

BEFORE THE DIRECTOR OF THE DEPARTMENT  
OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of the )  
Application of ) 00-84-83  
GARDEN ISLE CABLEVISION LP )  
For Sale of Assets and ) ORDER NO. 122  
Transfer of Derby )  
Cablevision, Inc. )  
\_\_\_\_\_ )

DIRECTOR'S FINAL ORDER

On April 22, 1986, the duly appointed Hearings Officer submitted her Recommended Decision in the above-entitled matter to the Director. The parties were given opportunity to file written exceptions.

On May 7, 1986, the State filed Exceptions to Recommended Decision. On May 7, 1986, Petitioner Garden Isle Cablevision LP ("GIC") filed a Statement in Support of Recommended Decision and Exception in Part to Recommended Decision. On May 22, 1986, GIC filed a Memorandum in Support of Recommended Decision. On May 22, 1986, the State filed a Statement in Partial Support of Recommended Decision.

The parties were given notice of opportunity to present oral argument before the Director. On June 10, 1986, the Director heard oral argument on the exceptions. GIC was represented by attorney Wayne Minami. Derby Cablevision, Inc. ("Derby") was represented by Thomas W. Williams, Jr. The State was represented by Deputy Attorney General Rodney I. Kimura. Intervenor The Seven Twenty Limited Partnership ("Seven Twenty") was represented by attorney James W. Licke.

On September 23, 1986, GIC and the State submitted a form of conditions amplifying the conditions set forth in the Recommended Decision.

The parties raised exceptions to the Recommended Decisions on three (3) matters: 1) the standard and issue for determination, 2) the term of the permit and, 3) the conditions. By the submission of September 23, 1986 by GIC and the State, the Director finds that the exceptions to the conditions have been superseded by the form of conditions submitted and set forth below.

The State challenged the standard and burden of proof employed by the Hearings Officer in reaching the Recommended Decision. The State argued that the Hearings Officer erred in ruling that GIC had to show that it met the criteria for transfer by a preponderance of the evidence. The standard advanced by the State would place the burden of proof on the applicant to show by a preponderance of the evidence that the initial adverse decision was wrongly, erroneously or improperly made and accord deference and great weight to the expertise and knowledge of the staff in reviewing the application. According to the State, it was improper for the Hearings Officer to follow the standard for transfer set forth in prior decisions in this proceeding and to conduct an essentially de novo determination on the qualifications of the applicant by allowing the parties to provide a full record via oral testimony and cross examination and admission of documents in compliance with the Rules of Practice and Procedure.

Under HRS § 91-10(5), the burden of proof is on the party initiating the proceedings, in this case GIC, to show by a preponderance of the evidence that they are entitled to the relief sought. Here, the applicant was required to show that it was entitled to the property right for which it had applied, i.e., the CATV permit, and the hearing was on the merits of the application and not the decision making process of the Cable TV Division ("division") staff. GIC was required to show that it had met all of the criteria for transfer of a CATV permit and that it overcame the adverse findings in Amended Decision and Order No. 120. The Hearings Officer reviewed the application submitted by GIC and Derby together with the evidence presented

at hearing which provided for a full presentation of the information contained in the application as well as an opportunity for the State to present evidence to rebut the evidence presented by the applicants and the Hearings Officer properly concluded that GIC had met its burden.

The State took exception to the standard set forth by the Hearings Officer (the application should be approved if it is found that the terms of the transfer are reasonable and there is a reasonable prospect for improvement in the system) on the grounds that that was the standard to be applied to an initial application for transfer and was not applicable to contested cases where an applicant is contesting the denial of an application for transfer of permit. The Director finds this argument to be without merit. In either an initial application for transfer of a permit or after a contested case hearing on a denial of an application for a transfer of permit, the criteria that an applicant must satisfy to show that it is entitled to receive approval for the transfer remain the same. If upon review of the initial application and supporting documentation, the Department finds that approval should be granted, approval is granted without a contested case hearing. This promotes administrative efficiency in reviewing applications. In instances where a positive decision is not made based upon the written documentation submitted in the application process, the applicant is then afforded a right to a contested case proceeding. Thus, contested case proceedings need only be conducted in instances where there is an initial adverse determination. In either instance, the criteria remains the same for the approval of a transfer.

The Director concludes therefore that the Hearings Officer employed the proper standard in issuing the Recommended Decision.

GIC has raised an exception to the Recommended Decision by requesting that GIC be awarded a CATV permit for a period of twenty (20) years instead of receiving the CATV permit previously issued to Derby which will expire in 1990. GIC filed an application for approval of sale of assets and transfer of franchise of

Derby intact. Thus, the application of Derby requested a transfer of Derby's permit and not the issuance of a new permit for the service area. During the application process, GIC requested that the division reconsider and agree to extend the permit through the year 2001 to run coincident with that of Seven Twenty. In its response, GIC noted that it had been advised by the division that the division did not intend to act on the request for an extension of the permit and GIC stated that it would agree to abide by the Department's decision on this matter.

During oral argument on exceptions, GIC raised the argument that a twenty (20) year permit was necessary because its cash flow analysis was based on a ten (10) year funding and that an extended period of time would be necessary to recoup the investment being made. These issues, however, were not raised at the hearing level and there is no record on which to make a finding on whether GIC has a compelling need to have a twenty (20) year permit issued.

HRS § 440G-10 requires that a proposed transferee receive the consent of the Director before a transfer of a permit is allowed. The Director has been given the responsibility for overseeing and regulating the cable industry in the State of Hawaii. It is essential for the Director to review transfer applications in order to ascertain whether new operators of existing cable systems meet the criteria established by HRS Chapter 440G and are thus qualified to receive a CATV permit and operate within the State. Therefore, the Director looks to the guidelines set forth for the issuance of new permits in determining whether to grant a transfer application because the transferee steps into the shoes of the transferor and must meet the same standards.

A transfer, however, does not involve the issuance of a new CATV permit. By its terms, a transfer is the conveyance of the existing right and ownership of a CATV permit by the present holder to the transferee or new holder. The transferee takes the permit as it currently exists and must thereafter petition for any modification or change in the permit. Thus, the Director concludes that GIC is entitled to approval of the transfer

application of the CATV permit from Derby to GIC and that GIC will receive the permit as it presently exists in terms of time, conditions and previously issued orders.

Having reviewed and considered the entire record of these proceedings together with the exceptions to and statements in support of the Recommended Decision, the Director hereby adopts the Hearings Officer's Recommended Decision, as amended below, as the Director's final order and orders that the application of GIC for a transfer of the cable television permit of Derby to GIC shall be approved on the following conditions:

#### CONDITIONS

1. Prior to closing, GIC shall complete a test of the distribution system, which test shall be performed in accordance with testing procedures submitted by GIC and approved by the division. The purpose of the test is to determine the amount of expenditures required, if any, to enable the cable television system of GIC to operate at the 23-channel capacity proposed by GIC at or above state technical quality standards.

(a) Regarding test procedures

GIC shall submit to the division a testing plan indicating the specific sections of the distribution system to be tested, the specific testing procedures to be performed, and the pass-fail criteria for the testing.

GIC may test the distribution system on a sample basis provided the sections or areas tested are representative of the entirety of the distribution system. GIC and the division shall cooperate with one another to ensure that appropriate and representative test sections or areas of the distribution system are selected, and that the testing standards are adequate to ensure that the cable television system will operate at the 23-channel capacity proposed by GIC at or above state technical quality standards.

Where test results indicate that an area or section does not meet the pass criteria, GIC shall undertake corrective action necessary to ensure that said section or area shall meet

the pass criteria. GIC shall maintain a record of expenses incurred for such corrective action.

2. Regarding estimate of expenditures

(a) The record of expenses incurred for corrective action prepared pursuant to condition no. 1 shall be used as a basis for estimating the expenditures necessary to enable the cable television system to operate at the 23-channel capacity proposed by GIC at or above state technical quality standards. The repair costs will be applied on a statistical basis to the entire cable television system.

GIC will submit to the division for its review and approval, all cost estimate criteria to be used in preparing the estimate of said expenditures, and the estimate of said expenditures.

(b) Based on the estimate of the system repair costs prepared in accordance with condition no. 2(a), GIC shall prepare a system upgrade plan complete with cost estimates. The system upgrade plan and cost estimates shall be submitted to the division for review and approval, prior to closing. Prior to closing, GIC will also submit to the division a construction schedule complete with construction milestones and relevant dates of completion so as to enable the division to verify the progress of construction. Approval of the construction schedule by the division is not required provided that the construction schedule meets the one-year time table for completion and conforms to cost estimates derived in condition no. 2 necessary to enable the cable television system to operate at the 23-channel capacity proposed by GIC at or above state technical quality standards.

3. Upon completion of the test of the distribution system and prior to closing, GIC shall submit revised pro forma operating statements, statements of sources and uses of funds, and cash flow projections, all for the period of 5 years. The pro forma operating statements shall be based on the proposed financial plan in which Monroe N. Rifkin is to be the sole limited partner. All statements shall incorporate any expenditures in addition to those originally proposed by GIC, which may be required as a result of the test of the distribution system,

as well as any additional funding required to make such expenditures.

4. Where additional funds are required to cover capital expenditures in excess of those originally proposed, GIC shall submit prior to closing, written evidence that such funds are available. If additional funds are to be made available in the form of equity, the source of sources of equity funding and the amounts to be contributed shall be fully disclosed. The availability of corporate funding shall be evidenced by certified copies of funding resolutions. If additional funds are to be made available in the form of debt, the availability of credit facilities for the total amount of debt to be incurred shall be evidenced by copies of detailed commitment letters, proposed loan documents or the like. The terms and conditions of such funding shall be subject to the director's prior approval, if such terms and conditions differ from the commitment letter already reviewed by the division.

5. Upon commencement of construction and continuing until all scheduled system improvements have been completed, GIC shall file a written biweekly construction status report with the division.

6. GIC shall not commence construction until it has filed with the division, a performance bond required by section 440G-6(b)(5), Hawaii Revised Statutes, in an amount not less than 50% of the total cost of construction of system improvements as identified in the schedule of expenditures required by condition no. 2. However, where the system upgrade plan of GIC submitted in accordance with condition no. 2 proposes to undertake such construction in phases clearly outlined and delineated by area, expenses and time, and where the cost of the performance bond required by section 440G-6(b)(5), Hawaii Revised Statutes, is deemed by the director to be cost prohibitive and detrimental to the cable subscribers of GIC, the director may modify the bond requirement to permit GIC to obtain and file a bond equal to 50% of the total cost of construction for the first phase of construction, which bond, subject to modification in amount, will thereafter be rolled over to apply to the succeeding phase of

construction upon completion of the prior phase of construction, until such time as all construction has been completed.

7. Within 60 calendar days of the issuance of the director's order and prior to closing, GIC shall submit a certified copy of a resolution from the Board of Directors of Narragansett Capital Corporation regarding its commitment to funding GIC and subject to the terms of the First Interstate Bank commitment.

8. Within 60 calendar days of the issuance of the director's order and prior to closing, GIC shall submit confirmation from the First Interstate Bank that it has extended its loan commitment to GIC on the same terms as contained in its July 25, 1985 letter to GIC.

9. A full-time Hawaii-based employee of GIC shall be responsible for the management and operations of GIC. The employee shall be vested with appropriate power and authority to make any and all decisions and undertake any and all actions that are necessary and appropriate for the effective and efficient operation of GIC.

10. Any and all changes in the limited or general partners or in the managerial and operating entities of GIC shall require the director's prior approval.

11. All revenues of GIC shall be deposited to, and all disbursements by GIC shall be made from accounts maintained with a bank or other financial institution authorized under the laws of the State of Hawaii to engage in a general banking business in the state.

12. GIC shall maintain complete accounting books and records, including invoices and other documentation and records of customer accounts, at the system's headquarters to be located on the island of Kauai. These records shall be maintained separately from those of any other business entity owned, controlled, managed or having any relationship with any general or limited partner of GIC.

13. No later than 60 days after the issuance of the director's order, GIC shall submit in a form specified by the division, a schedule setting forth the terms and conditions for



all cable services to be provided in the designated service area, including, for informational purposes, all rates and programming services. All regulated rates and terms and conditions of customer service shall be subject to the director's prior approval.

14. Until December 29, 1986, GIC's rates shall not exceed the following amounts plus tax for basic cable service:

- i. Monthly service charge, first outlet
  - Individually \$12.55
  - Bulk account 4.20
- ii. Installation of first outlet \$50.00

15. No later than 45 days after the transfer of ownership, GIC shall submit for the director's approval a proposal for the expenditure of funds equal to the amount of Derby's 1985-86 annual franchise fee for the support of community programming and the utilization of public, governmental or educational access channels.

16. Prior to the first anniversary of the transfer of ownership, GIC shall distribute to all of its existing subscribers a customer satisfaction survey in a form approved by the division. The results of this survey shall be made available to the division within 60 days following the distribution of the survey.

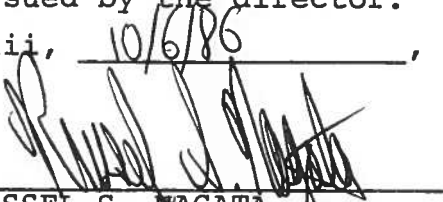
17. Subject to the provisions of Section 625 of the Cable Communications Policy Act of 1984, 47 U.S.C. § 545, GIC shall maintain the mix, quality, and level of programming proposed. In specific, GIC shall provide a mix of services which includes local broadcast, children's, news, sports, general interest, and local origination programming. GIC shall notify the division of planned changes in specific program services at least thirty calendar days in advance of the change.

18. GIC shall be subject to all applicable conditions in Order No. 6 dated October 21, 1970, and Order No. 20, dated October 1, 1971, which are not superseded or amended by this Order. GIC may hereafter petition for modification or waiver of said conditions.

19. GIC shall secure prior written approval of the director before engaging in any cable related or other business activity not permitted in Order Nos. 6 and 20, where such cable related or other business activity will materially affect the financial structure and/or operations of GIC hereunder.

20. GIC's construction and operation of cable facilities in the state shall be subject to the provisions and requirements of applicable federal and state laws governing the cable television industry, including, but not limited to, the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, et seq., and amendments thereto, applicable rules of the Federal Communications Commission, the Hawaii Cable Television Systems Law, Chapter 440G, Hawaii Revised Statutes, and amendments thereto, and rules and orders issued by the director.

DATED: Honolulu, Hawaii, 10/6/86, 1986.

  
\_\_\_\_\_  
RUSSEL S. NAGATA  
Director  
Department of Commerce  
and Consumer Affairs