

ORDINANCE NO. 3959

AN ORDINANCE OF THE CITY OF KIRKLAND, WASHINGTON GRANTING TIME WARNER TELECOM (TWTC) OF WASHINGTON LLC, A DELAWARE LIMITED LIABILITY COMPANY, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS TELECOMMUNICATION BUSINESS.

Be it ordained by the City Council of the City of Kirkland as follows:

Section 1. Definitions. Where used in this franchise (the "Franchise") these terms have the following meanings:

(a) "TWTC" means TWTC Telecom of Washington LLC, a Delaware Limited Liability Company, and its respective successors and assigns.

(b) "City" means the City of Kirkland, a municipal corporation of the State of Washington, and its respective successors and assigns.

(c) "Franchise Area" means any, every and all of the roads, streets, avenues, alleys, highways and unrestricted utility easements of the City as now laid out, platted, dedicated or improved; and any, every and all roads, streets, avenues, alleys and highways that may hereafter be laid out, platted, dedicated or improved within the present limits of the City and as such limits may be hereafter extended.

(d) "Facilities" means wires, lines, conduits, cables, vaults, duct runs, and all necessary or convenient facilities and appurtenances thereto, whether the same be located over or under ground.

(e) "Ordinance" means this Ordinance No. 3959 which sets forth the terms and conditions of this Franchise.

Section 2.

A. Facilities within Franchise Area. The City does hereby grant to TWTC the right, privilege, authority and franchise to construct, support, attach, connect and stretch Facilities between, maintain, repair, replace, enlarge, operate and use Facilities in, upon, over, under, along and across the Franchise Area for purposes of its telecommunications business.

B. Permission Required to Enter Onto Other City Property. Nothing contained in this Ordinance is to be construed as granting permission to TWTC to go upon any other public place other than those types of public places specifically designated as the Franchise Area in this Ordinance. Permission to go upon any other property owned or controlled by the City must be sought on a case-by-case basis from the City.

C. Compliance with Washington Utilities and Transportation ("WUTC") Regulations. At all times during the term of this Franchise, Time Warner shall fully comply with all applicable regulations of the WUTC.

Section 3. Non-interference of Facilities

A. TWTC's Facilities shall be located, relocated and maintained within the Franchise Area so as not to unreasonably interfere with the free and safe passage of pedestrian and vehicular traffic and ingress or egress to or from the abutting property and in accordance with the laws of the State of Washington. Whenever it is necessary for Time Warner, in the exercise of its rights under this Franchise, to make any excavation in the Franchise Area, TWTC shall, upon completion of such excavation, restore the surface of the Franchise Area to the specifications established within the City of Kirkland Public Works Policies and Standards and in accordance with standards of general applicability imposed by the City by ordinance or administrative order. If TWTC should fail to leave any portion of any Franchise Area so excavated in a condition that meets the City's specifications per the Public Works Policies and Standards, the City may after notice of not less than five days to TWTC, which notice shall not be required in case of an emergency, order any and all work considered necessary to restore to a safe condition that portion of the Franchise Area so excavated, and TWTC shall pay to the City the reasonable, actual and documented cost of such work; which shall include among other things the overhead expense of the City in obtaining completion of said work.

B. Any surface or subsurface failure occurring during the term of this Agreement and caused by any excavation by TWTC shall be repaired to the City's specifications, within 30 days or upon 5 days' written notice to TWTC; the City shall order all work necessary to restore the damaged area to a safe and acceptable condition and TWTC shall pay the reasonable, actual and documented costs of such work to the City.

Section 4. Relocation of Facilities.

A. Whenever the City causes the grading or widening of the Franchise Area or undertakes construction of any water, sewer or storm drainage line, lighting, signalization, sidewalk improvement, pedestrian amenities, or other public street improvement (for purposes other than those described in section 4[B] below) and such project requires the relocation of TWTC's then existing Facilities within the Franchise Area, the City shall:

- (1) Provide TWTC, at least 90 days prior to the commencement of such project, written notice that a project is expected to require relocation; and
- (2) Provide TWTC with plans and specifications for such grading or widening.

After receipt of such notice and such plans and specifications, TWTC shall relocate such Facilities within the Franchise Area at no charge to the City so as to accommodate such street improvement project. The City shall cooperate with TWTC to designate a substitute location

for its Facilities within the Franchise Area. City will establish a date by which Facilities will be relocated, which date will be not less than 60 days after written notice to TWTC as to the facility to be relocated. TWTC must finish relocation of each such Facility by the date so established.

B. Whenever any person or entity, other than the City, requires the relocation of TWTC's Facilities to accommodate the work of such person or entity within the Franchise Area; or, whenever the City requires the relocation of TWTC's Facilities within the Franchise Area for the sole benefit of any person or entity other than the City, then TWTC shall have the right as a condition of such relocation to require such person or entity to:

(1) make payment to TWTC, at a time and upon terms acceptable to TWTC, for any and all costs and expense incurred by TWTC in the relocation of TWTC's Facilities; and

(2) indemnify and save TWTC harmless from any and all claims and demands made against it on account of injury or damage to the person (including death) or property of another arising out of or in conjunction with the relocation of TWTC's Facilities, to the extent such injury or damage is caused by the negligence of the person or entity requesting the relocation of TWTC's Facilities or other negligence of the agents, servants or employees of the person or entity requesting the relocation of TWTC's Facilities.

C. This Section 4 shall govern all relocations of TWTC's Facilities required in accordance with this Franchise. Any required relocation of TWTC's Facilities which also involves a conversion of above-ground Facilities to underground Facilities shall, as to those Facilities being converted from above-ground Facilities to underground Facilities, be arranged and accomplished in accordance with Section 11. Nothing in this Section 4 shall require TWTC to bear any cost or expense in connection with the location or relocation of any Facilities existing under benefit of easement or other rights not arising under this Franchise.

D. TWTC recognizes the need for the City to maintain adequate width for installation and maintenance of City owned and/or Northshore Utility District owned utilities such as, but not limited to, sanitary sewer, water, and storm drainage. Thus, the City reserves the right to maintain clear zones within the public right-of-way for installation and maintenance of said utilities. The clear zones for each right-of-way segment shall be noted and conditioned with the issuance of each right-of-way permit. If adequate clear zones are unable to be achieved on a particular right-of-way, TWTC shall locate in an alternate right-of-way, obtain easements from private property owners, or propose alternate construction methods which maintain and/or enhance the existing clear zones.

Section 5. Indemnification. TWTC shall indemnify, defend and hold the City, its agents, officers, employees, volunteers and assigns harmless from and against any and all claims, demands, liability, loss, cost, damage or expense of any nature whatsoever, including all costs and attorney's fees, made against them on account of injury, sickness, death or damage to persons or property which is caused by or arises out of, in whole or in part, the

willful, tortious or negligent acts, failures and/or omissions of TWTC or its agents, servants, employees, contractors, subcontractors or assigns in the construction, operation or maintenance of its Facilities or in exercising the rights granted TWTC in this Franchise. Provided, however, such indemnification shall not extend to injury or damage caused by the negligence or willful misconduct of the City, its agents, officers, employees, volunteers or assigns.

In the event any such claim or demand be presented to or filed with the City, the City shall promptly notify TWTC thereof, and TWTC shall have the right, at its election and at its sole cost and expense, to settle and compromise such claim or demand, provided further, that in the event any suit or action be begun against the City based upon any such claim or demand, the City shall likewise promptly notify TWTC thereof, and TWTC shall have the right, at its election and its sole cost and expense, to settle and compromise such suit or action, or defend the same at its sole cost and expense, by attorneys of its own election.

Section 6. Moving Buildings Within the Franchise Area. Before granting permission to any person or entity other than the City to use the Franchise Area for the moving or the removal of any building or other object, the City shall require such person or entity to make any necessary arrangements with TWTC for the temporary adjustment of TWTC's Facilities to accommodate the moving or removal of such building or other object. Such necessary arrangements with TWTC shall be made, to TWTC's satisfaction, not less than fourteen (14) days prior to the moving or removal of said building or other object. In such event, TWTC shall, at the expense of the person or entity desiring to move or remove such building or other object, adjust any of its wires which may obstruct the moving or removal of such building or other object, provided that:

(A) The moving or removal of such building or other object which necessitates the adjustment of wires shall be done at a reasonable time and in a reasonable manner so as not to unreasonably interfere with TWTC's business;

(B) Where more than one route is available for the moving or removal of such building or other object, such building or other object shall be moved or removed along the route which will minimize the interruption of utility service, interference with transportation and potential detriments to the public safety, as determined by the City.

(C) The person or entity other than the City obtaining such permission from the City to move or remove such building or other object shall be required to indemnify and save TWTC harmless from any and all claims and demands made against it on account of injury or damage to the person (including death) or property or another arising out of or in conjunction with the moving or removal of such building or other object, to the extent such injury or damage is caused by the negligence or willful misconduct of the person or entity moving or removing such building or other object or the negligence or willful misconduct of the agents, servants or employees of the person or entity moving such building or other object.

Section 7. Default. If TWTC shall fail to comply with any of the provisions of this Franchise, unless otherwise provided for herein, the City may serve upon TWTC a written order to so comply within thirty (30) days from the date such order is received by TWTC. If TWTC is not in compliance with this Franchise after expiration of said thirty (30) day period, the City may act to remedy the violation and may charge the costs and expenses of such action to TWTC. The City may act without the thirty (30) day notice in case of an emergency threatening imminent danger to health, safety and welfare of the general public. If TWTC shall fail to act within the 30 days after notice, the City may in addition, by ordinance, declare an immediate forfeiture of this Franchise, provided, however, if any failure to comply with this Franchise by TWTC cannot be corrected with due diligence within said thirty (30) day period (TWTC's obligation to comply and to proceed with due diligence being subject to unavoidable delays and events beyond its control), then the time within which TWTC may so comply shall be extended for such time as may be reasonably necessary and so long as TWTC commences promptly and diligently to effect such compliance.

In addition to other remedies provided herein, if TWTC is not in compliance with requirements of the Franchise, and if a good faith dispute does not exist concerning such compliance, the City may place a moratorium on issuance of pending TWTC right-of-way use permits until compliance is achieved.

Section 8. Nonexclusive Franchise. This Franchise is not and shall not be deemed to be an exclusive Franchise. This Franchise shall not in any manner prohibit the City from granting other and further franchises over, upon, and along the Franchise Area which do not interfere with TWTC's rights under this Franchise. This Franchise shall not prohibit or prevent the City from using the Franchise Area or affect the jurisdiction of the City over the same or any part thereof.

Section 9. Franchise Term. This Franchise is and shall remain in full force and effect for a period of ten (10) years from and after the effective date of the Ordinance, provided that the term may be extended for an additional five (5) years upon the agreement of TWTC and the City; and provided further, however, TWTC shall have no rights under this Franchise nor shall TWTC be bound by the terms and conditions of this Franchise unless TWTC shall, within thirty (30) days after the effective date of the Ordinance, file with the City its written acceptance of this Franchise, in a form acceptable to the City Attorney.

Section 10. Compliance with codes and regulations.

A. The rights, privileges and authority herein granted are subject to and governed by this ordinance and all other applicable ordinances and codes of the City of Kirkland, Washington as they now exist or may hereafter be amended. Nothing in this ordinance limits the City's lawful power to exercise its police power to protect the safety and welfare of the general public. Any location, relocation, erection or excavation by TWTC shall be performed by TWTC in accordance with applicable federal, state and city rules and regulations, including the City Public Works Policies and Standard Plans, and any required permits, licenses or fees, and applicable safety standards then in effect.

B. Upon written inquiry, TWTC shall provide a specific reference to either the federal, state or local law or the W.U.T.C. order or action establishing a basis for TWTC's actions related to a specific franchise issue.

C. In the event that any territory served by TWTC is annexed to the City after the effective date of this Franchise, such territory shall be governed by the terms and conditions contained herein upon the effective date of such annexation.

D. TWTC is responsible for painting over or removing any graffiti on the TWTC's facilities. TWTC shall paint over or remove graffiti from its facilities within 10 days of being notified by the City of the graffiti.

Section 11. Undergrounding. The City encourages TWTC to locate or relocate its facilities underground when and where practical. TWTC acknowledges that the City desires to promote a policy of undergrounding of Facilities within the Franchise Areas. TWTC will cooperate with the City in the undergrounding of TWTC's Facilities within the Franchise Areas. If, during the term of this Franchise, the City shall direct TWTC to underground Facilities within any Franchise Area, such undergrounding shall be at no cost to the City. TWTC shall comply with all applicable federal, state and City regulations on undergrounding at the very least. This Section 11 shall govern all matters related to undergrounding of TWTC's Facilities (i.e., conversion or otherwise) within the Franchise Areas.

(A) Street improvements. If the City undertakes any street improvement which would otherwise require relocation of TWTC's above-ground facilities in accordance with subsection 4(a) above, or if subsection 4(c) above applies, the City may, by 90 day written notice to TWTC, direct that TWTC convert any such Facilities to underground Facilities. Any such conversion shall be done subject to and in accordance with schedules and Tariffs on file with the W.U.T.C.

(B) Location of Equipment. All Facilities to be installed within the Franchise Area shall be installed underground; provided, however, that such Facilities may be installed above ground if so authorized by the City, which authorization shall not be unreasonably withheld or delayed, consistent with the provisions of the City's Land Use Code and applicable development standards.

Section 12. Record of Installations and Service. With respect to excavations by TWTC and the City within the Franchise Area, TWTC and the City shall each comply with its respective obligations pursuant to Chapter 19.122 RCW and any other applicable state law.

Upon written request of the City, TWTC shall provide the City with the most recent update available of any plan of potential improvements to its Facilities within the Franchise Area; provided, however, any such plan so submitted shall be for informational purposes within the Franchise Area, nor shall such plan be construed as a proposal to undertake any specific improvements within the Franchise Area.

As built drawings of the precise location of any Facilities placed by TWTC in any street, alley, avenue, highway, easement, etc., shall be made available to the City within ten (10) working days of request.

Section 13.

A. City Use of Facilities. With respect to trenches which are facilities and which are (1) owned by TWTC and (2) within the Franchise Area, the City, subject to TWTC's prior written consent, which may not be unreasonably withheld, may install and maintain underground conduits in such trenches, subject to the following:

(a) Such installation and maintenance shall be done by the City and any additional costs shall be at the City's expense;

(b) TWTC shall have no obligation under the indemnification provisions of the Franchise for the installation or maintenance of such City owned conduits.

(c) TWTC shall not charge the City a fee for the use of such poles or trenches in accordance with this Section 14 as a means of deriving revenue therefrom; provided, however, nothing herein shall require TWTC to bear any cost or expense in connection with such installation and maintenance by the City.

B. City Access. If the City requests telecommunication services from TWTC, TWTC shall allow the service at TWTC's most favorable rate charged for a similar service within the state of Washington. Other terms and conditions of the provision of such services may be determined between TWTC and the City in a separate agreement.

C. It is agreed and understood that TWTC intends to install its Facilities underground in the Franchise Area. TWTC shall not install poles in the Franchise Area, nor shall it acquire poles from any other entity with facilities in the Franchise Area; provided, however, that nothing in this Franchise shall prohibit TWTC from entering into pole attachment agreements with pole-owners in the Franchise Area.

Section 14. Shared Use of Excavations. TWTC and the City shall exercise best efforts to coordinate construction work either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of such work as a whole. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities within the Franchise Areas informed of its intent to undertake such construction work. TWTC and the City shall further exercise best efforts to minimize any delay or hindrance to any construction work undertaken by themselves or other utilities within the Franchise Area.

If at any time, or from time to time, either TWTC, the City, or another franchisee, shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the other, upon receipt of a written request to do so, an opportunity to use such excavation, provided that: (a) Such joint use shall not unreasonably delay the work of

the party causing the excavation to be made; and (b) Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties. The parties shall each cooperate with other utilities in the Franchise Area to minimize hindrance or delay in construction.

The City reserves the right to not allow open trenching for five years following a street overlay or improvement project. TWTC shall be given written notice at least 120 days prior to the commencement of the project. Required trenching due to an emergency will not be subject to five-year street trenching moratoriums.

The City reserves the right to require TWTC to joint trench with other facilities if both parties are anticipating trenching within the same franchise area and provided that the terms of (a) and (b) above are met.

Section 15. Insurance. TWTC shall maintain in full force and effect throughout the term of this Franchise, a minimum of One Million Dollars (\$1,000,000.00) liability insurance for property damage and bodily injury.

The City shall be named as an additional insured on any policy of liability insurance obtained by TWTC for the purpose of complying with the requirements of this section.

In satisfying the insurance requirements set forth in this section, TWTC may self-insure against such risks in such amounts as are consistent with good utility practice. TWTC shall provide the City with an insurance certificate indicating that such insurance (or self-insurance) is being so maintained by TWTC. The City may, in addition, require TWTC to provide additional insurance information, including but not limited to a copy of the insurance policy on which the insurance certificate is based.

Section 16. Tariff Changes. If TWTC shall file, pursuant to Chapter 80.28 RCW, with the Washington Utilities and Transportation Commission (or its successor) any tariff affecting the City's rights arising under this Franchise, TWTC shall give the City Clerk written notice thereof within five (5) days of the date of such filing.

Section 17. Assignment. All of the provisions, conditions, and requirements herein contained shall be binding upon TWTC, and no right, privilege, license or authorization granted to TWTC hereunder may be assigned or otherwise transferred without the prior written authorization and approval of the City, which the City may not unreasonably withhold. Notwithstanding the foregoing, TWTC may assign this agreement to an affiliate or subsidiary without the consent of, but upon notice to, the City.

Section 18. Miscellaneous. If any term, provision, condition or portion of this Franchise shall be held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Franchise which shall continue in full force and effect. The headings of sections and paragraphs of this Franchise are for convenience of reference only and are not intended to restrict, affect, or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

TWTC shall pay for the City's reasonable administrative costs in drafting and processing this franchise agreement and all work related thereto. TWTC shall further be subject to all lawful permit fees associated with activities undertaken through the authority granted in this franchise ordinance or under the laws of the City. Where the City incurs cost and expenses for review, inspection, or supervision of activities undertaken through the authority granted in this franchise or any ordinances relating to the subject for which a permit fee is not established, TWTC shall pay such lawful, actual and documented costs and expenses directly to the City. In addition to the above, TWTC shall promptly reimburse the City for any and all actual, documented costs it reasonably incurs in response to any emergency involving TWTC's facilities.

The City has the right, but not the obligation, to take over control and ownership of Franchise's facilities in the ROW, specifically including the fiber-optic network, without compensation, if: (1) such facilities are abandoned; or (2) in the event this Franchise is terminated and Franchisee does not remove such facilities at its own expense within 180 days.

This Franchise may be amended only by written instrument, signed by both parties, which specifically states that it is an amendment to this Franchise, and is approved and executed in accordance with the laws of the State of Washington. Without limiting the generality of the foregoing, this Franchise (including, without limitation, Section 5 above) shall govern and supersede and shall not be changed, modified, deleted, added to, supplemented or otherwise amended by any permit, approval, license, agreement or other document required by or obtained from the City in conjunction with the exercise (or failure to exercise) by TWTC of any and all rights, benefits, privileges, obligations, or duties in and under this Franchise, unless such permit, approval, license, agreement or document specifically: (a) references this Franchise; and (b) states that it supersedes this Franchise to the extent it contains terms and conditions which change, modify, delete, add to, supplement or otherwise amend the terms and conditions of this Franchise.

In the event of any conflict or inconsistency between the provisions of this Franchise and the provisions of any such permit, approval, license, agreement of other document, the provisions of this Franchise shall control.

This Franchise is subject to the provisions of any applicable tariff now or hereafter on file with the Washington Utilities and Transportation Commission or its successor. In the event of any conflict of inconsistency between the provisions of this Franchise and such tariff, the provisions of such tariff shall control.

Section 19. Notice. Any notice required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033
Attn: City Clerk

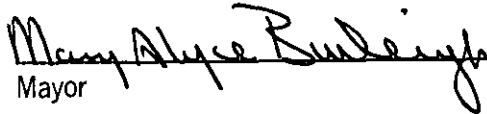
Brian Thomas VP Regulatory, Northwest
223 Taylor Ave. South
Seattle, WA 98109

with a copy to:
Tina Davis, VP Deputy General Counsel
10475 Park Meadows Dr.
Littleton, CO 80124

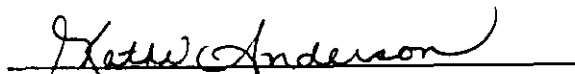
Section 20. Effective date. This Ordinance, being in compliance with RCW 35A.47.040, shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.017 Kirkland Municipal Code in the summary form attached to the original of this ordinance and by this reference approved by the City Council.

Passed by majority vote of the Kirkland City Council in open meeting this 21st day of September, 2004.

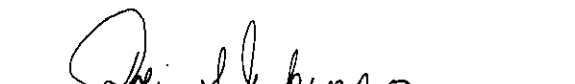
Signed in authentication thereof this 21st day of September, 2004.


Mayor

Attest:


City Clerk

Approved as to Form:


City Attorney

PUBLICATION SUMMARY OF ORDINANCE NO. 3959


AN ORDINANCE OF THE CITY OF KIRKLAND GRANTING TIME WARNER TELECOM (TWTC) OF WASHINGTON LLC, A DELAWARE LIMITED LIABILITY COMPANY, THE RIGHT, PRIVILEGE, AUTHORITY AND FRANCHISE TO CONSTRUCT AND MAINTAIN, REPAIR, REPLACE, OPERATE UPON, OVER, UNDER, ALONG AND ACROSS THE FRANCHISE AREA FOR PURPOSES OF ITS TELECOMMUNICATION BUSINESS.

SECTIONS 1-19. Provide for the grant to Time Warner Telecom (TWTC) of Washington LLC a franchise for a telecommunication business for ten years on specified terms and conditions.

SECTION 20. Authorizes publication of the ordinance by summary, which summary is approved by the City Council pursuant to Section 1.08.017 Kirkland Municipal Code and establishes the effective date as five days after publication of summary.

The full text of this ordinance will be mailed without charge to any person upon request made to the City Clerk for the City of Kirkland. The ordinance was passed by the Kirkland City Council at its regular meeting on the 21st day of September, 2004.

I certify that the foregoing is a summary of Ordinance 3959 approved by the Kirkland City Council for summary publication.



City Clerk