

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 17, 2010

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 10-V-0196 - Application of Time Warner Entertainment-
Advance/Newhouse Partnership for Approval of the
Renewal of its Cable Television Franchise for
the Town of Castile (Wyoming County).

ORDER APPROVING RENEWAL
(Issued and Effective July 23, 2010)

BY THE COMMISSION:

On April 20, 2010, Time Warner-Entertainment/Advance
Newhouse Partnership submitted an application requesting
approval of the renewal of its cable television franchise
(franchise renewal) with the Town of Castile, Wyoming County.
The Town authorized renewal of the franchise by Resolution of
the Town Board dated April 8, 2010, after holding a duly noticed
public hearing on the same date. The term of the renewal is ten
years, beginning on the date that this Order is issued and
effective.

No renewal of a franchise is effective without the
approval of the Commission (Public Service Law (PSL) §222). The
Commission is required to approve an application for a franchise
renewal, unless it finds specific violations of law, Commission
regulations, or the public interest (PSL §222(3)). Failure to
conform to franchise standards established in Commission
regulations does not preclude Commission approval, if the
Commission finds that approval of the franchise renewal would
serve the public interest; and, the Commission may approve the

application contingent upon compliance with the statutory and regulatory standards, terms, or conditions that are not met by the franchise renewal (PSL §222(3) and (4)). Commission regulations (16 NYCRR §891.2 and Part 895) require an application for renewal to conform to minimum standards for required contents of franchises and set forth procedural requirements for municipal review of the franchise renewal, including public notice, opportunity for comments, and a public hearing.

After reviewing this application in the context of applicable statutory and regulatory standards, we determine that approval of the franchise renewal serves the public interest. We, therefore, approve the agreement to renew the franchise (franchise agreement), subject to compliance with certain statutory and regulatory standards and requirements.

DISCUSSION

The Town complied with procedural standards in our rules for authorizing renewal of a cable franchise. These include adequate public notice, opportunity for comment, and a public hearing upon notice to the public (16 NYCRR §894.7).

With the exception of certain provisions, the renewal agreement substantially complies with the rules applicable to contents of franchise renewals (16 NYCRR Part 895). Approval of the franchise renewal is in the public interest because failure to approve the renewal would require the municipality and cable television company to expend significant time and resources to replicate their efforts to reach another agreement. Accordingly, we will exercise our discretion and approve the franchise renewal upon the condition that our approval is contingent upon compliance with certain statutory and regulatory requirements (PSL §222(4)).

Section 3.2 of the franchise renewal purports to: authorize the cable television company to terminate the franchise as a matter of right, if a local, state, or federal law eliminates the municipal franchise requirement for construction and operation of a cable television system, whether or not the law allows continuation of franchise agreements for the duration of their terms; and, require the municipality to agree, at the cable television company's request, to amend the franchise and reduce regulatory and economic burdens, if a local, state, or federal law reduces the regulatory or economic burdens of other cable television providers.

The cable television company's right to amend or terminate the franchise conflicts with the statutory requirements that the Commission review and approve franchise amendments (PSL §222; 16 NYCRR §892-1.4 and §897.3) and order termination of a franchise prior to the expiration of its term upon certain findings (PSL §227). Commission approval of the franchise agreement is subject to the condition that any amendment, including a modification due to a change in law or regulations, requires municipal and Commission approval (PSL §222; 16 NYCRR §892-1.4 and §897.3) and that termination of a franchise is authorized only by Commission order upon certain findings (PSL §227).

The franchise renewal omits requirements for contents of franchises in the Commission's rules relating to access to cable service and to submission of system-wide statistics. Our rules require a franchise renewal to contain a provision stating that access to cable service will not be denied to any group of potential residential subscribers based on income of the residents of the local area in which the subscribers reside (16 NYCRR §895.1(d)) and a provision stating that the cable television company may submit system-wide statistics for any

valid reporting requirement contained in the franchise agreement, except for reporting requirements related to franchise fees and customer complaints (16 NYCRR §895.1(t)). The franchise renewal is approved, subject to the condition that §895.1(d) and §895.1(t) are deemed part of the franchise agreement.

Section 11.3 of the franchise agreement requires the franchisee to designate channel capacity for public, educational, and governmental (PEG) access and provide access channels on a first come, first served basis. Section 895.4 establishes comprehensive minimum standards for PEG access, including administration of use of channel capacity and procedures for waivers of the standards. Designation and provision of access channel standards comprise only one component of these requirements. Accordingly, our approval of the franchise agreement is granted upon the condition that §11.3 is construed to provide for application of the entire §895.4 of the Commission's rules to PEG access in the franchise agreement.

Our rules require a franchise renewal to include a provision stating that the cable television company shall not abandon its cable television service in any portion of the franchise without the written consent of the municipality (16 NYCRR §895.1(h)). In §18 of the franchise agreement, the parties agree that the franchisee shall not abandon its cable service "in such a way as would limit its ability to continue to provide service to all subscribers" without the Town's written consent. Municipal approval is required before abandonment of any service or portion thereof without limitation or qualification (PSL §226; 16 NYCRR §895.1(h)). Accordingly, we approve the franchise renewal, upon the condition that §18 is construed in a manner that is consistent with these statutory and regulatory requirements.

Section 5.1 of the franchise agreement does not fully comply with our rules, which require a cable television company to "indemnify the municipality for, and hold it harmless from, all liability, damage, cost or expense arising from claims of injury to persons or damage to property occasioned by conduct undertaken pursuant to the franchise" (16 NYCRR §895.1(i)).

Section 5.1 states:

Franchisee shall indemnify and hold harmless the Town for all damages and penalties, at all times during the term of this Franchise, as a result of or due to Franchisee's construction or operation of the System.

Section 5.1 would appear to limit the company's liability to the system's construction or operation, instead of providing indemnification and hold-harmless coverage for the claims described in our rule. In addition, §5.1 and §5.4 purport to indemnify, defend, and hold harmless the Town from "damages and penalties" rather than from "all liability, damage, cost or expense." The proposed terminology in the franchise renewal may impose limitations on potential recovery for personal injury and property damage. Accordingly, the renewal agreement is approved with the condition that §895.1(i)(1) is deemed part of the franchise agreement.

The franchise renewal contains requirements that are imprecise when compared with similar requirements in our rules. Section 2.3 provides:

Any grant of a subsequent franchise by the Town shall be on terms and conditions which are not more favorable or less burdensome than those imposed on Franchisee hereunder and shall be granted in keeping with the rules of the PSC.

Our rule relating to level playing field terms and conditions for competitors (16 NYCRR §895.3) states:

No municipality may award or renew a franchise for cable television service which contains economic or regulatory burdens which when taken as a whole are greater or lesser than those burdens placed upon another cable television franchise operating in the same franchise area.

We, therefore, construe Section 2.3 of the proposed agreement in a manner consistent with Section 895.3 of our rules, requiring level playing field terms and conditions for competitors in the same service area.

The Commission's rules require that a franchise renewal contain a provision reserving to the municipality the right to adopt additional regulations necessary in the exercise of its police power, not materially in conflict with the franchise, and consistent with all federal and state laws, rules, regulations, and orders (16 NYCRR §895.1(1)). In the third paragraph of §6.1 of the franchise renewal, the reference to federal and state laws, rules, regulations, and orders is omitted. Accordingly, we condition our approval of the franchise renewal upon the addition of the phrase "and consistent with all federal and state laws, rules, regulations and orders" to the final conditional clause of the third paragraph of §6.1.

The franchise agreement contains additional provisions that are not required by the Commission's rules. Our approval of these provisions is granted to the extent that they pertain to the provision of cable service and are, and remain, consistent with PSL Article 11, our regulations, policies, and orders, and applicable federal statutes and regulations. In the event of an ambiguity in any provision, or among separate provisions, the provision will be construed in the manner most favorable to the franchisor.

The Commission orders:

1. The application of Time Warner Entertainment-Advance/Newhouse for renewal of its cable television franchise for the Town of Castile (Wyoming County) is approved, subject to the conditions set forth in this Order. The term of the renewal shall expire in ten years, beginning on the date that this Order is issued and effective.

2. This Order does not in any way confer rights or privileges other than those granted in the underlying franchise and the certificate holder remains subject to the obligations imposed by Public Service Law Article 11, the underlying franchise and all applicable rules, regulations and orders of this Commission.

3. This proceeding is closed.

By the Commission,

JACLYN A. BRILLING
Secretary