

CABLE TELEVISION DIVISION  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of	)	<b>NOTICE OF FINDINGS OF FACT</b>
	)	<b>AND INTENT TO ISSUE A DECISION</b>
TIME WARNER ENTERTAINMENT	)	<b>AND ORDER</b>
COMPANY, L.P.,	)	
	)	<b>CATV-06-04</b>
Refund of Over-Collected Franchise	)	
Fees from Subscribers in the East Hawaii	)	
Franchise Area on the Island of Hawaii	)	
for the Period of May 1, 1996 to	)	
December 31, 2003.	)	
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**NOTICE OF FINDINGS OF FACT AND**  
**INTENT TO ISSUE A DECISION AND ORDER**

**I. FINDINGS OF FACT**

- A. The State of Hawaii (“**State**”) Department of Commerce and Consumer Affairs (“**Department**”) retained Merina & Company, LLP and Public Knowledge (collectively referred to as “**Merina**”), as a financial consultant to review the cable television franchise fee collection and payment process performed by Time Warner Entertainment Company, L.P. (“**TWE**”), doing business as Hawaiian Cablevision of Hilo (“**HAWAIIAN CABLEVISION**”), for the East Hawaii (including Honokaa, Hilo, Volcano and Pahoia areas) cable television franchise area on the island of Hawaii, during the period of May 1, 1996 to December 31, 2003.
- B. In addition, Merina was directed to compare the cable television franchise fee calculation, assessment, collection, and payment process with the

requirements in Decision and Order Nos. 185 (dated April 8, 1996) and 261 (dated August 11, 2000).

- C. The State received a report from Merina on those issues dated October 29, 2004.
- D. Decision and Orders Nos. 185 and 261, and Hawaii Administrative Rules chapter 16-132, specify that the franchise fee consists of three elements: (1) an “Access Operating Fee,” to support public, educational and governmental (**PEG**) access programming,<sup>1</sup> (2) a Hawaii Public Broadcasting Authority (“**HPBA**”) Fee,<sup>2</sup> and (3) an “Administrative Fee.”<sup>3</sup>
- E. In general, the Merina Report determined that during the period of May 1, 1996 to December 31, 2003, TWE collected amounts of franchise fees from East Hawaii cable television subscribers that differed from what it was required to pay to the following designated recipients: Na Leo ‘O Hawaii (“**Na Leo**”), the designated PEG access organization in the East Hawaii Franchise area; Hawaii Public Television Foundation (“**HPTF**”), dba PBS HAWAII (“**PBS**”), formerly known as HPBA; and the Department. This resulted in the following cumulative net over-collected and under-collected amounts:

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<sup>1</sup> By Decision and Order No. 261, TWE pays the Director or the Director’s designee an amount equal to three percent (3%) of TWE’s annual gross revenues from TWE’s East Hawaii System.

<sup>2</sup> Decision and Order No. 261 directs TWE to pay Hawaii Public Broadcasting Authority or its designee an amount equal to one percent (1%) of TWE’s East Hawaii System annual gross revenues.

<sup>3</sup> Pursuant to Hawaii Administrative Rule §16-132-2, TWE pays an administrative fee to the Department. During the time period in question here, the fee was one percent of the income received from subscribers during the preceding calendar year. The rule was subsequently modified.

<u>Franchise Fee Element</u>	<u>Accrual basis over/ (under) collected balances</u>
Access Operating Fees	\$ 206,930.00
HPBA Fees <sup>4</sup>	\$( 87,418.00)
Administrative Fees	\$( 77,412.00)
Total	\$ 42,100.00

- F. The Merina Report further found that the over- and/or under-collected amounts were largely a result of TWE's internal accounting practices. TWE itemized franchise fees on a flat fee basis, as opposed to charging subscribers a percentage of the amount of the cable television services on each individual subscriber's bill. Over time, the amount TWE collected in itemized franchise fees differed from the percentage amounts remitted to Na Leo, PBS, and the Department. The Merina Report also determined that this difference was attributable to the timing of the collection of the franchise fees from subscribers and the later remittance to Na Leo, PBS, and the Department, and also to the subscriber bill itemization methodology.
- G. The Merina Report also concluded that in its franchise fee computation, TWE did not utilize bad debt write-offs in the revenue reported to the Department. TWE did not also include launch fees, marketing support credits, and/or co-op advertising in its gross revenue calculation.

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<sup>4</sup> Adjusted to an accrual basis which was due and paid in January 2004.

- H. The Merina Report also evaluated whether TWE paid Na Leo, PBS, and the Department the franchise fee amounts that they were due during the period of May 1, 1996 to December 31, 2003. The Merina Report concluded that there were no instances in which Na Leo, PBS, and/or the Department did not receive the proper amount of franchise fees. Each entity received the correct amount due to it.
- I. Notwithstanding the fact that franchise fee payments were made correctly during the period from May 1, 1996 to December 31, 2003, TWE did not attempt to correct any differences between the amounts collected from subscribers and the amounts remitted to beneficiaries at the end of each calendar year. Had it done so, TWE could have decreased the amount assessed and collected less from subscribers to adjust for the overcollection of projected franchise fees.
- J. As directed in a letter order dated August 11, 2000, TWE agreed to implement a new procedure, beginning January 1, 2001, under which the franchise fee assessment for each subscriber would be based upon a percentage of the subscriber's monthly bill. This was a change from the past practice of a flat fee assessment under which all subscribers were assessed the same amount of franchise fees irrespective of whether a subscriber subscribed to basic service only or subscribed to basic service and other cable programming. This new procedure should eliminate future re-occurrences of over-and/or under-collections caused by the circumstances set forth in Paragraph F herein.

- K. During the period from May 1, 1996 to December 31, 2003, many different customers connected to and/or disconnected from TWE's cable system. At this point, it would be difficult and not cost beneficial to reconstruct which subscribers may have overpaid during the more than seven (7) year period in question.
- L. Based on the amount of fees at issue, the Department finds it would not be cost-effective to reconstruct the over- and under-collections from May 1, 1996 to December 31, 2003 on a customer-by-customer basis.
- M. The Department finds that the amount collected from subscribers in TWE's East Hawaii cable television franchise area on the island of Hawaii did not equal the amount paid out to designated recipients, and TWE overcollected from subscribers in TWE's East Hawaii cable television franchise area on the island of Hawaii, the net amount of FORTY-TWO THOUSAND ONE HUNDRED AND NO/100 DOLLARS (\$42,100.00), during the period of May 1, 1996 to December 31, 2003.

## **II. PROPOSED DECISION AND ORDER**

- A. The Department believes that since TWE was in control of the billing process, it appropriately should bear the consequences of the decisions it made in administering that process. If it overcollected fees, it should not be allowed to retain them.
- B. Because the cost of determining which individual subscribers overpaid is prohibitive, and because of the length of time which has elapsed since the

overpayments, the Department does not believe it is appropriate to require TWE to refund overpayments now to those past subscribers who paid them.

- C. The Department notes that the same issue arose in another franchise area, the City and County of Honolulu. See Decision and Order No. 316, issued February 2, 2005. In that case the Department determined that the overcollected amounts should be refunded to current subscribers. There, as here, it was not practical to identify individual subscribers and determine individually the amounts overpaid by them. The Department believes that TWE should not be allowed to retain funds to which it was not originally entitled, and that accordingly, the equitable solution is to return the funds to current subscribers.
- D. Accordingly, the Department intends to issue a Decision and Order directing TWE to refund the over-collected franchise fees in the amount of **FORTY-TWO THOUSAND ONE HUNDRED AND NO/100 DOLLARS (\$42,100.00)** to cable television subscribers in TWE's East Hawaii cable television franchise area on the island of Hawaii.
- E. However, prior to the issuing of a Decision and Order, the Department will allow interested persons to submit comments on the above Findings of

Fact for thirty (30) calendar days from the date of this Notice. The Department will consider comments timely submitted and issue its Decision and Order thereafter.

Dated: Honolulu, Hawaii, February 17, 2006.

*Mark E. Recktenwald*

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MARK E. RECKTENWALD  
Director of Commerce and  
Consumer Affairs