

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

-----In the Matter of -----)
)
THE SEVEN TWENTY LIMITED PARTNERSHIP)
)
For Authority to Provide Cable Television)
Service to the Lawai and Omao Communities)
of the County of Kauai.)
_____)

DOCKET NO. 83-82-01

ORDER NO. 94

DECISION AND ORDER

PROCEDURES

1. On October 9, 1982, The Seven Twenty Corporation ("Applicant") filed with the Department of Commerce and Consumer Affairs' Cable Television Division ("Department"), an application dated October 7, 1982, requesting an amendment to its permit to provide cable television services to specific areas situated on the island of Kauai; namely areas commonly known as Lawai and Omao.
2. By letter dated November 10, 1982, Derby Cablevision ("Derby" or "Protestant") notified the Director that Derby opposed the application of The Seven Twenty Corporation to serve the communities of Lawai and Omao.
3. On December 9, 1982, Applicant subsequently filed a supplementary submission entitled, "Application for Cable Permit for a New/Proposed Area," for authority to provide cable services to the Lawai and Omao communities.
4. On December 9, 1982, the Applicant filed Responses to the staff's Information Requests, which Information Requests indicated that Applicant is prepared to serve nearly all of the individuals residing in Lawai and Omao within thirty days of being authorized to do so by the Director.
5. After due notice to the public in The Garden Island on November 24, 1982 and December 1, 1982, a public hearing was held at 7:00 p.m., December 16, 1982, at the State Office Building in Lihue, Kauai. Approximately 75

individuals were in attendance at that public hearing. A transcript was taken of the proceeding and is a part of the record upon which this decision is based. A clear sense of the meeting was that favorable action be given the application.

6. An evidentiary hearing on the matter was conducted by a duly designated hearings officer on Friday, December 17, 1982, in the conference room of the Department of Planning and Economic Development in Honolulu, Hawaii. The hearing was held after actual notice to all parties and was conducted in accord with the requirements of Chapter 91, H.R.S. A transcript of the evidentiary phase of this proceeding is on file with the Department. The application, responses to the staff's information requests, a statement by Derby Cablevision, maps, and late-filed exhibits were received and are a part of the evidentiary record in this proceeding. All of the documents referred to have been reviewed by the Director.

7. The general format of the proceeding was that the Applicant had to show that it was fit, ready, willing, and able to provide the services it proposed and that the proposed services would be addressing unmet needs or conveniences of the communities involved. Once the Applicant made such showings, the burden of proof was to shift to Protestant to show either why Applicant's representations were not reliable, or why granting the application was contrary to the public interest.

CONCLUSION

8. In accordance with the procedures, supra, and the factual analysis, infra, Applicant should be, and hereby is, granted authority to provide cable television services to the areas generally known as Lawai and Omao and specifically delineated in Attachment A to this Order.

APPLICANT'S POSITION

9. Based on Applicant's representations and the staff's on-site examination of Applicant's facilities in place, it is found that Applicant stands ready, willing and able to provide basic and pay services to the residents of the Lawai and Omao areas.

10. Based on the representations of the 13 witnesses providing testimony at the public hearing, and the general comments expressed by other individuals at the public hearing, it is found that there are acute demands for cable television services in Lawai and Omao which are not being met by Protestant/incumbent permittee.

11. At the time of the hearing, Applicant had 18 employees, including four installers, three underground crewmen, one chief technician, one senior project engineer, four door-to-door salesmen, and a sales clerk at the Kalaheo office. Applicant's representation that it can serve any and all Lawai and Omao residents who request service -- within thirty (30) days of being granted approval -- appears from all of the evidence to be reliable.

12. The matter of Applicant's financial fitness is less clear. The latest financial statement available is for an eight month period through August 31, 1982. It is unaudited and thus merely represents management's opinion. It covers a period of time prior to the Company's accrual of revenues from the sale of cablevision services.

The most recent audited financial statement is through the period December 31, 1981, wherein it is shown that the Company received \$41,192 of interest income in 1981 from time deposits, and that \$1,250,000 of an \$1,800,000 loan is committed, subject to: (1) continuing progress of the construction of plant and (2) actual subscriber penetration as it relates to projected penetration. Based on management's representations, progress of construction is satisfactory and subscriber penetration is running approximately 15% ahead of projections.

Based on on-site inspections by the staff of the Division, it is clear that a substantial, but an unverified and unspecified amount, has been invested in both plant-in-place and construction-in-progress. It is concluded that Applicant has sufficient capital resources to finance the proposed construction of Lawai and Omao, without jeopardizing its construction program or depleting available capital.

PROTESTANT'S POSITION

13. Derby's objections to the application of Kauai Cable TV are five in number:

- (1) The matter is res judicata;
- (2) Derby stands ready, willing and able to provide the service;
- (3) Applicant is unfit -- in that (a) Applicant is in active violation of Department orders, and (b) Applicant has reversed its position on the issue of "over-building";
- (4) Applicant will be unable to carry out construction in areas that Applicant is already obligated to serve; and
- (5) Applicant's action is preventing Derby from providing service to the subject areas.

Each of the above bases for Derby's objections will be addressed in the following numbered paragraphs.

14. "Res judicata." Non-exclusivity is the principal characteristic of permits granted in Hawaii; the exclusivity feature that was recommended for a limited number of selected areas on Kauai was for the purposes set forth in that recommended decision. Thus, Applicant's objection based on the theory of res judicata is not well-founded. Applicant is prevented from serving the areas of Lawai and Omao (and Puhi) only because a specific recommendation, i.e. Paragraph 46 in a recommended decision, was incorporated in the final order by a

general reference. That proceeding dealt with the question of issuing permits to TCI and Seven Twenty. Derby was not an intended beneficiary of that decision. The Director's final decision in that proceeding was at variance with the recommended decision: in the recommended decision, exclusivity for the two Kauai franchises proposed to be awarded was established for selected areas because TCI was known as an aggressive MSO operator and Seven Twenty was a fledgling neophyte in the industry.

The status quo resulting from the final decision of the Director in Order No. 83 dated August 4, 1981 is that Applicant/Kauai Cable TV/Seven Twenty is a more aggressive operator on the island of Kauai than the long-time incumbent, Derby, and that Applicant is building far more rapidly than Derby, is offering more programming alternatives, was the first to introduce pay TV to the island, and is investing capital in cable operations at a far greater rate than Derby.

Derby has no legal right to rely either on res judicata or the principle of exclusivity of its permit on the island of Kauai to defeat Applicant's proposal.

15. "Derby is ready, willing, and able." Contrary to Derby's representation that it is ready, willing, and able to provide cable television services to the areas of Lawai and Omao, the record of Derby's activity, or inactivity as the case may be, contradicts its representations. It is Derby who applied to this Department on May 3, 1976 for waiver of its requirement to complete construction of its authorized areas. It is Derby who claims the subject areas are not marketable because there is clear over-the-air reception but it is the testimony of several witnesses at the public hearing that the over-the-air signals are not well-received in the areas. It is Derby's long-standing position that pay television is not cost justifiable; it is a fact that the introduction of pay television services on Kauai has been very well received by the public. It is Derby who projects a potential 130

customers and 3.45 miles of plant to be built in the subject areas; it is the signed petitions of several dozen individuals, and house counts by Applicant and reliable estimates of residents taken from the 1980 Federal census and the meter counts of Kauai Electric that indicate there are at least 370 potential homes to be served in the area. Derby has long been unwilling to serve the communities in question. Past is not always prologue; but the record is clear in this case.

16. "Applicant's unfitness." Derby alleges that Applicant is unfit to serve the subject areas because it is currently in violation of Department orders, and it has, in fact, "over-built." The fact that Applicant did construct plant through Derby's area is not violative of any Department order. Relative to the allegation of "over-building," the issue was thoroughly explored in the evidentiary hearing and there appears to be sound economic bases for Applicant constructing its transmission lines through a portion of Derby's area, e.g. alternative routings were cost equivalent, Applicant's inability to obtain access to utility poles owned by plantations, Applicant's assessment of the "business risk" of a slight additional investment to build through Derby's area and possibly have to later rebuild via another routing.

17. "Applicant's disabling itself from constructing other areas required by its permit." Derby alleges that Applicant's diversion of financial resources, human resources, and managerial attention to the Lawai and Omao areas will ultimately disable Applicant from constructing plant in the more isolated rural areas which Applicant is obligated to serve under the mandates of its permit. Applicant appears to have adequate financial resources to maintain its aggressive construction schedule. Also, the economics of serving the subject areas are at least as favorable as constructing in any other area on the island of Kauai; by all reasonable estimates, there are potentially 370 homes to be served with between seven and eight miles of plant to be built. Given the numbers, and the expressed

enthusiasm by numerous representatives of the communities for Applicant's service, it would appear that penetration in the area will be substantial, and when combined with the pay revenues, the area seems to be financially viable. Indeed, service to Lawai and Omao may well enhance, rather than dissipate, Applicant's ability to serve other areas. The evidence shows that Applicant will provide service to all customers in the area requesting service within 30 days and do it concurrently with maintaining its construction schedule in other sections of the island.

18. "Applicant's actions will prevent Derby from providing service."

Derby has had authority to serve the Lawai and Omao areas for approximately thirteen years. During that period of time, it provided service only to one highly concentrated subdivision which is immediately adjacent to its transmission cables; it has refused service to many residents in relatively close proximity to the transmission lines, and has maintained that it is uneconomic to serve this particular area because of the sparsity of homes and the quality of the over-the-air signals. Derby's representations in this regard have been clearly refuted by reliable evidence in this proceeding.

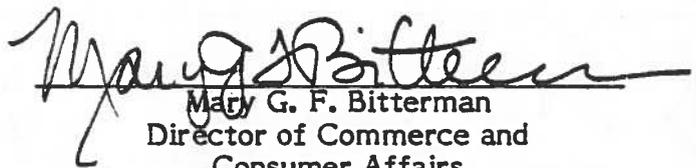
CONCLUSION

19. Derby has had the authority to serve the areas in question since October 22, 1970 (refer to Director's Order No. 6) and has had facilities in place in the subject areas since at least October, 1973. On the one hand, Applicant stands fit, ready, willing, and able to provide service; on the other hand, Derby has been unwilling or unable to provide service for the past ten years, and, when willing, will be prepared to serve only very limited additional areas in Lawai and Omao by August or September, 1983, at the earliest.

20. Based on my review of the evidence in the record, I am compelled to grant the Application. To deny the Application is to deny service for an undetermined amount of time in addition to the ten years the numerous residents of Lawai and Omao have already waited for cable services.

DATED: Honolulu, Hawaii, 26 January 1983

STATE OF HAWAII


Mary G. F. Bitterman
Director of Commerce and
Consumer Affairs

CERTIFICATE OF SERVICE

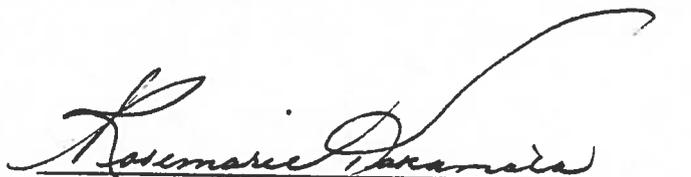
I hereby certify that copies of the foregoing **Decision and Order** were mailed, postage prepaid, to the following on this 26th day of January, 1983:

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