been doing it in
the past.

CHAIRPERSON TORRES: Does anybody else
have any comments? Do you have another comment,
Russ?

BOARD MEMBER SAITO: I do. All I'm
trying to do is make sure that whatever decision we
reach stands up to any kind of challenge, and I
think we are all going to be asked to vote, and I
think we all should state for the record the reason
why we are voting one way or the other, so to be
silent on something, I mean, I think we are just
begging to have our decision overturned.

BOARD MEMBER HO: Well, my reasons for B
would be the same as why I would voted for A.

BOARD MEMBER MATSUMOTO: I have to tell you that for me these questions are hard, quite honestly, because there's a lot of unknowns in this. There's an element where I do honestly believe it may be impractical to rebid.

On the other hand too, there's a part of me that feels that the ability to outsource and compete it may also help reconcile some of the discrepancies that exist currently in the way the whole process is going through. It may actually force DCCA into a decision making process to both create performance standards as well as address some these asset issues which are significant, and there's where I am conflicted because, you know, I want to see it reconciled because that's what's going to make it better long term, and this is not -- the problem I have is if you are going to go for short term, it's an easy fix, but we need to solve this long term, and that's the problem I have, and to be honest, I'm not really sure how I am going to vote right now, but that's the discrepancy.

I mean, we can't tell DCCA you screwed up. I mean, that's for them to decide or the courts to decide, and I think the testimony and the
decisions of prior courts that sort of have been
told to them in one way, shape, or form already.
But for me, it's really not an easy choice because,
as I said, there's positives on both sides of the
fence at this point.

BOARD MEMBER SAITO: Daryle Ann, on the
first vote, your decision was based on whether or
not they were a utility. Whether or not they are a
utility is not a factor in the second petition. The
second petition is just purely simply on the
practicability and whether or not it is advantageous
to the State.

CHAIRPERSON TORRES: You know, I
understand your point on that, Russ, I know you were
addressing that to Daryle Ann, but I had said that
mine was essentially the same also, but it did
discuss the practicable or being advantageous to the
State, but I would like to add on this that I don't
believe that we can say whether it is practicable or
whether it is advantageous until we actually go
through the competition and until we see what comes
out in the RFP, so I don't think that's a
determination that we can make based on pure
speculation, so that's another concern that I have
on this particular issue.
BOARD MEMBER SAITO: So I would state that I disagree with that. I think that's what we are being asked to do is to make a determination, and based on the evidence that was put before us, I think we all need to make a determination, so if you can't make a determination, that's fine, but the rest of us I think are being asked to make a determination.

CHAIRPERSON TORRES: Please don't put words into my mouth. I mean, essentially, I am saying that we can't determine whether something is practicable or advantageous. I'm not saying I can't make a determination on what I believe on this particular paragraph, so I think those are two different issues. I can clearly make the determination.

Darryl?

VICE CHAIRPERSON BARDUSCH: When you are done.

CHAIRPERSON TORRES: Yeah, I am done.

VICE CHAIRPERSON BARDUSCH: Well, I guess in trying to convince other people to support this one, this exemption, I know you sat through very patiently while I brought up all the different exemptions, and people came in and testified for
them, and they put forth just really flimsy excuses that convinced you that it was, you know, it was too impractical to compete dog food, it was too impractical to compete fresh meat, and that they actually changed that. They were just one after another.

We couldn't compete library books, and you bought that argument. You bought one argument after another that was just so flimsy, and I mean, I was almost to the point where I was considering wearing the brown shirt and burning books because the argument wasn't how to buy the books. Their argument back to us was we were telling them what books to buy, which wasn't the case.

So I would say that if we are willing to give exemptions out for those, what I consider rather unsupported arguments, now this group comes in front of us and shows us, you know, valid arguments for why the exemption should apply because of all of these difficulties, for us to sit here and say that, okay, that's not good, but these other ones which were really lame are good, I just have a hard time with that.

And the idea that we don't know because in the future we don't know what's going to happen,
we have testimony four years of nothingness, four
years of nothingness of nothing happening, and, you
know, I think that's sufficient evidence to show
that this is just too complex, and it is not
advantageous for the State of Hawaii to try to
compete these requirements, respectfully.

CHAIRPERSON TORRES: Too complex? Okay.
I am not sure that I agree with that. And going to
your issue of the other exemptions that we discussed
in previous Board meetings, one of the reasons that
I was perfectly content to let those exemptions stay
on the book is that traditionally in procurement,
exemptions are determined through a trial basis.
You go out, and you compete something on a repeated
basis. If you cannot get competition for it or then
you see that it is not advantageous to compete it or
that there's only a single source after a trial,
then past history shows us that an exemption is
warranted.

And that's pretty much what I am saying
here is that I think until we try it at least one
time, it's one thing for the vendor to say, hey,
there's no competition out there, there's nobody, I
have heard that a hundred times in previous
procurements. We go out there, and we try to
compete, and we find competition, and sometimes we
find vendors who are far better experienced and far
better qualified than the previous ones we had.

And I'm not implying that that is what
would happen in this case. It's not a comment on,
you know, the quality of your services. It's just a
reflection of what I have seen historically in
procurements. You go out, you give it a try, you
give it your best effort, you create a good RFP, and
you see what happens to it. You don't like the RFP
the way it is right now, if the vendor doesn't like
it, they have a duty to come and work to change it.

Yes?

BOARD MEMBER SAITO: Just food for
thought, I think in the environment that you are
from, that may have been true for most of the
exemptions. I think in the case of the Hawaii state
procurement code and its exemptions, that is an
assumption, and in many cases that didn't happen.
The exemptions were there because logically they
were determined that they are not practicable and
not advantageous before they went and tried it.

CHAIRPERSON TORRES: Okay, well, I am
basing -- I am basing my comments essentially on my
own personal experience, and I don't have a lot of
experience with State procurements, but I do know how it is determined in the Federal government, and I have seen a general trend on the Procurement Board, the State Procurement Policy Board, that we are going very much in the direction of Federal procurement. That's my personal opinion, and I think that it is not a bad example to use.

BOARD MEMBER HO: Can I just say something?

CHAIRPERSON TORRES: Sure.

BOARD MEMBER HO: While I agree that, you know, it may be quite complex to, you know, come up with an RFP or come up with a contract or, you know, everything is split, everything's down the middle, you know, for us to say we are not going to do it just because it is going to be overly complex for the State is not right.

You know, I do agree with Keith that, yeah, it may -- if we put it into an RFP, it may push things along, it may make it where DCCA has to come to some type of, okay, here is the split, and this is what is going to happen, and here it goes.

I also agree with Pam that when you put it out for a -- if we do put it out for a competitive type of bid, there may be somebody
that's better, there may not. We don't know until we do that. But to just turn around and say, no, you're exempt; no, we are not going to do it; no, it is too complex; no, we can't do this, I don't agree with that. That's not -- that's not what I agree with. You know, yes, I look at it, we have a fiduciary responsibility to the State on some -- on an RFP. It may not work. It may work. We don't know that. We haven't even tried it.

BOARD MEMBER SAITO: Okay.

VICE CHAIRPERSON BARDUSCH: Okay.

BOARD MEMBER SAITO: I want to respond to what Daryle Ann's saying. I think what it is is that we are focusing on what the law says, and the law says in those situations where it is not practicable and not advantageous, and so we are using some of these examples like it is complex or it is this or it is property rights and everything else. That's the sum total of those things that leads you to a conclusion one way or the other that it is not practicable and it is not advantageous, so to focus on a single word that is used that it is complex, I think this is one of several factors that are being considered.

I have read the petition where it
decided all of those things that in their minds made it impracticable and not advantageous, and having gone through that, I am convinced that it is not practicable and it is not advantageous. There's not a single item that leads me to that conclusion. It is the sum total of the arguments presented in this petition.

VICE CHAIRPERSON BARDUSCH: And I would just ask that in providing my analogy, I was bringing up the other exemptions because if I bring more -- the reasons why they, you know, put forward that was, let's say, we are at the -- about the books, and we could see buying the books, they were going to all of these different vendors, and when we asked them, they said we could get the books, the same books from different vendors, but we just want the right to choose whoever vendor we want to to go get those books, and that's why we can't be in the competitive process, and that was sufficient. And please don't say that's not what it was because then I am going to get out the memos that say that because they even had --

So I mean, with that kind of a statement that we had the other one where for the dog food, the only reason why he wanted to be exempted was
because the person who was helping him for the sole source wasn't approving the sole source, and that was wrong. But it was still allowed to continue with the exemption such that in your statement, Pam, we do things, and then we granted the exemptions, that's clearly not how the State is doing.

As Russ said, it is just a process of it was there in the past, it is allowed, and it keeps going and keeps going, such that I am just asking that when we approved exemptions for other people and other items, we did that on a lot less rationale than what is being put forward here, and I would just ask that if we go back and think and say, well, if we only required certain people to provide A and the current people providing A, B, C, D, and E, why is it that we are not granting the exemption to the current person as opposed to the past people?

CHAIRPERSON TORRES: Okay. I think -- hello? It is so nice to have options. I like that, two microphones is good.

Well, I think we have gotten off the track. I think talking about exemptions for dog food is not really helping us to reach a conclusion here.

VICE CHAIRPERSON BARDUSCH: Okay, wait,
wait.

CHAIRPERSON TORRES: Let me finish. I let you speak without any interruptions. Let me -- let me finish what I have to say, and it makes it easier for our recorder too if only one of us is speaking at a time.

I think we are off the track. I feel very comfortable that I have considered the arguments that have been put forth here, that I have considered every piece of testimony that I have heard, and I feel very confident in the decision that I am making. I think that I as well as the other people on the Board have provided their rationale, and I don't think there's any need for any additional rationale unless other people on the Board feel compelled to give additional information, so I for one am ready for the vote. If we have additional comments, we will entertain those, but please, let's limit them.

VICE CHAIRPERSON BARDUSCH: Okay, I really, really find it offensive your manner of characterizing the speech and the testimony that I put forth. I put forth a very logical argument that this Board has a record of granting exemptions, and I put forward what those exemptions are. Now, I
cannot help it that the example I put forth seems
silly, but it is factual, and the fact that you make
a condescending comment about that is really
offensive to me.

And I think that we should focus the
idea on what I am trying to do, which is if we grant
exemptions, we should grant exemptions on the same
standard to everybody. We shouldn't just grant
exemptions on one standard if they are preexisting,
and then if there's a new request, we have some
higher standard for an exemption. That's what I am
trying to say. And this keeps going in and out.

CHAIRPERSON TORRES: Okay, well, if I
offended you, I apologize for that. I don't agree
with your position that exemptions should be across
the board under the same standards. I think there
are many different standards for granting
exemptions, and I have considered what's been
presented here, and I will vote according to what I
heard in the testimony and what I saw in the
documentation and what I saw in the letters that
were presented from the three organizations that I
referenced earlier, and I can make an independent
decision, and I intend to do that in this case.

So, again, may I call for the vote?
Okay. If you support paragraph four B, the petition paragraph four B, please vote in the affirmative by showing your hands.

(Vice-Chairperson Bardusch and Board Member Russ Saito raised their hands.)

CHAIRPERSON TORRES: If you do not support paragraph four B, the petition identified in four B, please signify by raising your hand.

(Board Members Daryle Ann Ho and Chairperson Torres Pam raised their hands.)

CHAIRPERSON TORRES: And we have --

BOARD MEMBER MATSUMOTO: I abstained.

CHAIRPERSON TORRES: Did you abstain?

BOARD MEMBER MATSUMOTO: I abstained.

CHAIRPERSON TORRES: Okay. Pat, point of order, could you explain what the results are in this situation? Would you say that this motion, it's neither been denied or affirmed?

BOARD MEMBER OHARA: The motions fails because you only have two affirmative votes. You need four.

CHAIRPERSON TORRES: Okay, for the reason that our attorney mentioned, because we did not have four affirmative votes, the motion has...
failed. Thank you.

BOARD MEMBER MATSUMOTO: The rationale for that is because we have seven -- we are supposed to have seven members.

MS. OHARA: Yes.

BOARD MEMBER MATSUMOTO: And four is the number?

MS. OHARA: Yes.

BOARD MEMBER MATSUMOTO: Just to make sure.

CHAIRPERSON TORRES: Okay, I would like to say --

BOARD MEMBER MATSUMOTO: Pam, let me explain something, the reason why. You know, I said earlier, I am having a hard time on this, right, and I really am, I really am. I am trying to look at this other bill on the broadband just to get a little more information, and I just can't reconcile the discrepancy, and that's the reason why I abstained.

CHAIRPERSON TORRES: Okay, I would like to thank everybody for --

MR. THOMASON: May I?

CHAIRPERSON TORRES: Certainly.

MR. THOMASON: The first statement that
we made when I stood up here was that our understanding is that there needs to be a sufficient record created for a Circuit Court review.

Normally, there would be an identification of the evidence that you received to support the conclusions that you reached and the legal analysis that supports the conclusions reached. I would ask that, although you have a vote on the motions, that at the end of this meeting or in a future meeting you go into an executive session and consult with your counsel.

We are asking for a declaratory ruling, we are asking for a ruling, not a vote on a motion, and we request that the Board consider the nature of the petition that is presented to the Board and recognize that this is an exercise of a constitutional right defined by a statute, and I thank the patience of the Board and recognize the diligence, but we are not asking for a vote and an opinion. We are asking for the Board to issue a declaratory ruling right now.

CHAIRPERSON TORRES: Thank you. I believe that will come from our attorney, is that correct, Pat? A declaratory ruling, would you be providing that?
MS. OHARA: I will be drafting it.

CHAIRPERSON TORRES: Yes, that will come from our attorney and not from the Board. My understanding of procedures is --

MR. THOMASON: I would submit to you the attorney general, the deputy attorney general works for you, and in the final draft when it is in writing, then the Board would vote and determine if they sustain or support those terms, the findings of the fact and the conclusions of law. All we are asking is that -- and we recognize how difficult these things are, and we wouldn't have written it if we didn't believe that they were hard. We ask that the Board please address carefully and consider the motions. Our preliminarily sensing that the Board write the drafting of the ruling, the declaratory ruling, is what requires the Board to approve. The AG does not issue the --

CHAIRPERSON TORRES: I would expect that the attorney will echo and support the voting opinions of the Board, of each of the Board members. Now, if that's --

BOARD MEMBER MATSUMOTO: I think, Chair, I think the issue is that now that we have laid out publicly, heard testimony and laid out publicly the
petitions, the Board needs to formally request the
Attorney General to write out the declaratory ruling
that we would act on at a subsequent meeting for
formal approval and filing, and I believe that's the
process; is that correct?

MS. OHARA: (Counsel nods head up and
down.)

BOARD MEMBER SAITO: And I guess then I
have a question because there was a lot of testimony
today and a lot of discussion. So the declaratory
ruling in itself, the draft, needs to come out of
the evidence that was provided and the testimony and
the discussion, or can it go beyond that?

MS. OHARA: I don't understand what you
mean by beyond that.

BOARD MEMBER SAITO: Well, because we
have all the stuff that was filed in writing, right,
as the evidence, and we have -- we are going to have
transcripts of all the discussion, so it is from
those -- regardless of what the votes were, it is
from those documents and from the evidence that you
will draft the declaratory ruling and vote on the
petitions, and that the Board at a future meeting
will vote on, is that --

MS. OHARA: No. The draft will be based
on and reflect the voting and reflect the evidence in the record, and then the draft does not automatically become valid. The Board will have the opportunity to review it for accuracy or comment and approve the final version of the draft. But basically, it is not a -- the draft does not give you an opportunity to revisit the issue. It's just is it a correct accurate memorialization, a recordation of what has happened here?

CHAIRPERSON TORRES: Pat, as the Chair for the Board, I request that you draft that up and have it available to us at the next meeting so that the Board can review it.

MS. OHARA: I would like to wait for the transcript and make sure that I have a correct record.

CHAIRPERSON TORRES: Okay, when can the transcript be expected?

MS. REPORTER: Two weeks.

CHAIRPERSON TORRES: Two weeks.

MS. OHARA: Okay, the next meeting is (inaudible).

CHAIRPERSON TORRES: Okay, that sounds good. Thank you. Okay, I would like to move on to agenda item five, but in case we have people who are
leaving, I would like to thank everybody for participating, and I would like to thank our court reporter very, very much for your assistance.

(Hearing concluded at 4:57 p.m.)
CERTIFICATE

STATE OF HAWAI'I

) SS.

CITY AND COUNTY OF HONOLULU 

I, PATRICIA ANN CAMPBELL, CSR 108, Notary Public, State of Hawaii, do hereby certify:

That on January 21st, 2010, the hearing was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

I further certify that I am not an attorney for any of the parties hereto, nor in any way concerned with the cause.

DATED this 9th day of February, 2010,
in Honolulu, Hawaii.

PATRICIA ANN CAMPBELL, CSR 108
Notary Public, State of Hawaii
My Commission Exp: March 8th, 2010

Ralph Rosenberg Court Reporters, Inc.
2460 American Savings Bank, 1001 Bishop Street
Honolulu, Hawaii 96822 (808) 524-2090