

# 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. Thomason, 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 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.*

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.

Agenda Item IVb - *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).*

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 rate 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 V - *Announcements*

Mr. Aaron Fujioka 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,

2/25/10  
Date

Russ K. Saito  
RUSS K. SAITO, Secretary  
Procurement Policy Board

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

## **PROCUREMENT POLICY BOARD**

Aloha Stadium, Hospitality Room  
99-500 Salt Lake Boulevard  
Honolulu, Hawaii 96818  
Regular Meeting  
January 21, 2010  
1:00 p.m.

### **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](mailto: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

1 APPEARANCES:

2 For the Procurement Policy Board:

3 PATRICIA OHARA, ESQ.

4 Deputy Attorney General

5 Department of the Attorney General,

6 State of Hawaii

7 Administration Division

8 425 Queen Street

9 Honolulu, Hawaii 96813

10  
11 Procurement Policy Board:

12 Chairperson Pam Torres

13 Vice-Chairperson Darryl Bardusch

14 Board Member Leslie S. Chinen

15 Board Member Russ K. Saito

16 Board Member Keith Matsumoto

17 Board Member Daryle Ann Ho

18 Aaron S. Fujioka, Administrator

19 Ruth E. Yamaguchi, Assistant Administrator

20 Cheryl Oho, Assistant Administrator

21  
22 Also present:

23 Terry E. Thomason

24 Keali'i S. Lopez, 'Olelo Community Media

25 Jay April, Akaku Maui Community Television

1 Also present (continued):

2 Justin Billings

3 Michael Paz

4 Stanton Mato

5 Kevin Takesu

6 Wayne Yun

7 Randy Gomoban

8 Michele Paz

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1                   CHAIRPERSON TORRES: I would like to  
2 call the meeting to order at this point, and before  
3 we begin with the official agenda items, I would  
4 like to mention to everyone that we do have a court  
5 reporter here with us today, and she will be taking  
6 down all testimony verbatim. So it is going to be  
7 very important that everyone speak clearly, that  
8 they identify themselves before they speak, and that  
9 only one person at a time speaks so that we can get  
10 down all of the testimony accurately. So if you  
11 have any questions about that, please raise them at  
12 this point.

13                   Okay, no questions, so we will begin  
14 with the item two of the agenda, which is approval  
15 of the minutes from the meeting of October 15th,  
16 2009. Do we have any additions or changes to be  
17 made to the minutes?

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

20                   (Vice Chairperson Bardusch motioned.)

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

23                   (Russ Saito seconded the motion.)

24                   Thank you, Russ. Russ has seconded the  
25 motion. All in favor.

1 (Everyone raised their hands.)

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

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

14 Move that we adjourn for the executive  
15 session?

16 BOARD MEMBER SAITO: Second.

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

19 BOARD MEMBER HO: Aye.

20 BOARD MEMBER MATSUMOTO: Aye.

21 BOARD MEMBER SAITO: Aye.

22 VICE CHAIR BARDUSCH: Aye.

23 (Recess was taken.)

24 CHAIRPERSON TORRES: Okay, the meeting  
25 is called to order again after the executive

1 session.

2 The next item on the agenda for Board  
3 action is item four A, which is petition for  
4 declaratory rulings submitted by Olelo Community  
5 Television. Do I need to read this, or do we want  
6 this in the record? I guess we do. Let me read it.

7 Olelo Community Television petitions the  
8 Procurement Policy Board pursuant to Hawaii Revised  
9 Statutes HRS, paragraph 91-8, for a declaratory  
10 ruling stating that contracts with entities to  
11 manage and administer public, education, and  
12 government, PEG, access channels are contracts for  
13 utility services within the meaning of HRS paragraph  
14 103 D-102(b)(4)(F) and for which the competitive  
15 award procedures of HRS Chapter 103 D are neither  
16 practicable nor advantageous to the State, and so on  
17 that basis, such contracts are exempt from the  
18 application of the State Procurement Code.

19 Now, before we go into any testimony, I  
20 would like to just discuss very briefly how we are  
21 going to proceed with testimony at this point. When  
22 we begin again with the actual testimony, we will  
23 have Olelo's representative go first to explain the  
24 petition to the Board, and then there may be  
25 discussion and questions after that point. After

1 discussion and questions are completed, at that time  
2 we will ask for any public comments. At this time,  
3 it does not look like we have a lot of people  
4 testifying, but in order to maintain fairness to  
5 everyone, we have decided to put a limitation on  
6 public testimony of four minutes per actual  
7 testimony.

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

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

21 And because of our court reporter and  
22 just because it is good general practice for  
23 meetings, we will take a break every hour after  
24 approximately fifty minutes, and it will be a  
25 ten-minute break.



1                   Okay, we would like to begin the  
2 testimony with Olelo's representative.

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

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

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

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

1 the person.

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

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

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

24 However, that same statute does not  
25 assign to PUC regulatory authority over the

1 transmission of telecommunications messages, so what  
2 we are saying is it is a utility, because they  
3 transmission -- they are transmitting  
4 telecommunications. It has not been assigned to the  
5 PUC to regulate, and that's what, in a separate  
6 letter, we commented to the Chair that we feel that  
7 PUC's opinion is not relevant to the Board's  
8 consideration.

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

19           The point, to distill it down into a  
20 single sentence, is because DCCA regulates  
21 everything from how much the PEGs are paid to how  
22 the PEGs conduct their activities, you are not able  
23 through competitive practices procedures of the  
24 procurement code to gain any advantage in price or  
25 quality of performance or changes in performance.

1 That's all done through DCCA's activities and  
2 authority under a separate statute.

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

10 BOARD MEMBER SAITO: Thank you.

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

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

16 VICE CHAIRPERSON BARDUSCH: Okay, and  
17 looking at these rules that I have which are Title  
18 16 440 that they just passed out, it says that the  
19 director, I'm assuming, of DCCA can continue this  
20 agreement for like five, a minimum of five years and  
21 a maximum of twenty years.

22 MR. THOMASON: That is correct.

23 VICE CHAIRPERSON BARDUSCH: Is it twenty  
24 years?

25 MR. THOMASON: I believe also in many

1 papers that the Board has had submitted to it in  
2 various stages of this process, I think over three  
3 years now, was a legislative panel that was  
4 established two legislative sessions ago that  
5 addressed the authority of the director of DCCA and  
6 submitted their own findings and conclusions  
7 recommending legislative action to make the PEG  
8 access agreements not subject to procurement  
9 procedures.

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

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

14 BOARD MEMBER HO: 1988.

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

1 Oahu.

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

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

16 It seems to me a little bit of a  
17 disconnection to be sitting there saying at this  
18 point in time, competitive procedures of the State  
19 Procurement Code would be utilized, and at the same  
20 time, if we look in the procedures more directly on  
21 the PEG access services, it seems to say that maybe  
22 those terms in the State Procurement Code are  
23 subject to the DCCA person consulting with the cable  
24 advisory committee to come up with the correct terms  
25 of the contract, which seems to be contrary to

1 having the State Procurement Code. I'm done, so.

2 CHAIRPERSON TORRES: Any other questions  
3 from the Board?

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

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

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

25 BOARD MEMBER SAITO: Are you referring

1 specifically to legislation as in Hawaii Revised  
2 Statutes or rules as in Hawaii Administrative Rules  
3 that are pending?

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

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

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

25 MR. THOMASON: I don't believe there



1 would be a conflict. Whichever way the legislative  
2 process would go or the administrative rule process  
3 would go, the process that they are involved in, the  
4 Legislature and the administrative body, is to  
5 create the rules that govern the administration of  
6 the PEG channel providers. The administrative PEG  
7 channel providers would not be affected in any way  
8 without a determination by this Board that it is not  
9 advantageous to conduct competitive procedures to  
10 select the competitive provider.

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

23 BOARD MEMBER SAITO: I'm still not sure  
24 I understand what the answer was. If this Board  
25 were to approve your petition to exempt the PEG

1 access providers from the procurement code, and if  
2 the Hawaii Administrative Rules then are established  
3 to manage the access providers, that is still not  
4 inconsistent. The selection would have been outside  
5 of the exemption code, but the regulation would be  
6 subject to the rules of the statutes. Is that  
7 basically what you are saying?

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

19 If, however, everything that we have  
20 seen in the past, that these rules and the statutory  
21 efforts are being promulgated with a focus on  
22 insuring that the disenfranchised members of the  
23 community, the folks that need a platform for their  
24 free speech, that the DCCA director will resource  
25 through cable funds and oversee the conduct of the

1 PEG program without regard -- they can use the  
2 existing PEG providers. These rules do not address  
3 or relate to a demand that there be some competitive  
4 selection of PEG providers.

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

12 BOARD MEMBER SAITO: Thank you.

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

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

23 CHAIRPERSON TORRES: Okay, that would be  
24 fine.

25 MS. LOPEZ: Hello. I am Kealii Lopez,

1 president and CEO of Olelo Community Television.

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

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

1 looked at them as related to the PEG access  
2 services.

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

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

1       that's my recollection.

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

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

14              MS. LOPEZ: Yes.

15              CHAIRPERSON TORRES: -- that talked  
16       about the recommendations and so on, and towards the  
17       end of that letter they have a special paragraph  
18       there that is related to the PEG access, and  
19       essentially, the DCCA seems to be saying that even  
20       though they understand the importance of this  
21       particular issue, because of the complexity of it or  
22       the difficulties we have had in the past, you know,  
23       coming to resolution on this issue, it sounded like  
24       they pretty much washed their hands of this issue  
25       and suggested that it be addressed in a separate

1 bill. Did that separate bill ever materialize?

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

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

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

1 forward. It's in conference committee.

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

11 CHAIRPERSON TORRES: Russ, does that  
12 answer your question?

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

23 So this is essentially saying that at  
24 least it is a two step process, first of all,  
25 declaring that it is a utility, and that the



1 regulation or the management of a utility would be  
2 by this process that they set up where DCCA would  
3 govern the terms and conditions and everything else  
4 of this -- that basically is how I understand the  
5 process that is involved.

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

19 However, in the time between when we  
20 filed our petition and now, these efforts through  
21 the task force and other legislative initiatives  
22 have arisen, and they are focused on just confirming  
23 that that is true, that DCCA is empowered by statute  
24 to regulate the PEGs, is empowered by statute to  
25 dictate how much money is going to go to the PEGs,

1     how the PEGs operate their facilities, and as Mr.  
2     Bardusch points out, is very free, more free than  
3     under the procurement code to impose changes in  
4     fundamental terms and conditions of the contract.

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

7             VICE CHAIRPERSON BARDUSCH: I do.

8             CHAIRPERSON TORRES: Okay.

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

19            MR. THOMASON: I believe the history of  
20    the PEG access program is that the DCCA created the  
21    entities that exist now, and those entities have  
22    remained stable through -- from 1988 to now. The  
23    rules, my understanding of the rules, and obviously  
24    the Attorney General interprets these rules, but my  
25    understanding of the rules is that although the

1 director of the DCCA may have the power to sever out  
2 maybe different jurisdictions, right now it's by  
3 County, and the example I would give is I believe  
4 that these rules empower the director of DCCA to  
5 establish a PEG access provider on Maui and a  
6 separate on Molokai if the director of the DCCA  
7 determines that that is an appropriate allocation of  
8 the public airways.

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

22 MS. LOPEZ: So, Kealii Lopez again, I  
23 just want to add to that because of some other new  
24 developments which I apologize we actually don't  
25 have copies of the most recent franchise that the

1 Department of Commerce and Consumer Affairs issued  
2 last week for Oceanic's cable franchise on Oahu, but  
3 in fact, as a part of that franchise, the DCCA has  
4 in fact done exactly what Mr. Bardusch is asking,  
5 which is can it add providers?

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

19 Consistent with what Mr. Thomason has  
20 said, it makes very clear that the director of the  
21 DCCA can change the amount of funding provided to a  
22 PEG, increase, decrease, change the frequency in  
23 which the payments occur. If they were annual, they  
24 reduced them to semiannually. It makes clear that  
25 they can choose to suspend the payments to the PEGs.

1 They can change that to monthly payments. They can  
2 authorize Oceanic to discontinue payment to the  
3 PEGs. There's a lot of, again, direction related to  
4 PEG oversight, PEG access oversight in the  
5 franchising document which is a part of DCCA's  
6 regulation of cable television, so I just wanted to  
7 say that, yes, that can happen, and it has.

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

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

14 VICE CHAIRPERSON BARDUSCH: So --

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

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

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

23 VICE CHAIRPERSON BARDUSCH: Okay. I  
24 have a few questions on -- I guess this is your  
25 petition of -- this is -- I don't have a date here

1 on this petition, but it talks about the  
2 impracticable state of the RFP, it says the RFP  
3 lacked any performance standard. We don't have a  
4 copy of the RFP. This is on page five of the  
5 report.

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

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

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

22 MR. THOMASON: I would submit to you  
23 that the question as we wrote to the Chair, you can  
24 get a question that is misleading if you ask an  
25 incorrect question. The question is not whether the

1 PUC regulates cable or whether the PUC regulates the  
2 funded PEG channels that come from the cable  
3 franchises. The question is whether a procurement,  
4 a competitive procurement procedure is advantageous  
5 to the State in pursuing this type of service.

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

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

24 But the question is yours, as  
25 procurement professionals, of whether this type of

1 activity which is consistent with the very statutory  
2 definition of utility is conducive -- or is the  
3 State's interest served by asking for competition in  
4 providing something that is essentially expression  
5 of first amendment rights according to members of  
6 the community?

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

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

24 We believe that the question before this  
25 Board is is there an advantage to be gained by a



1 competitive process wherein a separate government  
2 entity, DCCA, regulates every aspect, everything  
3 from the creation of the entities that are now PEG  
4 providers to how much money they are going to get  
5 next year and when they are going to get paid.

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

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

20 The rules are -- I believe, that's what  
21 the draft that Mr. Bardusch is looking at. These  
22 rules are focused on insuring that the public is  
23 aware and understands how DCCA can exercise its  
24 power over the PEGs and that its conduct is  
25 consistent with the rules as they are written. None

1 of those will change whether there is an advantage  
2 or not of competing the PEGs, the PEG entities for  
3 the right to provide this service.

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

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

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

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

23 CHAIRPERSON TORRES: I think it is  
24 pretty highly revised, isn't it? I mean, there are  
25 large sections of it that are removed.

1 MR. THOMASON: I beg your pardon?

2 CHAIRPERSON TORRES: Some ellipses  
3 there.

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

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

15 MR. THOMASON: No.

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

22 MR. THOMASON: Well, the definition of a  
23 public utility is any plant equipment facilities  
24 directly or indirectly for public use for  
25 transmission of telecommunications messages. So our

1 effort is to ask you to interpret a statute that is  
2 placed in your power, the procurement code is  
3 subject to your interpretation and your application  
4 as experts.

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

13           If you interpret 103 D to mean the plain  
14 meaning of a statutory word, the general process of  
15 the basic statute is not providing a definition,  
16 then you can look at statutes that cover similar  
17 activities and see what they say. That's a method  
18 of legal argument, and that's what we have done  
19 here. There's no definition in 103 D. We have  
20 pointed to a different statute and asked that at  
21 least the plain meaning of those undefined words in  
22 103 D be used here by you in determining whether  
23 this falls within the section of the code,  
24 procurement code, that allows for an exemption.

25           BOARD MEMBER SAITO: I think what you

1 are saying is that regardless of the determination  
2 made by DCCA, that if this Board reads this  
3 definition of a utility, and it is convinced that  
4 the PEGs are indeed utilities, then we go from there  
5 with an exemption from the procurement code --

6 MR. THOMASON: That is correct.

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

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

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

1 refer to another statute that looks like utilities  
2 covers telecommunications in a different statute so  
3 in applying your own decision on what 103 D says, we  
4 ask that you apply the plain meaning. We weren't  
5 asking and we have never argued that it is  
6 appropriate to ask the PUC to interpret for you what  
7 103 D says.

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

21 MR. THOMASON: That's correct.

22 CHAIRPERSON TORRES: And I believe that  
23 the reason for that, the reasoning, and, you know, I  
24 am making a jump in logic here, the reasoning is  
25 that when you are talking about a utility and you

1 are granting exemptions, you are not concerned about  
2 how that group is pricing and how that service is  
3 handling its business, and the reason you are not  
4 concerned is because their prices are regulated,  
5 their conduct is regulated, and when I say  
6 regulated, that means defined, formal, regulations,  
7 public reviews, all sorts of controls that are in  
8 place that make, you know, other definitions and  
9 that make other controls unnecessary, and certainly,  
10 competition is generally not required for that  
11 reason as well.

12 MR. THOMASON: That's correct.

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

19 MR. THOMASON: No.

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

22 MR. THOMASON: No, ma'am. Generally,  
23 there's a concept called statutes en pari materia,  
24 meaning statutes that cover similar or the same  
25 things. The reason we point to this instead of

1. Black's Law Dictionary is that the statute that the  
2 Legislature wrote using the same or a similar word  
3 in one area defines a utility as including  
4 telecommunications.

5           What we are saying is that body, the  
6 Hawaii Legislature, that wrote the statute Chapter  
7 269 also wrote 103 D. They didn't refer to the FAR  
8 because that distinction you are making with the  
9 Federal Acquisition Regulations has a great deal to  
10 do with constitutional structure. Local governments  
11 regulate, for the most part, public utilities in  
12 their jurisdictions.

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

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

24           MR. THOMASON: But the reason I -- the  
25 point I am making is that when lawyers speak, they



1 don't speak as witnesses. Lawyers are advocates. A  
2 legal construct argument that is preferred by the  
3 courts is if you have two statutes written by the  
4 same body that regulates similar and the same  
5 activities, one has a definition and the other  
6 doesn't, then you ask the deciding body, the trial  
7 court or in this case the Procurement Policy Board,  
8 to look at the word the Legislature used in one  
9 statute if they didn't provide a definition in the  
10 other.

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

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

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

20 CHAIRPERSON TORRES: No, that's okay.

21 VICE CHAIRPERSON BARDUSCH: I am  
22 presenting an advocate's position. I want you to  
23 understand the nature of the argument we are  
24 presenting and why it has been crafted the way it  
25 is.

1                   CHAIRPERSON TORRES: There may be a  
2                   misunderstanding, though. I didn't understand that  
3                   the Legislature has written 103 D. Is that correct?

4                   BOARD MEMBER SAITO: That's correct.  
5                   The Legislature writes all legislation, and Chapter  
6                   103 D is a statute that resulted from legislation.

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

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

21                  So please accept -- I am presenting an  
22                  advocate's position explaining to you that the  
23                  Legislature that wrote both of these statutes used  
24                  the term in one and then the same or a similar term  
25                  in another and only defined one. So we are asking

1 you to look and see if the word utility -- if the  
2 Legislature's use of the word utility, meaning  
3 telecommunications, warrants your adopting it as a  
4 definition within 103 D.

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

16 My client has expended a great deal of  
17 resources in answering the Board's questions,  
18 presenting testimony to the Board, in responding to  
19 requests for information from procurement staff,  
20 addressing -- submitting protests to address what we  
21 feel are significant flaws in the solicitation  
22 ultimately. That solicitation was subsequently  
23 withdrawn. So for a period of three years, the  
24 procurement staff and the Board have struggled with  
25 this.

1                   We believe that all of this effort  
2 provides you evidence by itself that there is  
3 nothing to be gained by imposing a competitive  
4 scheme on what appears to be a successful operation  
5 regulated in cost and in content by a government  
6 body, and we ask that the Board consider that there  
7 does not appear on the evidence in front of you to  
8 be any advantage to go through this competitive  
9 process, and on that basis we ask for the exemption  
10 to be granted.

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

13                   BOARD MEMBER SAITO: That sounds good.

14                   CHAIRPERSON TORRES: Yeah, I would like  
15 to do that, but if I could make one final comment  
16 here. I guess even if I could accept the definition  
17 or lack of definition of utility, the part that  
18 concerns me the most is that there is no formal  
19 regulation by any body. There is no formal  
20 regulation by DCCA, there is no real control, there  
21 is none by the PUC, and that is a serious concern.  
22 In that case, I would think that your regulation  
23 would be coming through a formalized contract. That  
24 would be the direction, that would be where all of  
25 the direction would come from.

1                   So I would like to end on that note. We  
2 have abused our court reporter, so let's take about  
3 a fifteen minute break. Okay, let's a ten-minute  
4 break, and we will be back at 2:30. Thank you.

5                   (Recess was taken.)

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

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

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

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

24                  One of the earlier comments to  
25 Mr. Saito's question, though, even with these

1 additional rules, the question that we are posing  
2 for the Board, we argue, would not conflict with the  
3 rules as they are being developed now, and to the  
4 extent that they may conflict, the Board certainly  
5 has every right, power and responsibility to  
6 reconsider any previous decision where a change in  
7 the law might cause that decision to be  
8 inappropriate under the change conditions.

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

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

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

23 MR. THOMASON: To date, the DCCA cable  
24 franchise is awarded under a different procedure  
25 that is not necessarily the competitive procedures

1 as included in a procurement situation where you  
2 have two bidders, but they do determine whether the  
3 cable operator is qualified and certainly  
4 responsibility as you mentioned.

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

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

12 VICE CHAIRPERSON BARDUSCH: Okay.

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

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

1 enough for the smaller person that's involved?

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

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

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

23 CHAIRPERSON TORRES: Okay, I guess I  
24 would disagree that there is no advantage to be  
25 gained by going through the competitive process. I



1 think there are other advantages in competition. I  
2 mean even just determining what is out there in the  
3 market, perhaps even refining requirements. I think  
4 there are many kinds of advantages that can come  
5 through competition.

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

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

23 CHAIRPERSON TORRES: The ugliest clause  
24 in the FAR.

25 MR. THOMASON: The ugliest clause in the

1 FAR, but it can be written, and it is duly accepted  
2 and has been accepted since 1943. The problem we  
3 have is that was never done because they didn't use  
4 those other sections of the procurement code to  
5 define changes, to define general conditions and  
6 special conditions that relate specifically to how  
7 the funds are used, who owns the property once the  
8 funds are used to purchase new equipment and  
9 buildings.

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

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

1 consistent with good -- best practices in  
2 procurement, in administration of the procurement  
3 contract.

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

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

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

20 VICE CHAIRPERSON BARDUSCH: I do.

21 CHAIRPERSON TORRES: There we go.

22 VICE CHAIRPERSON BARDUSCH: Yes, I would  
23 have to say that when I previously asked about the  
24 questions I had on paragraph or page five, you said  
25 that was only on item four B, but in fact, it is

1 four A because four A has both the utilities  
2 services issue and the competitive award issue in  
3 that, and since you brought up your comments about  
4 whether, you know, there's value to competition, I  
5 think it is fair that I could ask your client to  
6 provide information about what was lacking in the  
7 performance standards of the RFP that was withdrawn?

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

19 These PEG programs provide those people,  
20 to include high school students at various high  
21 schools in the community, an opportunity to express  
22 their views and create programming that is the  
23 essence of our constitutional right of free speech.  
24 These PEG providers are the first amendment window  
25 for large segments of our community.

1           The Supreme Court has struggled for more  
2   than a century trying to define when is free speech  
3   okay, and how is free speech to be regulated  
4   directed? And the idea that we have difficulty  
5   writing an RFP that does something the Supreme Court  
6   hasn't been successful in yet, I think is not  
7   surprising. I think it is really difficult to make  
8   a competitive award on something that is as  
9   difficult to grasp and quantify as the public's  
10   right of access to their own airways to exercise the  
11   right of free speech.

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

19           VICE CHAIRPERSON BARDUSCH: Okay, I will  
20   concede that issue, but when the petition asks  
21   whether it is practicable or advantageous for the  
22   State to award a contract or convene for a contract  
23   on this subject matter, I think that the past effort  
24   and what the State did is very relevant in making a  
25   decision on that subject.

1                   So moving to the second issue would be  
2                   there was a problem with the property identified.  
3                   Can you explain what the property problem was?

4                   MR. THOMASON: The property problem  
5                   remains. The DCCA's interpretation of the current  
6                   1998 contract is that all of the PEGs property used  
7                   to operate the current facilities -- or the current  
8                   facilities they are now operating belong to the  
9                   State. However, under the earlier '88 agreement  
10                  through 1998, there was no government provided  
11                  property clause. And it is not -- it doesn't  
12                  contain any of those government owned contract or  
13                  operating type clauses that you see in an Army  
14                  ammunition plant contracts.

15                  So right now we have a circumstance  
16                  where the PEGs think they own and they do have title  
17                  to real estate. They have -- at least in some  
18                  instances, the counsel for Akaku represented that  
19                  some of those facilities have been made subject to a  
20                  mortgage and were providing collateral for a loan,  
21                  so commercial banks have an interest in this  
22                  property. DCCA is very confident that the State  
23                  owns everything, and the reality is the Board  
24                  members who have been appointed to the Board  
25                  pursuant to a statute that governs the conduct of

1 Board members for not-for-profits have the fiduciary  
2 duty to insure that they protect the property of  
3 their not-for-profit.

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

14 So we are not talking about an  
15 individual procurement, and I recognize the Board  
16 does not have and should not ever address a single  
17 procurement. But what you are looking at is  
18 systemic. This is a general industry issue  
19 presented to the Board to determine whether this  
20 type of contract should be exempt from competitive  
21 procedures, and in this type of contract, because of  
22 the history of the contracting parties'  
23 relationship, and the way they treated each other,  
24 the parties, PEG parties, believe they own their  
25 property. The government believes they don't.

1           It is not easy to resolve, and neither  
2 party can just give up. As of now, there is no  
3 determination, and the last RFP reflecting this  
4 systemic problem indicated in apportionment that the  
5 State couldn't give assurance that any competitor  
6 coming in who would be replacing the incumbent would  
7 receive the studio facilities.

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

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

24           So in effect, it was a directed  
25 subcontract which in our view is not consistent with



1 the competitive process, and in effect the  
2 government is, by doing that, making a directed  
3 award without competition through an agent and  
4 telling the prime you have to give the contract to a  
5 sub that we decide, and we protested that. I think  
6 I mentioned though that that RFP was subsequently  
7 withdrawn.

8 VICE CHAIRPERSON BARDUSCH: Thank you.

9 CHAIRPERSON TORRES: Okay, are there any  
10 other questions from the Board members?

11 Okay, I should have done this earlier,  
12 but I would like to get some comments from SPO. I  
13 think this is probably as good a time as any because  
14 we are getting into your area very heavily now.

15 Aaron, do you have any comments that you  
16 would like to make?

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

25 In this instance, the contracted

1 service, which is to manage and operate the PEG  
2 access channels, is subject to competition, and  
3 competition for the service exists. The State wants  
4 to procure these management services, and we are  
5 planning on behalf of the DCCA to issue the RFP  
6 shortly.

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

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

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

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

23 CHAIRPERSON TORRES: Okay, please  
24 identify yourself and try to stay within the time  
25 limits.

1                   MR. APRIL: Okay, thank you. My name is  
2 Jay April. I am president and CEO of Akaku Maui  
3 Community Television. I came all the way over here  
4 from Maui, so respectfully, Ms. Chair, I do object  
5 to the time limitation because of the expense that  
6 it took for me to come over here and the five years  
7 that I have spent with this process including  
8 membership on the HCR 358 Task Force. This process  
9 has been long, it has been difficult, and so the  
10 time limitation is rather restrictive.

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

21                   Nowhere in that legislation does it say  
22 procure. It says designate. And as one of the  
23 members pointed out, PEG access is a subset of the  
24 cable television franchise. Procurement has no  
25 business in this area. It purports to replace a

1 mature existing workable electronic commons with  
2 unknown, unproven, and nonexistent entities or  
3 existing entities with different or even conflicting  
4 agendas. There are no other vendors. This resource  
5 was set up specifically to do public, education,  
6 government access. There is no other entity.

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

20 The PEGs are unique. They are sole  
21 sources in each island. There is no other entity.  
22 It is like if another bidder comes in with a  
23 conflicting agenda, it would be like tearing down a  
24 thriving force ecosystem of community communications  
25 that was planted for that purpose twenty years ago

1 and replacing it with astroturf and expecting the  
2 grass for the lost social capital to grow up again  
3 on its own with no seeding, no philosophy, no  
4 community building netposts to nurture and sustain  
5 it.

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

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

22 This is a public good. It is a public  
23 good that can be accountable. The administrative  
24 draft, the administration rules that you have in  
25 front of you basically solved any question that any

1 legislator had. Thousands of people have testified  
2 against procurement. The bills sailed through both  
3 houses in the last two or three years and never made  
4 it out of committee at the last minute for a number  
5 of reasons.

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

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

23 I can reserve the rest of my comments  
24 for the second go around in the other petition  
25 because I have more, and I will just leave it there.

1 So thank you very much, unless you have any  
2 questions --

3 CHAIRPERSON TORRES: Anybody?

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

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

14 MR. APRIL: Thank you.

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

24 Olelo Community Television petitions the  
25 Procurement Policy Board pursuant to Hawaii Revised

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

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

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

25 One of the problems we have is that



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

12                 We would disagree that there's  
13    competition. The testimony you may have heard  
14    earlier was a statement from one of the executives  
15    from Akaku saying that's one of the reasons this  
16    entity -- this circumstance was created. There was  
17    no one. The commercial cable television companies  
18    will not and cannot economically make available air  
19    time for the people that use the PEG access  
20    services. These entities are not commercially  
21    available. The only reason they exist in Hawaii now  
22    is because DCCA created them in 1988, and I would  
23    ask that we have an opportunity to hear evidence  
24    related to how these entities were created and what  
25    services are being provided in the community.

1 MS. LOPEZ: Hello, I am Kealii Lopez,  
2 president and CEO of Olelo Television. I am going  
3 to provide some general comments related to this  
4 particular petition, and specifically, our concern  
5 is that public -- we believe public, education, and  
6 government access services cannot be competed or are  
7 not practicable or advantageous to the State to  
8 compete them.

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

17 As part of its franchise renewal  
18 process, the State required that that function be  
19 shifted to a not-for-profit organization that did  
20 not exist at that time. The State then convened a  
21 group of public representatives, you know,  
22 representatives from the community to, in fact,  
23 create Olelo, incorporate Olelo, and then the State  
24 entered into a contract specifically with Olelo in  
25 1989 to begin delivering those services. The assets

1 held by Oceanic Cable at that time to provide those  
2 services were transferred to Olelo. Franchise fees  
3 and capital funds were then provided to Olelo each  
4 year to deliver these PEG access services.

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

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

19 I would then say that it is very much so  
20 impracticable and disadvantageous to the State to  
21 then compete this contract and imagine that someone  
22 who would be starting from ground zero can in fact  
23 manage six PEG access centers, seven community media  
24 centers to the public and education and government  
25 here on the Island of Oahu.

1                   We provide facilities to the State  
2                   Legislature. We provide facilities to the City  
3                   Council, City administration. We provide those  
4                   resources and some funding. We provide funding to  
5                   the University of Hawaii and their Department of  
6                   Education to create their content. All of those  
7                   resources, well over \$10,000,000 worth of assets,  
8                   are held by Olelo.

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

22                  The other thing that I am concerned  
23                  about is there was no, that I am aware of, market  
24                  survey to identify competitors. So I understand  
25                  that there is a concept that there are competitors.

1 If the concept is that the PEG access organizations  
2 on each of the islands are potential competitors, I  
3 would at least make very clear that no PEG access  
4 organization in good conscience would bid on a  
5 contract for another island. No PEG access  
6 organization in good conscience would compete for a  
7 PEG access contract on another island. Community  
8 access is community based.

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

19 Now, I do understand that there are  
20 businesses like, you know, Bank of Hawaii, for  
21 example, has branches everywhere. That's a  
22 consistent kind of delivery of service that they  
23 provide. It's the same all across. You go to an  
24 ATM, you go wherever, the fees are the same, the  
25 interest is the same. It's different with PEG

1 access. They aren't the same. The services even on  
2 Oahu, again, are very customized. So that's the  
3 other thing, so I don't know who the competitors  
4 are. So I mean, so, that's my one issue there.

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

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

22 If the question is can someone else run  
23 the television, you know, put programming on the  
24 channel? Sure, anyone can do that. That's not what  
25 PEG access services are. That's the misnomer, if

1 anything, that it is really just to manage a  
2 channel. But I would also say to manage a channel,  
3 you have to have experience, but you also have to  
4 have access and resources to manage six channels,  
5 which is what we have.

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

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

25 And, again, it is not reflective of, I

1 think, the SPO's ability. I think they absolutely  
2 have the ability to provide and be involved in  
3 procuring services as they have for the State. The  
4 point we are making is that the business and  
5 services with which we are engaged in are difficult  
6 to develop.

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

20 That's economically infeasible because  
21 Olelo has been providing these services for five  
22 years at a minimum of a million dollar deficit from  
23 the funds that we get from the State. We have been  
24 offsetting that deficit with our own reserves.  
25 Olelo has, in fact, spent about \$10,000,000 of its



1 own funds over the last twenty years in the delivery  
2 of these services. It is a not-for-profit. We  
3 deliver the services, even at a deficit.

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

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

24 Again, no reflection on what the SPO  
25 staff is capable of. I am speaking to strictly the

1 parameters in which PEG access is regulated. Again,  
2 I think that is economically impracticable.

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

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

20 My point there is that the part that's  
21 disadvantageous is what does that contract end up  
22 looking like? From Olelo's perspective, we are very  
23 clear we would be successful because we do not  
24 believe that there is competition. The problem is  
25 if the final contract looks anything like the last

1 RFP, it is disadvantageous to the people we provide  
2 services to.

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

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

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

24 BOARD MEMBER MATSUMOTO: What kind of  
25 nonprofit corporation is Olelo?

1 MS. LOPEZ: Olelo is a 501 C 3 tax  
2 exempt nonprofit organization, independently  
3 managed.

4 BOARD MEMBER MATSUMOTO: It's a private  
5 nonprofit?

6 MS. LOPEZ: It is a private nonprofit.

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

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

1 were to be able to recoup costs that were above that  
2 and including the deficit would be helpful.

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

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

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

23 CHAIRPERSON TORRES: Okay, I'm sorry,  
24 Terry, I would like to take a break right now, a ten  
25 minute break, so let's come back at 3:30, and then

1 we will pick up with additional questions.

2 (Recess was taken.)

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

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

21 The other thing that we talked about was  
22 -- and I am trying to remember what it was that I  
23 was going to say on that. The RFP, I think our  
24 discussion on the RFP is also really very  
25 hypothetical. It talks about what has happened in

1 the past, previous RFP's, and we heard from the SPO  
2 that there's a brand new RFP coming out next week.  
3 At this point, really, none of us know what the  
4 terms and conditions of that particular RFP will be.

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

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

25 MS. LOPEZ: Can I just clarify?

1 CHAIRPERSON TORRES: Yes, ma'am.

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

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

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



1 CHAIRPERSON TORRES: Sure.

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

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

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

23 MS. LOPEZ: I understand.

24 BOARD MEMBER SAITO: You understand?

25 MS. LOPEZ: I understand.

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

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

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

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

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

24 MS. LOPEZ: Correct.

25 CHAIRPERSON TORRES: You know, that's

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

12 Darryl?

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

1 incorporated into the RFP, so I mean it's --

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

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

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

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

20 BOARD MEMBER MATSUMOTO: How?

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

23 BOARD MEMBER MATSUMOTO: Because there's  
24 no contractual relationship between Olelo and  
25 Oceanic, number one. It states for the record.

1 VICE CHAIRPERSON BARDUSCH: That has  
2 nothing to do with the question here of whether it  
3 is practicable for the State to issue a competitive  
4 contract with the PEG provider.

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

9 MR. THOMASON: May I respond to that?

10 CHAIRPERSON TORRES: Sure.

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

21 I believe the most important aspect that  
22 you can take from that, whatever the RFP says, one  
23 group of competitors, if there are any, has the  
24 facilities, studios, cables, cameras. The  
25 government wants to compete to others who are not

1 the incumbent and don't have that cable system and  
2 ask them to provide the same service without that  
3 property. That makes it not advantageous to the  
4 State at this point until that property is resolved.  
5 So please recognize, we are not -- the SPO has  
6 worked for four years on a very complex RFP. It is  
7 still not on the street. That by itself is evidence  
8 that this is extremely hard to do and not  
9 practicable.

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

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

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

22 MR. APRIL: Thank you. We went over  
23 some of this ground before, so I won't repeat, but I  
24 wanted to give you a real world example of what  
25 happened when the RFP came out last time. It's not

1 a hypothetical. I don't know if you are aware, but  
2 in 2005 there was a power struggle over public  
3 access in Akaku on Maui. Basically, land  
4 development interests were threatened by some of the  
5 first amendment programming that was put on by some  
6 of our community producers. Land development is, of  
7 course, a big issue all over our islands, and there  
8 were some programs that were somewhat critical of  
9 the development.

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

20 Soon after that, this RFP construct came  
21 out of the State. This developer told me that he  
22 spent \$300,000 on this project. One of our senators  
23 told me it was somewhere near a million dollars to  
24 essentially shut down and take over Akaku. A bill  
25 was floated at the State Legislature that would

1 split Akaku into thirds, according to the letters of  
2 PEG, a sort of Sesame Street approach, I call it.  
3 And there were quite a few donations going to the  
4 administration. I'm not making the connection that  
5 that was the reason for the RFP, but I am just  
6 saying the timing was rather interesting.

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

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

20 Another thing that happened during the  
21 RFP hearings that were going around the State and  
22 are in the RFI stage, cable administrator Clyde  
23 Sonobe had a meeting on Molokai that was televised  
24 on Akaku, and one of the Molokai people said to  
25 Mr. Sonobe, well, what happens if this successful



1 bidder wins the contract but only says that they  
2 only need \$650,000 instead of the \$850,000 that's  
3 allocated for franchise fees? Mr. Sonobe replied,  
4 and this is on tape, he said, well, we probably  
5 would just return it to the consumer.

6 That's sent two very public messages.  
7 The first message was the lowest bidder could be the  
8 person who wins based on price, and that Time Warner  
9 would receive some kind of back door rate relief of  
10 \$200,000, actually, as a result of that proceeding.  
11 It also sent another message to people like this  
12 developer, for instance, that if a sugar daddy came  
13 along and decided to subsidize an access  
14 organization to the tune of, let's say, \$200,000,  
15 they could essentially buy themselves a PEG access  
16 entity.

17 This is not a hypothetical. This is a  
18 real world situation. That's one of the problems  
19 that we have with a procurement process. It doesn't  
20 work, and I think we have heard today the fact that  
21 it has taken this many years to even get an RFP out,  
22 it is proving that it doesn't work. If you look at  
23 the protests, the record of the solicitation, and  
24 the RFP's themselves, I think that on its face I  
25 think you can see what I mean.

1           The other thing I wanted to mention is  
2 about the courts, Akaku versus Rieffer (phonetic).  
3 Director Rieffer stated before the Legislature last  
4 March and actually several times that he was in  
5 favor of an exemption for the PEGs, and that that  
6 was his position. He also stated that according to  
7 the Attorney General, that he has to follow the  
8 instructions of the SPO, that he has no choice but  
9 to promulgate rules that adopt the State Procurement  
10 Code of Chapter 91 in order to designate access  
11 corporations.

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

21           Now, that to me is somewhat  
22 disingenuous. We have the court who says he can use  
23 any reasonable method. We have the HCR 358 Task  
24 Force that has actually created an extremely  
25 reasonable accountable method and put that forth,

1 and I just find this process to be somewhat  
2 contradictory. I mean, how can the director say one  
3 thing in one forum and another thing in another  
4 forum?

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

19 Number two, if all television stations  
20 are buildings, if MTV sells you music, HBO sells you  
21 movies, PBS sells you Ken Burns, there's a program,  
22 there's a boss at the top floor telling the audience  
23 what it is going to see. We are the public park.  
24 Olelo is the park, the green space, the green space  
25 in the middle of all of those buildings where the

1 people who come in are the people who program the  
2 channel. It is an entirely different animal. It is  
3 a level playing field for everybody. It is not a  
4 building.

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

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

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

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

23 Number six, there are other entities,  
24 you heard about this today, the Hawaii Educational  
25 Network Consortium, PBS, that aren't subject to

1 procurement in this paradigm.

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

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

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

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

20 Does the SPO have any comments or  
21 questions?

22 ADMINISTRATOR FUJIOKA: No.

23 CHAIRPERSON TORRES: Okay, I think we  
24 are ready for -- possibly for a vote before we have  
25 a vote, though, we need -- what do we need?

1 (Discussion off the record.)

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

5 MS. OHARA: Ask for a motion.

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

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

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

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

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

19 CHAIRPERSON TORRES: Is there a second  
20 to the motion?

21 BOARD MEMBER SAITO: (Raised his hand.)

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

25 You want me to ask her to reread it?

1                   Okay, please reread the motion, and I  
2                   caution the people on the Board to understand what  
3                   you are really voting for, whether you are voting in  
4                   the affirmative or the negative. If you could  
5                   please reread that?

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

8                   CHAIRPERSON TORRES: Thank you. Okay.

9                   ADMINISTRATOR FUJIOKA: Who seconded the  
10                  motion?

11                  CHAIRPERSON TORRES: We have a second  
12                  from Russ.

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

15                  VICE CHAIRPERSON BARDUSCH: Okay, in  
16                  supporting and asking you to support this approval  
17                  of this petition, I would say that in looking at all  
18                  of the exemptions we have, and I know we have over  
19                  the years, we have exemptions for some rather silly  
20                  things like dog food, and that really, really annoys  
21                  me, but I think that when we can stretch the meaning  
22                  of an exemption such as reference books to include  
23                  children's books that the term utility services is  
24                  broad enough to include the services that are being  
25                  provided by the PEG organizations such that it would

1 be just a valid interpretation of the existing  
2 utility services exemption that would fit the PEG  
3 services.

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

11 CHAIRPERSON TORRES: Any other comments?

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

22 In the second petition, the same  
23 disadvantageous arguments are made, but it doesn't  
24 have the added value in my mind of being interpreted  
25 as a utility, and that was the main -- I think you



1 have a stronger case to prove relative to being,  
2 well, being disadvantageous to the State. If I read  
3 the definition of the utility that was offered in  
4 the petition, I think that Olelo could very well fit  
5 within the definition of a telecommunications  
6 service provider, so I think that the test is passed  
7 in my mind as far as the definition of utility, and  
8 I think from that point on, it is a matter of is it  
9 advantageous to the State to give them the  
10 exemption?

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

16 BOARD MEMBER MATSUMOTO: You know, I beg  
17 to offer a different opinion primarily because I  
18 think, number one, the use of the definition under  
19 the public utilities guidelines is somewhat clear  
20 and yet unclear, and in the clarifying statement in  
21 testimony that we had received from the cable tv  
22 administrator clarifies the fact that cable tv  
23 services is exempted from telecommunications  
24 definition, and I don't believe the PUC is the  
25 jurisdiction or agency when it comes down to cable

1 tv anyway. It's DCCA.

2 DCCA offers a franchise and the basis of  
3 cable organization contracts or franchise, and while  
4 Oceanic today is the only franchisee in the State,  
5 that doesn't mean that a competing franchise can't  
6 come in that DCCA will similarly require PEG type  
7 services for which it may or may not offer to Olelo,  
8 therefore, offering additional competing services on  
9 public access channels.

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

24 But relating to this particular request,  
25 I just cannot in good conscience find it in support

1 of a utility or utility-like service.

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

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

18 So this ties into the other concept of  
19 DCCA has a proven track record of never treating the  
20 PEG contractor as a contractor but rather as just,  
21 for a better word, another government agency which  
22 it can dictate whatever it wants to, withhold money,  
23 provide money, do this, take away channels, all in  
24 violation of the contracts such that it seems to me  
25 that to then try to say we will compete, and it is

1        advantageous for the State to compete for who will  
2        provide this service through the competitive process  
3        and then turn around that having made that, with the  
4        knowledge of having done that, we are then going to  
5        ignore the contractual relationship that we  
6        establish because that's not what we want to do.

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

18                      BOARD MEMBER SAITO: I think I want to  
19        address the notion of a franchise. In here, the  
20        DCCA, I think we all pretty much agree whether it is  
21        legally stated or not, what they grant Oceanic is a  
22        franchise, and by their regulation of Oceanic, if  
23        they are not convinced that Oceanic is doing the job  
24        that it should be doing in providing cable service,  
25        they can take away the franchise.

1 I think maybe the unfortunate thing is  
2 that they haven't done that formal a process with  
3 the PEG access service provider as they should, and  
4 in the regulation that it has to provide, they  
5 should include service standards, something along  
6 those lines. They should also have the ability and  
7 make it clear to the access service providers that  
8 what they have is a franchise as an access service  
9 PEG, and if they don't fulfill the requirements, the  
10 franchise is going to be taken away. I think that's  
11 how to regulate this thing, and I think that is a  
12 more effective method than periodically competing  
13 it.

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

24 BOARD MEMBER SAITO: That's one of the  
25 reasons for my questioning on Mr. Thomason. Again,

1 all we are approving here -- approve this appeal is  
2 to exempt them from the source selection methods  
3 part of the procurement code. They are still going  
4 to be subject to oversight by DCCA by law, and so  
5 what we need to do is give DCCA some direction or  
6 whatever you want to call it to exercise that  
7 responsibility in a more, you know, structured way  
8 so that they can have assurance of the kind of  
9 service that we are hoping to get out of a PEG  
10 access service provider.

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

17 CHAIRPERSON TORRES: Any additional  
18 comments?

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

21 (Discussion off the record.)

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

25 CHAIRPERSON TORRES: Okay, so vote in

1 the affirmative if you support the petition as it is  
2 written and in the negative if you do not support  
3 the petition. Let's go ahead and take the vote.  
4 All in favor of supporting the petition, please say  
5 aye, raise your hands.

6 VICE CHAIRPERSON BARDUSCH: Aye.

7 BOARD MEMBER SAITO: Aye.

8 CHAIRPERSON TORRES: Opposed? Nay?

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

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

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

17 BOARD MEMBER MATSUMOTO: A motion.

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

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

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

1 B.

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

4 (Discussion off the record.)

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

7 Okay, do we have a second to the motion?

8 BOARD MEMBER SAITO: I will second the  
9 motion.

10 CHAIRPERSON TORRES: Thank you, Russ.  
11 Any additional discussion?

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

19 Here now if we grant them the exemption,  
20 who provides the oversight or how do they get  
21 treated? You know, as a utility, they can be  
22 treated as a franchisee, and oversight can be very  
23 tight. Here, the oversight is going to be a little  
24 bit harder to exercise, but I think all the  
25 arguments from the previous discussion on the fact



1 that it is not advantageous to the State I think  
2 still apply.

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

14 BOARD MEMBER SAITO: Well, I have a  
15 point of order for the deputy attorney general.  
16 There was no argument, I don't think, or there was  
17 very limited argument on why the State was opposed,  
18 among who opposed the petition, so not having a  
19 public record as to why we voted -- I think we  
20 established a record between Mr. Bardusch and myself  
21 as to why we voted for the petition, but I don't  
22 know that we have established a record as to why we  
23 would voting against it, so do we need to revisit  
24 the first petition to establish on the record why we  
25 voted against it?

1 MS. OHARA: It would be helpful.

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

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

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

1 in place at this time.

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

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

21 And there were comments made in  
22 testimony that concerns me where Olelo has to put  
23 out their own resources just to keep operating, and  
24 on that basis, you know, it tells me that the nature  
25 of the agreements are much more of a competitive

1 sourcing rather than the type of franchise type  
2 arrangement that I believe exists with Oceanic.

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

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

24 BOARD MEMBER SAITO: Okay, so my other  
25 comment to that question is that, as I said, we had

1 to first determine whether or not they are a  
2 utility, so I think we could without -- the only  
3 definition that has been made available to us and  
4 has been presented in the record is out of the  
5 statutes, so I think I would like to have a  
6 definition from the rest of you as to how you are  
7 making the determination that it is not a utility  
8 unless you are relying simply on the opinion of the  
9 DCCA that they are not because they did not explain  
10 what the definition was.

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

18 CHAIRPERSON TORRES: Well, I really  
19 don't have any more comments on that. I think you  
20 mentioned a couple of things, though, and here I am  
21 making a comment. You mentioned a couple of things  
22 that went into my decision process. One of them was  
23 the three letters that were sent out, and  
24 essentially DCCA pretty much, as I said earlier,  
25 seemed to wash their hands of the situation. They

1 took no responsibility for being the regulator of  
2 the PEGs. They said, you know, we don't want to  
3 address it in this one bill. We are going to  
4 address it in a future bill. It's just too complex  
5 for us to deal with at this point.

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

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

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

22 BOARD MEMBER SAITO: So that's a  
23 question from earlier. I think it was stated  
24 earlier on and we are reminded that our decisions  
25 are to be based on the evidence that's presented in

1 the record, and, again, I point out that on the  
2 record and on the evidence, the only definition of a  
3 utility was in this petition, so we need to rely on  
4 the record and the evidence that was provided to us.

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

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

20 I don't accept that definition, and the  
21 definition is -- I don't know, what's the proper  
22 word? There are parts of it that are taken out of  
23 the definition. I understand that was probably done  
24 for convenience sake, but I think it is an important  
25 definition, and I'm not sure that if we had the

1 entire definition in front of us we would all feel  
2 so strongly about it. Parts of it have been  
3 excerpted, and I have mixed feelings about that.

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

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

21 They are controlling, totally  
22 controlling the PEGs, and the fact that they are not  
23 doing their job and have not done their job and set  
24 forth the regulations that they are supposed to have  
25 set forth I don't think is a penalty or provides a



1 valid reason to say that the PEG is not really  
2 utility-like because of the fact that they are  
3 regulated, they are regulated by a public entity,  
4 just like with the PUC, not the PUC, but like the  
5 private entity.

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

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

24 CHAIRPERSON TORRES: Okay, I think it is  
25 in evidence that we have three letters from

1 different organizations. One of them happens to be  
2 the PUC, which stands for the Public Utilities  
3 Commission, which states that Olelo is not a  
4 utility, the service is not a utility. We have one  
5 from DCCA, and if I remember correctly, the  
6 petitioner when questioned stated that there are no  
7 written regulations from DCCA that guide them. I'm  
8 sorry. I saw a look of . . .

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

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

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

24 CHAIRPERSON TORRES: Okay, I'm sorry if  
25 I misunderstood that. What we have is insufficient

1 text. We don't have formalized regulations; is that  
2 correct? Am I correct in saying that?

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

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

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

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

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

22 MS. OHO: Division of consumer  
23 advocacy --

24 ADMINISTRATOR FUJIOKA: And cable  
25 television.

1 MS. HO: -- and cable television.

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

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

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

24 MS. OHARA: The comptroller had sort of  
25 reopened petition number one. Are you now done with

1 the petition number one and moving back to petition  
2 number two?

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

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

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

11 MS. OHARA: Four B.

12 CHAIRPERSON TORRES: Correct.

13 MS. O'HARA: Thank you.

14 CHAIRPERSON TORRES: Yes, thank you.

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

21 BOARD MEMBER MATSUMOTO: Can I clarify  
22 something? Member Bardusch, Vice-Chair Bardusch  
23 mentioned that the Public Utility's letters stated  
24 that they believed that Olelo generally conformed to  
25 the description, and if you read what it says in

1        subparagraph three, it says Olelo in their petition  
2        reasons that it, A, stands in place of Oceanic for  
3        the designated PEG access channels, and, B,  
4        generally conforms to the description of utilities  
5        under the definition provided in HRS Chapter 269-1  
6        because it manages equipment for public use for the  
7        transmission of telecommunication messages.

8                        Continuing on the second page, it says  
9        in response, we note that the definition of the  
10       telecommunication services set forth in HRS Chapter  
11       269-1 specifically excludes cable services from the  
12       definition of a public utility.

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

18                      VICE CHAIRPERSON BARDUSCH: I do.

19                      CHAIRPERSON TORRES: Okay.

20                      VICE CHAIRPERSON BARDUSCH: I think that  
21       in reading that, I think it is without question that  
22       the PUC's comments that it is not a utility is  
23       because it is not cable services because they can't  
24       change the form or content of information sent and  
25       received, this stuff, it is quite clear that

1     what the PEG providers are doing on many times is  
2     providing an open forum whereby viewers call in and  
3     transmit verbal and electronic, electromagnetic  
4     transmissions back and forth between the speakers  
5     who are sitting in the place talking with their  
6     viewers such that it is not just the example of  
7     cable tv where you pay your money and get a movie in  
8     return, but these are actually open forum where the  
9     transmissions that are going through the telephone  
10    and then out over the transmission lines will in  
11    fact be telecommunications service regardless of how  
12    they have structured their comments because I don't  
13    think that they took that into account when they  
14    were giving their opinion because of the fact that  
15    the services provided by the PEG providers are in  
16    fact more than what is being normally provided by  
17    cable services that they are looking at.

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

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

22                 BOARD MEMBER SAITO:  I asked if the  
23    Chair would consider asking for another vote or if  
24    the vote stands, so the Chair has decided not to  
25    call for another vote.

1 CHAIRPERSON TORRES: Well, I actually  
2 just forgot. I got lost somewhere here along the  
3 way. Okay, I have been requested to ask all of the  
4 Board members whether they would consider changing  
5 their vote based on additional discussion for  
6 paragraph four A. I am not quite sure how we would  
7 do this, but is this an informal questioning?

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

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

12 VICE CHAIRPERSON BARDUSCH: No.

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

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

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

19 BOARD MEMBER SAITO: Would not.

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

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

24 CHAIRPERSON TORRES: Okay, so the voting  
25 remains the same on that paragraph, and, again, that



1 motion has failed.

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

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

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

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

19 BOARD MEMBER MATSUMOTO: (Inaudible.)

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

24 BOARD MEMBER SAITO: Okay, again, my  
25 understanding is that we have to put on the record

1     what our thinking is when we vote, so in my mind,  
2     this is not quite as strong an argument for a  
3     petition because it doesn't have the definition of a  
4     franchise once looked into it, but having listened  
5     to the arguments, and not necessarily the ownership,  
6     et cetera, but literally the difficulty would be and  
7     the fact that as a result of that and the fact that  
8     this is not a service that would be paid for by the  
9     viewing audience that it is intended for, I think  
10    that it is not advantageous to the State necessarily  
11    to have them subject to the code given the nature of  
12    the business. That's my thinking.

13                 CHAIRPERSON TORRES: My comments on this  
14    are essentially the same as for paragraph four A.

15                 VICE CHAIRPERSON BARDUSCH: Okay, I  
16    would say that I would add that in voting to approve  
17    this that the ownership issue of the equipment is  
18    just one of the key problems, but the other problem  
19    is trying to figure out what are we trying to do  
20    from the State's standpoint?

21                 And the State through the DCCA's conduct  
22    in the past contractual actions, basically treating  
23    them as an agency, to me speaks loud and clear that  
24    it is more advantageous to the State to operate with  
25    the PEGs based on this, whatever agreement they are

1 doing and however they are doing it, than it is to  
2 try to pretend now at this last minute we can  
3 establish some kind of competitive award and  
4 procedures to go forward that when the whole concept  
5 is, here, we give you money, and you allow everybody  
6 to access the equipment, and at this point in time,  
7 we don't even know who owns the equipment.

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

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

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

25 BOARD MEMBER HO: Well, my reasons for B

1 would be the same as why I would voted for A.

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

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

23 I mean, we can't tell DCCA you screwed  
24 up. I mean, that's for them to decide or the courts  
25 to decide, and I think the testimony and the

1 decisions of prior courts that sort of have been  
2 told to them in one way, shape, or form already.  
3 But for me, it's really not an easy choice because,  
4 as I said, there's positives on both sides of the  
5 fence at this point.

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

13 CHAIRPERSON TORRES: You know, I  
14 understand your point on that, Russ, I know you were  
15 addressing that to Daryle Ann, but I had said that  
16 mine was essentially the same also, but it did  
17 discuss the practicable or being advantageous to the  
18 State, but I would like to add on this that I don't  
19 believe that we can say whether it is practicable or  
20 whether it is advantageous until we actually go  
21 through the competition and until we see what comes  
22 out in the RFP, so I don't think that's a  
23 determination that we can make based on pure  
24 speculation, so that's another concern that I have  
25 on this particular issue.

1                   BOARD MEMBER SAITO: So I would state  
2                   that I disagree with that. I think that's what we  
3                   are being asked to do is to make a determination,  
4                   and based on the evidence that was put before us, I  
5                   think we all need to make a determination, so if you  
6                   can't make a determination, that's fine, but the  
7                   rest of us I think are being asked to make a  
8                   determination.

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

17                  Darryl?

18                  VICE CHAIRPERSON BARDUSCH: When you are  
19                  done.

20                  CHAIRPERSON TORRES: Yeah, I am done.

21                  VICE CHAIRPERSON BARDUSCH: Well, I  
22                  guess in trying to convince other people to support  
23                  this one, this exemption, I know you sat through  
24                  very patiently while I brought up all the different  
25                  exemptions, and people came in and testified for

1       them, and they put forth just really flimsy excuses  
2       that convinced you that it was, you know, it was too  
3       impractical to compete dog food, it was too  
4       impractical to compete fresh meat, and that they  
5       actually changed that. They were just one after  
6       another.

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

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

24             And the idea that we don't know because  
25      in the future we don't know what's going to happen,

1 we have testimony four years of nothingness, four  
2 years of nothingness of nothing happening, and, you  
3 know, I think that's sufficient evidence to show  
4 that this is just too complex, and it is not  
5 advantageous for the State of Hawaii to try to  
6 compete these requirements, respectfully.

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

20 And that's pretty much what I am saying  
21 here is that I think until we try it at least one  
22 time, it's one thing for the vendor to say, hey,  
23 there's no competition out there, there's nobody, I  
24 have heard that a hundred times in previous  
25 procurements. We go out there, and we try to



1 compete, and we find competition, and sometimes we  
2 find vendors who are far better experienced and far  
3 better qualified than the previous ones we had.

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

13 Yes?

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

23 CHAIRPERSON TORRES: Okay, well, I am  
24 basing -- I am basing my comments essentially on my  
25 own personal experience, and I don't have a lot of

1 experience with State procurements, but I do know  
2 how it is determined in the Federal government, and  
3 I have seen a general trend on the Procurement  
4 Board, the State Procurement Policy Board, that we  
5 are going very much in the direction of Federal  
6 procurement. That's my personal opinion, and I  
7 think that it is not a bad example to use.

8 BOARD MEMBER HO: Can I just say  
9 something?

10 CHAIRPERSON TORRES: Sure.

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

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

23 I also agree with Pam that when you put  
24 it out for a -- if we do put it out for a  
25 competitive type of bid, there may be somebody

1 that's better, there may not. We don't know until  
2 we do that. But to just turn around and say, no,  
3 you're exempt; no, we are not going to do it; no, it  
4 is too complex; no, we can't do this, I don't agree  
5 with that. That's not -- that's not what I agree  
6 with. You know, yes, I look at it, we have a  
7 fiduciary responsibility to the State on some -- on  
8 an RFP. It may not work. It may work. We don't  
9 know that. We haven't even tried it.

10 BOARD MEMBER SAITO: Okay.

11 VICE CHAIRPERSON BARDUSCH: Okay.

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

25 I have read the petition where it

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

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

23 So I mean, with that kind of a statement  
24 that we had the other one where for the dog food,  
25 the only reason why he wanted to be exempted was

1 because the person who was helping him for the sole  
2 source wasn't approving the sole source, and that  
3 was wrong. But it was still allowed to continue  
4 with the exemption such that in your statement, Pam,  
5 we do things, and then we granted the exemptions,  
6 that's clearly not how the State is doing.

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

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

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

25 VICE CHAIRPERSON BARDUSCH: Okay, wait,

1 wait.

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

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

20 VICE CHAIRPERSON BARDUSCH: Okay, I  
21 really, really find it offensive your manner of  
22 characterizing the speech and the testimony that I  
23 put forth. I put forth a very logical argument that  
24 this Board has a record of granting exemptions, and  
25 I put forward what those exemptions are. Now, I

1 cannot help it that the example I put forth seems  
2 silly, but it is factual, and the fact that you make  
3 a condescending comment about that is really  
4 offensive to me.

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

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

25 So, again, may I call for the vote?

1 Okay. If you support paragraph four B, the petition  
2 paragraph four B, please vote in the affirmative by  
3 showing your hands.

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

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

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

12 CHAIRPERSON TORRES: And we have --

13 BOARD MEMBER MATSUMOTO: I abstained.

14 CHAIRPERSON TORRES: Did you abstain?

15 BOARD MEMBER MATSUMOTO: I abstained.

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

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

23 CHAIRPERSON TORRES: Okay, for the  
24 reason that our attorney mentioned, because we did  
25 not have four affirmative votes, the motion has



1 failed. Thank you.

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

5 MS. OHARA: Yes.

6 BOARD MEMBER MATSUMOTO: And four is the  
7 number?

8 MS. OHARA: Yes.

9 BOARD MEMBER MATSUMOTO: Just to make  
10 sure.

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

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

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

23 MR. THOMASON: May I?

24 CHAIRPERSON TORRES: Certainly.

25 MR. THOMASON: The first statement that

1 we made when I stood up here was that our  
2 understanding is that there needs to be a sufficient  
3 record created for a Circuit Court review.  
4 Normally, there would be an identification of the  
5 evidence that you received to support the  
6 conclusions that you reached and the legal analysis  
7 that supports the conclusions reached. I would ask  
8 that, although you have a vote on the motions, that  
9 at the end of this meeting or in a future meeting  
10 you go into an executive session and consult with  
11 your counsel.

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

22 CHAIRPERSON TORRES: Thank you. I  
23 believe that will come from our attorney, is that  
24 correct, Pat? A declaratory ruling, would you be  
25 providing that?

1 MS. OHARA: I will be drafting it.

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

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

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

23 BOARD MEMBER MATSUMOTO: I think, Chair,  
24 I think the issue is that now that we have laid out  
25 publicly, heard testimony and laid out publicly the

1 petitions, the Board needs to formally request the  
2 Attorney General to write out the declaratory ruling  
3 that we would act on at a subsequent meeting for  
4 formal approval and filing, and I believe that's the  
5 process; is that correct?

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

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

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

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

25 MS. OHARA: No. The draft will be based

1 on and reflect the voting and reflect the evidence  
2 in the record, and then the draft does not  
3 automatically become valid. The Board will have the  
4 opportunity to review it for accuracy or comment and  
5 approve the final version of the draft. But  
6 basically, it is not a -- the draft does not give  
7 you an opportunity to revisit the issue. It's just  
8 is it a correct accurate memorialization, a  
9 recordation of what has happened here?

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

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

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

19 MS. REPORTER: Two weeks.

20 CHAIRPERSON TORRES: Two weeks.

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

23 CHAIRPERSON TORRES: Okay, that sounds  
24 good. Thank you. Okay, I would like to move on to  
25 agenda item five, but in case we have people who are

1 leaving, I would like to thank everybody for  
2 participating, and I would like to thank our court  
3 reporter very, very much for your assistance.

4 (Hearing concluded at 4:57 p.m.)  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## C E R T I F I C A T E

STATE OF HAWAII )  
 ) 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