

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

In the Matter of the Application of )

Daniels Communications Partners, )  
Limited Partnership doing business as )  
HAWAIIAN CABLE VISION COMPANY )

Docket No. 90-04

For Approval of Cable Franchise Renewal )  
to Provide Cable Communications Service )  
\_\_\_\_\_ )

DECISION AND ORDER NO. 142

**I. Introduction.**

On October 1, 1990, the Director of Commerce and Consumer Affairs ("Director") accepted an application for franchise renewal from Daniels Communications Partners, Limited Partnership, dba Hawaiian Cable Vision Company ("DCPLP"). DCPLP provides cable communications service for the district of Lahaina, island of Maui in Census Tract Areas 314 and 315.

Pursuant to Section 440G-7, Hawaii Revised Statutes, a public hearing on this application was held on October 17, 1990 at the Lahainaluna High School Cafeteria. Notice of the hearing was published in the Sunday Star-Bulletin and Advertiser and The Maui News on September 23 and 30, 1990; and The Lahaina Times on September 26 and October 3, 1990.

## II. The Law.

### A. State Law

The regulatory powers of the Director regarding the renewal of a cable communications franchise are set forth in Sections 440G-10, 440G-7, and 440G-8 of the Hawaii Cable Communications Systems Law ("Hawaii Cable Law"), Chapter 440G, Hawaii Revised Statutes. These sections require the Director's approval before any renewal of a cable franchise occurs. The application for renewal contains substantially the same information as an original application for a grant of cable franchise. Section 440G-6(b), Hawaii Revised Statutes, requires the Director to obtain information regarding:

- "(1) The citizenship and character of the applicant;
- (2) The financial, technical, and other qualifications of the applicant;
- (3) The principals and ultimate beneficial owners of the applicant;
- (4) The public interest to be served by the requested issuance of a cable franchise; and
- (5) Any other matters deemed appropriate and necessary by the director including the proposed plans and schedule of expenditures for or in support of the use of public, educational, and governmental access facilities."

While Section 440G-6, Hawaii Revised Statutes, specifies the information to be obtained from each applicant, it is Section 440G-8(b), Hawaii Revised Statutes, which establishes the criteria to be considered by the Director prior to issuing a cable franchise:

- "(b) The director, after a public hearing as provided in this chapter, shall issue a cable franchise to the applicant when the director is convinced that it is in the public interest to do so. In determining whether a cable franchise shall be issued, the director shall take into consideration, among other things, the content of the application or proposal, the public need for the proposed service, the ability of the applicant to offer safe,

adequate, and reliable service at a reasonable cost to the subscribers, the suitability of the applicant, the financial responsibility of the applicant, the technical and operational ability of the applicant to perform efficiently the service for which authority is requested, any objections arising from the public hearing, the cable advisory committee established by this chapter, or elsewhere, and any other matters as the director deems appropriate in the circumstances."

The regulatory powers enable the Director to determine the length of the franchise term. Section 440G-10, Hawaii Revised Statutes, states that:

"Any cable franchise issued pursuant to this chapter may be renewed by the director upon approval of a cable operator's application or proposal therefor. The form of the application or proposal shall be prescribed by the director. The periods of renewal shall not be less than five nor more than twenty years each. The director shall require of the applicant full disclosure, including the proposed plans and schedule of expenditures for or in support of the use of public, educational, or governmental access facilities."

Finally, Section 440G-8(d), Hawaii Revised Statutes, delineates the Director's authority in determining the terms and conditions of the franchise:

"(d) In issuing a cable franchise under this chapter, the director is not restricted to approving or disapproving the application or proposal but may issue it for only partial exercise of the privilege sought or may attach to the exercise of the right granted by the cable franchise terms, limitations, and conditions which the director deems the public interest may require . . . ."

B. The Privilege of a Franchise

The grant of a cable franchise, whether at initial issuance or by a renewal of authority, gives the recipient a right to use and occupy public places, highways, and

easements which are of a limited and scarce nature. Substantial economic benefits may flow to the holder of the franchise as a consequence of this privilege.

The privilege of a franchise therefore carries with it associated obligations. The franchisee should recognize that there are certain responsibilities it assumes when issued a franchise. These include operating a system that is both responsive and responsible to the public it serves, providing the widest possible diversity of information sources and services to its subscribers at a reasonable cost, enhancing its community's communications capabilities by supporting public, educational, and governmental access.

### **III. Statutory Criteria.**

#### **A. Discussion**

In its application, DCPLP has requested a franchise renewal term of 15 years. As stated above, Section 440G-10, Hawaii Revised Statutes, allows the Director to set the term of the renewal at no less than 5 and no more than 20 years. The Director has determined that only the minimum term allowed by statute is appropriate in the circumstances of this proceeding.

The awarding of this five-year term is based on the Director's reservations regarding the applicant's suitability; the requirement of the terms of the limited partnership that a purchaser be sought for the system by 1994 and to liquidate the system's assets by 1995; the lack of a financial plan which demonstrates the applicant's ability to satisfy all of its obligations; and the 1996 expiration of the applicant's limited partnership.

The applicant has indicated that it is likely that United Artists Entertainment, Inc. ("United Artists") will purchase the system; however, no formal commitment has been made by United Artists. In the past, United Artists has purchased other systems affiliated with Daniels Communications, Inc. as is the situation with DCPLP. Consequently, while sale of the system appears likely within the next five years, no purchaser has yet been identified.

The Director considered the applicant's request for a franchise renewal term of fifteen (15) years. However, each of the following factors suggested that a term of five (5) years would be more appropriate in the circumstances:

- (1) The Director has reservations, discussed more fully below, regarding the suitability of the applicant.
- (2) The applicant is, under the terms of its limited partnership agreement required to seek a buyer for its system within four years. It appears the applicant does not intend to be the operator of the system for the 15-year period it has requested.
- (3) The applicant has not presented a financial plan which shows how all of its obligations, which include the \$16 million liability to Perry Leff, the seller of the system, ("the Leff Notes") will be satisfied during the franchise term.
- (4) The life of the limited partnership is due to expire in 1996, long before the end of the requested 15-year term, and the applicant has committed only to extending the life of the limited partnership for so long as is necessary for it to accomplish its purpose, without specifying the term of the extension.

It is in some ways understandable, given the circumstances, that the applicant is unable or unwilling at this time to address these concerns. However, these factors give rise to such a high level of uncertainty for the financial and operational future of the system that the Director believes the best interests of the public will be served by issuing the minimum five-year renewal.

The five-year term allows cable services to continue to be delivered by DCPLP in Lahaina while the State and the applicant see what develops with respect to the anticipated sale of the system and the refinancing of the Leff notes. In addition, the length of the term approximates the remaining life of the limited partnership. It should be noted that the State fully expects and encourages DCPLP to apply for renewal or transfer of the system at any time during this renewal period when the applicant is ready to address the issues raised in this proceeding.

B. Public Need for the Proposed Service

The applicant has proposed to provide the same cable programming services it has offered for the past two and one-half years. The DCPLP system now provides cable communications service to the district of Lahaina on the island of Maui. DCPLP serves approximately 16,000 subscribers most of whom would be without cable communications service if DCPLP ceased to provide that service. This indicates a need for continued communications service as proposed and provided by the applicant.

C. Suitability of the Applicant

In reviewing the suitability of the applicant, the State looked at the interrelationship between the entities, The Daniels Communications Partners, Limited Partnership, doing business as Hawaiian Cable Vision of Hawaii, DCP-85, Ltd., Daniels Communications, Inc., and United Artists Entertainment, Inc. ("United Artists"). These entities are inextricably tied together in operating the cable system.

The Daniels Communications Partners, Limited Partnership, ("DCPLP") doing business as Hawaiian Cable Vision of Hawaii is a limited partnership. DCPLP's general partner is DCP-85, Ltd. is also a limited partnership. The general partner of DCP-85, Ltd. is Daniels Communications, Inc., a publicly held corporation whose stock is owned by United Artists.

The Director's reservations regarding the suitability of the applicant arise from the following sequence of events. On August 29, 1988, the Director issued Decision and Order No. 134, which transferred the cable franchise for the Lahaina service area to the applicant. Condition 7 of this Order stated:

"7. DCP [Daniels Communications Partners, Limited Partnership] shall pay to the Director within 30 days the sum of \$45,850 for public, educational, and governmental access in West Maui. Thereafter, DCP shall pay to the Director for such purpose the sum of \$18,000 every 12 months until the end of its franchise." (Emphasis added.)

In January 1989, DCPLP sent a letter to all of its subscribers notifying them of its decision to increase rates. The letter stated, in pertinent part:

". . . Certainly, we have no quarrel with an appropriate amount of community programming. But our experience has shown us that only a limited number of customers take an active interest in it. At the same time, the studio that you are funding is located in Wailuku on the other side of the island.

So that you might see the full impact of these assessments, your statement will look a little different the next time you receive it. The first new item on your bill will be franchisee fees. In effect, these fees are used to fund the [Cable Television] Division and its expanding operations. The second item is the community programming assessment fund used to pay for the Wailuku studio facilities.

If you doubt the Division's intentions to continue to increase your cost of cable television, remember that Oceanic Cablevision on Oahu just renewed its franchise at a cost to customers of \$1.70 a month for the next 15 years. All of this increase was a result of Division mandated participation in the development of Hawaii's telecommunications infrastructure. Hawaiian Cable Vision's franchise is due for renewal shortly, and we have every reason to believe that similar demands will be made of us and you.

We'll do everything we can to control the Division's action, but your assistance will be crucial if we are to continue to provide quality programming, reliable service, and cost effect [sic] cable television entertainment for West Maui."

(Emphasis added.)

What DCPLP's letter said about the intended use of the access funds required by the transfer Order and what the Order actually stated are clearly different. Contrary to what the letter states, the Order specifically earmarked the funds contributed by DCPLP to support access activities in West Maui.

It is very troubling that a corporate decision to release this letter was made at all and at any level. The State is certainly aware of the applicant's First Amendment right

to freedom of expression. However, the letter contained misleading statements, and under Hawaii law, the making of misleading statements in the course of business (and other conduct which similarly creates a likelihood of confusion or of misunderstanding) is a deceptive trade practice. The dissemination of misleading information in the conduct of any business in the State of Hawaii is not to be tolerated. Whether there was intent to deceive or confuse on the part of DCPLP or whether any subscribers were in fact deceived or confused is irrelevant. The fact is that misleading statements were made.

Pursuant to the Hawaii Cable Law, good character on the part of the applicant is clearly a criterion for the issuance of a cable franchise, whether at initial issuance, transfer or renewal. In this context, the making of misleading statements in this letter to subscribers reflects poorly on the applicant's character.

Equally troubling is the fact that, when the State raised the issue of DCPLP's misrepresentations regarding the use of the access funds in Wailuku, DCPLP did not take advantage of the opportunity to correct the record. It is not an over-statement to say that serious consideration was given to denying this renewal application based on the operator's failure to exhibit the character required of a cable franchisee.

In an effort to demonstrate its regret at sending the letter, United Artists and DCPLP have provided a joint letter of apology, a donation of \$50,000 for access purposes which will not be charged to the DCPLP's subscribers of West Maui, and a solemn assurance that such conduct will not occur again.

These actions are enough to suggest that DCPLP appears to understand the magnitude and implications of its conduct in this case and that it will not recur. These circumstances appear to allow a finding that DCPLP meets the threshold requirement for establishing suitability and that its franchise may therefore be renewed. The State, however, will continue to monitor DCPLP's actions very carefully to ensure that no further misconduct occurs.

#### D. Operational Ability of the Applicant

DCPLP has operated the Hawaii system since its transfer in August of 1988. DCPLP has demonstrated a capacity to operate a cable operation generally attuned to the needs and requirements of its Hawaii system's subscribers.

E. Technical Ability of the Applicant

DCPLP has a competent and well-trained technical staff capable of meeting the daily technical requirements of its cable communication facilities. This staff has demonstrated its ability in planning and executing upgrades throughout its system.

F. Ability to Provide Service at Reasonable Cost and Financial Capability

DCPLP has been operating the cable system since 1987. Under DCPLP's current rate structure, its operating margin for 1990, as of September 30, 1990, is sixty-one percent (61%). The Financial Plan presented by DCPLP is based on several favorable factors: (1) increased rates, (2) an increased number of subscribers, and (3) an increase in revenues from premium services and ancillary services. The composition of DCPLP's subscribers is approximately twenty-two percent (22%) residential and seventy-eight percent (78%) transient population. (The seventy-eight percent (78%) transient population, which includes residential condominiums, receives bulk billing.)

On April 30, 1987, DCPLP acquired the assets of the Maui cable system for approximately \$18,000,000.00. The notes payable to the Seller (the Leff Notes) are due and payable on May 1, 1998. However, the Seller has the option to forego payment on three of the four notes to receive a potentially greater payment, calculated on the cash flow from the cable system, on April 30, 1993.

The Director's concerns about the magnitude and upcoming due dates of the Leff Notes have not been abated by the discussions with DCPLP. DCPLP has repeatedly assured the Director of the refinancing of the Leff Notes, but neither a definitive financial plan addressing payment of the Leff Notes nor a commitment to refinancing these notes has been presented. The factors above weigh heavily in favor of the renewal term of five (5) years.

Based on DCPLP's past operation of the system, its growing revenue stream, and the information provided in the application, it appears the applicant is able to offer the proposed service at a reasonable cost and that it meets the minimum requirement for financial capability.

G. Public Hearing

Testimony from individuals indicated they were satisfied with the service provided by DCPLP. However, concerns about the increases in cable rates were raised.

H. Other Matters

1. Control. The Hawaii Cable Law states that no change of control of a cable system may occur without the prior approval of the Director. The State is concerned that the entity or individual which actually controls the operations of the cable system, regardless of the means by which that person holds that control, is known to the State, meets the threshold requirements for holding a cable franchise, and is responsible and accountable to the State.

2. Channel Capacity. The Director is not requiring DCPLP to upgrade its channel capacity above the current forty (40) channels. Due to the short term of the franchise, the Director is also not requiring DCPLP to provide a study assessing the need to provide sixty (60) channels of programming.

3. Public, Educational, and Governmental Access Programming and Local Origination. In this proceeding, DCPLP has asked that, in establishing access requirements, the Director give consideration to the unique composition of the applicant's subscriber base. DCPLP provided information which indicates that close to eighty percent (80%) of its subscribers are non-residents and that this segment generates approximately sixty percent (60%) of the company's revenues.

DCPLP noted that these non-residents would be unlikely to avail themselves of the access facilities and equipment to be made available and that their programming needs and interests differ from those of resident subscribers.

The Director recognizes that these non-residents may be less likely to use PEG access facilities and equipment than residents of Lahaina. However, the access requirements which are part of this Order are based on the access needs ascertained in DCPLP's service area.

With respect to the need for visitor-oriented programming, however, the Director believes that support of the production of this kind of programming may be warranted. The composition of DCPLP's subscriber base and the company's past experience suggest that there is a desire for locally originated programming oriented towards the visitor population.

The Director has therefore required that, as part of the access planning process to be conducted in Maui County, some mechanism, for instance, the reservation of a certain percentage of time, be developed to allow the sharing of access equipment for local origination purposes. Through this means, the Director seeks to ensure that the programming interests of all segments of DCPLP's subscriber base—including its visitor population—are met, while at the same time the maximum economies possible are achieved in the expenditure of resources for production equipment and facilities.

4. **Extension of Franchise Term.** The Director notes that the franchise term for DCPLP was extended twice: (1) for no more than one month, from October 21, 1990 to the earlier of November 21, 1990 or the date of issuance of a final order in this matter, and (2) from November 21, 1990 to November 23, 1990. This extension was made under the authority of Section 440G-12, Hawaii Revised Statutes.

#### **V. Conclusion.**


Based on the information presented in the application and the evaluation of this information, the Director believes that it is in the public interest to approve this application. The applicant appears to possess the minimum qualifications for the issuance of the franchise. Pursuant to Section 440G-10, Hawaii Revised Statutes, the cable franchise term shall be for approximately five (5) years. The area served by DCPLP shall be Census Tract Areas 314 and 315, the district of Lahaina, County of Maui, State of Hawaii.

#### **VI. Order.**

**NOW, THEREFORE,** the application of Daniels Communications Partners, Limited Partnership, doing business as Hawaiian Cable Vision Company to renew its cable

franchise permit is hereby APPROVED, subject to the attached terms and conditions which are incorporated by reference herein.

DATED: Honolulu, Hawaii, November 23, 1990.

A handwritten signature in dark ink, appearing to read "Robert A. Alm", written over a horizontal line.

ROBERT A. ALM  
Director of Commerce and Consumer  
Affairs

# HAWAIIAN CABLE VISION COMPANY

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## TERMS AND CONDITIONS OF DECISION AND ORDER NO. 142

### Section One

#### Definitions

"Access channel" means any channel on the system made available for public, educational or governmental (hereinafter referred to as "Access") use.

"Access fee" means the annual fee to be paid by DCPLP to the Director or his designee for public, educational or governmental uses pursuant to paragraph 7.2.

"Basic service" means the lowest cost tier of cable service offered by DCPLP to all its subscribers which includes the delivery of local television broadcast signals, access channels, and local origination.

"Cable franchise" shall have the meaning as interpreted and set forth in Section 440G-3, Hawaii Revised Statutes.

"Cable service" shall have the meaning as interpreted and set forth in Section 440G-3, Hawaii Revised Statutes.

"Cable system" and "system" mean the cable system on the island of Maui doing business as Hawaiian Cable Vision Company and shall have the meaning as interpreted and set forth in Section 440G-3, Hawaii Revised Statutes.

"Channel" means a minimum of six megahertz (6 MHz) bandwidth in the electromagnetic spectrum which is capable of carrying any type of transmission which DCPLP is authorized to provide to subscribers.

"Daniels Communications, Inc." means Daniels Communications, Inc. formerly known as Daniels Holdings, Inc., a Delaware corporation.

"DCPLP" means Daniels Communications Partners, Limited Partnership doing business as Hawaiian Cable Vision Company, a Delaware limited partnership.

"DCP-85, Ltd." means DCP-85, Ltd., a Colorado limited partnership.

"Director" shall have the meaning as interpreted and set forth in Section 440G-3, Hawaii Revised Statutes.

"Educational access channel" means any channel on the system which is made available by DCPLP for use by educational authorities such as the Hawaii State Department of Education, Maui Community College, and other accredited educational institutions for non-commercial educational purposes.

"Government access channel" means any channel on the system made available for use by county, state, and federal government agencies.

"Gross revenues" means all cash, credits, property of any kind or nature or other consideration derived directly or indirectly by DCPLP, its affiliates, subsidiaries, and any other person or entity in which DCPLP has a financial interest or which has a financial interest in DCPLP arising from or attributable to operation of the Maui cable system, including but not limited to:

- (a) revenue from all charges for entertainment and non-entertainment services provided to subscribers;
- (b) revenue from all charges for the insertion of commercial advertisements upon the cable system;
- (c) revenue from all charges for the leased use of a studio or cable channel;
- (d) revenue from all charges for the installation, connection and reinstatement of equipment necessary for the utilization of the cable system and the provision of subscriber and other service; and
- (e) revenue from the sale, exchange or use or cablecast of any programming developed for community use or institutional users.

Gross revenues shall include, valued at agreed upon or contract price levels, the value of any goods, services, or other remuneration in non-monetary form, received by DCPLP or

others described above in consideration of performance by DCPLP or others described above of any advertising or other service in connection with the cable system.

Gross revenues shall exclude any amounts received by others described above from DCPLP as management fees, fees in the nature of general and administrative allocations, and partnership distributions.

"Leased access channel" means a channel made available to producers or programming services wishing to purchase channel time. Leased access may be commercial in nature.

"Local origination programming" means any program produced by or for the cable system and where the cable operator maintains editorial control over programming and scheduling.

"Person" means and includes any individual, partnership, firm, corporation, association, trust or other enterprise.

"PEG access programming" means any programming on any access channel developed by or made for the public, educational or governmental entities.

"Public access channel" means any channel on the system made available for use by individuals and organizations for non-commercial purposes.

"Public, educational, and governmental access facilities and equipment" means (1) channel capacity designated for public, educational, or governmental uses and (2) facilities and equipment for the use of that channel capacity.

"State" means State of Hawaii.

"Subscriber" means any person lawfully receiving any cable service.

## Section Two

### Franchise Term

#### 2.1 Franchise Term

The franchise term shall be from November 23, 1990 to December 31, 1995 subject to the following condition::

Taken as a whole, the provisions of this Order represent the optimum balance of interests in this case. Each provision has been weighed and balanced to form an integrated document. The elimination of any portion of this Order would consequently undermine the entire document. Therefore, if any section, subsection, sentence, clause, phrase or other portion of this Order is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body or other authority of competent jurisdiction, and the State determines that the unenforceable or unlawful provision(s) represent a substantial breach to the integral nature of this Order, then the franchise term for DCPLP will revert to:

- A five (5) year franchise (measured from the date the franchise was originally awarded if the invalidation occurs within the first two (2) years of operations); or
- A three (3) year franchise (measured from the date of the invalidation if such action occurs after the first two (2) years of operations, but in no event will the amended franchise term exceed the original franchise term)

## Section Three

### Management

#### 3.1 Limited and General Partners

(a) For the duration of the franchise term:

- (1) Daniels Communications, Inc. shall remain the general partner of DCP-85, Ltd.

(2) DCP-85, Ltd. shall remain the general partner of DCPLP.

(b) Any change in the general ownership of five percent (5%) or more in Daniels Communications, Inc., shall be filed with the Director within ten (10) working days from the change.

(c) Any change in the limited partner of five percent (5%) or more in DCPLP shall be filed with the Director within ten (10) working days from the change.

(d) Any change in the general or limited partner of one percent (1%) or more of DCP-85, Ltd. shall be filed with the Director within ten (10) working days from the change.

### 3.2 Books and Records

Except as hereinafter provided in this paragraph, DCPLP shall maintain at its principal place of business on the island of Maui a complete set of books and records, including but not limited to subscriber records, monthly profit-and-loss statements, and other documentation relating to the operation of the cable system. All books and records not maintained and available for review at the local office shall, upon request, be made available locally within five (5) working days.

If these records are not available locally within five (5) working days of the request, then:

(1) DCPLP agrees to pay an administrative fine of \$1,000 per day for each day that these records have not been produced; or

(2) DCPLP shall make appropriate office space available and pay for air fare, hotel, other related travel expenses, and salary and fringe benefits necessary to allow the Director's representative(s) to review the requested records wherever they are located.

### 3.3 Other Business Activity

DCPLP shall not engage in any type of business activity in Hawaii or elsewhere which is not related to the operation of its cable system without the prior written approval of the Director.

### 3.4 Tariff

DCPLP shall amend its schedule of its rates of service and other information as required by the rules promulgated pursuant to Chapter 440G, Hawaii Revised Statutes, at least fourteen (14) days in advance of any changes. The terms and conditions of service shall be subject to approval by the Director to the extent permitted by law.

### 3.5 Reporting of Violations

(a) Upon acquiring knowledge of any event which is reasonably likely to lead to a violation of any condition of this Order DCPLP shall immediately notify the Director in writing specifying: (1) the nature of the violation, (2) an opinion as to when the violation is likely to occur, and (3) the action that DCPLP proposes to take regarding the probable violation.

(b) Upon acquiring knowledge of the existence of a violation of any condition of this Order, DCPLP shall promptly inform the Director in writing of (1) the nature of the violation, (2) the period in which the violation has been in existence, and (3) the actions that DCPLP proposes to take with respect to the violation.

(c) By April 30 of each year, DCPLP shall submit to the Director a statement from its General Partner to the effect that no violation of this Order has occurred and is continuing and that DCPLP has observed or performed every condition contained in this Order. In the event a violation has occurred and is continuing or if DCPLP has not observed or performed all of the conditions contained in this Order, it will specify the nature and period of the violation and what action DCPLP has taken or proposes to take to with respect to the violation.

## Section Four

### Financial

#### 4.1 Changes in Purchase and Sale of Partnership Interests Agreement

Any material change in the terms and conditions of the Agreement of Purchase and Sale of Partnership Interests made by and among Perry B. Leff and Global Telecommunications Corp. and DCPLP ("the Perry Leff Notes") as approved in Decision and Order No. 134 subsequent to the date of this Order for the financing of the expansion or operation of the Maui cable system as reviewed and approved in this Docket shall require prior approval of the Director.

#### 4.2 Covenant Violations

Any violation of a covenant of any agreement involving financing for DCPLP's Maui cable system shall be reported promptly in writing to the Director.

#### 4.3 Collateralization of System Assets

The assets of DCPLP shall not be pledged as collateral for any additional borrowings subsequent to the financing approved Decision & Order No. 134 which are not solely for the benefit of the Maui cable system. All additional collateralization of the system shall be reported to the Director.

#### 4.4 Additional Borrowing

Excluding trade accounts, secured financings of vehicles and equipment in the aggregate principal amount of \$100,000, and advances, equity contributions, and subordinated borrowings from its partners, any borrowing or financing exceeding \$5,000 by DCPLP from whatever source and under whatever condition, shall require prior approval of the Director, except the foregoing shall not prohibit DCPLP from guaranteeing the debt of its partners in connection with any advances, equity contributions, and subordinated borrowings from its partners, and the prior approval of the Director shall not be required therefor.

#### 4.5 Transfers or Payments

Except as provided below, any transfer or payment of a sum in excess of \$50,000 and not related to the cost of operating the Maui Cable System (including debt service) shall require the prior approval of the Director. Prior approval shall not be required for the following:

(a) Payments made under the Perry Leff notes; and

(b) Payments to the partners of DCPLP in connection with advances, equity contributions or subordinated borrowings as permitted in paragraph 4.4 above, provided that the Perry Leff notes have been fully satisfied.

#### 4.6 Annual Financial Statements

(a) By April 30 of each year, DCPLP shall submit to the Director its annual financial statements for the preceding calendar year. The financial statements shall include a balance sheet, an income statement, a statement of cash flows, and notes to the financial statements. Each such financial statement shall be prepared in accordance with generally accepted accounting principles consistently applied. The financial statements shall be presented in sufficient detail to allow the analysis of the cable system on a stand-alone basis.

(b) The financial statements required to be furnished pursuant to paragraph 4.6(a) shall be accompanied by a statement showing the basis for computing and the amounts paid by DCPLP or any subsidiary to its parents, affiliates, subsidiaries, general partners or any person for management fees and fees in the nature of general and administrative allocations.

#### 4.7 Credit Agreement Compliance

DCPLP shall furnish to the Director, promptly upon their mailing or transmittal, all documents which show DCPLP's compliance with the provisions of the Perry Leff notes.

## **Section Five**

### **Construction**

#### **5.1 Institutional Network**

(a) At no charge or cost to the State except for DCPLP's cost for labor and materials, DCPLP shall within three (3) months of a request by the Director provide and maintain two-way interconnections between its cable system and sites to be determined by the Director. DCPLP shall cooperate with Chronicle Cablevision of Hawaii to complete connectivity between the institutional network and sites within DCPLP's service area to be determined by the Director.

(b) These interconnections shall be capable of carrying T-1 circuits for data, voice, video, and analog in both directions.

(c) DCPLP shall work with the Director's staff, consultants, and others designated by the Director to develop and implement a coordinated plan for the use of the institutional network.

#### **5.2 Interconnection for Access Purposes**

On a schedule and in a manner to be determined in the plan described in paragraph 7.1 below, DCPLP shall effect an interconnection with the other cable system on Maui for the purpose of carrying access programming.

#### **5.3 Interconnection with HITS**

Within three (3) months of a request by the Director, DCPLP shall provide for a single channel interface between the HITS (Hawaii Interactive Television System) and its cable system at no cost or charge to the State and at a cost to DCPLP not in excess of \$10,000. This shall include an ITFS down-converter, a receiving antenna dish, modulator, other hardware, and the cost of installation.

**Section Six**  
**Programming Services**

**6.1 Mix, Quality, and Level of Service**

DCPLP shall not alter its current mix, quality, and level of programming services for its basic service tier without the prior approval of the Director.

**6.2 Basic Service Tier Broad Categories of Programming**

(a) Subject to availability, DCPLP shall carry programming in each of the following broad categories of service on its basic service tier:

- (1) Public access programming;
- (2) Educational access programming;
- (3) Governmental access programming;
- (4) Local origination programming;
- (5) Public non-profit station with national programming;
- (6) National news programming;
- (7) Broadcast television stations as required by the Federal Communications Commission or applicable law; and
- (8) General entertainment including, for example, music, children's, cultural, and special interest programming.

(c) Except as provided below, no broad category of video programming may be deleted without the prior approval of the Director. Prior approval shall not be required for the following:

- (1) Programming is discontinued without notice to DCPLP;
- (2) Programming changes beyond the control of DCPLP.

(d) DCPLP shall provide notice to the Director at least fourteen (14) days in advance of any changes in its channel lineup.

**Section Seven**  
**Public, Educational, and Governmental Access**

**7.1 Access Plan**

DCPLP shall work with the Director's staff, consultants, and others designated by the Director to develop for the Director's approval and to implement a coordinated plan for the use of public, educational, and governmental access facilities and equipment on the island of Maui. The plan shall at a minimum consider the following:

- (a) Resources available on the island of Maui for access use;
- (b) User needs and interests;
- (c) Models for providing public, educational, and government access;

(d) Management of access facilities and equipment, including the interconnection of all cable systems on Maui, the activation of additional access channels, the scheduling of channel capacity, guidelines for the interim use of access channel(s) by the cable operator, and the provision of facilities and equipment for the production of programming, including local origination programming;

(e) Coordination of access with HITS (Hawaii Interactive Television System), HAWAIIAN (HAWAII Wide Area Integrated Information Access Network) or any other interconnects; and

- (f) Coordination with the Institutional Network set forth in paragraph 5.1.

**7.2 Access Fee**

(a) As hereinafter provided in paragraph 7.2(b) , during each and every year for the remaining term of the franchise, DCPLP shall pay to an account designated by the Director or his designee an amount up to three (3) percent of its Gross Revenues. These payments shall be used for public, educational, and governmental access uses.

(b) For the years ending December 31, 1991 through December 31, 1995, DCPLP shall pay on the due dates shown, to an account designated by the Director or his designee, an annual Access Fee equal to the greater of the amounts shown below or two (2) percent of Gross Revenues:

<u>Due Date</u>	<u>PEG Access Fee</u>
December 31, 1991	\$ 78,000.00
December 31, 1992	\$ 83,000.00
December 31, 1993	\$ 89,000.00
December 31, 1994	\$102,000.00
December 31, 1995	\$111,000.00

(c) The Access Fee required pursuant to paragraph 7.1(b) may be reconsidered by the Director at the following times:

- (1) By December 31, 1992 to determine the Access Fee for the years ending December 31, 1993 through December 31, 1995 based on the Director's consideration of the community's needs.
- (2) Upon transfer of the franchise.

(d) The Access Fee shall be calculated on the estimated annual Gross Revenues for the calendar year. Adjustments to the Access Fee due to differences between the estimated and actual Gross Revenues shall be made within thirty (30) days after the submission of DCPLP's annual financial statements to the Director. If DCPLP is entitled to a refund, the Director or his designee shall grant a credit towards the next payment of the Access Fee or make a refund if the last payment of the Access Fee has been made. The Director may require DCPLP to submit to an audit by the Director's accountant.

(d) The amount of the Access Fee required pursuant to paragraph 7.2(a ) may be reconsidered by the Director based on consideration of the financial condition of DCPLP, the community needs, and other factors the Director deems necessary.

### 7.3 Facilities and Equipment

(a) For the years ending December 31, 1990 through December 31, 1995, DCPLP shall, on the due dates shown, provide to the Director or his designee PEG capital funds for PEG access facilities and equipment in accordance with the following schedule:

<u>Due Date</u>	<u>Amount</u>
December 31, 1991	\$ 10,000
December 31, 1992	\$124,100
December 31, 1993	\$ 41,600
December 31, 1994	\$ -0-
December 31, 1995	\$ -0-

(b) Any PEG capital funds paid pursuant to paragraph 7.3 shall not be credited to the Access Fee.

(c) Any transfer of the cable system shall require the payment to the Director or his designee of the outstanding PEG capital funds for public, educational, and governmental access pursuant to paragraph 7.3 before the effective date of the transfer. The Director reserves the right to waive or to reduce the amount due under this paragraph for good cause.

(d) For purposes of paragraph 7.3, "PEG capital funds" means the sum of money set apart specifically for public, educational, and governmental access facilities and equipment.

### 7.4 Access Channels

(a) By December 31, 1990, DCPLP shall designate to the Director one full-time activated channel for public, educational, and governmental access. Two (2) additional channels shall be designated by February 28, 1991, however, DCPLP may use the designated access channels as provided in this paragraph until such time as those channels are activated in accordance with the policies and procedures for activation determined under paragraph 7.1 above.

(b) The two additional channels designated for access use may be activated after December 31, 1993.

(c) All access channels, once activated, shall be used for public, educational, and governmental access and shall be transmitted to all subscribers on DCPLP's basic service tier.

(d) DCPLP shall be permitted to use time on the access channel(s) whenever such access channel is not scheduled for use; provided that any such use by DCPLP shall at all times be subordinated to access programming and shall be preempted by access programming. Any such use shall be subject to guidelines established by the Director or Director's designee or as established pursuant to paragraph 7.1.

(e) All non-access programming on access channel(s) shall be identified as such by an appropriate announcement made prior to and following each non-access use.

#### 7.5 Access Organization

The Director may designate one or more entities to fund, control, manage or operate access facilities and equipment.

#### 7.6 Access Transition

(a) DCPLP shall continue to fund and operate its existing access facilities and equipment until it receives notice from the Director to alter its present activities pursuant to paragraph 7.1 above. Access shall be made available for non-commercial use on a first-come, nondiscriminatory basis to all persons or groups requesting use of public, educational, and governmental channels.

(b) All equipment presently devoted exclusively to access use shall be transferred upon the receipt of notice from the Director pursuant to paragraph 7.5 above.

(c) All expenses relating to access operations paid within a given calendar year by DCPLP shall be credited towards the next annual access fee payment; however, the value of any facilities and equipment required to be transferred pursuant to paragraphs 7.5 and 7.6(b) above shall not be credited toward the payment of any access fee.

#### 7.7 Reporting Requirements

(a) By April 30 of each year, DCPLP shall submit to the Director a report of local origination expenses and a report for access programming expenses for the preceding calendar year.

(b) For the purposes of accounting for amounts expended for local origination and access programming, DCPLP shall only include an appropriate portion of DCPLP's total operating expenses associated with local origination and access programming. Such portions of the total operating expenses shall reflect only necessary and reasonable expenses which can be specifically identified with, or allocated to, local origination and access programming in accordance with the benefits provided by the resources presented by the expenses. For the purposes of this paragraph, resources used for local origination and to comply with the access requirements shall be deemed to benefit local origination and access programming. In addition to operating expenses, amounts expended for local origination and access programming may include an annual depreciation allowance for local origination and access related equipment and facilities, as calculated over the assets' useful lives.

(c) Amounts expended for local origination and access programming shall be subject to the State's review in conjunction with the State's review of DCPLP's annual financial report. DCPLP shall make such changes in its accounting for local origination and access programming expenditures as the State may reasonably require consistent with generally accepted accounting principles. Unless and until any such change is required, DCPLP may continue to account for local origination and access programming expenses in the same manner as it has in the past. If the State has not required changes within six months of the State's actual receipt of DCPLP's local origination and access programming expenditure reports, then DCPLP's accounting for local origination and access programming shall be deemed accepted by the State.

#### 7.8 Payment by United Artists Entertainment, Inc.

(a) Within thirty (30) days from the date of this Order, United Artists Entertainment, Inc. shall pay to the Director the amount of \$50,000. This amount shall be in full and complete satisfaction of all past obligations. These funds shall be used to support public, educational, and governmental access for the district of Lahaina, on the island of Maui.

(b) DCPLP, DCP-85, and Daniels Communications, Inc. understand that the Director and United Artists Entertainment, Inc. have agreed that the amount paid pursuant to paragraph 7.8(a) is not a payment in return for renewing, extending, transferring or issuing a cable franchise.

(c) DCPLP, DCP-85, and Daniels Communications, Inc. acknowledge that the amount paid by United Artists Entertainment, Inc. pursuant to paragraph 7.8(a) shall have no effect on the Access Fee paid pursuant to paragraph 7.2 or PEG capital funds paid pursuant to paragraph 7.3.

(d) United Artists Entertainment, Inc., Daniels Communications, Inc., DCP-85, and DCPLP agree that the amount paid by United Artists Entertainment, Inc. shall not be passed through to DCPLP's subscribers in any form.

### Section Eight

#### Miscellaneous

8.1 The Director hereby expressly reserves the right to regulate rates to the extent permitted by law.

8.2 Consistent with Section 612(b) of the Cable Communications Policy Act of 1984, on or before December 31, 1990, DCPLP shall file with the Director and implement a published schedule of terms, conditions, and charges for the leasing of cable channels for commercial use.

8.3 (a) This Order shall not be construed as exempting DCPLP or any affiliated or controlling entities from any antitrust law.

(b) This Order does not constitute an adjudication upon any antitrust issues which may be involved in this proceeding.

8.4 DCPLP, its employees, and agents, shall be familiar with all federal, state, and local laws, ordinances, rules and regulations that in any manner affect the DCPLP cable system. If DCPLP discovers any provision in the plans, specifications, orders or documents which is contrary to or inconsistent with any such law, ordinance, rule or regulation, DCPLP shall promptly report it to the Director in writing. DCPLP, its employees, and agents, shall comply with all applicable federal, state, and local laws, rules and regulations issued pursuant thereto and shall indemnify the State against any loss, liability or damage occasioned by reason of a violation of this paragraph. DCPLP and the Director have carefully reviewed this Order, and believe that all of its provisions are in full compliance with all federal and state statutory requirements in effect on the date of this Order, including the Cable Communications Policy Act of 1984.

8.5 The failure of the State at any time to require performance by DCPLP of any condition of this Order shall in no way affect the right of the State to enforce the same. The waiver by the State of any breach of any condition of this Order shall not be taken or held to be a waiver of any succeeding breach of such condition or as a waiver of the condition itself.

8.6 DCPLP shall save and hold the State and its officials, agents, and employees free and harmless from any loss, expense or damage to person or property arising out of or resulting from any provision or requirement of the Franchise or exercising its rights or performing its duties under this Franchise.

8.7 The Director reserves the right to waive any condition of this Order for good cause.

8.8 Time is of the essence with respect to this Order.

8.9 The State may, from time to time, adopt or issue such rules, orders, or other directives governing DCPLP as it shall find necessary or appropriate in the exercise of its police power. The Director may, from time to time, issue such orders governing DCPLP as he shall find reasonably necessary or appropriate pursuant to and in

furtherance of the purposes of this Order. DCPLP agrees to comply with all rules, regulations or orders lawfully binding upon it or other directives issued pursuant to this Order.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 142 in Docket No. 90-04 was served upon the following parties at the addresses shown below by mailing the same, postage prepaid, on this 23rd day of November, 1990:

Ms. Sharan Wilson  
2930 East Third Avenue  
Denver, Colorado 80206

Mr. Tom Schaeffer  
Southland Cablevision  
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Redlands, California 92374

Mr. James McBride  
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Kevin S. C. Chang, Esq.  
Kobayashi, Watanabe, Sugita,  
Kawashima & Goda  
745 Fort Street, 8th Floor  
Honolulu, Hawaii 96813

  
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Joyce E. Mikami  
Secretary