

CABLE TELEVISION DIVISION

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

STATE OF HAWAII

In the Matter of)
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 TIME WARNER ENTERTAINMENT)
 COMPANY, L.P.)
)
 Franchise Amendment for Activation of a 6th)
 Access Channel for the Oahu Cable Franchise)
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CABLE DIVISION
 COMMERCE AND
 CONSUMER AFFAIRS

TIME WARNER ENTERTAINMENT COMPANY, L.P.'S
 MOTION FOR RECONSIDERATION OR CLARIFICATION OF
 DECISION AND ORDER NO. 320 DATED JUNE 8, 2005

AND

CERTIFICATE OF SERVICE

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DECISION AND ORDER NO. 320 DATED JUNE 8, 2005

COMES NOW TIME WARNER ENTERTAINMENT COMPANY, L.P. ("Time Warner"), by and through its attorneys, Watanabe Ing Kawashima & Komeiji LLP, and hereby moves for reconsideration or clarification of Decision and Order No. 320 dated June 8, 2005 ("D&O 320") and issued by the Cable Television Division, Department of Commerce and Consumer Affairs, State of Hawai'i ("DCCA").

This motion is made pursuant to Hawai'i Administrative Rules ("HAR") §§ 16-201-16 and 16-201-23, the points and authorities raised herein, and the entire record and file herein.

I. BACKGROUND

On October 8, 2004, `Ōlelo Community Television ("`Ōlelo") submitted to the director of the Department of Commerce and Consumer Affairs a request for a sixth analog

public, educational and governmental (“PEG”) access channel. `Ōlelo argued that a sixth PEG channel was justified on three bases: 1) increased community interest; 2) decreased availability of equitable broadcast time; and 3) increased civic issues and government programming.

See Request by `Ōlelo Community Television to the Department of Commerce & Consumer Affairs for the Addition of a Sixth PEG Access Channel dated October 8, 2004 (“`Ōlelo Request”). In essence, `Ōlelo sought a sixth channel primarily to increase prime time airings of producer programming, and prime time coverage of neighborhood board meetings, government programs, and legislative programs, particularly during the legislative session. Id.

Time Warner noted via a letter dated October 30, 2004 to the DCCA that statistics for `Ōlelo’s existing five channels demonstrated that the demand for `Ōlelo’s programming by its own constituent viewers was extremely small, and the channels collectively constituted only slightly over one half of one percent (.57 percent) of the total viewed hours on the standard channels. See Letter to DCCA dated October 30, 2004. Accordingly, while Time Warner recognized `Ōlelo’s desire for an additional channel, Time Warner noted that the addition of a channel was clearly not supported by viewership demand, and Time Warner urged `Ōlelo and the DCCA to consider several factors with respect to the management of the existing channels. Among the factors that Time Warner discussed and raised was whether `Ōlelo should use existing technology to “make programming more responsive to consumer demands within the existing channels[.]” Id.

In response to the issues raised by Time Warner, `Ōlelo noted in a letter to the DCCA dated November 19, 2004 that it disagreed with the basic premise that viewership should be a key factor on whether the provision of an additional PEG channel is supported, but

acknowledged that “viewership is important in evaluating how to better serve our community.” See Letter to DCCA dated November 19, 2004. `Ōlelo argued that its channels could not be equated to commercial channels and that `Ōlelo provides a forum “for speakers to be heard, and opportunities for our community to hear them.” Id. In response to the issue raised by Time Warner with respect to technology, `Ōlelo stated that it “continues to explore new technological advances to make programming more responsive to viewers”; however, `Ōlelo did not specify what steps it has taken (or will take) with respect to the use of technology to better manage its existing channels.

On January 7, 2004, Time Warner informed the DCCA that `Ōlelo’s request, if approved, would “require Oceanic to re-evaluate and possibly modify” existing cable programming, and would “reduce Oceanic’s flexibility in responding to subscriber demand for commercial and local programming.” See Letter to DCCA dated January 7, 2004. Time Warner noted that regardless of whether programming is commercial or non-commercial in nature, “it makes little sense to utilize valuable channel capacity if there is limited subscriber demand for such programming.” Id. Accordingly, Time Warner reiterated that if `Ōlelo’s goal is truly to “increase viewership for each individual producer and their individual speech,” (and provide additional prime-time programming) then the needs of the subscribers would be better served – not by adding a channel – but by encouraging more subscribers to view existing programming. Id.

Via letters dated January 7, 2005 and January 21, 2005, `Ōlelo reiterated its position that “using viewership or consumer data to oppose the request for an additional PEG Access Channel is unfounded,” and that “[t]he distribution and availability of every speaker’s

message is of paramount importance.” See Letters to DCCA dated January 7, 2005 and January 21, 2005. `Ōlelo, however, again did not inform the DCCA of how `Ōlelo could utilize technology to better manage its existing channels and increase the “distribution and availability” of its clients’ messages through other means.

On June 8, 2005, the DCCA issued D&O 320. Although the DCCA’s recent practice has been to issue “a notice of findings of fact and intent to issue a decision and order” with a 30 day comment period prior to issuing a final decision and order, D&O 320 was issued without such a notice. Accordingly, Time Warner did not have an opportunity to address the DCCA’s findings and conclusions (nor engage in discussions with `Ōlelo) prior to the issuance of a final decision and order with respect to `Ōlelo’s request for a 6th PEG channel.

While D&O 320 found, inter alia, that there has been an increase in demand for public access and government programming, the decision and order did not include any findings or conclusions whatsoever as to whether `Ōlelo could better manage its existing channels and programming through technology or other means in lieu of obtaining the use of an additional channel. In addition, D&O 320, while recognizing that Time Warner would have to re-evaluate and possibly modify the existing cable programming if `Ōlelo’s request to use “valuable channel capacity” was granted, incongruously characterized the impact to Time Warner as “minimal”. Finally, D&O 320, while ordering `Ōlelo to submit a report to the Department of Commerce and Consumer Affairs nine months after the 6th channel is available for programming, which “shall include detailed statistics and data reflecting” the channel utilization and viewership, did not provide detailed information on the criteria that the DCCA will actually use to evaluate whether the 6th channel will be made permanent.

II. ARGUMENT

Hawai'i Administrative Rules § 16-201-23 provides that a motion for reconsideration shall specify "what points of law or fact the authority has overlooked or misunderstood together with brief arguments on the points raised." The DCCA, through D&O 320 overlooked and/or failed to adequately address and consider several issues raised by Time Warner: 1) whether `Ōlelo can utilize existing technology to better manage its existing channels and increase the "distribution and availability" of its clients' messages through other means in lieu of the provision of an additional channel; and 2) the significant impact to Time Warner and - more importantly cable subscribers -- for the provision of a 6th channel to `Ōlelo. Even assuming the DCCA declines to reconsider D&O 320, it should at a minimum clarify the decision and order by specifying exactly what "detailed statistics and data reflecting Access Channel utilization and viewership" will be required from `Ōlelo following the nine month trial period so that all parties will have a clear understanding of what will be expected.

- A. **The DCCA overlooked and/or failed to adequately address and consider whether `Ōlelo can utilize existing technology to better manage its existing channels and increase the "distribution and availability" of its clients' messages through other means in lieu of the provision of an additional channel.**
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The DCCA's omission of findings and conclusions relating to whether `Ōlelo can utilize existing technology to better manage its existing channels and increase the distribution and availability of client and government programming in lieu of the provision of an additional channel is significant, as technology has substantially transformed the way that people and institutions disseminate information, as well as the way traditional television viewers receive information. As noted in the survey of cable television subscribers conducted by Ward Research

dated January, 2004 and commissioned by `Ōlelo (“Ward Survey”) (attached to `Ōlelo’s letter to the DCCA dated January 7, 2005), for example, 72 percent of individuals surveyed indicated that they have internet access, with an average of 13.4 hours per week spent on the internet. See Ward Survey at 42. Indeed, the Ward Research data indicates that subscribers with internet access actually watch less television per day on average. Id. at 49.

Indeed, `Ōlelo itself has clearly recognized the utility and value of the internet as a means for the distribution of its programming, as it currently streams all of its channels on its website, www.olelo.org. `Ōlelo can easily “time shift” its streaming programming and create menus on its website to allow many of its constituents to view any program at any time, similar to what is now common on internet news sites such as www.cbsnews.com and www.cnn.com/video/.

Thus, the traditional paradigm of public access programming as a “soapbox” for individuals and institutions to express their ideas to a potentially broad audience through cable television has undergone a radical transformation as a result of the internet and related technological advances. Individuals, educators and government institutions can now communicate directly with literally millions of people through web sites, video streaming, blogs, podcasts, RSS feeds and other related technology and protocols. Accordingly, television is no longer the single dominant forum for the broad exchange of information and ideas, and ordering the addition of a PEG channel without carefully considering how established and virtually ubiquitous technology can significantly facilitate `Ōlelo’s desire to increase its prime time and government programming within its existing resources fails to recognize present reality and would clearly be a regulatory step backwards.

Given the foregoing, Time Warner respectfully submits that the DCCA failed to consider how the utilization of existing technology mitigates against the provision of an additional PEG channel, while also allowing `Ōlelo to maximize its existing resources to the benefit of its constituents. Under the current paradigm, Time Warner respectfully submits that the DCCA must consider that the solution to `Ōlelo's concerns with respect to the increase in programming and a finite amount of prime time is not to simply add an additional analog PEG channel (which will also likely have very limited viewership to the detriment of the vast majority of other subscribers), but to better manage and maximize the distribution of `Ōlelo's current channels and content through the use of ubiquitous and practical technology. The DCCA should therefore reconsider D&O 320 in light of the foregoing.

B. The DCCA overlooked and/or failed to adequately address and consider the impact to Time Warner and -- more importantly the subscribers -- as a result of the provision of a 6th PEG channel to `Ōlelo.

Time Warner also believes that the DCCA failed to recognize and fully analyze the impact to Time Warner -- and more importantly, the subscribers -- as a result of the provision of a 6th PEG channel to `Ōlelo. As Time Warner informed the DCCA, and as the DCCA recognized in D&O 320, Time Warner would have to re-evaluate and modify the existing cable programming if `Ōlelo's request was granted. Despite the foregoing, and the DCCA's recognition that "valuable channel capacity" would thus be re-allocated to a series of channels with extremely low viewership, D&O 320 incongruously characterized the impact to Time Warner as "minimal".

All of the available analog channels are currently being utilized for programming.

See Analog Channel Lineup at www.oceanic.com. Accordingly, the provision of a 6th PEG channel to `Olelo, if implemented, will require Time Warner to delete programming from an existing channel and reallocate the channel for programming that will likely be viewed by very few subscribers. Accordingly, Time Warner submits that the impact of the reallocation will be far greater than “minimal,” and will be to the significant detriment of all subscribers, who will lose an existing channel. The reallocation of another analog channel would be particularly unfortunate for all subscribers, given that, as noted above, technology exists to address `Olelo’s desire for additional programming time.

Given the foregoing, Time Warner respectfully submits that the DCCA failed to consider the significant impact of the provision of a 6th PEG channel to `Olelo (particularly in light of the very small number of subscribers who actually view the existing PEG channels), and the DCCA should therefore reconsider D&O 320 in light of the foregoing.

- C. Although the DCCA should reconsider D&O 320 as noted above, in the alternative, the DCCA should clarify the decision and order to articulate the specific criteria that the DCCA will use in determining whether the 6th PEG channel is justified after the trial period.**

Finally, while Time Warner believes that the DCCA should reconsider D&O 320 as noted above, even assuming the DCCA declines to do so, it should at least clarify the decision and order to articulate the specific criteria that the DCCA will use in determining whether the 6th channel is justified after the nine month trial period. While D&O 320 currently provides that `Olelo will submit a report after the nine month period, which includes “detailed statistics and data reflecting Access Channel utilization and viewership,” Time Warner respectfully submits that the DCCA should develop and include specific evaluation criteria in D&O 320 so that the

parties have a clear understanding from the outset as to the factors that the DCCA will consider after the trial period to determine whether the 6th channel is justified.

III. CONCLUSION

Time Warner respectfully requests the DCCA to reconsider D&O 320 in light of the foregoing, or in the alternative, to clarify the decision and order as noted above. Time Warner reserves the right to petition the DCCA for a contested case hearing on this matter should the DCCA deny the relief requested herein.

DATED: Honolulu, Hawaii, June 17, 2005.



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Attorneys for TIME WARNER
ENTERTAINMENT COMPANY, L.P.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following by means of hand delivering same on June 17, 2005 to:

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DATED: Honolulu, Hawaii, June 17, 2005.



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