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MUNICIPAL ASSISTANCE

97-V-0276

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Honorable Cathryn C. Thomas  
Supervisor, Town of Webster  
1000 Ridge Road  
Webster, New York 14580-2917

Re: Time Warner Communications Franchise Renewal with the Town of Webster

Dear Supervisor Thomas:

The purpose of this letter is to follow-up and to respond to the issues raised during our franchise renewal meeting. By way of this letter I will respond to those issues raised during that meeting and/or provide substitute language which may be incorporated into the franchise documents so as to satisfy both the needs of the community and those of Time Warner Communications. Any changes to previously proposed language is double underlined to aid you in your review.

SECTION ONE: DEFINITIONS

1.7 "Gross Revenues." Kindly be advised that pursuant to the Cable Communications Policy Act of 1984 as amended (hereinafter referred to as "Cable Act"). A Franchise Fee may only be imposed upon revenues from cable service. The authority for a community to collect a franchise fee from a cable television operator is set forth in the Cable Act. The Cable Act specifically provides at Section 622(b) a follows:

For any 12-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services...(emphasis added).

The term "cable service" is also defined in the Cable Act at Section 602(6). The term is defined as "... the one-way transmission to subscribers of (I) video programming or (ii) other programming service and (B) subscriber interaction, if any, which is required for the selection or use of such programming or other programming service." The term "video programming" is further defined at Section 602(19) as "...programming provided by, or generally considered comparable to programming provided by a television broadcast station. The term "other programming service" is defined in the Cable Act at Section 602 (13) as" ...information a cable operator makes available to all subscribers generally."

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The legislative history which accompanied the Cable Act discussed in some detail the distinction between a "cable service" and other services. Interestingly, the legislative history specifically noted that voice communication is *not* a "cable service." Page 44 of the legislative history states as follows:

Some examples of non-cable services would be shop-at-home and bank-at-home services; electronic mail, one-way and two-way transmission of non-video data and information not offered to all subscribers, data processing, video-conferencing, and all voice communications. (Emphasis added).

Accordingly, by the very terms of the Cable Act itself, a franchise fee may only be imposed on the revenues collected from the provision of "cable service" which is, in turn, defined by the Cable Act to include video programming or other comparable programming. Voice communications or telephony is quite clearly not a "cable service."

To further clarify this treatment, the Cable Act was amended in early 1996 when Congress adopted the much publicized Telecommunications Act of 1996 (hereinafter the "1996 Act"). The 1996 Act included an amendment which specifically added the phrase "cable services" to Section 622(b) of the Cable Act set forth above. According to the House amendment and, in turn the Conference Agreement which adopted the House amendment, the purpose of this amendment is

...make clear that the franchise fee provision is not intended to reach revenues that a cable operator derives from providing new telecommunications service over its system, but only the operator's cable-related revenues.

In conclusion, it is abundantly clear in the Cable Act as amended by the Telecommunications Act of 1996 that the local franchising authority may impose a franchise fee only upon the revenues derived from "cable service." The term "cable service" does not include voice communications or telephony.

Therefore in keeping with the above, we would request that any reference to telephone, computer or any other service not specifically intended by the Cable Act be stricken from this section.

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## SECTION TWO: GRANT OF AUTHORITY

2.2 As I am sure you are aware, it is the municipalities obligation prior to adopting a franchise to determine its future cable related needs. Section 2.2 simply protects Time Warner Communications from a franchise being issued to another service provider on more favorable terms than which have been granted to Time Warner Communications. Obviously, Time Warner Communications would not be a party to any discussions and/or negotiations between the municipality and another provider and, would therefore request that the municipality afford the company some protection in this regard. We would however, be willing to discuss limiting such protection to specific issues should the Town so desire.

## SECTION THREE: COMPLIANCE WITH APPLICABLE LAWS AND ORDINANCES.

3.3 As the municipality adopts, and the company agrees to, the terms and conditions of the franchise, it would not be reasonable to expect that the municipality would challenge the legality of its own franchise. Therefore it would not be appropriate to provide the Town with the reciprocal right to administrative and/or judicial review and therefore the Company sees no reason to incorporate the same into the franchise.

## SECTION FOUR: TERRITORIAL AREA OF FRANCHISE.

The Company agrees to reduce the homes per mile to twenty-five homes in lieu of that previously proposed.

## SECTION NINE: TERMINATION OF FRANCHISE.

9.1 The Company will agree to include items one (1) through six (6) which were enumerated in the Town's letter of October 10, 1996, relative to this section. However, at item number seven, the Company would propose the following.

7. Franchisee fails to obtain the prior approval of the State Public Service Commission prior to the transfer or assignment of the franchise as may be required by State or Federal law.

## SECTION TEN: FRANCHISE RENEWAL

10.2.5 My notes reflect that we agreed on "one or more" being retained in order to satisfy this section.

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## SECTION ELEVEN: RATES

The Company has no particular problem with the Town overseeing rates only to the extent which maybe consistent with State and/or Federal law and, only upon application, should such be required. In that regard, kindly amend Section 11.1 as follows:

11.1 Rates and Charges imposed by the Franchisee for cable television service shall be subject to the approval of the Town and the New York State Department of Public Service only to the extent consistent with applicable state and federal law and only upon application for said certification to regulate such rates should such application be so required.

## SECTION XII: SYSTEM REQUIREMENTS

Kindly amend Section 12.2 as follows: In order to clarify those services the company will provide and under what conditions such service will be proffered.

12.2 The Franchisee shall provide one drop, its basic and all available tiers of service, exclusive of premium services, to all municipal buildings (including educational institutions, fire and police stations, public libraries and private accredited schools), without charge; however, the Franchisee shall not be required to provide such service to facilities outside of the primary service area as is designated in Section Four of this agreement, nor is the Company required to provide service to facilities which are more than two hundred (200) feet from the Company's main lines located within the primary service area or perform any internal wiring or electronic amplification equipment for such buildings except, that the Company will provide service to educational institutions in keeping with the Company's Social Contract with the FCC so long as such remains in effect.

12.5 - 12.7 The Company requires additional dialogue relative to the community's needs as enumerated in these sections. We would hope that we would be able to discuss these issues at a future meeting.

12.8 Should be amended as follows, so as to provide for the coordination and use of the emergency alert system.

12.8 The Company shall commit to providing the capability to override the audio portion of the cable television system in order to permit the broadcasting of emergency messages by the Town. This capability shall be overseen and administered by a governmental agency and the Company shall not be held liable for any injuries suffered by the Town or any other person, at any time, whether during an emergency or otherwise, if for any reason the Town is not able to make full use of the cable television system as contemplated herein, or during the Town's use of

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such system. The Company may also establish reasonable procedures for such uses. Upon request of the municipality to institute such emergency override system, the Company shall, in cooperation with the Town, work with a central county and/or regional agency who will be responsible for administering such emergency override system and in instituting the procedures for the use of the emergency override system within the Town. The Town shall cooperate with the Company and other municipalities in providing emergency override capabilities should the system be shared by other municipalities served by the Company.

12.9 I am currently investigating the cost associated with meeting your request as enumerated in Section 12.9; once I have that information, I will be happy to provide the Company's formal response relative to this issue.

Section 12.10 The Company is interested in further exploring the proposal made by the Town relative to the transmission of programming to all residents located within the Webster Central School District, and would like to discuss this with you further at a subsequent meeting.

12.11 Should be amended as follows, in order to provide the Company with some flexibility to discontinue such use should the need for the downlink no longer be necessary.

12.11 The Franchisee shall allow the Town free use of the existing (and currently unused) satellite downlink antenna on Picture Parkway for the rebroadcasting of free, public service and governmental programming, which may be made available to the community access facility so long as said satellite downlink remains at such location. The Company shall provide the Town with ninety days notice prior to removing said downlink.

12.13 Should the municipality require a two-way fiber-optic interconnection between the Webster Schools, the Company would be willing to provide the Town with a proposal for such construction and/or maintenance of the network, however, the Company is not currently prepared to provide such to the municipality free of charge, nor has there been the demonstration of a community need relative to such interactive connections. We would however, be willing to discuss the needs of the community as they relate to such interconnection in the future.

12.14 Kindly be advised that pursuant the Telecommunications Act of 1996, it is specifically provided at Section 624(e) that "no state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or transmission technology" and therefore prohibits the Town from requiring the Company to install converter less pole mounted addressable systems. Therefore, we respectfully request this section be deleted in its entirety.

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#### SECTION THIRTEEN: PHYSICAL FACILITIES

The Company can and will not agree to include a requirement that the studio and/or office facilities on Picture Parkway remain as the Company's needs and/or technology may change in the future which may allow the Company to eliminate said facilities and/or redeploy its signals through other means without the required use of such hub and/or head end. We would however, agree to assist the municipality with the relocation of its studio facility, should that need arise due to the abandonment of the facility by Time Warner Communications.

#### SECTION FOURTEEN: CONSTRUCTION STANDARDS

The Company hereby agrees to the additional language proposed by the Town in Section 4.8.1 relative to tree trimming.

#### SECTION FIFTEEN: OPERATION AND SYSTEM MAINTENANCE

The Company cannot agree to establish a system that reports violations of consumer protection issues, complaints, system downtime, etc. as contemplated in Section 15.1 which has been proposed by the municipality as such would be overly burdensome for the Company to administer. The Company will however, agree to provide such information to the municipality upon written request to the Company and as may be required by the municipality during the administration of our franchise with the Town.

#### SECTION 15.2.1

History has shown that the current business office (payments center) located in the Town is seldom used by customers. In fact, most of the activity there is reoccurring customers paying their monthly bill which, can be accommodated through any On-Bank branch location or by mail. While our current intention is to continue to operate this location the Company would agree to provide the municipality with some reasonable notice prior to relocating and/or closing said facility.

#### SECTION 15.3

While the Company has no problem with complying with all federal and/or state laws, rules and regulations regulating consumer protection and customer service standards, we cannot agree to many of the provisions contained in this section.

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As we did not have the opportunity to discuss these or any of the other items you have proposed during our last meeting, I would suggest that another work session be scheduled so as to provide for a dialogue on the remaining items as well as the proposals contained herein. I look forward to hearing from you in order to schedule such a meeting.

As always, should you have any questions with regard to the foregoing, please call me directly at (716) 756-1325.

Sincerely,



Brian B. Wirth  
Director of Government and Regulatory Affairs

BBW:mjh

c: Ann Burr