

CABLE DIVISION
COMMERCE AND
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March 1, 2012

Watanabe Ing LLP
A LIMITED LIABILITY LAW PARTNERSHIP

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CABLE DIVISION
COMMERCE AND
CONSUMER AFFAIRS~~

VIA HAND DELIVERY

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

Re: 'Olelo Community Media's Responses to Oceanic Time Warner Cable's Request for Information

Dear Ms. Lopez:

This concerns 'Olelo Community Media's responses to intervenor Time Warner Entertainment Company, L.P. dba Oceanic Time Warner Cable's request for information and production of documents to 'Olelo served on January 27, 2012. For the following reasons, 'Olelo's February 3, 2012 responses are incomplete and deficient, and Oceanic requests that the Department of Commerce and Consumer Affairs order 'Olelo to supplement its responses no later than March 12, 2012.

As the DCCA is aware, Act 19, SLH 2011 exempts the designation of public access providers from the state procurement code. Act 19, however, provides for a written application or proposal from an applicant, a public hearing, intervention by interested parties, consideration by the Cable Advisory Committee and consideration of various factors, including the "suitability of the applicant" the "financial responsibility of the applicant," "any objections arising from the public hearing, the cable advisory committee, or elsewhere," and any "matters that the director deems appropriate under the circumstances." Clearly, the Legislature, in enacting Act 19, sought to ensure that the selection of a public access provider – while not subject to the detailed safeguards of the state procurement code – would nonetheless be subject to a fair, transparent and impartial process that would ensure that an applicant would be fully vetted, and the State would receive full and fair value from a competent provider.

At issue here is not only whether 'Olelo will be allowed to continue as Oahu's PEG access provider, but also, if 'Olelo is to continue in that role, what terms and conditions its contract with the DCCA will contain. Given the substantial financial resources provided by the State to 'Olelo through funds provided by Oceanic and its

subscribers (and 'Olelo's various representations in its application, as well as its limited responses to Oceanic's request for information thus far), Oceanic believes that it is critical that the DCCA require that 'Olelo be open and transparent about its finances, assets and operations so that the DCCA, along with the parties and the public can fully and fairly consider 'Olelo's request to continue as the Oahu public access provider.

Since 1989, 'Olelo has received approximately \$96 million from Oceanic and its subscribers for operating and capital purposes, including over \$78 million in access operating fees and \$17 million in capital fund payments. In 2011 alone, 'Olelo received over \$4.7 million in access operating fees from Oceanic's subscribers. For purposes of comparison, the amount received by 'Olelo for its operations as the public access provider on Oahu for 2011 was over \$1.6 million more than Oceanic's subscribers provided to Hawaii Public Television statewide for the same year, and over \$2.8 million more than Oceanic's subscribers provided to the DCCA for the administrative fee to assist in the Cable Television Division's operations for the same year.

'Olelo's application notes that as of year end 2010, 'Olelo held assets of \$11.35 million, and had \$2.9 million and \$2.2 million in operating and capital reserves respectively. 'Olelo's assets include a building and leasehold improvements valued at over \$7 million, which 'Olelo purchased through unrestricted funds provided by Oceanic subscribers, and which 'Olelo claims that it owns even if it is not awarded the contract to continue to be the public access provider on Oahu. Despite the substantial funds provided to 'Olelo and its operating and capital surpluses, 'Olelo's application indicates that it seeks additional funds in connection with a proposed ten year contract, and its preference is to receive (in addition to the operating funds it currently receives) amounts currently earmarked for the State's Inet fund (which amounted to \$1.8 million in 2010).

Given the foregoing, as well as other aspects of 'Olelo's application, it is vitally important that the DCCA require 'Olelo to be fully transparent about its finances and operations so that the parties and the public can meaningfully participate in this proceeding and so that the DCCA has all the necessary information to fully and fairly evaluate whether 'Olelo is suitable to continue as the public access provider on Oahu, and if so, the terms and conditions under which 'Olelo may continue to operate. Despite seeking a ten year contract (with two consecutive five-year extensions) with the State, receiving over \$96 million from Oceanic and its subscribers since 1989, holding substantial surpluses and assets (and seeking substantially more funds in its application), 'Olelo refused to provide basic information in response to Oceanic's requests that are highly relevant and material to the criteria that must be applied in evaluating 'Olelo's application. The categories of requests that 'Olelo failed to sufficiently respond to are summarized as follows:

1. *Information regarding 'Olelo's tenants (Request for Information Nos. 13, 14, 15 and 16):* 'Olelo refused to provide information regarding the square footage leased to the tenants in its building in Mapunpuna, the lease terms, the amount and percentage of capital funds that 'Olelo has used for the direct or indirect benefit of its tenants since 2005 and whether 'Olelo plans to use any capital funds from 2012 to 2017 for the direct or indirect benefit of its tenants. 'Olelo's refusal to disclose information about its tenants and how it has used funds (and plans to use funds) provided by Oceanic through the State is perplexing, since it directly relates to 'Olelo's financial responsibility in using funds provided by the State to improve areas of its own building for tenant (rather than public access) use and what revenues 'Olelo has received from such activities.

2. *Information and documents relating to the arbitration proceeding involving 'Olelo regarding 'Olelo's PEG capital funding requests for 2012 to 2014 (Request for Information Nos. 18, 19 and 20; Request for Documents No. 2):* 'Olelo fails to provide any reason whatsoever to support its burden to show that the documents that it has marked "confidential" in a proceeding involving capital funding (during a period that will be covered by the contract that it seeks here) are somehow "confidential, proprietary, and/or competitively sensitive [in] nature."

The information is readily available to 'Olelo; indeed, some of it is already in Oceanic's possession. Yet, 'Olelo would have the DCCA refuse to allow it to be used in connection with its request to be afforded a new contract. Clearly the information is relevant – the same issues are present in this matter as were present in the arbitration. Among other things, the information is necessary to evaluate 'Olelo's financial responsibility and how it plans to use funds in the future. There is no other "competitor" to 'Olelo given that it is the only applicant being evaluated. The evidence in the arbitration hearing is now closed, so there is no danger of "intrud[ing] upon the arbitration process" as 'Olelo suggests. Finally, 'Olelo fails to note that the stipulated protective order it agreed to and entered in the arbitration proceeding expressly provides that either party may seek declassification of the documents. It was not essential during the arbitration that the information be publicly available; it is essential now, in this very

public proceeding which will determine the future of PEG access on Oahu for years to come.

Given the foregoing, 'Olelo's effort to withhold information from the DCCA and the public that is directly material and relevant to evaluating 'Olelo's financial responsibility and suitability to continue as the Oahu public access provider in this proceeding cannot be condoned and the DCCA should order such information to be produced.

3. *Documents relating to 'Olelo's budgets and finances (Request for Documents Nos. 3, 4, 5, 6, 8, and 10):* Despite receiving millions of dollars from Oceanic and its subscribers over the years and now requesting millions more, 'Olelo has refused to produce basic financial documents essential to evaluating how 'Olelo has spent that money and how it plans to spend millions more in the future.

'Olelo seeks to completely foreclose inquiry into its operating and capital budgets (even budgets, budget to actual results reports, and financial projections referenced and cited in the 2011 performance audit conducted by the DCCA), purchasing transaction registers that would show actual operating and capital expenditures made by 'Olelo, and documents to show what 'Olelo has done to raise funds from sources other than Oceanic or the State, as required by its own 1998 contract with the State.

Unquestionably, these documents are relevant to evaluating how 'Olelo has spent the money provided by Oceanic and its subscribers through the State in the past and how 'Olelo intends to spend such money in the future. In turn, such documents are directly and materially relevant to analyzing 'Olelo's financial responsibility, its suitability to continue to be the public access provider on Oahu, and if so, the terms and conditions of its contract. The information, which is readily available to 'Olelo, is necessary to fully evaluate these key factors mandated by Act 19.

'Olelo has not provided any information to sustain its burden to show that such basic financial information is "confidential," "proprietary" or "competitively sensitive". Moreover, as noted above, the evidence is closed in the capital payment arbitration, so the production of this material information will not affect the arbitration.

4. *Documents relating to viewership of 'Olelo's channels from 2005 to 2010 (Request for Documents No. 9):* 'Olelo refused to provide any documents relating to the viewership of its channels, which is relevant and material to establishing the "public need for the proposed service" under Act 19. In addition, the information is relevant to evaluating the financial responsibility of 'Olelo with respect to the use of Oceanic's subscriber's money for its proposed services. 'Olelo claims that Oceanic needs to provide 'Olelo with viewership information. Oceanic's request, however, seeks information that *'Olelo has* (including, but not limited to *'Olelo's* records and any surveys) describing or documenting viewership of 'Olelo's channels from 2005 to 2010. 'Olelo should be ordered to provide the information.

Oceanic's requests are straightforward and seek relevant and material information about factors that must be considered pursuant to Act 19, including 'Olelo's financial responsibility, its suitability to continue as the public access provider, and the public need for the proposed services. As the DCCA has recognized in granting Oceanic's request for intervention, Oceanic and its subscribers have a substantial interest in the outcome of the designation of the applicant as an access provider, and the foregoing information is necessary for Oceanic to analyze and comment on 'Olelo's application and representations in this proceeding. And the information will be essential to the DCCA's determinations in this matter. The public interest requires that these proceedings be fair, open and transparent. 'Olelo's efforts to block access to basic and relevant information to evaluate its own application is contrary to this policy and 'Olelo should be ordered by the DCCA to produce the foregoing information no later than March 12, 2012.

Thank you for your attention to the foregoing, and please contact us with any questions.

Very truly yours,

WATANABE ING LLP



BRIAN A. KANG

cc: Mr. Donn Yabusaki
Corianne Lau, Esq.
Oceanic Time Warner Cable