

COMPUTEL CONSULTANTS

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May 29, 2013

Via Email & USPS

Honorable Jeffrey C. Cohen
Acting Secretary to the Commission
New York State Department of Public Service
3 Empire State Plaza
Albany, New York 12223-1350

Subject: Case 13-V-0144 – Time Warner Cable Franchise Fee Payments to the Village of Camden

Dear Acting Secretary Cohen:

We are in receipt of the Commission's May 23, 2013 Order in the above mentioned case regarding cable franchise fee payments to the Village of Camden. After reviewing the Order, it is apparent that the Commission was confused regarding the basic facts of the case. In fact, although the Order denies the Village's request for the payment of additional franchise fees, a detailed reading of the Order reveals the Commission's support for the basic argument made in favor of the Village being owed additional franchise fees.

First, it should be noted that this complaint is unique and unrelated to any other complaints Computel has filed on behalf of other municipal clients, the majority of which have involved questions regarding the exclusion of franchise fees from Gross Revenues. Nowhere in our January 26, 2010 complaint filing do we allege an improper exclusion of franchise fee revenue. In fact, during the entire period subject to our audit – January 2003 through December 2008 – franchise fees were included in the gross revenue pool on which franchise fees were calculated and paid.

The deficiency in franchise fee payments during the period under review was caused by the exclusion of numerous other revenue categories the Village was entitled to under the terms of their franchise agreement. As outlined in the January 26, 2010 complaint, the following relevant sections of the Village's cable franchise agreement (approved by Commission Order on March 3, 1997 in Case 31447) call for a 3% franchise fee on what is effectively the maximum allowable gross revenue pool:

Section 1(I)

"Gross Revenues" mean any revenue received by the Grantee from the operation of the Cable System to provide Cable Services in the Service Area, provided, however, that such phrase shall not include any fees or taxes which are imposed directly or indirectly on any Subscriber thereof by any governmental unit or agency, and which are collected by the Grantee on behalf of such unit or agency.

Section 4.1 Franchise Fee

A. The Grantee shall pay to the Franchising Authority a franchise fee equal to three (3) percent of Basic Revenues received by the Grantee from the operation of the Cable System to provide Cable Services on an annual basis; provided, however, Gross Revenues shall not include: (i) any tax, fee, or assessment of any kind imposed by the Franchising Authority or other governmental entity on a cable operator, or Subscriber, or both, solely because of their status as such; (ii) any tax, fee or assessment of general applicability which is unduly discriminatory against cable operators or Subscribers (including any such tax, fee, or assessment imposed, both on utilities and cable operators and their services), and (iii) any other special tax, assessment or fee such as a business, occupation, and entertainment tax.

The audit of franchise fee payments revealed that, rather than paying a 3% fee on all allowable revenue, Time Warner issued payments that were limited to 3% of Basic/Standard and franchise fee revenue collected from subscribers. In terms of Time Warner accounting terminology, the following revenue streams were excluded – Equipment, Guide, Mini-Pay (later known as Digital), Pay (later known as Premium), Install, Pay-Per-View, Advertising, and Home Shopping.

When this was brought to Time Warner's attention, the Company's response (written by Thomas P. Doheny, copy included in original complaint) was that the reference to "Basic Revenues" in Section 4.1(A) of the agreement (above) limited the revenue pool on which franchise fees should be paid to just "Basic Cable" the lowest priced tier of service regularly provided to all subscribers.

Therefore, the dispute centers on whether the Village was entitled to franchise fees on revenue from Equipment, Guide, Digital, Premium, Install, Pay-Per-View, Advertising, and Home Shopping; or whether, as Time Warner alleges, the gross revenue pool should be limited to just "Basic Cable". In the January 26, 2010 complaint, the Village notes the confusion between the terms "Basic Revenues" and "Gross Revenues" in Section 4.1(A), arguing that the term "Basic Revenues" should rightly be interpreted as a reference to "Gross Revenues".

The Commission's May 23, 2013 Order describes the Village's position on page 4 under the heading "Village Letter". This section of the Order misstates the basic facts raised in the complaint – specifically, the Village did **not**:

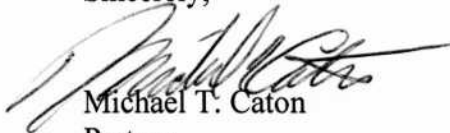
- 1) state that the franchise agreement it executed with Time Warner defines the gross subscriber revenues subject to franchise fees to exclude franchise fee revenue.
- 2) assert that this definition of gross subscriber revenues conflicts with a requirement in the Commission rules.
- 3) assert that audit results revealed the exclusion of franchise fees from gross revenues.

However, this same section of the Commission's Order does address the use of "basic" and "gross" revenues (in Section 4.1(A)) and how the 1997 Approval Order dealt with the ambiguity caused by those terms. The relevant details are described in footnote 7 as follows:

This discussion in the 1997 Renewal Order is not equivalent to a directive striking the franchise fee exclusion. It relates to the use of the term, basic revenues, in place of gross revenues and interprets the provision to mean gross revenues.

That is precisely the Village's argument to support their position that franchise fees should have been paid on the excluded revenue called for in the agreement's Section 1(I) definition of "Gross Revenues". The Village respectfully requests a review of their complaint. We are confident that when that is done, the Commission will agree that the 1997 Approval Order calls for the application of a franchise fee based on the "Gross Revenues" definition in the agreement rather than a franchise fee on "Basic Revenues." Such a conclusion would require that Time Warner be directed to make an additional franchise fee payment on previously excluded revenue from Equipment, Guide, Digital, Premium, Install, Pay-Per-View, Advertising, and Home Shopping for the period of January 2003 until the current agreement became effective on March 11, 2009. Thank you for your consideration.

Sincerely,



Michael T. Caton
Partner

CC: Robin Mitchell, Village of Camden (via email)
John Fogarty, Time Warner Cable (via email)
Brian Ossias, PSC (via email)