

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

In the Matter of the Application of	)	<b>DECISION AND ORDER NO. 318</b>
	)	
	)	
TIME WARNER ENTERTAINMENT	)	
COMPANY, L.P.	)	
	)	
	)	
For the Extension of its Cable Franchise	)	
for the Kona and Kohala Systems on the	)	
Island of Hawaii.	)	

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**DECISION AND ORDER NO. 318**

**I. INTRODUCTION**

- A. On November 27, 2002 Time Warner Entertainment Company, L.P. (“TWE”) submitted its Final Report on the Kohala System 750 Mhz Upgrade to the State of Hawaii Department of Commerce and Consumer Affairs (“Department”). TWE requested a determination by the Department that: (1) the 750 Mhz Upgrade requirements in Decision and Order No. 173 (“D&O 173”) have been satisfied; and (2) TWE is entitled to a six (6) year extension of its franchise term for the Kona and Kohala Systems through December 31, 2011.
  
- B. The Department issued a “Notice of Findings of Fact and Proposed Decision and Order” CATV-03-1 (“Notice”) on January 22, 2004 to allow interested persons to submit comments on TWE’s 750 Mhz Upgrade

within thirty (30) calendar days. The Notice was posted on the Department's web page on or about January 22, 2004.

- C. The Department did not receive any comments regarding the Notice.
- D. After carefully considering the files and records herein, the Department hereby issues expanded findings of fact and sets forth its Decision and Order.

## II. FINDINGS OF FACT

- A. Pursuant to a February 8, 1995 Asset Purchase Agreement, American Cable TV Investors 4, Ltd. ("**ACT 4**") agreed to sell all of the assets of the Sun Cablevision of Hawaii System and Kamehameha Cablevision to TWE.
- B. Sun Cablevision provided cable service to census tract areas 213 through 217 (Captain Cook, Waikoloa, Kawaihae-Puako, Honaunau, Kealahou, Kealahou, Kalalua, Mauna Lani, and Mauna Kea) (sometimes referred to as "**Kona System**"). Kamehameha Cablevision provided cable communication services to the North Kohala area of the island of Hawaii in census tract 218 (sometimes referred to as "**Kohala System**").
- C. In its application for transfer of the Sun Cablevision and Kamehameha Cable franchise areas and amendment of the cable franchises, TWE set forth certain representations or commitments, including among other things, the upgrade of the existing Kona and Kohala cable distribution systems to a minimum bandwidth of 750 Mhz and to provide a minimum of

75 available channels plus digital capability using fiber to node architecture.

- D. On or about June 30, 1995, the Department issued D&O 173 that approved the transfer and amendment of the cable franchises held by ACT 4 for the Kona System and Kohala System to TWE.
- E. D&O 173 consolidated the Kona and Kohala franchises into one franchise, which was then collectively referred to as the "**West Hawaii System.**" Although the systems were consolidated by D&O 173, the Kona and Kohala systems were referred to separately for the purposes of their upgrades.
- F. Section 3 of the Terms and Conditions of D&O 173 ("**Terms and Conditions**") set forth the upgrade requirements for the Kona and Kohala cable systems.
- G. Section 3.1(a) of the Terms and Conditions required TWE to construct, reconstruct, rebuild, reconfigure, and/or upgrade the Kona System by July 1, 2000 to a minimum bandwidth of 750 Mhz and with a capability to provide a minimum of 75 available channels ("**Kona Upgrade**").
- H. Similarly, Section 3.2(a) of the Terms and Conditions required TWE to construct, reconstruct, rebuild, reconfigure, and/or upgrade the Kohala System by July 1, 2001 to a minimum bandwidth of 750 Mhz and with a capability to provide a minimum of 75 available channels ("**Kohala Upgrade**").

- I. Section 2.1(a) of the Terms and Conditions extended the franchise term for the Kona System to June 30, 2005. In addition, section 2.1(b)(1) of the Terms and Conditions provided for an extension of the franchise term to June 30, 2010 if TWE completed the Kona Upgrade by July 1, 2000.
- J. Section 2.2(a) of the Terms and Conditions extended the franchise term for the Kohala System to May 29, 2005. In addition, section 2.2(b)(1) of the Terms and Conditions provided for an extension of the franchise term to June 30, 2010 if TWE completed the Kohala Upgrade by July 1, 2001.
- K. While reviewing the cable franchise transfer application, a key consideration by the Department was to ensure that the West Hawaii System was technically capable of meeting the existing and future needs of the communities it serves.
- L. In addition, D&O 173 noted that the Department could require TWE to complete additional system upgrades after completion of the Kona and Kohala Upgrades, although any future upgrades that the Department required TWE to complete would first be discussed with TWE.
- M. TWE proceeded to construct the physical infrastructure requirements for the upgrades to the Kona and Kohala Systems as ordered in D&O 173.
- N. By Decision and Order No. 241 ("**D&O 241**") dated May 10, 1999, the Department approved of the transfer of the cable franchises held by TCI of Hawaii, Inc. ("**TCI**") to TWE, which resulted in among other things, the transfer of the cable franchise for the Ka'u area of the island of Hawaii to

TWE. This transfer resulted in TWE holding cable franchises covering the entire island of Hawaii.

- O. In a concurrent order, Decision and Order No. 244 ("**D&O 244**") dated May 10, 1999, the Department amended Sections 2.1(b) and 2.2(b) of D&O 173 in their entirety, and granted TWE's request to extend the franchise terms for both the Kona and Kohala Systems for one additional year to December 31, 2011 upon TWE's satisfactory completion of the Kona and Kohala Upgrades as previously described in D&O 173.
- P. D&O 244 states that TWE may configure the upgrades using fiber or microwave, or both, provided that all present and future services that TWE may make available (including advanced services such as high-speed Internet cable access and other new services) are offered to all subscribers throughout the Kona and Kohala franchise and service areas. D&O 244 did not specify a time frame for the provision of advanced services to Kona and Kohala cable subscribers.
- Q. TWE completed the Kona Upgrade prior to the July 1, 2000 deadline and the cable plant facilities in the Kona franchise area had the capability to carry a minimum of 75 analog channels. The Department, however, refrained from issuing an order extending TWE's franchise term until the Kohala Upgrade was also completed.
- R. As the work on the Kohala Upgrade progressed, the Department approached TWE to provide broadband Internet access (i.e., such as RoadRunner service), to residents of Kohala as soon as possible, as

opposed to having Kohala subscribers wait until the service became technically and economically feasible based upon TWE's business plan.

- S. In order to provide broadband Internet access service to Kohala, additional engineering work and equipment improvements had to be made by TWE. These improvements were in addition to the physical upgrades of the system as required by D&O 173 (as amended by D&O 244) and involved improvements to the microwave transmission system to support broadband Internet access.
- T. TWE agreed to expedite the provision of the broadband Internet access into and out of North Kohala and worked to accomplish this task.
- U. Prior to the July 1, 2001 deadline, on or about June 8, 2001, TWE requested a nine (9) month extension (from July 1, 2001) to complete the Kohala Upgrade. TWE informed the Department that there was a new development with respect to the upgrade that would result in a decrease in interference in the microwave link, thereby improving the delivery of service. TWE's new plan was to re-engineer the existing transmission path so that existing channels from Kona could be transported across the microwave system to the Hawi area.
- V. By letter dated July 27, 2001, the Department acknowledged TWE's failure to timely complete the Kohala Upgrade by July 1, 2001, but did not make a decision on TWE's request for an extension.
- W. TWE responded by letter dated September 17, 2001, and described its efforts to comply fully with D&O 173 (as amended by D&O 244). TWE

stated that time delays occurred because it had considered and pursued different alternatives which later proved to be not viable and also because negotiations with utility companies for joint pole usage entailed considerable time and effort. TWE, however, asserted that the entire plant in the North Kohala (Hawi) area had been upgraded for over a year, which meant that the cable system had been capable of delivering 78 analog channels and had the capability of an active two-way system, designed into a 750 MHz fiber to node architecture.

- X. In a letter dated September 28, 2001, the Department deferred making a decision on TWE's request for an extension of time to complete the Kohala Upgrade. Instead, the Department requested monthly progress reports from TWE, starting November 1, 2001, detailing the appropriate steps taken by TWE to complete the Kohala Upgrade. The parties understood and agreed that while the physical requirements of the Kohala Upgrade were completed, the microwave link needed to be improved before broadband Internet access service would be available to Kohala residents.
- Y. TWE submitted the requested reports to the Department detailing the status of the Kohala Upgrade.
- Z. By letter dated October 1, 2002, TWE reported that all systems were fully two-way capable, and TWE submitted its Final Report on the Kohala Upgrade on November 27, 2002.

- AA. In its Final Report, TWE stated that Kohala's subscribers had access to the same 75 analog channel lineup as the adjoining Kona System and multiple digital offerings including premium channels, pay per view, channel mapped analog, and music choice. Broadband internet access was also available to Kohala's subscribers including the public library at Kohala.
- BB. Additionally, in its Final Report, TWE explained that although the upgrade to the Kohala plant was completed in March 1998, there had been delays in providing digital service to the Kohala System, principally due to the geographical features of the Kohala area. TWE reported that as of November 27, 2002, all systems were fully two-way capable and that Kohala subscribers had access to the same 75 analog channel lineup as the adjoining Kona System and multiple digital offerings such as premium, pay per view, channel mapped analog, and music choice. Digital programming and access to broadband Internet access services were made available to subscribers on September 30, 2002.
- CC. As a result, TWE requested a determination from the Department that:
1. The 750 Mhz upgrade requirements of Section 3.2(a) of D&O 173 (as amended by D&O 244) have been satisfied; and
  2. TWE is entitled to a six (6) year extension of its franchise term for the Kohala and Kona Systems through December 31, 2011, pursuant to Sections 2.1(b) and 2.2(b) of D&O 173 (as amended by D&O 244).

DD. In February 2003, the Department contacted subscribers in the Kohala area (from a list provided by TWE) to confirm completion of TWE's digital service or high-speed Internet service 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 173 (as amended by D&O 244) sets forth the terms and conditions for the extension of TWE's franchise period for the Kona and Kohala Systems.
- B. TWE complied with the upgrade requirements for the Kona System by the July 31, 2000 deadline.
- C. TWE also completed the physical upgrade requirements for the Kohala System by July 30, 2001, which increased TWE's ability to deliver additional programming to Kohala residents, with the exception of the upgrade of the microwave link to Kohala.
- D. The Department further determines that subsequent to the amendments to D&O 173, the Department and TWE reached an understanding that TWE would make available broadband Internet access service to the Kohala subscribers in conjunction with the rest of the 750 Mhz upgrade for the Kohala area, which was sooner than the service would have otherwise been implemented. Accordingly, TWE revised its plans for the Kohala microwave transmission facilities to include additional engineering and equipment improvements.

- E. The Department further concludes that although TWE did not complete the Kohala microwave modifications by July 31, 2001 as required by D&O 173 (as amended by D&O 244) this was due in part to the understanding of the Department and TWE that broadband Internet access service would be made available to the Kohala area sooner than when such service would otherwise have been made available.
- F. The Department further concludes that although TWE was unable to complete all the additional, agreed upon upgrades to the Kohala system by July 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 Kohala subscribers on or about September 30, 2002, thereby providing a great benefit to the area.
- G. The Department concludes that all of the upgrades for the Kona and Kohala Systems required by D&O 173 (as amended by D&O 244), have been completed. Although the Kohala microwave upgrade was not completed by July 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 West Hawaii franchise. TWE is accordingly entitled to an extension of its cable franchise as provided in D&O 173 (as amended by D&O 244).

IV. ORDER

Based upon the above, TWE's request to extend its franchise is hereby

APPROVED. Accordingly,

- A. Pursuant to sections 2.1(b) and 2.2(b) of Decision and Order No. 173 (as amended by Decision and Order No. 244), the Department extends the franchise term for the West Hawaii System (Kona and Kohala Systems) for six (6) additional years, and the cable franchise for the West Hawaii System shall expire on December 31, 2011, unless otherwise terminated in accordance with the franchise or applicable law;
- B. The Development Fund requirements contained in Section 3.5 of Decision and Order No. 173 are hereby terminated; and
- C. Except as otherwise provided herein, the remaining provisions of Decision and Order No. 173 and Decision and Order No. 244 shall continue to apply and remain in full force and effect.

Dated: Honolulu, Hawaii, April 20, 2005.



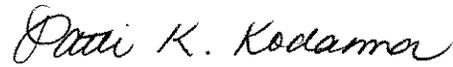
MARK E. RECKTENWALD  
Director of Commerce and Consumer Affairs

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 318 was served upon the following person(s) at the address shown below by mailing the same, postage prepaid, on this 20<sup>th</sup> day of April, 2005.

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