

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

In the Matter of the Application of)
PACSAT, INC. for a Permit to)
Provide Cable Television Service to)
the Community Commonly Referred)
to as Gentry-Waipio Subdivision)

Docket No. 00-82-01
ORDER NO. 97

ORDER DENYING PACSAT'S REQUEST FOR ISSUANCE
OF CEASE AND DESIST ORDER

On Wednesday, April 6, 1983, PACSAT, INC. filed an ex-parte request with the duly Designated Hearings Officer requesting that a Cease and Desist Order be issued directing Honolulu Television and Communications Corporation, dba Oceanic Cablevision, to stop the construction of its cablevision system within the Gentry-Waipio subdivision, pending final determination of PACSAT, INC.'s application to provide service within the same subdivision.

For the reasonings set forth below, the ex-parte request is DENIED:

1. PACSAT cites as the Department's authority for issuing the requested order both Section 440G-12(e) and Department Rule Section 16-237-17. The statute states that the "Director (and, presumably, designated hearings officers) shall have the power and the authority to . . . issue all . . . orders . . . necessary to enforce this chapter with the rules, regulations and orders adopted thereunder." The cited regulation (relating to hearings officers conducting hearings) permits hearings officers to regulate the course and conduct of the hearing.

2. The essence of PACSAT's claims are that (a) Oceanic's most recent action is "flagrantly prejudicial to the fairness of this proceeding," and (b) Oceanic's actions in the construction of a cable system within the confines of the Gentry-Waipio development may possibly jeopardize Gentry's efforts to dedicate public rights-of-ways to the City and County of Honolulu government.

3. PACSAT does not allege, in fact or in legal theory: (a) that Oceanic is violating any statute, departmental regulation, company tariff, or any rule or regulation of any other governmental entity, such as the City and County of Honolulu building permit

gencies; (b) that Oceanic is exceeding in any way its rights under its permit granted to it by the Department in 1973; and (c) that Oceanic's actions are providing Oceanic illegal business advantages in the marketplace.

4. Oceanic is legally authorized to serve the Gentry-Waipio subdivision. Indeed, that has been the representation of Gentry on numerous occasions. In the April 5, 1983 letter to Attorney Watanabe, PACSAT's counsel states "Oceanic can come into the Gentry-Waipio Project and provide cable television to residents." Also, as recently as March 25, 1983, Gentry stated in a letter to the homeowners in the Gentry subdivision, the following:

"In summary, you have been deprived of cable television service because Oceanic has attempted to confuse you by equating the issue of access with that of the availability of the ducts. What this means is that they have indicated that they cannot gain access to your homes because they can't use the ducts to run their cable. In fact, there always has been at least one of two methods for Oceanic to gain access:

- (1) via the telephone ducts and/or
- (2) by trenching a main cable in the project planter strips."

5. PACSAT alleges that Oceanic's conduct "constitutes a trespass." PACSAT alleges that Oceanic is jeopardizing the dedication of rights-of-ways by Gentry to the City and County because Oceanic has failed to obtain or provide adequate bonding, insurance, indemnifications, and rights of entry. However, PACSAT has not represented that it has made any demand of Oceanic Cablevision to stop its construction activities. PACSAT has not represented that it has requested Oceanic Cablevision to get off of Gentry-owned land. Further, PACSAT has not represented that Oceanic has performed any activity which is diminishing the value of PACSAT's/Gentry's property interests or its business opportunity interests which cannot be compensated for in damages.

6. The legal rights and duties of many parties and interests in this proceeding are yet to be determined. Specifically, the hearing on the merits is scheduled for late April, 1983 and no witness has yet testified under oath. Whether Oceanic's presence on the rights-of-ways of the Gentry-Waipio subdivision constitutes a trespass, an unauthorized entry, or a violation of any legal rights or duties flowing from the regulation

of cablevision is unclear. These issues are to be addressed in the hearing scheduled in the future. The rights and duties of persons on Gentry-owned property—including persons such as privately-owned public utilities; publicly-owned public utilities; agents for public services, such as mailmen, school teachers, bus drivers, and policemen; and persons not associated with public services, such as laundrymen and television repairmen—are unclear. Invitations to enter may exist either by expression or by implication. The legal status of Oceanic's presence on the premises also is unclear—particularly given this fact that PACSAT/Gentry has stated Oceanic can come into the project. This is confirmed by the fact that it has not demanded that Oceanic leave the property. Also, the parties have been negotiating privately the terms and conditions for entry for many months.

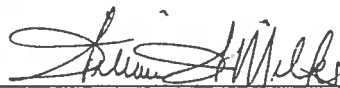
7. The major way Oceanic is constructing its permanent presence within the subdivision of Gentry-Waipio is within conduit now occupied by the telephone company. The reasons why Oceanic has now commenced such construction rather than having done so years ago can be addressed in the evidentiary hearing. Similarly, the reasons why Gentry/PACSAT did not construct a cable system on private property (which does not require government licensing) can also be addressed in the evidentiary hearing. In either event, under any set of circumstances, a "flagrant act of grandstanding" is not known to be violative of any law enforceable by the Director, with one possible exception--interference with due process in the conducting of administrative hearings.

8. PACSAT's real concern, then, is that Oceanic's activities are prejudicial to the fair hearing process PACSAT is entitled to. PACSAT's unfamiliarity with the hearing process is the cause for the concern. The case will be decided on the evidence presented by the parties that participate in the evidentiary hearing. At present, there are two parties: namely, PACSAT and Oceanic. While there is potential for intervention by other parties sometime between now and the beginning of the hearing, problems with such intervention can be dealt with at that time. The extent to which evidence submitted at the hearing can be "tampered with" is minimal; e.g., the polling of residents conducted by PACSAT is completed. The only work to be done on the survey is tabulation and analysis. New parties entering the case with a viewpoint prejudiced by Oceanic's activities since April 5, 1983 can be dealt with at the hearing. Procedures for intervention at the

evidentiary hearing are set forth in the Department's rules, and were explained at the January 19, 1983 hearing. (Refer to transcript pages 26, 51, and 63.) Representations by the parties at the hearing are subject to the safeguard of cross-examination.

Based on the foregoing, it has been concluded that issuance of a Cease and Desist Order by the Hearings Officer—while fully within the jurisdictional powers of the department and the Designated Hearings Officer—would be inappropriate at this time based on the pleadings to date.

DATED: Honolulu, Hawaii, April 6, 1983.



WILLIAM W. MILKS
Designated Hearings Officer

CERTIFICATE OF SERVICE

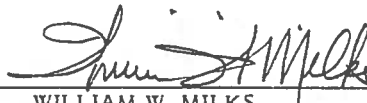
I hereby certify that copies of the foregoing Order Denying PACSAT's Request for Issuance of Cease and Desist Order were mailed, postage prepaid, to the following on this 6th day of April, 1983:

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