Op. Ltr. 02-08 'Olelo: The Corporation For Community Television and Ho'ike: Kauai Community Television, Inc.
This opinion was partially overruled by 'Olelo v. OIP, 116 Haw. 337.

September 6, 2002

Ms. Wendy Arbeit
President
The Community Television
Producers Association
P.O. Box 23296
Honolulu, Hawaii 96823

Ms. Carol D. Bain
President
Kauai League of Women Voters
P.O. Box 1181
Lihue, Hawaii 96766

Re: 'Olelo: The Corporation For Community Television and Ho'ike: Kauai Community Television, Inc.

Dear Ms. Arbeit and Ms. Bain:

In 1998, The Community Television Producers Association ("CTPA"), represented by Wendy Arbeit, asked the Office of Information Practices ("OIP") to determine whether 'Olelo: The Corporation for Community Television ("'Olelo") is a state agency or a quasi public body. In 2001, The League of Women Voters of Kauai, represented by Carol D. Bain, asked the OIP to reconsider its opinion that Ho'ike: Kauai Community Television, Inc. ("Ho'ike") is not subject to the requirements of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). Additionally, The League of Women Voters of Kauai asked the OIP whether Ho'ike is subject to the Open Meetings Law, chapter 92, Hawaii Revised Statutes. This second issue regarding Ho'ike will be addressed separately.

ISSUE PRESENTED

Whether ʻOlelo and Hoʻike are subject to the requirements of the UIPA.

BRIEF ANSWER

Yes. The Director ("Director") of the Department of Commerce and Consumer Affairs ("DCCA") has required, as the local franchising authority, the cable franchisee to set aside public, educational and governmental access channels ("PEG access channels"). A review of the totality of circumstances indicates that both ʻOlelo and Hoʻike were originally created by the DCCA, notwithstanding their current corporate form, and are funded almost entirely through funds allocated pursuant to the Director's authority under the Hawaii Cable Communications Systems Law, chapter 440G, Hawaii Revised Statutes (1993) ("HCCSL").

The OIP concludes that although the DCCA has not exercised close control over the administration of the PEG access channels, the DCCA does have significant and direct control over ʻOlelo and Hoʻike through its appointment and removal power of the majority of appointees on the boards of those corporations. The OIP concludes that the DCCA exercises indirect control over the existence of ʻOlelo and Hoʻike through the contractual agreements designating both as the Director's designee and terminating their corporate existence when that designee status ends.

Finally, the OIP concludes that the DCCA performs a government function by providing for PEG access channels and that the administration of such channels, but not editorial control over the public portion of PEG access channels, is a government function performed by ʻOlelo and Hoʻike by or on behalf of the DCCA.

Examining the totality of all the factors, the OIP is of the opinion that ʻOlelo and Hoʻike are corporations owned, operated, or managed by or on behalf of this State as set forth under section 92F-3 of the Hawaii Revised Statutes, and are, therefore, required to follow the UIPA. To the extent that this opinion is in conflict with OIP Op. Ltrs. No. 93-18, No. 94-23, and No. 94-24, those opinions are rescinded by this opinion.

FACTS

In 1970, the State of Hawaii enacted the HCCSL, amending it several times through the 1980s. Under State[1] and federal[2] authority, the Director of the DCCA authorizes cable system franchises for each county. The Director has issued, by way of Decisions and Orders ("D&Os"),[3] cable franchises to certain entities ("Cable Operators")[4] at various times[5] to operate cable

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[1] Haw. Rev. Stat. §§ 440G-4(a) and 440G-8(a) (1993).

[2] Clyde S. Sonobe, DCCA's Cable Television Administrator, advised the OIP in a letter dated May 10, 2002, that the authority under which the DCCA operates includes 47 U.S.C.S. §§ 522(10), 541(a)(1) and 542 (2002).

Cable television originated because of the need to reach communities unable to receive television signals because of distance or terrain. Ed Foley, Comment: The First Amendment as Shield and Sword: Content Control of PEG Access Cable Television, 27 Cap. U.L. Rev. 961, 963 (1999). In his Comment, Mr. Foley notes that as the cable television system ("CATV") grew, local broadcasters became concerned about the incursion of cable into their market share and applied pressure on the Federal Communications Commission ("FCC") to regulate this new media. Id. The FCC asserted jurisdiction over CATV operations, preventing the CATVs from importing signals into the top 100 markets and issued rules requiring the cable operators to create programs themselves, not simply retransmit broadcast signals. Two years later, the FCC eliminated the local origination requirements and required certain cable operators to reserve four channels for four types of third-party access: leased, public, educational and governmental programming. Leased channels were for those who wished to purchase a time slot generally for profit. The remaining channels, public, educational and government ("PEG channels") could not sell advertising or engage in commercial acts. The FCC intended that PEG channels provide a forum where citizens could "participate in community dialogue." The FCC thus required the operator to provide non-discriminatory access on a first-come, first-served basis free of charge. Id. at 964.

In 1979, the United States Supreme Court struck down the FCC's mandatory access rules, ruling that they were beyond the FCC's power under the Communications Act. Id. In 1984, Congress passed the Cable Communications Policy Act of 1984 ("CCPA"). Public access channels were considered by Congress to be the "video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." Id. at n. 54. Under the CCPA, the local franchising authority could require the cable operator to set aside public access channels under arrangements set out by the local franchising authority. However, under the federal law, the cable operator was prohibited from exercising any editorial control over the public access channels and was absolved of any civil or criminal liability resulting from programming carried on those channels. Id. at 967.

[3] The Director has the power to issue D&Os pursuant to sections 440G-3, Definitions; 440G-7, Cable franchise application or proposal procedure; public hearing; notice; 440G-8.1, Requirement for adequate service; terms and conditions of service; and 440G-12(a), Other duties of director; suit to enforce chapter, of the Hawaii Revised Statutes. The Director has issued D&Os authorizing the initial cable franchises and amended such franchise terms and conditions with subsequent, non-sequential D&Os.

[4] In 1996, the U.S. Supreme Court issued Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 116 S. Ct. 2374 (1996) ("Denver Area"). In that case, the Court explained that:

systems including the laying of cable along public places and easements.[6] These D&Os note that such franchisees derive economic benefit from such an authorization.[7] Under the HCCSL, the Director has significant power to attach terms and conditions to the cable franchise.[8] Under State law, the Cable Operators must set aside channels for PEG use.[9] The United States Supreme Court has stated that:

> [p]ublic, educational, or governmental channels' . . . are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way.

Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 116 S. Ct. 2374 (1996) ("Denver Area"). State law[10] authorizes the DCCA to require support of PEG access under federal and State law, and has imposed that obligation, as well as others, *via* D&Os upon the Cable

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> Cable operators typically own a physical cable network used to convey programming over several dozen cable channels into subscribers' houses. Program sources vary from channel to channel. Most channels carry programming produced by independent firms, . . . as well as some programming that the system operator itself (or an operator affiliate) may provide. Other channels may simply retransmit through cable the signals of over-the-air broadcast stations. [Citation omitted.] Certain special channels here at issue, called "leased channels" and "public, educational or governmental channels," carry programs provided by those to whom the law gives special cable system access rights.

518 U.S. at 733-34.

[5] In 1994, Hawaii had seven independent cable companies. Following a period of acquisition or exchange of cable systems Hawaii ended up with two Cable Operators: for the island of Kauai, G Force, L.L.C. dba Garden Isle Communications, and for the remainder of the State, the predecessor to the current authorized franchisee, TWE-AOL Time Warner Inc. D&O No. 261 at 5-6, (Aug. 11, 2000). Just recently, TWE-AOL Time Warner Inc. acquired all cable franchises in the State of Hawaii under D&O No. 291 (July 12, 2002) when the Director granted the transfer of the two cable franchises for the island of Kauai to Time-Warner Entertainment Company, L.P.

[6] Haw. Rev. Stat. § 440G-8.2(a) (1993).

[7] D&Os No. 261, § II, C at 5, (Aug. 11, 2000); No. 255, § II, C at 5, (Aug. 30, 2000).

[8] § 440G-8(d).

[9] § 440G-8.2(f).

[10] §§ 440G-6(b)(5), 440G-8.2(f), 440G-4 and 440G-12(e) (Supp. 2001).

Operators.[11] Pursuant to these cable franchises, and through specific contracts tied to the D&Os, entities were formed for the specific purpose of administering PEG access channels across the state ("PEG Access Organizations").[12]

DISCUSSION

I. STANDARD FOR RECONSIDERATION OF PRIOR OPINIONS

The OIP has previously issued opinions regarding the application of the UIPA to Akaku – Maui Community Television, Inc.,[13] Ho'ike[14] and Na Leo O' Hawaii, Inc.[15] The request to revisit the issue of whether Ho'ike is subject to the UIPA, and the new issue of whether 'Olelo is subject to the UIPA, raises the question of what standard the OIP will follow when asked to revisit an issue settled in previous OIP opinions. The OIP therefore examines appellate court standards for reconsideration of a specific ruling, and for overruling prior decisions, as a guide.

The standard used by courts for reconsidering a conclusion of law is that the appealing party must show the findings of fact are clearly erroneous or the conclusions of law are incorrect. Child Support Enforcement Agency v. Jane Roe, 96 Haw. 1, 13, 25 P.3d 60, 72 (2001) (citation omitted). The standard for overruling a settled precedent, or *stare decisis*, is "compelling justification." Hilton v. S. Carolina Pub. Rys. Cmsn., 502 U.S. 197, 202, 112 S. Ct. 560, 565 (1991).

In three instances, the OIP has reconsidered prior opinions. Although no standard for reconsideration was cited to, the specific reasons for reconsideration in those opinions were a change in the law in two cases[16] and

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[11] D&Os No. 135, Terms and Conditions § 5.4(d) at 12, (Nov. 30, 1988); No. 138, Terms and Conditions of Order No. 138, § 6.4 at 15, (July 16, 1990).

[12] See infra Section II, B.1 of this opinion for a discussion of the formation of Ho'ike and 'Olelo, DCCA's designated PEG Access Organizations.

[13] OIP Op. Ltr. No. 93-18 (Oct. 20, 1993).

[14] OIP Op. Ltr. No. 94-23 (Dec. 13, 1994).

[15] OIP Op. Ltr. No. 94-24 (Dec. 13, 1994).

[16] OIP Op. Ltrs. No. 95-17 (July 18, 1995) (reconsidering OIP Op. Ltr. No. 95-5 (Mar. 5, 1995)); No. 97-07 (July 18, 1997) (reconsidering OIP Op. Ltr. No. 89-8 (Nov. 20, 1989)).

a change in the facts in the third.[17] Based on prior OIP practice and on court standards, the OIP will reconsider a prior opinion when at least one of the following is present: (1) change in the law, (2) change in the facts, or (3) other compelling circumstances.

In the requests before us, it is clear that the OIP has been provided with an abundance of facts that substantially changes the context in which the prior opinions were issued, and therefore, the OIP will reconsider the OIP Opinion Letter Number 94-23, on Ho'ike.

II. REQUIREMENTS OF THE UIPA

A. Accountability Through Access to Records

When interpreting the UIPA, the OIP is required to apply and construe the chapter to promote its underlying purposes and policies. One of those policies is to "enhance governmental accountability through a general policy of access to government records; . . ." Haw. Rev. Stat. § 92F-2 (1993).

The legislature declared that "[i]t is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of government agencies – shall be conducted as openly as possible." Id. To enforce this policy, the legislature has required government agencies to "make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b). However, the UIPA applies only to the inspection and copying of "government records" and, under the law, "[g]overnment record means information maintained *by an agency* in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (emphasis added). The term "agency" is defined by the UIPA as:

> any unit of government in this State, any county, or combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; **or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, . . .**

Id. (emphasis added).

[17] OIP Op. Ltr. No. 99-05 (Oct. 19, 1999) (reconsidering OIP Op. Ltr. No. 90-20 (June 12, 1990)).

Quite often, the issue of accountability is raised when either a government agency has been "privatized" or an entity is so intertwined with government that the public perceives that entity to be engaged in governmental action. In either event, the issue of accountability is raised. The question of who is accountable to the public underlies the issue raised by the requesters of this opinion.

In this instance, The League of Women Voters of Kauai alleged in its request to the OIP that "a continuing movement away from part 1, Chapter 92 "Sunshine Law" provisions by the Ho'ike board of Directors is apparent. In recent months the board has systematically stripped major elements of open governance and Sunshine from the Ho'ike By Laws." [18]

The CTPA, through Ms. Arbeit, claims to have sought documents from 'Olelo and been denied access to "detailed fiscal reports." In its 1998 testimony to the Senate Committee on Commerce, Consumer Protection and Information Technology on S.C.R. No. 51 and S.R. 18, the CTPA detailed its frustration with 'Olelo and alleged that the legislature should require a third-party to do a fiscal and operational audit of 'Olelo and alleged that an in-house audit would do nothing but enable 'Olelo to "continue misappropriating public resources and curtailing the public's First Amendment rights."[19]

Thus, both requesters indicate their inability to obtain information from 'Olelo and Ho'ike, and their frustration with the way in which these entities deal with issues of accountability. The requesters are asking that 'Olelo and Ho'ike be accountable to the public by asserting that 'Olelo and Ho'ike are government agencies, and thus subject to the public records and Sunshine laws.

B. Corporation Owned, Operated, Managed By or On Behalf of This State

The issue before the OIP is whether 'Olelo and Ho'ike are subject to the UIPA by virtue of the definition of "agency." In 1990, the OIP had occasion to interpret and apply section 92F-3 of the Hawaii Revised Statutes, to the

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[18] Letter from Carol Bain, President of The League of Women Voters of Kauai, to the OIP of Sept. 13, 2001, at 1.

[19] Testimony of Wendy Arbeit, CTPA President, to the Hawaii State Legislature, Senate Committee on Commerce, Consumer Protection and Information Technology on S.C.R. No. 51 and S.R. 18 on March 18, 1998.

Hawaiian Humane Society. In that opinion, the OIP said:

> Although this definition of agency presents little difficulty when applied to such organizations as executive branch departments, boards, and commissions, its application becomes difficult when a UIPA request is directed either to a hybrid organization that bears only some characteristics of a state or local agency, **or an entity that is not commonly perceived as a government agency.**

OIP Op. Ltr. No. 90-31, at 5 (Oct. 25, 1990) (emphasis added). In applying this definition of "agency" to the Hawaiian Humane Society, the OIP reviewed the legislative history of the UIPA, looked for guidance to the commentary accompanying the Uniform Information Practices Code, upon which the UIPA was based,[20] reviewed federal interpretation of section 552(f) of the Freedom of Information Act, and state court interpretations of state public records laws. The OIP concluded that the decision as to whether an entity is subject to the UIPA must be determined on a case-by-case basis and must be based upon a review of the totality of circumstances.[21] However, it was clear that an entity is not "operated on behalf of" the State or any county . . . merely [because it contracts] with a government agency.[22] Nonetheless, the OIP declined to follow the federal approach of requiring day-to-day control of the entity's operations by the government agency and concluded that such a constrictive approach to the broader definition of

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[20] H. R. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., *reprinted in* Haw. H. J. 969, 972 (Haw. 1988). The definition of "agency," as set in the Uniform Information Practices Code, includes the same language as set out in section 92F-3 of the Hawaii Revised Statutes except that the Model Code excludes the legislature or courts of the state from the definition of "agency". The commentary to the section states:

> The definition of the term "agency" in Section 1-105(2) is intended to be comprehensive. Consistent with much existing public record legislation, it includes all units of state and local government ranging from the largest to the one-person office. . . . It also includes any combination of political subdivisions of state or local government and *any corporation or other establishment operated on behalf of the state or any political subdivision.*

Uniform Information Practices Code §1-105(2) Cmt. At 8 (1980). (emphasis added) (citations omitted)

[21] OIP Op. Ltr. No. 90-31, at 14 (Oct. 25, 1990).

[22] Id.

agency found in the UIPA would be contrary to the legislative intent behind the statute.[23]

In the OIP Opinion Letter Number 94-5, (whether the Villages of Kapolei Association was a government agency) the OIP set forth the elements it would review to determine whether an entity is an establishment owned, operated, or managed by or on behalf of this State or any county. The OIP wrote:

> in determining whether a nonprofit corporation is an "agency" for purposes of the UIPA, it is necessary to examine the totality of circumstances surrounding the operation of the corporation. Such an examination should include a consideration of **whether the corporation performs a governmental function, the level of governmental funding, the extent of governmental regulation or control, and whether the entity was created by the government.**

Id. at 1 (emphasis added).

Three of these elements of the UIPA test were used by the U. S. Supreme Court in Lebron v. National Railroad Passenger Corp., 513 U.S. 374, (1995), to determine that Amtrak was, for purposes of individual rights, a governmental entity. Despite the fact that Congress had deemed Amtrak to not be a government agency, the United States Supreme Court noted:

> [t]hat Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak.

Id. at 397, 130 L. Ed. 2d 902, 921 115 S. Ct. 961, 973 (1995). The Lebron Court reviewed Amtrak's creation, whether Amtrak furthered government

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[23] Id.

goals, and the extent of government control over Amtrak. The Court noted that Amtrak:

> is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees. It is in that respect no different from the so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission, which are run by Presidential appointees with fixed terms.

Id. at 397-99, 130 L. Ed. 2d 902, 922-23 115 S. Ct. 961, 974-75 (1995).

Thus, as with the U.S. Supreme Court's test, the test used to distinguish the corporation subject to the UIPA from the corporation that simply provides goods or services to the government requires that there be at least four elements which, on balance and in their totality, show action by the entity that reflects governmental action. See Demarest v. Athol/Orange Cmty. T.V., Inc., 188 F. Supp. 2d 82, 90 (D. Mass. 2002), (citing Evans v. Newton, 382 U.S. 296, 299, 15 L Ed. 2d 373, 86 S. Ct. 486 (1965)) (AOTV, a municipally authorized and operated PEG access channel, held to be a state actor for purposes of evaluating First Amendment claims). The elements that the OIP will review include: 1) whether the entities were created by government, 2) whether the functions performed by the entities are government functions, 3) the level of government funding and, 4) the extent to which government controls the entities themselves. The OIP will now examine the totality of circumstances giving rise to these requests for an opinion.

1. Whether the Government Created 'Olelo and Ho'ike

We begin this analysis with a review of the facts to determine whether either 'Olelo or Ho'ike was created by the government. At the outset, 'Olelo asserts that it was not created by "state constitutional provision, state statute, county charter provision, ordinance, administrative rule, or executive order." 'Olelo argues that it was not "created by any State or county legislative or executive enactment or appointment authority" and notes that it is not like other entities created by statute or charter.[24]

[24] Letter from William M. Tam, Esq., counsel for 'Olelo, to the OIP of Dec. 14, 2001. The OIP assumes that Ho'ike would adopt these arguments as well.

The OIP could find no constitutional provision, statute, administrative rule nor executive order that created either ʻOlelo or Hoʻike. However, the records in the public domain reflect such a close and strong nexus between the DCCA and the initial boards of both ʻOlelo and Hoʻike, that it is impossible to agree with ʻOlelo's assertions that "no government action was taken to create ʻOlelo."

The Director has recognized in the D&Os covering both the Oahu and Kauai cable franchises that there was a demand for public, educational and governmental access by the residents of these islands, and noted that the Director intended to create and implement a coordinated plan for cable access. In the D&Os establishing both franchises, the Director noted[25] that "PEG access has been and continues to be an important issue for the State. In establishing PEG access in Hawaii, the State viewed it as a means for cable subscribers to receive informational and educational programming that in general reflect the communities in which they reside."

The Cable Operators were required to set aside activated channels for public, educational and governmental access,[26] pay access fees,[27] pay capital funds for facilities and equipment for PEG use on an annual basis[28] and the Kauai Cable Operator was required to work with the Director's staff, consultants, and others designated by the Director to develop a coordinated plan for the use of public, educational and governmental access facilities and equipment on the island of Kauai.[29]

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[25] (Kauai), D&O No. 255 at 9, (Aug. 3, 2000) (Oahu) D&O No. 241 at 10, (May 10, 1999). See also D&O No. 291 at 11, (July 12, 2002).

[26] (Kauai), D&Os No. 138, Terms and Conditions of Order No. 138, § 6.3 at 14, (July 16, 1990); No. 139 Amended Terms & Conditions of Order No. 138, § 6.2 at 14, (Sept. 26, 1990); No. 143, Terms & Conditions of Order No. 143, § 7.4 at 18, (Nov. 26, 1990); No. 154, Terms and Conditions of Order No. 154, § 5.2 at 10, (Jan. 27, 1993); D&O No. 291, Terms and Conditions of Order No. 291, § 4.3 at 9, (July 12, 2002). (Oahu), D&Os No. 135, Terms and Conditions of Order No. 135, § 5.2(a), (e) and (f), (Nov. 30, 1988); No. 261, Amended Terms and Conditions of D&O No. 154, as Amended by D&O Nos. 156, 158, and 243 (Oceanic Cable), § 4 at 20, (Aug. 11, 2000).

[27] (Kauai) D&Os No. 135, § 5.1 at 9, (Nov. 30, 1998); No. 138, § 6.1 at 13, (July 16, 1990); No. 143, § 7.2 at 15-16, (Nov. 26, 1990); D&O No. 291, Terms and Conditions of Order No. 291 § 4.2 at 8, (July 12, 2002). (Oahu) D&Os No. 154, § 5.1 at 9, (Jan. 27, 1993); No. 261, § 3 at 17-20, (Aug. 11, 2000).

[28] D&Os No. 135, Terms and Conditions of Order No. 135, § 5.4 at 11, (Nov. 30, 1998); D&O No. 138, Terms and Conditions of Order No. 138, § 6.4 at 15, (July 16, 1990); D&O No. 291, Terms and Conditions of Order No. 291, § 4.6 at 10, (July 12, 2002).

[29] D&O No. 139, § 6.2 at 14, (Sept. 26, 1990); No. 143 § 7.1 at 14, (Nov. 26, 1990).

When the Director issued the D&Os that authorized the cable franchises for the islands of Oahu and Kauai ("enabling D&Os"), the power to designate one or more entities to "fund, control, manage or operate [a]ccess [f]acilities and [e]quipment" was reserved to the Director.[30] Indeed, the Director's appointment power for the majority of the board of directors of both designated entities is set forth in the enabling D&Os. D&O No. 255, renewing the cable franchises for the island of Kauai in 2000, sets forth that the majority of the board members of Ho'ike are appointed by the Director.[31] D&O No. 154, which transferred the cable franchises for Oahu to Time Warner Entertainment Company, L.P. in 1993, set forth that "[a]ny designated entity shall have a governing board of nine members. Three of the members shall be appointed by [the Cable Operator] and six shall be appointed by the Director."[32] (emphasis added).

Once the franchises were established, the Director then appointed committees to make recommendations for the creation and implementation of a not-for-profit organization to manage PEG access channels, facilities, equipment and funding. For the island of Oahu, in April 1989:

> the Director appointed a nine person Access Planning Committee to make recommendations to the Director regarding the creation and implementation of a not-for-profit organization to manage public, education and government access channels, facilities, equipment and funding.
>
> The Corporation, 'Olelo: the Corporation for Community Television, was charted by the State of Hawaii September, 1989. The Board of Directors was appointed by the Director and the President of [the Cable Operator] in accordance with Section 5.5 of the franchise agreement and was seated on December 15, 1989.

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[30] (Kauai) D&Os No. 139, § 6.5 at 16, (Sept. 26, 1990); No. 143, § 7.5 at 19, (Nov. 26, 1990); No. 291, § 4.6 at 11, (July 12, 2002). (Oahu) D&O No. 154, § 5.5 at 11, (Jan. 27, 1993).

[31] D&O No. 255, § IV, C at 11, (Aug. 30, 2000); this is as set forth in D&O No. 291, § C. at 13, (July 12, 2002).

[32] D&O No. 154, Terms and Conditions of Order No. 154, § 5.5 at 11, (Jan. 27, 1993).

Agreement between DCCA and ʻOlelo, January 12, 1990, at 1 (emphasis added). For the island of Kauai, in July 1991:

> the Director appointed an eleven member Access Planning Committee to develop and implement a comprehensive plan for PEG access on Kauai. The [PEG] Access Plan for the County of Kauai ("Plan") was submitted to the Director on June 15, 1992 and approved for implementation on August 28, 1992. The Plan outlined a model for PEG access whereby a not-for-profit access corporation called Ho'ike – Kauai Community Television, Inc. ("Ho'ike") would be established to manage a centralized PEG access production facility and to facilitate public, educational and governmental access on Kauai.
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> Ho'ike was incorporated by the State of Hawaii on June 18, 1992 with members of the Access Planning Committee serving as the initial board of directors. The founding Board of Directors was appointed by the Director and the general managers of [the Cable Operators] in accordance with Ho'ike's Bylaws, and the first meeting of the Board was held on December 12, 1992.

Agreement between DCCA and Ho'ike, October 13, 1993, at 1 (emphasis added). The Director then entered into contracts with these organizations to administer and operate, on behalf of the DCCA, the PEG channels.

Given that the cable franchise enabling documents set forth the Director's appointment power of the majority of the directors of the designated entities, given the payments required by the Director from the Cable Operator for the access fee and the capital funds for facilities and equipment for PEG access, and given the clear statement of facts within the agreements between DCCA and Ho'ike and ʻOlelo, the OIP concludes that the Director took governmental action and created ʻOlelo and Ho'ike as private not-for-profit corporations.

This conclusion is supported by the decision of the United States District Court for the District of Massachusetts in Demarest. The Court noted that:

> AOTV was created by the Town of Athol . . . through its license agreement with Time-Warner Cable . . . Athol demanded the creation of AOTV as a condition of Time-Warner's license renewal . . . Pursuant to this agreement, Time-Warner paid the

> Board of Selectmen of the Town of Athol . . . , $15,000, followed by payments of $120,000 and $30,000 so that the Board of Selectmen could form, organize, and maintain AOTV and its facilities . . . There can thus be no doubt that AOTV was created by Athol, much like the Bank of the United States was created by the federal government.

188 F. Supp. 2d. at 90-91 (citations omitted). As in the Demarest case, the Director has created both 'Olelo and Ho'ike, demanding certain payments from the Cable Operators to form, organize, and maintain these corporations through the D&Os, and appointing the initial board.

2. The Extent of Governmental Control

The extent to which the DCCA does or does not control 'Olelo and Ho'ike can be seen through the establishment of both direct and indirect methods of control. Thus, the OIP now reviews the manner in which the DCCA is able to control either corporation.

a. Direct Control of the Corporations – Board of Directors

When the DCCA formed 'Olelo in 1989 and Ho'ike in 1992, both non-profit, no-member corporations, 'Olelo's initial board was composed of seven directors[33] and Ho'ike's initial board of nine directors.[34] These directors were appointed for the sole purpose of forming the corporation.[35] The corporations were organized to "maintain those cable channels dedicated to public, educational and governmental use in a manner that is free of censorship and control of program content, except as necessary to comply with state or federal law."[36] Thereafter, appointments to the board were to follow the scheme specified by the DCCA, which gave the Director majority control of the boards. For Ho'ike, seven directors were to be appointed by the Director

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[33] 'Olelo Articles of Incorporation, Article V, filed September 22, 1989. C*f.* Under the Terms and Conditions of Order No. 154, the designated entity for the island of Oahu was required to have a board of nine members, three of whom were to be appointed by the Cable Operator and six by the Director. D&O No. 154, § 5.5 at 11, (Jan. 27, 1993).

[34] Ho'ike Articles of Incorporation, Article V, filed June 8, 1992.

[35] Ho'ike Bylaws, Article VI, §§ 6.1 & 6.2, August 17, 1992, at 2; 'Olelo Bylaws, Article VI, §§ 6.1 & 6.2, October 1, 1998, at 2.

[36] Ho'ike Articles of Incorporation, Article IV, § 1(a), at 1; 'Olelo Articles of Incorporation, Article IV, § 1(a), at 1-2.

and two by each Cable Operator[37] and for 'Olelo, six directors were to be appointed by the DCCA and three by the Cable Operator.[38]

In OIP Op. Ltr. No. 94-5, the OIP determined that the Villages of Kapolei Association was not an agency subject to the UIPA because, although appointment of its initial board was made by the State of Hawaii, subsequent boards were elected by the Association's members. Here, unlike the Villages of Kapolei Association,[39] neither of the corporations have members and both boards continue to be controlled through the Director's appointees.

The bylaws of both corporations provide that the nominating committees were to prepare recommended slates of directors for vacancies on the boards. While these slates were advisory to the DCCA and the Cable Operators, both corporations' bylaws required the DCCA and Cable Operators to "consult with the Board on any appointee not appearing on the recommended slate."[40] This provision attempting to limit the powers of the Director and Cable Operators was removed in the latest version of Ho'ike's Bylaws.[41] With two exceptions,[42] Ho'ike's Bylaws all specified that the DCCA and the Kauai Cable Operators had removal power with respect to their respective board appointments. 'Olelo's Bylaws recognized the power of both the DCCA and the Cable Operator to remove their board appointments as well.[43]

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[37] Ho'ike Bylaws, Article VII, § 7.2 at 3. The current requirements for Ho'ike's Board of Directors are specified in D&O No. 291 at 13, (July 12, 2002). Due to the recent merger of two Kauai cable franchises, there was a reduction in the total number of Ho'ike board members from 11 to 9 members. Id. Ho'ike's current bylaws and D&O 291 require a total of nine members, seven of which are DCCA appointees and two of which are appointees of the merged Cable Operator. Id.

[38] 'Olelo Bylaws, Article VI, § 6.2, January 18, 2002, at 2. The current requirements for 'Olelo's Board of Directors are specified D&O No. 154, Terms and Conditions of Order No. 154, § 5.5 at 11, (Jan. 27, 1993)

[39] OIP Op. Ltr. No. 94-5, (Apr. 19, 1994).

[40] Ho'ike Bylaws, Article VII, § 7.9, August 17, 1992, at 5; 'Olelo Bylaws, Article VII, § 7.9, October 1, 1998, at 4.

[41] Ho'ike Bylaws, Article VI, § 6.9, amended February 12, 2002, at 3-4.

[42] The exceptions occurred in the bylaws amended on October 10, 2000, and again on October 12, 2000, in which the DCCA's power to remove its appointees was not mentioned. This removal provision was restored in the latest version of the bylaws. See Ho'ike Bylaws, Article VI, § 6.10, amended February 12, 2002, at 4.

[43] 'Olelo Bylaws, Article VI, § 6.10, amended January 18, 2002, at 4.

Since the incorporation of 'Olelo and Ho'ike, the DCCA has retained the power to appoint and remove a majority of the board of directors. While both boards have attempted to have more say in the process of appointment, through the bylaw requirement that the DCCA Director and Cable Operator confer with the board, it is clear that this requirement is superfluous to the question of the DCCA's ultimate ability to control the corporations. And, while the boards may desire more independence, the DCCA has exercised its power to remove a director on at least one occasion with regard to Ho'ike's Board.[44]

As with any corporation, administrative control and day-to-day management is rarely exercised through its board of directors but through its corporate officers who have been hired by the board. Indeed, both Ho'ike and 'Olelo assert that "[t]he government does not become involved with any of the daily operations or services."[45] These assertions are supported by the DCCA.[46] While the DCCA itself has at times made some direct effort to influence the direction of policy at a PEG access organization[47] there is no indication that the DCCA has ever sought to be informed of or to control the day-to-day management of PEG access organizations. Nevertheless, application of the UIPA's definition of agency in this case does not require such an intimate control of the private entity. And, in fact, such an approach was explicitly rejected by the OIP in OIP Op. Ltr. No. 90-31.[48]

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[44] Letter from Clyde Sonobe to Edward Coll of Aug. 2, 2001.

[45] Letter from Ho'ike to the OIP of Dec. 10, 2001, in which Ho'ike also said "[t]he DCCA exercises no administrative control nor does it play any part in the day to day operations," and in a letter from 'Olelo to the OIP of Mar. 10, 1999, ". . . DCCA does not play any part in 'Olelo's management or operations."

[46] Letter from Sonobe to the OIP of Aug. 14, 2002.

[47] In his letter dated May 3, 2001, to the Board of Directors of 'Olelo regarding complaints about 'Olelo's use of the Public portion of the PEG access channels, Mr. Sonobe stated:

> The public access channel was designated to provide an equal opportunity for the public to access cablecasting equipment and facilities for video production. Such access should be conducted in a non-discriminatory fashion. Public, educational, and governmental access facility is to accomplish this task by administering, training, coordinating, and assisting those requesting access.
>
> Public members and State agencies are asserting that 'Olelo may be interfering with this primary function. Therefore, this letter is written to ensure that the public's right to access is not being hampered.

[48] OIP Op. Ltr. No. 90-31, supra, at 14.

While the Ho'ike board's action to restrict the DCCA's powers could generally be viewed as an effort to be independent from the DCCA, thus reflecting reduction in governmental control, it is clear that the DCCA has direct control of the corporation through the ability to appoint and remove the majority of its board members. Thus, such board actions should be viewed within the totality of circumstances and do not affect the conclusion that it is the Director of the DCCA who controls these corporations, through the appointment and removal power over a majority of the board.

b. Indirect Methods of Control - Designation of PEG Channels & Funding

Beyond the power of the DCCA to appoint and remove a majority of the directors on both boards, control over the corporations actually begins with the Director's statutory power to direct that the Cable Operator set aside PEG access channels and pay certain fees related to the cable franchise, all as set out under the authority of the D&O.[49] Under federal law, while the Director may not impose on the cable operator a franchise fee that exceeds 5% of the cable operator's gross revenues,[50] there are no other restrictions and thus the Director has the discretion to designate how that franchise fee will be expended or directed so long as it is in the public's interest.

Thus, the most critical but indirect element of control is the Director's power to designate the payment of funds from the Cable Operator directly to other entities. In some cases, designation of these fees may be for purposes of PEG access support and management and directed to her designees for PEG channel management, or to other entities for non-PEG channel purposes.[51] Discussion of this point will be dealt with in the later provisions of this opinion. Thus, whether and how much funding the PEG Access Organizations will receive is completely dependent upon the Director's designation within the D&O.

c. Indirect Methods of Control - Designation of PEG Access Organizations

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[49] Haw. Rev. Stat. §§ 440G-8.2(f) (1993) and 440G-15 (Supp. 2001).

[50] 47 U.S.C.S. § 542(b) (MB, LEXIS through P.L. 207, approved Aug. 15, 2002).

[51] D&O No. 154, in which the Director notes that the facilities of the Hawaii Public Broadcasting Authority are in "serious need of support." The Director further notes that "[i]n each of its orders since 1988 granting a cable franchise, DCCA has required the State's cable operators to interconnect their cable systems with [Hawaii Public Broadcasting Authority's Hawaii Interactive Television System], thereby creating a statewide communication system." Id. at 1. The Director then increased the franchise fee by one percent, payable to the Hawaii Public Broadcasting Authority. Id. See also D&O No. 135, § 8.2 at 18, (Nov. 30, 1988) and 47 U.S.C.S. § 531 (b)(c). See also D&O No. 291 et seq.

The second method of indirect control arises out of the Director's power to designate an entity to operate PEG access channels on behalf of the State. It is abundantly clear that the DCCA has the ability to choose – or not to choose – 'Olelo or Ho'ike as its designee for the administration of PEG access channels for Oahu or Kauai. And, supporting the Director's ability to choose the PEG access organizations, the most current agreements between the DCCA and the PEG Access Organizations[52] (hereinafter referred to jointly as "Agreements") include provisions that require the Director's approval or require the corporations to provide information to her. For example, neither 'Olelo nor Ho'ike are permitted to assign their rights nor delegate any duties, obligations, or responsibilities under the Agreements without the Director's approval.[53] Both PEG Access Organizations are required to file certain documents with the Director on a periodic basis.[54]

While the Director has chosen both 'Olelo and Ho'ike as PEG Access Organizations, it is instructional to review the powers she has to terminate these designations under the Agreements.

If the Cable Operators' franchises are terminated, then the Agreements with the PEG Access Organizations are "automatically terminated on the date such franchise is terminated."[55] If the Agreements

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[52] Agreement between DCCA and Ho'ike, dated August 25, 1999, ("Ho'ike Agreement") and Agreement between DCCA and 'Olelo, dated December 24, 1998, ("'Olelo Agreement"), or ("Agreements").

[53] Ho'ike Agreement, § I at 7; 'Olelo Agreement, § I at 7.

[54] The PEG Access Organizations are required to file with the Director, among other things: amendments to the articles of incorporation and bylaws no later than 30 days following approval by the board of directors; a roster of the board and officers; annual financial statements; and an annual operational plan and budget. Agreements, § C at 3. They are required to develop and update a strategic or long-range planning document. Id. They must file annually a complete equipment inventory, and an annual activity report which reflects, for each of the PEG access categories, the total hours of programming, the hours of locally produced original programming, hours of repeat programming and total hours of programming not aired. Id. at 3-4. They must include a summary of all channel outages, facility use by users, number of persons trained, summary of complaints and action taken, summary of outreach and marketing efforts, and summary of revenues from sources other than the cable franchisee. Id. at 5.

[55] Ho'ike Agreement § M at 7-8; 'Olelo Agreement § M at 8. The Director is also allowed to terminate the Agreements for default and other events. Agreements, §§ L & M at 7-8. In the case of default, the Director has the right to either terminate the agreement with the PEG Access Organization, or to direct the cable franchisee to withhold contributions of PEG Access Fees or PEG capital funds or both. Agreements, § L at 7.

are terminated, the PEG Access Organizations are required to **immediately relinquish any and all claims to the PEG Access Fees, Facilities and Equipment Fund, and the access facilities and equipment,** and must provide a verified accounting, a current inventory, and **transfer the balance of accounts and facilities and equipment to the DCCA.**[56] Disposition of any facility or equipment not purchased or acquired from the Facilities and Equipment Fund, shall be by appropriate appraisal and allocation agreed to by the Director and the PEG Access Organizations.[57] If the Agreements are terminated, the Director may then designate other entities as the successor of either PEG Access Organization.[58]

Under usual circumstances, when the government and an entity providing goods or services end a contractual relationship, the government has no contractual ability to affect the very existence of the entity. Each is left to go their separate ways. In this case, however, it is apparent from the terms of the Agreements that the very corporate existence of both 'Olelo and Ho'ike will end when the Director no longer chooses them as her designees, whether through termination or otherwise. It is clear from the language of the Agreements that the parties agreed that each of the PEG Access Organizations would, upon termination of the Agreements, wind down its operations and end the corporation.[59]

In summary, the Director maintains majority control of the PEG Access Organizations' boards through appointment and removal power; has indirect but significant control over the PEG Access Organizations through the Director's ability to designate funding for PEG access support; has the ability to control the PEG Access Organizations' major source of funding through her power to designate the amount of funding to any entity or to the PEG Access Organizations; has the ability to designate any entity as a PEG Access Organization because when the cable franchises end, the PEG Access Organizations Agreements terminate automatically; and because upon termination, generally all assets return to the DCCA and PEG Access Organizations wind down their operations. Therefore, because the Director

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[56] Agreements, § N at 8.

[57] Id.

[58] Agreements, § L at 7.

[59] Under the Agreements, when the contract is terminated, the PEG Access Organizations are to follow generally accepted accounting principles, neither incurring any new obligations nor disbursing new funds ***except as related to the winding down of operations.*** Agreements, § N at 8 (emphasis added).

exercises significant direct control over the board of directors, and thus over the policies to be followed by 'Olelo and Ho'ike, as well as indirect control over the funding and existence of the corporations themselves, through its exercise of its powers as the local franchising authority, the OIP concludes that the DCCA exercises control over 'Olelo and Ho'ike. This conclusion does not mean that the DCCA exercises day-to-day control or management over the PEG Access Organizations.

3. Governmental Function

We now review the extent to which 'Olelo and Ho'ike perform governmental functions. This is a two-fold inquiry – first to determine what, if any, governmental function the DCCA performs with regard to PEG access channels and second, whether the PEG Access Organizations perform those functions on behalf of the DCCA.

a. The DCCA's Function

In the OIP Opinion Letter No. 93-18, the OIP wrote that "our research has not revealed any section of the Hawaii Revised Statutes that requires a government agency to provide 'community' broadcasting. Nor are we aware of any legal authority that has found community broadcasting to constitute a governmental function." Id. at 4. This statement refers to a function that has, as its base, the exercise of editorial control over PEG access channels, which is, in some circumstances, prohibited.

Clearly, however, there is another function to be reviewed and that is the **provision and administration of PEG access channels**. In this instance, references to the governmental function of providing and administering the PEG access channels are found within the federal and state laws.

To start with, the federal government allows the local franchising authority to require that Cable Operators set aside PEG access channels.[60] In doing so, Congress found that for a variety of reasons, cable operators had garnered undue market power compared to consumers and video programmers and that the cable industry had become vertically integrated.

[60] 47 U.S.C.S. § 531 (b) (MB, LEXIS through P.L. 207, approved Aug. 15, 2002).

Thus, Congress found that:

> [t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media[;] . . . in ensuring that cable subscribers have access to local noncommercial educational stations[; and] . . . in making all nonduplicative local public television services available on cable systems . . . thereby advancing the Government's compelling interest in educating its citizens . . . [and] provid[ing] public service programming that is responsive to the needs and interests of the local community. . .

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(6)–(8), 106 Stat. 1460, 1461 (Potomac Publishing, LEXIS through 2000 legislation).

The State law, the HCCSL, evinces on its face a legislative intent that the Director **provide and administer** the required set-aside PEG access channels. The HCCSL not only gives the Director the sole power to issue cable franchises when the Director "is convinced that it is in the public interest to do so,"[61] but also *requires* the Cable Operator to designate "three or more channels for public, educational, or governmental use."[62] The HCCSL then allows the Director to designate "any nonprofit organization . . . to oversee the development, operation, supervision, management, production, or broadcasting of programs for any channels obtained under section 440G-8."[63]

As the statute is clear on its face, the OIP concludes that the legislature intended that the DCCA provide for and administer PEG access channels.

b. Function Performed by 'Olelo and Ho'ike

To determine whether the governmental function of overseeing "the development, operation, supervision, management, production, or

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[61] Haw. Rev. Stat. § 440G-8(b) (1993).

[62] § 440G-8.2(f).

[63] § 440G-3; see also D&Os No. 154, § 5.5 at 11, (Jan. 27, 1993); D&O No. 255, Terms and Conditions of Order No. 255, § 4.6 at 10, (Aug. 30, 2000).

broadcasting of programs" for PEG access channels is being carried out by 'Olelo or Ho'ike, the OIP reviewed the Agreements.

The "whereas" clauses in Agreements recite the Director's provision of PEG access pursuant to the cable franchises,[64] the Director's requirements that the Cable Operators pay the annual PEG Access Fees, contribute to PEG capital funds for facilities and equipment, and provide interconnection among all cable systems on Oahu and Kauai.[65] Both Agreements note that, in accordance with the recommendations made by an access planning committee appointed by the Director, 'Olelo and Ho'ike were created to: 1) manage the PEG access finances, and 2) operate the PEG facilities, channels, and other resources for the islands of Oahu and Kauai.[66]

While many of the contractual requirements in the Agreements are similar to contracts for the provision of goods and services to the government, other provisions indicate that 'Olelo and Ho'ike are carrying out governmental functions by providing services ***to the public*** through the administration of the PEG access channels. For example, as noted above, the Agreements state that 'Olelo and Ho'ike are "responsible for . . . the PEG access facilities and equipment including, but not limited to" channels, facilities and equipment, training of educational, governmental, community organizations and the general public, marketing, support services and insurance coverages.[67]

To fulfill these management and operational responsibilities, the DCCA requires the PEG Access Organizations to develop and update an annual operational plan and budget, and a strategic or long-range planning document. And to determine how well these functions are being carried out, the PEG Access Organizations must provide the DCCA with a summary of all channel outages, facility use by users, number of persons trained, a summary of complaints and actions taken, and a summary of outreach and marketing efforts.[68]

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[64] ('Olelo) D&Os No. 135, 141, 148, 150, 153, 154, 156, 158 and 187; (Ho'ike) D&Os No. 143, 145, 152, 160, 208, and 209.

[65] Agreements at 1.

[66] Id. at 2.

[67] Id. § B at 2-3.

[68] Id. § C(7) at 5.

Nevertheless, 'Olelo alleges that it operates under a typical fee-for-service contract.[69] In those types of contracts a vendor would have claims to funds received for work done. That this is not the case here is shown by the contractual provisions that require all funds, equipment, and facilities held and used by Ho'ike and 'Olelo for public access purposes, to be returned to the DCCA upon termination of the Agreements.[70] Thus, whether or not the contract was performed properly, it is clear that Ho'ike and 'Olelo do not have any claims to the PEG Access Fees or the property purchased with those funds. These provisions and others discussed earlier show an intent that provision and administration of PEG access would continue to be provided through other designees if either 'Olelo or Ho'ike defaulted on the contract or were terminated for other reasons.

Thus, as opposed to a vendor providing goods or services to government, the Agreements require that the PEG Access Organizations provide services, on the DCCA's behalf, to educational, governmental, and community organizations, and the general public. In fact, the DCCA has exercised its power as the local franchising authority to ensure that the PEG Access Organizations provide those services to the public when the Cable Division Administrator advised 'Olelo that it had received complaints about 'Olelo and was writing to remind it that the public's right to public access not be hampered.[71]

The OIP opines that, in combination, congressional findings as to governmental interests, State legislative intent to provide for and administer the PEG access channels, and contractual provisions within the Agreements, all set forth a clear State policy to have the DCCA operate, through PEG Access Organizations, cable channels for the use by the public and for educational and governmental uses. Thus, the OIP concludes that both Ho'ike and 'Olelo, as the Director's designees, are performing the governmental function of providing and administering the PEG access channels.

This conclusion is, in fact, supported by Ho'ike's own argument that the "fundamental purpose of Public Access . . . [is] to provide a voice to the public . . ."[72] However, Ho'ike implies that as a private non-profit

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[69] Letter from William M. Tam, Esq., counsel for 'Olelo, to the OIP of Dec. 14, 2001, at n. 3.

[70] Agreements § N at 8.

[71] See letter from Clyde Sonobe to the Board of Directors of 'Olelo of May 3, 2001, supra.

[72] Letter from J.S. Robertson to the OIP of Dec. 10, 2001.

organization it cannot be a government agency because that would undermine its self-described function as a public voice. This position as stated by Ho'ike may be a misstatement of its role, for clearly, under Demarest, Ho'ike and 'Olelo themselves could face claims for damages resulting from their actions as state actors for any unconstitutional restrictions upon free speech.

While the federal law permits the franchising authority to have an ownership interest in a cable system,[73] it limits the franchising authority's editorial control over the cable system except for those channels designated for educational or governmental use, "unless such control is exercised through an entity separate from the franchise authority."[74] And, under the D&Os, for those channels over which the public exercises its free speech rights, i.e., public access channels, the DCCA has prohibited editorial control by itself or the Cable Operator.[75] As the U.S. Court of Appeals for the Second Circuit recognized:

> the [federal Cable Communications Policy Act] permits a locally accountable body, typically the local franchising authority, to control the operation of public access channels. However, a local franchising authority may avoid liability in its exercise of editorial control of public access channel content only to the

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[73] The term herein "cable system" is broader than PEG access channels and is defined as:

> [A] facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 653 of this title or (E) any facilities of any electric utility used solely for operating its electric utility systems. . . .

47 U.S.C. § 522(7) (MB, LEXIS through P.L. 207, approved Aug. 15, 2002).

[74] 47 U.S.C. § 533(e) (MB, LEXIS through P.L. 207, approved Aug. 15, 2002).

[75] D&O No. 154, § 5.2, at 10, (Jan. 27, 1993).

> extent that it exercises such control within First Amendment boundaries.

McClellan v. CableVision of Connecticut, 149 F.3d 161, 168 (2d Cir. 1998) (citation omitted). Thus, while a local franchising authority can provide PEG access channels as an exercise of its governmental function, its *exercise of editorial control* over the PEG access channels must be within an appropriate range in order to withstand judicial scrutiny.

While in this case the DCCA has prohibited itself from exercising editorial control, the question remains whether its designees – the PEG Access Organizations – may legitimately exercise editorial control over the PEG access channels.

Since the issuance of OIP Opinion Letter Numbers 93-18, 94-23, and 94-24, several cases have looked at whether Cable Operators or PEG Access Organizations are State actors when these entities have acted to censor programming on cable channels, whether they were cable channels, licensed channels, or PEG access channels.

When the U. S. Supreme Court reviewed in Denver Area the constitutionality of the Cable Television Consumer Protection and Competition Act of 1992,[76] which permitted the private cable operator to prevent transmission of "patently offensive" programming on public access channels, thereby restricting the rights of PEG users, Justice Breyer said:

> We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech – and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting.

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[76] In Denver Area, the Supreme Court was asked to review three sections of the Cable Television Consumer Protection and Competition Act of 1992 ("CTCPC") that aimed to control sexually explicit or indecent programming conveyed over cable television. This federal legislation addressed the relationship between cable operators and the viewing public with regard to its own cable channels, including leased channels, as well as the PEG access channels.

First, if the cable operator decided to allow patently offensive programming, the CTCPC required the *cable operator* to segregate the programming on a single channel and block it from viewer access unless the viewer requested access in advance and in writing. Denver Area 518 U.S. 727, 735. Second, the CTCPC permitted the *cable operator* to prohibit broadcasting of such programming on PEG channels. Id. at 736. The third element of the CTCPC permitted the cable operator to prohibit the broadcasting on leased access channels programming that the operator believed was patently offensive. Id.

518 U.S. at 737 (first emphasis added). But Justice Breyer also wrote that the judicial tradition "teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through *close judicial scrutiny*." Id. at 742 (emphasis added). The United States Supreme Court held that the federal statute that allowed the cable operator to censor programming on the PEG access channels unconstitutionally violated the PEG users' First Amendment rights. Id. at 766.

Whether PEG Access Organizations would be subject to the same "close judicial scrutiny" as would action by a state, was the issue raised in two cases reviewed by the federal district courts for Massachusetts and for the Northern District of Georgia. Both courts found that these PEG access organizations were state actors and thus subject to the same standards applied to government entities. These courts applied "close judicial scrutiny" to the actions of the PEG access organizations. Demarest, supra; Jersawitz v. People TV, 71 F. Supp. 2d 1330 (N.D. Ga. 1999). Additionally, as the Demarest court noted, "several cases have treated a PEG channel as a state actor without explicitly addressing the issue. See e.g. Horton v. Houston, 179 F.3d 188, 190 n.3 (5th Cir. 1999) (parties did not dispute that PEG channel was state actor on appeal), *cert. denied* 528 U.S. 1021, 145 L. Ed. 2d 411, 120 S. Ct. 530 (1999); Coplin v. Fairfield, 111 F. 3d 1395, 1401-1402 (8th Cir. 1997) (assuming that public access television committee was state actor)." 188 F. Supp. 2d at 90.

In analyzing whether the PEG access organizations were state actors, the Jersawitz and Demarest courts both followed the United States Supreme Court's Lebron holding that when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." Jersawitz, at 1338, and Demarest, at 90, both quoting Lebron 513 U.S. at 400.

In Jersawitz and Demarest, both courts found the PEG access organization to have been created by the government, both found the government retained appointment power over a majority of directors, and both found the organization furthered governmental objectives.[77] The

[77] All of these elements are found within the OIP's test as to whether an entity is an agency under the "totality of the circumstances" for purposes of the UIPA.

Demarest court, in particular, found that the local franchise authority had created the PEG access organization:

> to further public objectives. The licensing agreement provides that AOTV "may be used by the public," and that "any resident of the Town, or any organization or institution based in the Town, shall have the right to place locally produced programming on the Access Channel." . . . The agreement further provides that the channel shall be managed "for the benefit of the community." . . . Like the public park in Evans, AOTV "serves the community."

Demarest at 91 (citing Evans, supra, at 302) (citations omitted).

While a PEG access organization may perceive itself to be the public's voice, the PEG access organization may be as liable as would the government in the event it improperly restricts First Amendment rights. Thus, the OIP concludes that the governmental function carried out by the PEG Access Organizations, as to the public portion of PEG access, includes providing and administering access to the public on a first-come, first-served basis.

4. The Level of Governmental Funding

In the OIP Opinion Letter Number 93-18, the OIP assumed that payments by the Cable Operator to public access cable organizations were not public funding because they came directly from the Cable Operator, and thus were not "taxpayer funds." Id. at 2-4. See also OIP Op. Ltrs. No. 94-23 (Dec. 13, 1994) and No. 94-24 (Dec. 13, 1994). However, since the issuance of the OIP's earlier opinions, federal courts have treated PEG funding by a cable operator, at the direction of government, as public funds. As discussed earlier, both the Jersawitz and the Demarest courts considered money provided by a cable operator for PEG access, as required by the government, to be essentially public funding. The OIP notes also that the U.S. Supreme Court's discussion of public access cable organizations in Denver Area assumed without discussion that "franchise fees or other payments pursuant to the franchise agreement" constituted public funding for access channels and their management. 518 U.S. at 762.[78] Based on the development of the law, the OIP will reconsider the question of public funding.

[78] Although the discussion cited to is in a plurality section of the Denver Area opinion, the factual discussion appears to be supported by a majority of the Supreme Court. See McClellan v. CableVision of Connecticut, Inc., 149 F.3d 161, 167 n.11. (2d. Cir. 1998).

As previously stated, D&Os issued by the Director to the Cable Operators authorize that a portion of the Cable Operators' revenues be designated as funding for local PEG Access Organizations. The D&Os require the Cable Operators to pay fees as a condition of the franchise. There is no dispute that all funding for 'Olelo[79] and all operational funding for Ho'ike[80] come from these cable franchises. Further, the Agreement between 'Olelo and the DCCA restricts the use of these funds to operational, facility and equipment purposes.[81] In 1995, the Hawaii Legislative Reference Bureau's Report No. 4,[82] noted that, at that time, 'Olelo was "by far the largest access organization in the State, and one of the largest in the country . . . [and was] budgeted to received [sic] over $2.6 million for operating expenses alone in 1995."[83] On the other hand, Ho'ike is the smallest access center in Hawaii, and in 1995 had an operating budget of $150,000 for PEG access, renting a 900 square foot building in Koloa, Kauai.[84]

Federal law appears to permit the cable operator to pass these fees on to the subscriber; the law allows the cable operators to inform subscribers of the various fees imposed on the operators by the local franchise authority and the amount of the total bill that represents these fees.[85] The question is whether this money represents public funding. A review of the relevant documents shows very clearly the public nature of this funding.

Under the HCCSL, there is neither a specific restriction nor a specific requirement that specific fees be assessed the Cable Operator. The Director

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79 See Letter from William M. Tam, Esq., counsel for 'Olelo, to the OIP of Dec. 14, 2001, at 11.

80 See Letter from J.S. Robertson, Managing Director of Ho'ike, to the OIP of Dec. 10, 2001 at 2. Ho'ike also states that it receives "foundation grants[ ] and service contracts to Kauai County." Id.

81 See Letter from William M. Tam Esq., counsel for 'Olelo, to the OIP of Dec. 14, 2001, at 11-12.

82 Susan Ekimoto Jaworoski, Leg. Ref. Bureau, Report No. 4, Public, Education, and Government Cable Television Access in Hawai'i: Unscrambling the Signals, (1995) ("Jaworoski").

83 Id. at 9 (citations and footnotes omitted). The OIP notes that the CTPA, through Jeff Garland, asserts that the 3% PEG access fee for 'Olelo has been capped at $3.7 million. Letter from Jeff Garland to the OIP of Dec. 17, 2001.

84 Jaworoski at 22.

85 47 U.S.C.S. § 542(c) (MB, LEXIS through P.L. 207, approved Aug. 15, 2002).

has the power to assess and expend those funds for public purposes.[86] Indeed, an application or proposal for a cable franchise must include facts as to, among other items, "[a]ny other matters deemed appropriate and necessary by the director **including the proposed plans and schedule of expenditures for or in support of the use of public, educational and governmental access facilities**."[87]

The Director has required the Cable Operators to pay several different fees, including an Annual Fee,[88] a Franchise Fee,[89] a PEG Access Fee,[90] and a Capital Funds Fee.[91] The fees are not voluntary and, as noted further in this opinion, the DCCA, through its governmental power, directs the disposition of all fees required of a Cable Operator under the cable franchise. The D&Os now require the Cable Operator to pay the PEG Access Fee directly to the PEG Access Organization and to other parties, also discussed in greater detail below.

As part of her broad authority under the HCCSL, the Director has also required Cable Operators to provide and activate assorted interconnections

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[86] See Haw. Rev. Stat. § 440G-8(d) (1993): "In issuing a cable franchise under this chapter, the director . . . may attach to the exercise of the right granted by the cable franchise terms, limitations, and conditions which the director deems the public interest may require."

[87] § 440G-6(b)(5) (emphasis added).

[88] § 440G-15, Annual Fees, requires the Cable Operator to pay an annual fee to offset the costs of administering the HCCSL, and Haw. Admin. R. § 16-131-2 (1988) sets that fee at 1% of the Cable Operator's income received from subscribers for cable services.

[89] The Director has authority to assess a franchise fee paid by a cable operator with respect to any cable system which shall not exceed 5 percent of such cable operator's gross revenues. See 47 U.S.C.S. § 542 supra. D&Os No. 261, §2.9 at 17, (Aug. 11, 2000); No. 255, §2.7 at 5, (Aug. 30, 2000); and No. 291, § 2.7 at 5, (July 12, 2002) which set forth that the Cable Operators are required to pay a franchise fee of 1% of its gross revenues to the Hawaii Public Broadcasting Authority Fund.

[90] See D&Os No. 261, §5.1 at 17, (Aug. 11, 2000); No. 255, §4.2 at 7, (Aug. 30, 2000) and No. 291, § 4.2 at 8, (July 12, 2002) in which, generally, the PEG Access Fee is set at 3% of the Cable Operator's gross revenues and payable directly to the PEG Access Organizations.

[91] In 1988, the Oahu Cable Operator was expected to pay, over a 15-year period, $9,286,498 for the Capital Funds Fee. D&O No. 135, Terms and Conditions of Order No. 135, § 5.4 at 11, (Nov. 30, 1998). In 1993, these amounts were amended so that over the term of the franchise, from 1993 to 2003, the Cable Operator was required to pay approximately $4,890,598 for the Capital Funds Fee. D&O No. 154, Terms and Conditions of Order No. 154, § 5.4 at 11, (Jan. 27, 1993).

For one of the Kauai franchises, the Cable Operator was expected to pay, over a 10-year period, $105,316 for the Capital Funds Fee. D&O No. 138, Terms and Conditions of Order No. 138 § 6.4 at 15, (July 16, 1990). In 2002, this amount was amended to $375,000 pursuant to D&O No. 291, Terms and Conditions of Order No. 291, § 4.5 at 10, (July 12, 2002).

between cable systems and public sites such as schools, libraries, and government buildings, at no cost or reduced cost to the State. Interconnections for PEG access programming are also required. While the Director has required the Cable Operator to provide these interconnection systems, to improve facilities or schools, libraries, etc., the cost of developing such system is not counted toward the PEG Access Fee. Nonetheless these requirements serve government purposes and do indirectly benefit PEG access.[92]

As to the PEG Access Fee itself, the Director has exercised the power to direct that all or portions of it are expended in particular ways. For example, the Director has directed that the Oahu Cable Operator pay twenty-five percent (25%) of the PEG Access Fee to the Hawaii Educational Networking Consortium ("HENC"),[93] an educational consortium of public and private schools, for educational access to the cable system.[94] And as to the remainder of this fee, the D&Os direct the Cable Operator to make the payments to either the Director or the Director's designee.[95]

And although D&O No. 154 declares that public television is not considered a PEG access channel (and thus would not be included in the PEG Access Channels required to be "set-aside"),[96] the Director requires that one percent (1%) of the Cable Operator's gross revenues be directed to public television.[97] The Director has also required the Cable Operators provide an emergency override system (for civil defense broadcasts)[98] but the cost of such system is not counted toward the PEG Access Fee. The Director may sometimes require other non-PEG monies be used for PEG access purposes.

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92 Id.

93 HENC is a collaborative relationship between the University of Hawaii, the State Department of Education, the East-West Center and the Hawaii Association of Independent Schools. The HENC's website states "[t]he purpose of HENC's effort is to facilitate and coordinate Hawaii-based cooperative activities relating to the development, promotion and support of telecommunications technology in education and research." See http://www2.hawaii.edu/~henc/who.html (last visited Sept. 6, 2002).

94 D&O No. 261, Amended Terms and Conditions of Decision and Order No. 154, As Amended by Decision and Order Nos. 156, 158, and 243 (Oceanic Cable), § 5.1(d) (Aug. 11, 2000).

95 D&O No. 261, § 5.1(a) at 17, (Aug. 11, 2000).

96 D&O No. 154, Terms and Conditions of Order No.154, § 5.2(b) (Jan. 27, 1993).

97 Id. § 2.9.(a).

98 D&O No. 255, Terms and Conditions of Order No. 255, § 5.2 (Aug. 30, 2000).

For instance, in the past the Director required that up to $10,000 be spent by the Kauai Cable Operator on the emergency override system for civil defense broadcasts and that any remainder of this amount go to PEG access as additional money.[99] Payments of this remainder would not reduce the PEG Access Fee to be paid by the Cable Operator.[100]

Having ordered the Cable Operators to pay certain fees, the Director then contracts with the PEG Access Organizations who agree to receive and use, as restricted funds,[101] the amounts required to be paid by the Cable Operators pursuant to the D&Os authorized by the Director. They also agree to perform all services, duties, responsibilities, and obligations under their agreement in exchange for the PEG Access Fees and Equipment and Facilities Fund contributions from the cable franchisees pursuant to the D&Os.[102]

The OIP notes, however, that monies, facilities and equipment used to provide PEG access by PEG Access Organizations are to be returned to the DCCA upon termination of the Agreement.[103] In fact, ʻOlelo's 38,101 square foot building was purchased with these funds and will revert to the State upon expiration of ʻOlelo's agreement with the state.[104] Thus, having ordered the payment of certain funds from one party in return for certain benefits, the DCCA then contractually requires another party to use those same funds for certain public purposes, and then requires the return of assets used for those public purposes and flowing from those funds at the end of the contract term. These documents show a continuous claim by the DCCA to these monies from the outset of the designation all the way to the end of the contract. The DCCA's continuous claim to the monies underscores the public nature of these funds.

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[99] D&O No. 143, Terms and Conditions of Order No. 143, § 5.3 (Nov. 26, 1990). The $10,000 amount was increased to $25,000 by D&O No. 152, Terms and Conditions of Order No. 152, § 4.10(b) (Jan. 7, 1992).

[100] D&O No. 143, Terms and Conditions of Order No. 143, § 5.3 (Nov. 26, 1990).

[101] The PEG Access Organizations are required to establish separate accounts for the operations and for the facilities and equipment and may not commingle these funds without approval of the Director. Agreements, Section D at page 6.

[102] Agreements, § G at 6 (Hoʻike) and at 7 (ʻOlelo).

[103] Agreements, § N at 8.

[104] Jaworoski, supra, at 9.

In Jersawitz, the same funding mechanism was reviewed and the court found that "the funding for People TV is provided by the City through its contract with the cable franchisee and, in the event that the agreement with People TV is terminated for any reason, all property of People TV reverts to the City." 71 F. Supp. 2d at 1338. The Demarest court noted, similarly, that "[t]he fact that much of AOTV's funding comes from Time-Warner, rather than public coffers, is no evidence of any lack of state action. Time-Warner's contribution to AOTV functions much like a tax or licensing fee." 188 F. Supp. 2d at 91.

The OIP is of the opinion that the fees required by government as a condition of doing business in the State are public funds even if the money is not channeled through the State's general fund or through another State fund. In the case of the Access Fee and other contributions required of Cable Operators to support PEG access, the OIP agrees with the Demarest court that such contributions "function much like a tax or licensing fee." Id.

Based on the facts presented, and the federal case law treating similar funding arrangements as public funding, the OIP is of the opinion that the franchise fee is public money, is used to support the public access organizations, and thus represents public funding.

C. Summary

Given the clear statement of facts within the Articles of Incorporation and within the various D&Os and Agreements, the OIP concludes that, although acting on the recommendations of committees appointed by the Director of the DCCA, it was the Director of the DCCA that created 'Olelo and Ho'ike as private not-for-profit corporations.

As the DCCA exercises significant direct control over the board of directors, and thus over the policies to be followed by 'Olelo and Ho'ike, as well as indirect control over the funding and existence of the corporations themselves, through its exercise of its powers as the local franchising authority, the OIP concludes that in the totality of circumstances the DCCA exercises control over 'Olelo and Ho'ike.

Moreover, the HCCSL and the contractual provisions together set forth a clear State policy to have the DCCA administer, through the Director's designees, cable channels for use by the public and for educational and governmental uses. As the public access element of PEG access is sufficiently like a public forum to subject government to heightened scrutiny when it

tries to curtail public access, and because federal courts have found that provision of PEG access to be a governmental objective, the OIP is of the opinion that providing for and administering PEG access for the public is a governmental function for purposes of UIPA analysis.

As the DCCA has used its power to require payments of money by the Cable Operator to support the PEG access channels, given the financing arrangements between the DCCA, the Cable Operators and the Public Access Organizations, and the federal case law treating similar funding arrangements as public funding, the OIP is of the opinion that these monies paid to the Public Access Organizations are public funding.

These conclusions are supported by the United States Supreme Court's holding in Lebron. The Court held that when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." 513 U.S. at 400.

CONCLUSION

The OIP has previously stated that an entity is not "operated on behalf of" an agency merely because it contracts with that agency. Whether an entity is subject to the UIPA must be determined on a case-by-case basis and based upon the totality of circumstances.

In this case, a review of the circumstances indicates that both 'Olelo and Ho'ike were originally created by the government, notwithstanding their current corporate form, and funded almost entirely through the funds designated pursuant to the Director's authority under the HCCSL. Additionally, although the DCCA has not exercised close control over the administration of the PEG access channels, the government does have significant and direct control over the PEG Access Organizations through its appointment and removal power. Moreover, government exercises indirect control over the existence of the corporations through the contractual Agreements designating them both as PEG Access Organizations and terminating their existence when the designee status ends. Finally, it is clear that the legislature intended that, as one of its government functions, the DCCA provide for and administer PEG access channels and that 'Olelo and Ho'ike are performing this government function by providing services to the public on behalf of the DCCA.

Examining the totality of circumstances, the OIP is of the opinion that ʻOlelo and Hoʻike are not simply fee-for-service vendors to the State. The OIP concludes that ʻOlelo and Hoʻike are corporations owned, operated, or managed by or on behalf of this State as set forth under section 92F-3 of the Hawaii Revised Statutes.

As a matter of public policy, the legislature declared that the formation and conduct of public policy -- the discussions, deliberations, decisions, and actions of government agencies -- be conducted as openly as possible. Haw. Rev. Stat. § 92F-2 (1993). The OIP is required to construe the UIPA to promote the chapter's purposes and policies, which include enhancing governmental accountability through access to government records. Id. Therefore, because ʻOlelo and Hoʻike are owned, operated or managed on behalf of this State, their records are also subject to this policy as set forth in the UIPA. When the records of ʻOlelo and Hoʻike are accessible to the public, government can be held accountable for its actions, even when government's actions are carried out by separate entities.

Very truly yours,

Moya T. Davenport Gray
Director

MTDG:ankd

cc: ʻOlelo: The Corporation for Community Television
Hoʻike: Kauai Community Television, Inc.