

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

In the Matter of)	
)	DECISION AND ORDER NO. 359
TIME WARNER ENTERTAINMENT)	
COMPANY, L.P.)	
)	
Migration of Analog Education Channels)	
to Digital Format for its Lahaina Cable)	
Television Franchise.)	

DECISION AND ORDER NO. 359

I. INTRODUCTION

- A. On March 5, 2012, the State of Hawaii (“**State**”) Department of Commerce and Consumer Affairs (“**Department**”) issued a “Notice of Findings of Fact and Intent to Issue a Decision and Order,” CATV-12-04 (“**Notice**”), to allow interested persons time to submit written comments on a proposed Findings of Fact and Order regarding Time Warner Entertainment Company, L.P.’s (“**TWE**”) migration of the Educational Channels to digital format in its Lahaina franchise area. This Notice was posted on the Department’s web page on or about March 5, 2012.

- B. The Department received seven (7) written comments on the Notice.
 - 1. Representatives from the University of Hawaii (“**UH**”), Hawaii Association of Independent Schools (“**HAIS**”) and Hawaii Educational Networking Consortium (“**HENC**”) each provided comments in support of the Notice. The education representatives indicated their support for TWE’s digital migration of the analog Education Channels to digital format on the neighbor islands since the transition provided additional linear Channel capacity as well as digital video-on-demand capacity similar to that specified in the Oahu franchise, Decision and Order No. 346 (“**D&O 346**”), thereby potentially increasing access to education for all citizens on all islands.

 - 2. By letter dated April 4, 2012, TWE supported the intent to issue orders regarding the digital migration of the TEC and TEACH Channels on the neighbor islands. TWE requested that the final decision and order also include a waiver with respect to the definition of a Channel in Decision and Order No. 174 (“**D&O 174**”),

and a reservation of its rights with respect to the migration of the TEC and TEACH Channels on the neighbor islands and interpretation of its neighbor island franchises.

3. Hoike: Kauai Community Television, Inc. ("**Hoike**") through its general manager submitted comments opposing the digital migration of the Education Channels. Hoike denied that it received any communications from TWE during the months of December 2011 through February 2012 about the digital migration of the Education Channels. Hoike also objected to TWE's discussions with the Education Partners directly without input from Hoike. Hoike further suggested that TWE keep the Education Channels on the analog tier while at the same time duplicating them for the digital tier and create a process to easily transition the entire network to digital format.
 4. Maui Community Television, Inc. dba Akaku: Maui Community Television ("**Akaku**"), through its president and CEO, submitted written objections to the digital migration of Education Channels for the Maui and Lahaina franchises, stating that Akaku was not informed of, or invited to the meetings between TWE and the Education Partners on the schedule and details of the proposed digital migration of the Education Channels. Akaku also raised concerns about distribution of free converter boxes to Subscribers in rural areas and suggested that TWE have box distribution outlets in the rural areas of Molokai, Lanai, and East Maui. Akaku also voiced oral objections for all neighbor islands franchises and requested that TWE be required by DCCA to deliver all existing public, educational, and governmental ("**PEG**") Access Channels in analog format on the Basic Service Tier until the entire tier goes to digital format, and (unless the parties agreed otherwise) that PEG Access Channels should be a part of the digital Basic Service Tier.
 5. An Oahu Subscriber submitted written opposition to TWE's request to waive the requirements in the definition of a Channel, stating that Oceanic refused to provide her more than one free digital converter box to enable her family to watch the Education Channels and other PEG Access Channels that have migrated to digital format.¹
- C. At the April 4, 2012 Cable Advisory Committee ("**CAC**") meeting, CAC members expressed concern that TWE did not provide sufficient notification to the neighbor island PEG Access Organizations prior to the migration. CAC members suggested that TWE's waiver request be denied by the Director, and that in the future, TWE should consult with the

¹ TWE subsequently provided the Subscriber a second free digital converter box.

PEG Access Organizations on the digital migration of any Access Channels.

- D. After carefully considering the files, records, and comments herein, the Department hereby issues the following Decision and Order (“**D&O**”).

II. **BACKGROUND**

- A. On or about October 2, 1995, the Department issued D&O 174 to TWE.
1. Among other things, D&O 174 approved the transfer of the cable franchise of Daniels Communications Partners Limited Partnership for West Maui (“Lahaina”) census track areas 314 and 315 which included Lahaina, Kaanapali, Honokawai, Kahana, Napili, Kapalua, Honolua, Honokohau, and Kahaloa.
 2. Section One (“Definitions”) of D&O 174 defines a “Channel” as “a minimum of six megahertz (6 MHz) in the electromagnetic spectrum that is capable of carrying any type of transmission which TWE is authorized to provide to Subscribers.” This definition was based upon the then-existing analog broadcast technology.
 3. Pursuant to D&O 174, TWE was required to provide at least three (3) full-time activated Access Channels. In D&O 261, TWE was also to provide at least two (2) additional full time Educational Access Channels, as required by the Director after completion of system upgrades.
 4. The Lahaina Cable System currently has five (5) full-time activated Access Channels, of which two (2) are full time Education Channels. These two (2) full-time Channels are referred to herein as TEC (Channel 55) and TEACH (Channel 56). These two channels are distinct from the three (3) full-time activated Access Channels required under Section 4.3(a) of D&O 174.
- B. Pursuant to D&O 245, TWE’s Lahaina cable franchise was extended to December 31, 2013.
- C. Over the past decade, the development and implementation of digital technology has increased rapidly nationwide, and the current trend is that almost all aspects of communication, including the transmission of video programming and other broadband services, are being converted to digital format.
- D. In 2009, the American Recovery and Reinvestment Act of 2009 (“**ARRA**”) was enacted by the United States Congress to, among other things, stimulate the development of broadband infrastructure and services through grants and loans.

- E. The United States Federal Communications Commission (“FCC”) mandated that all full power broadcast television stations were required to complete the transition from analog to digital broadcast by June 2009. Full power broadcast stations in the State of Hawaii, however, completed this transition early, moving fully to digital broadcasts by January 15, 2009.
1. As part of the digital TV transition, millions of households across the country were required to either obtain and install digital to analog conversion boxes, or purchase new TV sets, in order to receive over-the-air digital broadcasts.
 2. In addition to this, almost all TV sets manufactured since 2007 are now equipped with QAM tuners.
 3. The FCC adopted the “viewability” rule, which required hybrid cable operators (excluding Internet protocol TV systems such as Hawaiian Telcom Services video service) to provide access to “must carry” broadcasters’ Channels in a manner that allowed these Channels to be viewed on analog televisions, resulting in a cable operator carrying these Channels on an analog tier or providing the subscriber with a free set-top converter box. On June 12, 2012, the FCC allowed the viewability rule to sunset and required hybrid systems to continue to carry the signals of must-carry stations in analog format to all analog cable subscribers until December 12, 2012.
- F. On or about January 14, 2010, the Department issued D&O 346 to TWE, which among other things, renewed TWE’s cable franchise for the island of Oahu.
1. In D&O 346, the Department recognized that TWE’s migration of its cable capacity currently used for analog transmissions to digital format would benefit consumers because TWE would be able to offer its Subscribers enhanced services, including greater choices in high-definition programming, more efficient means of viewing programs and videos, and substantial increases in broadband speeds.
 2. Pursuant to D&O 346, TWE was authorized to transition any Channel in its analog lineup to digital service in its Oahu cable franchise, subject to an enumerated schedule for the PEG Access Channels; provided that TWE ensured that all Subscribers would have access to PEG Access Channels and non-Access Channels on its Basic Service Tier. TWE was directed to provide, at no charge, digital set-top boxes or similar devices to Subscribers who did not have digital access but who wished to view the Basic Service Tier programming that had been converted to digital format.

- G. On August 23, 2011, the State adopted the Hawaii Broadband Initiative to ensure ubiquitous access to up to one gigabit-per-second broadband service at affordable prices throughout Hawaii and to increase the use of high-speed broadband services and applications for economic development, health care, education, public safety, governmental efficiency, and civic engagement. The Hawaii Broadband Initiative promoted the use of digital technology to drive innovation, the economy and job creation in the 21st century in Hawaii.
- H. During 2010 and throughout the first half of 2011, TWE consulted and worked directly with representatives from the UH, HENC, and the Hawaii State Department of Education ("**State DOE**") to address the technical details and scheduling of the migration of the TEC (Channel 55) and TEACH (Channel 56) Education Channels from analog to digital format on the island of Oahu. As part of this effort, UH and State DOE worked with TWE on Channel assignments to ensure compatibility with existing infrastructure in UH and State DOE facilities.
- I. On or about July and August 2011, TWE provided notification to its Oahu Subscribers that the TEC Education Channel 55 on Oahu would remain on the Basic Service Tier but would be moving to digital format only and be viewable with digital equipment (e.g., digital set-top box, CableCARD-equipped Unidirectional Digital Cable Product, digital television, or other device). TWE further informed Subscribers that as of September 12, 2011, TEC would be found on Channel 355 when using a digital set-top box or on QAM Channel 46.55 and offered to provide analog Subscribers with converter boxes to view the migrated TEC Education Channel at no additional cost. TWE also informed the Department of its proposed migration plans and date for the TEC Education Channel on Oahu.
- J. On or about September 12, 2011, the TEC Education Channel 55 was relocated from the analog cable Channel line-up on Oahu to digital format at Channel 355 (QAM 46.55).
- K. During the fall of 2011, TWE, UH, State DOE, and HENC worked towards the digital migration of the TEACH Education Channel 56 in TWE's neighbor island franchises: the East Hawaii and West Hawaii cable franchises on the Big Island, the Maui and Lahaina cable franchises in Maui County, and the Kauai cable franchise. TWE also consulted with the University of Hawaii Maui College ("**UHMC**") to resolve UHMC's concerns about the scheduling of the TEC Education Channel migration in the Maui County franchise areas.
- L. TWE did not, however, contact or include any of the neighbor island PEG access organizations in its discussions with UH, State DOE and HENC to plan for the transition of the Education Channels. Pursuant to its contract with the DCCA, each neighbor island PEG access organization is

responsible for managing the PEG Access Channels including the Education Channels in its service area and for reporting the programming hours and use of funding for the Education Channels.

- M. On or about September 28, 2011, the Department received written notification from TWE that it planned to migrate the TEC Education Channel 55 for its neighbor island franchises to digital format by January 31, 2012.
- N. By letter dated October 17, 2011, TWE also informed the Department that on or about December 19, 2011, the statewide TEACH Education Channel 56 would remain on the Basic Service Tier but would be made available in digital format.
- O. Pursuant to the Department's request, TWE provided additional information to the Department regarding its discussion with UH on the digital migration via a November 4, 2011 letter. TWE also provided a copy of its letter to the neighbor island PEG Access Organizations.
- P. On or about October and November 2011, TWE provided notifications to its neighbor island Subscribers of the digital migration dates of the TEC and TEACH Education Channels on their monthly statements. TWE also mailed letters to all neighbor island subscribers informing them of the digital migration of the Education Channels. TWE informed customers that TEACH Education Channel 56 would be moved from the analog lineup to digital Channel 356 and QAM Channel 46.56 and that TEC Education Channel 55 would be moved from analog to digital format on digital Channel 355 and QAM Channel 46.55.
 - 1. The monthly statements also informed neighbor island Subscribers that although the TEC and TEACH Education Channels will remain on the Basic Service Tier, they will only be viewable with digital equipment (e.g., digital set-top box, CableCARD-equipped Unidirectional Digital Cable Product, digital television, or other device with a QAM tuner).
 - 2. For Subscribers who need digital equipment to view the migrated Channels, TWE will provide digital converters upon request, at no additional cost; provided that the Subscriber continued to maintain the Subscriber's existing analog service from TWE.
 - 3. In addition to the notices in their monthly billing statements, TWE informed Subscribers of the pending transition by mailing separate letters to customers who use the automatic bill paying service from mid-October 2011 through mid-November 2011, and included notifications on its website under "My Services" for Subscribers who view their bills online.

- Q. The UH ran crawls on the bottom of Channel 55 from November 9, 2011 to January 11, 2012, informing viewers that Channel 55 would be relocated to Channel 355 and provided exclusively in digital format. The crawl also explained the need for a QAM tuner set to Channel 46.55 or the need for free set top box offered by TWE and listed TWE's telephone number.
- R. The DOE also ran a crawl on the bottom of Channel 56 with similar information from November 19, 2011 to December 19, 2011, informing viewers that Channel 56 will move to an all-digital format on Channel 356 on December 19, 2011.
- S. On or about November 2011, the Department received comments from the neighbor island PEG Access Organizations (i.e., Akaku, Hoike, and Na Leo `O Hawaii ("**Na Leo**")), that TWE had not contacted nor consulted with them about the proposed migration of the TEC and TEACH Education Channels to digital format.
- T. The Department and TWE subsequently engaged in discussions to resolve the Department's concerns regarding TWE's set-top converter box policy for customers who wish to view the migrated digital TEC and TEACH Education Channels, and to ensure that TWE provided sufficient notification to its analog customers and the neighbor island PEG Access Organizations about its proposal to move the TEC and TEACH Education Channels to digital format.
- U. On or about December 16, 2011, TWE informed the Department of its policy with respect to the distribution of digital set-top boxes to new and existing analog Subscribers in TWE's neighbor island franchises who may wish to view the TEC and TEACH Education Channels after the migration to digital format:
1. For any new or existing analog Subscriber who is also a bona fide student and who requires a digital box to view the TEC and/or TEACH Education Channels after the digital migration, TWE will provide upon request and at any time, one digital box free of charge, and an additional box without cost upon further request.
 2. For all other new or existing analog Subscribers who desire to view the TEC and/or TEACH Education Channels and require digital boxes to do so, TWE will provide upon request, up to two (2) digital boxes (and evaluate requests for additional boxes on a case by case basis) free of charge; provided that the analog Subscriber maintains the same level of service with TWE. TWE will make the requested boxes available to Subscribers through its customer service centers and also through its mail service without cost to the Subscriber.

3. If a Subscriber had special needs or required special technical assistance, TWE will install the requested set-top box at the Subscriber's location at no additional charge.
 4. TWE and the Department agreed to meet and confer to further discuss TWE's box distribution policy.
 5. TWE agreed to inform the neighbor island PEG Access Organizations of the digital migration plan for the Education Channels and of its set-top box distribution plans.
- V. On or about December 16, 2011, TWE made efforts to contact each neighbor island PEG Access Organization to provide information on the digital migration of the TEC and TEACH Education Channels in their respective cable franchise area.
1. On or about mid-December 2011, TWE informed the Department that a TWE representative had contacted Akaku and notified it of the migration of the Education Channels to the digital tier and of the availability of set-top converter boxes at no additional cost to analog Subscribers.
 2. TWE also informed the Department that on or about December 16, 2011, a TWE representative had contacted Hoike, was unable to speak directly with the managing director because he was out of the office, and left a detailed message about the migration of the Education Channels to the digital tier and the availability of set-top converter boxes at no additional cost to analog Subscribers.
- W. On or about December 19, 2011, the TEACH Education Channel 56 was transitioned to digital format. The TEACH Channel statewide remained on the Basic Service Tier viewable with a digital set-top box or a digital TV with a QAM tuner.
- X. On or about January 8, 2012, TWE proceeded with the digital migration of TEC Education Channel 55 for the Kauai, East Hawaii, and West Hawaii cable franchises. The TEC Education Channel remained on the Basic Service Tier and was viewable with a digital set-top box or a digital TV with a QAM tuner.
- Y. TWE also informed the Department that given the continuing objections to the full migration of the Education Channels on Maui, it was not proceeding with the transition of TEC Education Channel 55 for the Maui and Lahaina cable franchise systems to digital format at that time, TEC Education Channel 55 would remain in its analog Channel lineup until further notice by TWE, and digital services to UHMC were postponed.

- Z. TWE reported to the Department that the amount of bandwidth available for reallocation on Kauai and the Big Island as a result of the digital migration of the TEC and TEACH Education Channels is approximately twelve (12) MHz.
- AA. TWE also reported to the Department that for the Maui and Lahaina franchises, the bandwidth available for reallocation from the transition of the TEACH Education Channel is approximately six (6) MHz.
- BB. TWE informed the Department that consistent with consumer demand, it would be using the reallocated bandwidth on the neighbor islands for the benefit of all customers on the neighbor islands to increase broadband speeds, add additional video-on-demand Channels, increase the number of high definition Channels among other improvements, and launch the Statewide Education and Government Franchise Required Channels mandated by D&O 346.
1. On or about February 14, 2012, TWE requested a waiver (pursuant to Section 12.8 of D&Os 173, 174, 185, and 241; and Section 11.8 of D&O 291) of the applicable provisions in D&Os 173, 174, 185, 241, and 291 that defined a "Channel" as "a minimum of six megahertz (6 MHz) in the electromagnetic spectrum" for the purpose of migrating the TEC and TEACH Education Channels on the neighbor islands to the digital spectrum and recovering the attendant bandwidth for the purposes stated therein.
 2. In general, TWE stated that the digital migration of the TEC and TEACH Education Channels allowed TWE to continue to provide increased speeds for its Road Runner High Speed Online, Road Runner Extreme, and Road Runner Wideband services on the neighbor islands while also making it possible to launch the Statewide Education and Government Franchise Required Channels pursuant to D&O 346.
 3. In addition, the digital migration of the Education Channels on the neighbor islands would enable TWE to provide digital and high definition channels to neighbor island residents and further increase broadband speeds in 2012 commensurate with consumer demand.
 4. While requesting a waiver of the definition of a Channel in the neighbor island franchises, TWE also reserved all of its rights with respect to the digital migration of the TEC and TEACH Channels on the neighbor islands and interpretation of its neighbor island cable franchises.

- CC. On or about February 17, 2012, TWE reported to the Department that two (2) TWE representatives spoke to Na Leo to explain TWE's policies and plans regarding the continued migration of analog channels to digital format.
- DD. In addition, on February 17, 2012, the TWE representatives also spoke to the general manager of Hoike and explained TWE's migration of the Education Channels to digital format. The general manager of Hoike initially disputed that TWE contacted him in December, January or February 2012; however, he did acknowledge that he spoke to TWE representatives in March 2012 about TWE's digital transition of the Education Channels.

III. DISCUSSION

- A. The Department has the power and jurisdiction to supervise and regulate every cable operator within the State so far as may be necessary to carry out the purposes of the Hawaii Cable Communications Systems Law, Hawaii Revised Statutes ("**HRS**") chapter 440G, and to do all things which are necessary and convenient in the exercise of this power and jurisdiction.
- B. Under HRS section 440G-8.1(a), every cable operator is required to provide safe, adequate, and reliable service in accordance with applicable laws, rules, franchise requirements, and its filed schedule of terms and conditions of service.
- C. All PEG Access Channels, once made available, shall be used for public, educational, and governmental access and shall be transmitted to all Subscribers on TWE's Basic Service Tier or the most widely available tier. See, D&O No. 174, and 47 U.S.C. section 543(b)(7).
- D. 47 U.S.C. section 544(e) prohibits a franchising authority from placing conditions or restrictions on a cable system's use of any transmission technology. Although TWE is not required to obtain the Department's prior approval before migrating channels from analog to digital format, TWE nevertheless is required to provide advance notice to the Department and Subscribers of changes to its channel lineup, including their conversion to digital format.
- E. Based on the foregoing, the Department finds that TWE has provided reasonable notice to the Department and its Lahaina cable Subscribers of its planned migration of the TEACH Education Channel to digital format.

- F. The Department also finds that initially, TWE did not effectively communicate with the neighbor island PEG Access Organizations prior to the migration of the TEACH Education Channel to digital Channel 356. However, the Department finds that TWE eventually remedied this situation after-the-fact and provided sufficient information to the neighbor island PEG Access Organizations about the digital migration of its analog Channels to digital format and about its box distribution policy.
- G. Furthermore, the Department finds that TWE's set-top box distribution plan ensures that analog Subscribers who wish to view the migrated Channels have the equipment to do so at no cost, as long as they subscribe to the same level of analog service, and those current analog Subscribers who own TV sets equipped with QAM tuners will not need any special equipment to view the migrated TEACH Education Channel.
- H. The Department further finds that as a result of the digital migration of the TEACH Education Channel and after the digital migration of the TEC Education Channel, TWE will be recovering bandwidth, and this recovered bandwidth should be utilized on the neighbor islands (including the Lahaina cable franchise) to benefit UH, the State DOE, and neighbor island residents; upgrade broadband speeds and services; provide enhanced flexibility to the neighbor island Education partners; and enhance video-on-demand services for UHMC.
- I. Under Section 12.8 of D&O 174, the Department has the authority to waive any requirement of the franchise order "for good cause."
- J. The Department finds that based on the benefits to Subscribers as a result of the digital migration of the TEACH Education Channel and pending migration of the TEC Education Channel, as well as TWE's efforts to utilize the increased bandwidth, "good cause" exists under Section 12.8 of D&O 174 to waive the 6 MHz requirement in the definition of "Channel" in D&O 174 for these two Channels.

IV. ORDER

Accordingly, the Department hereby orders that:

- A. The 6 MHz requirement in the definition of "Channel" in D&O 174 for the TEC and TEACH PEG Education Channels is hereby waived; provided that this waiver is conditioned on TWE fully complying with the requirements of this D&O.
- B. TWE shall continue to ensure that analog Subscribers who wish to view the migrated Channels have the equipment to do so at no cost as long as they subscribe to the same level of analog service and that those current analog Subscribers who own TV sets equipped with QAM tuners will not

need any special equipment to view the migrated TEC and TEACH Education Channels.

1. TWE shall provide upon request a digital box free of charge to an analog Subscriber (and an additional box upon further request).
 2. TWE shall make the requested digital boxes available to Subscribers through its customer service centers for pick up or for delivery by mail service at no charge to the Subscriber.
 3. If a Subscriber has special needs or requires special technical assistance, TWE shall install the requested boxes at the Subscriber's premises within thirty (30) calendar days of the request and at no charge to the Subscriber.
- C. When TWE provides the digital Channel or alternate delivery service to UHMC pursuant to Decision and Order No. 360, (pertaining to the migration of analog Education Channels to digital format in the Maui County cable television franchise) IV.C, TWE shall also make available at no cost the State, UH or Maui PEG Access Organization, this digital Channel or alternate content delivery service to its Lahaina cable franchise Subscribers.
- D. In the future, if TWE plans to migrate any current PEG Access Channels to the digital only tier, in keeping with federal law, TWE shall provide at least thirty (30) calendar days' prior notification to Subscribers of the digital migration of PEG Access Channels, and also provide a copy of this notification to the Department. TWE, however, shall use its best efforts to provide more than thirty (30) calendar days prior notice to Subscribers before migrating a PEG Access Channel to digital only format. TWE shall also consult and work directly with the Maui PEG Access Organization on the transition and scheduling of PEG Access Channels to digital format.
- E. The Department acknowledges TWE's reservation of its rights with respect to the digital migration of the TEC and TEACH Channels on the neighbor islands and interpretation of its neighbor island cable franchises.
- F. The Department intends to incorporate by reference the orders and requirements for TWE as stated herein in future decision and orders addressing the renewal of TWE's Lahaina franchise and reserves the right to require as a part of such renewal the dedication of additional Channel capacity or alternate delivery technology for use by PEG Access Organizations.
- G. In order to ensure that Subscriber's access is not impeded, TWE shall provide reports upon request by the Department on the number of Subscribers requesting equipment to access the migrated Education

Channels, any complaints, and any other related information that the Department requests.

- H. Except as otherwise specifically provided herein, the remaining provisions of D&O 174 shall continue to remain in full force and effect.

DATED: Honolulu, Hawaii, October 11, 2012.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

KEALI'I S. LOPEZ
Director of Commerce and Consumer Affairs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 359 was served upon the following person at the address shown below by mailing the same, postage prepaid, on this 11th day of October, 2012.

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