

Cable Access Gets Slammed Time Warner Gets the Land

There is a new land grab in Hawaii whereby the government is giving away valuable public land to private business without getting anything in return for the people. Sound familiar? It has happened before in Hawaii – with agriculture, with beaches, with water and now, with the public airwaves. This time the difference is that the land in question is in the form of public electronic real estate, the electromagnetic spectrum. These are the frequencies you pay for to watch cable TV, use the internet or talk on the phone.

Most people don't know this, but in exchange for using public rights of way - airwaves, telephone poles, electric wires and underground conduits - cable monopolies like Oceanic Time Warner have to pay "rent" in the form of community access channels like Olelo on Oahu, Akaku on Maui, Na Leo on Big Island and Hoike on Kauai. Now, because of new technology, the frequencies or space these channels occupy have suddenly become extremely profitable to cable companies. (Not unlike how lands once granted to indigenous people by treaty became more valuable once minerals were discovered.) That is why Time Warner wants to take over this public property and move these channels to inferior locations while vastly reducing the amount of non-commercial electronic real estate. That is why, if you are an Oceanic Time Warner Cable subscriber, channels are disappearing from your channel line-up altogether, or re-appearing someplace else. So far, instead of holding your land in public trust, the state is falling for the Time Warner plan - hook, line and sinker.

Maybe that is not such a bad thing after all. Oceanic says this techy move will free up more space on the cable for them to bring us all kinds of goodies like High Definition (HD) channels, video on demand channels, enhanced services and the holy grail of faster, better and more affordable internet for all. That's a good thing, right? We all want to believe. We really do. The thing Time Warner forgot to mention was...well...the several new adult services that have recently appeared as a result of moving your access channels to cable no man's land.

On Wednesday, April 4, the naked truth behind this land grab was revealed at the State of Hawaii Cable Advisory Committee hearing in Oahu. The members, made up of appointees from each county, did not like what they saw. Let's just call it, Oceanic Time Warner's dirty little secret.

The meeting started out innocently enough. Director of the Department of Commerce and Consumer Affairs (DCCA) Keali'i Lopez, announced that she was inclined to grant a "waiver" Oceanic Time Warner had requested, to strike the definition of the word "channel" from contracts that govern cable operations on neighbor islands. This little change would allow the cable company to legitimize "after the fact" a contract violation it had already committed months ago, when it moved educational access channels

from their current analog location (55 and 56) to an area on the cable dial, commonly referred to as “digital Siberia” (355 and 356)¹

This action allowed Time Warner to reclaim twelve megahertz (12MHz) of dedicated non-commercial spectrum for unrestricted commercial development.² Former two-digit, full service, publicly owned, analog channels disappeared and were replaced by three-digit “digital channels” in hard to find locations. Replacement digital channels represent a tiny fraction - perhaps 10% or less - of their former electronic land value and are viewable only by subscribers who obtain special equipment.

In defense of DCCA Director Lopez, her motivations were perhaps well meaning, even altruistic. Who doesn't want faster, better, affordable internet? Time Warner broadband speeds on neighbor islands are truly pa-thet-ic. Last time we checked on Maui, they were about 5 megabits down and less than 1 megabit up. Public testimony at the CAC hearing revealed, however, that even though a huge amount of dedicated public spectrum was taken away in December and in January, cable subscribers on Maui, Molokai, Lanai, Big Island and Kauai did not get faster, better, more affordable internet. What they got was a rate hike, a slew of expensive digital channels, and a big fat bunch of additional adult services like Playboy Interactive, Playboy TV on Demand, Penthouse on Demand, Hustler on Demand and Manhandler on Demand.

Putting the Porn Warner switcheroo aside, it was also revealed during public testimony that DCCA has no guarantee or quid pro quo from Time Warner to ensure that any of us will ever get faster, ubiquitous, more affordable broadband. On the contrary, Wall Street analysts at Sanford Bernstein are reporting that Time Warner has recently announced that they will be applying overcharging schemes to broadband customers, charging all customers usage fees to boost revenues and profits. The street predicts that these charges will become the rule and not the exception in the near future.

After these and many other unsavory facts were revealed,³ several CAC members questioned the character of Oceanic Time Warner, a company that protects all local broadcast channels on analog and repeats them over again on digital; protects Oceanic owned channels such as OC 16 and dozens of non-local channels like QVC, MTV and Shop NBC by keeping them on analog - yet finds it necessary to kick your local Community Access Channels off these more profitable and desirable locations in order to steal the public's bandwidth.

¹ Analog PEG channels 55 and 56 were migrated to digital channels 355 and 356 on Big Island and Kauai in December, 2011 and January, 2012. On Maui, to date, only Analog PEG channel 56 has been migrated to digital channel 356

² 6MHz on Maui

³ See testimony of Akaku President, Jay April and Hoike Managing Director, J. Robertson on DCCA Cable Administration website or at www.akaku.org.

No one disputes that someday all channels will be digital. How that transition occurs and what happens to public electronic real estate in the process is an important discussion to have with cable subscribers and cable access providers on each island. Before the state gives it all away, we have a right to say how our land will be used.

To its credit, for the time being, the Cable Advisory Committee has taken a stand against the DCCA waiver of the definition of channel pending further review. It remains to be seen which is more obscene – the Time Warner lie itself or the state’s willingness to believe it at the expense of neighbor island Public Access channels and Community Broadband development.

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

WRITTEN COMMENTS of:

Jay April, President and CEO
Maui County Community Television, Inc. dba Akaku: Maui Community Television

In the Matter of:

Notice of Findings of Fact and Intent to Issue a Decision and Order
CATV-12-04 and CATV-12-05
In the Matter of: Time Warner Entertainment Company, L.P.
Migration of Analog Education Channels to Digital Format for its
Lahaina and County of Maui (respectively) Cable Television Franchise

OVERVIEW:

Akaku: Maui Community Television, on behalf of it’s neighbor island producers, online viewers and cable television subscribers, would like to thank the Department for the opportunity to comment on the DCCA Notice of Findings of Fact and Intent to Issue a Decision and Order(s) in the above mentioned proceedings.

If you look at the long tradition of U.S Telecommunications Law, time and time again you will come across references to the fundamental principles of “localism” and

“diversity of viewpoint.” These foundational principles are essential in helping local individuals and communities communicate with one another in order to to maintain an informed electorate and a healthy democracy. This is precisely the reason why uniquely local Public, Educational and Government (PEG) access channels have always been included along with local broadcast channels in the definition of “basic cable service.” These local broadcast and PEG access channels have everywhere and always been intended to be made available to all subscribers at the most affordable, most widely available tier. What appears to be self evident, as a matter of policy, is that PEG channels have a right to the same treatment as every other local “must carry” broadcast channel on every cable subscriber’s most basic tier of service. This Intent to Issue a Decision an Order will have, perhaps, the unintended consequence of making certain that this does not happen now or in the future. It will fragment and devalue local PEG channel electronic real estate, have a negative impact on audience share, require special equipment to view, inhibit channel branding and marketing efforts, allow for signal degradation below that of existing analog broadcast channels, weaken PEG community partnerships and create considerable barriers for viewers.

Monica Shah Desai, former Chief of the FCC Media Bureau, put it this way:

“It has come to our attention that some programmers are moving PEG channels to a digital tier, or are treating them as on-demand channels. We are concerned by these practices. We believe that placing PEG channels on any tier other than the basic service tier may be a violation of the statute, which requires that PEG access programming be placed on the basic service tier. Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier. We believe it is important to ensure that consumers are able to get access equally to all channels belonging on the basic service tier, and that this should be the case regardless of what type of system the channels are being carried on.”

The main point we wish to emphasize is, technologically speaking, while we recognize that the eventual transition from analog to digital is inevitable and even desirable in the future, the devil is in the details. All we are asking, ultimately, is that PEG migration follow the same timetable as our local broadcast channels, that there be no diminishment of existing analog spectrum available to PEG access in the migration from analog to digital, and that the PEG access transition from analog to digital not result in reduced bandwidth, reduced accessibility, reduced quality or reduced features during or after transition relative to any other previously broadcast analog cable channels. We are asking DCCA to modify its D&O to direct Oceanic Time Warner to deliver all existing PEG channels in analog format on the basic service tier until the entire tier is digital and (unless the parties agree otherwise) that PEG channels be part of basic when digital.

At the heart of the matter before us is whether or not the definition of “Channel” as a minimum of six megahertz (6 MHz) in the electromagnetic spectrum should still apply to PEG channels in a rapidly changing technological migration of analog to digital. Also in question is whether or not an equivalent amount of PEG bandwidth set aside for

noncommercial use under federal law in the analog environment should be retained by the LFA in the digital environment for use by the public benefit sector.

There is also a significant legal question as to whether, as a result of issuing the intended order, the DCCA is properly exercising its authority by, in effect, allowing the “renter” of our public rights of way (Oceanic Time Warner Cable) to reclaim extremely valuable public property in the form of noncommercial electromagnetic spectrum for commercial use without due process, just compensation or quid pro quo.

Consumers and users of monopoly cable television and wireline broadband services on neighbor islands have not had the benefit of the comprehensive analysis required in the franchise renewal process that took place in Oahu. We believe that one size does not fit all and that neighbor islands have a right to expect that DCCA would conduct economic analyses, engineering studies and public hearings in affected franchise areas prior to approving any migration of Analog PEG channels to Digital format.

Akaku has also informed the Department that it is our belief that the Digital Migration of Educational Access Channels is in violation of the Cable Telecommunications Act of 1984 and of DCCA Decision and Order 241 and related D&O’s (see Addendum A attached) The Department disagrees with our analysis.

Regardless of the long standing federal and state regulatory history discussed in previous correspondence with the Department, a history that appears to discourage and prohibit analog to digital migration without representation or prior LFA approval (citations of which are included here in Addendum A) the DCCA Notice of Findings of Fact raise several political, economic, technological and philosophical questions some of which are not easy to answer. A few to consider include:

1. The State of Hawaii is striving to fulfill the laudable goals of the Governor’s Hawaii Broadband Initiative to attain symmetrical Gigabit connectivity to all residents by 2018. I will take him at his word that he means *all* residents, not just a few privileged institutions. What this means is that we will need a firm quid pro quo from Oceanic Time Warner in exchange for the surrender of public bandwidth to private enterprise. In lieu of that, what measurable guarantees can be realized to ensure that public agencies such as DCCA, The University of Hawaii, the Department of Education and others do not prematurely succumb to a “siren song” of wireline incumbent promises for affordable, ubiquitous broadband for all at the expense of PEG access and Community Broadband development?

2. As telecommunications technologies like cable, voice, wireline and wireless broadband converge and cable TV transforms itself into an Internet Protocol Television (IPTV) delivery service with unregulated and highly lucrative broadband components, what is the proper role, responsibility and scope of the Local Franchise Authority (LFA) in protecting fully local public interest community communications. How will DCCA provide local stakeholders, NGOs, NPOs and the public maximum input into the decision making process?

3. To what extent do the provisions of the DCCA's Franchise Renewal for the Island of Oahu granted to Oceanic Time Warner in 2010 - that allowed for the digital migration of PEG access channels - influence the current DCCA's inclination to vacate existing neighbor island franchise orders by fiat? Why does DCCA appear to champion the same goals demanded by Oceanic Time Warner without careful review by neighbor island PEGs or public input from the neighbor island public?

4. Oceanic Time Warner continues to apply considerable political pressure at the Legislature and at DCCA by dictating how its cable franchise fee and capital contribution or "rent" money is spent for use of public rights of way (PROW) while enjoying record profits from its cable, telephone and unregulated broadband businesses. The company has also been moderately effective in mounting a sophisticated campaign to pit PEG access beneficiaries and communities against one another. It has hired at least one state representative and offered State /County Government and Educational partners "digital" incentives and/or channels to persuade these agencies and individuals to advocate abandoning a successful integrated PEG funding model in favor of a funding scheme that will split the resource. The company has aggressively questioned the suitability of at least one PEG Access provider to manage stewardship of the E and G sectors, misled legislative committees and other government agencies regarding a true calculation of its actual cash contribution in exchange for use of PROW, and severely questioned the appropriateness and expenditures of Olelo related to PEG technology, innovation and IT. How will DCCA respond to this ongoing industry challenge and will DCCA continue to support robust funding of public sector community communications?

Finally, before we present ARGUMENTS IN FAVOR and ARGUMENTS AGAINST *Notice of Findings of Fact and Intent to Issue a Decision and Order /CATV-12-04 and CATV-12-05, In the Matter of: TWE, L.P. Migration of Analog Education Channels to Digital Format for its Lahaina and County of Maui (respectively) Cable Television Franchise*, we need to point out that since December 19, 2011, Oceanic Time Warner successfully migrated PEG channel 56 on Maui from the lowest cost, most widely available analog service tier to a digital tier vacating that analog channel slot which requires subscribers to acquire special equipment to view. What this means is that Oceanic Time Warner made PEG channel 56 disappear from nearly 40% of cable subscriber homes without adequate notice or prior consultation with Akaku and PEG entities in each neighbor island county and without DCCA approval as required by law.

ARGUMENTS IN FAVOR and ARGUMENTS AGAINST Notice of Findings of Fact and Intent to Issue a Decision and Order /CATV-12-04 and CATV-12-05, In the Matter of: TWE, L.P. Migration of Analog Education Channels to Digital Format for its Lahaina and County of Maui (respectively) Cable Television Franchise.

ARGUMENTS IN FAVOR OF ISSUING A D&O

1. DCCA UNAWARE OF DIGITAL TECHNOLOGY UPON DRAFTING OF ORIGINAL D&O

Akaku agrees that to the best of its knowledge with a few minor exceptions, the DCCA is essentially correct in its FINDINGS OF FACT enumerated in Sections I. A, B, C, D, F, H, I, N, R, S, and T, in Notice CATV-12-04 and Section I. A, B, C, D, E, F, G, H, I, J, O, S, T, and U of Notice CATV-12-05. Akaku also agrees with DCCA that when the definition of Channel was written in D&O 174 and 241 in 1995 and 1999 respectively, that DCCA may have only been aware of analog technology as a delivery mechanism for the distribution of cable television and had not properly or diligently investigated the technological integration of digital and IPTV technology with cable.

2. TWE CAN OFFER MORE ENHANCED SERVICES

Akaku agrees that in theory and aided by the absence of regulatory oversight, economic, engineering or audience analysis - migration of cable spectrum currently used for analog transmission to digital could enable TWE to offer enhanced services; including greater choices in high definition, more efficient means of viewing programs and substantial increases in broadband speeds.

3. ELECTROMAGNETIC SPECTRUM RECOVERED FOR COMMERCIAL USE

Although there is no guarantee, quid pro quo or tangible benefit to the state, PEG providers or cable consumers, Oceanic Time Warner has reclaimed 12MHz of analog spectrum from PEG for use in providing what many hope will be faster broadband speeds at affordable rates.

4. DIGITAL TRANSITION IS THE FUTURE

Akaku notes that although the FCC has suggested extending its cable analog carriage mandate for three years and its waiver of HD carriage mandate for an additional three years, and although some industry analysts are predicting that a total cable analog to digital transition may not be complete for 7-10 more years, the transition from analog to digital is inevitable.

5. PEG BANDWIDTH IS PROFITABLE

Operators have new and profitable bandwidth intensive uses such as HD channels, Internet speeds, VoIP, etc. In a bandwidth hungry world, PEG channel capacity is valuable.

6. THERE ARE LOOPHOLES IN THE LAW

Current law is not as clear as needed to protect PEG in a digital world. This ambiguity makes it easier for the phenomenon known as regulatory capture to occur.

ARGUMENTS AGAINST ISSUING A D&O

1. POSSIBLE VIOLATION OF FEDERAL STATUTE

Oceanic Time Warner has already effected the digital migration of PEG channels in violation of existing neighbor island Decision and Orders that govern their franchise agreements. In a similar case in Michigan (Dearborn v. Comcast) a TRO was granted by the 6th Circuit against the cable operator for possible violation of Federal Law for doing almost exactly the same thing. In that case, because the LFA chose to enforce, rather than waive, its franchise agreement, the City of Dearborn obtained a settlement that restored the channels to the analog tier, guaranteed the channels on digital and HD tiers, and received \$250,000 in compensation.

2. INTENT TO ISSUE D&O CONTRADICTS DCCA SENATE TESTIMONY

My colleagues and myself greatly appreciate the ongoing conversations we have had with the Department regarding this issue going back as far as September of 2011. We are concerned, however that apparently very little has been done to stop the erosion of PEG channels. The Maui DOE channel 56 is already gone to Digital 356 and Akaku is concerned about a similar event taking place with Channel 55 on Maui's cable systems to go along with Oceanic's recent rate hike.

It was encouraging to hear Cable Television Administrator, Donn Yabusaki, not rule out some sort of "legal action" in his recent testimony before the Senate Committee on Commerce and Consumer Protection at the onset of this Legislative session - but as defenders of the little that is left of public benefit electronic real estate, we are deeply troubled by the apparent about face the Department has taken regarding the implications of this Intent to Issue a D&O.

3. 40% OF SUBSCRIBERS DISENFRANCHISED

As a result of this PEG analog to digital migration, 40% of cable subscribers on neighbor islands cannot view educational PEG channels without first obtaining special equipment. Not only that, advertised QAM and Digital channel designations are confusing and may not be available on all television sets. This creates a serious barrier to PEG marketing and audience building and diminishes public access to state education and lifelong learning opportunities.

4. MIGRATION PREMATURE AT THIS TIME

We fully appreciate that digital and IPTV is the inevitable future of cable technology and we support efforts by our educational partners to add learning on demand services. We need to point out, however, that this particular piecemeal digital migration at this time is

premature. Since DCCA's own Findings of Fact has determined that Akaku was not informed or included in Oceanic Time Warner discussions and ex-parte negotiations with our client educational partners, we are concerned that misinformation put forth to our educational partners linking their digital success to abandonment of analog spectrum now may not reveal the whole picture. There is no reason why education cannot move forward with digital improvements while simultaneously remaining on the analog tier until this issue is resolved.

5. DCCA ACTION MAY JEOPARDIZE FRANCHISE RENEWAL

Since Maui County will be entering into a franchise renewal negotiation in the near future, the failure of the Department to enforce its Maui contract cannot help but send the wrong signal to Oceanic that may impair Maui County's ability to achieve a fair franchise agreement in 2013.

6. D&O WILL SEVERLY WEAKEN COMMUNITY TELEVISION PARADIGM

Apart from a major channel branding and marketing disruption, the loss and dissolution of public benefit bandwidth as a result of this move costs us money and audience we will never get back; diminishes the ability to be treated on a par with commercial services such as local broadcast channels; and inhibits community broadband efforts by usurping electronic spectrum from the public sphere. It creates significant barriers to viewership; blurs the distinction, definition, placement and jurisdiction of PEG channels; and due to the significant barrier of finding out about and acquiring special equipment, reduces DOE and UH stations to what amounts to dedicated institutional channels with limited viewership. This ignores the general wider public audiences who can still benefit from educational programming and pay their taxes to be able to have free and open access to it.

7. PUBLIC BANDWIDTH TAKEN FOR COMMERCIAL USE WITHOUT COMPENSATION OR DUE PROCESS.

What this migration does to put it simply is to allow the cable operator to appropriate 40% of public electronic parkland for its own commercial use. The math to support this metaphor is as follows: 2 analog channels (55 and 56) equal a minimum of 8 digital channels and the 2 digital channels that supposedly replace them (355 and 356) do not amount to enough bandwidth to even compensate for 1 analog channel. So if analog channels were acres of parkland, you are down sizing 5 contiguous acres of parkland to 3 acres and, in return for those two lost prime acres, you get 1/2 an acre located way out in the boondocks where you need a special key (digital cable box) to get in. It is difficult to see how a deal like that is in the public interest.

8. DIGITAL PEG CHANNELS CAN RESULT IN LOWER QUALITY SIGNAL

The Cable Act requires non-discriminatory treatment of PEG channels yet a digital channel is an application, not a channel. Consequently, digital "channels" are encoded and decoded differently which can result in a significant loss of quality. Without written

assurances of minimum technical standards from the cable operator, such as upgrades to HD, services such as secondary audio, closed captioning capability, or ability to record may be adversely affected.

9. TIME WARNER BROADBAND PLANS MAY BE ANTITHETICAL TO HAWAII BROADBAND INITIATIVE GOALS

A major factor in the DCCA Findings of Fact appears to be a decision on the part of DCCA to allow Oceanic Time Warner to immediately reclaim as much as 12 MHz of what was once dedicated PEG bandwidth to free up spectrum for the company to provide “ubiquitous and affordable” broadband speeds to consumers. There is evidence from other markets that Time Warner is dramatically reducing analog cable line-ups across the nation to make additional room for new digital HD channels and faster broadband speeds. Nowhere in the DCCA Findings however is there a quid pro quo from Time Warner to make these services “affordable” or “ubiquitous” particularly in rural areas which are characteristic of neighbor islands. Nor do any such enhancements accrue to PEG channels. Even though Hawaii ranks among the most highly penetrated and profitable cable systems in the nation, the DCCA has not undertaken any cost benefit analysis or engineering studies to determine whether or not Time Warner is under invested in its current monopoly network or whether an upgrade to increase bandwidth would be an appropriate alternative. Cable operators who do not constantly manage their own network capacity can experience traffic clogs by overselling service without upgrading capacity to sustain user demand. Wall Street analysts at Sanford Bernstein are reporting that Time Warner has recently announced that they will be applying overcharging schemes to broadband customers charging all customers usage fees to boost revenues and profits. The street predicts that these charges will become the rule and not the exception in the near future. This calls into question the prevailing wisdom that permeates many of the conclusions drawn by DCCA in the Findings of Fact. Relying on commercial providers to build 21st Century broadband as a platform for economic transformation may be problematic particularly in a non-competitive, essentially de-regulated wireline market like Hawaii with chronically underserved remote rural areas.

10. NETWORK ARCHITECTURE MAY RELEASE MORE BANDWIDTH

Netflix General Counsel, David Hyman, has blasted user caps and consumption billing practices as anti-competitive. Putting aside legitimate concerns regarding conflicts of interest companies like Time Warner have by owning content as well as the main competing delivery systems like cable and Internet, Mr. Hyman recently was quoted in overthecap.com as follows:

“ wireline bandwidth is almost an unlimited resource due to advances in internet architecture. The marginal costs of providing an extra gigabit of data – one episode of 30 Rock - from Netflix is one cent and falling” and Phillip Dampier has reported that Time Warner has recently implemented a “optional” usage pricing package for consumers who use less than 5GB per month charging over limit fees of \$1 per GB which is an enormous

mark up.

11. DCCA ASSUMPTIONS IN FINDINGS OF FACT in CATV-12-04 and CATV 12-05 ARE NOT SUPPORTABLE OR REQUIRE CLARIFICATION

There are a number of assumptions made in DCCA Notice of Finding of Fact under Section I in both documents that are not entirely supportable or require clarification. They include but are not limited to the following:

CATV-12-04 / E,G,H,I and CATV-12-05 / F,H,I,J:

These sections refer to actions and Decisions and Orders that apply specifically to the cable franchise for the island of Oahu as a result of franchise renewal proceedings and should not apply to neighbor islands without public hearings.

CATV-12-04 / J and CATV-12-05 / K

TWE and the State were remiss in that they did not notify or consult with Akaku, the PEG parent of UHMC and MDOE regarding its concerns regarding the digital migration of PEG client channels.

CATV-12-04 / K,L and CATV-12-05 / L,M

The Department did not inform Akaku of these ongoing developments.

CATV-12-04 / M and CATV-12-05 / N

These notices, if they were provided at all, were cryptic, in fine print, incomplete and confusing to subscribers.

CATV-12-04 / O and CATV-12-05 / P

The Department has not provided any record of these discussions, conclusions or agreements with TWE, nor has Oceanic Time Warner provided “sufficient notification” to its analog subscribers and Akaku about its proposal to move the TEC and TEACH channels. It also remains unclear as to how long a customer may retain a digital box at no additional cost should he or she request one. Time Warner has made no written digital migration plan available to Akaku for Educational Channels or for set top box distribution.

CATV-12-04 / Q and CATV-12-05 / R

Akaku received a phone call from Time Warner Representative, Mr. Norman Santos on December 21, 2011 and received a verbal explanation of the intended migration. There was no follow up call as requested.

CATV-12-04 / W and CATV-12-05 / X

There is no evidence to support the claims made by TWE under this item. In addition, Maui subscribers did not have an opportunity to provide input into decision making regarding D&O 346 which was part of Oahu's franchise renewal proceeding.

CATV-12-04 / X and CATV-12-05 / Y

Given the many arguments against granting this waiver contained in these comments, the DCCA assumptions under this item appear to be based on the unexamined claims of TWE. These assumptions do not afford neighbor island constituents the benefit of an economic, engineering or performance analysis to determine a deliberative process with regard to whether granting this waiver is the correct or even prudent course of action. It forecloses the possibility of considering comparative and alternative best practice models in other jurisdictions such as Portland, Boston and New York where public bandwidth is preserved and protected by the LFA.

CATV-12-04 / Y and CATV-12-05 / Z

This item states that on or about February 17, 2012, TWE reported that a TWE representative had contacted Hoike and Na Leo to explain TWE digital migration plans and policies. Item CATV-12-04 / Z and CATV-12-05 / AA goes on to state that based on the above (Y and Z) that the Department finds that TWE has given reasonable notice to its Kahului and Lahaina cable subscribers regarding its planned migration. We fail to see the logic of how contacting Hoike and Na Leo justify reasonable notice to subscribers in Kahului and Lahaina.

CATV-12-04 / AA and CATV-12-05 / BB

Akaku completely disagrees with the DCCA conclusion that TWE has "remedied the situation" under this item. This is obviously an opinion and not a Finding of Fact.

CATV-12-04 / CC and CATV-12-05 / DD

This finding completely chooses to ignore the indisputable fact pointed out by the FCC and the 6th Circuit Federal Court proceedings in Dearborn v. Comcast that requiring subscribers to obtain special equipment to view PEG channels is a significant barrier to consumers under any circumstances even if set top boxes are provided at no cost. This finding represents a lack of understanding of how television channels are identified and branded. It ignores the fact that this migration which was conducted in a cavalier and haphazard manner by TWE, has ensured that nearly 40% of potential cable audience will likely be permanently lost by our educational partners in the absence of an extraordinary and expensive public relations campaign to recapture and retain them.

CATV-12-04 / DD and CATV-12-05 / EE

Without a firm quid pro quo in writing from Time Warner, the lofty words in this finding about recovery of bandwidth and how residents will benefit bear little weight and veracity. This flawed finding tends to tip the balance of benefit toward the E faction of PEG at the expense of the public and G sectors. This is ironic, since due to the set box requirement and aforementioned audience drop off, what it really does is reduce the number of consumers of the E sector to a institutional club of tuition paying with members-only access to state sponsored education and video on demand.

CATV-12-04 / EE, FF and CATV-12-05 / FF, GG

For the many reasons articulated in these comments, Akaku cannot agree that the migration of TEC and TEACH channels constitute “good cause” under Section 12.8 of D&O 174 and 241 to waive the six megahertz (6 MHz) requirement in the definition until and unless the D&O is amended.

CONCLUSION:

Akaku would like to respectfully request that the Director of DCCA reconsider her Intent to Issue a Decision and Order as described. In the alternative, if the Director does choose to issue such an order, that she do so including the following amendments:

In exchange for permitting the Oceanic migration of PEG Channels 55 and 56 from the analog to the digital tier, Akaku would like to obtain a written commitment from Oceanic including but not limited to the following:

1. Oceanic will agree that all future ex-parte communications with PEG entity and PEG entity client E and G recipients/providers regarding cable access services, channels and equipment that affect PEG subscribers require written permission from affected PEG entities and the full participation of the PEG entity from each franchise area. Oceanic will also agree not to dispute, advocate or seek to change the apportionment or allocation of current PEG funding.
2. A binding agreement on the part of Oceanic to treat all PEG channels and PBS Hawaii on a par with commercial broadcast channels including all local broadcast channels. This may include installation of digital broadcast and/or high definition transmission equipment and capability at no cost at the cable headend, PEG studios and/or at designated origination sites such as County Council chambers according to a reasonable time frame.
3. Guaranteed analog PEG channel designation and placement repeated on all digital tiers upon every digital migration of each analog channel.

4. The equivalent of 6 digital channels and/or equivalent bandwidth on digital tier reserved for PEG for expansion for each analog PEG channel vacated.
5. In addition to digital basic, the placement of (2) 1080p resolution PEG Hi Definition Channels on the Hi Definition tier in exchange for each analog PEG channel within 24 months of initial analog to digital migration.
6. \$100,000 annual financial compensation to Akaku for 3 years to assist in marketing channel changes in service, rebuild lost audience, promote digital equipment availability to subscribers and establish, market and promote new channel identities.
7. Agreement to provide free digital box distribution to all analog subscribers for a minimum of 5 years and the establishment of rural digital box distribution outlets in Molokai, Lana' i, East and West Maui.
8. 1 Gigabit, symmetrical Internet installed and maintained free of charge to Akaku offices in Kahukui, Molokai and Lana' i.

Mahalo for the opportunity provide comments regarding this very important matter.

April 04, 2012

Department of Commerce & Consumer Affairs
Cable Television Division
335 Merchant Street, Room 101
Honolulu, Hawaii, 96813

Attn: Cable Advisory Commission

RE: Notice of finding of Fact and Intent to issue a Decision and Order CATV-12-01

Thank you for this opportunity to address you in regards to the Intent to issue a Decision and Order related to the migration of channels or the alteration of the PEG channel lineup for the residents, community and island of Kauai.

The intent of this action is to provide up to one gigabit-per-second broadband service at affordable prices throughout Hawaii and to increase the use of high-speed broadband services.

You have found that Time Warner has been in negotiations and agreements with both the University of Hawaii and the Department of Education, both are State Agencies or arms of our government. This is tantamount to sub letting to a third party without the consent of the original landlord. Those educational access channels are assigned and managed by the non-profit PEG organizations. Those two entities are content providers and not the managers. To go behind the PEG's backs and create a separate agreement that diminishes our role and effectiveness is quite harmful to the people of Hawaii. This action cannot be considered an act of good conscience. It is unfortunate that the DCCA is compliant with the abrogation of the public property.

You have found that on or about December 16, 2011 Time Warner informed the Department that a representative had contacted Ho'ike and provided information on the proposed migration. It wasn't "proposed" rather it had already been pre-determined and the change was going to happen regardless. And at no time was Ho'ike ever made aware of it. No communication in any form came to Ho'ike from Time Warner – not in December, not in January nor in February. It was not until last month that someone actually reached out to us to talk about this situation and by that time the channels had already been moved. The assertion on page 5 –R #2 is completely false and not a fact.

I want to address the value and service that the basic cable tier provides. It is extremely important and valuable as demonstrated by the decisions of Time Warner. Originally Ho'ike occupied channels 10, 11, and 12. We were forced to move to 52 through 56. In our place

you'll now find PBS Hawaii, OC Sports and CNN's Headline News. We got kicked to an undefined area and at that time unused. Time Warner will show you how important the basic service tier is by their alignments and what actually got moved. They kicked the Public Access channels, property of Kauai into the digital no-man's land and made sure that the local Visitor Information channel remained the same, the local origination channel remains the same, QVC remains the same, OC16 did not move, the MTV and VH1 channels were not affected despite their repetition on other parts of the spectrum. Our channel 56 was actually replaced with C-SPAN, they needed our channel location for another channel. The question is, if they are looking for bandwidth why is it that the people of Kauai are charged with paying for it with diminished rent for rights of way payment?

The PEG provisions of the franchise agreement are compensation for the residents of the County of Kauai and nowhere else. It is written and suggested that all neighbor islands must agree to this move because Oahu already agreed. Kauai was not part of that negotiation, Kauai had no voice at that table, and Kauai should not have to be part of the payment structure for a franchise negotiation on Oahu. It truly seems that the needs of the people of Kauai are ignored and we are to assume the status of kauwa.

Since the taking of our channels without our knowledge, consent or agreement the Department indicated that the benefits would be:

- 1) Increased internet speeds – yet those speeds are not available right now and they will come at some point in the future with an increased cost to the consumer. We are currently paying \$289 per month for a two by two megabyte connection which has never provided the two megabyte upload speed. If and when the internet speeds are increased it will mean a significant increase in the revenue flow for Time Warner at the expense of the public.
- 2) Road Runner Extreme and Road Runner Wideband will be implemented meaning another profit margin for Time Warner.
- 3) Additional benefits for a proposed statewide education and government channels. However at this time there is no action plan or even a suggestion on the table. So we are paying up front for something not even on the drawing board.
- 4) Plus an increase of video on demand channels. Now this is something that took immediate effect.

What has happened is not the increase of broadband capacity or services to the community. In fact what has happened is the addition of no less than 58 on demand channels and a much larger revenue stream for the cable operator (much of this has been added since January of this year). The people's education channels must be moved in order to add channels like Hustler on Demand, Playboy on Demand, Penthouse on Demand, Manhandler on Demand, Howard Stern on Demand and more. That is the fact, those are additions to the cable operations not the listed improvements and benefits as described in the proposed Decision and Order.

No other local channels have been affected. Why is it that the people and the PEG must pay the way for the increased profit margins of the cable operator? The fact remains that the basic tier of service is the most valuable in terms of service to the broadest number of subscribers and Kauai's PEG deserves to be there. That is part of the original agreement and should not be changed. Education channels must be made available to all of our residents, not just those currently enrolled in State Institutions. All the people of Kauai

deserve access to these channels regardless of the reasoning. I am sad to see the interest of the people is tossed aside in the efforts to preserve the profits of the corporations.

It would be my recommendation that we remain with our original order and agreement, that the cable operator find a more satisfactory solution that is fair to the residents of Kauai and not diminish the minimal "rent" structure that exists. You can easily see how valuable the basic tier is in the channel allocations that have been made.

The cable operator would like to continue to use the public rights of way in generating tremendous revenue for cable, internet and telephone services yet they want to cut the rightful rent payment to the people. That is unacceptable and the people of Kauai deserve the full measure of reciprocation for the use of our valuable rights of way.

In a perfect world Time Warner would have kept our channels as designated, duplicated our channels on the digital tier and created a process where we can easily transition the entire network into the less valuable real estate for their continued growth and financial development. It seems the people have no voice. When will the rights of the people protected?

Sincerely,

J S Robertson
Managing Director, Ho'ike: Kauai Community Television.

