BEFORE THE

DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS

OF THE STATE OF HAWAII

In the Matter of the Application of TCI COMMUNICATIONS, INC. AND TCI OF HAWAII, INC. For Transfer of the Cable Franchise Held by The Chronicle Publishing Company dba Chronicle Cablevision of Hawaii	)	DOCKET NO. 96-01

DECISION AND ORDER NO.187

I. Introduction

The State has accepted TCI Communications, Inc. and TCI of Hawaii, Inc.'s Application for Transfer of the cable franchise held by The Chronicle Publishing Company dba Chronicle Cablevision of Hawaii.

Chronicle Cablevision of Hawaii ("Chronicle") holds the cable franchise for the following areas: the island of Maui (except Lahaina) covering census tracts 301, 302, 303.01, 303.02, 304.01, 304.02, 305, 306, 307, 308, 309, 310, 311.01, 311.02, 311.03, 312 and 313; the island of Molokai covering census tracts 317, 318 and 319; the island of Lanai covering census tract 316; the Ka'u area of the island of Hawaii covering census tract 212; and the Hawaii Kai area of the island of Oahu covering census tracts 1.02, 1.04, 1.05, 1.06, 1.07 and 1.08. Chronicle's cable franchise expires on December 31, 2000.

Pursuant to that certain Agreement and Plan of Merger and Reorganization ("Merger Agreement") dated as of June 28, 1995, by and between The Chronicle Publishing Company and Tele-Communications, Inc., The Chronicle Publishing Company will be merged with and into Tele-Communications, Inc., and the latter will be the surviving corporation. Under the Merger Agreement, all properties, rights, privileges, powers, and franchises of Chronicle Publishing Company will be vested in

Tele-Communications, and Tele-Communications will assume all debts, liabilities, and duties of Chronicle Publishing Company.[1] Tele-Communications states that it will assume approximately $300,000,000 of The Chronicle Publishing's debt with the balance of the purchase price to be paid in stock. Closing of the Merger Agreement is anticipated to occur on or before March 31, 1996.

In the Application for Transfer, TCI Communications, Inc. and TCI of Hawaii, Inc. (sometimes hereinafter collectively referred to as "Applicants") state that upon closing of the Merger Agreement TCI Communications, Inc. will transfer Chronicle's cable systems to TCI of Hawaii, Inc. dba TCI, a Colorado corporation ("TCI"), as the sole franchise holder.[2] According to Applicants, the organizational chart of TCI is as follows: TCI-West Inc., a Delaware corporation, is the sole shareholder of TCI; TCI-Holdings, Inc., a Colorado corporation, is the sole shareholder of TCI-West, Inc.; TCI Communications, Inc., a Delaware corporation, owns 95% of TCI-Holdings, Inc.; and Tele-Communications, Inc., a Delaware corporation, is the sole shareholder of TCI Communications, Inc.

Pursuant to section 440G-7, Hawaii Revised Statutes, public hearings on the Transfer Application were held as follows:

(a) Ka'u, Hawaii - January 30, 1996 at 5:00 p.m., Ka'u High and Pahala Elementary School;

(b) Hawaii Kai, Oahu - February 1, 1996 at 6:30 P.m., Koko Head Elementary School; and

(c) Maui, Molokai and Lanai - February 3, 1996 at 3:00 p.m. via video conference, Maui Community College, Media Center, Kahului, Maui; Maui Community College, Molokai Education Center; Maui Community College, Lanai Education Center; and Maui Community College, Hana Education Center.

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[1]Although there are certain reorganizational schemes in connection with the merger, Chronicle Publishing's cable systems will become and remain a part of TCI's cable systems. According to TCI, there are 37 Chronicle Publishing cable franchises that will be acquired under the Agreement of Merger.

[2]Applicants state that TCI of Hawaii, Inc. dba TCI is a newly created corporation and that as of December 31, 1995 it has no assets. Applicants also state that they intend to draw on existing credit facilities to acquire the systems, that the identity of such credit facilities has not yet been determined, and that "none" of the credit facilities require the pledging of Chronicle's cable systems.

Notices of the public hearings were published in the Hawaii Tribune Herald and West Hawaii Today on January 8 and 15, 1996; in The Advertiser and Honolulu Star-Bulletin on January 11 and 18, 1996; and in the Maui News on January 11 and 18, 1996.

II. <u>THE LAW</u>

A. <u>Federal law</u>

The transfer of a cable franchise is made under the authority of State law and is consistent with the Cable Communications Policy Act of 1984 and the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act").

Section 624 of the Cable Act allows franchising authorities to impose requirements for cable-related facilities and equipment which include, but are not limited to, channel capacity, system configuration, and institutional and subscriber networks. Section 611 permits franchising authorities to require that channel capacity be designated for public, educational or governmental use. Section 622 allows the assessment of a franchise fee up to five percent (5%) of annual gross revenues, any portion of which may be used for public, educational and governmental access and other purposes.

B. <u>State law</u>

The regulatory powers of the Director regarding the transfer of a cable communications franchise are set forth in sections 440G-7, 440G-8, 440G-10.1, and 440G-12, Hawaii Revised Statutes, as amended ("Hawaii Cable Law").

Section 440G-10.1, Hawaii Revised Statutes, requires the Director's approval before the transfer of a cable franchise. Section 440G-8(b), Hawaii Revised Statutes, establishes the criteria to be considered by the Director, which states as follows:

> (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, <u>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</u>

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. (Emphasis added).

C. The Privilege of a Franchise

The grant of a cable franchise 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 recipient 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, and enhancing communications capabilities for its communities by supporting interconnection of public facilities, public television, and public, educational and governmental access.

III. STATUTORY CRITERIA

A. Public Need for Proposed Service

In response to the State's inquiry, Applicants identified numerous areas or subdivisions within Chronicle's franchise for Maui, Ka'u and Molokai that remain unserved because the areas do not meet Chronicle's line extension policy of 40 homes per mile:

(a) Maui - Haiku Country Estates, Haiku Ranch Estates, Haiku Road Subdivisions, Kuloli Subdivision, Makawao Country Estates, Maui Ranch Estates, Peahi Hui Lands Subdivision, West Kuiaha Road Extension, Whaley Ranch Subdivision, Kula 200, Makawao Highlands Subdivision, Pakani Subdivision, Waihee River Extension, Yaggi Subdivision.

(b) Molokai - Kalama'ula Hawaiian Homestead, Kaluako'i Resort, Kualapuu/Kala'e Extension, Mauna Loa Village, Seacliff Extension, West Kaunakakai Extension.

(c) Ka'u - Discovery Harbor/Mark Twain.

In addition, the following unserved areas were identified by residents who expressed their desire for cable services through testimonies or comments regarding Applicants' transfer application:

(a) Kalama'ula (Hawaiian Home Lands), Molokai;
(b) Stable Road, Sprecklesville, Maui;
(c) Olinda/Makawao, Maui;
(c) Kula, Maui;
(d) Big Beach, Makena, Maui; and
(e) Ocean View, Hawaii.

It is evident that there is a serious need for cable service, particularly for those residing in Kalama'ula, Molokai. The residents of Kalama'ula, Molokai made a strong and passionate showing regarding the need and desire for cable services at the February 3, 1996 public hearing. Residents testified that only a few off-the-air local television signals could be received, that the area is very near the cable company's distribution line, and that they have long awaited the delivery of cable services to their area.

Chronicle and Applicants state that the density of the Kalama'ula area does not meet the line extension policy of 40 homes per mile. However, in light of the strong showing of support for cable services by the residents of Kalama'ula, Chronicle agrees to extend cable services to this area as an exception to its line extension policy at no cost to subscribers. The build out of cable plant will commence within three (3) months after closing of the Merger Agreement, and will be completed within nine (9) months after the closing of the Merger Agreement, provided that all necessary permits are readily obtainable. TCI agrees to honor and assume Chronicle's agreement and obligations upon closing of the Merger Agreement.

Chronicle's and TCI's agreement with respect to extending cable services to the residents of Kalama'ula, Molokai is acceptable. Accordingly, the build out of cable plant to and within Kalama'ula shall commence within three (3) months after closing of the Merger Agreement, and the build out shall be completed within nine (9) months after closing of the Merger Agreement at no cost to subscribers.[3] Upon closing of the Merger Agreement, TCI shall assume Chronicle's obligations and perform the cable plant build out as described herein. In the event the necessary permits are not readily obtainable or in the event other circumstances may arise that are beyond the cable operator's control as to delay completion of the build out, the Director, after receiving a written notice and request, agrees to

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[3]The total cost of the build out shall not be passed on to subscribers.

extend the completion date for a period of time not to exceed 60 days.

With respect to other identified unserved areas, Applicants state that such areas do not meet the line extension policy of 40 homes per mile. It is noted that the renewal process for the subject franchise will commence in 1997. The line extension policy of 40 homes per mile will be addressed at such time if not sooner.

B. <u>Suitability of the Applicant</u>

As noted previously, TCI is a member of Tele-Communications, Inc.'s corporate family. Tele-Communications, Inc. is considered the largest multiple system owner in the United States with cable systems in 48 states. TCI, however, is a newly created entity whose sole asset would be Chronicle's cable systems. Presumably, TCI would be provided adequate financial resources to fulfill its franchise obligations. Nonetheless, the Director will closely monitor the operations of TCI in order to ensure compliance with its franchise obligations, and may take any action the Director deems necessary or appropriate as provided in section 8.9 of Decision and Order No. 148.

C. <u>Operational Ability of the Applicant</u>

TCI does not currently contemplate any significant changes with respect to the operations of the Chronicle cable systems. TCI states that it intends to maintain the staff and level of services currently in place under Chronicle.

D. <u>Technical Ability of the Applicant</u>

As noted above, TCI intends to maintain the current staff. In general, the technical staff are competent, well-trained, and capable of meeting the daily technical requirements of the cable communications facilities. It should also be noted that Chronicle's staff have completed the upgrades as required under the existing franchise obligations, and have installed Emergency Override equipment at its four system headends - Koko Head (Hawaii Kai), Pu'u Nana (Molokai), Pu'u Nianiau (Maui) and Naalehu (Ka'u).

E. <u>Ability to Provide Service at Reasonable Cost and Financial Capability</u>

Because TCI is a new presence in the State with respect to controlling the operations of a cable system, it is too early to assess TCI's ability to provide service at reasonable cost and its financial capability. Corporate management from the prior owners to the new owners is distinctively different. Accordingly, the Director reserves the right to review TCI's ability to provide service at reasonable cost and its financial capability and to impose any and all conditions deemed necessary or appropriate pursuant to section 8.9 of Decision and Order No. 148.

IV. <u>OTHER MATTERS</u>

A. 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 that 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. Therefore, any change in control of TCI shall require the prior approval of the Director.

B. Public, Educational, and Governmental Access.

<u>Hawaii Kai System</u>. Most of the testimonies or comments presented at the Hawaii Kai public hearing on February 1, 1996 centered on providing additional PEG access channels for the Hawaii Kai system as to be on par with the other areas of Oahu. Presently, 'Olelo: The Corporation for Community Television ("Olelo"), the access entity serving the City and County of Honolulu, cablecasts programming on three (3) PEG access channels on Chronicle's Hawaii Kai system via Oceanic Cablevision's microwave facility, and on five (5) PEG access channels on Oceanic Cablevision's system.

Applicants state that existing equipment, and not channel capacity, limits the number of additional channels that may be delivered by Olelo to Hawaii Kai. However, completion of the fiber interconnection between Oceanic Cablevision's system and Chronicle's Koko Head headend will resolve the problem of inadequate equipment and provide the means to deliver additional PEG access programming to Hawaii Kai via Oceanic Cablevision's system. Oceanic indicated that the fiber interconnect will be completed by May 15, 1996.

In response to the community's desire for two additional PEG access channels, Chronicle agrees to activate and make available two (2) additional PEG access channels for its Hawaii Kai system within six (6) months after completion of the fiber interconnect between Oceanic Cable and Chronicle's Koko Head headend. Chronicle also agrees that it will not pass through to subscribers any costs associated with the provision of such channels. TCI agrees to honor and assume Chronicle's agreement and obligations as described herein upon closing of the Merger Agreement. Accordingly, Chronicle shall activate and make available two (2) additional PEG access channels for its Hawaii Kai system within six (6) months after the completion of the fiber interconnect between Oceanic Cable and Chronicle's Koko

Head headend at no cost to subscribers.[4] Upon closing of the Merger Agreement, TCI shall assume and perform Chronicle's obligations as described herein. TCI shall work cooperatively with Olelo and/or Oceanic Cablevision to ensure a smooth launching of the two additional PEG access channels as contemplated herein. In connection therewith, Director's approval shall be required at least 30 days prior to the actual launching of the additional channels.

Maui System. One additional PEG access channel is required to be activated and made available by January 1, 1996 or upon completion of the 40 channel upgrade.[5] With the activation and availability of the additional PEG access channel, there will be a total of three (3) PEG access channels for Maui County. Presently, Chronicle's Maui system carries a channel for Akaku: Maui Community Television ("Akaku") and a channel for Maui Community College ("MCC").

Chronicle agrees to provide up to $125,000 for the purchase of equipment and installation of facilities necessary to cablecast the third PEG access channel to the tri-islands of Maui County at no cost to subscribers. TCI agrees to assume Chronicle's obligation to provide said funds and to prepare the necessary design and plans upon closing of the Merger Agreement.

The launching of the third channel will require cooperative planning by TCI, Akaku, MCC and other members of the Maui PEG Consortium.[6] It is noted that the Maui PEG Consortium ("Consortium") is working on an Access Plan, and that a preliminary report and a final report are required to be submitted to the Director by August 1, 1996 and October 1, 1996, respectively.

Therefore, the issue of launching the third channel e.g., the origination point of the channel, necessary equipment to deliver programming, total cost and means for payment, time table for completion of tasks and launch date, and any other related matter, shall be addressed by TCI and the Consortium and

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[4]The total cost of activating the two (2) additional PEG access channels for the Hawaii Kai system shall not be passed on to subscribers.

[5]The 40 channel upgrade was completed on January 29, 1996. In addition, the launching of the third PEG access channel on the Maui system will make it on par with Hawaiian Cablevision serving the West Maui area.

[6]According to Chronicle, the total cost for launching the third channel will depend upon where that channel will be originated e.g., at Akaku or MCC's facilities, and the type of equipment to be used e.g., fiber, coaxial or microwave.

incorporated into the Access Plan; provided, however, that the technical design of facilities and selection of necessary equipment shall be at the discretion of TCI. Chronicle shall pay up to $125,000 for the purchase of such equipment and installation of facilities,[7] and upon closing of the Merger Agreement TCI shall assume and perform Chronicle's obligations as described herein.

Ka'u System. Pursuant to section 7.4 of Decision and Order No. 148, Chronicle is required to provide two (2) activated channels for PEG access programming on its Ka'u system by January 1, 1996 at no cost to subscribers.[8] Chronicle currently provides one (1) activated PEG access channel on its Ka'u system. Chronicle will make available and activate the second PEG access channel on its Ka'u system within three (3) months after closing of the Merger Agreement. In connection therewith, within 60 days after closing of the Merger Agreement, TCI and Na Leo O' Hawaii, Inc., the PEG access entity serving the island of Hawaii, shall develop and submit to the Director for approval a plan for the design and installation of playback equipment for PEG access programming, including, but not limited to, a timetable for equipment purchase and installation; provided that installation shall be completed within three (3) months after the plan is approved by the Director.

Upon approval of the plan referred to above, Chronicle agrees to provide to Na leo up to $30,000 to purchase playback equipment necessary to cablecast PEG access programming on the Ka'u system at no cost to subscribers. Chronicle also agrees to provide Na Leo with access to and space for the playback equipment within the Ka'u headend facility. TCI agrees to assume and perform Chronicle's obligation to provide said funds upon closing of the Merger Agreement.

On or before January 1, 1997, TCI shall work cooperatively with Na Leo in developing a technical plan for the provision of PEG access programming, including, but not limited to, design, construction, and timetable for completion.[9] TCI shall submit

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[7]The full amount of $125,000 or any portion thereof shall not be passed on to subscribers.

[8]Until such time as PEG access programming is provided over the PEG access channels, Chronicle or TCI may use the same as provided in paragraph (d) of section 7.4 of Decision and Order No. 148.

[9]Na Leo, and not TCI, will be responsible for providing funds for the interconnection i.e., microwave or fiber optic, between Na Leo's facilities and the Ka'u system. Notwithstanding the generality of the foregoing, funding may also be provided by TCI and credited towards its PEG access capital contributions or

the plan to the Director for review and approval on or before March 1, 1997. Upon approval, TCI and Na Leo shall implement the plan as determined by the Director.

As noted above, Chronicle shall pay up to $30,000 for the purchase of necessary playback equipment, and upon closing of the Merger Agreement TCI shall assume and perform Chronicle's obligations as described herein.[10]

PEG Access Fees. Under existing franchise requirements, for the year ending December 31, 1996 and continuing through the duration of the franchise term, TCI is required to contribute an annual Access Fee in an amount equal to three percent (3%) of its annual gross revenues from all of its Hawaii cable systems. Given the current financial crises facing the State and private industry, the existing level of funding for PEG access operations and contributions for facilities and equipment shall not be altered at the present time. The Director reserves the right to reconsider PEG access fees and contributions at any time during the franchise term.

C. Franchise Fees. In connection with the requested approval for the transfer of ownership from Chronicle to TCI, TCI agrees to increase its annual franchise fees by one percent (1%) of its annual gross revenues from all of its Hawaii cable systems. Recent reductions in the level of funding for Hawaii Public Broadcasting Authority ("HPBA") threaten the continued viability of public broadcasting in Hawaii. Accordingly, the additional one percent (1%) franchise fee to be paid by TCI shall be allocated to HPBA, which provides educational, informative, and entertaining programming that is a valuable public resource for the people of the State of Hawaii.

V. CONCLUSION

Based on the information presented in the application, and the evaluation of this information, the Director concludes that it is in the public interest to approve this application for transfer of the cable communications franchise held by Chronicle.

PEG access fee payments.

[10]The full amount of $30,000 or any portion thereof and the total cost of activating the PEG access channels for the Ka'u system shall not be passed on to subscribers.

VI. ORDER

NOW, THEREFORE, the application for the transfer of Chronicle Cablevision of Hawaii's cable franchise to TCI of Hawaii, Inc. dba TCI is hereby APPROVED, subject however, to the closing of the Merger Agreement and to the terms and conditions set forth in this Decision and Order and attached hereto. TCI shall immediately notify the Director in writing of the closing of the Merger Agreement. Except as amended, the provisions of Decision and Order Nos. 148 and 150 and the terms and conditions incorporated therein are hereby ratified and shall remain in full force and effect.

Notwithstanding any provision to the contrary, in the event the Merger Agreement fails to close as contemplated therein or Chronicle Cablevision of Hawaii is not a part of the transaction under the Merger Agreement at closing, and upon receipt by the Director of written notification thereof, this Decision and Order and attached terms and conditions shall be deemed null and void. In any such event, Decision and Order Nos. 148 and 150 in the entirety shall be in full force and effect, and the Director shall have the right to take any and all actions and to issue such orders as the Director deems necessary or appropriate to serve and protect the public interest with respect to cable services for the franchise areas.

DATED: Honolulu, Hawaii, March 22, 1996.

KATHRYN S. MATAYOSHI
Director of Commerce and Consumer Affairs

AMENDED TERMS AND CONDITIONS OF DECISION AND ORDER NO. 148

The Terms and Conditions of Decision and Order No. 148 are hereby amended as set forth below. All provisions of Decision and Order No. 148 as amended by Decision and Order No. 150 and terms and conditions attached thereto that are not amended herein shall remain in full force and effect. Any and all references to Chronicle Cablevision of Hawaii shall be replaced with the term "TCI" as defined herein.

1. Section One, Definitions, is hereby amended by adding a new definition to be designated appropriately therein, which shall read as follows:

> "TCI of Hawaii, Inc. dba TCI" or "TCI" means TCI of Hawaii, Inc., doing business as TCI, incorporated under the laws of Colorado, and the successor in interest of Chronicle Cablevision of Hawaii.

2. Section Two, Franchise Term, is hereby amended by amending paragraph (b) of subsection 2.2 and by adding a new paragraph (c) to subsection 2.2 to be designated immediately after paragraph (b), which shall read as follows:

> (b) Notwithstanding any provision herein to the contrary, the total amount of fees paid in a calendar year, including the total amount of the Annual Fee as specified in Chapter 440G, Hawaii Revised Statutes, the annual Access Fee, and the HPBA Fee, shall not exceed the maximum amount permitted by the applicable provisions of Federal or State law, as the same may be amended throughout the term of this franchise.
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> (c) Commencing April 1, 1996 and continuing for the duration of the franchise term, TCI shall pay an amount equivalent to one percent (1%) of its annual Gross Revenues from all of its Hawaii systems to the Hawaii Public Broadcasting Authority Revolving Fund ("HPBA Fee"). For year ending December 31, 1996, the one percent (1%) HPBA fee shall be paid on February 15, 1997, and for each and every year of the remaining franchise term the one percent (1%) HPBA fee shall be paid annually on February 15. The fee shall be based on TCI's Gross Revenues for the preceding calendar year. The Director may require TCI to submit to an audit by the Director's accountant for purposes of verifying TCI's gross revenues. In connection with the payments required under this paragraph (c), TCI shall submit to the Director verified copies of all payments made to the Hawaii Public Broadcasting Authority Revolving Fund.

3. Subsection 7.4, Access Channels, is hereby amended by amending subparagraph (b)(1), which shall read as follows:

> (1) By November 30, 1996, four (4) additional channels in Hawaii Kai on the island of Oahu.

4. Subsection 7.4, Access Channels, is hereby amended by adding a new paragraph (f) to be designated immediately after paragraph (e), which shall read as follows:

> (f) KHET or any successor broadcast television channel operated by the Hawaii Public Broadcasting Authority shall not be deemed an Access Channel and shall not be counted or included among the Channels required by paragraphs (a) and (b) above.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 187 in Docket No. 96-01 was served upon the following party at the address shown below by mailing the same, postage prepaid, on this 22nd day of March, 1996.

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Patti K. Kodama

Patti K. Kodama
Secretary