

MAR 18 2009

SENATE CONCURRENT RESOLUTION

REQUESTING THE STATE AUDITOR TO REVIEW THE RESPONSIBILITIES AND FUNCTIONS OF THE CABLE TELEVISION DIVISION OF THE DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS AND THE RELATIONSHIP BETWEEN ACTIVITIES OF THE CABLE TELEVISION DIVISION AND PUBLIC, EDUCATION, AND GOVERNMENT ACCESS ORGANIZATIONS.

1 WHEREAS, in 1984, Congress passed the Cable Communications
2 Policy Act, which permitted franchising authorities of the cable
3 television companies, such as the State of Hawaii, to require
4 their franchisees, the cable companies, to provide funds for
5 public, education, and government (PEG) access; and
6

7 WHEREAS, in 1987, the State Legislature amended chapter
8 440G, Hawaii Revised Statutes:
9

10 (1) To grant the Director of Commerce and Consumer
11 Affairs, as a part of the Director's authority to
12 administer Hawaii's cable television system, the
13 authority to designate PEG access organizations, due
14 to the substantial benefit PEG access provides to the
15 residents of the State; and
16

17 (2) To require the cable companies to set aside moneys for
18 PEG access; and
19

20 WHEREAS, the intent of permitting PEG access federally and
21 mandating it locally was to intervene in the cable television
22 market to support non-commercial, community-based television
23 programming that would not otherwise be supported by the cable
24 television market; and
25

26 WHEREAS, consistent with the national practice of
27 independent organizations managing the operations and affairs of
28 PEG access, the State also was instrumental in starting up



1 private, nonprofit corporations to implement PEG access as
2 independent access organizations; and
3

4 WHEREAS, in 1995, the Senate of the Eighteenth Legislature
5 of the State of Hawaii, Regular Session of 1995, requested the
6 Legislative Reference Bureau to study PEG access organizations
7 in Hawaii, and the Legislative Reference Bureau, in Report No.
8 4-1995, issued "Public, Education, and Government Cable
9 Television Access in Hawaii: Unscrambling the Signals",
10 suggesting more appropriate and consistent regulation of PEG
11 access organizations; and
12

13 WHEREAS, in 1997, because of encroachment by government
14 institutions in PEG access organization resources, the
15 Department of Commerce and Consumer Affairs commissioned a study
16 entitled "Disputes over PEG Resources: Splitting the Baby is
17 NOT the Solution", which recommended that the Department of
18 Commerce and Consumer Affairs exercise its authority over PEG
19 access organizations to protect them from financial raids by
20 other public institutions and that community control over PEG
21 access organizations be endorsed and strengthened; and
22

23 WHEREAS, in 2005, the Attorney General opined that the
24 Department of Commerce and Consumer Affairs' two-decade-long
25 designation of access organizations was subject to the Hawaii
26 Public Procurement Code; and
27

28 WHEREAS, in 2007, in Akaku Maui Community Television v.
29 Lawrence Reifurth et al., Civil No. 07-1-0278(1), Circuit Court
30 of the Second Circuit, the Court determined that the Department
31 of Commerce and Consumer Affairs' failure to adopt rules on PEG
32 designation was "standardless discretion" and required the
33 Department to adopt rules pursuant to the Hawaii Administrative
34 Procedure Act in the designation of access organizations;
35 however, since 1987, no rules have been adopted; and
36

37 WHEREAS, in 2007, the Hawaii Supreme Court ruled in Olelo:
38 The Corporation for Community Television v. Office of
39 Information Practices, 116 Haw. 337 (Haw. 2007) that access
40 organizations were not public or quasi-public governmental
41 entities subject to the Uniform Information Practices Act; and
42

43 WHEREAS, in 2008, the Department of Commerce and Consumer
44 Affairs adopted rules regarding the designation of access



1 organizations by attempting to adopt the Hawaii Public
2 Procurement Code; and

3
4 WHEREAS, in 2008, in Akaku Maui Community Television v.
5 Mark Bennett et al., Civil No. 07-1-0282(1), Circuit Court of
6 the Second Circuit, the Court held against the Attorney General
7 and for the public in a chapter 92F, Hawaii Revised Statutes,
8 action seeking to compel disclosure of the 2005 Attorney General
9 opinion regarding the Department of Commerce and Consumer
10 Affairs' power to designate access organizations; and

11
12 WHEREAS, the Department of Commerce and Consumer Affairs'
13 designation of access organizations has been an ad hoc,
14 piecemeal set of so-called "decisions and orders" and
15 "agreements" between the Department and the cable television
16 operators and between the Department and the access
17 organizations; and

18
19 WHEREAS, the public has voiced concern over the Department
20 of Commerce and Consumer Affairs' erratic and inconsistent
21 designation and regulation of PEG access organizations over the
22 last twenty years; and

23
24 WHEREAS, there has been strong and near unanimous
25 opposition to the application of the Hawaii Public Procurement
26 Code to the designation of access organizations and to the
27 Department of Commerce and Consumer Affairs' actions contrary to
28 that opinion; and

29
30 WHEREAS, in response to public outcry, the Twenty-fourth
31 Legislature of the State of Hawaii, Regular Session of 2008,
32 adopted House Concurrent Resolution No. 358, H.D. 1, requesting
33 the formation of a task force to examine methods other than the
34 public procurement process to oversee PEG access organizations'
35 expenditures, and the task force has met and submitted a report
36 of its findings to the Legislature; and

37
38 WHEREAS, the Cable Communications Policy Act of 1984
39 permits local franchising authorities to assess fees of up to
40 five per cent of cable operators' revenues to be used for PEG
41 access purposes; however, in 2005, the Department of Commerce
42 and Consumer Affairs narrowed the definition of "gross revenue"
43 and has consistently chosen not to assess the full five per cent
44 permitted; and



1
2 WHEREAS, the Cable Communications Policy Act of 1984
3 permits local franchising authorities to assess fees from cable
4 operators' revenues for the non-residential government and
5 education institutional network, yet the Department of Commerce
6 and Consumer Affairs has severely limited the assessment for the
7 institutional network and restricted the full use of its
8 capacities and potential by state, county, and educational
9 agencies; and

10
11 WHEREAS, the sole cable operator in the State of Hawaii has
12 indicated a significant transfer of ownership during the first
13 quarter of 2009; however, the Department of Commerce and
14 Consumer Affairs has not commenced statewide public hearings as
15 required by chapter 440G, Hawaii Revised Statutes; now,
16 therefore,

17
18 BE IT RESOLVED by the Senate of the Twenty-fifth
19 Legislature of the State of Hawaii, Regular Session of 2009, the
20 House of Representatives concurring, that the State Auditor is
21 requested to review the responsibilities and functions of the
22 Cable Television Division of the Department of Commerce and
23 Consumer Affairs and the PEG access organizations, and the
24 relationship between activities of the Cable Television Division
25 and the PEG access organizations; and

26
27 BE IT FURTHER RESOLVED that the State Auditor is requested
28 to review the past and current process of designating PEG access
29 organizations by the Cable Television Division of the Department
30 of Commerce and Consumer Affairs and the Division's method of
31 franchising cable television operators; and

32
33 BE IT FURTHER RESOLVED that the State Auditor is requested
34 to review all appropriate financial audit issues related to the
35 Cable Television Division of the Department of Commerce and
36 Consumer Affairs and the implementation of chapter 440G, Hawaii
37 Revised Statutes; and

38
39 BE IT FURTHER RESOLVED that the State Auditor is requested
40 to review the findings of the task force created under House
41 Concurrent Resolution No. 358, H.D. 1, and current law relating
42 to PEG access, and make recommendations regarding possible
43 changes to the law; and
44



S.C.R. NO. 94

1 BE IT FURTHER RESOLVED that the State Auditor is requested
2 to complete the requested review and submit it to the
3 Legislature no later than twenty days prior to the convening of
4 the Regular Session of 2010; and
5

6 BE IT FURTHER RESOLVED that certified copies of this
7 Concurrent Resolution be transmitted to the State Auditor, the
8 Director of Commerce and Consumer Affairs, the Administrator of
9 the State Procurement Office, the Mayors of each county, the
10 Administrator of the Cable Television Division of the Department
11 of Commerce and Consumer Affairs, the Attorney General, and the
12 executive directors and chairpersons of the boards of Olelo
13 Community Television; Akaku: Maui Community Television; Hoike:
14 Kauai Community Television; and Na Leo O Hawaii.
15
16
17

OFFERED BY: 





