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March 8, 2012

**VIA HAND-DELIVERY**

Ms. Keali'i Lopez  
Director  
Department of Commerce and Consumer Affairs  
King Kalakaua Building  
335 Merchant Street, Room 101  
Honolulu, Hawaii 96813

**Re: Response to Time Warner Entertainment Company, L.P.  
dba Oceanic Time Warner Cable  
March 1, 2012 Request for Additional Information  
Concerning Application of `Olelo Community Media**

Dear Ms. Lopez:

As you know, this firm represents `Olelo Community Media ("`Olelo"). This addresses Brian Kang's March 1, 2012 letter sent on behalf of Time Warner Entertainment Company, L.P. dba Oceanic Time Warner Cable ("TWE") in relation to `Olelo's Application to Provide PEG Access Services for the people of O`ahu ("application").

TWE is not satisfied with `Olelo's response to its requests for information and documents purporting to relate to `Olelo's Application. The reality is that `Olelo has proven to be very willing to share information that will help advance the understanding of its application to continue as Oahu's PEG operator. However, we are not inclined to have our client address questions that are not relevant to the application or that intend to revisit the issues involved in the arbitration over capital funding, which has not yet been decided.

We note that many of TWE's follow up questions either misunderstand `Olelo's earlier responses or portray `Olelo's interest in maintaining certain documents as confidential, as lacking in transparency. Nothing could be further from the truth. As detailed below, `Olelo is subject to strict reporting requirements to the Department of Commerce and Consumer Affairs ("DCCA") concerning its finances, assets and activities and its books are audited annually by third party auditors. In addition, `Olelo addressed in great detail, the requirements set forth in the DCCA's Guidelines to Designate PEG Access Organizations Pursuant to Act 19

(SLH 2011) ("Guidelines"), in 'Ōlelo's application and its December 22, 2011 response to DCCA's first request for information.

#### I. 'Ōlelo's Financial Support and Financial Capability

The operating and capital funding amounts 'Ōlelo has received over the years to perform DCCA's PEG contract are set by TWE's franchise agreements and by DCCA.<sup>1</sup> TWE promised to fulfill community support obligations in the form of PEG Access support when it became the franchise holder. In return for the very favorable economic opportunities TWE has received and continues to receive under its franchise agreements, TWE is required to provide operating and capital funds that DCCA determines are needed to sustain the PEG Access Program.

'Ōlelo's assets and reserves are consistent with 'Ōlelo's board's directives and best practices recommended for nonprofit organizations. 'Ōlelo's capital reserves<sup>2</sup> ensure coverage for unexpected contingencies, such as catastrophic natural disasters ('Ōlelo's PEG channels include the designated Civil Defense channel), major equipment failure or the lack of funding received from TWE due to its refusal to offer any reasonable amounts for required capital funding. 'Ōlelo's capital reserves may also be used to accommodate and adapt to technological changes that may unexpectedly arise in this era of rapid technological evolution.

As TWE's criticisms are related to DCCA's examination of 'Ōlelo's "financial capability," required by the Guidelines, 'Ōlelo urges DCCA as the governmental agency responsible for administering the PEG Access program, not to lose sight of the following two points:

(1) Although 'Ōlelo administers the access fee and capital funds, neither the funds nor the facilities and equipment purchased with the funds "belong" to 'Ōlelo. Under Section N of the current PEG Agreement (originally executed in 1998), 'Ōlelo is contractually obligated to relinquish and return any unexpended operational and capital funds and all facilities and

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<sup>1</sup> For the first time ever, 'Ōlelo was required starting in November 2011, to arbitrate with TWE, to obtain capital funding to perform its contract with DCCA.

<sup>2</sup> TWE is well aware 'Ōlelo's capital fund reserves as of January 17, 2012 was \$1.48 million, far less than the \$2.2 million TWE cites 'Ōlelo had as of December 31, 2010, particularly because 'Ōlelo's expenditures of reserve funds were due to TWE's underfunding of 'Ōlelo's capital requirements for 2011, due to its expensive mandatory migration from analog to digital equipment. In addition, 'Ōlelo's operating fund reserves as of January 17, 2012 are nearly \$300,000 less than what it had as of December 31, 2010. Unfortunately 'Ōlelo's operating reserves have decreased almost every year for the last eight years.

equipment to the DCCA upon termination or expiration of the PEG Agreement. To the extent 'Ōlelo can demonstrate it purchased any facilities or equipment with funds other than those distributed under the PEG Agreement, such facilities and equipment are subject to "appropriate appraisal and allocation agreed to by the Director and 'Ōlelo." Accordingly, 'Ōlelo is entitled only to return of its own funds by "allocation," and all funds and capital assets in 'Ōlelo's possession remain government property subject to the control of the DCCA Director.

(2) "Financial Capability" of the PEG Access provider refers to whether the applicant has been in a stable financial position, including with regard to maintaining its level of assets without incurring an appreciable amount of debt, similar to DCCA's examination of the franchise applicant. Therefore, 'Ōlelo's healthy financial condition should be viewed favorably in the context of whether it can operate effectively as the PEG Access provider.

## II. 'Ōlelo's Tenants

TWE's focus on 'Ōlelo's tenants is a red herring because the issue is irrelevant to the designation of the next PEG provider. 'Ōlelo's actions to rent out space it does not use to renters, is a prudent use of the building and maximizes revenue to continue to serve the public and fulfill DCCA's requirements of providing PEG Access services.

Despite TWE's claims to the contrary, 'Ōlelo provided the exact amount of square footage leased by each of its tenants and the terms of the leases. All the rent received by 'Ōlelo is utilized for PEG Services to the community and is unfortunately, virtually offset by 'Ōlelo's payments in ground lease rents and the cost of common area maintenance. All rental income is publically disclosed in 'Ōlelo's filings with DCCA. 'Ōlelo does not disclose lease terms because it could place 'Ōlelo at a commercial disadvantage in any future lease negotiations.

## III. 'Ōlelo's Confidential and Proprietary Documents: Budgets and Financial Information

TWE suggests 'Ōlelo's withholding of confidential operating and capital budgets is improper and lacks transparency. As the contracting agency charged with oversight, DCCA has the right to inspect all of 'Ōlelo's confidential documents. 'Ōlelo invites DCCA's confidential inspection of its operating and capital budgets and any other documents pertinent to this designation so it can be satisfied that 'Ōlelo's finances are in order.

In addition, 'Ōlelo submits audited financial statements, operational plans and budgets to DCCA annually. 'Ōlelo's 2010 Financial Audit by N&K CPAs was attached to 'Ōlelo's December 22, 2011 response to DCCA's request for information in connection with 'Ōlelo's application.

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The capital and operating budget documents are required to be kept confidential, however, due to competitive and commercial reasons. `Ōlelo does not presume that it will be the designated PEG Access provider. If DCCA determines `Ōlelo will not receive the contract at this time and it wishes to reopen the competition to other applicants, any other organization wishing to compete for the designation will have access to `Ōlelo's proprietary internal information. Moreover, `Ōlelo's capital budgets contain competitive commercial pricing that `Ōlelo's potential vendors could use to manipulate or inflate pricing for equipment and facilities-related expenditures. For example, if a vendor sees that `Ōlelo has budgeted \$100 to spend on a "widget," why would the vendor quote the widget price for `Ōlelo at less than \$100?

In addition, TWE fails to note that it attempted numerous times in the arbitration proceeding (which has not resulted in any decision at this time), to "de-classify" `Ōlelo's confidential capital budgets to be able to use them outside the arbitration, and failed on each occasion. Thus, `Ōlelo's reasons for maintaining the confidentiality of its documents were valid in the arbitration and remain so today.

Additionally, `Ōlelo is subjected to a thorough equipment inventory review by independent auditor Merina & Company, LLC, a third party hired by the DCCA to take inventory of `Ōlelo's equipment each year. Quarterly reports are submitted to DCCA that detail `Ōlelo's activities. All revenue received by `Ōlelo from non-cable funding sources including tenant rents, is itemized and listed in the annual Executive Summary of `Ōlelo's activities.

#### **IV. Viewership Numbers**

TWE claims `Ōlelo must provide viewership numbers. `Ōlelo's viewership numbers are tracked by TWE, yet despite `Ōlelo's requests, TWE refuses to regularly report the numbers to `Ōlelo.

More importantly, however, the requirement under Act 19 that there be a "public need for the proposed service" relates to the public need for `Ōlelo's services to facilitate the exercise of free speech rights, not the number of viewers who watch the programs.

Commercial television's primary motivation is to generate revenue. To do this, the station must sell commercial time, the revenues for which are directly linked to the number of viewers that are watching their broadcasts. As a result, the station provides a limited volume of programming that can be broadcast to the largest number of viewers.

In contrast, a PEG access services organization measures its success by using community participation and the number of individuals using the PEG Access equipment and facilities. The

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goal of PEG access is to fulfill the need for a free flow of ideas, information, concepts, and even ideologies. This unrestricted flow helps to educate and build the community and create a well informed public. This is accomplished by giving all sectors of the community and government reasonable access to the resources needed to present their views, information, and ideas to the community. As the PEG access organization, 'Ōlelo, is the facilitator that provides the training, equipment, and cable channel air time to the greatest member of individuals possible. Thus, PEG access resources are driven by community demand for these services rather than viewership.

As you know TWE was allowed to intervene in this proceeding over 'Ōlelo's objections, which are renewed herein.<sup>3</sup> 'Ōlelo requests that DCCA not lose sight of the public interest goals of PEG Access in considering what information is relevant to the application review process. DCCA must retain the authority to procure PEG Access services and should not allow any improper use of the state's legitimate inquiry in the designation of the PEG Access provider to further any entity's self interest.

For the above-referenced reasons, 'Ōlelo urges you to deny TWE's request for additional information and documents.

Very truly yours,



Terry E. Thomason  
Corianne W. Lau  
Jessica Wong Lavarias

TET/CWL/JWL:clm

cc: Laureen Wong, Esq. (via email)  
Brian Kang, Esq. (via email)

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<sup>3</sup> "Intervention" as contemplated by Act 19, should be limited to interested competitors in a procurement who are seeking award of the PEG access contract. As such, TWE does not qualify to intervene in this proceeding.