



made no later than fourteen (14) days prior to the day of the hearing (i.e., by December 2, 1999). The Respondent failed to make any disclosure to the Division.<sup>1</sup>

In accordance with the Notice, an administrative hearing was held on December 16, 1999 pursuant to Hawaii Revised Statutes ("HRS") chapters 26, 91, and 440G, and HAR chapters 16-131, 16-132, and 16-201. The Division (or Petitioner) was represented by Rodney J. Tam, Deputy Attorney General, and Sanford T. Inouye, Staff Attorney for the Division, and the Respondent was represented by Mike Carroll, its president.<sup>2</sup> The Director of Commerce and Consumer Affairs ("**Director**") presided over the matter and accepted into evidence Petitioner's exhibits 1 through 11 into evidence.

Although not required under HAR § 16-201-41, a Proposed Order was issued on or about January 10, 2000 and the Respondent was given the opportunity to provide written exceptions to the Proposed Order. On January 25, 2000, the Respondent filed its written "exceptions" dated January 24, 2000. On February 8, 2000, the Petitioner filed its Statement in Support of the Proposed Order.

After careful review of the Respondent's written "exceptions" and the Petitioner's Statement in Support, no modifications to the Proposed Order are warranted.<sup>3</sup> Therefore,

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<sup>1</sup> At the hearing, the Respondent did not submit any documents in support of the Respondent's position on or opposition to the Petition (although the Respondent mentioned a Time-Warner Decision and Order at one point during the hearing).

<sup>2</sup> The Notice informed the Respondent that it could retain legal counsel or represent itself at the hearing, and the Respondent chose to have Mr. Carroll as its representative.

<sup>3</sup> The Respondent's written "exceptions" can be fairly characterized as an attempt to explain and remedy some of the violations set forth in the Petition. However,

having considered the evidence and arguments presented, and the entire record, the Director hereby renders the following Findings of Fact, Conclusions of Law, and Final Order.

## II. FINDINGS OF FACT

1. The Respondent is an Ohio corporation registered to transact business in the State of Hawaii on or about July 11, 1997, and the Division's records currently list the Respondent's business address as: 5090 Hana Highway, Haiku, Maui, Hawaii 96708.

2. On December 10, 1997, DCCA issued Decision and Order No. 214 ("D&O 214") which granted the Respondent a five year cable television franchise for certain areas in Haiku and Kula on Maui. See, Petitioner's Exhibit 1. The Respondent accepted D&O 214 in a fax transmittal cover sheet dated December 9, 1997 to the Division. See, Petitioner's Exhibit 11.

3. Section 7.4 of D&O 214 required the Respondent to provide three (3) channels<sup>4</sup> for the cablecasting of public, educational, and governmental ("PEG") access on Respondent's system by December 10, 1998. The Respondent failed to comply with this requirement. In a June 16, 1999 letter to the Division, the Respondent states that "we

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the Respondent's attempt to remedy is untimely and even if the Respondent's attempted cure of some of the violations set forth in the Petition is accepted, the Respondent still failed to comply with all of the provisions of D&O 214, and HAR chapters 16-131 and 16-132. Accordingly, the Respondent's "exceptions" are not adopted, nor are they to be explicitly or implicitly construed, as Findings of Fact or Conclusions of Law.

<sup>4</sup> See, HRS § 440G-8.2(f) ("The cable operator shall designate three or more channels for public, educational, or governmental use"). See also, HAR §§ 16-131-32, 16-131-33, and 16-131-34.

are in the process of negotiating with Time Warner Entertainment to interconnect our systems for the purpose of accessing the PEG channels". See, Petitioner's Exhibit 2.

4. HAR § 16-132-2(b) required the Respondent to pay the State of Hawaii's annual fee provided in HRS § 440G-15 by June 1, 1999 and December 1, 1999. The Respondent failed to comply with this requirement. At the hearing, the Respondent stated that the Respondent was not aware that this fee was required to be paid.

5. HAR § 16-131-43 required the Respondent to file a report on ownership (e.g., a list of all shareholders and undisclosed principals holding one or more per cent of the corporation's shares, etc.) on or before January 31 of each year with the Division. The Respondent failed to comply with this requirement.

6. HAR § 16-131-44 required the Respondent to submit financial statements (e.g., balance sheet, statement of income and equity, etc.) within one hundred twenty days after the close of the Respondent's fiscal year to the Division. To the extent not otherwise provided in HAR § 16-131-44, section 4.4 of D&O 214 required the Respondent to submit its annual financial statements for the preceding calendar year by April 30, 1999. The Respondent failed to comply with this requirement. At the hearing, the Respondent admitted that it has not complied with this requirement and stated that the Respondent was not sure when the end of its fiscal year was.

7. HAR § 16-131-45 required the Respondent to submit a status report on its current construction on or before the fifteenth day of each month, and an annual construction report by March 31, 1999 to the Division. The Respondent submitted reports for the months of January, February, March, and April 1998. The records of the Division

indicate that the Respondent failed to submit reports for the months of May through December 1998, and January through November 1999. At the hearing, the Respondent admitted that the Respondent was not aware that the reports are due even if there has been no construction activity.

8. HAR § 16-131-46 required the Respondent to file a report on subscriber complaints on or before March 31, 1999 with the Division. The Respondent failed to comply with this requirement. At the hearing, the Respondent stated that the Respondent was not aware of this requirement.

9. HAR § 16-131-47 required the Respondent to file an annual compilation of monthly reports of service, quality, and testing programs, together with remedies for deficiencies on or before March 31, 1999 with the Division<sup>5</sup>. The Respondent failed to comply with this requirement.

10. HAR § 16-131-48 required the Respondent to file reports on production and programming activities on or before January 31, 1999 with the Division. The Respondent failed to comply with this requirement.

11. HAR § 16-131-49 required the Respondent to submit a report on all major system faults and interruptions, and corrective actions taken, on or before the fifteenth day of each month to the Division. The Respondent failed to comply with this requirement.

12. HAR § 16-131-50 required the Respondent to file quarterly reports regarding subscriber activity, revenues, expenses, assets, liabilities, equity accounts, cable operator

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<sup>5</sup> The Petition does not allege that the Respondent failed to file an annual proof of performance test with the Division.

personnel, services/programming provided by the cable operator, quality of service of the cable system, etc. on or before the last day of the month subsequent to the ending of the quarter with the Division. The Respondent was required to file reports for quarters ending December 31, 1998, March 31, 1999, and June 30, 1999. The Respondent failed to comply with this requirement. At the hearing, the Respondent admitted that the Respondent has not complied with this requirement.

13. Section 9.2 of D&O 214 required the Respondent to file and implement a published schedule of terms, conditions, and charges for the leasing of channels for commercial use on or before December 10, 1998 with the Division. The Respondent failed to comply with this requirement.

14. Section 8.1 of D&O 214 required the Respondent to maintain and operate within its service area at least one customer service office. The customer service center is a basic requirement and the Respondent was required to provide it as soon as service was provided to subscribers. A customer bill of the Respondent for the period July 5, 1998 to August 5, 1998 (that was obtained by the Division) indicates that the Respondent provided cable television service since at least July 1998. See, Petitioner's Exhibit 3.

In a letter dated June 16, 1999 to the Division, the Respondent stated that "[b]y September 1, 1999, [Cable Partners] expects to establish a retail location as close as possible to our franchise area . . .", thereby admitting that they have not complied with this requirement. At the hearing, the Respondent confirmed that it has not complied with the customer service requirement, and the Respondent's position was that it would not be economically feasible until the Respondent had 100 to 120 subscribers.

Because the Respondent started providing service on or about July 1998, the Respondent has failed to comply with this requirement since at least that time.

15. D&O 214 required the Respondent to construct approximately thirty (30) miles of cable infrastructure in the Haiku and Kula areas on Maui in two (2) phases by December 10, 1998. Phase 1 covered 13 miles in Haiku and was to have been completed by April 10, 1998. Phase 2 covered another 12 miles in Haiku and 5 miles in Keokea, Kula and was to have been completed by December 10, 1998.

In an April 29, 1998 letter to the Division, the Respondent requested that the deadline to complete and activate Phase 1 be extended to August 31, 1998. See, Petitioner's Exhibit 4. This extension was granted by the Division.

No other extensions or changes to Respondent's obligations were granted by the Division. The Respondent was still required to complete the entire build out of its cable television system by December 10, 1998.

By letters dated February 26, 1998, April 28, 1998, July 6, 1998, April 29, 1999, and May 21, 1999 to the Respondent (see, Petitioner's Exhibits 5 through 9), and meetings with the Respondent on or about January 27, 1999, March 24, 1999, and May 20, 1999, the Division repeatedly demanded that the Respondent comply with the construction requirements of D&O 214.

In the May 21, 1999 letter to the Respondent, the Division mentioned a modification of the Respondent's franchise area that was discussed between the parties; however, the Division did not at any time agree to modify the Respondent's franchise area.

On or about January 4, 1999, the Division's engineer conducted a limited inspection

of the Respondent's system and estimated that the Respondent only constructed approximately ten (10) to twelve (12) miles of the required thirty (30) miles of cable infrastructure.

In a March 5, 1999 letter to the Division, the Respondent admitted that "[w]e have not completed building the entire area required by the State Cable Board in Docket 214. As of the date we are unclear if we will ever complete building the entire area". See, Petitioner's Exhibit 10. At the hearing, the Respondent confirmed that the Respondent has not complied with the construction requirements of D&O 214.

16. At the hearing, the Respondent stated that the Respondent currently has approximately seventy (70) subscribers. The Respondent also stated that the Respondent has collected "HI Franchise Fees", "HPBA Fee", and "Access Fee" from its subscribers and is holding all of these collected franchise fees.

### **III. CONCLUSIONS OF LAW**

In an administrative proceeding of this nature, the provisions of HRS § 91-10(5) and HAR § 16-201-21(d) require that the allegations in the Petition be proven by a preponderance of the evidence in order to establish that the Respondent has violated the law and is subject to having its franchise revoked.

The Division alleges that the above-described acts and/or omissions by the Respondent constitute violations of HRS § 440G-9(b) which provides in pertinent part as follows:

"(b) Any cable franchise issued hereunder after hearing in accordance with chapter 91 may be revoked, altered, or suspended by the director as the director deems necessary on



any of the following grounds:

- \* \* \* \*
- (5) For violation of the terms of its cable franchise;
- (6) For failure to comply with this chapter or any rules or orders prescribed by the director;"

Haw. Rev. Stat. § 440G-9(b) (1993).

The preponderance of the testimony and documentary evidence clearly show that the Respondent failed to comply with specific requirements of D&O 214 and the laws and rules that govern cable television franchises.

The Director concludes that these acts or omissions constitute violations of HRS § 440G-9(b)(5) and (6), and demonstrate a pattern of noncompliance and a continuing course of conduct that is in contravention with the requirements of D&O 214, HRS chapter 440G, and HAR chapters 16-131 and 16-132.

**IV. FINAL ORDER**

Based on the above Findings of Fact and Conclusions of Law, the Director hereby:

1. Revokes the Respondent's cable television franchise for five (5) years and orders that:
  - a. The Respondent shall cease and desist providing cable television services to its subscribers within sixty (60) calendar days from the date the Respondent receives this Final Order (the five (5) year revocation period shall begin from this period of time);
  - b. The Respondent shall notify its current subscribers in writing within thirty (30) calendar days from the date the Respondent receives this

Final Order that the Respondent will cease all cable television operations by the expiration of the above sixty (60) day period (the Respondent shall inform subscribers of the specific date that its cable television service will terminate);

- c. The Respondent shall refund a pro-rated portion (if any) of the monthly subscription fee to subscribers for the month that service ceases. This refund shall be mailed to subscribers within ten (10) calendar days at the end of that month.

If the Division receives any subscriber complaint regarding the refund (e.g., the refund was not received, the refund amount is incorrect), the Division may audit the Respondent's books and records to verify the amount of the refunds and that the refunds were timely sent to subscribers. The Respondent shall be responsible for the reasonable costs incurred by the Division (e.g., the cost of a certified public accountant) in auditing the Respondent's books and records, and the Respondent shall pay for these costs by cashier's check or money order made payable to DCCA within ten (10) calendar days from the date the Respondent receives an invoice from the Division.

The Respondent shall keep its books and records intact and

available to the Division upon demand (while winding up its cable television operations and thereafter);

- d. The Respondent shall return the "HI Franchise Fee", "HPBA Fee", and "Access Fee" collected from subscribers but not paid to the State, HPBA, and PEG access entity within ten (10) calendar days from the end of the month that the Respondent ceases its services;
- e. The Respondent shall remove its facilities (i.e., its wires, cables, etc.) from the public rights-of-way and other public areas (i.e., highways, streets, etc.), and restore the areas to their original or an acceptable condition in accordance with HRS § 440G-8.2(g). The Respondent shall complete the removal and restoration within one hundred eighty (180) calendar days from the date the Respondent receives this Final Order. In addition, the Respondent shall exercise due and reasonable care while removing its facilities, and shall be subject to the indemnification provisions in HRS § 440G-8.2(d).

If the Respondent fails to comply with this requirement, the Respondent's facilities shall be deemed abandoned and the Respondent shall be liable for the cost of removal in accordance with HRS § 440G-8.2(g); and

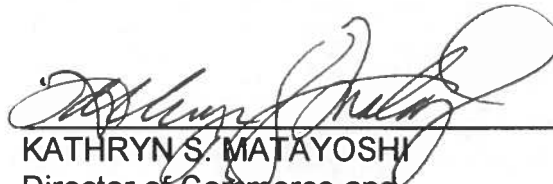
- f. The Respondent shall cooperate with the Division and act reasonably in the winding up of its affairs, and submit written certification that it

has complied with all of the requirements thereof to the Division within one hundred eighty (180) calendar days from the date that the Respondent receives this Final Order; and

2. Fines the Respondent FIVE THOUSAND AND NO/100 DOLLARS (\$5,000.00); provided that this fine shall be stayed as long as the Respondent fully complies with the provisions of this Final Order.

If the Respondent fails to comply with any provision of this Final Order, the stay shall be automatically lifted and the entire amount of \$5,000 shall be immediately due and payable to DCCA. The fine shall be paid by cashier's check or money order made payable to DCCA, and shall be a precondition to any new cable television franchise in the future.

DATED: Honolulu, Hawaii, March 9, 2000.



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KATHRYN S. MATAYOSHI  
Director of Commerce and  
Consumer Affairs