

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

In the Matter of)
)
TIME WARNER ENTERTAINMENT) **DECISION AND ORDER NO. 329**
COMPANY, L.P.,)
)
Refund of Over-Collected Franchise Fees)
from Subscribers in Maui County)
(excluding Lahaina) for the Period of)
June 1, 1999 to December 31, 2003.)
_____)

DECISION AND ORDER NO. 329

I. INTRODUCTION

- A. On or about February 17, 2006, the State of Hawaii ("**State**") Department of Commerce and Consumer Affairs ("**Department**") issued a "Notice of Findings of Fact and Intent to Issue a Decision and Order," CATV 06-02 ("**Notice**"), to allow interested persons time to submit comments on the Findings of Fact and proposed order. This Notice was posted on the Department's web page on or about February 22, 2006.
- B. The Department did not receive any comments on the Notice.
- C. After carefully considering the files and records herein, the Department hereby issues the following Decision and Order ("**D&O**").

II. FACTS

- A. The 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 utilized

by Time Warner Entertainment Company, L.P. (“**TWE**”), doing business as Hawaiian Cablevision (“**HAWAIIAN CABLEVISION**”), for the Maui County (excluding Lahaina) cable television franchise area (“**Maui County**”) for the period of June 1, 1999 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 D&O Nos. 241 (dated May 10, 1999) and 261 (dated August 11, 2000).
- C. The Department received an October 29, 2004 report from Merina (“**Merina Report**”).
- D. The Merina Report included amounts remitted by TWE to Akaku: Maui Community Television (“**Akaku**”), Hawaii Public Television Foundation (“**HPTF**”),¹ and the Department. For the purposes of this D&O, Akaku, HPTF and the Department shall be collectively referred to as the “**designated beneficiaries**.”
- E. 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 and governmental (**PEG**)

¹ Merina refers to HPTF by its former name: Hawaii Public Broadcasting Authority (“**HPBA**”).

access programming,² (2) an HPBA Fee,³ and (3) an “Administrative Fee.”⁴

F. In general, the Merina Report determined that during the period of June 1, 1999 to December 31, 2003, the amount of cable television franchise fees TWE collected from Maui County cable television subscribers differed from the amount that it was required to pay to the designated beneficiaries. This resulted in a difference between the amounts collected and remitted to the designated beneficiaries as follows:

<u>Franchise Fee Element</u>	<u>Over/ (under) collected balances</u>
Access Operating Fees	\$ 102,970.00
HPBA Fees	\$ 2,312.00
Administrative Fees	<u>\$ 14,796.00</u>
Total	<u>\$ 120,078.00</u>

G. 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 cable television franchise fees on a flat fee basis for each cable television subscriber, as opposed to charging cable television subscribers a percentage of the amount of the cable television services on each individual subscriber's bill. Over time, the amount TWE collected in

² Under D&O 241, as amended by D&O 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 Maui County cable television franchise system.

³ Under D&O 241, as amended by D&O 261, TWE pays HPTF or its designee an amount equal to one percent (1%) of TWE’s Maui County cable television franchise system annual gross revenues.

⁴ Pursuant to Hawaii Administrative Rule (“HAR”) §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 has subsequently been modified.

itemized cable television franchise fees differed from the percentage amounts remitted to the designated beneficiaries. The Merina Report also determined that this difference was attributable to the timing of the collection of the cable television franchise fees from cable television subscribers and the delayed payment schedule to the designated beneficiaries.

- H. The Merina Report also concluded that in its cable television franchise fee computation, TWE did not utilize bad debt write-offs in the revenue reported to the Department and did not include launch fees, marketing support credits, and/or co-op advertising in its gross revenue calculation.
- I. Merina also evaluated whether TWE paid the designated beneficiaries the cable television franchise fee amounts that they were due during the period of June 1, 1999 to December 31, 2003. Merina concluded that there were no instances in which the designated beneficiaries did not receive the proper amount of cable television franchise fees (i.e., each entity received the correct amount that it was due).
- J. Notwithstanding the fact that the correct amount of cable television franchise fees were paid to the designated beneficiaries during the period of June 1, 1999 to December 31, 2003, TWE did not attempt to correct any differences between the amounts collected from cable television subscribers and the amounts remitted to the designated beneficiaries at the end of each calendar year.

- K. As directed in an August 11, 2000 letter order from the Department, TWE agreed to implement a new procedure beginning January 1, 2001, under which the cable television franchise fee assessment for each cable television subscriber would be based upon a percentage of the cable television subscriber's monthly bill. This was a change from the past practice of a flat fee assessment under which all cable television subscribers were assessed the same amount of cable television franchise fees irrespective of whether a cable television subscriber subscribed to basic service only, or subscribed to basic service and other cable television programming. This new procedure should eliminate future re-occurrences of over-and/or under-collections caused by the circumstances set forth in Paragraph G herein.
- L. During the period from June 1, 1999 to December 31, 2003, many customers connected to and/or disconnected from TWE's cable television system (i.e., many people became cable television subscribers and/or canceled their subscription). Since December 31, 2003, many other customers have connected to and/or disconnected from TWE's system. At this point, it would be difficult and expensive to reconstruct which subscribers may have overpaid during the more than four (4) year period in question from June 1, 1999 to December 31, 2003.

III. CONCLUSION

- A. Based on the foregoing, the Department concludes that during the period of June 1, 1999 to December 31, 2003, the amount collected from cable

television subscribers in TWE's Maui County cable television franchise area did not equal the amount paid out to designated beneficiaries, and that this difference was an over-collected net balance of **ONE HUNDRED TWENTY THOUSAND SEVENTY-EIGHT AND NO/100 DOLLARS (\$120,078.00)**.

- B. TWE was in control of its own billing process and should be responsible for its administration and execution of that process. The Department finds that TWE could have developed a process to correct any over and/or under collections from cable television subscribers on a continuing basis. The Department further concludes that had TWE implemented such a process, it could have made adjustments in its billing procedure to adjust for the over-collection of projected cable television franchise fees.
- 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 more than four (4) year period when the net over-collections occurred. The Department finds that given the length of time which has lapsed since the overpayments, it would be extremely difficult to now identify and locate the cable television subscribers who overpaid the cable television franchise fees from June 1, 1999 to December 31, 2003, and it would not be cost-effective or

practicable to reconstruct the over- and under-collections on a customer-by-customer basis.

- E. The Department further concludes that given the circumstances, the equitable solution is to return the over-collected cable television franchise fees to current cable television subscribers in the Maui County cable television franchise area.

IV. **ORDER**

Accordingly, the Department hereby orders that:

- A. TWE shall refund the over-collected franchise fees that were collected during the period of June 1, 1999 to December 31, 2003 in the amount of **ONE HUNDRED TWENTY THOUSAND SEVENTY-EIGHT AND NO/100 DOLLARS (\$120,078.00)**, to current cable television subscribers in the Maui County (excluding Lahaina) cable television franchise area.
- B. This refund shall take the form of a credit on a future monthly cable television bill to Maui County (excluding Lahaina) cable television subscribers and be completed no later than one hundred twenty (120) calendar days from the date of this D&O;
- C. TWE shall develop a plan that implements the refund, and submit this refund plan to the Department for approval within thirty (30) calendar days from the date of this D&O. The refund plan should include, but not be limited to, a definition of eligible recipients (subscribers) for the refund, the calculation of the refund amount for each eligible recipient, and a description of how the refund will be implemented; and

D. TWE shall confirm in writing to the Department that the refund has been completed. Such confirmation shall be submitted no later than thirty (30) calendar days after the refund is completed, and shall identify any significant difficulties which arose with implementing the refund.

Dated: Honolulu, Hawaii, December 28, 2006.



MARK E. RECKTENWALD
Director of Commerce and
Consumer Affairs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION AND ORDER NO. 329 was served upon the following person(s) at the address shown below by mailing the same, postage prepaid, on this 29th day of December, 2006.

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