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

In the Matter of TIME WARNER ENTERTAINMENT COMPANY, L.P., Over-Collected Franchise Fees for the Period of January 1, 2007 through December 31, 2008.	**DECISION AND ORDER NO. 347**

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I. <u>INTRODUCTION</u>

A. Pursuant to Hawaii Revised Statutes ("**HRS**") chapter 440G, the Department of Commerce and Consumer Affairs ("**Department**") has issued cable television franchises to Time Warner Entertainment, L.P. ("**TWE**"), currently the sole cable operator in the State of Hawaii ("**State**"), for the following franchise areas: Island of Oahu, Island of Kauai, Maui County (excluding Lahaina), Lahaina, West Hawaii (Kona and Kohala) and East Hawaii (Hilo and Kau).

B. Federal law requires cable operators to pass through to subscribers the amount of any decrease in franchise fees. <u>See</u>, 47 U.S.C. section 542(e) (2001).

II. <u>FINDINGS OF FACT</u>

A. The State of Hawaii ("**State**") Department of Commerce and Consumer Affairs ("**Department**") retained Merina & Company, LLP ("**Merina**"), as a financial consultant to review the cable television franchise fee collection and payment process utilized by TWE, in its cable franchise areas of Oahu, Maui, Lahaina, East Hawaii (Hilo), West Hawaii (Kona) and Kauai, for the period from January 1, 2007 to December 31, 2008.

B. In addition, Merina was directed to compare the cable television franchise fee calculation, assessment, collection, and payment process with the requirements in various Decisions and Orders issued by the Department.

C. The State received reports from Merina on those issues dated May 13, 2009 ("**Merina Reports**"), and a letter from Merina with his recommendations ("**Letter**").dated December 1, 2009.

D. The Merina Reports included amounts remitted by TWE to the designated PEG access organizations in each franchise area,[1] Hawaii Public Television Foundation Fee ("**HPTF**"),[2] and the Department. For the purposes of this Decision and Order, the designated PEG access organizations, HPTF and the Department shall collectively be referred to as the "**designated entities**."

E. In the Merina Reports, Merina reviewed the collection and payment process for the cable television franchise fee which consists of three elements: (1) an "Access Operating Fee" to support public, educational,

1 Olelo Community Television is the designated access organization on Oahu; Akaku for Maui and Lahaina, Hoike for Kauai, and Na Leo for the Big Island (including East and West Hawaii).

2 Merina refers to HPTF by its former name, Hawaii Public Broadcasting Authority ("HPBA").

and governmental ("**PEG**") access programming,[3] (2) an HPTF fee,[4] and (3) an "Administrative Fee."[5]

F. Merina evaluated whether TWE paid the designated entities the cable television franchise fee amounts that they were due during the period of January 1, 2007 through December 31, 2008. In the Merina Reports and Letter, Merina concluded that there were no instances in which the designated entities did not receive the proper amount of cable television franchise fees (i.e., each entity received the correct amount that it was due).

G. In the Merina Reports and Letter, Merina also concluded that during the period of January 1, 2007 to December 31, 2008, TWE collected amounts of cable television franchise fees from cable television subscribers in all franchises that differed from what it was required to pay to the designated entities. This resulted in a difference between the amounts collected and remitted to the designated entities as follows:

	Franchise Fee Element			
Franchise Areas	**Access operating**	**HPTF**	**Administrative**	**Total**
East Hawaii (Hilo)	46,596	15,533	2,434	64,563
Maui (Kahalui)	79,684	26,562	8,894	115,140
Kauai	36,749	12,250	4,617	53,616

[3] In accordance with Decision and Order ("**D&O**") Nos. 261 and 291, TWE is generally required to pay an annual Access Operating Fee ("**AOF**") equal to three percent (3%) of its annual gross revenues from its cable television franchise systems to the designated PEG access organizations. In Decision and Order No. 346, the AOF paid to Olelo is equal to the amount paid in the previous calendar year multiplied by a change in the Consumer Price Index, or 3% of TWE's annual gross revenues, whichever is less.

[4] Pursuant to various D&Os, TWE pays HPTF or its designee an amount equal to one percent (1%) of its annual gross revenues from its cable television franchise systems.

[5] Pursuant to Hawaii Administrative Rule section 16-132-2, TWE pays an annual administrative fee to the Department. During the time period in question here, the fee was one percent (1%) of the income received from subscribers during the preceding calendar year. The rule was subsequently modified.

West Hawaii (Kona)	51,809	17,269	6,096	75,174
Lahaina	15,641	5,214	(112)	20,743
Oahu	342,492	114,165	21,011	477,668
Total over-collected balances	572,971	190,993	42,940	806,904

H. The Merina Report found that the over-collected amounts were largely attributable to the difference in accounting methods used by TWE for collections and remittances. Merina determined that the amounts remitted to the designated entities were based on year-end final accounting income, which included adjustments for items such as revenues earned but not yet billed, pro-rations for service adjustments, and bad debts. According to the Merina Report, amounts billed to subscribers however were based on the billing system which was not reduced for bad debts.

I. In the Merina Letter, Merina further explained that collection figures were taken solely from the total monthly bills sent to subscribers during the subsequent year and were nearly always higher because TWE was constantly adding new subscribers. Merina concluded that because the amounts billed to new subscribers were historically greater than the accounting adjustments (i.e., bad debts), inevitably there will be over (or under) collected amounts at year end. Merina recommended that the amounts over-collected by TWE be refunded back to subscribers.

J. During the period from January 1, 2007 through December 31, 2008, many customers connected to and/or disconnected from TWE's cable television system in the different franchise areas (i.e., many people became cable television subscribers and/or canceled their subscription). Since December 31, 2008, many other customers have connected to and/or disconnected from TWE's system. Because of the high number of new and former subscribers, it would be difficult and expensive to reconstruct which subscribers may have overpaid during January 1, 2007 through December 31, 2008.

III. CONCLUSION

A. Based on the foregoing, the Department concludes that during the period of January 1, 2007 to December 31, 2008, the amount collected from cable television subscribers in each TWE Hawai'i franchise area did not equal the amount paid out to designated beneficiaries. The over-collected amounts in each franchise area are:

Franchise Areas	Over-Collection Amount
East Hawaii (Hilo)	$ 64,563
Maui (Kahalui)	$ 115,140
Kauai	$ 53,616
West Hawaii (Kona)	$ 75,174
Lahaina	$ 20,743
Oahu	$ 477,668

B. Due to the differences in TWE's accounting methods for collections and remittances, TWE over-collected franchise fee payments from cable television subscribers.

C. The Department concludes that it is not appropriate for TWE to retain franchise fees to which it was not originally entitled.

D. The Department further concludes that it is not appropriate for the Department to require that TWE now refund the overpayments to the past cable television subscribers who paid them. Not every current cable television subscriber was a subscriber during the two-year period when the net over-collections occurred, and it would be difficult and expensive to identify and locate all of the cable television subscribers who were assessed the franchise fees during the period in question. It is therefore not appropriate to require TWE to refund the over-collected amounts to these former subscribers, and the refund of franchise fees shall be provided only to current cable television subscribers in each of TWE's Hawaii franchise areas.

IV. ORDER

Accordingly, the Department hereby orders that:

A. TWE shall refund the over-collected franchise fees that were collected during the period from January 1, 2007 to December 31, 2008 to current cable television subscribers (i.e., those who are cable television subscribers as of February 5, 2010) in each of TWE's respective franchise areas listed below as follows:

Franchise Areas	Over-Collection Amount to be Refunded
East Hawaii (Hilo)	$ 64,563
Maui (Kahalui)	$ 115,140
Kauai	$ 53,616
West Hawaii (Kona)	$ 75,174

Lahaina	$ 20,743
Oahu	$ 477,668

B. The refund shall take the form of a credit on a future monthly cable television bill to cable television subscribers in each respective franchise area, and be completed no later than March 20, 2010. TWE shall coordinate the refund for the over-collected franchise fees in this Decision and Order with the refund of the excess annual fee in D&O No. 348. Any costs associated with this refund for over-collected franchise fees shall be covered by the reimbursed costs allowed in D&O No. 348.

C. TWE shall confirm in writing to the Department that the refund has been completed and shall submit an itemization of the costs associated with the refund. Such confirmation and itemization shall be submitted no later than fourteen (14) calendar days after the refund is completed to eligible recipients.

Dated: Honolulu, Hawaii, January 20, 2010.

Lawrence M Reifurth

LAWRENCE M. REIFURTH
Director of Commerce and Consumer Affairs