

CABLE TELEVISION DIVISION

CABLE DIVISION
COMMERCE AND
CONSUMER AFFAIRS

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

2005 JUL 29 P 3: 55

STATE OF HAWAII

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In the Matter of)
)
 TIME WARNER ENTERTAINMENT)
 COMPANY, L.P.)
)
 Franchise Amendment for Activation of)
 a 6th Access Channel for the Oahu)
 Cable Franchise Area.)
)
 _____)

**‘OLELO’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**

and

CERTIFICATE OF SERVICE

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Franchise Amendment for Activation of a 6th)
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**‘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**

Time Warner Entertainment Company, L.P.’s (“TWE’s”) Motion for Reconsideration or Clarification of Decision and Order No. 320 (“Motion”) should be denied. As threshold matter, there is no good reason for the Department of Commerce and Consumer Affairs (“DCCA”) to reconsider Decision and Order No. 320 (“D&O 320”). TWE’s Motion merely re-hashes old arguments. TWE does not provide any new information that could not have been presented in its prior submissions in support of those old arguments. The Motion should therefore be summarily denied.

On its merits, TWE’s Motion should be denied because:

- (1) TWE’s argument that ‘Olelo should utilize alternative technologies ignores the fact that: (a) only cable broadcasting will reach all cable

subscribers, and (b) many cable subscribers do not have access to the equipment and services (e.g., hardware or internet broadband connections) to effectively use the alternative technologies suggested by TWE.

- (2) TWE has presented no credible evidence to support its claim of “significant” harm, even though TWE has sole access to viewer ratings that might support its assertions.

Finally, ‘Ōlelo has no objection to DCCA clarifying D&O 320 to include specific evaluation criteria, but requests that such criteria be the product of negotiation between the DCCA, TWE and ‘Ōlelo.

I. Reconsideration Of D&O 320 Is Not Appropriate.

As pointed out in DCCA’s letter dated July 20, 2005 to TWE’s attorney, John T. Komeiji, Esq., the sections that TWE relies upon in its Motion -- Hawai‘i Administrative Rules (“HAR”) §§ 16-201-15 and 16-201-23 -- do not apply. HAR Title 16, Chapter 201 applies to evidentiary contested case hearings, declaratory rulings, and rulemaking -- none which occurred in this matter. HAR § 16-201-1. Reconsideration under those sections is not appropriate.

Although not directly on point, HAR § 16-133-18, which applies to the DCCA Cable Division, requires an entity requesting reconsideration to show that there is “good cause” why the information in the motion was not previously presented to the Cable Division. This standard is similar to the

reconsideration standard used by courts, which prohibits parties from rehashing old arguments. *Briggs v. Hotel Corp. of the Pacific, Inc.*, 73 Haw. 276, 287 n.7, 831 P.2d 1335, 1342 n.7 (1992); *Sousaris v. Miller*, 92 Hawai'i 505, 512, 993 P.2d 539, 546 (2000) *Pancakes of Haw., Inc. v. Pomare Properties Corp.*, 85 Hawai'i 286, 296-97, 944 P.2d 83, 93-94 (Ct. App. 1997) (same). See also *In re Greco*, 113 Bankr. 658, 666 (D. Hawai'i 1990) (motions for reconsideration which seek simply to re-litigate old issues are "as a matter of law without merit and frivolous").

TWE fails the threshold test for reconsideration. There is no "good cause" why TWE failed to present the arguments and information in its Motion in its prior comments and objections. TWE's Motion merely re-hashes the same arguments. Moreover, TWE has had ample time to make these arguments and could have requested additional time to supplement the record. 'Olelo first made its request for a sixth channel on October 8, 2005. DCCA issued its decision on June 8, 2005 -- eight months later. During that eight month period, TWE submitted comments on October 30, 2004 and January 7, 2005. Moreover, TWE had the opportunity to submit additional reply comments on January 21, 2005, and chose not to do so. Rather, TWE informed the DCCA via email on January 28, 2005 that it felt it had already adequately addressed the issue. Decision and Order 320, at 7, ¶Q.

All told, TWE has had eight months to present arguments and evidence. DCCA gave TWE a full and fair opportunity to state its position, and

TWE made only the arguments now reiterated in the present motion. TWE should not get another bite at the apple. There is no “good cause” justifying TWE’s Motion and it should be summarily denied.¹

II. Alternative Technologies Will Not Reach All Cable Subscribers.

As a preliminary matter, only cablecasting currently offers the potential to reach *all* cable subscribers. The alternative internet technologies suggested by TWE will only reach that portion of cable subscribers with adequate internet access - a much smaller portion than the 72 percent of cable subscribers that have internet access of some kind. *See* Motion, at 7. The 72 percent figure does not tell the whole story, since the level of service available to internet users (dial-up, DSL or cable modem) has a significant impact on the subscribers’ ability to view video delivered online. Internet users relying on dial-up or lower-speed DSL connections, for example, will experience very poor video quality. TWE provides no data to show how many cable subscribers have the technology to make internet access an effective tool for downloading or viewing video programming. It is clear, however, that contrary to TWE’s assertions, a much smaller portion than the 72 percent of cable subscribers with internet access could effectively use the internet to view video programming.

¹ ‘Ōlelo objects to the reconsideration process. DCCA has given TWE yet another opportunity to submit additional information to DCCA simultaneous with ‘Ōlelo’s opposition to the Motion – a third bite at the apple. Where does this process end? ‘Ōlelo will have no opportunity to respond to TWE’s simultaneously filed information, and objects to this process.

TWE's recommendation that 'Olelo use alternative technologies to disseminate its programming rings particularly hollow because here on O`ahu, TWE itself does not avail itself of this technology with respect to its own programming. If this were a popular and effective technology, TWE would already be employing it. It does not, which clearly undercuts TWE's claim that the technology is "ubiquitous and practical." Motion, at 7.

The basic cable tier is available to ALL cable subscribers.

Alternative technologies like video on demand and web-based video reach a smaller and more select portion of subscribers. These alternatives are a second tier method of dissemination; they may supplement, but cannot replace cablecasting, which reaches *all* cable subscribers. More households have a television than a computer with sufficient technological capability and a broadband internet connection to make internet video access practical and effective.

'Olelo has consistently pointed out that it needs a 6th channel to give its clients an equitable opportunity to broadcast their programs in prime time. TWE's suggestion that 'Olelo make programming available via the internet does not address the problem of insufficient primetime hours, but implies that the solution lies in shifting some primetime programming to online delivery. However, given the reduced availability of web video and the lower quality of video delivered on-line, TWE's proposed solution would effectively create a second tier of less desirable PEG programming that would have less

opportunity to reach an audience and convey clients' messages. It also puts 'Olelo in the untenable position of having to select programming that would be relegated to this sector of low-quality, limited-availability programming.

While 'Olelo is investigating potential benefits associated with delivering and archiving video via the web, along with video on demand, such technologies should be a supplement to, not a replacement for, prime time cablecasting. 'Olelo agrees that such technologies can be useful in disseminating its clients' messages. However, such technologies are not an adequate substitute for cablecasting.

III. TWE Exaggerates Its Alleged Harm.

TWE alleges that it will suffer "significant" harm -- that all of its analog channels are currently being utilized for programming and that provision of a sixth channel to 'Olelo will force it to delete programming from an existing channel and reallocate that channel for 'Olelo's programming, which will be viewed by few subscribers. Motion at 8-9. However, Time Warner fails completely to support its own argument.

While Time Warner provides data on 'Olelo viewership,² it does not provide viewership data for its own channels. See Motion at 2, *citing* TWE Letter to the DCCA dated October 30, 2004. Thus, while Time Warner describes 'Olelo's aggregate viewership as "extremely small," there is no way to

² 'Olelo reiterates its objection to using viewership as a criterion for activation or continuation of a PEG channel.

compare that number to its other channels. Absent bona fide viewership data for *all* stations carried on the TWE analog system, it is impossible to assess what impact (if any) reassigning a channel will have on subscribers, or specifically, whether such a change “will be to the significant detriment of all subscribers,” as TWE claims. Motion, at 8. In the absence of complete data regarding viewership, TWE’s claims of “harm” are exaggerated and have no evidentiary basis. Further, there is no precedent for using “harm” to TWE as criteria for determining possible activation of a PEG Access Channel.

TWE also makes an unsupported association between viewership and “value.” A core belief underlying all PEG access programming is that the provision of a forum for the voice of the community, the provision of educational programming, and increased access to the workings of government are of inherent value to the community. Thus, while the loss of a fourth channel of home shopping may deprive a few subscribers of some opportunities, the provision of an additional channel that makes the workings of government more available to subscribers may represent a greater value.

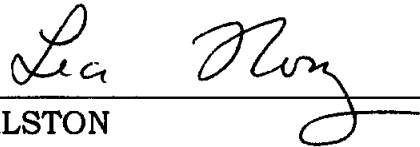
Moreover, it is clear that TWE itself does not make programming decisions solely on the basis of viewership. It is difficult to believe, for example, that a channel such as 77 Hawaii, running programming for only three hours a day, attracts a larger audience than would offerings such as The DIY Network or The Biography Channel, both of which are available on Time Warner’s digital service in Hawaii. It seems that Time Warner determines its channel lineup

based on a variety of factors, including salability of program packages, income potential, and audience mix.

IV. 'Ōlelo Has No Objection To Further Clarification Of Criteria.

Finally, TWE requests that DCCA should articulate specific criteria that DCCA will use in determining whether a 6th channel is justified after a 9-month trial period. 'Ōlelo has no objection to establishment of specific criteria. The existence of evaluation criteria will, at minimum, allow the parties to avoid protracted discussions of the significance of 'Ōlelo's performance with regard to the sixth channel. 'Ōlelo does request, however, that these criteria be the product of consultation, discussion and negotiation between the DCCA, TWE, and 'Ōlelo.

DATED: Honolulu, Hawai'i, July 29, 2005.



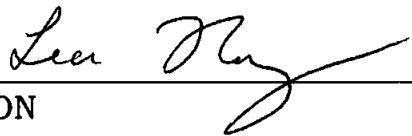
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing to be served on the following persons by facsimile, hand-delivery or U.S. mail, postage prepaid (as indicated below) to their respective addresses:

	HAND- DELIVERED	FAX	MAILED
DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS c/o Mr. Clyde Sonobe Administrator Cable Television Division 333 Merchant Street Honolulu, HI 96809	(<input checked="" type="checkbox"/>)	()	()
JOHN T. KOMEIJI, ESQ. BRIAN A. KANG, ESQ. First Hawaiian Center 999 Bishop Street, 23rd Floor Honolulu, HI 96813 Attorneys for Time Warner Entertainment Company L.P.	(<input checked="" type="checkbox"/>)	()	()

DATED: Honolulu, Hawai'i, July 29, 2005.



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