

# CITY OF TUKWILA, WASHINGTON

## ORDINANCE NO. 2114

Passed on 3/6/06

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, GRANTING A NON-EXCLUSIVE FRANCHISE TO TIME WARNER TELECOM OF WASHINGTON, LLC, LEGALLY AUTHORIZED TO CONDUCT BUSINESS IN THE STATE OF WASHINGTON, FOR THE PURPOSE OF CONSTRUCTING, OPERATING, AND MAINTAINING A TELECOMMUNICATIONS TRANSMISSION LINE IN CERTAIN PUBLIC RIGHTS-OF-WAY IN THE CITY; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

**WHEREAS**, Time Warner Telecom of Washington, LLC, hereinafter referred to as "TWTC," is a competitive telecommunications company providing voice, data and internet broadband access services; and

**WHEREAS**, TWTC's desired route through the City of Tukwila, hereinafter referred to as "City," requires the use of certain portions of City rights-of-way for the installation, operation, and maintenance of a telecommunications system that includes fiber-optic cables; and

**WHEREAS**, the City Council has determined that the use of portions of the City's rights-of-way for installation of telecommunications transmission lines is appropriate from the standpoint of the benefits to be derived by local businesses and the region as a result of such services; and

**WHEREAS**, the City Council also recognizes that the use of public rights-of-way must be restricted to allow for the construction of amenities necessary to serve the future needs of the citizens of Tukwila and that the coordination, planning, and management of the City's rights-of-way is necessary to ensure that the burden of costs for the operations of non-municipal interests are not borne by the citizenry; and

**WHEREAS**, the Revised Code of Washington (RCW) authorizes the City to grant and regulate nonexclusive franchises, for the use of public streets, right-of-ways and other public property, for transmission of communications; and

**WHEREAS**, TWTC was previously granted a three-year nonexclusive franchise (Ordinance 1961), which has since expired;

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, DO ORDAIN AS FOLLOWS:**

### **Section 1. Non-exclusive Franchise Granted.**

A. The City hereby grants to TWTC, subject to the conditions prescribed in this ordinance ("Franchise Agreement"), the franchise rights and authority to construct, replace, repair, monitor, maintain, use and operate the equipment and facilities necessary for an underground telecommunications transmission system, which includes fiber-optic cable, within the City-owned rights-of-way generally described in Exhibit A, and hereinafter referred to as the "franchise area."

B. Such Franchise shall not be deemed to be exclusive to TWTC and shall in no way prohibit or limit the City's ability to grant other franchises, permits, or rights along, over, or under the areas to which this Franchise has been granted to TWTC; provided,

that such other franchises do not unreasonably interfere with TWTC's exercise of franchise rights granted herein as determined by the City. This Franchise shall in no way interfere with existing utilities or in any way limit, prohibit or prevent the City from using the franchise area, or affect the City's jurisdiction over such area in any way.

**Section 2. Authority.** The Director of Public Works or his or her designee is hereby granted the authority to administer and enforce the terms and provisions of this Franchise Agreement, and may develop such rules, policies and procedures as he or she deems necessary to carry out the provisions contained herein.

**Section 3. Franchise Term.** The franchise rights granted herein shall remain in full force and effect for a period of three years from the effective date of this ordinance. This Franchise shall not take effect and TWTC shall have no rights under this Franchise unless a written acceptance with the City is received pursuant to Section 4 of this agreement. If TWTC requests a Franchise renewal prior to the expiration date, the City may, at the City's sole discretion, extend the term of this Franchise for up to one year beyond the expiration date to allow processing of renewal. If the City elects to extend the term of this Franchise, written notice of the extension shall be provided to TWTC prior to the Franchise expiration date.

**Section 4. Acceptance of Terms and Conditions.** The full acceptance of this Franchise and all the terms and conditions shall be filed with the City Clerk within 30 days of the effective date of this ordinance in the form attached hereto as Exhibit B. Failure on the part of TWTC to file said consent within 30 days of the effective date of this ordinance shall void and nullify any and all rights granted under this Franchise Agreement.

**Section 5. Construction Provisions and Standards.** The following provisions shall be considered mandatory and failure to abide by any conditions described herein shall be deemed as non-compliance with the terms of this Franchise Agreement and may result in some or all of the penalties specified in Section 6.

**A. Permit Required.** No construction, maintenance, or repairs (except for emergency repairs) shall be undertaken in the franchise area without first obtaining appropriate permits from the City of Tukwila, Department of Public Works. In case of an emergency, TWTC shall within 24 hours of the emergency, obtain a permit from the City of Tukwila Department of Public Works.

**B. Coordination.** A City inspector shall inspect all capital construction projects performed by TWTC within the franchise area. All work and inspection shall be coordinated with the Engineering Division of the Public Works Department to ensure consistency with City infrastructure, future Capital Improvement Projects, all developer improvements, and pertinent codes and ordinances.

**C. Construction Standards.** Any construction, installation, maintenance, and restoration activities performed by or for TWTC within the franchise area shall be constructed and located so as to produce the least amount of interference with the free passage of pedestrian and vehicular traffic. All construction, installation, maintenance, and restoration activities shall be conducted such that they conform to City's development guidelines and standards and comply with Title 11 of the Tukwila Municipal Code.

**D. Underground Installation Required.** All telecommunications cables and junction boxes or other vaulted system components shall be installed underground unless otherwise exempted from this requirement, in writing, by the Director of Public Works.

**E. Relocation.**

1. Within 90 days following written notice from the City, TWTC shall, at its own expense, temporarily or permanently remove, relocate, place underground, change or alter the position of any facilities or structures within the right-of-way whenever the

City has determined that such removal, relocation, undergrounding, change or alteration is reasonably necessary for the construction, repair, maintenance, installation, public safety, or operation of any City or other public improvement in or upon the rights-of-way.

2. TWTC may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. Such alternatives shall include the use and operation of temporary transmitting facilities in adjacent rights of way. The City shall evaluate such alternatives and advise TWTC in writing if one or more of the alternatives are suitable to accommodate the work, which would otherwise necessitate relocation of the facilities. If requested by the City, TWTC shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by TWTC full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, TWTC shall relocate its facilities as otherwise provided in this section.

**F. Removal or Abandonment.** Upon the removal from service of any fiber optic system or other associated structures, facilities and amenities, TWTC shall comply with all applicable standards and requirements prescribed by the City of Tukwila Public Works Department for the removal or abandonment of said structures and facilities. No facility constructed or owned by TWTC may be abandoned without the express written consent of the City.

**G. Bond.** Before undertaking any of the work, installation, improvements, construction, repair, relocation, or maintenance authorized by this Franchise Agreement, TWTC shall upon the request of the City, furnish a bond executed by TWTC and a corporate surety authorized to operate a surety business in the State of Washington, in such sum as may be set and approved by the City as sufficient to ensure performance of TWTC's obligations under this Franchise Agreement. At TWTC's sole option, TWTC may provide alternate security in the form of an assignment of funds or a letter of credit, in the same amount as the bond. All forms of security shall be in the form reasonably acceptable to the City. The bond shall be conditioned so that TWTC shall observe all the covenants, terms, and conditions and shall faithfully perform all of the obligations of this Franchise Agreement, and to repair or replace any defective work or materials discovered in the City's roads, streets, or property.

**H. "One-Call" Location & Liability.** TWTC shall subscribe to and maintain membership in the regional "One-Call" utility location service and shall promptly locate all of its lines upon request. The City shall not be liable for any damages to TWTC's system components or for interruptions in service to TWTC customers which are a direct result of work performed for any City project for which TWTC has failed to properly locate its lines and facilities within the prescribed time limits and guidelines established by One-Call. The City shall also not be liable for any damages to the TWTC system components or for interruptions in service to TWTC customers resulting from work performed under a permit issued by the City.

**I. As-Built Plans Required.** TWTC shall maintain accurate engineering plans and details of all installations within the City limits and shall provide such information in both paper form and electronic form using the most current AutoCAD version prior to close-out of any permits issued by the City and any work undertaken by TWTC pursuant to this Franchise Agreement. The City shall determine the acceptability of any as-built submittals provided under this section.

**J. Recovery of Costs.** TWTC shall be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise Agreement or under ordinances of the City. Where the City incurs costs and expenses for review or inspection of activities undertaken through the authority granted in this Franchise Agreement or any ordinances relating to the subject for which permit fees have not been established, TWTC shall pay such reasonable costs and expenses directly to the City.

K. **Vacation.** If, at any time, the City shall vacate any City road, right-of-way or other City property which is subject to rights granted by this Franchise Agreement and said vacation shall be for the purpose of acquiring the fee or other property interest in said road, right-of-way or other City property for the use of the City, in either its proprietary or governmental capacity, then the City may, at its option and by giving 30 days written notice to TWTC, terminate this Franchise Agreement with reference to such City road, right-of-way or other City property so vacated, and the City shall not be liable for any damages or loss to TWTC by reason of such termination other than those provided for in RCW 35.99.

## **Section 6. Franchise Compliance.**

A. **Franchise Violations.** The failure by TWTC to fully comply with any of the provisions of this Franchise Agreement may result in a written notice from the City, which describes the violations of the franchise and requests remedial action within 30 days of receipt of such notice. If TWTC has not attained full compliance at the end of the 30-day period following receipt of the violation notification, the City may declare an immediate termination of all franchise rights and privileges, provided that full compliance was reasonably possible within that 30-day period.

### **B. Emergency Actions.**

1. If any of TWTC's actions, or any failure by TWTC to act to correct a situation caused by TWTC, is deemed by the City to create a threat to life or property, the City may order TWTC to immediately correct said threat or, at the City's discretion, the City may undertake measures to correct said threat itself; provided that, when possible, the City shall notify TWTC and give TWTC an opportunity to correct said threat before undertaking such corrective measures. TWTC shall be liable for all costs, expenses, and damages attributed to the correction of such an emergency situation as undertaken by the City to the extent that such situation was caused by TWTC and shall further be liable for all costs, expenses, and damages resulting to the City from such situation and any reimbursement of such costs to the City shall be made within 30 days of written notice of the completion of such action or determination of damages by the City. The failure by TWTC to take appropriate action to correct a situation caused by TWTC and identified by the City as a threat to public or private safety or property shall be considered a violation of franchise terms.

2. If during construction or maintenance of TWTC's facilities any damage occurs to an underground facility, and the damage results in the release of natural gas or other hazardous substance or potentially endangers life, health or property, TWTC or its contractor shall immediately call 911 or other local emergency response number.

C. **Other Remedies.** Nothing contained in this Franchise Agreement shall limit the City's available remedies in the event of TWTC's failure to comply with the provisions of this Franchise Agreement, to include but not limited to, the City's right to a lawsuit for specific performance and/or damages.

D. **Removal of System.** In the event that this Franchise Agreement is terminated as a result of violations of the terms of this Franchise Agreement, TWTC shall at its sole expense, promptly remove all system components and facilities, provided that the City, at its sole option, may allow TWTC to abandon its facilities in place.

## **Section 7. Insurance.**

A. TWTC shall maintain liability insurance written on a per occurrence basis during the full term of this franchise for personal injuries and property damages. The policy shall contain coverage in the amounts and conditions stipulated in Title 11 of the Tukwila Municipal Code.

B. Such insurance shall specifically name, as additional insured, the City, its officers, and employees; shall apply as primary insurance; shall stipulate that no insurance affected by the City will be called on to contribute to a loss covered

thereunder; and shall further provide that the policy shall not be modified or canceled during the life of the permit or Franchise Agreement without giving 30 days written notice to the City. Notice shall be by certified mail, return receipt requested to the City.

C. If the City determines that circumstances warrant an increase in insurance coverage and liability limits to adequately cover the risks of the City, the City may require additional insurance to be acquired. The City shall provide written notice should the City exercise its right to require additional insurance.

**Section 8. Other Permits & Approvals.** Nothing in this Agreement shall relieve TWTC from any obligation to obtain approvals or necessary permits from applicable federal, state, and City authorities for all activities in the franchise area.

**Section 9. Transfer of Ownership.**

A. The rights, privileges, benefits, title, or interest provided by this franchise shall not be sold, transferred, assigned, or otherwise encumbered, without the prior written consent of the City, with such consent not being unreasonably withheld or delayed. No such consent shall be required for a transfer in trust, by other hypothecation, or by assignment or any rights, title, or interest in TWTC's fiber optic system in order to secure indebtedness. Approval shall not be required for mortgaging purposes provided that the collateral pledged for any mortgage shall not include the assets of this franchise, or if such transfer is from TWTC to another person or entity controlling, controlled by, or under common control with TWTC. TWTC may license fibers to other users without the consent of the City provided that TWTC remains solely responsible for the terms and conditions outlined in this Franchise Agreement.

B. In any transfer of this franchise which requires the approval of the City, TWTC shall show that the recipient of such transfer has the technical ability, financial capability, and any other legal or general qualifications as reasonably determined by the City to be necessary to ensure that the obligations and terms required under this Franchise Agreement can be met to the full satisfaction of the City. The qualifications of any transferee shall be determined by hearing before the City Council and the approval to such transfer shall be granted by resolution of the City Council. Any actual and reasonable administrative costs associated with a transfer of this franchise which requires the approval of the City, shall be reimbursed to the City within 30 days of such transfer.

**Section 10. Administrative Fees.**

A. Pursuant to the Revised Code of Washington (RCW), the City is precluded from imposing franchise fees for "telephone businesses" defined in RCW 82.04.065, except that fees may be collected for administrative expenses related to such franchise. TWTC does hereby warrant that its operations as authorized under this franchise are those of a telephone business as defined in RCW 82.04.065.

B. TWTC shall be subject to a \$5,000 administrative fee for reimbursement of costs associated with the preparation, processing, and approval of this Franchise Agreement. These costs shall include but not be limited to wages, benefits, overhead expenses, equipment, and supplies associated with such tasks as plan review, site visits, meetings, negotiations, and other functions critical to proper management and oversight of City's right-of-way. Administrative fees exclude normal permit fees as stipulated in Title 11 of the Tukwila Municipal Code. Payment of the one-time administrative fee is due 30 days after franchise approval.

C. In the event TWTC submits a request for work beyond scope of original franchise, or submits a complex project that requires significant comprehensive plan review, or inspection, TWTC shall reimburse City for franchise amendment and expenses associated with the project. TWTC shall pay such costs within 30 days of receipt of bill from the City.

D. Failure by TWTC to make full payment of bills within the time specified shall be considered sufficient grounds for the termination of all rights and privileges existing under this ordinance utilizing the procedures specified in Section 6 of this ordinance.

**Section 11. Notices.** Any notice to be served upon the City or TWTC shall be delivered to the following addresses respectively:

City of Tukwila	TIME WARNER TELECOM
Office of the City Clerk	Attn: Tina Davis
6200 Southcenter Boulevard	10475 Park Meadows Dr
Tukwila, WA 98188	Littleton, CO 80124

**Section 12. Indemnification.**

A. TWTC shall use reasonable and appropriate precautions to avoid damage to persons or property in the construction, installation, repair, operation, and maintenance of its structures and facilities. TWTC shall indemnify and hold the City harmless from all claims, actions or damages, including reasonable attorney's and expert witness fees, which may accrue to or be suffered by any person or persons, corporation or property to the extent caused in part or in whole by any negligent act or omission of TWTC, its officers, agents, servants or employees, carried on in the furtherance of the rights, benefits, and privileges granted to TWTC by this Franchise. In the event any claim or demand is presented to or filed with the City which gives rise to TWTC's obligation pursuant to this section, the City shall within a reasonable time notify TWTC thereof and TWTC shall have a right, at its election, to settle or compromise such claim or demand. In the event any claim or action is commenced in which the City is named a party, and which suit or action is based on a claim or demand which gives rise to TWTC's obligation pursuant to this section, the City shall promptly notify TWTC thereof, and TWTC shall, at its sole cost and expense, defend such suit or action by attorneys of its own election. In defense of such suit or action, TWTC may, at its election and at its sole cost and expense, settle or compromise such suit or action. This section shall not be construed to require TWTC to:

1. protect and save the City harmless from any claims, actions, or damages;
2. settle or compromise any claim, demand, suit, or action;
3. appear in or defend any suit or action; or,
4. pay any judgment or reimburse the City's costs and expenses (including reasonable attorney's fees), to the extent such claim arises out of the negligence or intentional acts of the City, its employees, agents or independent contractors.

B. To the extent of any concurrent negligence between TWTC and the City, TWTC's obligations under this paragraph shall only extend to its share of negligence or fault. The City shall have the right at all times to participate through its own attorney in any suit or action which arises out of any right, privilege, and authority granted by or exercised pursuant to this Franchise when the City determines that such participation is required to protect the interests of the City or the public. Such participation by the City shall be at the City's sole cost and expense.

C. With respect to the performance of this Franchise and as to claims against the City, its officers, agents and employees, TWTC expressly waives its immunity under Title 51 of the Revised Code of Washington, the Industrial Insurance Act, for injuries to its officers, agents and employees and agrees that the obligation to indemnify, defend and hold harmless provided for in this paragraph extends to any claim brought by or on behalf of TWTC's officers, agents or employees. This waiver is mutually negotiated by the parties.

**Section 13. Severability.** If any section, sentence, clause or phrase of this ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, the City may, at its sole option, deem the entire ordinance to be affected and thereby

nullified. However, in the event that a determination is made that a section, sentence, clause, or phrase in this ordinance is invalid or unconstitutional, the City may elect to treat the portion declared invalid or unconstitutional as severable and enforce the remaining provisions of this ordinance; provided that, if the City elects to enforce the remaining provisions of the ordinance, TWTC shall have the option to terminate the Franchise Agreement.

**Section 14. Reservation of Rights.** The parties agree that this agreement is intended to satisfy the requirements of all applicable laws, administrative guidelines, rules, orders, and ordinances. Accordingly, any provision of this agreement or any local ordinance which may conflict with or violate the law shall be invalid and unenforceable, whether occurring before or after the execution of this agreement, it being the intention of the parties to preserve their respective rights and remedies under the law, and that the execution of this agreement does not constitute a waiver of any rights or obligations by either party under the law.

**Section 15. Police Powers.** Nothing contained herein shall be deemed to affect the City's authority to exercise its police powers. TWTC shall not by this Franchise Agreement obtain any vested rights to use any portion of the City right-of-way except for the locations approved by the City and then only subject to the terms and conditions of this Franchise Agreement. This Franchise Agreement and the permits issued thereunder shall be governed by applicable City ordinances in effect at the time of application for such permits.

**Section 16. Future Rules, Regulations, and Specifications.** TWTC acknowledges that the City may develop rules, regulations, and specifications, including a general ordinance or other regulations governing telecommunications operations in the City. Such regulations, upon written notice to TWTC, shall thereafter govern TWTC's activities hereunder; provided, however, that in no event shall regulations:

- A. materially interfere with or adversely affect TWTC's rights pursuant to and in accordance with this Franchise Agreement; or
- B. be applied in a discriminatory manner as it pertains to TWTC and other similar user of such facilities.

**Section 17. Effective Date.** This ordinance or a summary thereof shall be published in the official newspaper of the City, and shall take effect and be in full force and effect five (5) days after passage and publication as provided by law.

PASSED BY THE CITY COUNCIL OF THE CITY OF TUKWILA, WASHINGTON, at a Regular Meeting thereof this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

ATTEST/AUTHENTICATED:

\_\_\_\_\_  
Jane E. Cantu, CMC, City Clerk

\_\_\_\_\_  
Steven M. Mullet, Mayor

APPROVED AS TO FORM BY:  
\_\_\_\_\_  
Office of the City Attorney

Filed with the City Clerk: \_\_\_\_\_  
Passed by the City Council: \_\_\_\_\_  
Published: \_\_\_\_\_  
Effective Date: \_\_\_\_\_  
Ordinance Number: \_\_\_\_\_

ATTACHMENTS: *EXHIBIT A, Time Warner Telecom Fiber Optic Systems Project Description*  
*EXHIBIT B, Franchise Agreement Acceptance Form, Time Warner Telecom*