

MEMORANDUM

October 7, 2010

TO: Board of Mayor and Aldermen

FROM: Eric Stuckey, City Administrator *Eric*
David Parker, City Engineer/CIP Executive
Shauna Billingsley, City Attorney

SUBJECT: **tw telecom, LLC. (TWTC)**
Right-Of-Way Use Agreement
COF Contract No 2010-0167

Purpose

The purpose of this memorandum is to provide information to the Franklin Board of Mayor and Aldermen (BOMA) to consider a proposed Right-of-Way Use Agreement with tw telecom, LLC.

Background

Approximately a month ago, a representative of tw telecom, LLC (TWTC) of Tennessee contacted the City requesting approval to install infrastructure within the City's rights-of-way (ROW). In response to this request, City staff informed the representative that TWTC is required to obtain a franchise in order to use City ROW. An example of the City's franchise ordinance was then provided to TWTC.

Later after Shauna Billingsley discussed the idea of a TWTC franchise with their legal counsel, it was determined that due to federal laws, the City could not require a franchise for the type of services TWTC (see attached letter describing TWTC's proposed services). TWTC has thus provided the draft Right-of-Way Use Agreement along with a schedule of fees for the City's cost in issuing construction permits and supervising the TWTC's use of the rights-of-way. The proposed fees are what other cities in the area are using for this type of agreement. While staff previously mentioned the need to develop right-of-way use (maintenance) fees the fees presented appear to be appropriate until such develop of fees can occur. Staff recommends some additional language in Section 14 of the Agreement that would allow for changes in the right-of-way use fees in the future if a needed change was shown to be appropriate and then approved by BOMA. Also, there needs to be some additional language in the Agreement that indicates the City's standard bonds for right-of-way permits apply to any permit requested by TWTC.

Financial Impact

The Company, tw telecom, llcl, will pay to the City the Right-of-Way Usage Fees as indicated in Exhibit B, Schedule of Fees. These permit fees will be revenue to the City for the cost of permit issuance and inspection of work in the right-of-way and should cover the City's cost.



Options

1. Do nothing – do not approve the Right-Of-Way Use Agreement with tw telecom, llc. BOMA needs to be aware, however, if an agreement with TWTC is not entered into, then the Federal Communications Commission (FCC) could possibly overrule the City to allow TWTC to use the City's right-of-way; or
2. Approve the proposed Right-Of-Way Use Agreement, COF Contract No 2010-0167, with tw telecom, llc; or
3. Approve a revised or amended version of the Right-Of-Way Use Agreement, COF Contract No 2010-0167.

Recommendation

Option 3 is recommended: Approve a revised or amended version of the proposed Right-Of-Way Use Agreement, COF Contract No 2010-0167 to include additional language concerning future increases of the Right-Of Way Use Fees and the requirements for posting of bonds for the permits. Authorization can also be granted to the City Administrator and City Attorney to execute the agreement with appropriate provisions addressing these issues.

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Reply to:
Nashville Office

MEMORANDUM

To: Mayor John C. Schroer
From: Chuck Welch
Date: September 27, 2010
Re: tw telecom of tennessee, llc

tw telecom, headquartered in Littleton, CO, is a leading provider of managed networking solutions to a wide array of businesses and organizations in 75 markets spanning 30 states and D.C. As one of the country's premier competitive service providers, **tw telecom** integrates data, dedicated Internet access, and local and long distance voice services for long distance carriers, wireless communications companies, incumbent local exchange carriers, and enterprise organizations in healthcare, finance, higher education, manufacturing, and hospitality industries, as well as for military, state and local government.

We began our business in 1993 as a joint venture with Time Warner Cable (now a unit of Time Warner Inc.). Since 1997, we focused on delivering services to business customers, including carriers and governmental entities, and on expanding from dedicated services into Voice Services, Internet and data.

In July 1998, we became a separate entity apart from Time Warner Cable and were reorganized into Time Warner Telecom LLC. In May 1999, we issued an IPO and became Time Warner Telecom Inc.

In July 2008, Time Warner Telecom became **tw telecom**.

tw telecom provides services to business customers. Our optical networks are fast, powerful, flexible, secure and highly reliable to deliver a comprehensive suite of voice, data, dedicated Internet and integrated communications services to our customers. Our metropolitan fiber networks enable us to deploy new service platforms efficiently and cost effectively, which allows us to rapidly meet our customers' needs. Our innovative National Operations Center (NOC) monitors all our networks for reliability and performance, 24-hours-a-day, seven-days-a-week.

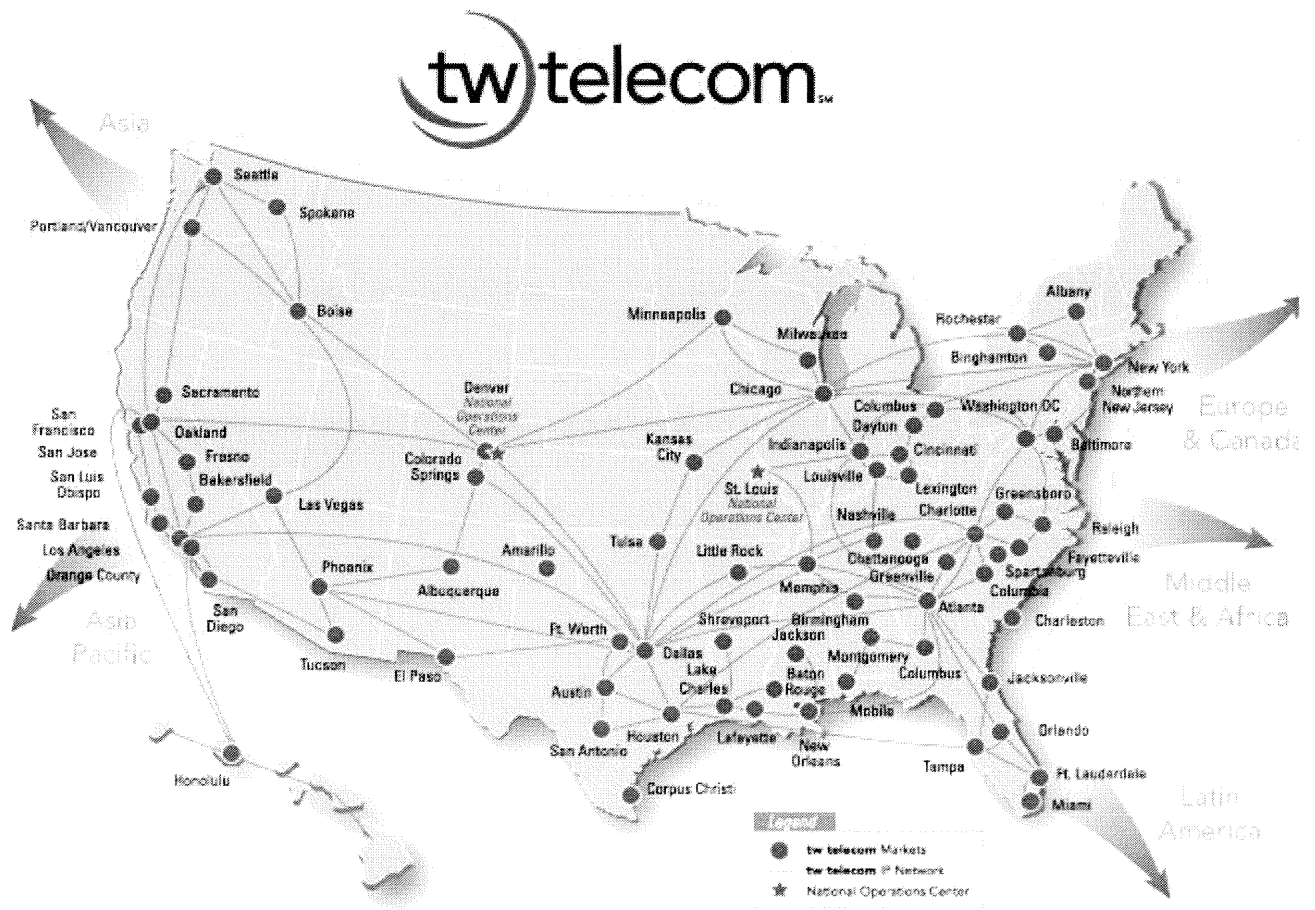
The flexible infrastructure provided by these networks allows us to offer almost any technology, product, service, or solution to benefit our customers. Our Solutions Include:

- **Internet & Data Products** that allow customers to create their own internal computer networks and to access the Internet and other external networks.
- **Switched & Transport Services** which include local and long distance calling solutions that use a carrier class switch to connect one calling party to the other, and private line connections for broadband services at transmission speeds from 1.5 megabits to 10 gigabits per second.
- **Bundled Solutions** that bundle products and services to meet unique customer needs for voice, data and dedicated Internet access.

TWTC has reviewed the template franchise ordinance provided by your City Attorney, Ms. Shauna Billingsly. The vast majority of the document is standard to the industry with the exception of the franchise fee described in Section 14 as 5% of Gross Revenue. Gross Revenue is a broadly defined term and includes all revenue derived by the franchisee from sales and services provided within the City of Franklin. Although franchise fees based upon a percentage of gross revenues is a permitted assessment for ROW usage by cable television/video service providers pursuant to federal law (Communications Act of 1934, as amended. 47 USC 101, et. seq.), there is no corresponding authority, state or federal, for a similar assessment for telephone, voice, and data services providers. Accordingly, the Tennessee Court of Appeals has issued an opinion in the case of BellSouth Telecommunications, Inc. v. City of Memphis, 160 S.W. 3d; 2004 Tenn. App. LEXIS 442, that a municipality is prohibited from such an assessment is invalid as an authorized tax.

We would like to discuss this issue, as well as two other minor issues, with the Mayor and Board of Alderman for the purpose of reaching an agreement as to an appropriate franchise fee which is cost based as permitted by applicable law.

The map below shows **tw telecom's** national footprint.



CITY OF FRANKLIN, TENNESSEE

RIGHT-OF WAY USE AGREEMENT

THIS RIGHT-OF-WAY USE AGREEMENT ("Agreement") is entered into effective the _____ day of October, 2010, by between the City of Franklin, a municipal corporation existing and operating under the laws of the State of Tennessee, ("City") located in Williamson County, and tw telecom of tennessee, llc., a limited liability company organized and existing under the laws of the State of Tennessee, ("Company" or "TWTC") doing business within the State of Tennessee, with its principal place of business located at 535 Mainstream Drive, Nashville, TN 37228 (collectively referred to as the "Parties").

RECITALS

- A. The City owns, manages and maintains rights-of-ways within its corporate limits;
- B. The Company desires to occupy the City's rights-of-ways to install, construct, operate, and maintain its telecommunications facilities and network for the purpose of providing voice, Internet and data services to its customers at locations within the City; and
- C. The Parties desire to establish the terms and conditions of the Company's occupation and use of City's rights-of-ways.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

SECTION 1. Definitions. For the purposes of this Agreement, the following terms, phrases, words, and their derivations shall have the meanings given herein. When not inconsistent with the context, words, using 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 word “shall” is always mandatory and not merely directory.

- (1) TWTC is the “Grantee” of the rights under this Agreement.
- (2) “City” is the City of Franklin, Tennessee, a municipal corporation and is the “Grantor”.
- (3) “Day” or “Days” shall mean a calendar day or days.
- (4) “FCC” shall mean the Federal Communications Commission, or any successor agency.
- (5) “Person” is any, firm, partnership, association, corporation, company or organization of any kind.
- (6) “Public Right-of-Way” shall mean real property; surface, subsurface and air rights; acquired by the City by any lawful means and includes the surface and that area below the surface which is necessary to support the public highway, street, avenue, road, lane, way, alley, path, bridge, tunnel, sidewalk, planting strip, median, or public ground. No reference herein or in any franchise for use of any public right-of-way shall be deemed to be a representation or guarantee by the City that its title to any public right-of-way or any improvement or object located therein is sufficient to permit or authorize its use by the Grantee.
- (7) “Public Utility Easement” shall mean easements conveyed, granted or dedicated to the City or public dedicated or devoted to utility purposes not exclusive in nature for a particular utility, such as water, sanitary sewer, drainage, electrical, etc. Public

Utility Easements are typically designated as Public Utility and Drainage Easement (PU&DE) on recorded plats.

- (8) “Rights-Of-Way Use” shall mean the non-exclusive authorization granted as provided in this Agreement to occupy or use the public streets and/or rights-of-way within the City of Franklin for the construction, operation and maintenance of a telecommunications system within all or a portion of the City.
- (9) “System” or “Telecommunications System” shall mean Grantee’s network of cables (wires and/or fiber optic), lines, and any associated equipment, or facilities designed and constructed for the purpose of providing voice, Internet and data services to customers at locations within the City.

SECTION 2. Authority. There is hereby granted by the City of Franklin, Tennessee, to TWTC, its successors and assigns, the non-exclusive right, authority, and privilege to erect, construct, operate and maintain a Telecommunications System in, upon, under, along, across and over the highways, streets, avenues, roads, alleys, lanes, ways, Public Utility Easements, parkways and other public grounds in the present or future corporate limits of the City, for the supplying and selling of telecommunication services to said City and the inhabitants, institutions and businesses thereof, and for such purposes to construct, maintain, operate, renew, replace, repair, and extend its System as may be necessary for said purposes.

SECTION 3. Term. This Agreement and the rights granted herein shall take effect and be enforced from and after the Effective Date hereof, as required by law, and shall continue in force for ten (10) years from and after the approval and execution by the Parties.

SECTION 4. Construction Standards. The Telecommunications System constructed, maintained and operated by virtue of this Agreement, shall be so constructed, maintained and operated in accordance with all applicable engineering codes adopted or approved by the City, State of Tennessee,

federal government and/or engineering profession and in accordance with any applicable Statutes of the State of Tennessee, Rules and Regulations of the Tennessee Regulatory Authority, Ordinances of the City of Franklin or of any other governmental regulatory commission, board or agency having jurisdiction over the Company. Said facilities shall be constructed as not to interfere with the drainage of City or unreasonably interfere with or injure any street, sewer, water main or any other public improvement which City has heretofore made or may hereafter make in, upon, along or under any highway, street, avenue, road, alley, lane, way, Public Utility Easement, parkway, or other public ground, or unnecessarily impede or obstruct such highways, streets, avenues, roads, alleys, lanes, ways, Public Utility Easements, parkways and other public grounds of City, and shall conform to the grade as then or hereafter established. The Company agrees to attempt to utilize known Public Right-of-Way whenever practical before resorting to right of condemnation to which the Company may be entitled to utilize by law.

The Company shall have the sole responsibility for obtaining, at its own cost and expense, all permits, licenses, or other forms of approval or authorization necessary to construct, operate, maintain or repair or expand the System, and to construct, maintain and repair any part thereof prior to commencement of any such activity.

SECTION 5. Construction Safety. When the highways, streets, avenues, alleys, road, lanes, ways, Public Utility Easements, parkways or other public grounds are opened, or any other opening is made by the Company within the City, whether the same be made for the purpose of laying, constructing, replacing or repairing the mains, pipes and other appliances and fixtures of the Company, the Company shall place and maintain necessary safety devices, barriers, lights and warnings to properly notify persons of any dangers resulting from such entrances, and shall comply with applicable safety regulations required by federal, state and local laws.

SECTION 6. Protection of Trees. Trimming of trees and shrubbery within the public rights-of-way to prevent contact with the Company's facilities shall be done in such a manner to cause the minimum

amount of damage to trees and shrubs. If trees in the public rights-of-way are excessively damaged as a result of the work undertaken by or on behalf of the Company, the Company shall pay the City within thirty (30) days of submission of a statement by the City, the cost of any treatment required to preserve a tree or shrub and/or cost for removal and replacement of the tree or shrub with landscaping of equal value and/or the value of the tree or shrub prior to the damage or removal, as determined by the City Engineer or other authorized agent of the City. Any trimming or removal of trees or shrubs shall be done in full compliance with the City's Tree Ordinance, Zoning Ordinance, and all other laws or regulations of the City.

SECTION 7. Relocation. In the event it becomes necessary or expedient for the City to change the course or grade, or to reconstruct, resurface, relocate or otherwise alter or improve (including, but not limited to, the installation, maintenance or repair of sidewalks, curbs, gutters, drainage facilities, water mains, sanitary sewer mains, traffic signals, trees or other street improvement amenities) of any highway, street, avenue, road, alley, way, public utility, parkway, or other public ground in which the Company is maintaining its Telecommunication System, then, upon the written request of the City, the Company shall, at its own cost and expense and within one hundred twenty (120) days, protect, remove, alter or relocate the System as necessary to conform to the proposed alteration. Notice to the Company will include detailed project plans and proposed project schedule. Relocation must be substantially complete prior to the City issuance of a Notice to Proceed to its general contractor for the project necessitating the relocation, unless in the opinion of the City Engineer the project coordination prohibits same. The Company's failure to comply with these provisions may be considered a breach of this Agreement and cause for termination of the Agreement and the City shall have the right to break through, remove, alter or relocate such part of the System, without any liability to the City, and the Company shall pay to the City the costs incurred in connection with such breaking through, removal, alteration or relocation.

SECTION 8. Construction Permit. Whenever the Company wishes to enter upon any Public Right-of-Way or Public Utility Easement for the purpose of constructing, replacing or repairing any portion of its System, it will, notify the City, file a plan or map of the proposed work and obtain a

permit as required before commencing same. Whenever any Public Right-of-Way or other Public Utility Easement shall be entered, dug up or disturbed by the Company, the Company shall, at its expense and as soon as possible after the work is completed, restore such Public Right-of-Way or other Public Utility Easement in as good condition as existed before the work was done and to the reasonable satisfaction of the City. In the event the Company shall fail to fulfill its obligations under this Section, the City, after giving the Company reasonable written notice, and failure of the Company to make such repairs or restoration, may make the necessary restoration or repairs itself and the Company shall be liable for the cost of same.

The provisions of this Section shall not be applied or interpreted in such a way as to prevent or delay Company work that may be required as a result of any emergency, leak or other immediate hazard or danger. Likewise, the provisions of this Section anticipate that the Company shall not be unreasonably denied permission to perform necessary work.

SECTION 9. Map of System. A current map or map of proposed of facilities of the Telecommunication System is hereby attached as Exhibit "A" and provided on a CD formatted using ARC Info for inclusion in the City's GIS mapping. An annual construction work plan for any proposed additions to the Telecommunications System within the City shall be filed with the City Engineer upon annual approval of such plan by the Company. Company shall file a complete new "as built" System map with the City Engineer, updated upon the request of the City, within a reasonable time of such request, but no less frequently than every twelve (12) months showing the location of the Company's System within the City. Except as provided herein, this section shall not be construed nor is it intended to require the approval of the City of the Company's construction and projects for services within the City.

SECTION 10. Utility Easements. Nothing contained herein shall be construed as preventing the Company from installing, placing, replacing, taking up, repairing, maintaining, or removing any portion of its System, from using any Public Utility Easements for telecommunication service which are shown on any plats of any portion of the City hereto or hereafter platted or recorded, or any such Public Utility Easement

which may hereafter be created, granted or dedicated for any such utility purpose by any person, form or corporation whatsoever.

SECTION 11. Liability. The Company shall at all times indemnify and hold harmless the City from and against any and all lawful claims for injury to any person or property by reason of the Company or its employees' failure to exercise due care and diligence in and about the installing and maintenance of said System, guarding trenches and excavation while said System is being installed or subsequent extensions, repairs or alterations are being made or generally in the operation and maintenance of said System, provided the Company shall have been notified in writing of any claim against the City on account thereof, and shall have been afforded the opportunity fully to defend the same.

The Company shall comply with all provisions of the workers' compensation laws of the State of Tennessee and the federal government and Tennessee Employment Security laws (including unemployment compensation), and with all state and federal laws regulating the operation and maintenance of business enterprises and the employment of personnel.

SECTION 12. Rules and Regulations. The City and the Company hereby agree that this Agreement shall be subject to rules and regulations adopted by the Company and approved by the Tennessee Regulatory Authority, FCC or any other regulatory body having jurisdiction thereof during the term of this Agreement, and that all such Rules and Regulations shall be and become a part of this Agreement to the same extent and with the same effect as if said Rules and Regulations were herein set out in full provided that such rules and regulations shall not be in conflict with law or the rules and regulations of the State of Tennessee or the City. The Company shall not be obligated or required to make any extension of the System or service lines except in accordance with the provisions relating thereto adopted or approved by the Tennessee Regulatory Authority, or any other regulatory body having jurisdiction thereof during the term this Agreement.

SECTION 13. Change of Law. In the event subsequent revisions to state and/or federal law are enacted which are inconsistent with any provision of this Agreement, either party may request to renegotiate such provisions upon one hundred and twenty (120) days' notice to the other party.

SECTION 14. Fees. The Company shall pay to the City a fee in the amount equal to the cost incurred by the City in the issuance of the construction permit and the supervision of the Company's Rights-Of-Ways Use. Fees shall include, without the implication of limitation, costs itemized in the Schedule of Fees, attached hereto and incorporated herein by reference as Exhibit B. Said fees shall be due and payable at the time of the issuance of the construction permit. The City may increase the fees set forth in Exhibit B no more often than once in a 12 month period, upon 30 days written notice, to cover any increased costs of issuing the permit and supervising the Rights-of-Way

SECTION 15. Local Office Compliant Procedures. During the term of this Agreement, and any renewal thereof, the Company shall maintain within twenty-five (25) miles of the City limits of the City of Franklin a business office or agent for the purpose of receiving and resolving all complaints regarding the quality of service, new service equipment malfunction, and similar matters. The local office shall be open to receive inquiries or complaints from subscribers during normal business hours, and in no event less than 9:00 a.m. to 4:00 p.m., Monday through Friday. Any complaints from subscribers may be made orally or in writing and shall be investigated and acted upon as soon as possible, but at least within ten (10) business days of their receipt. The Company shall keep a log of complaints and actions taken concerning each complaint. This log shall be available for periodic inspection by the City.

SECTION 16. Sale or Transfer. No sale or transfer of the Telecommunication System, or the transfer of any rights under this Agreement shall be effective until the assignee or lessee has filed in the Office of the City Recorder for the City of Franklin an instrument, duly executed, reciting the fact of such sale, assignment or lease, accepting the terms of this Agreement, and agreeing to perform all the conditions thereof.

SECTION 17. Sundry Provisions. The Company will not refuse to hire or employ, nor bar or discharge from employment, nor discriminate against any person in compensation or in terms, conditions, or privileges of employment because of race, creed, religion, national origin, sex or age. The Company shall establish, maintain and effect equal employment policies and procedures set forth both by federal statute and pursuant to the rules of any applicable governmental agency to extent applicable to the Company. Such policies and procedures shall be made known to the general public. The Company shall establish a system and a procedure for the periodic review of its employment practices and procedures to ensure their compliance with federal statutes and the rules promulgated by applicable governmental agencies. The Company shall further carry out a periodic review of its employment practices to determine whether unfair or discriminatory practices occur and, if so, shall make all necessary changes.

SECTION 18. Force Majeure. Company shall not be required to perform any covenant or obligation in this Agreement, or be liable in damages to the City, so long as the performance or non-performance of the covenant or obligation is delayed, caused or prevented by an act of God, force majeure or by the other party. An "act of God" or "force majeure" is defined for purposes of this Agreement as strikes, lockouts, sit-downs, material or labor restrictions by any governmental authority, unusual transportation delays, riots, floods, washouts, explosions, earthquakes, fire, storms, weather (including wet grounds or inclement weather which prevents construction), acts of the public enemy, wars, terrorism, insurrections, and/or any other cause not reasonably within the control of Company or which by the exercise of due diligence Company is unable wholly or in part, to prevent or overcome.

SECTION 19. Applicable Law; Choice of Forum/Venue. These Standard Terms and Conditions are made under and will be construed in accordance with the laws of the State of Tennessee without giving effect to any state's choice-of-law rules. The choice of forum and venue shall be exclusively in the Courts of Williamson County, Tennessee.

SECTION 20. Acceptance. The Company shall acknowledge the terms and conditions of this Agreement by the verified signature of an officer of the Company authorized to act on its behalf. After

such execution, this Agreement shall constitute a contract between the Parties and shall, subject to the rights and powers vested in the Tennessee Regulatory Authority or such other regulatory body of the State of Tennessee as may hereafter succeed to the rights and powers of the Tennessee Regulatory Authority or as may exercise statutory jurisdiction of telecommunication companies furnishing telecommunication service in the State of Tennessee, be the measure of the rights, powers, obligations, privileges and liabilities of said City and of said Company.

SECTION 21. Successors and Assigns. All the privileges given and obligations created by this Agreement shall be binding upon the successors and assigns of the Company.

SECTION 22. Severability. If any section or portion of any section, of this Agreement shall hereafter be declared or determined by any court of competent jurisdiction to be invalid, the remaining provisions of this Agreement shall remain in full force and effect.

SECTION 23. Effective Date. This Agreement shall take effect and be in force immediately upon its approval and execution by the Company and the City of Franklin, Tennessee and approval by the Board of Mayor and Aldermen of the City.

IN WITNESS WHEREOF, the authorized representatives of the Parties affix their signatures hereto effective as of the day and date first above written.

ATTEST:

CITY OF FRANKLIN, TENNESSEE

By: _____
Eric S. Stuckey
City Administrator

By: _____
John C. Schroer
Mayor

Date: _____

Date: _____

Approved As To Form:

tw telecom of tennessee llc

By: _____
Shauna Billingsley
City Attorney

By: _____
Title: _____

Date: _____

Date: _____

EXHIBIT B

SCHEDULE OF FEES

I. ROADWAY CUTS

Permit Fees

First 30 Linear Feet:	\$50.00
Each Additional Linear Foot:	\$5.00
Maximum Fee:	\$200.00

BOND AMOUNT

Min Bond for 30' or less:	\$4500.00 (\$150.00 / ft. x 30')
Over 30 Linear Feet:	\$150.00 per linear foot

II. RIGHT-OF-WAY CUTS

Permit Fees

First 100 Linear Feet:	\$100.00
Each Additional Linear Foot:	\$0.50

III. BOND AMOUNT

Per Linear Foot:	\$25.00
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