

ORDINANCE NO. 2214

**TWIN VALLEY COMMUNICATIONS, INC.
FRANCHISE ORDINANCE**

AN ORDINANCE GRANTING A CITY FRANCHISE TO TWIN VALLEY COMMUNICATIONS, INC., OF MILTONVALE, KANSAS, FOR THE RIGHT TO ERECT, MAINTAIN AND OPERATE IN, UNDER, ALONG, ACROSS AND UPON THE STREETS, AVENUES, SIDEWALKS, ALLEYS, BRIDGES AND HIGHWAYS AND OTHER PUBLIC PLACES IN THE CITY OF CLAY CENTER, KANSAS, AND SUBSEQUENT ADDITIONS THERETO, FOR THE PURPOSE OF TRANSMISSION AND DISTRIBUTION BY WIRE CABLE OF VOICE COMMUNICATIONS, AND OTHER SIGNALS TO ENABLE THE SALE OF ITS SERVICE TO THE INHABITANTS OF SAID CITY, AND ENVIRONS THEREOF AND OTHER PURPOSES, FOR A TERM OF TWO YEARS, SUBJECT TO RENEWAL, AND REGULATING THE SAME; AND PROVIDING WHEN THIS ORDINANCE SHALL BE IN FULL FORCE AND EFFECT.

SECTION 1. FRANCHISE REQUIRED: It is unlawful for any person to construct, operate or maintain any type of telecommunications system or to provide telecommunication services within the City Limits, utilizing City rights-of-way, without a valid, unexpired franchise or license, unless otherwise specifically authorized under applicable Federal or State law. Any person who violates any provisions of this ordinance shall be guilty of a misdemeanor and shall be subject to a fine of two thousand, five hundred dollars (\$2,500.00) per day. The payment of such fine, notwithstanding, all such violators shall be subject to all other applicable provisions of this ordinance to the fullest extent allowed by law, including but not limited to the payment of a franchise fee.

SECTION 2. In consideration of the faithful performance and observance of the conditions and reservations herein specified, Twin Valley Communications, Inc., of Miltonvale, Kansas, (hereinafter referred to as Grantee) a company doing business under the laws of the State of Kansas, its successors and assigns is hereby granted the nonexclusive right to construct and/or install and cause to be constructed and/or installed, and to maintain and/or cause to maintained, and to operate telecommunications local exchange service, and other electronic signal transmission and distribution facilities and additions thereto (and related electronic facilities) in, under, over, along, across and upon the streets, avenues, sidewalks, alleys and other public places in the City of Clay Center, Kansas, (hereinafter referred to as the City and Grantor) and subsequent additions hereto, for the purpose of providing such services, in accordance with the laws and regulations of the United States of America and the State of Kansas, and this ordinance for a period of Two (2) years with the provisions that this Agreement shall be re-negotiated for An additional term beginning in July 2010, and if not re-negotiated, there shall be an automatic renewal for an additional Five (5) years, from and after the effective date of this ordinance, unless sooner terminated as herein provided.

SECTION 3. This Ordinance is granted pursuant to K.S.A. 12-2001 (2004 supp.) After sixty (60) days from the date of publication giving opportunity of all interested parties to make known any concerns and file said concerns with the City Clerk and upon careful consideration of the Grantee's qualifications including its legal charter, financial and technical qualifications and the adequacy and feasibility of its construction, maintenance and operation arrangements. Within said sixty (60) days, said Grantee shall file its written acceptance of this Ordinance with the City Clerk, and if said acceptance is filed and no objections are filed by any other interested party, said Ordinance shall take effect sixty (60) days after publication.

SECTION 4. DEFINITIONS: For the purpose of this contract franchise ordinance, the following words and phrases and their derivations shall have the following meaning:

"Access line" shall mean and be limited to retail billed and collected residential lines; business lines; ISDN lines; PBX trunks and simulated exchange access lines provided by a central office based switching arrangement where all stations serviced by such simulated exchange access lines are used by a single customer of the provider of such arrangement. Access line may not be construed to include interoffice transport or other transmission media that do

not terminate at an end user customer's premises, or to permit duplicate or multiple assessment of access line rates on the provision of a single service or on the multiple communications paths derived from a billed and collected access line. Access line shall not include the following: Wireless telecommunications services, the sale or lease of unbundled loop facilities, special access services, lines providing only data services without voice services process by a telecommunications local exchange service provider or private line service arrangements.

"Access line count" means the number of access lines serving consumers within the corporate boundaries of the city on the last day of each month.

"Gross receipts" means those receipts collected from within the corporate boundaries of the city enacting the franchise and which are derived from grantees providing the following services: A) Recurring local exchange service for business and residence which includes basic exchange service, touch tone, optional calling features and measured local calls; (B) recurring local exchange access line services for pay phone lines provided by a telecommunications local exchange service provider to all pay phone service providers; (C) local directory assistance revenue; (D) line status verification/busy interrupt revenue; (E) local operator assistance revenue; and (F) nonrecurring local exchange service revenue which shall include customer service for installation of lines, re-connection of service and charge for duplicate bills. Gross receipts shall be reduced by bad debt expenses. Uncollectible and late charges shall not be included within gross receipts. If a telecommunications local exchange service provider offers additional services of a wholly local nature which if in existence on or before July 1, 2002, would have been included with the definition of gross receipts, such services shall be included from the date of the offering of such services in the city.

"Local exchange service" means local switched telecommunications service within any local exchange service area approved by the state corporation commission, regardless of the medium by which the local telecommunications service is provided. The term local exchange service shall not include wireless communication services.

"Provider" shall mean a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, or a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto.

"Public right-of-way" means only the area of real property in which the city has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts.

"Subscriber" shall mean any person or entity receiving for any purpose the cable or telephone service of Lessee.

"Telecommunications local exchange service provider" means a local exchange carrier as defined in subsection (h) of K.S.A. 66-1,187, and amendments thereto, and a telecommunications carrier as defined in subsection (m) of K.S.A. 66-1,187, and amendments thereto, which does, or in good faith intends to, provide local exchange service. The term telecommunications local exchange service provider does not include an inter-exchange carrier that does not provide local exchange service, competitive access provider that does not provide local exchange service or any wireless telecommunications local exchange service provider.

"Telecommunications services" means providing the means of transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

SECTION 5. RIGHTS PROVIDED TO GRANTEE:

(a) The Grantee shall have the right to construct and/or install and maintain, or to cause to be constructed and/or installed and maintained, equipment and facilities as necessary for the operation and maintenance of the subject systems provided, however, all equipment and facilities so constructed and/or installed in any public place shall be at locations approved by the Governing Body of the City.

(b) The Grantee shall be entitled to determine the nature and extent of the services to be provided to subscribers over its equipment and facilities, subject to all applicable regulations and laws of the United States and of the State of Kansas. The Grantee shall maintain a toll free telephone number to be provided to all subscribers for the purpose of receiving inquiries and complaints from its customers and shall investigate all complaints within twenty-four (24) hours of their receipt and shall, in good faith, attempt to resolve them swiftly and equitably.

(c) The Grantee shall have the right to charge and collect compensation from all subscribers to whom it shall furnish service, but the Grantee shall not as to rates, charges, service, facilities, or in any other respects, make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage, provided, further, that this provision shall not be deemed to prohibit the establishment of graduated scales of charges and classified rate schedules, including but not limited to establishment of differing charges for differing types of service or groups of such services, to which any customer coming within such scale of charges or classifications shall be entitled. Rates shall be the same for all customers within each rate classification which are served by the Grantee from identical facilities.

(d) The Grantee may modify the rates charged for any service or group of services upon prior notice to subscribers. The Grantee shall provide to the City a current schedule of the maximum rates Grantee shall be entitled to charge for its services at all times during the effective term hereof, which shall be maintained in the City records on file at the City Hall and available for inspection by the public.

(e) The Grantee shall have the right, at all times, to take such legal action as it deems necessary to preserve the security of its system, equipment and facilities and to assure only authorized use thereof by its subscribers or others.

SECTION 6. THE GRANTEE SHALL:

(a) Provide notice of the procedures for reporting and resolving complaints will be given by grantee to each subscriber at the time of the subscriber's initial subscription to the service(s).

(b) All structures, lines and equipment constructed and/or installed or caused to be constructed and/or installed by the Grantee within the City shall be so located as to cause minimum interference with the use of streets, avenues, sidewalks, alleys, bridges and highways, easements and other public ways and places and with consideration for the convenience of property owners, and the Grantee shall comply with all reasonable, proper and lawful ordinances of the City now or hereafter in force.

(c) In case the Grantee requires disturbance of pavement, sidewalk, driveway or other surface, it shall, at its own expense and in a manner approved by the City, replace and restore the same in as good condition as before said work was commenced. If the Grantee fails to do so within a reasonable time, the City may do so and charge the expense thereof to the Grantee.

(d) The Grantee shall at all times during the term hereof be subject to all lawful exercise of the police power by the City, and to such reasonable regulations as the City shall hereafter provide by ordinance or resolution; provided, however, that the Grantee's provision of service as a telecommunications public utility shall be subject to the laws of the State of Kansas and of the United States of America and to regulation lawfully imposed pursuant thereto.

(e) All poles, lines, structures and other facilities of the Grantee in, under, over, along, across and upon the streets, avenues, sidewalks, alleys, bridges and highways, easements, and other public ground or places within the City shall be kept by the Grantee at all times in a safe and sound condition. In the event of damage to such facilities beyond Grantee's control, including but not limited to calamity and/or act of God, Grantee will repair the same promptly and within a reasonable time.

SECTION 7. MOVING FACILITIES: If requested by City, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety, and welfare of the public, Twin Valley shall

remove its facilities from the public right of way or shall relocate or adjust its facilities within the public right of way at no cost to the City. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the City for such relocation or adjustment. Any damages suffered by the City or its contractors as a result of Twin Valley's failure to timely relocate or adjust its facilities shall be borne by Twin Valley.

SECTION 8. TREE TRIMMING: Permission is hereby granted to Twin Valley to trim trees upon and overhanging streets, alleys, sidewalks and public places of the City so as to prevent the branches of such trees from coming in contact with Twin Valley facilities, all the said trimming shall comply with all applicable laws, statutes and/or ordinances. Twin Valley shall notify the City at least 48 hours prior to the time they want to perform said trimming in conjunction with any new or existing construction. However, in the event said trimming is necessary in order for Twin Valley to perform repair or response work (including but not limited to service outages, installation, and line repair) Twin Valley may perform said repair or response work without providing notification to the City.

SECTION 9. REPAIR AND REPLACEMENT: Any Easement provided herein is provided to Twin Valley for the purpose of placement of lines. At any time construction, repair, maintenance or replacement of any line owned by Twin Valley, requires digging within any such Easement provided herein, Twin Valley shall, immediately following the completion of such necessary digging and/or construction, cause to be removed from said Easement, all debris, surplus material and construction equipment and leave the property in a neat and presentable condition.

SECTION 10. RIGHT OF EXAMINATION. The City shall have the right to examine, upon written notice to the telecommunications local exchange service provider, no more than once per calendar year, those records necessary to verify the correctness of the compensation paid pursuant to this contract franchise ordinance.

SECTION 11. CARRIAGE OF SIGNALS. All FCC regulations shall be complied with regarding carriage of the programming and signals of broadcast television stations. Such signals will be carried throughout the broadcast day of the broadcast television station without alteration, deletion or substitution, except as required or permitted by FCC Rules and Regulations.

SECTION 12. FCC/KCC LICENSING REQUIREMENTS. As a condition of this contract franchise ordinance, Twin Valley is required to obtain and is responsible for any necessary permit, license, certification, grant, registration or any other authorization required by any appropriate governmental entity, including, but not limited to, the City, the Federal Communications Commission (FCC) or the Kansas Corporation Commission (KCC), subject to Twin Valley's right to challenge in good faith such requirements as established by the FCC, KCC or other City Ordinance. Twin Valley shall also comply with all applicable laws, statutes and/or ordinances, subject to Twin Valley's right to challenge in good faith such laws, statutes and/or ordinances.

SECTION 13. HOLD HARMLESS AND INDEMNITY. The Grantee shall save the City harmless from any and all loss sustained by the City by reason of any suit, judgment, execution, claim or demand whatsoever, resulting from negligence on the part of the Grantee in the construction, operation or maintenance of its system within the City; for this purpose the Grantee shall carry property damage and public liability insurance, with a responsible insurance company, authorized to do business within the State of Kansas. The amounts of such insurance to be carried against liability owing for damage to property and for public liability shall be reasonable, adequate and in keeping with accepted standards in the industry, but shall not be less than set out in Section 15. The Grantee shall also carry such insurance necessary to protect it from claims made under applicable Workers Compensation laws. As a condition hereof, the City shall notify the Grantee within ten (10) days after the presentation of any claim or demand, either by suit or otherwise, made against the City on account of any allegation of negligence as aforesaid on the part of the Grantee.

SECTION 14. LIABILITY AND INDEMNIFICATION. The permittee shall maintain throughout the term of this permit adequate liability insurance insuring the City and the permittee as follows:

- (a) Bodily injury or death - \$500,000;
- (b) Property damage - \$500,000;
- (c) All other types of liability - \$500,000.

SECTION 15. FRANCHISE FEE. In consideration of the rights, privileges and franchise hereby granted, and as compensation to the City for the use of its public ways and places by the Grantee, and in lieu of all occupation and license taxes and other fees of any nature whatsoever, the Grantee shall collect and remit, to the City, a fee equal to five percent (5%) of gross receipts. Pursuant to K.S.A. 12-2001(c)(6) (2004 Supp.) All other revenues, including, but not limited to, revenues from extended area service, the sale or lease of unbundled network elements, non-regulated services, carrier and end user access, long distance, wireless telecommunications services, lines providing only data service without voice services processed by the Grantee, private line service arrangements, internet, broadband and all other services not wholly local in nature are excluded from gross receipts. Gross receipts shall be reduced by bad debt expenses. Uncollectible and late charges shall not be included within gross receipts. Pursuant to K.S.A. 12-2001(r) (2004 Supp.), without prejudice to the Grantee's other rights and authorities, the Grantee shall add to its end-user customer's bill, statement or invoice a surcharge, equal to the pro rata share of any such fees.

SECTION 16. REVIEW AND/OR RE-NEGOTIATION: The field of telecommunications is rapidly changing in the areas of regulation, technology, financing, marketing and law, therefore, in order to provide maximum flexibility in this franchise and to help achieve a continued advanced and modern system the following provisions are established for review and re-negotiation of the franchise hereby granted:

(a) In the event of a change in federal or state law materially affecting such provisions and upon request by either the Grantor or the Grantee, to the other, the parties shall re-negotiate the provisions of this ordinance pertaining to regulation of rates and services, compensation or programming.

(b) Grantor shall review the entire franchise operation within six (6) months preceding the renewal date of the franchise hereby granted, to determine, to the extent permitted by federal or state law, if any changes are needed in the free or discounted services, application of new technologies, system performances, services provided, programming offered, customer complaints, privacy in human rights, amendments to this ordinance, undergrounding progress and judicial and Federal Communication Commission rulings.

(c) Special review and re-negotiation sessions may be held at any time during the term of the franchise on the request of either the Grantor or the Grantee with such request to specify the topics to be reviewed and re-negotiated including any proposals therefore.

(d) Nothing contained in subsection (b) or (c) of this section, however, shall be construed as requiring either the Grantor or the Grantee to negotiate a new franchise, or modify or extend an existing franchise.

SECTION 17. The obligations of the Grantee as specified in this ordinance may be discharged on the Grantee's behalf by one or more other entities, provided, that in the discharge thereof, such other entity or entities shall enjoy the same rights and privileges and shall be subject to the same duties and requirements as are applicable to the Grantee.

SECTION 18. The rights granted under this ordinance shall be freely assignable and transferable, by the Grantee, during the term hereof, provided, that no assignment or transfer of the rights Granted hereunder shall become effective until the assignee or transferee has filed, with the City Clerk of the City, and instrument accepting the terms of this ordinance and agreeing to perform all of the conditions hereof.

SECTION 19. RIGHTS TO THE CITY, DUE PROCESS, NOTIFICATION: The right is hereby reserved to the City to adopt, in addition to the provisions contained herein, and in existing applicable ordinances, such additional regulations as it may find necessary in the exercise of its regulatory power, provided that such regulations by ordinance or otherwise, shall be reasonable and not conflict with, impair or diminish the rights granted herein.

SECTION 20. NOTIFICATION. Any required or permitted notice under this contract franchise ordinance shall be in writing. Notice upon the City shall be delivered to the City Clerk by first class United States mail or by personal delivery. Notice upon Twin Valley shall be delivered by first class United States mail or by personal delivery to:

Twin Valley Communications, Inc.
22 Spruce

SECTION 21. FAILURE TO ENFORCE. The failure of either party to enforce and remedy any noncompliance of the terms and conditions of this contract franchise ordinance shall not constitute a waiver of rights nor a waiver of the other party's obligations as provided herein.

SECTION 22. FORCE MAJEURE. Each and every provision hereof shall be subject to acts of God, fires, strikes, riots, floods, war and other disasters beyond Grantee's or the City's control.

SECTION 23. If any section, subsection, sentence, clause, phrase or portion of this ordinance is, for any reason, held invalid or unconstitutional, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 24. It shall be the policy of the City to amend this Ordinance liberally, upon application of the Grantee, to take advantage of any developments in the fields of telecommunications, transmission of programming and/or information and related services which will afford the Grantee an opportunity more effectively or economically to serve its subscribers.

SECTION 25. This contract franchise ordinance is made under and in conformity with the laws of the State of Kansas. No such contract franchise shall be effective until the ordinance granting the same has been adopted as provided by law.

SECTION 26. Said Company shall have sixty (60) days from, and after its passage and approval, to file its written acceptance of this Ordinance, with the City Clerk, and upon said acceptance being filed, this Ordinance shall be considered as taking effect and being in force from and after the date of its passage and approval by the Mayor.

PASSED BY THE COUNCIL AND APPROVED BY THE MAYOR ON _____, 2008.

Sharon J. Brown, Mayor

ATTEST:

Calvin Wohler, City Clerk

(Seal)

**ACCEPTANCE
ORDINANCE NO. 2214**

Whereas, the governing body of the City of Clay Center, Kansas, did on the _____ day of August, 2008, adopt and pas an Ordinance entitled:

“AN ORDINANCE GRANTING A CITY FRANCHISE TO TWIN VALLEY COMMUNICATIONS, INC., OF MILTONVALE, KANSAS, FOR THE RIGHT TO ERECT, MAINTAIN AND OPERATE IN, UNDER, ALONG, ACROSS AND UPON THE STREETS, AVENUES, SIDEWALKS, ALLEYS, BRIDGES AND HIGHWAYS AND OTHER PUBLIC PLACES IN THE CITY OF CLAY CENTER, KANSAS, AND SUBSEQUENT ADDITIONS THERETO, FOR THE PURPOSE OF TRANSMISSION AND DISTRIBUTION BY WIRE OR CABLE OR VOICE COMMUNICATIONS, INFORMATION, ENTERTAINMENT AND OTHER SIGNALS TO ENABLE THE SALE OF ITS SERVICE TO THE INHABITANTS OF SAID CITY, AND ENVIRONS THEREOF AND OTHER PURPOSES, FOR A TERM OF FIVE YEARS, SUBJECT TO RENEWAL, AND REGULATING THE SAME; AND PROVIDING

WHEN THIS ORDINANCE SHALL BE IN FULL FORCE AND EFFECT.”

Whereas, said Ordinance was duly signed by the Mayor of said City of Clay Center, Kansas and the seal of said City affixed and attested thereto by the City Clerk of the City of Clay Center, and

Whereas, said Ordinance further provided that it should be in full force and effect after its adoption and publication and its acceptance by Twin Valley Communications, Inc.

Now, therefore, in compliance with the terms of said Ordinance, so enacted and so approved and attested, the Twin Valley Communications, Inc. hereby accepts said Ordinance and files this, its written Acceptance, with the City Clerk of said City of Clay Center, Kansas, on this, the _____ day of August, 2008.

TWIN VALLEY COMMUNICATIONS, INC.

By:

Acceptance filed in the office of the City Clerk of the City of Clay Center, Kansas, this _____ day of August, 2008.

Calvin Wohler
City Clerk