

CABLE TELEVISION DIVISION

CABLE DIVISION
COMMERCE AND
CONSUMER AFFAIRS

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS AUG -8 P 3: 17

STATE OF HAWAII

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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)
Area.)
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TIME WARNER ENTERTAINMENT COMPANY, L.P.'S
REPLY TO `OLELO COMMUNITY TELEVISION'S MEMORANDUM
IN OPPOSITION TO TIME WARNER ENTERTAINMENT COMPANY, L.P.'S
MOTION FOR RECONSIDERATION OR CLARIFICATION OF
DECISION AND ORDER NO. 320 DATED JUNE 8, 2005

EXHIBIT "A"

AND

CERTIFICATE OF SERVICE

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MOTION FOR RECONSIDERATION OR CLARIFICATION OF
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 submits this reply memorandum to `Ōlelo Community Television's Memorandum In Opposition to Time Warner Entertainment Company, L.P.'s Motion for Reconsideration or Clarification of Decision and Order No. 320 Dated June 8, 2005, filed on July 29, 2005. Time Warner also submits this reply memorandum in response to the Department of Commerce and Consumer Affairs' ("DCCA") letter dated August 2, 2005, requesting additional information from Time Warner.

`Ōlelo Community Television ("`Ōlelo") argues that the DCCA should not reconsider Decision & Order No. 320 ("D&O 320") because: 1) reconsideration is "not

appropriate”; 2) alternative technologies will not reach all cable subscribers; and 3) Time Warner allegedly “exaggerates” its alleged harm. As discussed below, `Ōlelo’s arguments are without merit and the DCCA should reconsider and clarify D&O 320.

I. ARGUMENT

A. `Ōlelo’s procedural arguments are moot.

The DCCA has determined that it will proceed to consider Time Warner’s motion for reconsideration and/or clarification of D&O 320, and has set forth a procedure for addressing the substantive arguments raised by Time Warner. See Letter from Clyde S. Sonobe to John T. Komeiji dated July 20, 2005. Accordingly, `Ōlelo’s procedural objections to the motion are moot, and the DCCA should proceed with addressing the merits of Time Warner’s motion.¹

B. `Ōlelo’s request for a sixth channel and its programming statistics cannot be analyzed in a vacuum, but must be evaluated -- as the DCCA has already recognized in its PEG Plan -- in light of the existence and utilization of technology.

In essence, `Ōlelo disputes the relevance of existing alternative technology on `Ōlelo’s request for a 6th PEG channel. `Ōlelo’s argument that technological alternatives

¹Although the DCCA has determined that it will address the merits of Time Warner’s motion for reconsideration, Time Warner has also requested the DCCA to clarify its position that Hawai’i Administrative Rules (“HAR”) Chapter 201 is not applicable to this matter. See Letter from John T. Komeiji to Clyde S. Sonobe, dated July 29, 2005. Time Warner, without waiving any rights under any applicable rules, notes that, among other things, HAR Chapter 201 applies to “all proceedings brought before any authority of the department . . . the purpose of which is to obtain . . . [a] declaration as to the applicability, with respect to a factual situation, of any . . . order of the authority . . . which the authority is required to administer or enforce[.]” In D&O 320, the DCCA reviewed and cited D&O 261 (which amended, in part, D&O 154), and ordered that D&O 261 be amended to include language relating to the temporary provision of a 6th PEG channel. Although the DCCA did not follow the formal procedures for declaratory relief as provided in Subchapter 3 of HAR Chapter 201, the DCCA, through the issuance of D&O 320, determined the “applicability” of the relevant decisions and orders with respect to `Ōlelo’s request for a 6th PEG channel. Time Warner further notes that pursuant to HAR § 16-201-23, a motion for reconsideration is proper for “any final order or decision” of the department. `Ōlelo’s reliance upon HAR § 16-133-18 (and the standards for reconsideration therein) (See Memo. in Opp. at 3) is clearly misplaced, given that HAR Chapter 133 only pertains to proceedings for applications for new or transferred cable television franchises.

“cannot replace cablecasting” (Memo. in Opp. at 6) is misplaced and misconstrues Time Warner’s position herein. The issue is not whether technological advances and alternatives can or should “replace all” of `Ölelo’s cable television programming. Rather, the issue is whether the DCCA overlooked and/or adequately failed to address whether existing technology mitigates against the provision of an additional PEG channel, beyond the five channels that `Ölelo already currently manages.

Moreover, while `Ölelo appears to dispute the reach and effectiveness of internet technology, Time Warner notes that the 72 percent figure, which represents the percentage of subscribers with internet access, was obtained from `Ölelo’s own market research. See Motion at 5-6. Moreover, as noted in `Ölelo’s research, subscribers with internet access actually watch less television per day on average, thus indicating a preference among `Ölelo’s subscribers to receive information over the internet.

`Ölelo’s argument that the “level of service available” (i.e. between dial-up, DSL or cable modem) has a “significant impact on the subscribers’ ability to view video delivered online” also rings hollow given `Ölelo’s own stated efforts to make programming available in both “low” and “high” bandwidth formats for all internet users. In `Ölelo’s 2003 Annual Activity Report, for example, `Ölelo reported that:

In 2003, `Ölelo’s Playback center was responsible for cablecasting 43,800 hours of on-air programming. Video streaming continued throughout the year for channels 52, 53 and 54 with live, 24-hour a day video streaming on the internet. The addition of two new web streams brought the total number of web streams to five, which allowed for streaming of all live programming in both low and high bandwidth formats while still providing 24-7 coverage of channels 52, 53 and 54. Low bandwidth was provided to serve viewers who use dial up modem and high bandwidth was offered

to serve those who use cable or DSL hook up, but most importantly it allowed neighbor island access centers to use the feed to broadcast live legislative hearings on their channels.

See `Ōlelo: The Corporation for Community Television, 2003 Annual Activity Report at 6 (excerpts attached hereto as Exhibit "A").²

Accordingly, `Ōlelo clearly recognizes the utility of internet technology in the distribution of its programming (and in fact employs such technology), and Time Warner respectfully submits that the DCCA overlooked and/or failed to adequately address the issue of whether this technology, among others, mitigates against the provision of a 6th PEG channel.³

The impact of technology is also relevant to `Ōlelo's claim that it needs a 6th PEG channel to "give to its clients an equitable opportunity to broadcast their programs in prime time." Memo. in Opp. at 6. In its Plan for Public, Education, and Government ("PEG") Access dated January 2004 ("PEG Plan"), the DCCA stated that requests for additional channels must be accompanied with documentation including, but not limited to, statistical data illustrating the use of existing channels; types of programming being cablecast on each channel; statistics on channel programming that is first run versus re-run; percentage of first run programming versus re-run programming; and percentage of time used for "bulletin board". See the Department of Commerce and Consumer Affairs' ("DCCA") Plan for Public, Education, and Government

²This report was also referenced (and excerpts were attached to) `Ōlelo's request to the DCCA dated October 8, 2004.

³`Ōlelo's argument that internet technology is not "ubiquitous and practical" because Time Warner does not webcast its programs is misplaced. As an initial matter, the various legal rights associated with commercial programming (unlike public or government programming) limits Time Warner's ability to webcast commercial programs. This is a legal issue, and not an issue of the practicality or ubiquitousness of the internet. Moreover, Time Warner does employ webcasting for selected programs, as provided on www.aroundhawaii.com.

("PEG") Access dated January, 2004 at 9.⁴ Although discussed in the context of financial considerations, the DCCA also recognized in the PEG Plan that "The development of new delivery systems and technologies will be a significant consideration in future regulatory policy." Id. at 10.

Accordingly, the statistics provided by `Olelo with respect to its programming cannot be analyzed in a vacuum, but must be evaluated -- as the DCCA has already recognized in the PEG Plan -- in light of the existence and utilization of technology. Viewed in light of the foregoing, the statistics provided by `Olelo on its programming -- far from supporting the provision of an additional PEG channel -- support the proposition that webcasting and other technologies are particularly appropriate for resolving `Olelo's concerns with respect to the time available for its programming.

While `Olelo claims that the webcasting of its programs would create a "second tier of less desirable PEG programming," `Olelo has already recognized the value and utility of providing its programs on the internet. Moreover, contrary to `Olelo's assertion that making its programming available on the internet will "not address the problem of insufficient primetime hours," the use of webcasting and other technology directly addresses this issue.

Repeat programming, for example, is particularly suitable for webcasting, and will allow additional hours of prime time programming. In `Olelo's 2003 Annual Activity Report, for example, `Olelo reported that out of 13,891.43 total hours of public programming, 11,081.28

⁴Even apart from the technological considerations, Time Warner respectfully submits that the DCCA overlooked and/or failed to adequately address all of these factors. While D&O 320 cited to the increase in `Olelo's overall and government programming, for example, it did not address or analyze the percentage of `Olelo's repeat programming, nor consider the extent of "bulletin board" and other non-PEG programming. As noted below, `Olelo's 2003 Annual Activity Report indicates that `Olelo broadcasts a significant percentage of repeat programming and non-PEG programming.

hours (or nearly 80 percent) of that programming was repeat programming. See Exhibit "A". Similarly, out of 6,673.23 hours of total government programming, 5,223.58 hours (or approximately 78 percent) of that programming was repeat programming. Id.

Also significant is the fact that in 2003, `Olelo reported that out of 20,564.66 total hours of public and government programming, 10,739.19 of those hours (or approximately 52 percent) were not designated as public, education or government programming at all, and included "bulletin board" type of announcements and "non-PEG programs". Id.

Given the foregoing, Time Warner submits that using webcasting to distribute even a portion of the significant number of hours that `Olelo devotes to repeat programming, bulletin board announcements and non-PEG programming will allow `Olelo to provide sufficient service to its clients within its existing channels.

Moreover, although `Olelo relies heavily upon the need to provide additional programming during "prime time" hours to support its request for an additional channel, the concept of "prime time" has radically changed, and will continue to change, as a result of evolving technology. Even the ubiquitous VCR allows viewers to "time shift" programs and watch any program at any time, whether the original program first aired in the middle of "prime time" at 7:00 p.m. or first aired at 2:00 a.m. Webcasting would allow viewers to select virtually any program at any time at their convenience. More advanced, but now fairly common technology such as digital video recorders and podcasts (which would allow audio feeds of appropriate `Olelo programming, such as legislative hearings) would provide additional ways for `Olelo to distribute its programming, while allowing viewers to select when to view or hear the programs.

In short, the paradigm of a broadcaster dictating when and where a viewer will watch a particular program is no longer valid, and the concept of what constitutes “prime time” cannot be addressed without also considering how existing technology allows viewers to see and hear virtually any program at their convenience.

Accordingly, Time Warner submits that the DCCA should consider how the foregoing practical and ubiquitous technology, including the internet and viewer recording and playback devices, will allow `Ōlelo to better manage its programming and maximize its distribution within its existing channels.⁵

C. The DCCA has already recognized that “channel demand” is a relevant factor in determining whether an additional PEG channel is warranted.

`Ōlelo asserts that its programming has “inherent value to the community,” thus viewership statistics are virtually irrelevant, and depriving other subscribers of commercial programming for an additional PEG channel may provide “greater value”. Memo. in Opp. at 8. As the DCCA itself has already recognized in its PEG Plan, however, “factors relating to channel demand” are relevant to the determination of whether an additional PEG channel is justified. See PEG Plan at 3. As the DCCA further recognized in D&O 320, “viewership” of `Ōlelo’s channels, while not conclusive, “is a factor that merits consideration in the determination to grant `Ōlelo’s Request to utilize valuable channel capacity.” See D&O 320 at 8.

Thus, despite `Ōlelo’s arguments to the contrary, viewership of `Ōlelo’s channels is a relevant factor in determining whether an additional channel is warranted, and under the PEG

⁵In its letter dated August 2, 2005, the DCCA requested that Time Warner describe the ubiquitous and practical technology (described above) that can be utilized by `Ōlelo, and how that technology can be utilized to maximize distribution of `Ōlelo’s programming. As noted above, the issue is not whether these existing technologies can replace `Ōlelo’s distribution of cable programming, but rather, whether these technologies allow `Ōlelo to maximize the distribution of its programming through existing resources.


plan, `Olelo clearly has the burden of demonstrating factors relating to "channel demand". While criticizing Time Warner's evidence of the lower viewership of `Olelo's channels, `Olelo has failed in its burden to provide information demonstrating subscriber demand for an additional PEG channel.

If required to provide a 6th PEG channel, Time Warner will be required to remove an existing commercial channel, which will be a channel not subject to the "must carry" rules, retransmission consents or any existing contractual obligations.⁶

III. CONCLUSION

Time Warner respectfully requests the DCCA to reconsider and clarify D&O 320 in light of the foregoing and the points and authorities raised in its motion.

DATED: Honolulu, Hawaii, August 8, 2005.



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⁶The actual commercial channel that will be deleted cannot be determined at this time, as the selection of the channel would depend, in part, upon when the channel must be deleted.

OLELO: THE CORPORATION FOR COMMUNITY TELEVISION

2003 Annual Activity Report

Executive Summary

Sector	Total Hours of Programming	Total Hours of First Run Programming	Total Hours of Repeat Programming	Total Hours of Programming Submitted but Not Aired
Public	13,891.43	2,810.15	11,081.28	N/A
Education	12,496.15	N/A	N/A	N/A
Government	6,673.23	1,449.65	5,223.58	N/A
Sub-Totals	33,060.81	4,259.80	16,304.86	N/A
Other Sectors	* 10,739.19			
Total	43,800.00			

* This programming is not designated P, E or G, and includes overnights, Island Info and other non-PEG programs.

Sector	Total Hours of Programming	Total Hours of Locally Produced Programming	Total Hours of Non-Locally Produced Programming	Total Hours of "Bulletin Board" Programming
Public	13,891.43	12,498.52	1,392.92	N/A
Education	12,496.15	8,753.92	3,742.23	N/A
Government	6,673.23	6,553.78	119.45	N/A
Totals	**33,060.81	27,806.22	5,254.60	* 1,444.83

* 'Olelo's Island Info and Jobs Info which comprise 'Olelo's "Bulletin Board," are not tracked using the PEG sector designations.

** This does not include "Bulletin Board" hours and other programming not designated P, E or G.

Note: The following segment accounts for first run hours only.

Sector	Total Hours of Programming "Dropped Off for Play"	Total Hours of Programming Created by PEG Trained and Certified Producers	Total Hours of Programming Created by Open Mic	Total Hours of Programming Created by PEG
Public	1,147.87	1,560.33	N/A	N/A
Education	24.48	32.15	N/A	N/A
Government	41.41	1,387.07	N/A	N/A
Totals	1,213.76	2,979.55	* 42.00	** 48.86

* These hours are not tracked using the P, E or G designations and Open Mic includes *O'ahu Speaks* and *Capitol Commentary*.

** These hours are not tracked using the P, E or G designations.

EXHIBIT "A"

PLAYBACK SUMMARY

In 2003, 'Olelo's Playback center was responsible for cablecasting 43,800 hours of on-air programming. Video streaming continued throughout the year for channels 52, 53 and 54 with live, 24-hour a day video streaming on the internet. The addition of two new web streams brought the total number of web streams to five, which allowed for the streaming of all live programming in both low and high bandwidth formats while still providing 24-7 coverage of channels 52, 53 and 54. Low bandwidth was provided to serve viewers who use dial up modem and high bandwidth was offered to serve those who use cable or DSL hook up, but most importantly it allowed neighbor island access centers to use the feed to broadcast live legislative hearings on their channels.

On-channel errors were evaluated in the following three categories: those caused by technical problems with client program tapes; those resulting from transmission/power problems; and errors caused by 'Olelo equipment or processes.

The table below details the number of errors in each area.

Type of Errors	Number of Errors	Percentage of Total
Tape Errors (Client: bad tape, poor audio, wrong audio track)	156	36%
Live Feed Errors (UH, DOE, Legislature, City Council, Traffic Cams, Satellite feeds)	148	34%
Technical (Equipment)	69	16%
Processing Errors (Programming, Playback)	42	10%
Other Errors (Oceanic Cable, Hawaiian Electric power outage)	17	4%
Total Errors	432	

Client discrepancies dropped dramatically in 2003. Although the Programming Department began logging additional discrepancy items such as improper form submissions, improper end slates, etc., the updated tracking mechanism and process of informing the clients may have curbed the overall number of repeat discrepancies. Clients seem better informed and are turning in programs with proper paperwork, technical compliance, etc. These numbers will continue to be tracked in 2004.

In 2003, there was an increase in the amount of equipment errors that can be attributed to tape formats. 'Olelo began accepting the DVCam videotape format in early 2003 and during the soft launch of the format, clients who tested the new format showed no problems with DVCam. After the format was designated as an acceptable format for general submission, a recurring audio problem was linked to the DVCam decks and has since been resolved by 'Olelo Engineers. Additionally, the DVCPro tape format as a playback source is relatively new and 'Olelo began experiencing deck failures. Research indicated these decks require more frequent maintenance to improve performance.

Summary of all Channel Outages

The 'Olelo Playback Department uses two back-up techniques to minimize channel outages. In the event of a power outage, portable UPS batteries maintain power in the Playback Center, while the back-up generator is powered up. The back-up generator is used until normal power is restored to the Playback Center.

In 2003, 'Olelo Channels were off-air for four hours and 45 minutes due to three incidents listed below:

January 27, 2003 – A power surge at Oceanic's main facility in Mililani knocked out cable service island-wide for 21 minutes.

CERTIFICATE OF SERVICE


I hereby certify that a copy of the foregoing document was duly served upon the following by means of hand-delivery on August 8, 2005 to:

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