

ORDINANCE NO. 2003-02-11-001

AN ORDINANCE GRANTING A CABLE TELEVISION FRANCHISE TO TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP TO CONSTRUCT, OPERATE AND MAINTAIN A CABLE TELEVISION SYSTEM IN THE CITY OF KEMPNER; SETTING FORTH CONDITIONS ACCOMPANYING THE GRANT OF THE FRANCHISE; AND PROVIDING FOR REGULATION AND USE OF THE SYSTEM.

WHEREAS, the public interest will be served by the granting of a non-exclusive franchise to Time Warner Entertainment-Advance/Newhouse Partnership to erect, install, construct, reconstruct, maintain, operate, dismantle, test, repair, replace, retain, and use a Cable Television System in, upon, along, across, above, over, under or in any manner connected with the streets, lanes, avenues, sidewalks, alleys, bridges, and highways, and other public places in the City of Kempner as the same now or in the future may exist, for the purpose of transmission and distribution of Cable Services servicing the inhabitants of said City, and other purposes, for a period of five (5) years, and regulating same.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF KEMPNER:

SECTION I.
SHORT TITLE

This ordinance shall be known and cited as the "Time Warner Entertainment Advance/Newhouse Partnership Cable Television Franchise Ordinance". Within this document it shall also be referred to as "this Franchise" or "the Franchise".

SECTION II.
DEFINITIONS

For purposes of this Franchise, the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

- A) "Basic Service" means that service tier which includes the retransmission of local television broadcast signals.
- B) "Cable Television System" or "System" means a facility consisting of a set of closed transmission paths associated signal generation, reception, and control equipment that is designed to provide Cable Services and

which is provided to multiple subscribers within the City. Such term does not include:

- 1) A facility that serves only to retransmit the television signals of one (1) or more television broadcast stations;
 - 2) A facility that serves subscribers without using any public right-of-way;
 - 3) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the retransmission of video programming directly to subscribers unless the extent of such use is solely to provide interactive on-demand services;
 - (4) An open video system that complies with section 653 of the Communications Act of 1934 as amended; or
 - 5) Any facilities of any electric utility used solely for operating its electric utility systems.
- C) "Cable Service" means (1) the one-way transmission to subscribers of video programming (i.e., programming provided by, or generally comparable to programming provided by, a television broadcast station) and other programming; and (2) subscriber interaction, if any, which is required for the selection or use of such video programming.
- D) "City" shall mean the City of Kempner, and any area annexed thereto from time to time. For purposes of this Agreement, any annexation shall become effective within sixty (60) days of the City's written notification to Grantee of the annexation including a complete and accurate listing of the affected addresses.
- E) "FCC" means the Federal Communications commissions or any successor thereto, having jurisdiction over cable television.
- F) "Force Majeure" means a strike, acts of God, acts of public enemies, orders of any kind of a government of the United States of America or of the State or any of their departments, agencies, political subdivisions; riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, tornadoes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, explosions, labor unrest, shortage of materials or supplies, partial or entire failure of utilities or any other cause or event not reasonably within the control of the disabled party.

- G) "Grantee" means Time Warner Entertainment Advance/Newhouse Partnership its agents, lawful successors, transferees or assignees.
- H) "Gross Revenues" means all service fees, installation charges, and all other fees or charges received by Grantee which are derived from the operation of the system to provide Cable Services to subscribers of the System in the City. Gross Revenues shall not include (1) excise taxes; or (2) sales taxes or any other taxes or fees, including the franchise fee, which are imposed on the Grantee or any subscriber by any governmental unit and collected by the Grantee for such governmental unit.
- I) "Person" means any corporation, partnership, proprietorship or organization authorized to do business in the State or any natural person.
- J) "Public Property" means any real property other than a street owned by any governmental unit.
- K) "State" means the state of Texas.
- L) "Street" means the surface of and the space above and below any street, road highway, freeway, lane, path, way, alley, court, sidewalk, boulevard, parkway, drive, or any public easement or right-of-way now or hereafter held by the City including poles, wires, cables, conductors, ducts, confluent, vaults, manholes, amplifiers, appliances, attachments and other property as may be ordinarily necessary and pertinent to a System.
- (M) "Subscriber" means a member of the general public who legally receives broadcast programming distributed by a cable television system and does not further distribute it.

SECTION III
GRANT OF AUTHORITY

For the purposes of constructing, operating and maintaining a System in the City, Grantee may erect, install, construct, repair, replace, relocate, reconstruct and retain in, on, over, under, upon, across and along the Streets, including over public rights-of-way and through easements, within the City such lines, cables, conductors, ducts, confluent, vaults, manholes, amplifiers, appliances, pedestals, attachments and other operating equipment as are necessary and pertinent to the operation of the System.

SECTION IV.
COMPLIANCE WITH APPLICABLE LAWS AND ORDINANCES

- A) This Franchise is granted pursuant to the terms and conditions contained herein. Such terms and conditions shall be subject to all applicable provisions of state and federal laws, rules and regulations.
- B) Grantee's rights are subject to the police powers of the City to adopt and enforce ordinances of general applicability necessary to the health, safety and welfare of the public that are not otherwise inconsistent with the terms and conditions of this Franchise. Grantee shall comply with all generally applicable laws and ordinances enacted by the City pursuant to that power.

SECTION V.
TERRITORIAL AREA INVOLVED

This Franchise is granted for the territorial boundary of the City. In the event of annexation by the City, any new territory shall become part of the area covered upon sixty (60) days advance written notice by the City to the Grantee.

SECTION VI
FRANCHISE TERM

This Franchise shall commence upon the effective date of this Ordinance, Feb 11, 2003 [DATE] and shall expire five years thereafter on Feb 10, 2008 [DATE] unless renewed, revoked or terminated sooner as herein provided.

SECTION VII.
FRANCHISE NON-EXCLUSIVE

The Franchise granted herein is non-exclusive. The City specifically reserves the right to grant, at any time, one or more additional franchises for a System in accordance with state and federal law; provided, however, no such future franchise shall be granted on terms more favorable or less burdensome than those contained herein.

SECTION VIII.
WRITTEN NOTICE

All notices or demands required to be given under this Franchise shall be deemed to be given when delivered personally to the persons designated below or upon the date actually received as evidenced by registered or certified mail receipt addressed as follows:

If to the City: City of Kempner
(To be added)
PO Box 660
Kempner, Texas 76539-0660

property owner and shall not interfere unduly with the travel and use of public places by the public during the construction, repair, or removal thereof, and shall not unduly obstruct or impede traffic. For all new residential structures in which undergrounding is required by the City, the builder, subdivider, or developer of such structure, at his sole cost and expense shall provide, in accordance with Grantee's current specifications, all conduits, trenches to buildings point of entry, from the boundary of the development, back fill and restoration of the trench area.

- E) The Grantee shall maintain its System so that its facilities shall conform to the pattern of the existing public utility facilities, subject to the right of the City to require relocation, either overhead or underground, of all such utility facilities when the City determines that such relocation is necessary and in the public interest but not for arbitrary and capricious reasons. Any such relocation shall be at the Grantee's pro-rata expense unless any other user of the street or public right of way is compensated for such relocation, in which case the Grantee shall be similarly compensated.
- F) The Grantee shall maintain its System so that poles and other structures of public utilities which are available shall be used to the extent practicable and subject to Grantee's ability to obtain such use on reasonable terms and conditions. Before placing or setting new poles, the Grantee shall file any requested notice of such intention with the City.
- G) Whenever by reason of the construction, repair, maintenance, relocation, widening, raising, lowering of the grade, or vacation of any street by the City for rehabilitating any section of the City, it shall be deemed necessary by the City for the Grantee to move, relocate, change, alter or modify any of its facilities or structures, such change, relocation, alteration or modification shall be promptly made by the Grantee. Any such relocation shall be at the Grantee's expense unless any other user of the street or public right of way is compensated for such relocation in which case the Grantee shall be similarly compensated. In the event the Grantee, after such notice, fails or refuses to commence, pursue or complete such relocation work within a reasonable time, the City shall have the authority, but not the obligation, to remove or abate such structures of facilities and to require the Grantee to pay to the City the cost of such relocation, alteration, or modification. If the Grantee fails to complete in a timely manner, any relocation requested by the City and the City incurs any costs resulting from such delay, the Grantee shall be liable to the City for such costs.
- H) The Grantee shall, upon request of any person holding building moving permit or permit to move oversize loads issued by the City, temporarily raise or lower its wires to permit the moving of buildings or oversize loads. The expense of such temporary removal or raising or lowering of the wires shall be paid by the person requesting the same and Grantee shall have the authority to require such payment in advance. The Grantee shall be given not less than seventy-two (72) hours advance notice to arrange for such temporary changes.

If to Grantee: Johnny Mankin, Division President
215 Factory Dr.
Waco, TX 76710

Such addresses may be changed by either party upon notice to the other party given as provided in this Section.

SECTION IX
REPAIR OF STREETS AND PROPERTY

Any and all Streets or Public Property or private property which are disturbed or damaged by the Grantee during the construction, repair, replacement, relocation, operation, maintenance or reconstruction of the System shall be promptly repaired by Grantee to a condition as good as that prevailing prior to Grantee's work.

SECTION X.
CONSTRUCTION AND USE OF FACILITIES

- A) Subject to the City's generally applicable permitting procedures, the Grantee shall have the right to erect and maintain its own poles at locations as it may find necessary for the proper construction and maintenance of the Cable Television System. Approval shall be procured by the Grantee from the proper City department providing for the erection of these poles. The City agrees that such prior approval shall be granted on a timely basis and will not be unreasonably withheld.
- B) The Grantee's transmission and distribution system poles, wires, appurtenances, shall be located, erected, and maintained, so as not to endanger or interfere with the lives of persons or to interfere with any improvements the City may deem proper to make or to unnecessarily hinder or obstruct the free use of the streets, alleys, bridges, sidewalks, or other public property. Removal or relocation of poles or equipment when necessary to avoid such interference shall be at the Grantee's expense. However, if any user of the street or right of way is compensated for such removal or relocation, Grantee shall be similarly compensated.
- C) Construction and maintenance of the System shall be performed in an orderly and workmanlike manner. Grantee shall at all times comply with the National Electrical Safety Code and such applicable ordinances and regulations of the City affecting electrical and structural installations which may be presently in effect. The City acknowledges that as of the effective date of this Franchise, Grantee's existing cables, wires, and other like facilities are in compliance with this provision.
- D) The Cable System shall be installed in accordance with good engineering practice, so as not to unreasonably interfere with the right of the public or individual

- I) The Grantee shall have the authority to trim trees upon and overhanging the streets of the City as to prevent the branches of such trees from coming in contact with the Grantee's wires and cables.
- J) All work undertaken in connection with the construction, reconstruction, maintenance, operation or repair of the Grantee's System shall be subject to and governed by all State and Federal laws, rules and regulations including those of the FCC and any other federal agency having jurisdiction.

SECTION XI
LEGAL OBLIGATIONS

- A) The Grantee shall, at its sole cost and expense, indemnify, defend and hold harmless the City, its officers, boards, commissions, agents and employees, against and from any and all claims, demands, causes of actions, suits, proceedings, damages, liabilities and judgments of every kind arising out of or due to the Grantee's construction or operation of the System in the City, including but not limited to damages for injury or death or damages to property, real or personal, and against all liabilities to others and against all loss, cost and expense, resulting or arising out of any of the same. However, Grantee shall not be required to hold harmless and indemnify the City for any claims to the extent arising out of the negligence or misfeasance of the City, its officers, boards, commissions, councils, elected officials, agents or employees. The City shall indemnify and hold harmless Grantee from any damage or claims resulting from any acts of the City, its officers, boards, commissions, councils, elected officials, agents or employees, including but not limited to any acts committed by the City in connection with its use of the System and work performed by the City on, or adjacent to, the Cable System.
- B) The Grantee shall, at the sole risk and expense of the Grantee, upon demand of the City, appear in and defend any and all suits, actions, or other legal proceedings, whether judicial, quasi-judicial, administrative, or otherwise brought or instituted or had by third persons or duly constituted authorities, against or affecting the City, its officers, boards, commission, agents, or employees, to the extent arising out of or due to the Grantee's construction or operation of the System in the City.
- C) The Grantee shall pay and satisfy and shall cause to be paid and satisfied any judgment, decree, order, directive, or demand, rendered made or issued, against the Grantee, the City, its officers, boards, commissions, agents or employees, for the foregoing; and such indemnity shall exist and continue without reference to or limitation by the amount of any bond, policy of insurance, deposit, undertaking or other assurance required hereunder or otherwise.

- D) In order for the City to assert its rights to be indemnified, defend and held harmless, the City must:
- 1) Promptly notify Grantee of any claim or legal proceeding which gives rise to such right;
 - 2) Afford Grantee the opportunity to participate in and fully control any compromise, settlement, resolution or disposition of such claim or proceeding; and
 - 3) Fully cooperate in the defense of such claim and make available to Grantee all such information under its control relating thereto.

SECTION XII
CUSTOMER SERVICE STANDARDS

Grantee shall at all times comply with the customer service standards of the FCC including without limitation those related to notifications to subscribers, office hours and availability, installations, outages, service calls, billing, refunds, and credits as they may be amended from time to time.

SECTION XIII
LIABILITY INSURANCE

- A) Grantee shall maintain, throughout the term of this Franchise, liability insurance insuring the City and the Grantee with regard to all damages mentioned in Section XI above in the following minimum amounts:
- 1) One Million Dollars (\$1,000,000) for bodily injury or death to any one person;
 - 2) One Million Dollars (\$1,000,000) for bodily injury or death resulting from any one accident; and
 - 3) One Million Dollars (\$1,000,000) for all other types of liability.
- B) Upon request of the City, Grantee shall furnish to the City satisfactory evidence that an insurance policy has been obtained and is in full force and effect.

SECTION XIV
PERFORMANCE STANDARDS

- A) The Grantee shall construct, operate and maintain its System according to the specifications of the FCC.

- B) The Grantee shall at all times employ a reasonable standard of care to prevent failures or accidents which are likely to cause damages, injuries or nuisances to the public.
- C) Subject to the requirements of the FCC, the Grantee shall provide a parental control device capability for a reasonable charge, upon request, to any subscriber.

SECTION XV
TRANSFER OR ASSIGNMENT OF FRANCHISE

The rights granted herein shall not be transferred or assigned by the Grantee without written notice to the City. Notwithstanding the foregoing, no notice shall be required for any transfer or assignment of the franchise to any entity controlling, controlled by or under the same common control as the Grantee.

SECTION XVI
FRANCHISE RENEWAL

This Franchise shall be renewed in accordance with applicable state and federal law.

SECTION XVII
CITY'S RIGHT TO REVOKE

In addition to all other rights which City has pursuant to law or equity, the City reserves the right to revoke, terminate or cancel this Franchise and all rights and privileges pertaining thereto in the event that:

- A) Grantee violates any material provision of this Franchise; or
- B) Grantee practices any fraud upon the City; or
- C) Grantee becomes insolvent, unable or unwilling to pay its debts, or is adjudged bankrupt or a receiver is appointed to it.

SECTION XVIII
REVOCATION PROCEDURES

- A) The City shall notify the Grantee of its intention to revoke, terminate or cancel this Franchise. The written notice shall describe in reasonable detail the specific violation so as to afford Grantee an opportunity to remedy the violation.
- B) Grantee shall have ninety (90) days subsequent to receipt of the notice (or such longer period of time as may be reasonably necessary) in which to correct the violation before the City may formally revoke, terminate or cancel this Franchise. Grantee may, within thirty (30) days of receipt of the notice, notify the City that

there is a dispute as to whether a violation has, in fact, occurred. Such notice by Grantee to the City shall stay the ninety (90) day period described above.

- C) Upon receipt of the Grantee's notification of a dispute as to whether a violation has, in fact, occurred pursuant to paragraph (B) above, the City shall hear Grantee's dispute and shall determine whether a default or violation by Grantee has occurred. In the event the City shall determine that a default or violation has occurred, the City shall supplement the decision with written findings of fact.
- D) If after hearing the dispute, Grantee has been found to be in default, Grantee shall then have ninety (90) days (or such longer period of time as may be reasonably necessary) from such a determination to remedy the violation or failure. At any time after that ninety (90) day period the City may by formal action at a public hearing affording reasonable notice and opportunity for Grantee to be heard, revoke, terminate or cancel this Franchise if Grantee fails to cure such default.
- E) Any such final decision of the City may be appealed to any court of competent jurisdiction, which filing shall stay any such revocation, termination or cancellation of this Franchise.

SECTION XIX REMOVAL UPON REVOCATION

Upon the final revocation, termination or cancellation of this Franchise as herein provided, Grantee shall, upon request of the City, remove all of its attachments and wires from poles used as authorized herein.

SECTION XX FORCE MAJEURE

If by reason of a Force Majeure any party is unable in whole or in part to carry out its obligations hereunder, that party shall not be deemed to be in violation or default during the continuance of such inability.

SECTION XXI UNAUTHORIZED CONNECTIONS OR MODIFICATIONS

- A) It shall be unlawful for any Person, without the expressed consent of the Grantee to make any connection, extension, or division whether physically, acoustically, inductively, electronically or otherwise with or to any segment of the System for any purpose whatsoever.
- B) It shall be unlawful for any Person to willfully interfere, tamper, remove, obstruct or damage any part, segment or content of the System for any purpose whatsoever.

- C) It shall be unlawful for any Person to construct, operate or maintain a System without having first applied for and received a franchise from the City.
- D) Any Person convicted of a violation of this Section shall be subject to all federal, state and local penalty provisions which penalty provision are incorporated herein by reference.

SECTION XXII
FRANCHISE FEE PAYMENTS

Subject to applicable law, the Grantee shall pay to the City a franchise fee in the amount of three percent (3%) of the Grantee's annual Gross Revenues (the "Franchise Fee"). The Franchise Fee shall be due and payable on March 1 of each year for the previous calendar year. The City shall have the right to inspect, at the Grantee's business office during normal business hours, the books and financial records of the Grantee compiled in the ordinary course of business necessary to verify Franchise Fee payments. The Franchise Fee shall be deemed to reimburse the City for the rights granted herein and for all costs of regulation and administration of the Franchise.

SECTION XXIII
CONSENT/APPROVALS

Where in this document consent and/or approval of the City is required, such consent or approval shall be timely delivered and not unreasonably withheld.

SECTION XXIV
SEVERABILITY

If any term, condition or Section of this Franchise or the application thereof to any person or circumstance shall, to any extent, be held to be invalid or unenforceable, the remainder hereof and the application of such term, condition or Section to persons or circumstances other than those as to whom it shall be held invalid or unenforceable shall not be affected thereby, and this Franchise and all the terms, conditions and Sections hereof shall, in all other respects, continue to be effective and to be complied with.

SECTION XXV
REPEAL OF ORDINANCES

Ordinance _____ and all other ordinances or parts of ordinances in conflict with this Ordinance are hereby repealed.

SECTION XXVI
PASSAGE AND EFFECTIVE DATE

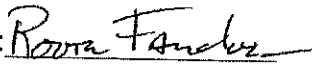
This Franchise, having been published as required, shall take effect and be in force from and after thirty (30) days following its final passage and approval.

Passed and adopted this 11th day of February, 2003.

ATTEST:

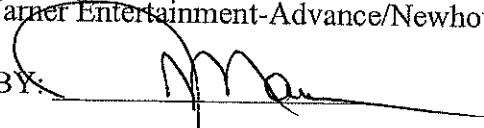
BY: 

Its Asst. City Secretary

BY: 

Its Mayor

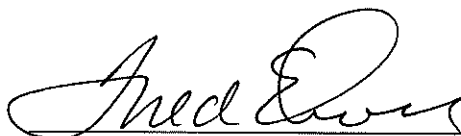
Time Warner Entertainment-Advance/Newhouse Partnership

BY: 

Its _____

PUBLISHER'S AFFIDAVIT

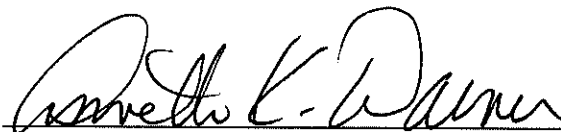
I solemnly swear that the attached notice was published in the **Lampasas Dispatch Record**, a newspaper of general circulation which has been continuously and regularly published for a period of not less than one year preceding the dates of publication of the attached notice, that the said notice was published in the issue(s) of such newspaper on the day(s) of February 25, 2003.



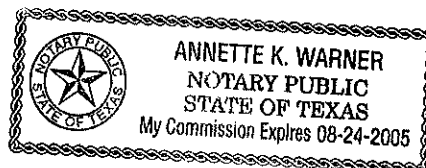
**Publisher, Fred E. Lowe
or James F. Lowe**

SWORN TO AND SUBSCRIBED BEFORE ME BY Fred E. Lowe

this the 28 day of February, 2003, to certify which witness my hand and seal of office.



Notary Public, State of Texas



MAR 05 2003