

ORDINANCE NO. 1956

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON GRANTING TIME WARNER OF OREGON LLC. A NONEXCLUSIVE FRANCHISE FOR TEN YEARS TO OPERATE AS A TELECOMMUNICATIONS PROVIDER WITHIN THE CITY OF MILWAUKIE AND AUTHORIZING THE CITY MANAGER TO SIGN A FRANCHISE AGREEMENT WITH TIME WARNER OF OREGON LLC. IN SUBSTANTIALLY THE FORM OF EXHIBIT A.

WHEREAS, Time Warner of Oregon LLC (TWTC) wishes to provide telecommunication services in the City of Milwaukie;

WHEREAS, the City has the authority to regulate the use of rights of way within the City and to charge for the use of those rights of way, and

WHEREAS, the City and TWTC both desire TWTC to provide telecommunications service within the City of Milwaukie and to establish the terms by which TWTC shall use rights of way within the City;

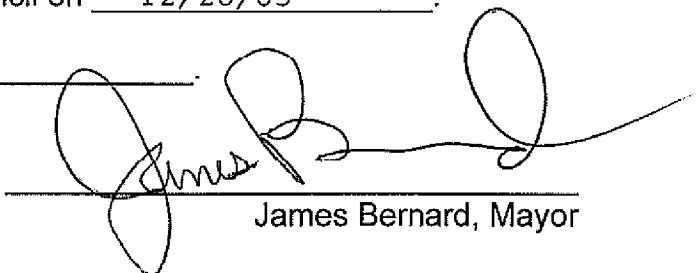
NOW THEREFORE, THE CITY OF MILWAUKIE DOES HEREBY ORDAIN:

The City hereby grants to Time Warner of Oregon LLC. a non-exclusive franchise on the terms and conditions in the attached Exhibit "A", for a period of ten years from the effective date of this ordinance, to provide telecommunications service within the City of Milwaukie and authorizes the City Manager to sign a franchise agreement with Time Warner of Oregon LLC. in substantially the form of Exhibit A.

Read the first time on 12/20/05 and moved to second reading by 4-0 vote of the City Council.

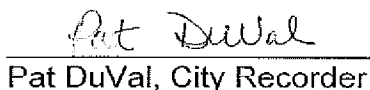
Read the second time and adopted by the Council on 12/20/05.

Signed by the Mayor on 12/21/05


James Bernard, Mayor

ATTEST:

APPROVED AS TO FORM:
RAMIS, CREW & CORRIGAN, LLP


Pat DuVal, City Recorder

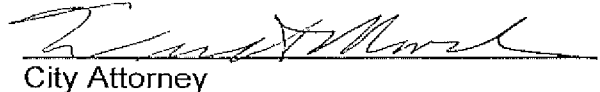

City Attorney

Exhibit A

Franchise Agreement between

Milwaukie, Oregon and Time Warner Telecom of Oregon LLC. December 2005

Section 1. Rights Granted

- A. The City of Milwaukie ("City") grants to Time Warner Telecom of Oregon LLC ("TWTC"), its successors and assigns a nonexclusive franchise to operate as a competitive telecommunications provider as defined by ORS 759.005 within the City as it now exists or may be extended in the future. The franchise includes the privilege to install, maintain and operate poles, wires, fixtures, equipment, underground circuits necessary to supply telecommunications services, upon, over, along, under, and across the streets, alleys, roads and other public ways, parks and places. Nothing in this agreement limits the City from granting others the right to carry on activities similar to or different from the ones described in this agreement.
- B. All facilities in possession of TWTC currently located within rights of way are covered by this agreement and are deemed lawfully placed in their current locations. The City may require relocation as further specified in Section 7 of this agreement.

Section 2. Term

This agreement shall be effective as of December 7, 2005 and shall remain effective through December 7, 2015 unless sooner terminated as provided in this agreement.

Section 3. Construction Work

- A. Before TWTC conducts work involving excavation, new construction including placement of new wires or major relocation work in public rights of way, property or places, TWTC shall first notify the City Engineer and shall comply with any special conditions relating to scheduling, coordination and public safety as determined by the City Engineer. Special conditions would include work being done in the right of way by the City or other third parties and may include a requirement that the facility be placed underground. Work could include open cuts, boring, excavations, and digging new pole holes in streets or sidewalks in the right of way. In emergencies, TWTC may conduct emergency work at any time and must provide the City Engineer with written or oral notice of emergency

work as soon as reasonably possible, no later than five (5) business days after the emergency work has commenced.

- B. The Company shall file preliminary maps or drawings of its proposed construction work within the City with the City Engineer showing the location of the construction, extension or relocation of its facilities and services in public rights of way, property or place of the City. In emergencies, TWTC will provide the City Engineer a map of any excavations, repavings, and new facilities conducted on an emergency basis within 30 days of completion of the work. No facility may be placed other than in a location approved by the City, except in the event of an emergency.
- C. **Reasonable care.** All work by TWTC within the rights of way shall be conducted with reasonable care and with the goal of eliminating or minimizing the risk to those using City rights of way and to eliminate or minimize the risk of damage to public or private property. All work shall be performed in accordance with all applicable laws and regulations. Any work within the right of way may be inspected by the City and its officers to determine whether it has been placed in its approved location. If emergency work has been done and is determined to be in a place not approved by the city, the City will notify TWTC and give 60 days for the work to be corrected once the emergency has passed.

Section 4. **Supplying Maps**

TWTC shall maintain maps and data pertaining to its facilities located as described in Section 1 (A) in the City on file at their Portland, Oregon office. With 24 hours prior notice, the City may inspect the maps at any time during business hours. Upon request of the City and without charge, TWTC shall furnish current maps to the City, either in a printed form, or, if the City maintains compatible data base capability, then by electronic data in read-only format, showing the location of any electrical system facilities, but not other proprietary information, used in operating TWTC's transmission and distribution facilities within the City's Urban Growth Boundary area served by TWTC. The City will not sell or transmit TWTC maps or data to third parties unless permitted by TWTC. The City will make available to TWTC any City-prepared maps or data.

Section 5 **Excavation**

Subject to Sections 3 and 6 of this agreement, TWTC may make all necessary excavations within any right of way for the purpose of installing, repairing or maintaining any facility. Assuming sufficient right of way, all poles shall be placed between the sidewalk and the edge of the right of way unless another location is approved by the City Engineer. TWTC shall take all reasonable precautions to minimize interruption to traffic flow, damage to property or creation of a hazardous condition.

Section 6. **Restoration after Excavation**

Except as otherwise provided in this section, TWTC shall restore the surface of any right of way disturbed by any excavation by TWTC to the same condition it was in prior to its excavation. In the event that TWTC's work is coordinated with other construction work in the right of way, the City Engineer may excuse TWTC from restoring the surface of the right of way, providing that as part of the coordinated work, the right of way surface is restored at least to the condition it was in prior to any excavation. All restoration of right of way surface shall be subject to the approval of the City Engineer, who may issue an order requiring correction of the restoration work. If the correction order is not complied with within 30 days or such other time as may be specified in the order, the City may restore the surface of the right of way, in which case TWTC shall pay the City for the cost of resurfacing, including all administrative costs of resurfacing and of issuing the correction order.

Section 7. **Relocation**

- A. **Permanent Relocation - General.** In accordance with ORS 221.420, City may by written order require TWTC to move any facility in the right of way. If the relocation is the result of a public project, TWTC shall be responsible for the costs of relocation. If the relocation is required to accommodate a private party development or project, TWTC shall have the right to seek reimbursement from the private party. In such event the City shall not be responsible for the costs of relocation of any of TWTC's facilities.
- B. **Permanent Relocation - Under grounding.** As permitted by applicable law, administrative rule, or regulation, the City may require TWTC to remove any overhead facilities and replace those facilities within underground facilities at the same or different locations subject to TWTC's engineering and safety standards. The expense of such a conversion shall be paid by TWTC, and TWTC shall recover its costs of from its customers in accordance with state law, administrative rule, or regulation. Nothing in this paragraph prevents the City and TWTC from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis, including but not limited to the creation of an underground assessment district pursuant to ORS 758.210.
- C. **Temporary Relocation at Request of Third Parties.** Whenever it is necessary to temporarily relocate or rearrange any facility of TWTC to permit the passage of any building, machinery or other object, TWTC shall perform the work on 30 business days written notice from the persons desiring to move the building, machinery or other object. The notice shall: (1) bear the approval of the City Engineer; (2) detail the route of movement of the building, machinery, or other object; (3) provide that the person requesting the temporary relocation shall be

responsible for TWTC's costs; (4) provide that the requestor shall indemnify and hold harmless the City and TWTC from any and all damages or claims resulting either from the moving of the building, machinery or other object or from the temporary relocation of TWTC facilities; and (5) be accompanied by a cash deposit or other security acceptable to TWTC for the costs of relocation. TWTC in its sole discretion may waive the security. The cash deposit or other security shall be in an amount reasonably calculated by TWTC to cover TWTC's costs of temporary relocation and restoration.

- D. **Temporary Relocation at Request of City.** In accordance with ORS 221.420, the City may require the Company to remove and relocate transmission and distribution facilities maintained by the Company in any public rights of way, property or place of the City by giving notice to the Company. Prior to such relocation the City agrees to provide a suitable location which includes a minimum or maximum square footage set by the Company and the required easements from private property owners for such relocated facilities sufficient to maintain service. The cost of removal or relocation of its facilities for public projects shall be paid by the Company; however when the City requires more than one temporary relocation and both the initial and subsequent relocations are for public projects and not at the request of or to accommodate a private party, the initial relocation shall be at the expense of the Company and subsequent relocations occurring less than two years after the initial relocation shall be at the expense of the City. In the event that any relocation is requested by or is to accommodate a private party, TWTC shall seek reimbursement from the private party and not from the City. The City and the Company agree to cooperate to minimize the economic impact of such temporary relocation on each party.
- E. **Notice.** The notice required by Section 7 (A), (B), (C) and (D) shall be in writing and shall be provided at least 30 business days before the date that TWTC is required to move its facilities. The City will endeavor to provide as much notice as possible. The notice shall specify the date by which the existing facilities must be removed. Nothing in this provision shall prevent the City and TWTC from agreeing, either before or after notice is provided, to a schedule for relocation. In the event that TWTC fails to comply with a notice to relocate and the City and TWTC have not reached agreement on a schedule for relocation, the City may remove or relocate TWTC's facilities that were the subject of the relocation notice at TWTC's expense.
- F. **Location for Relocated Facilities.** The City shall provide TWTC with a suitable location in existing right of way sufficient to maintain service for all facilities required to be relocated pursuant to Section 7 (A), (B), and (D).

Section 8. **City Public Works and Improvements**

Nothing in this agreement shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or doing any

work that may be needed or convenient in any rights of way. The City shall coordinate any such work with TWTC to avoid, to the extent reasonably foreseeable, any obstruction, injury or restrictions on the use of any of TWTC's facilities.

Section 9. Payment by TWTC for Use of Rights of Way

- A. In consideration for its use of rights of way and for the City's administration of the rights of way, TWTC agrees to pay the City the greater of a minimum franchise fee of \$1,000 per quarter or the sum equal to 5 percent of the gross revenue generated within the City by TWTC from customers within the City. Gross revenue is defined here as monthly service charges paid by customers within the City, the full amount of charges for separately charged transmissions originating and received within the City, half the amount of separately charged transmissions that either originate or are received within the City, any amounts received for the rental of facilities within the right-of-way, and any other amounts received by the franchisee for services (including resale services) provided by the franchisee that use facilities within the right of way.
- B. TWTC shall pay the franchise fee quarterly on or before 45 days after the preceding quarter. Payments shall be accompanied by a statement of how the total due amount was calculated. Interest on late payments shall accrue from the due date at a rate equal to the prime rate of interest and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether the City has provided notice of delinquency. However, should payment be insufficient due to an error in computation, interest payments shall not begin to accrue until after the discovery of the error by TWTC or receipt by TWTC of notice of the error.
- C. The City may audit TWTC no more than once per each calendar year while this agreement is in effect to determine the accuracy of the reporting of gross revenues. TWTC shall make all records available to the City and any auditor retained by the City within 30 days of written request. Any difference of payment due the City following audit shall be payable within thirty (30) days after written notice to the Grantee, and shall bear interest at the lesser of the maximum rate allowed by law or the rate of 9 per cent per annum. In the event the audit discloses that Grantee has underpaid by more than 2% of its annual payment obligation, Grantee shall pay the City's expenses of performing the audit.
- D. The City shall retain the right, as permitted by Oregon Law, to charge a privilege tax in addition to the franchise fee set forth herein. The City agrees to notify ELI of the privilege tax in writing, 60 days prior to the date the tax goes into effect.
- E. In consideration of TWTC's agreement to pay the franchise fee and the City's Public Utilities Privilege Tax, if implemented, the City shall not impose other

business license fees or taxes on the Company during the term of this ordinance. This provision does not exempt the property of the Company from lawful ad valorem taxes, local improvement district assessments, or conditions, exactions, fees and charges that are generally applicable to businesses within the City as required by City ordinance.

- F. The obligation to pay the franchise fee imposed by Section 9 (A) shall survive expiration of this agreement as long as TWTC continues to exercise the rights granted in section (1). In the event this agreement is terminated before expiration, TWTC shall pay the City the franchise fee based on gross revenue through the date of termination within 90 days of the termination date.
- G. TWTC shall be responsible for all costs associated with its work and facilities in the right of way, except as otherwise specifically provided in this agreement.

Section 10. **Performance Bond**

TWTC shall provide the City with a performance bond of \$25,000 as security for the full and complete performance of this franchise, including costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the grantee to comply with any codes, ordinances, rules, regulations, administrative rules or permits of the city.

Section 11. **Vacation of Right of Way**

Whenever the City initiates any proceeding to vacate any rights of way within which TWTC has a facility, the City will notify TWTC. The City will maintain a public utility easement for TWTC's facility, if requested by TWTC.

Section 12. **Use of ELI Facilities by Wireless Communications Facilities**

TWTC shall allow third parties to place wireless communications facilities on TWTC poles provided that (1) the placement will not interfere with TWTC's operations, (2) the placement and operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) TWTC agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations. TWTC may extend any existing pole to allow such co-location, consistent with the City's regulations of wireless communications facilities. The City shall have no liability arising from the co-location of third party facilities on TWTC poles.

Section 13. **Termination**

- A. **By City for Nonpayment.** City may terminate this agreement and TWTC's franchise if TWTC fails to pay the franchise fee. The City shall provide 30 days' notice of termination prior to any termination for non-payment. The agreement shall not be terminated if pays the full undisputed amount, including interest, within 30 days of the notice. Any disputed amounts owing, including interest, shall be paid within 30 days after final resolution of the dispute between the parties.
- B. **By City for Cause.** If TWTC ceases to maintain its facilities and the lack of maintenance increases the risk of personal injury or property damage, the City may terminate this agreement by providing TWTC 30 days' notice of termination. The agreement shall not be terminated if TWTC substantially eliminates such risk within 30 days of the notice.

Section 14. **Sale of Franchise**

TWTC shall not sell or assign this franchise without the prior written consent of the City. TWTC shall notify the City not later than 60 days prior to any intended transfer and the City will not unreasonably withhold any consent required.

Section 15. **Removal of Facilities**

If this agreement is terminated or expires on its own terms and is not replaced by a new franchise agreement or similar authorization, TWTC and the City shall by mutual agreement decide whether TWTC's facilities are to be removed or remain in place. In the event that TWTC and the City are unable to reach agreement on the disposition of TWTC facilities after termination, the City Engineer may issue an order requiring removal for any TWTC facilities the City Engineer reasonably determines interfere with future, planned City or other utility projects.

Section 16. **Hold Harmless**

TWTC shall indemnify and hold harmless the City, its public officials and employees against any and all claims, damages, costs and expenses to which they may be subjected as a result of any negligent or wrongful act or omission of TWTC, under this agreement or otherwise arising from the rights and privileges granted by this agreement. The obligations imposed by this section are intended to survive termination of this agreement.

Section 17. **Insurance**

TWTC shall, as a condition of the franchise grant, secure and maintain the following general and automobile liability *insurance* policies insuring the grantee

and listing the City, and its elected and appointed officers, officials, agents and employees as additional insureds:

1. Comprehensive general liability *insurance* with limits not less than:
 - a. Three million dollars for bodily injury or death to each person;
 - b. Three million dollars for property damage resulting from any one accident; and,
 - c. Three million dollars for all other types of liability.
2. Automobile liability for owned, non-owned and hired vehicles with a limit of one million dollars for each person and three million dollars for each accident.
3. Worker's compensation within statutory limits and employer's liability *insurance* with limits of not less than one million dollars.
4. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars.
5. The liability *insurance* policies required by this section shall be maintained by the grantee throughout the term of the telecommunications franchise, and such other period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its telecommunications facilities.

Section 18. Limitation on Privileges

All rights and authority granted to TWTC by the City are conditioned on the understanding and agreement that the privileges in the rights of way are not to operate in any way so as to be an enhancement of TWTC's properties or values or to be an asset or item of ownership in any appraisal thereof.

Section 19. Effect of Invalidity of a Portion of this Agreement

If any section, subsection, sentence, clause, phrase, or other portion of this franchise is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of the agreement that are not held to be invalid or unconstitutional shall remain in effect until the agreement is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this agreement, either party may demand that the other party meet to discuss amending the agreement to adjust the relationship of the parties to conform to their original intent in entering into this agreement. If the parties are unable to agree on a revised franchise agreement within 90 days after a portion of the agreement is found to be invalid or unconstitutional, either party may terminate the agreement on 180 days' notice to the other party.

Section 20. Reservation of Rights

The parties acknowledge that the law surrounding municipal franchises is unsettled. The City and TWTC do not agree on whether the fee specified in this franchise is appropriate under the law. In order to move forward with this agreement, the City and TWTC have

agreed that TWTC shall pay the franchise fee stated in this agreement but reserves its rights to challenge the appropriateness of the franchise fee. To the extent a federal court issues a final, non-appealable order which addresses the appropriateness of franchise fee; for telecommunications companies, TWTC will be allowed to challenge the City's franchise fee and seek a refund or credit to the extent the fee being charged exceeds what is allowed by law. The parties agree to negotiate in good faith to resolve such a fee dispute. If agreement cannot be reached by the parties within sixty (60) days, TWTC may seek relief from any court of competent jurisdiction.

Section 21. Definitions

- A. "Facility" includes any poles, guy wires, anchors, wires, fixtures, equipment, conduit, circuits, vaults, ground mounted switch cabinets, ground mounted mineral oil filled transformers, ground mounted secondary junction cabinets, and other property necessary or convenient to the provision of telecommunications services by TWTC within the City.
- B. "Right of way" means any right of way or public utility easement within the City and under City ownership, control or administration. "Right of way" does not include any state highway or county road.
- C. "Install" means to erect, construct, build, replace or place.
- D. "Gross revenue" includes monthly service charges paid by customers within the city, the full amount of charges for separately charged transmissions originating and received within the City, half the amount of separately charged transmissions that either originate or are received within the City, any amounts received for the rental of facilities within the right-of-way, and any other amounts received by the franchise for services (including resale services) provided by the franchisee that use facilities within the right of way.

- E. "Public project" means any project for work in the right of way that is not undertaken to benefit a specific development or redevelopment project on private property and that is not undertaken to benefit a public utility or utility service provider other than the City.

Authorized Signature: **The City of Milwaukie, Oregon**

BY: _____

TITLE: _____

DATE: _____

Authorized Signature: **Time Warner Telecom of Oregon LLC**
By Time Warner Telecom Holdings Inc., its sole member

BY: _____

TITLE: _____

DATE: _____