

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

In the Matter of)
)
TIME WARNER ENTERTAINMENT) **DECISION AND ORDER NO. 330**
COMPANY, L.P.,)
)
Under-Collected Franchise Fees from)
Subscribers in the West Hawaii Franchise)
Area on the Island of Hawaii for the Period)
of July 1, 1995 to December 31, 2003.)
_____)

DECISION AND ORDER NO. 330

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 06-03 ("**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 webpage on or about February 22, 2006.
- B. The Department received one comment on the Notice on March 17, 2006, which was from Time Warner Entertainment Company, L.P. ("**TWE**"). In its March 17, 2006 letter,¹ TWE objected to the Notice and requested entry of a Decision and Order permitting TWE to recover the under-collected amounts in the Kona franchise area from current subscribers. In general,

¹ TWE's March 17, 2006 letter (the year was incorrectly cited as "2005") included comments and objections to the Notices of Findings of Fact and Intent to Issue a Decision and Order in CATV-06-01 and CATV-06-03.

TWE argued that the Department applied inconsistent and arbitrary standards and requirements for the over- and/or under-collected balances in the different franchise areas, and that the proposed Decision and Order in the Notice penalized TWE in hindsight for failing to promptly address the shortfall in the collection of cable television franchise fees.

- 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 TWE, doing business as Sun Cablevision ("**Sun Cablevision**"), for the West Hawaii (including Kona and Kohala) cable television franchise area on the island of Hawaii, for the period of July 1, 1995 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.173 (dated June 30, 1995) 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 Na Leo `O Hawaii, (“**Na Leo**”), Hawaii Public Television Foundation (“**HPTF**”),² and the Department. For the purposes of this D&O, Na Leo, 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**) access programming,³ (2) an HPBA Fee,⁴ and (3) an “Administrative Fee.”⁵
- F. In general, the Merina Report determined that during the period of July 1, 1995 to December 31, 2003, the amount of cable television franchise fees TWE collected from West Hawaii 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:

² Merina refers to HPTF by its former name: Hawaii Public Broadcasting Authority (“**HPBA**”).

³ Under D&O 173, 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 East Hawaii cable television franchise system.

⁴ Under D&O 173, as amended by D&O 261, TWE pays HPTF or its designee an amount equal to one percent (1%) of TWE’s East Hawaii cable television franchise system annual gross revenues.

⁵ 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 was subsequently modified.

<u>Franchise Fee Element</u>	<u>Over/ (under) collected balances</u>
Access Operating Fees	\$ (154,296.00)
HPBA Fees	\$ 143,548.00
Administrative Fees	<u>\$ (74,915.00)</u>
Total	<u>\$ (85,663.00)</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 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 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 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 coop 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 July 1, 1995 to December 31, 2003. The Merina Report

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 July 1, 1995 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 described in Paragraph G herein.

- L. During the period of July 1, 1995 to December 31, 2003, many customers connected to and/or disconnected from TWE's cable television system (i.e., many people became new 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 underpaid during the more than eight (8) year period in question from July 1, 1995 to December 31, 2003.

III. CONCLUSION

- A. Based on the foregoing, the Department concludes that during the period of July 1, 1995 to December 31, 2003, the amount collected from cable television subscribers in TWE's West Hawaii cable television franchise area did not equal the amount paid to the designated beneficiaries, and that this difference was an under-collected net balance of **EIGHTY-FIVE THOUSAND SIX HUNDRED SIXTY-THREE AND NO/100 DOLLARS (\$85,663.00)**.
- B. The Department has carefully considered the arguments raised by TWE in its March 17, 2006 letter, and finds that the arguments do not justify a result different from that announced in the Notice. TWE was in control of its own billing process and should be responsible for its administration and execution of that process. There is nothing in the record that suggests that it would have been impracticable for TWE to develop a process to

timely correct any over and/or under collections from cable television subscribers on a continuing basis, and the Department finds that TWE could have developed such a process. The Department further concludes that had TWE implemented such a process, it could have made adjustments in its billing procedure to adjust for the under-collection of projected cable television franchise fees. Having failed to promptly correct under-collections when they occurred, TWE should not now be allowed to recover the under-collected amounts from either past or present subscribers, for the reasons set forth in the Notice as well as the additional reasons discussed below.

- C.** TWE's arguments concerning the equity of this ruling in comparison to rulings made by the Department with respect to over-collections ignore the difference in knowledge, authority and wherewithal between TWE and its customers during the period in question. The average consumer of TWE's services did not have the information or resources needed to determine whether the amounts of franchise fees that he or she was being asked to pay by TWE were correct. In contrast, TWE had the information and ability to determine whether an individual consumer was paying too much or too little. Since TWE had that ability, it is appropriate to hold TWE accountable for failing to exercise it, by (1) not allowing TWE to unjustly enrich itself in instances where it collected too much, and by (2) by requiring that, if TWE is to be permitted to recover any amounts that

were under-collected, it should have done so promptly after the under-collection occurred.

- D.** TWE's proposed alternative would be to order current subscribers to pay the under-collected amounts, even though many of those subscribers were not subscribers at the time of the under-collection. Such a ruling would be inequitable and without basis as to those new subscribers, and accordingly the Department does not adopt it.
- E.** Another alternative would be to authorize TWE to reconstruct which consumers underpaid from 1995-2003, and further authorize TWE to attempt to recover from those consumers. However, as noted in section II L above, it would be extremely costly to undertake that reconstruction at this time. Moreover, it would be difficult to establish that TWE did not, thereafter, pass that cost on to current subscribers through rates ungoverned by the department, even though many current subscribers were not subscribers at the time of the undercollections. Accordingly, the Department rejects this alternative as well.
- F.** Thus, the Department concludes that it is not appropriate for TWE to recover the under-collected amounts from either current or past cable television subscribers.

IV. ORDER

Accordingly, the Department hereby orders that TWE shall not assess and collect the under-collected cable television franchise fees for the period of

July 1, 1995 to December 31, 2003, in the amount of **EIGHTY-FIVE THOUSAND SIX HUNDRED SIXTY-THREE AND NO/100 DOLLARS (\$85,663.00)**, from either current or past cable television subscribers in TWE's West Hawaii cable television franchise area (Kona and Kohala) on the island of Hawaii.

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. 330 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.

JOHN T. KOMEIJI, ESQ.
Watanabe, Ing & Komeiji
First Hawaiian Center, 23rd Floor
999 Bishop Street
Honolulu, HI 96813

BRIANA A. KANG, ESQ.
Watanabe, Ing & Komeiji
FirstHawaiiCenter, 23rd Floor
999 Bishop Street
Honolulu, HI 96813

*(Attorneys for Applicant Time Warner Entertainment
Company, L.P.)*


Patti K. Kodama
Patti K. Kodama
Secretary