

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

In the Matter of)
)
TIME WARNER ENTERTAINMENT) **DECISION AND ORDER NO. 320**
COMPANY, L.P.)
)
Franchise Amendment for Activation of a)
6th Access Channel for the Oahu Cable)
Franchise Area.)
_____)

DECISION AND ORDER NO. 320

I. INTRODUCTION

- A. On October 8, 2004, 'Ōlelo Community Television ("**Olelo**")¹ submitted its "Request by 'Ōlelo Community Television to the Department of Commerce & Consumer Affairs for the Addition of a Sixth PEG Access Channel" ("**Request**") to the Director of Commerce and Consumer Affairs (hereinafter referred to as "**Director**" or "**Department**"). In general, Olelo requested activation of a sixth analog public, educational, and governmental ("**PEG**") access channel to increase Olelo's programming and playback capability.
- B. On or about November 19, 2004, the Department received comments from Time Warner Entertainment Company, L.P. ("**TWE**"), dba Oceanic Cablevision, the cable operator on Oahu, on Olelo's Request.

¹ Formerly known as "'Ōlelo: the Corporation for Community Television."

- C. The Department subsequently provided TWE and Olelo the opportunity to provide additional information to the Department and comment on each party's submissions.
- D. The Department also received letters and e-mails from the public, producers and legislators on Olelo's Request.
- E. After carefully considering the comments and information submitted, the Department hereby issues the following Decision and Order.

II. FINDINGS OF FACT

- A. Under paragraph (a) of section 5.2 of the Terms and Conditions of Decision and Order ("**D&O**") No. 154, as amended by D&O No. 261, TWE is required to make available at least five (5) full-time activated channels (i.e., "**Access Channels**") to the Director or to the Director's designee for PEG use, two (2) of which shall be Educational Access Channels or as otherwise designated by the Director.
- B. Pursuant to the December 24, 1998 Agreement ("**1998 Agreement**") between the Department and Olelo, Olelo was contracted to manage and operate the PEG access finances, facilities and equipment for the island of Oahu.
- C. Through various Supplemental Agreements, the term of the 1998 Agreement has been extended to August 31, 2005.
- D. In 2004, all five (5) PEG Access Channels on the island of Oahu were cablecasting programs 24 hours a day, 7 days a week, for a total of 43,800 hours of programming a year.

- E. Although responsible for all five (5) PEG Access Channels, Olelo primarily schedules programming on three channels, and the Department of Education (“DOE”) and University of Hawaii (“UH”) each program one Access Channel. Thus, the Access Channel lineup for Oahu is as follows:
- Oahu Channel 52 – includes subjects dealing with arts and entertainment, community, inspiration, and sports;
 - NATV Channel 53 – includes programs on Native Hawaii, Hawaiian issues, Pacific Islands, Native American, indigenous people, and cultural and ethnic issues;
 - VIEWS Channel 54 – includes public affairs, City and State government issues, live City Council meetings, legislative hearings and floor sessions, informational hearings, neighborhood board meetings, community issues and meetings;
 - TEC Channel 55 – higher education programming provided by the UH; and
 - TEACH Channel 56 – DOE Teleschool programming K-12 and staff development.
- F. Programming on the Access Channels includes first-run programs, replays, live shows, satellite feed, open mic, and other types of productions.
- G. On October 8, 2004, Olelo submitted its Request to the Department for the activation of a 6th Access Channel. In support of its Request, Olelo stated that:
1. The last increase in channel capacity was done in 1996;
 2. From 1993 to 2003, the total hours of first-run programming increased to 4,260 hours, which was an increase of 49% during the ten-year period;

3. For 2005, prime time availability on Olelo's channels will be reduced to 105 hours per week once TEC Channel 55 and TEACH Channel 56 are dedicated entirely to educational programming;
4. Olelo anticipated that prime time programming demand in 2005 will total 150 hours per week;
5. Between 1993 and 2003, the number of first-run programs produced by clients increased 747%, and Olelo expected that there would be an increase in client programming since digital technological advances allow clients to produce programs on their own;
6. Olelo opened four community centers, located in different areas on Oahu to implement outreach to underserved areas;
7. Olelo's client base grew to 2,774 active clients, of whom 1,149 clients were certified as producers (i.e., those who had submitted programs within the last two years);
8. There had been an increase in civic issues and government programming since 1993. There were currently 14 neighborhood board meetings to program on VIEWS Channel 54, each approximately three hours long and representing a 40% increase in programming since 2003. At this level, 42 hours of prime-time hours were needed for this programming, leaving little to no prime time available for public issues/affairs programming on VIEWS.

Several of neighborhood board meetings were not getting broadcast prime-time; and

9. Olelo programmed nearly 3,000 total hours of City government programs and almost 2,000 hours of State government programs each year. Demand for legislative programming is high during the legislative session each year. From 1993 (when legislative programming totaled 132.31 hours) to 2003, first-run legislative programming hours increased to 392.5 hours, which was an increase of 196%.
- H. By letter dated October 30, 2004, TWE provided written comments on Olelo's Request and questioned the need for an additional Access Channel. TWE asserted that the number of consumers who actually view Olelo's programming was relevant and should be a key factor in determining whether the provision of an additional PEG Access Channel was supported. TWE further stressed that it had collected data during the week ending October 24, 2004 from digital subscribers indicating that viewership of Olelo's five Access Channels was relatively small, and collectively totaled approximately .57 per cent (.57%) of the total viewed hours on TWE's standard channels. TWE therefore concluded that the small consumer demand for Olelo's programming did not support the provision of a 6th Access Channel to Olelo at this time.
- I. On November 5, 2004, the Department transmitted a copy of TWE's October 30, 2004 letter to Olelo for its review and comment.

- J. In a written response dated November 19, 2004, Olelo disagreed with TWE's assumptions and stated that its Request should not be judged by the same standards as for-profit commercial channels. Olelo affirmed that its Request was an attempt to increase viewership for its client-producers by giving them better airtimes and increasing access to a larger audience base.
- K. On December 6, 2004, the Department requested that TWE and Olelo each provide the Department with certain documentation, data and historical information regarding Olelo's viewership, the impact to its respective company/organization if the additional Access Channel was granted or denied to Olelo, and the impact to clients/subscribers if the additional channel was denied.
- L. In a letter dated January 7, 2005, TWE reported that it compiles aggregate data from its digital subscribers on a weekly basis, and that based on historical information, viewership of Olelo's five channels consistently constituted approximately one half of one percent (.50%) of the total viewed hours on its standard channels.
- M. TWE also indicated that if Olelo's request was approved, it would require TWE to re-evaluate and possibly modify the existing cable programming service tier, which would reduce TWE's flexibility in responding to subscriber demand for commercial and local programming. TWE claimed that irrespective of whether programming was commercial or

non-commercial, it made little sense to utilize valuable channel capacity if there was only limited subscriber demand for such programming.

- N. On January 7, 2005, Olelo also submitted further information and documentation supporting its Request. Although Olelo reaffirmed its position that PEG access resources should not be granted on the basis of viewership, Olelo submitted a survey which indicated that 86% of viewers surveyed found PEG access on Oahu to be valuable to the community. Olelo emphasized that without increased available channel time, there would be a lack of prime time airing of programming that would result in the denial of access to producers and the public.
- O. The Department provided both TWE and Olelo an opportunity to comment on each other's January 7, 2005 submissions.
- P. In a letter dated January 21, 2005, Olelo provided additional comments and re-iterated its responsibility to provide a forum to those who choose to exercise their First Amendment rights, and to educate and foster a better understanding of local government.
- Q. In a January 28, 2005 e-mail, TWE's attorney stated that TWE had already adequately addressed the issue and again emphasized that it believed that viewership numbers should be an important factor in determining whether Olelo's request for a 6th Access Channel should be granted.
- R. The Department also received letters and e-mails from producers and legislators in support of Olelo's request.

III. CONCLUSIONS

- A. Based upon the foregoing, the Department concludes that after the DOE assumes all the programming on the TEACH Channel 56 in 2005, the number of prime-time hours available for programming by Olelo will decline, although the number of Olelo's clients is growing and the demand for access programming is increasing.
- B. The Department further concludes that since the last channel increase for Olelo in 1996, there has been a substantial increase in governmental programming. Legislative leaders and neighborhood board members have expressed desire to have civic and governmental information aired in a timely manner. Producers, directors, television editors, and technicians also voiced their need to have their programs aired in a timely manner.
- C. The Department further concludes that a 6th Access Channel should alleviate some of the current scheduling difficulties encountered by Olelo and increase the number of first-run programs broadcast on Olelo, thereby resulting in greater public access and public benefit.
- D. The Department further concludes that data on viewership of Olelo's Access channels, although not conclusive in and of itself, is a factor that merits consideration in the determination to grant Olelo's Request to utilize valuable channel capacity.
- E. The Department also concludes that while the activation of a 6th Access Channel may require TWE to make some modifications to its existing cable programming service, those impacts appear to be minimal.

F. The Department further concludes that activation of a 6th Access Channel for a **one-year period** would allow the Department to further assess the usage of Olelo's PEG channel resources. After the first nine months of activation of the 6th Access Channel, Olelo and TWE would be afforded the opportunity to provide additional information and comments based on the utilization and viewership of Olelo's PEG access channels during this period.

IV. **ORDER**

A. Accordingly, the Department hereby orders that paragraph (4)(a) on page 20 of D&O 261, that amends section 5.2(a) of the Terms and Conditions of D&O 154, be amended in its entirety to read as follows:


- “(a) TWE shall designate and provide for activation to the Director or the Director's designee as least five (5) full-time Activated Channels, two (2) of which shall be Educational Access Channels or as otherwise designated by the Director. Activated Channels made available to the Director or the Director's designee under this paragraph shall be hereinafter sometimes referred to as "Access Channels." All Access Channels shall be made available by TWE at no cost to the State.
- (1) TWE shall also designate and provide for activation to the Director or the Director's designee an additional channel ("6th Access Channel") for a one-year period, commencing when the 6th Access Channel is available for programming by the designated access entity. TWE shall notify the Department in writing of the date the 6th Access Channel is available for programming.
 - (2) The 6th Access Channel shall be made available by TWE at no cost to the State.
 - (3) Nine (9) months after the 6th Access Channel is available for programming, the designated access entity shall submit a report to the Director that shall include detailed statistics and data reflecting Access Channel utilization and viewership.

The designated access entity shall consult with the Department prior to compiling the data for this report to ensure that the report contains information necessary for review by the Department.

- (4) The Director shall then determine whether the 6th Access Channel shall become a permanent full-time Activated Access Channel. TWE shall be provided the opportunity to comment and submit additional information to the Director prior to the Director's determination.
- (5) The designated access entity shall make available to TWE any fallow time on the 6th Access Channel as identified in section 5.3 of the Terms and Conditions of Decision and Order No. 154. The designated access entity and TWE shall mutually agree on the utilization of fallow time."

B. Except as otherwise provided in this Decision and Order, the remaining provisions of Decision and Order No. 154 (including but not limited to section 5.2), as amended by Decisions and Orders Nos. 156, 158, 243, and 261, shall continue to remain in full force and effect.

Dated: Honolulu, Hawaii, June 8, 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. 320 was served upon the following person(s) at the address shown below by mailing the same, postage prepaid, on this 8th day of June, 2005.

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