

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

In the Matter of the Application)
of)
)
TELE-COMMUNICATIONS, INC. AND)
AT&T CORP.)
)
For Change In Control of the Cable)
Franchise Held by TCI of Hawaii, Inc.)
_____)

DECISION AND ORDER NO. 239

I. Introduction

The State has accepted Tele-Communications Inc. and AT&T Corp.'s application for change in control of the cable franchise held by TCI of Hawaii, Inc., a subsidiary of Tele-Communications, Inc.¹

In March of 1996, the Director approved the transfer of the cable franchise held by Chronicle Cablevision of Hawaii to TCI of Hawaii, Inc. covering 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. TCI of Hawaii, Inc.'s cable franchise expires on December 31, 2000.

¹ On September 14, 1998, AT&T Corp. and Tele-Communications, Inc. filed a joint application under 47 U.S.C. section 310(d), requesting Federal Communications Commission approval of the transfer of control to AT&T Corp. of licenses and authorizations such as cable television relay services, private land mobile radio services, etc., controlled by Tele-Communications, Inc. and its affiliates and subsidiaries. As of the date hereof, the Federal Communications Commission has not issued an order on that joint application.

Pursuant to that certain Agreement and Plan of Restructuring and Merger ("Merger Agreement") among AT&T Corp., Italy Merger Corp. and Tele-Communications, Inc., dated as of June 23, 1998, AT&T Corp. will become the parent company of Tele-Communications, Inc. In general, the Merger Agreement contemplates several transactions in restructuring Tele-Communications, Inc.'s holdings and assets, as well as exchanges or transfer of assets between the "TCI Group" and the "Liberty/ Ventures Group". As part of the proposed merger, TCI Group stocks and Liberty Media stocks will be converted to AT&T stock.

According to Applicants, Tele-Communications, Inc. will continue to exist as a corporate entity, but certain of Tele-Communications, Inc. and AT&T Corp.'s services will be restructured into a new unit called "AT&T Consumer Services." In addition, Applicants state that all cable franchises will continue to be held by the current franchisee (e.g., for Hawaii it would be TCI of Hawaii, Inc.), and no cable franchises will be transferred as a result of the proposed merger. Closing of the Merger Agreement is anticipated to occur by April 30, 1999.

Applicants state that following the closing of the proposed merger the organizational structure will be as follows: Tele-Communications, Inc. will become a wholly owned subsidiary of AT&T Corp.; Tele-Communications Inc. will own 89.792% of the common stock of TCI Holdings, Inc.; TCI Holdings, Inc. will continue to be the sole shareholder of TCI West, Inc.; and TCI West, Inc. will continue to be the sole shareholder of TCI of Hawaii, Inc.

In the subject application, Tele-Communications, Inc. and AT&T Corp. (sometimes hereinafter collectively referred to as "Applicants") propose to cause TCI of Hawaii, Inc. to maintain and fulfill its current franchise obligations, and they do not propose to upgrade the cable systems nor do they seek an extended franchise term.

In addition to the subject transfer application, there are two other matters currently pending before the Director regarding the cable franchise held by TCI of Hawaii, Inc. First, on January 8, 1998, TCI of Hawaii, Inc. initiated the cable franchise renewal process as provided under federal law. The State has opened the ascertainment period to identify future cable-related needs and interests and to review the cable operator's performance of its current franchise obligations, which will remain open until closed by the State. The renewal process continues to be ongoing, and as a distinct and separate proceeding it will not be affected in any manner by this Decision and Order.

Second, on January 8, 1999, the State accepted Time Warner Entertainment Company, L.P.'s application for transfer of the cable franchise held by TCI of Hawaii, Inc. Similar to the franchise renewal described above, the Time Warner Entertainment Company transfer application is a distinct and separate proceeding and it will not be affected in any manner by this Decision and Order.

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

- (a) Ka'u, Hawaii - November 16, 1998, at 5:00 p.m., Ka'u High and Pahala Elementary School;
- (b) Molokai, Lanai, and Hana - November 17, 1998, at 6:30 p.m. via two-way video conference from Maui Community College, Media Center with Maui Community College, Molokai Education Center; Maui Community College, Lanai Education Center; and Maui Community College, Hana Education Center;
- (c) Maui - November 18, 1998, at 5:30 pm, Maui Arts and Cultural Center, Kahului; and
- (d) Hawaii Kai, Oahu - November 19, 1998, at 6:30 P.m., Koko Head Elementary School.

Notices of the public hearings were published on October 25, 1998 and November 1, 1998, in the Hawaii Tribune Herald, The Advertiser, and the Maui News. Applicants placed copies of the transfer application for review during normal business hours at public libraries in communities within TCI of Hawaii's franchise areas, the offices of TCI of Hawaii, Inc., and at the Cable Television Division, Department of Commerce and Consumer Affairs.

II. THE LAW

A. Federal law

The transfer of a cable franchise including change in control 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, as amended (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. State law

The regulatory powers of the Director regarding the transfer of a cable 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 including the transfer of control whether by change in ownership or otherwise. 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, 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 Hawaii Cable Law provides 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. Any change in control of TCI of Hawaii, Inc. or any other franchised cable operator shall require the prior approval of the Director.

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 Decision and Order No. 187 the Director noted several areas within the franchise areas where TCI of Hawaii, Inc. does not provide cable service. Applicants state that such areas do not meet TCI of Hawaii, Inc.'s line extension policy of 40 homes per mile. This remains a concern as cable service with advanced technology and informational programming such as educational distant learning and 24 hour news programming becomes more than strictly entertainment, particularly in areas considered as rural where population density may not reach 40 homes per mile. However, because of the open renewal process and transfer application of Time Warner Entertainment Company, L.P. regarding TCI of Hawaii, Inc.'s cable franchise, TCI of Hawaii, Inc.'s line extension policy of 40 homes per mile and all other matters will be addressed at either one of those proceedings.²

² The effectuation of Tele-Communications, Inc. merger with AT&T Corp. is primarily within the control of Applicants, subject to requisite governmental approval. In the event the proposed merger is not effectuated for whatever reason, the concerns described herein and other matters will be addressed during the review of the Time Warner Entertainment Company, L.P. transfer application. If Time Warner Entertainment Company's acquisition of TCI of Hawaii cable systems is not effectuated for whatever reason, all such concerns and other matters will be addressed during the open franchise renewal process with TCI of Hawaii, Inc.

B. Suitability of the Applicant

Tele-Communications, Inc. is considered one of the largest multiple system owners in the United States with cable systems in 44 states, District of Columbia and Puerto Rico, and AT&T Corp. is considered the largest provider of domestic and international long distance telephone service in the United States. As noted previously, Applicants have "no plans to change the service and operations of those systems as a consequence of acquiring control of [Tele-Communications, Inc.], and AT&T expects that [Tele-Communications, Inc.] will continue to manage those cable systems with the same personnel, management and resources."³

Following the closing of the Merger Agreement, Applicants intend to create an "AT&T Consumer Services" unit with its own officers and directors. According to Applicants, the unit will include certain of AT&T's current residential consumer business and Tele-Communications, Inc.'s (TCI Group) assets such as cable systems of its subsidiaries and affiliates and high-speed Internet access. Plans for this unit have not yet been finalized. In light of the present uncertainty of the unit's structure and control of the services to be provided, the Director will continue to monitor the operations of TCI of Hawaii, Inc. 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. Operational Ability of the Applicant

As noted above, Applicants do not contemplate any significant changes with respect to the operations of TCI of Hawaii, Inc.'s cable systems, and they expect management of the cable systems will remain the same. Staff at TCI of Hawaii, Inc. have worked cooperatively with the Department in resolving subscriber complaints and other matters involving the operations of the cable systems.

It is also noted that TCI of Hawaii, Inc. provided two additional PEG access channels on its Hawaii Kai cable system, one additional PEG access channel on its cable systems serving Maui County, activation of second PEG access channel on its Ka'u cable system, and built out its cable plant to and within Kalama'ula Hawaiian Homestead, Molokai, all as provided in Decision and Order No. 187.

³ Applicants' Response to First Request for Clarification/Supplemental Information, at page 5, filed on December 2, 1998.

Applicants do not currently plan to upgrade TCI of Hawaii, Inc.'s cable systems within a time certain because of the pending Time Warner Entertainment Company transfer application for the acquisition of those cable systems.⁴ It is noted that except for its Hawaii Kai cable system (recently upgraded to 750 Mhz bandwidth with maximum of 80 analog channels), each of TCI of Hawaii's cable systems serving Maui, Molokai and Lanai is designed at 330Mhz bandwidth (maximum of 41 analog channels), and the Ka'u system is designed at 300 Mhz bandwidth (maximum of 36 analog channels). Upgrades for TCI of Hawaii, Inc.'s cable systems will be addressed during either the franchise renewal process with TCI of Hawaii, Inc. or the transfer process with Time Warner Entertainment Company, L.P. for the cable franchise held by TCI of Hawaii, Inc.

D. Technical Ability of the Applicant

In connection with the subject transfer application, TCI of Hawaii, Inc.'s cable systems were tested for compliance with applicable state and federal technical standards. After several rounds of testing, all cable systems were eventually found to meet the minimum state and federal technical standards.⁵

Under Hawaii Cable Law a cable operator is required to provide, safe, reliable and adequate cable services. The Maui cable system is designed for maximum bandwidth of 330 Mhz or maximum of 41 analog channels, but it currently has 46 active analog channels. As such, "frequency roll-off at upper band limits" will occur.⁶ In addition, the Maui system utilizes seven microwave receive sites throughout the island and long cascade active devices, all of which require higher maintenance than the other TCI of Hawaii cable systems.⁷

⁴ Applicants' Response to First Request for Clarification/Supplemental Information, at page 4, filed on December 2, 1998.

⁵All TCI of Hawaii, Inc. cable systems were first tested on August 24-26, 1998, and September 14-18 and 24, 25 and 28, 1998. Subsequently, only the Maui cable system required retesting. Following the second retesting conducted during January 25-27, 1999, the Maui cable system was found to meet the minimum state and federal technical standards.

⁶ Applicants' Response to First Request for Clarification/Supplemental Information, at pages 6-7, filed on December 2, 1998.

⁷ Id.

The Director understands that with the assistance of technical experts from a mainland affiliate, TCI of Hawaii was able to modify its Maui system in mid January 1999 by replacing and adding active and passive devices or components to correct certain problems associated with frequency roll-off at the higher bandwidth and related matters. However, the Director is concerned whether that modification will be for the long or short term. Accordingly, periodic testing of the Maui cable system may be conducted by the State at any time to ensure that the Maui cable system provides safe, reliable and adequate cable services at all times.

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

Applicants have indicated a higher than usual increase in programming costs for 1999, and estimated programming cost increases at approximately 5% per year thereafter. In addition, operating costs are estimated to increase to certain levels each year.

With deregulation of the cable programming service tier (regulated by the Federal Communications Commission) after March 1999 pursuant to the Telecommunications Act of 1996, the Director is concerned about rising cost of cable services to subscribers. The basic service tier and associated regulated equipment and installation charges will continue to be regulated by the State, unless the Federal Communications Commission determines that the incumbent cable operator is faced with "effective competition."

As noted in Decision and Order No. 187, the Director will continue to reserve the right to review TCI of Hawaii, Inc.'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. CONCLUSION.

The subject transfer application as put forth by the Applicants is one that seeks approval to the change in control of TCI of Hawaii, Inc. from Tele-Communications, Inc. to AT&T Corp., without transferring the cable franchise held by TCI of Hawaii, Inc. Applicants have not proposed to make any changes to the operations and management of TCI of Hawaii's cable systems nor do they propose to upgrade the cable systems in connection with the subject transfer application. The basis for Applicants' position is that there are two other proceedings currently pending before the Director relating to the cable franchise held by TCI of Hawaii, Inc. that are more suited to addressing issues such as system upgrades and other matters, i.e., the Time Warner

Entertainment Company, L.P.'s application for transfer or the cable franchise renewal process initiated by TCI of Hawaii.

The Director understands but does not necessarily agree with Applicants' position. However, because the approval granted herein does not waive, relinquish or terminate any past and current obligations and liabilities of TCI of Hawaii now or hereafter known, and the availability of the franchise renewal process with TCI of Hawaii to address and resolve all issues and concerns relating to the operations and management of its cable systems in the event Time Warner Entertainment Company's proposed acquisition of TCI of Hawaii, Inc. cable systems is not effectuated for whatever reason, the Director concludes that it is in the public interest to approve the transfer application for change in control of the cable franchise held by TCI of Hawaii, Inc. from Tele-Communications, Inc. to AT&T Corp.

In addition, AT&T Corp. has sufficient financial resources to provide funding for upgrading the cable systems and for other improvements. Thus, either the franchise renewal process with TCI of Hawaii or the Time Warner Entertainment Company transfer proceeding for TCI of Hawaii's cable franchise, will produce substantial public benefits to subscribers within the franchise areas via the delivery of advanced technologies and new services for the foreseeable future.

V. ORDER

NOW, THEREFORE, the transfer application of Tele-Communications, Inc. and AT&T Corp. for change in control of the cable franchise held by TCI of Hawaii, Inc. is hereby APPROVED, subject however, to the following conditions:

(a) Closing of the Merger Agreement, provided that there has been no material changes to the Merger Agreement subsequent to that reviewed by the State. AT&T Corp. and Tele-Communications, Inc. shall immediately notify the Director in writing of the closing of the Merger Agreement.

(b) Federal Communications Commission approval of the joint application of AT&T Corp. and Tele-Communications, Inc., requesting Federal Communications Commission approval of the transfer of control to AT&T Corp. of licenses and authorizations held by Tele-Communications, Inc., its affiliates and subsidiaries, and to any conditions, obligations, and requirements imposed by the Federal Communications Commission in connection with such approval.


The provisions of Decision and Order Nos. 148, 150 and 187 and the terms and conditions incorporated therein are hereby ratified and shall remain in full force and effect. The franchise shall expire on December 31, 2000.

Nothing in this Decision and Order shall be deemed to be a waiver or relinquishment of any right of the State with respect to the cable franchise issued to TCI of Hawaii, Inc. under all applicable law, rule, and order, nor shall it be deemed a waiver or relinquishment of any TCI of Hawaii, Inc.'s past and current franchise obligations and liabilities now or hereafter known, and all issues and matters not specifically resolved in this Decision and Order.

Notwithstanding the generality of the foregoing paragraph, the Director, at any time, shall have the right to take any and all actions and to issue orders regarding any and all issues relating to the past and current operations and obligations of TCI of Hawaii, Inc. including, but not limited to, its line extension policy, late fees, franchise fees, technical and customer service standards, and system upgrades, in accordance with applicable state and federal law, rules and orders including this Decision and Order and Decision and Order Nos. 148, 150 and 187.

In the event the proposed merger is not effectuated for whatever reason such as the Merger Agreement fails to close as contemplated therein or the Federal Communications Commission does not approve the Applicants' application for transfer of control, this Decision and Order shall be deemed null and void. In such event, Applicants shall immediately provide sufficient written notification to the Director, 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, in accordance with applicable state and federal law, rules and orders including this Decision and Order and Decision and Order Nos. 148, 150 and 187.

DATED: Honolulu, Hawaii, February 12, 1999.


KATHRYN S. MATAYOSHI
Director of Commerce and Consumer
Affairs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 239 was served upon the following party at the address shown below by mailing the same, postage prepaid, on this 12th day of February, 1999.

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