

CABLE TELEVISION DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the Application of)
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)
TIME WARNER ENTERTAINMENT)
COMPANY, L.P.)
)
)
For the Extension of its Cable Franchise)
for the County of Maui (Excluding)
Lahaina).)
_____)

**DECISION AND ORDER
NO. 317**

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I. INTRODUCTION

- A. On November 27, 2002 Time Warner Entertainment Company, L.P. (“**TWE**”) submitted to the Department of Commerce and Consumer Affairs (“**Department**”) its “Final Report” on its 750 MHz system upgrade of the Maui County (excluding Lahaina area) cable system. TWE requested a determination by the Department that: (1) the 750 Mhz Upgrade requirements in Decision and Order No. 241 (“**D&O 241**”) have been satisfied; (2) TWE is entitled to a four (4) year extension of its Maui County cable franchise through December 31, 2013; and (3) TWE is entitled to the termination of the Development Fund requirements as set forth in D&O 241.
- B. The Department issued a “Notice of Findings of Fact and Proposed Decision and Order” (“**Notice**”), CATV-03-2, on January 22, 2004 to allow

interested persons to submit comments on TWE's 750 Mhz Upgrade within thirty (30) calendar days. The proposed Notice focused on TWE's cable franchise for census tracts on the tri-islands of Maui (excluding Lahaina), Molokai, and Lanai.

- C. The Department received comments from Akaku: Maui Community Television ("**Akaku**") and TWE on the Notice. In its public comments dated February 29, 2004, Akaku supported TWE's application for a four (4) year extension of its current cable franchise agreement for Maui County, with the condition that the Department "consider and address community needs and interest, and past fulfillment by Time Warner of its cable franchise obligations in Hawaii." By letter dated March 16, 2004, TWE opposed Akaku's recommendation and reiterated that it had already satisfied the requirements for the 750 Mhz Upgrade and was entitled to an automatic four (4) year extension of its cable franchise term.
- D. After carefully considering the comments and information submitted, the Department hereby issues expanded findings of fact and sets forth its Decision and Order.

II. FINDINGS OF FACT

- A. On or about November 25, 1998 TWE and various affiliates of TCI Communications Inc. ("**TCI**"), including TCI Hawaii, entered into an Asset Exchange Agreement to convey to TWE all of the assets of TCI's cable

systems, including the cable franchise granted by the State of Hawaii (**"State"**).

- B. Pursuant to the Asset Exchange Agreement, TWE submitted an application for transfer and amendment of the cable franchise held by TCI on December 23, 1998, which was accepted for filing by the Department.
- C. In its transfer application, TWE set forth certain representations or commitments, including among other things, the upgrade of the Maui, Molokai, and Lanai cable systems to a minimum bandwidth of 750 Mhz or analog channel capacity of 75 channels plus digital capability using fiber to node architecture (**"750 Mhz Upgrade"**) by December 31, 2001.
- D. In addition, for the Hana area, TWE proposed to upgrade the microwave transmission facilities linking the Hana area to other parts of Maui to allow for two-way connections.
- E. Pursuant to published notices in the newspapers, public hearings on the application were held on Oahu, Maui, Molokai, Lanai, and the island of Hawaii.
- F. Upon receipt of the Department's requests for clarification/ supplemental information, TWE provided documentation and responses to the Department's questions.
- G. After carefully considering TWE's responses and documentation, the Department issued D&O 241 to TWE on or about May 10, 1999.
- H. D&O 241 granted a cable franchise to TWE for the island of Maui (excluding Lahaina) for census tracts 301, 302, 303.01, 303.02, 304.01,

304.02, 305, 306, 307, 308, 309, 310, 311.01, 311.02, 311.03, 312, and 313; the island of Molokai for census tracts 317, 318, and 319; the island of Lanai for census tract 316; the Ka'u area of the island of Hawaii for census tract 212; and the Hawaii Kai area of the island of Oahu for census tracts 1.02, 1.04, 1.05, 1.06, 1.07, and 1.08.¹

- I. The terms and conditions of the former TCI cable franchise and applicable cable systems, which had been transferred to TWE, were attached to and made a part of D&O 241.
- J. Section 2.1 of the "Terms and Conditions" of D&O 241 states that the cable franchise term expires on December 31, 2009. However, that section also states that the cable franchise term shall be extended for an additional four (4) years only upon satisfactory completion of the 750 Mhz Upgrade described in Section 3.1 of the "Terms and Conditions" in which case the term of the cable franchise shall expire on December 31, 2013 unless otherwise terminated in accordance with the franchise or applicable law. Among other things, Section 3.1 required TWE to construct, reconstruct, rebuild, reconfigure, and/or upgrade the Maui County (excluding Lahaina) cable system to a minimum bandwidth of 750 Mhz

¹ D&O 242 provided that the Ka'u franchise area (census tract 212), including the cable system serving that area became part of Time Warner's franchise for the East Hawaii area of the island of Hawaii, be consolidated and incorporated into TWE's East Hawaii system. D&O 242 removed the Ka'u area of the island of Hawaii for census tract 212 from the provisions of D&O 241; and D&O 243 removed the Hawaii Kai area of the island of Oahu for census tracts 1.02, 1.04, 1.05, 1.06, 1.07, and 1.08 from the application of D&O 241.

plus digital capacity, and provide a minimum of 75 activated channels by December 31, 2001.

- K. While reviewing the cable franchise transfer application, a key consideration by the Department was to ensure that the Maui cable system was technically capable of meeting the existing and future needs and desires of the communities it serves.
- L. TWE also proposed to provide advanced interactive cable services such as broadband Internet access and digital services to subscribers within the cable franchise areas whenever such services became technically, economically or otherwise feasible. TWE, however, did not specify a specific date for the introduction of these services.
- M. The Department accepted TWE's proposal to increase channel capacity of the Maui cable system and to complete the proposed upgrades by December 31, 2001.
- N. In addition, D&O 241 noted that the Department could require TWE to complete additional system upgrades after completion of the 750 Mhz Upgrade, although any future upgrades that the Department required TWE to complete would first be discussed with TWE.
- O. TWE proceeded to construct the physical infrastructure requirements for the 750 Mhz Upgrade as ordered in D&O 241.
- P. As the work on the system upgrade progressed, the Department approached TWE to provide broadband Internet access (i.e., such as RoadRunner service) to Hana residents. Although broadband Internet

access is generally made available to its cable subscribers by TWE, the cable operator is not required to provide such service. The Department determined that due to the remote geographical location of the area, the rural Hana community and its residents would greatly benefit from broadband Internet access services. The Department requested TWE to provide this service to Hana residents as soon as possible, as opposed to having Hana subscribers wait until the service became technically and economically feasible based upon TWE's business plan.

- Q. In order to provide broadband Internet access service to Hana, certain additional engineering and equipment improvements had to be made by TWE since the microwave transmission improvements required in D&O 241 were designed to carry video and had to be further upgraded for broadband Internet access.
- R. After discussion with the Department, TWE agreed to expedite the provision of broadband Internet access to Hana. As a result TWE concentrated on constructing a microwave link with increased technical interconnection capabilities to Hana, rather than completing the original microwave transmission specifications as envisioned in D&O 241.
- S. TWE, however, encountered certain technical and engineering difficulties as it proceeded construct the microwave path upgrades.
- T. TWE was also required to obtain licenses from the Federal Communications Commission for additional frequencies, which caused

further unanticipated delays in completing the upgrades for bringing broadband Internet access to Hana.

- U. In a December 27, 2001 letter, TWE informed the Department that the 750 Mhz Upgrade was complete and requested that the franchise term be extended for four (4) additional years to December 31, 2013.
- V. By way of a letter dated January 7, 2002, the Department requested additional documentation to verify completion of the upgrade.
- W. In a written response dated February 27, 2002, TWE's attorneys informed the Department that within the Hana area, the upgrade of the cable distribution plant to 750 Mhz had been completed in late 2001, and that TWE had the ability to provide Hana subscribers 75 analog channels. TWE also stated that it was still working on the upgrade of microwave link interconnecting the Hana area to the remainder of the cable system on Maui. TWE reiterated that as of February 15, 2002, TWE's customers in all parts of Maui were able to receive 75 activated analog channels contemplated by the 750 Mhz upgrade.
- X. The Department responded on March 21, 2002 and stated that it could not acknowledge that that TWE had satisfactorily completed the 750 Mhz Upgrade by December 31, 2001 until the Department received further clarification and information about the processes or steps TWE employed in completing its upgrade.
- Y. The Department also deferred making a decision on TWE's completion of the 750 Mhz Upgrade and extension of the franchise term until after two

separate, outstanding issues were resolved:

1. Implementation of a two-way microwave that would allow Hana residents to request broadband Internet access if desired; and
 2. Completion of a redundant fiber ring from upcountry Maui to Kihei via Ulupalakua Ranch, which would provide higher levels of reliability to TWE's network.
- Z. With respect to the upgrade of the microwave link, by letter dated October 1, 2002, TWE reported to the Department that it had begun service for broadband Internet access to Hana and that all systems were fully two-way capable.
- AA. In response to the Department's request for a separate, final report on the tri-island Maui upgrades, TWE's attorneys provided a "Final Report" dated November 27, 2002 on the 750 Mhz Upgrade to the Department that addressed the issues raised by the Department in March 2002.
- BB. In its "Final Report," TWE confirmed that broadband Internet access services in the Hana area became available on August 23, 2002. However, prior to that time, by December 31, 2001, the cable distribution plant in the Hana area was already upgraded to a 750 Mhz hybrid fiber-coaxial architecture, and TWE was providing the full range of 75 analog channels contemplated under D&O 241.
- CC. TWE also reported that the fiber ring between upcountry Maui to Kihei via Ulupalakua Ranch was completed on October 24, 2002. TWE had entered into negotiations with private landowners including Ulupalakua

Ranch for easements. Access to ranch lands was delayed as negotiations were more time consuming than originally anticipated.

DD. In summary, TWE asserted that it had expended substantial amounts to upgrade its cable system on Maui and that TWE subscribers on all parts of Maui received 75 activated analog channels contemplated by the 750 Mhz upgrade, and had greatly enhanced programming choices and access to advanced services, such as digital services, digital video on demand, and broadband Internet access. TWE thus asserted that it had fully complied with the requirements of D&O 241.

EE. TWE's attorneys requested a determination from the Department that:

1. The 750 Mhz upgrades requirements of Section 3.1(a) of D&O 241 have been satisfied; and
2. TWE was entitled to a four (4) year extension of its Maui County franchise through December 31, 2013, pursuant to Section 2.1(b) of D&O 241.

FF. In February 2003, the Department contacted subscribers in Hana (from a list provided by TWE) to confirm completion of TWE's digital service or high-speed Internet access as a result of their upgraded system. All of the contacted subscribers confirmed that they were receiving such service from TWE.

III. CONCLUSION

- A. Based upon the foregoing, the Department concludes that D&O 241 sets forth the terms and conditions for the extension of TWE's franchise period for an additional four (4) years, from December 31, 2009 to December 31, 2013. The Department further concludes that TWE complied with the provisions of D&O 241, which required that TWE construct, reconstruct, rebuild, reconfigure, and/or upgrade the cable system for Maui County (excluding Lahaina) to a minimum bandwidth of 750 Mhz plus digital capability and provide a minimum of 75 activated channels, by December 31, 2001, with the exception of the upgrade of the microwave transmission facilities to Hana.
- B. The Department further determines that subsequent to the issuance of D&O 241, the Department and TWE reached an understanding that TWE would make available broadband Internet access service to the Hana area in conjunction with the rest of the upgrade for Maui County (except for Lahaina), which was sooner than the service would have otherwise been implemented. Accordingly, TWE revised its plans for the Hana microwave transmission facilities to include additional engineering and equipment improvements.
- C. The Department further concludes that although TWE did not complete the Hana microwave modifications by December 31, 2001 as required by D&O 241, this was due in part to the understanding of the Department and TWE that broadband Internet access service would be made available to

the Hana area sooner than when such service would otherwise have been made available.

- D. The Department further concludes that although TWE did not complete all the enhanced upgrades to the Hana system by December 31, 2001, TWE worked in good faith to comply with its obligations despite encountering unexpected obstacles, and that broadband Internet access service was made available to Hana subscribers on or about August 23, 2002, thereby providing a great benefit to the Hana area.
- E. The Department also concludes that the fiber ring through Ulupalakua Ranch was necessary only for purposes of redundancy and not for the purposes of providing the upgraded services pursuant to D&O 241.
- F. The Department concludes that all of the upgrades required by D&O 241 have been completed. Although the Hana microwave upgrade was not completed by December 31, 2001, the Department finds that, in light of the circumstances determined above, the delay is not an appropriate basis for denying an extension of the franchise. TWE is accordingly entitled to an extension of its cable franchise as provided in D&O 241.

IV. ORDER

Based on the above, TWE's request to extend its franchise is hereby APPROVED. Accordingly:

- A. Pursuant to Section 2.1(b) of D&O 241, the Department extends TWE's Maui County cable franchise for four (4) additional years, and the cable

franchise for the County of Maui (excluding Lahaina) shall now expire on December 31, 2013, unless otherwise terminated in accordance with the franchise or applicable law;

- B. The Development Fund requirements contained in Section 3.3 of the D&O 241 are hereby terminated; and
- C. Except as otherwise provided herein, the remaining provisions of D&O 241 shall remain in full force and effect.

Dated: Honolulu, Hawaii, March 28, 2005.

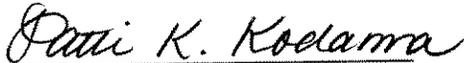
Mark E. Recktenwald
MARK E. RECKTENWALD
Director of Commerce and
Consumer Affairs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 317 was served upon the following person(s) at the address shown below by mailing the same, postage prepaid, on this 28th day of March, 2005.

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