

**PROCUREMENT POLICY BOARD**  
1151 Punchbowl Street, Conference Room 410  
Honolulu, Hawaii 96813

Regular Meeting  
April 16, 2009  
1:00 pm

AGENDA

- I. Call to Order.
- II. Approval of Minutes – Meeting of March 19, 2009.
- III. Communication from Gifford K.F. Chang dated April 4, 2009 regarding HRS Chapter 103D, Certified Payroll.
- IV. Request by Member Darryl Bardusch for:
  - a) The State Procurement Office (SPO) to give a presentation on how protests are conducted/handled and what the board has the authority to do concerning this process; and
  - b) A discussion on restricting the SPO's authority to delegate the authority to resolve protests.
- V. Executive Session to consult with the Board's attorney on powers, immunities, and liabilities pursuant to HRS section 92-5(a)(4); regarding two appeals of the PPB's Declaratory Order, in the Circuit Court of the First Circuit by Olelo Community Television and in the Circuit Court of the Second Circuit by Akaku: Maui Community Television.
- VI. Announcements.
- VII. Adjournment.

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

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

# Agenda Item III

**GIFFORD K.F. CHANG**

Fax 808 951-0352

1448 Young Street, Suite 18  
Honolulu, Hawaii 96814

Bus 808 951-0350

April 4, 2009

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

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

Attention:

Board Members:

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

Re: HRS Chapter 103D  
Certified Payroll

Dear Members of the Board:

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

We were informed that many private companies that are awarded contracts submit certified payroll to various governmental agencies for payment, but certain companies truly list their top managers or higher paid employees as the employees on site performing the work. Truly these high paid employees are merely temporarily and do not truly reflect the correct employees performing the work on site. That would mean that majority of the employees working on site is not being paid the true wage

scale as the State and Federal law is trying to implement. This is truly fraudulent and is hurting the employees. The principals of the companies, the upper and middle management of these companies should be scrutinized, prosecuted for cheating and lying to the government. As we understand, any company that submits a certified payroll signs their name and attest to the payroll as being true and not falsified.

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

1. How long have they worked on this project in the last 2 weeks or the week period in effect, etc.
2. What is their pay wage that they are receiving;
3. Have they been paid their pay wage properly in accordance with the Federal government wage standards;
4. Were they informed by their employer that this project is a government project and that their wage check will reflect such pay wage.

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

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

Your attention into this matter is greatly appreciated. Additionally, please inform me whether the Board will be taking specific measures on implanting procedures within the State and County contract laws and its staff members in stopping entities that abuse the system. If you wish to speak with me, you are welcome to contact me.

In the event I addressed this matter to the wrong Procurement Policy Board, please forward this letter to the proper governmental agency or department that could address this matter properly, effectively, swiftly and enforceably.

Sincerely,

  
GIFFORD K. F. CHANG

# Agenda Item V

Olelo

Of Counsel:  
ALSTON HUNT FLOYD & ING  
Attorneys at Law  
A Law Corporation

TERRY E. THOMASON 5417-0  
BARBARA A. KRIEG 8483-0  
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1001 Bishop Street, 18th Floor  
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Attorneys for Appellant  
`OLELO COMMUNITY TELEVISION

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2009 APR -2 PM 2: 09

F. OTAKE  
CLERK

3APR'09 AM 9:08 SP0-4

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

`Olelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. 09-1-0751-04

(Agency Appeal)

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

**NOTICE OF APPEAL TO CIRCUIT COURT**

Notice is hereby given that Appellant `Olelo Community Television ("`Olelo"), pursuant to Hawai'i Revised Statutes (HRS) §§ 91-8 and 91-14 and Hawai'i Rules of Civil Procedure Rule 72, hereby appeals to the Circuit Court of the First Circuit from Appellee

I hereby certify that this is a full, true, and  
correct copy of the original on file in this office.

  
Clerk Circuit Court, First Circuit

Procurement Policy Board's denial of 'Ōlelo's Petition for a Declaratory Ruling filed September 12, 2006 ("Petition"), as set forth in the "Declaratory Order Re: Akaku's Petition for Adoption of a Rule Filed February 24, 2006; Akaku's Petition for Modification of a Rule filed February 24, 2006; 'Ōlelo's Petition for a Declaratory Ruling Filed September 12, 2006; Akaku's Petition for a Declaratory Ruling Filed February 23, 2006; and Akaku's Petition for a Declaratory Ruling Filed January 25, 2007," which is attached as Exhibit "A" and herein referred to as the "Declaratory Order."

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

Accordingly, 'Ōlelo appeals the denial of its Petition on the grounds that the Declaratory Order is: (1) in violation of statutory provisions; (2) in excess of the statutory authority and jurisdiction of the agency; (3) made under unlawful procedure; (4) affected by

error of law; (5) clearly erroneous in view of the reliable, probative and substantial evidence in the whole record; and (6) arbitrary, capricious, and characterized by abuse of discretion pursuant to HRS § 91-14(g).

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

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

Attorneys for Appellant  
'Ōlelo Community Television

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ʻŌlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. \_\_\_\_\_  
(Agency Appeal)

**STATEMENT OF THE CASE**

**STATEMENT OF THE CASE**

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

**PARTIES**

1. Appellant ʻŌlelo is a Hawai'i non-profit corporation, registered and authorized to do business in the State of Hawai'i.

2. Appellee Procurement Policy Board (the "Board") is a statutory board created under the authority of HRS Chapter 103D, Part II and is an agency within the meaning of HRS § 91-1 and a Board within the meaning of HRS § 92-2.

### **JURISDICTION**

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

### **BACKGROUND AND FACTS**

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

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

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

7. The Board heard testimony on `Ōlelo's Petition and Akaku's rulemaking petitions on September 22, 2006, October 5, 2006, October 27, 2006, December 21, 2006, and January 18, 2007.

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

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

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

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

12. Meanwhile, during the two years following the hearings, significant additional evidence came to light regarding the advantages of exempting PEG access contracts from the competitive selection provisions of the State Procurement Code, including:

a. Notwithstanding the representations made by the Administrator of the State Procurement Office during testimony to the Board, it has become evident that an RFP cannot be successfully crafted for the PEG access contracts, as the only PEG access RFP issued in the last two years was withdrawn following the filing of protests;

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

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

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

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

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<sup>1</sup> The Declaratory Order addresses four petitions filed by Akaku in addition to Ōlelo's Petition. Two of Akaku's petitions (one of which was not filed until after the Board's vote on Ōlelo's Petition) are the subject of an agency appeal filed by Akaku in Case No. 2CC09-1-000189 pending before Judge August. Akaku's petitions and Ōlelo's Petition, as well as the respective appeals, raise different issues for determination. However, out of an abundance of caution and because the appeals are from the same Declaratory Order, Ōlelo has identified Akaku's agency appeal as a "related case" on the Civil Information Sheet in this action.

15. With respect to its decision to deny 'Ōlelo's Petition, the Declaratory Order states only that "the Board was not persuaded that it would be practicable or advantageous to exempt contracts for PEG services from the Procurement Code, and was not persuaded that the provision of PEG access services were comparable to the provision of utility services and thus exempt from the Procurement Code."

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

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

#### **RELIEF REQUESTED**

'Ōlelo prays this Court find and rule as follows:

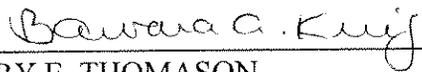
- a. That the matter be remanded to the Procurement Policy Board with the following instructions:
  - (i) That the Board, as presently constituted, reconsider 'Ōlelo's Petition and the record that has already been developed;
  - (ii) That the Board accept and consider additional evidence of matters that are material to the issues for determination and that have taken place in the more than two years since the vote purportedly denying 'Ōlelo's Petition;

- (iii) That the Board vote to grant or deny `Ōlelo's Petition by a majority of the seven directors to which the Board is entitled;
- (iv) That the Board issue a written decision either granting the Petition or denying the Petition and, in the event of denial, state in detail the reasons for the decision, including findings of fact and conclusions of law; and,
- (v) That the Board's written decision in this matter be issued no later than 120 days after remand;

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

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

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

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

Attorneys for Appellant  
`Ōlelo Community Television

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

ʻŌlelo Community Television,  
Appellant,  
vs.  
Procurement Policy Board,  
Appellee.

Civil No. \_\_\_\_\_  
(Agency Appeal)

**DESIGNATION OF THE RECORD ON  
APPEAL**

**DESIGNATION OF THE RECORD ON APPEAL**

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

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

DATED: Honolulu, Hawai'i, April 3, 2009.

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

Attorneys for Appellant  
ʻŌlelo Community Television

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

‘Ōlelo Community Television,  
Appellant,  
vs.  
Procurement Policy Board,  
Appellee.

Civil No. \_\_\_\_\_  
(Agency Appeal)

**ORDER FOR CERTIFICATION AND  
TRANSMISSION OF RECORD**

**ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD**

TO: THE PROCUREMENT POLICY BOARD, STATE OF HAWAII

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

APR - 2 2009

DATED: Honolulu, Hawai‘i, \_\_\_\_\_.

F. OTAKE



CLERK OF THE ABOVE-ENTITLED COURT

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ʻŌlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

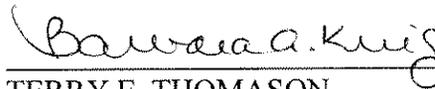
Civil No. \_\_\_\_\_  
(Agency Appeal)

**REQUEST FOR WRITTEN BRIEFS AND  
ORAL ARGUMENT**

**REQUEST FOR WRITTEN BRIEFS AND ORAL ARGUMENT**

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

DATED: Honolulu, Hawai'i, April 8, 2009.



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

Attorneys for Appellant  
ʻŌlelo Community Television

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

IN THE MATTER OF THE PETITIONS OF )  
 )  
AKAKU: MAUI COMMUNITY TELEVISION )  
FOR ADOPTION OF A RULE )  
FOR MODIFICATION OF A RULE )  
FOR DECLARATORY ORDER #1 )  
FOR DECLARATORY ORDER #2 )  
 )  
OLELO COMMUNITY TELEVISION )  
DECLARATORY RULING )  
\_\_\_\_\_ )

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

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

For the reasons stated below, Akaku's Petition for Adoption of a Rule, Akaku's Petition for Modification of a Rule, and Olelo's Petition for Declaratory Ruling are addressed together in part I, then Akaku's Petition for a Declaratory Order filed February 23, 2006 is treated in part II, and finally, Akaku's Petition for a Declaratory Order filed January 25, 2007 in part III.

I. AKAKU'S PETITION FOR ADOPTION OF A RULE, AKAKU'S PETITION FOR MODIFICATION OF A RULE, AND OLELO'S PETITION FOR DECLARATORY RULING

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

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

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

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

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

PROCEDURAL MATTERS

1. On February 24, 2006, Petitioner filed both Petition 1 and Petition 2.
2. Due to vacant positions on the Procurement Policy Board ("Board") and lack of quorum, the first Board meeting subsequent to the submission of the Petitions was on July 13, 2006.
3. Petitions 1 and 2 were placed on the agenda of the July 13, 2006 Board meeting, under the heading, "New Business, For Information."
4. On July 13, 2006, the Board considered Petitions 1 and 2 at its meeting. Board members Gregory King, Gordon Ing, Russ Saito, and Leslie Chinen were present.

Mr. King chaired the meeting. Lance D. Collins, Esq. appeared on behalf of Petitioner.

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

Petitions:

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

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

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

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

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

recommended the Board to consider as void, the actions taken concerning Petitions 1 and 2 at the PPB's July 13, 2006 meeting.

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

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

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

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

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

Kealii Lopez - Olelo

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

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

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

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

Colette Young-Pohlman - teacher  
Gary Pak - UH  
Sharran Langford – Olelo producer  
Mark Lutwak  
Nancy Hedlund  
Clara Batongbacal  
Gerry Kaman – Olelo  
Maile Shimabukuro – State Representative 45<sup>th</sup> district

Joan Lander  
John A. Hoag – Church of Jesus Christ of Later-Day Saints

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

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

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

Larry Geller – President, Kokua Council  
Ruby Maunakea, individually and for Connie Burchett, David Oclinaria, and  
Hokulei Crew – Olelo  
Reyanne Maunakea – Olelo  
Piilani Kaopuiki  
Bert Fishman for Jo Yasutake – City and County Recreation Director, Palolo  
Meredith Nichols for Sharon Narimatsu – Olelo Board of Directors  
Donna Wylan for Angela Meixell – Chancellor, Windward Community College  
Bob Farell – Olelo  
Naturalee Puou - Olelo  
Shirley P. Nabooji  
Sherry Ann Hoohui – Olelo  
Bronson Garcia – Olelo  
Christian P. Nahoopii-Hose – Olelo  
Kaleo Keliikipi-Poe – Olelo  
Sharlette Poe - Olelo  
Lynn M. Corneau – Olelo

Colby Corneau – Olelo  
Jordan Kila – Olelo  
Fuschia Keliikipi-Kamakani – Olelo  
Kourtney Kaaihue – Olelo  
Rodney Paguirigan – Olelo  
Kauhi Maunakea-Forth – Olelo  
Alan Ibanes – Olelo  
Tuli Leota – Olelo  
Jamie Deguzman – Olelo  
Ambree Hauhio – Olelo  
Thorne Fontanilla – Olelo  
Gary Supnet  
Steven Barsamin  
Kenneth and Hannah Barsamin – Olelo  
Ruth Hsu – UHM, Dept of English, Assoc. Professor  
Neal Rivera for Josephine Feiteira-Kahue – NaKupuna O Hawaii, Olelo  
Dennis Callan  
Akemi Carter  
Shirley Sybert

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

Gerry Silva  
Will Haynes  
BJ Protho – Kupuna Coalition Network  
Noyita Saravia – Olelo  
Gail Nakamoto – Olelo  
Leslie Gil – Olelo  
Tom McCrea – The Open Door Academy  
Sabine Deringer – HPU  
Keith Akana – Olelo  
Casina Waterman – Oahu Council  
Soloaii Faalepo – Samoa Mo Samoa  
Molesi Sagapolutele – Samoa Mo Samoa  
Aloha Davis – Olelo  
Aki Carter - Olelo  
Bokdong Yoon  
Aloa Kaneaukahi – Olelo  
Michael Bailey – Greenpeace  
Hans Peter Jensen – Olelo  
Betty Ann Leslie – Olelo  
Kawika Nahoopii - Olelo  
Anela Casauran – Olelo  
Tammy Toma

Meredith Nichols - Olelo  
Kaimanaloa Samson  
Bert Fishman – Cith & County of Honolulu  
Alaine Ko  
Pat Patterson  
Ernie Pascual  
Diego Cadiente, Jr.  
Andrew Germinaro  
Evera Williams  
Erin Malone  
James Nakapaahu  
Angela Breene  
Kuuleilani Reyes

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

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

Kyson Manaku-Kalili  
Makana Shook  
Bev Van Kinkle  
Suivaaia Soosenuu  
Taclasse Soosenuu  
Ramona Soosenuu  
Tracey Soosenuu  
Cornelia Kawamata – Waipahu Elementary School  
Shelley Zamborelli  
Kyle Kajihira - American friends Service Committee  
Romelia Shiroma  
Robert Bailey  
Matt Yamashita – Akaku  
Joanne Flannery – Kailua Historical Society  
Sean McLaughlin  
Gwendolyn Kim  
Jeanne L. Lee  
Cory Harden

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

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

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

Carol Bain – Community Media Producers Association

The following individuals provided written testimony against the Petitions.

Jeff Garland  
Wendy Arbeit

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

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

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

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

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

21. Because of concerns of the public, the Board questioned Clyde Sonobe and Aaron Fujioka about the Request for Proposal ("RFP") process that DCCA intended to use for contracts to obtain PEG access services. The Board voted unanimously to have Mr. Fujioka to provide the Board an update of the RFP process, and to inform the Board,

if, during the RFP process it became evident that it was neither practicable nor advantageous to continue the RFP process.

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

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

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

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

26. The three petitions acted upon by the Board at its October 5, 2006 meeting, were again treated together. The Board requested testimony be limited to five

minutes each, but allowed the time limit to be exceeded. The following individuals appeared and provided oral testimony in support of the Petitions.

Robert Stiver  
Gerry Silva  
Meredith Nichols  
Terry Thomason  
Jim Brewer

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

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

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

Jay April – Akaku  
Christian Nahoopii-Hose – Olelo  
Naturalee I. Puou – Olelo  
Renee Ing – Olelo  
Gerry Silva – Olelo  
Lance D. Collins – attorney for Akaku  
Barbara Krieg – attorney for Oelo  
Kealii Lopez – Olelo  
Ruth Hsu – UHM  
Kawika Nahoopii – Olelo  
Aloha Davis – Olelo

29. The Board conducted a question and answer session with representatives of Olelo, Akaku, DCCA, and those who use the Olelo facilities and services. Mr. Fujioka reported: the Request for Information (“RFI”) and RFP processes initiated to select contractors for the new PEG access services contracts were proceeding; comments received from the public were being considered by DCCA and SPO for incorporation into a new RFP; and another RFI would be issued to further solicit public comment.

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

### DECISION

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

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

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

In its Petition, Akaku requested the following.

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

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

#### PROCEDURAL MATTERS

1. Akaku filed its Petition on February 23, 2006.
2. Due to a misunderstanding by counsel for the SPO and the Board, Deputy Attorney General Patricia Ohara, this Petition was not considered until the December 21, 2006 Board meeting. She previously had understood Lance D. Collins, attorney for Akaku, to have agreed to set aside the Petition for Declaratory Order because of the other two petitions for rule adoption and modification he filed on Akaku's behalf on February 24, 2006 (Petitions 1 and 2 discussed above), and the lawsuit he filed on December 4, 2006, Akaku v. Aaron Fujioka, et al., Civil No. 06-1-0443(3).
3. The Board met and considered this Petition at its January 18, 2007 meeting, which was continued from the December 21, 2006 meeting. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made. Board members present were Gregory King, Russ Saito, Leslie Chinen, Pamela Torres, and Daryle Ann Ho. Richard Totten was excused from the meeting. Mr. King chaired the meeting.
4. The Board received testimony from Mr. Collins. A lengthy discussion followed about the funding of PEG access organizations, the relationship between PEG access services and cable franchises, and these fees being subject to procurement but not capital fees. The Board conducted an extensive question and answer session with

representatives of Olelo, Akaku, DCCA, and those who use Olelo's facilities and services.

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

### DECISION

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

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

On January 25, 2007, Akaku: Maui Community Television ("Akaku") filed a "Petition for a Declaratory Order" pursuant to HRS §91-8.

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

a. Whether the issuance of cable franchises granted pursuant to Chapter 440G, Haw. Rev. Stat. And those franchises are subject to Chapter 103D, Haw. Rev. Stat.;

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

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

### PROCEDURAL MATTERS

1. Akaku filed its Petition on January 25, 2007.

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

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

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

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

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

7. The Board determined contracts entered into by cable franchises with businesses as required by the enfranchisement decision and order that benefit the state,

in-kind or otherwise, are not subject to HRS chapter 103D because the cable franchises, such as Time Warner, are not governmental bodies subject to chapter 103D.

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

#### DECISION

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

PROCUREMENT POLICY BOARD

By: *Pamela Torres*  
PAMELA TORRES, CHAIR

Dated: *Feb 24, 2009*

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ʻŌlelo Community Television,

Appellant,

vs.

Procurement Policy Board,

Appellee.

Civil No. \_\_\_\_\_  
(Agency Appeal)

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

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

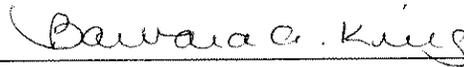
	<b>U.S. MAIL</b>	<b>HAND- DELIVERY</b>	<b>EMAIL</b>
MARK BENNETT PATRICIA OHARA Department of the Attorney General 425 Queen Street Honolulu, Hawai'i 96813	( X )	( )	( )

Attorneys for Appellee  
Procurement Policy Board  
State of Hawai'i

Pamela Torres, Chair  
Procurement Policy Board  
c/o Mr. Aaron Fujioka  
State Procurement Office  
Department of Accounting and General Services  
Kalanimoku Building  
1151 Punchbowl Street, Room 230A  
Honolulu, Hawai'i 96813

U.S. MAIL	HAND- DELIVERY	EMAIL
( X )	( )	( )

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



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

Attorneys for Appellant  
'Ōlelo Community Television

Akaku

Law Office of Lance D. Collins  
Lance D. Collins 8246  
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808.243.9292

FILED  
2009 MAR 12 AM 11:52

H. HALL  
CLERK  
SECOND CIRCUIT COURT

Attorney for Petitioners-Appellants

IN THE CIRCUIT COURT OF SECOND CIRCUIT

7 APR '09 AM 11:53 SP0-1

STATE OF HAWAII

AKAKU: MAUI COMMUNITY  
TELEVISION,  
  
Petitioner-Appellant  
  
vs.  
  
PROCUREMENT POLICY BOARD  
  
Agency-Appellee.

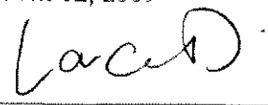
) Docket No. 09-1-0189 (1)  
) (Agency Appeal)  
)  
) NOTICE OF APPEAL; CERTIFICATE OF  
) SERVICE  
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NOTICE OF APPEAL

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

DATED: Wailuku, Maui, Hawai'i

March 12, 2009



LAW OFFICE OF LANCE D. COLLINS  
LANCE D COLLINS  
Attorney for Appellant

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



Clerk, Second Circuit Court

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY	)	Docket No. _____
TELEVISION,	)	(Agency Appeal)
	)	
Petitioner-Appellant	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
PROCUREMENT POLICY BOARD	)	
	)	
Agency-Appellee.	)	
	)	

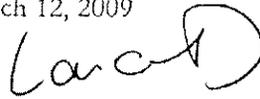
CERTIFICATE OF SERVICE

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

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

DATED: Wailuku, Maui, Hawai'i

March 12, 2009



\_\_\_\_\_  
LAW OFFICE OF LANCE D. COLLINS  
LANCE D COLLINS  
Attorney for Appellant

Law Office of Lance D. Collins  
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2009 MAR 12 AM 11:52

H. M. ... CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII

Attorney for Petitioners-Appellants

IN THE CIRCUIT COURT OF SECOND CIRCUIT

7 APR '09 AM 11:53 SP0-

STATE OF HAWAII

AKAKU: MAUI COMMUNITY  
TELEVISION,  
  
Petitioner-Appellant  
  
vs.  
  
PROCUREMENT POLICY BOARD  
  
Agency-Appellee.

) Docket No. 09-1-0189(1)  
) (Agency Appeal)  
)  
) STATEMENT OF THE CASE;  
) CERTIFICATE OF SERVICE  
)  
)  
)  
)  
)  
)

STATEMENT OF THE CASE

Of Counsel:  
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LANCE D COLLINS 8246  
2070 W Vineyard St, Ste 5  
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Attorney for Petitioners-Appellants

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION,	) Docket No. _____
	) (Agency Appeal)
	)
Petitioner-Appellant	) STATEMENT OF THE CASE
vs.	)
	)
PROCUREMENT POLICY BOARD	)
	)
Agency-Appellee.	)
	)

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

1. On or about February 23, 2006, Petitioner filed four petitions with the Agency, inter alia, entitled Petition for a Declaratory Order (First Petition for Dec Order). On or about January 25, 2007, Petitioner filed another petition with Agency entitled Petition for a Declaratory Order (Second Petition for Dec Order) regarding the applicability of Chapter 103D, Haw. Rev. Stat. to the power of the Director of the Department of Commerce and Consumer Affairs to designate access organizations under Chapter 440G, Haw. Rev. Stat.

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

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

4. The Agency did not take action on the Second Petition for Dec Order until April 5, 2007. The Board made determinations based upon the petition.

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

POINTS OF ERROR

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

7. Chapter 103D, Haw. Rev. Stat. does not apply to the designation of access organizations made under power granted in Chapter 440G, Haw. Rev. Stat.

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

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

PRAYER FOR RELIEF

Wherefore Appellants pray this Honorable Appellate Court as follows:

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

DATED: Wailuku, Maui, Hawai'i

March 12, 2009



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LAW OFFICE OF LANCE D. COLLINS  
LANCE D COLLINS  
Attorney for Appellant

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY	)	Docket No. _____
TELEVISION,	)	(Agency Appeal)
	)	
Petitioner-Appellant	)	CERTIFICATE OF SERVICE
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	)	
Agency-Appellee.	)	
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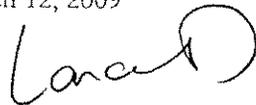
CERTIFICATE OF SERVICE

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

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

DATED: Wailuku, Maui, Hawai'i

March 12, 2009



\_\_\_\_\_  
LAW OFFICE OF LANCE D. COLLINS  
LANCE D COLLINS  
Attorney for Appellant

Law Office of Lance D. Collins  
Lance D. Collins 8246  
2070 W Vineyard St, Ste 5  
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808.243.9292

FILED

2009 MAR 12 AM 11:53

HONOLULU CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII

Attorney for Petitioner-Appellant

7 APR '09 AM 11:54 SPQ-

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

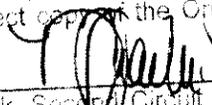
AKAKU: MAUI COMMUNITY  
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vs.  
  
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Agency-Appellee.

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

DESIGNATION OF THE RECORD ON APPEAL

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

Attorney for Petitioners-Appellants

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

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY TELEVISION,	)	Docket No. _____
	)	(Agency Appeal)
	)	
Petitioner-Appellant	)	DESIGNATION OF THE RECORD ON
vs.	)	APPEAL
	)	
PROCUREMENT POLICY BOARD	)	
	)	
Agency-Appellee.	)	
	)	
	)	

DESIGNATION OF THE RECORD ON APPEAL

PROCEDURAL BACKGROUND

Petition for A Declaratory Order (February 26, 2006)	1
Petition for A Declaratory Order (January 27, 2007)	6
Declaratory Order re: Akaku's Petition for Adoption of a Rule filed February 24, 2006; Akaku's Petition for Modification of a Rule filed February 24, 2006; Olelo's Petition for A Declaratory Ruling filed September 12, 2006; Akaku's Petition for A Declaratory Ruling filed February 23, 2006; and Akaku's Petition for A Declaratory Ruling filed January 25, 2007	12

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

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

PETITION FOR A DECLARATORY ORDER

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

Attorney for Petitioner  
Akaku: Maui Community Television

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

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

PETITION FOR A DECLARATORY ORDER

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

Akaku Is An Interested Party

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

Requested Action

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

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

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

Support for a Declaratory Order

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

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

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

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

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

8. There is uncertainty about whether PEG Access contracts fall under the requirements of the Code because of certain statements made by various state agencies. However, because public funds are not used, and even if the funds were to be collected and disbursed by the state, they are not public funds within the meaning of Haw. Rev. Stat. 193D.

#### Requested Action

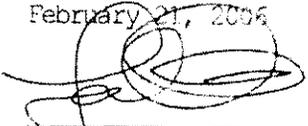
10. Petitioner Akaku hereby requests that the Board conduct an open meeting to deliberate and decide on a declaratory order as proposed herein.

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

12. Petitioner Akaku hereby requests that the Board grant the petition's request and make a declaratory order declaring (1) that funds collected and disbursed by the cable franchisees pursuant to order or rule of the Department of Commerce and Consumer Affairs are not 'public funds' within the meaning of Haw. Rev. Stat. 103D-102; and (2) that the State Procurement Code does not apply to services for providing public educational and governmental cable access.

Dated: Wailuku, Maui, Hawai'i

February 21, 2006

  
LANCE D. COLLINS  
Attorney for Petitioner Akaku

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

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

PETITION FOR A DECLARATORY ORDER

Of Counsel:  
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Attorney for Petitioner  
Akaku: Maui Community Television

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

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

PETITION FOR A DECLARATORY ORDER

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

Akaku Is An Interested Party

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

Requested Action

3. There is confusion regarding the applicability of the State Procurement Code and its implications on Petitioner's rights. Petitioner hereby requests that the Procurement Policy Board make a declaratory order pursuant to Haw. Rev. Stat. 91-8 as follows:

a. Whether the issuance of cable franchises granted pursuant to Chapter 440G, Haw. Rev. Stat. and those franchises are subject to Chapter 103D, Haw. Rev. Stat.;

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

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

Support for a Declaratory Order

4. Cable television in the United States is regulated by the federal Cable Television Consumer Protection and Competition Act of 1992, as amended. This act delegates to the states broad discretion to regulate cable television as franchising authorities. In addition to the regulation of the profitable aspects of cable television such as channel capacity, system configuration, and institutional and subscriber networks, 47 U.S.C.A. § 531

permits cable operators to designate channel capacity of franchisees to carry public, educational and government access (hereafter 'PEG access').

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

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

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

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

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

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

8. There is uncertainty about whether the cable franchises, PEG

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

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

Conclusion

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

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

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

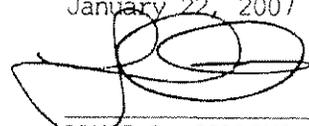
a. Whether the issuance of cable franchises granted pursuant to Chapter 440G, Haw. Rev. Stat. and those franchises are subject to Chapter 103D, Haw. Rev. Stat.;

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

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

Dated: Wailuku, Maui, Hawai'i

January 22, 2007



\_\_\_\_\_  
LANCE D. COLLINS

Attorney for Petitioner Akaku

MAR 09 2009

BEFORE THE PROCUREMENT POLICY BOARD

STATE OF HAWAII

IN THE MATTER OF THE PETITIONS OF )  
 )  
AKAKU: MAUI COMMUNITY TELEVISION )  
FOR ADOPTION OF A RULE )  
FOR MODIFICATION OF A RULE )  
FOR DECLARATORY ORDER #1 )  
FOR DECLARATORY ORDER #2 )  
 )  
OLELO COMMUNITY TELEVISION )  
DECLARATORY RULING )  
\_\_\_\_\_ )

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

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

For the reasons stated below, Akaku's Petition for Adoption of a Rule, Akaku's Petition for Modification of a Rule, and Olelo's Petition for Declaratory Ruling are addressed together in part I, then Akaku's Petition for a Declaratory Order filed February 23, 2006 is treated in part II, and finally, Akaku's Petition for a Declaratory Order filed January 25, 2007 in part III.

I. AKAKU'S PETITION FOR ADOPTION OF A RULE, AKAKU'S PETITION FOR MODIFICATION OF A RULE, AND OLELO'S PETITION FOR DECLARATORY RULING

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

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

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

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

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

PROCEDURAL MATTERS

1. On February 24, 2006, Petitioner filed both Petition 1 and Petition 2.
2. Due to vacant positions on the Procurement Policy Board ("Board") and lack of quorum, the first Board meeting subsequent to the submission of the Petitions was on July 13, 2006.
3. Petitions 1 and 2 were placed on the agenda of the July 13, 2006 Board meeting, under the heading, "New Business, For Information."
4. On July 13, 2006, the Board considered Petitions 1 and 2 at its meeting. Board members Gregory King, Gordon Ing, Russ Saito, and Leslie Chinen were present.

Mr. King chaired the meeting. Lance D. Collins, Esq. appeared on behalf of Petitioner.

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

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

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

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

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

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

recommended the Board to consider as void, the actions taken concerning Petitions 1 and 2 at the PPB's July 13, 2006 meeting.

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

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

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

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

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

Kealii Lopez - Olelo

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

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

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

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

Colette Young-Pohlman - teacher  
Gary Pak - UH  
Sharran Langford – Olelo producer  
Mark Lutwak  
Nancy Hedlund  
Clara Batongbacal  
Gerry Kaman – Olelo  
Maile Shimabukuro – State Representative 45<sup>th</sup> district

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Joan Lander  
John A. Hoag – Church of Jesus Christ of Later-Day Saints

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

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

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

Larry Geller – President, Kokua Council  
Ruby Maunakea, individually and for Connie Burchett, David Oclitaria, and  
Hokulei Crew – Olelo  
Reyanne Maunakea – Olelo  
Piilani Kaopuiki  
Bert Fishman for Jo Yasutake – City and County Recreation Director, Palolo  
Meredith Nichols for Sharon Narimatsu – Olelo Board of Directors  
Donna Wylan for Angela Meixell – Chancellor, Windward Community College  
Bob Farell – Olelo  
Naturalee Puou - Olelo  
Shirley P. Nabooji  
Sherry Ann Hoohui – Olelo  
Bronson Garcia – Olelo  
Christian P. Nahoopii-Hose – Olelo  
Kaleo Keliikipi-Poe – Olelo  
Sharlette Poe - Olelo  
Lynn M. Corneau – Olelo

Colby Corneau – Olelo  
Jordan Kila – Olelo  
Fuschia Keliikipi-Kamakani – Olelo  
Kourtney Kaaihue – Olelo  
Rodney Paguirigan – Olelo  
Kauhi Maunakea-Forth – Olelo  
Alan Ibanes – Olelo  
Tuli Leota – Olelo  
Jamie Deguzman – Olelo  
Ambree Hauhio – Olelo  
Thorne Fontanilla – Olelo  
Gary Supnet  
Steven Barsamin  
Kenneth and Hannah Barsamin – Olelo  
Ruth Hsu – UHM, Dept of English, Assoc. Professor  
Neal Rivera for Josephine Feiteira-Kahue – NaKupuna O Hawaii, Olelo  
Dennis Callan  
Akemi Carter  
Shirley Sypert

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

Gerry Silva  
Will Haynes  
BJ Protho – Kupuna Coalition Network  
Noyita Saravia – Olelo  
Gail Nakamoto – Olelo  
Leslie Gil – Olelo  
Tom McCrea – The Open Door Academy  
Sabine Deringer – HPU  
Keith Akana – Olelo  
Casina Waterman – Oahu Council  
Soloaii Faalepo – Samoa Mo Samoa  
Molesi Sagapolutele – Samoa Mo Samoa  
Aloha Davis – Olelo  
Aki Carter - Olelo  
Bokdong Yoon  
Aloa Kaneaukahi – Olelo  
Michael Bailey – Greenpeace  
Hans Peter Jensen – Olelo  
Betty Ann Leslie – Olelo  
Kawika Nahoopii - Olelo  
Anela Casauran – Olelo  
Tammy Toma

Meredith Nichols - Olelo  
Kaimanaloa Samson  
Bert Fishman – Cith & County of Honolulu  
Alaine Ko  
Pat Patterson  
Ernie Pascual  
Diego Cadiante, Jr.  
Andrew Germinaro  
Evera Williams  
Erin Malone  
James Nakapaahu  
Angela Breene  
Kuuleilani Reyes

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

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

Kyson Manaku-Kalili  
Makana Shook  
Bev Van Kinkle  
Suivaaia Soosenuu  
Taclasse Soosenuu  
Ramona Soosenuu  
Tracey Soosenuu  
Cornelia Kawamata – Waipahu Elementary School  
Shelley Zamborelli  
Kyle Kajihiro - American friends Service Committee  
Romelia Shiroma  
Robert Bailey  
Matt Yamashita – Akaku  
Joanne Flannery – Kailua Historical Society  
Sean McLaughlin  
Gwendolyn Kim  
Jeanne L. Lee  
Cory Harden

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

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

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

Carol Bain – Community Media Producers Association

The following individuals provided written testimony against the Petitions.

Jeff Garland  
Wendy Arbeit

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

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

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

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

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

21. Because of concerns of the public, the Board questioned Clyde Sonobe and Aaron Fujioka about the Request for Proposal ("RFP") process that DCCA intended to use for contracts to obtain PEG access services. The Board voted unanimously to have Mr. Fujioka to provide the Board an update of the RFP process, and to inform the Board,

if, during the RFP process it became evident that it was neither practicable nor advantageous to continue the RFP process.

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

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

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

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

26. The three petitions acted upon by the Board at its October 5, 2006 meeting, were again treated together. The Board requested testimony be limited to five

minutes each, but allowed the time limit to be exceeded. The following individuals appeared and provided oral testimony in support of the Petitions.

Robert Stiver  
Gerry Silva  
Meredith Nichols  
Terry Thomason  
Jim Brewer

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

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

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

Jay April – Akaku  
Christian Nahoopii-Hose – Olelo  
Naturalee I. Puou – Olelo  
Renee Ing – Olelo  
Gerry Silva – Olelo  
Lance D. Collins – attorney for Akaku  
Barbara Krieg – attorney for Oelo  
Kealii Lopez – Olelo  
Ruth Hsu – UHM  
Kawika Nahoopii – Olelo  
Aloha Davis – Olelo

29. The Board conducted a question and answer session with representatives of Olelo, Akaku, DCCA, and those who use the Olelo facilities and services. Mr. Fujioka reported: the Request for Information (“RFI”) and RFP processes initiated to select contractors for the new PEG access services contracts were proceeding; comments received from the public were being considered by DCCA and SPO for incorporation into a new RFP; and another RFI would be issued to further solicit public comment.

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

#### DECISION

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

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

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

In its Petition, Akaku requested the following.

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

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

#### PROCEDURAL MATTERS

1. Akaku filed its Petition on February 23, 2006.
2. Due to a misunderstanding by counsel for the SPO and the Board, Deputy Attorney General Patricia Ohara, this Petition was not considered until the December 21, 2006 Board meeting. She previously had understood Lance D. Collins, attorney for Akaku, to have agreed to set aside the Petition for Declaratory Order because of the other two petitions for rule adoption and modification he filed on Akaku's behalf on February 24, 2006 (Petitions 1 and 2 discussed above), and the lawsuit he filed on December 4, 2006, Akaku v. Aaron Fujioka, et al., Civil No. 06-1-0443(3).
3. The Board met and considered this Petition at its January 18, 2007 meeting, which was continued from the December 21, 2006 meeting. The Board conducted its proceeding under HRS chapter 92, part I. No objection to the procedure was made. Board members present were Gregory King, Russ Saito, Leslie Chinen, Pamela Torres, and Daryle Ann Ho. Richard Totten was excused from the meeting. Mr. King chaired the meeting.
4. The Board received testimony from Mr. Collins. A lengthy discussion followed about the funding of PEG access organizations, the relationship between PEG access services and cable franchises, and these fees being subject to procurement but not capital fees. The Board conducted an extensive question and answer session with

representatives of Olelo, Akaku, DCCA, and those who use Olelo's facilities and services.

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

#### DECISION

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

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

On January 25, 2007, Akaku: Maui Community Television ("Akaku") filed a "Petition for a Declaratory Order" pursuant to HRS §91-8.

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

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

#### PROCEDURAL MATTERS

1. Akaku filed its Petition on January 25, 2007.

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

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

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

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

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

7. The Board determined contracts entered into by cable franchises with businesses as required by the enfranchisement decision and order that benefit the state,

in-kind or otherwise, are not subject to HRS chapter 103D because the cable franchises, such as Time Warner, are not governmental bodies subject to chapter 103D.

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

#### DECISION

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

PROCUREMENT POLICY BOARD

By: Pamela Torres  
PAMELA TORRES, CHAIR

Dated: Feb 24, 2009

IN THE CIRCUIT COURT OF SECOND CIRCUIT

STATE OF HAWAII

AKAKU: MAUI COMMUNITY  
TELEVISION,

Petitioner-Appellant

vs.

PROCUREMENT POLICY BOARD

Agency-Appellee.

) Docket No. \_\_\_\_\_

) (Agency Appeal)

)

) ORDER TO CERTIFY RECORD ON

) APPEAL OR COUNTERDESIGNATE

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**ORDER TO CERTIFY RECORD ON APPEAL OR COUNTERDESIGNATE**

TO THE NAMED APPELLEE:

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

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

DATED: Wailuku, Maui, Hawai'i

MAR 12 2009

/sgd/ N. MARTINS (seal)

CLERK OF THE ABOVE-ENTITLED COURT