

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

In the Matter of Time Warner
Entertainment Company, L.P. dba
Oceanic Cablevision

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Docket No. 96-02

DECISION AND ORDER NO. 188

INTRODUCTION

On November 30, 1988 and December 30, 1988, Decision and Order Nos. 135 and 137, respectively, were issued granting Oceanic Cablevision, Inc., a cable franchise subject to certain terms and conditions. Decision and Order No. 135 was amended by Decision and Order No. 151 issued on June 28, 1991.

On September 25, 1992, the transfer of the cable franchise from Oceanic Cablevision, Inc. to Time Warner Entertainment Company ("TWE"), L.P. dba Oceanic Cablevision was approved pursuant to Decision and Order No. 153. On January 27, 1993, Decision and Order No. 154 was issued, which amended and superseded Decision and Order No. 153.

On March 18, 1994, Decision and Order No. 154 was amended by Decision and Order No. 156. Decision and Order No. 156 was then amended by Decision and Order No. 158 issued on June 30, 1994. Thus, Decision and Order Nos. 154, 156 and 158 (sometimes hereinafter collectively referred to as "Decision and Orders") provide the terms and conditions applicable to the cable

franchise held by TWE. TWE's franchise area covers the island of Oahu except the Hawaii Kai area (census tracts 1.02, and 1.04 through 1.08 inclusive).

'Olelo: The Corporation for Community Television ("Olelo"), a Hawaii non-profit corporation,¹ has requested the Director to require TWE to include revenues derived from its military subscribers as part of the Access Operating Fee contributions under section 5.1 of Terms and Conditions of Decision and Order No. 154. TWE has, and continues to, exclude military revenues from its Access Operating Fee contributions to Olelo.

DISCUSSION

Pursuant to section 5.1 of Terms and Conditions of Decision and Order No. 154, TWE is required to contribute to Olelo, as the designated access entity, a yearly Access Operating Fee in an amount equal to three percent (3%) of its annual Gross Revenues, as such terms are defined in section 1 of Terms and Conditions of Decision and Order No. 154, for public, educational, and governmental ("PEG") access uses.²

¹By that certain Agreement Between The Department of Commerce and Consumer Affairs and 'Olelo: The Corporation For Community Television, executed by the parties thereto on January 19, 1990, Olelo is the designated PEG access entity to receive funds contributed by TWE for PEG access purposes.

²Pursuant to the Decision and Orders, TWE is also required to contribute annually to the Hawaii Public Broadcasting Authority an amount equal to one percent (1%) of its annual Gross Revenues, and to contribute annually to the State an amount equal to one percent (1%) of its annual revenues derived from the basic service tier and

Based upon information submitted by TWE, the Director understands that TWE has entered into separate agreements with the Navy, Marine Corps, and Army for the provision of cable services within their respective bases and installations. Each agreement requires TWE to pay to the military branch an amount equal to five percent (5%) of TWE's annual gross revenues derived from military subscribers within the military branch's bases and installations. The three military branches do not allocate or contribute any portion of the amounts received from TWE to support PEG access³, nor is any portion allocated to the State for the operation of its cable regulatory functions.

Counsel for Olelo and TWE have each submitted papers in support of their respective positions. In summary, Olelo advocates that the State has the requisite authority to assess and collect PEG access fees from TWE's military subscribers, and TWE does not agree. After a careful review of the information presented by the parties, it is not readily apparent that the federal government has exclusive jurisdiction over certain military enclaves on the island of Oahu, or that the State has

associated equipment and installation charges.

³Although the military subscribers do not contribute to the operations of Olelo, the Director understands that the military subscribers receive PEG access programming cablecast by Olelo via TWE's cable system, and that they are permitted by Olelo to use its facilities.

concurrent jurisdiction over the same, pursuant to section 16(b) of the Hawaii Statehood Act.⁴

Section 16(b) of the Hawaii Statehood Act (Act of March 18, 1959, Pub.L.No. 86-3, 73 Stat.4), states in pertinent part:

Notwithstanding the admission of the State of Hawaii into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise of Congress of the United States of the power of exclusive legislation, as provided by article 1, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to admission of said State, are controlled or owned by the United States ..., whether such lands were acquired by cession and transfer to the United States by the Republic of Hawaii and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Hawaii for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: Provided, ... (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Hawaii, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority;

and (iii) that such power of exclusive legislation shall vest and remain in the United States only so long

⁴The dispositive issue is whether the State has concurrent jurisdiction with the federal government over the tracts of land in question, pursuant to section 16(b) of the Hawaii Statehood Act. In the event it is finally established or determined that the State has concurrent jurisdiction, other issues regarding the construction and interpretation of the Decision and Orders and applicable federal law and rules, the status of military branches as certified local franchising authorities, dual authority of the State and the military branches for purposes of the federal Cable Act (47 U.S.C. section 521 et seq., as amended), and other related matters, should be addressed at such time by the parties, the State, and the military authorities.

as the particular tract or parcel of land involved is controlled or owned by the United States and used for Defense or Coast Guard purposes; Provided, However, That the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense. (Emphasis added).

The legislative history of section 16(b) indicates that Congress intended to accord the State concurrent jurisdiction over tracts of land in Hawaii owned or controlled by the federal government at the time the State was admitted to the Union, and to reserve exclusive jurisdiction to the federal government over military installations that have been declared "critical areas" by the President and/or the Secretary of Defense.⁵

⁵Senate Report No. 80 from the Committee on Interior and Insular Affairs, states in pertinent part:

Subsection (b) reserves to Congress the right to exercise its power of exclusive legislation over lands which, immediately prior to admission of Hawaii into the Union are owned or controlled by the United States and held for defense or Coast Guard purposes. The State is authorized, however, to serve process on these lands and, until Congress Acts to exercise its reserved power, to exercise all of its other usual functions in the area. The Federal power of exclusive legislation expires when the area ceases to be used for defense or Coast Guard purposes. Notwithstanding other provisions of this subsection, the United States will have sole and exclusive jurisdiction over any military installations that are determined to be critical areas by the President or the Secretary of Defense.

... .

S.Rep.No. 80, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Admin. News 1346, 1365 (emphasis added).

Thus, before the dispositive jurisdictional issue may be resolved, it must be determined whether the federal government owns or controls the tracts of land in question, whether the federal government acquired such interest prior to Hawaii's admission to the Union, and whether such tracts of land have or have not been declared "critical areas." See State v. Thomas, 8 Haw.App. 497 (1991) cert. denied 72 Haw. 619 (1991).⁶

The tracts of land covered by the agreements between TWE and the three military branches include those within the bases and installations of the Navy, Marine Corps, and Army on the island of Oahu.⁷ Except for Iroquois Point, the extent of the federal

⁶In State v. Thomas, the appellate court determined that Iroquois Point, which is contiguous to Pearl Harbor, was purchased by the federal government prior to the State's admission to the Union. In holding that the State has concurrent jurisdiction with the federal government over Iroquois Point, the appellate court stated that although Pearl Harbor and its surrounding contiguous federal lands have been declared "vital" to the national defense, such a declaration is not equivalent to a declaration of "critical" as required under the last proviso of section 16(b) of the Hawaii Admissions Act. 8 Haw. App. at 504 and 505.

⁷According to TWE, Iroquois Point is one of many areas covered by TWE's agreement with the Navy. However, because of the total land area in question and the issues described in footnote 4, supra, no action will be taken regarding Iroquois Point until the jurisdictional issue discussed herein is finally resolved with respect to all tracts of land in question. Notwithstanding the foregoing, the Director, at any time, may take any action deemed necessary and appropriate with respect to Iroquois Point and other tracts of land in Hawaii owned or controlled by the federal government that have not been declared "critical areas."

government's ownership or control of the remaining tracts of land in question appears to be uncertain.⁸

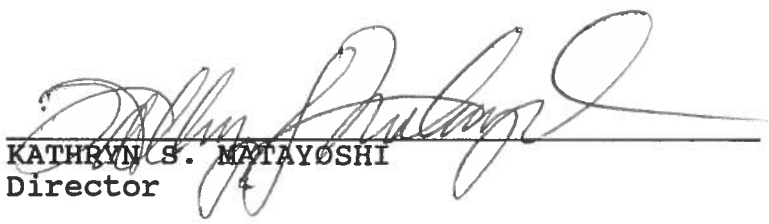
Olelo has not presented information sufficient to establish that the federal government owns or controls all of the remaining tracts of land in question and that such ownership or control was acquired prior to Hawaii's admission to the Union. Furthermore, neither Olelo nor TWE has presented information sufficient to establish that all of the remaining tracts of land in question have been declared "critical areas" as provided by the last proviso of section 16(b) of the Hawaii Statehood Act, or that such tracts of land have not be so declared.

In light of all of the above, TWE may continue to exclude military revenues from its annual Access Operating Fee contributions to Olelo until such time as otherwise directed by the Director, or as ordered by a court of competent jurisdiction.

⁸It is noted that the extent of the federal government's military land holdings (owned or controlled) is not clear. For example, in its report to the State Legislature, the Senate Committee on Military and Civil Defense, found, among other things, "extremely divergent statistics regarding federally owned or controlled lands in Hawaii ranging from the GSA's 711,699 acres, to the Soil Conservation Corp's 341,000 acres, to the State/City and County's figure of 329,000 acres." Report to the Fourteenth Legislature, State of Hawaii, On the Feasibility of A Land Use Review of All Military Properties In Hawaii Determined To Be Marginally Utilized, or Considered "Surplus" By The Federal Government, To Be Conducted by The Senate Committee On Military And Civil Defense, at pages 3-4. See Review of Project "Fresh" Report on Military Lands For Release, Department of Land & Natural Resources, October, 1973.

NOW, THEREFORE, it is hereby ordered that Olelo's request is denied without prejudice. Nothing herein shall be deemed or construed to adversely affect any of the State's rights with respect to TWE's military revenues and matters discussed herein, and any related matter not specifically raised by the parties or discussed herein. The terms and conditions of the Decision and Orders are hereby ratified and shall remain in full force and effect.

DATED: Honolulu, Hawaii, June 7, 1996



KATHRYN S. MATAYOSHI
Director

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order No. 189 in Docket No. 96-02 was served upon the following persons at the address shown below mailing the same, postage prepaid, on June 7, 1996.

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PATTI K. KODAMA
Secretary

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

In the Matter of Time Warner)
 Entertainment Company, L.P. dba)
 Oceanic Cablevision)
)
) Docket No. 96-02
)
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**ORDER DENYING 'OLELO: THE CORPORATION FOR
COMMUNITY TELEVISION'S MOTION FOR RECONSIDERATION
OF DECISION AND ORDER NO. 188**

On June 7, 1996, Decision and Order No. 188 ("Order No. 188") was issued concerning whether Time Warner Entertainment Company, L.P. ("TWE") dba Oceanic Cablevision is required to include revenues derived from its military subscribers as part of its Access Operating Fee contributions under section 5.1 of Decision and Order No. 154 pertaining to TWE, to 'Olelo: The Corporation for Community Television's ("Olelo").

On June 20, 1996, Olelo filed its Motion For Reconsideration of Order No. 188, alleging that Olelo did not file a petition for relief requesting a decision on this issue. Thus, according to Olelo, a decision should not have been made, and Order No. 188 violated Title 16, Chapter 201, Hawaii Administrative Rules ("HAR").

In its Motion for Reconsideration, Olelo asserts that HAR Chapter 16-201 contains the uniform rules of administrative procedure applicable to "all proceedings brought before any authority" of the Department of Commerce and Consumer Affairs ("Department"). HAR section 16-201-1. Olelo also asserts that pursuant to HAR section 16-201-3, a petition for permitted relief must be filed to initiate a proceeding.

Although a petition once filed, must be followed by a proceeding, there is no requirement that limits proceedings to arise only from petitions. In fact, pursuant to section 440G-12(e), Hawaii Revised Statutes ("HRS"), the Director is authorized to:

institute all proceedings and investigations, hear all complaints, issue all process and orders, and render all decisions necessary to enforce this chapter or the

rules and orders adopted thereunder, or to otherwise accomplish the purposes of this chapter. (Emphasis added.)

Olelo did not file a petition for relief per se. The Director, however, is not precluded from exercising the Director's statutory powers and authority to initiate a proceeding or an investigation, consider materials submitted by interested parties, and render a decision and issue an order such as Order No. 188 clarifying Decision and Order No. 154.

Because Olelo raised and pursued the military revenue issue, substantial arguments and briefings provided by Olelo and TWE over the course of several years were carefully considered before Order No. 188 was issued. It is noted that Olelo itself advocated that TWE should be required to include revenues derived from its military subscribers as part of TWE's Access Operating Fee contributions.

Furthermore, the correspondence and materials submitted by Olelo clearly reveal that Olelo repeatedly requested the Department's position and/or determination on the military revenue issue.¹ The rendering of a decision and issuance of an order in response to Olelo's request for the Department's position and/or determination is not only authorized by HRS section 440G-12(e), it is also consistent with section 11.10 of Decision and Order No. 154. That section authorizes the Director to issue subsequent orders concerning TWE's franchise obligations such as Order No. 188, and states in pertinent part:

The Director may, from time to time, issue such orders governing TWE as [the Director] shall find reasonably necessary or appropriate pursuant to and in furtherance of the purposes of this Order. The Director's authority shall not be used in a manner inconsistent with the provisions of this Order. Further, any action to be taken by the Director regarding this Order shall be taken in accordance with the applicable provisions of federal or State law.

¹For example, Mr. Thomas J. Kappock, III, Director and Treasurer of Olelo, in his August 12, 1994 letter to the former Cable Television Division Administrator, specifically requested "DCCA's position" on the military revenue issue. This letter was not contained in the exhibits attached to Olelo's Motion for Reconsideration.

Contrary to Olelo's assertion, there was no procedural error or irregularity with respect to Order No. 188. Order No. 188 was duly issued in accordance with HRS section 440G-12(e), and section 11.10 of Decision and Order No. 154. The Director's response to Olelo's request for a "position" by labelling it an "order" instead of "Statement of Position" did not create error.

THEREFORE, IT IS HEREBY ORDERED that Olelo's Motion For Reconsideration is denied.

Dated: Honolulu, Hawaii July 12, 1996.




KATHRYN S. MATAYOSHI
Director

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order Denying 'Olelo: The Corporation For Community Television's Motion for Reconsideration was served upon the following persons at the address shown below by mailing the same, postage prepaid, on July 12, 1996.

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