**Before the**
**Director of Commerce and Consumer Affairs**
**of the State of Hawaii**

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| In the Matter of the Application of | ) | |
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| G FORCE, LLC, dba Garden Isle | ) | Director's Order Denying G Force |
| Telecommunications for Garden Isle | ) | LLC's Petition for Reconsideration |
| Cablevision and Kauai Cablevision | ) | |
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| | ) | |
| For Renewal of Cable Franchises | ) | |
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**DIRECTOR'S ORDER DENYING G FORCE, LLC'S**
**PETITION FOR RECONSIDERATION**

## I. INTRODUCTION

The renewal ascertainment process for G Force, LLC., dba Garden Isle Telecommunications ("G Force") was initiated approximately three years ago, in the early part of 1998. Department of Commerce and Consumer Affairs ("DCCA") formally accepted the application for renewal on October 4, 1999. On August 30, 2000, the Director of DCCA ("Director") issued D&O 255 which granted G Force's application for renewal of cable franchises known as Garden Isle Cablevision and Kauai Cablevision. G Force's franchises were renewed for seven years, from December 31, 2001 to December 31, 2008, with the possibility of extension for an additional three years, until December 31, 2011.

On September 11, 2000, G Force submitted a "Petition for Reconsideration" ("Petition") of D&O 255 pursuant to Hawaii Administrative Rules ("HAR") § 16-133-18 requesting reconsideration of Sections 3.2, 4.9, 11.9, and commitment paragraph 6 of page 3 of the D&O, and clarification of composition of G Force. G Force raised numerous arguments in its Petition, and the Director hereby addresses these arguments in the order presented in the Petition.

## II. DISCUSSION

### "A. The Director's Option to Alter Franchise Terms During the Life of the Renewal Runs contrary to Established Regulatory and Contract Law."

G Force cites three particular provisions of the D&O, Sections 3.2, 4.9, and 11.9, as being both unfair and illegal, because these provisions reserve to the Director the authority to unilaterally order G Force to make changes to its system or to provide additional services at any time during the ten year term of the renewal franchise. G Force asserts that such terms allowing for mid-term alteration violates the basic principles of contracts and federal law.

"Franchise" is defined by state law as "a nonexclusive initial authorization or renewal thereof issued pursuant to this chapter, whether the authorization is designated as

a franchise, permit, order, contract, agreement, or otherwise, which authorizes the construction or operation of a cable system."[1] Thus upon the granting of a franchise, the franchisee receives a right to operate or construct a cable system limited to the extent permitted by law. Additionally, the franchisee must comply with not only applicable state and federal law but also with the terms of the cable franchise.

The language of Sections 4.9 and 11.9 in D&O 255 are virtually identical to the HRS § 440G 12(e). To this end, terms within the D&O that parrot state statutes are obligations that the franchisee must comport with regardless of whether it is reiterated in the franchise agreement. First, Section 4.9 of the D&O states that, "the Director, at any time during the term of the franchise, may commence informal or formal proceedings for the purpose of addressing future public, educational, and governmental access, and cable-related community needs and interest, and the Director may take any action the Director deems necessary or appropriate." By analogy, HRS § 440G 12(e) states that, the Director "shall have the power and authority 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."

Both Section 4.9 of the D&O and HRS § 440G 12(e) basically grant the Director, the State, the jurisdictional authority to institute informal or formal proceedings to protect the public interest. This is an inherent and plenary power of the State, a means to preserve the public welfare, codified by statute, and reinforced in the terms of the franchise agreement. It can not be removed, waived or compromised.

G Force further contends that Section 11.9 of the D&O unreasonably reserves open-ended powers to the Director. Section 11.9 states that, "the Director, from time to time, may issue such orders governing G Force as the Director shall find reasonably necessary or appropriate pursuant to and in furtherance of the purposes of this Order." This section is based on HRS § 440G 12(e) which states that, "the director shall have the power and authority…to issue all process and orders…." Therefore, the Director is empowered with the authority to issue orders under state law, and the law is merely reinforced in the franchise agreement.

Lastly, G Force also quotes part of Section 3.2 of the D&O as being unfair and illegal, whereby the "Director may address the need for additional upgrades and may require G Force to complete additional system upgrades as determined by the Director." However, the federal law explicitly authorizes the franchising authority this very right under Section 624. The law states that, "[t]he franchising authority, to the extent related to the establishment or operation of a cable system in its request for proposals for a franchise including requests for renewal proposals…may establish requirements for facilities and equipment,…"[2]

In addition, listed as one of the goals in the enactment of the 1984 Cable Act, is to grant the franchising authority the affirmative authority to require upgrading of facilities and

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[1] Haw. Rev. Stat. § 440G-3 (1993).
[2] Codified at, 47 U.S.C. § 544.

channel capacity during the renewal process.[3] Furthermore, Section 632 deferred regulation of system upgrades to the franchising authority by empowering the franchising authority the right to "establish and enforce customer service requirements for the cable operator; and construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator."[4] Therefore, federal law expressly empowers the franchising authority with the authority to establish upgrade requirements.

Moreover, G Force quoted only a portion of Section 3.2 of the D&O. The first sentence of that Section states in its entirety that, "[a]t any time after completion of the 750 MHz upgrade as described in section 3.1 hereof, to the extent commercially and technologically reasonable, the Director may address the need for additional upgrades and may require G Force to complete additional system upgrades as determined by the Director." (emphasis added). Under this language, the Director's authority to require additional system upgrades is qualified, and is not absolute or arbitrary. The Director may only require these upgrades if they are commercially and technologically reasonable.

This authority is further restricted by language in the D&O that states "[i]t is contemplated that any future upgrade that may be required by the Director will first be discussed with G Force" and also that "[t]he Director may impose additional or new terms and conditions and may extend the term of the franchise for any number of years as the Director deems just and reasonable, taking into consideration including, but not limited to the cost of meeting such new terms and conditions." (emphasis added).[5] Under these provisions, the Director intends to consult with G Force before imposing any future upgrades and will take into consideration the cost of any such upgrade.

G Force further contends that the entire structure of plenary federal regulation of cable television makes clear that cable operator's obligations are to be fixed at the time the franchise is granted or renewed and are to remain so for the life of the franchise term citing two provisions: Sections 625 and 626.

Section 625 establishes provisions for modification of franchise obligations.[6] Generally, Section 625 allows the cable operator to modify franchise requirements for facilities and equipment or service. G Force asserts that, "[t]his section, with its careful delineation of what can and cannot be modified – as well as the circumstances under which such modifications would be permitted – would be a nullity if a cable operator could be subject to an at-will modification of the conditions under which it does business by a franchising authority."

The terms and conditions of a franchise agreement require unilateral performance and compliance by one party, the operator. Thus Section 625 procedures were created to allow operators to modify obligations necessary to compete in a changing market place over the duration of a long-term franchise. Assuming arguendo that G Force is correct in

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[3] Cable Franchise Policy and Communications Act of 1984, Report of the Committee on Energy and Commerce 98th Congress Additional and Separate views Including cost estimate of the Congressional Budget Office, H.R. 4103, Rep. Doc. No. 98-934, at A-731.
[4] 47 U.S.C. § 552.
[5] See, pages 9 and 13 of D&O 255.
[6] 47 U.S.C. § 545.

that terms must be completely fixed and can not be altered after the granting of the franchise, this would in fact render the franchising authority powerless to regulate operators to protect the public interest. There would be no need, therefore, to monitor and oversee compliance throughout the life of the franchise and would nullify the entire federal and state law pertaining to the regulation of cable operators. G Force's position will unreasonably assume that Congress intended to strictly protect the interests of the operator by allowing only the operator to modify the terms of franchise under federal law Section 625 and ignoring the interests of the franchising authority.

Moreover, state law allows the Director, in issuing a cable franchise not just the restricted right of approving or disapproving the application or proposal but the right to 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...."[7]

Therefore, the Director has the statutory authority to place terms, limitations, and conditions within the franchise agreement that are deemed to be in the public interest. The right to institute formal and informal proceedings, to issue orders, and to possibly require upgrades to facility and equipment to the extent technologically and commercial feasible are clearly provisions intended to protect the consumer. Since franchises authorize operators the right to operate a cable system for a substantial period of time, it is only appropriate for the franchising authority to ensure operators are continually meeting market conditions and consumer demands adequately. These provisions encapsulate the very essence behind the enactment of the 1992 Cable Act. The Act responded to undue market power for lack of competition and the difficulties for franchising authorities to deny renewals to cable systems that are not adequately serving cable subscribers.[8]

G Force also cites Section 626, which sets forth procedures and standards that may be used for the renewal of cable franchises.[9] G Force states that the "federally-mandated renewal process begins with a review by the franchising authority of the future cable-related community needs and interests." Therefore, "if the cable operator's obligations were not going to be fixed, it would make no sense to provide for such a determination of *future* needs at the time of renewal."

G Force places unwarranted emphasis on the word "future" within this Section of the Act. The legislative history indicates that the purpose of this section is to grant renewal to cable operators whose past performance **and** future ability to perform meet the standards established.[10] These factors are to be considered in the review for renewal of franchise. This section is irrelevant in determining congressional intent regarding contractual obligations.

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[7] Haw. Rev. Stat § 440G-8(d)
[8] 47 U.S.C. § 531.
[9] 47 U.S.C. § 546.
[10] Dingell, supra note 3, at A-781.

In summary, the director has the obligation to ensure that the terms and conditions upon which cable service is provided are fair both to the public and to the cable operator.[11] Fairness is determined by the overall terms of the franchise agreement in toto.

**"B. The DCCA May Not Prohibit G Force from Recovering the Cost of the System Upgrade or the Institutional Network in Subscriber Rates."**

The terms of D&O 255 prevent G Force from passing onto subscribers cost incurred in the upgrade of the cable system and costs related to the construction of an Institutional Network (hereinafter "INET"). G Force asserts that these terms were never agreed to and does not believe that it made such a commitment. G Force further claims that, even if such a commitment had been made, it did not forego the right under federal law to pass through the costs of the system upgrade and those associated with the INET, and that this right is not one that can be contracted away.

Indeed federal regulation regarding headend upgrades states that small cable companies "**may** increase rates to recover the actual cost of the headend equipment...."[12] (emphasis added). Additionally, cable operators that "undertake significant network upgrades requiring added capital investment **may** justify an increase in rates...."[13] (emphasis added). Therefore, operators **may,** as an option, increase rates upon headend and network upgrades. This obviously is not an absolute requirement by law, and therefore, can be waived by the operator either by contract or strictly on its own initiative.

DCCA further disagrees with G Force's claim that G Force did not agree or commit to bear costs of the system upgrade and those associated with the INET. D&O 255 is the product of years of thoughtful deliberation and good-faith negotiations between G Force and the State. The formal process started with the submission of renewal application to DCCA on September 28, 1999. In its renewal application, G Force made certain commitments and proposals to DCCA.[14] One such proposal was that of system upgrade. GIT proposed to upgrade the entire system without securing financing for the system upgrade, and instead, promised to finance the total cost from member equity withdrawals. G Force stated that it anticipated "to expend approximately 2.5 million dollars for a new headend building."[15] G Force set aside 2.5 million dollars for the purpose of upgrading and operating the system, and stated that "no financing has been required or anticipated."[16]

Historically, when G Force applied for the transfer of the cable systems in 1997, the Gray Trust secured a loan to finance the acquisition of the systems. G Force stated that the Gray Trust will make an equity investment in the cable systems equal to the cost of acquisition plus working capital, the systems will not be encumbered or burdened for any portion of the acquisition debt and the debt liability will not be a basis for future rate

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[11] Haw. Rev. Stat §440G-8.1(c).
[12] 47 C.F.R.§76.922(g)(7).
[13] 47 C.F.R.§76.922(j)(1).
[14] See, Application for Cable Franchise Renewal for the Consolidated Kauai Systems, Technical Commitments p. ES-3.
[15] Id. at p. E-7.
[16] Id. at p. D-2.

increases.[17] Therefore, DCCA will hold G Force to its commitment that debt liability will not be the basis for future rate increases.

Another commitment made by G Force was with regard to the construction of various proposed sites to be included in the INET. G Force stated in the application that the, "[a]pplicant intends to offer technical support and maintain the fiber network. The cost of maintaining the fiber network will be born by the Applicant."[18] (emphasis added).

It is clear from the onset, by statements on the renewal application, that G Force intended and committed to bear INET and system upgrade costs. G Force never wavered from this position, in fact, this position was reconfirmed on various subsequent occasions. First, by letter from William Harkins, president of GIT, dated November 17, 1999, to DCCA specifically stating that it would not pass the system upgrade costs or costs associated with the INET on to subscribers, and also that $2,650,000 was set aside for the system's upgrade. (emphasis added). Thereafter, DCCA sent William Harkins a letter dated December 2, 1999, confirming that fiber connections or interconnection to INET would be provided at no additional cost to subscribers. (emphasis added).

Not once prior to the issuance of D&O 255 did Applicant, G Force, ever raise a concern regarding costs for either INET or system upgrade. G Force made this commitment consistently in writing and by its actions with certainty and definiteness. Therefore, under the basic principles of contract, G Force is bound by its apparent intention manifested to DCCA. DCCA relied upon G Force's promise and commitment.

There is significant public benefit resulting from the system upgrade and INET connection. The system upgrade will consolidate the two systems and eliminate geographic service disparity, enhance signal quality, and increase channel capacity. The expansion of the INET will continue to provide broadband telecommunication services to government agencies.

Based on the foregoing, G Force is prohibited from passing costs on to subscribers, and furthermore, the request is denied to strike Sections 3.2, 4.9, and 11.9.

**"C. The Provisions Relating to the Composition of G Force Require Clarification."**

G Force requests clarification of Section 7.5 of the "Terms and Conditions" of D&O 255 which states that "any change to the structure or organization of G Force shall require the prior written approval of the Director." G Force seeks confirmation that if:

1. A new member joins G Force and no change of control occurs, no prior consent is needed; and

2. The interest of the Gordon Gray 1956 Living Trust in G Force is changed (and there is no change in control), only the notice provided in section 8.1 is required, not the prior consent provision of section 7.5.

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[17] See, D&O 208 and 209.
[18] Id. at p. G-15.

The intent of sections 7.5 and 8.1 of the "Terms and Conditions" of D&O 255 is to require the Director's prior consent whenever there is a change of control in G Force or the Gordon Gray 1956 Living Trust. Thus, if a new equity member joins G Force or the interest of the Gordon Gray 1956 Living Trust in G Force is changed, and there is no change of control, only the ten (10) day notice provided in section 8.1 is required.

## III. DIRECTOR'S ORDER

Based on the foregoing, the Director hereby:

1. Denies G Force's:

   a. September 11, 2000 Petition for Reconsideration;

   b. Request to strike sections 3.2, 4.9, and 11.9 of D&O 255; and

   c. Request to delete the provisions which reflect G Force's commitment to not pass the system upgrade and INET costs to subscribers; and

2. Clarifies the notice requirements pertaining to a change of control in G Force or the Gordon Gray 1956 Living Trust as indicated above.

DATED: Honolulu, Hawaii, January 3, 2001.

KATHRYN S. MATAYOSHI
Director of Commerce and Consumer Affairs

Petition for a contested case review hearing may be filed within sixty days following this decision pursuant to Hawaii Administrative Rules §16-133-19.