



ORDINANCE NO. 2012 - 11

**AN ORDINANCE GRANTING TO LIGHTSPEED NETWORKS, INC., DBA "LS NETWORKS" AN OREGON CORPORATION, A FRANCHISE TO CONSTRUCT, OPERATE & MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF SUNNYSIDE, WASHINGTON.**

**WHEREAS**, Lightspeed Networks, Inc. dba LS Networks, an Oregon Corporation (hereinafter the "Franchisee") has proposed to provide Telecommunications services within the City of Sunnyside, Washington (hereinafter the "City"), and has requested a Telecommunications Franchise relating to Telecommunications located in the public rights of way within the City;

**WHEREAS**, Revised Code of Washington ("RCW") § 35A.11.020 grants the City broad authority to regulate the use of the public Right-of-Way;

**WHEREAS**, RCW § 35A.47.040 grants the City broad authority to grant non-exclusive franchises; and

**WHEREAS**, The City of Sunnyside has reviewed said request and has determined that it is in the best interest of the City to grant a non-exclusive franchise to Franchisee subject to the terms and conditions stated herein, **NOW THEREFORE**,

**THE CITY COUNCIL OF THE CITY OF SUNNYSIDE DO ORDAIN AS FOLLOWS:** A franchise is hereby granted to Franchisee to operate and maintain a telecommunications system in the City subject to the terms and conditions set forth below:

**Section 1: Definitions.**

**Gross Revenues:** Any and all revenue, of any kind, nature, or form, without deduction for expense in the City of Sunnyside as is further defined in Section 12. All such revenue remains subject to applicable FCC rules and regulations which exclude revenues from internet access services while prohibited by law.

**Rights-of-Way:** the present and future streets, viaducts, elevated roadways, alleys, public highways and avenues in the City, including Rights-of-Way held in fee, or by virtue of an easement or dedication.

**Telecommunications:** the transmission between and 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.

**Telecommunications Network:** the infrastructure owned by Franchisee utilizing one or more facilities located within the City's Rights-of-Way, including, but not limited to, lines, poles,

anchors, wires, cables, conduit, laterals, and other appurtenances, necessary and convenient to the provision of access to the Internet and Telecommunications service.

**Telecommunications Service:** the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities' uses.

**Section 2: Grant of Franchise.** The City hereby grants to Franchisee, its successors and assigns as authorized herein, a nonexclusive right, privilege, authority and Franchise to erect, construct, operate, repair, and maintain in, under, upon, along, across and over the City's Rights-of-Way, its lines, poles, anchors, wires, cables, conduits, laterals and other necessary and convenient fixtures and equipment, for the purposes of constructing, operating and maintaining a competitive Telecommunications Network within the City.

**Section 3: Franchise Not Exclusive.** The Franchise granted herein (the "Franchise") is not exclusive, and shall not be construed as any limitation upon the right of the City to grant to other persons or corporations, including itself, rights, privileges or authority the same as, similar to or different from the rights, privileges, or authority herein set forth, in the same or other Rights-of-Way, by Franchise, permit or otherwise; provided, however, that any such grant shall be done in a competitively neutral and non-discriminatory manner with respect to the rights, privileges and authorities afforded Franchisee.

**Section 4: Effective Date.** This ordinance and Franchise shall be effective from date of approval, passage, and publication as required by law.

**Section 5: Term and Termination.** The term of this Franchise shall be ten (10) years, commencing with the effective date of this Ordinance. Thereafter, this Franchise shall continue in full force and effect for an additional ten (10) years unless notice is given by either party ninety (90) days before expiration, of its intention to terminate or renegotiate the Franchise. Upon termination or expiration of the Franchise, Franchisee shall, within one hundred and eighty days (180), remove all its facilities from the City's Rights-of-Way. Should the Franchisee fail to remove its facilities within the one hundred and eighty day period (180), the City may remove such facilities, with all costs of such removal to be paid or reimbursed by Franchisee.

**Section 6: No Limitation of City Authority.**

(a) Except as provided in Section 7 below, nothing in this Franchise shall in any way be construed or interpreted to prevent, or in any way limit, the City from modifying or performing any work in its Rights-of-Way, or granting other franchises for use of Rights-of-Way, or of adopting general ordinances regulating use of or activities in the Rights-of-Way, or of otherwise abrogating or limiting any rights, privileges, or property interest the City now has in its Rights-of-Way, whether now owned or hereinafter acquired.

(b) In the event that any portion of the Franchisee's infrastructure interferes with any present or future use the City desires to make of its Rights-of-Way, Franchisee shall, upon request, and at its sole expense, promptly relocate such infrastructure, and restore the area where such relocation

occurs to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.

(c) In the event that Franchisee has paid for the relocation costs of the same facilities at the request of the City within any five (5) year period, the cost of relocation shall be shared equally between the Franchisee and City in the event that the City requests a relocation.

(d) Except as otherwise provided by law, and subject to Section 7 herein, nothing in this Franchise shall be construed to give the Franchisee any credit or exemption from any nondiscriminatory, generally applicable business tax, or other tax now or hereafter levied upon Franchisee's taxable real or personal property, or against any permit fees or inspection fees required as a condition of construction of any improvements upon Franchisee's real property and imposed under a generally applicable ordinance or resolution.

**Section 7: Competitively Neutral Application.** The City shall impose, on a competitively neutral and nondiscriminatory basis, similar terms and conditions as provided under this Franchise upon other similarly situated providers of Telecommunications services operating within the City. Any requirement imposed on Franchisee that is determined not in compliance with this Section 7 shall be unenforceable against Franchisee.

**Section 8: Construction, Maintenance and Repair of Infrastructure.**

(a) In order to minimize the burden on the City's Rights-of-way, Franchisee shall install its Telecommunications Network using suitable, existing above ground utility facilities (including telephone, energy transmission or other utility poles, or similar facilities), subject to such facilities being available for use by Franchisee on reasonable terms and conditions, including, without limitation, reasonable terms as to price, timing, and access; provided, however, that at such time as those facilities are required to be placed underground by the City or are placed underground, Franchisee shall likewise place its Telecommunications Network underground without additional cost to the City or to individual subscribers so served within the City. If Franchisee cannot install its network upon existing, above ground facilities on such reasonable terms and conditions as provided above, Franchisee may make all needful excavations in any Right-of-Way for the purpose of placing, erecting, laying, maintaining or repairing Franchisee's infrastructure, and shall repair, renew and replace the same as reasonably possible to the condition that existed prior to such excavation.

Franchisee shall obtain all necessary permits for such excavation and construction, and pay all applicable fees. Such work shall be done only in accordance with plans or designs submitted to, and approved by, the City, such plans to be evaluated by the standards applied to the construction of other similar Telecommunications systems in the City. Such work shall be performed in a good and workmanlike manner and in compliance with all rules, regulations, or ordinances which may, during the term of this Franchise, be adopted from time to time by the City or any other authority having jurisdiction over Rights-of-Way. Prior to commencing excavation or construction, Franchisee shall give appropriate notice to other franchisees, licensees or permittees of the City owning or maintaining facilities which may be affected by the proposed excavation or construction.

(b) In the event emergency repairs are necessary for Franchisee's facilities, Franchisee may immediately initiate such emergency repairs. Franchisee shall give notice to the City's Department of Public Works by telephone, electronic data transmittal, or other appropriate means as soon as is practicable after commencement of work performed under emergency conditions. Franchisee shall make such repairs in compliance with applicable ordinances and regulations, and shall apply for any necessary permits no later than the next business day following the discovery of the need for such repairs.

(c) Franchisee shall construct and maintain its Telecommunications system in such a manner so as to not interfere with City sewer or water systems, or other City facilities.

**Section 9: Insurance.**

(a) General. At all times during the term of this Franchise, Franchisee, at its own cost and expense, shall maintain the insurance specified in this section. Such insurance shall be from providers authorized to conduct business in the state of Washington and reasonably acceptable to the City. The limits of liability insurance required by this Section shall not, however, limit the liability of the Franchisee hereunder.

(b) Evidence Required. Within 30 days of the effective date of this Franchise, Franchisee shall provide the City with a certificate of insurance executed by an authorized representative of the insurer or insurers, evidencing that Franchisee's insurance complies with this section.

(c) Notice of Cancellation, Reduction, or Material Change in Coverage. Policies shall include a provision requiring written notice by the insurer or insurers to the City not less than 30 calendar days prior to cancellation, reduction, or material change in coverage. If insurance coverage is canceled, reduced, or materially changed, Franchisee shall, prior to the effective date of such cancellation, reduction, or material change, obtain the coverage required under this section, and provide the City with documentation of such coverage. Franchisee shall be responsible, to the extent not caused by the City's negligence or intentional misconduct, for the costs of any damage, liability, or injury, which are not otherwise covered by insurance or because of a failure to comply with this section.

(d) Insurance Required. During the term of this contract, Franchisee or Franchisee's contractors or sub-contractors in the event that Franchisee uses contractors or sub-contracts to perform the work specified herein, shall maintain in force, at its own expense the following insurance:

(1) Workers' compensation insurance for all subject workers; and

(2) General liability insurance with a combined single limit, or the equivalent, of not less than \$300,000 for each person, and \$1,000,000, for each occurrence of bodily injury and \$100,000 for property damage, which coverages shall include contractual liability coverage for the indemnity provided under this contract, and naming the City, its officials, officers, employees and agents as additional insureds with respect to Franchisee's activities pursuant to this Franchise.

**Section 10: Assignability/Transferability.**

(a) Transfer. This Franchise shall not be sold, leased, assigned or otherwise transferred, nor shall any of the rights or privileges herein granted or authorized be leased, assigned, mortgaged, sold or transferred, either in whole or in part, nor shall title hereto, either legal or equitable, or any right, interest or property herein, pass to or vest in any person, except the Franchisee, either by act of the Franchisee or by operation of law, without the written consent of the City. If the Franchisee wishes to transfer this Franchise, the Franchisee shall give City written notice of the proposed transfer, and shall request consent of the transfer by the City.

(b) Any transfer of ownership affected without the written consent of the City shall render this Franchise subject to revocation. The City shall have 90 days to act upon any request for approval of a transfer. If the City fails to render a final decision on the request within said 90 days, the request shall be deemed granted unless the Franchisee and the City agree to an extension of time.

(c) The Franchisee, upon any transfer, shall within 30 days thereafter file with the City a certified statement evidencing the transfer and an acknowledgment of the transferee that it agrees to be bound by the terms and conditions contained in this Franchise.

(d) The requirements of this section shall not be deemed to prohibit the use of the Franchisee's property as collateral for security in financing the construction or acquisition of all or part of a Telecommunications Network of the Franchisee or any affiliate of the Franchisee. However, the Telecommunications Network franchised hereunder, including portions thereof used as collateral, shall at all times continue to be subject to the provisions of this Franchise.

(e) The requirements of this section shall not be deemed to prohibit sale of tangible assets of the Franchisee in the ordinary conduct of the Franchisee's business without the consent of the City. The requirements of this section shall not be deemed to prohibit, without the consent of the City, a transfer to a transferee whose primary business is Telecommunications System operation and having a majority of its beneficial ownership held by the Franchisee, a parent of the Franchisee, or an affiliate, a majority of whose beneficial ownership is held by a parent of the Franchisee.

**Section 11: Indemnification; Waiver; No Representations.** Franchisee shall indemnify, defend, and hold harmless the City, its elected officials, officials, agents, officers, and employees for any losses, claims, damages, awards, penalties or injuries arising from the performance or non-performance, by reason of any intentional or negligent act, occurrence or omission of Franchisee, whether singularly or jointly with others, its representatives, permittees, employees, contractors or subcontractors, whether or not such acts or omissions were authorized or contemplated by this Franchise or applicable law. Nothing herein shall be deemed to prevent the parties indemnified and held harmless herein from participating in the defense of any litigation by their own counsel at such parties' expense. Such participation shall not under any circumstances relieve Franchisee from its duty of defense against liability or of paying any judgment entered against such party.

Franchisee's indemnities set forth in this Section are specifically and expressly intended to constitute a waiver by the Franchisee of its immunity, if any, under Washington's Industrial Insurance Act, RCW Title 51, et seq., to the extent necessary to provide the City with a full and complete indemnity from claims made by Franchisee and/or its employees, agents, contractors,

and invitees to the full extent of its negligence. Franchisee shall promptly notify the City of any casualties or accidents which may give rise to Franchisee's indemnity obligation set forth above.

**Section 12: Compensation.**

(a) Franchise Fee. Pursuant to RCW 35.21.860, the City is precluded from imposing franchise fees upon a telephone business, as defined in RCW 82.16.010, or a Service Provider for use of the Right-of-Way, as defined in RCW 35.99.010. The City hereby reserves its right to impose a fee on the Franchisee, to the extent authorized by law, for purposes other than to recover its administrative expenses, if statutory prohibitions on the imposition of such fees are removed or if the Franchisee adds or modifies its services such that the above prohibition against franchise fees no longer apply.

(b) Utility Tax. In accordance with RCW 35.21.870 and Sunnyside Municipal Code Chapter 5.04, Franchisee shall pay to the City during the term of this Franchise an amount equal to six percent (6%) of the Franchisee's Gross Revenues ("Utility Tax"). Franchisee hereby stipulates that all of its business activities in the City are subject to the 6% tax rate imposed by Sunnyside Municipal Code chapter 5.04 and governed by RCW 35.21.870. Any net uncollectibles, bad debts or other accrued amounts deducted from Gross Revenues shall be included in Gross Receipts at such time as they are actually collected. Revenue from point to point services is based on the pro-rata share of the revenue from those services. Notwithstanding the above, in the event that the rate at which the Franchisee may be taxed is increased in accordance with RCW 35.21.870, Franchisee shall pay to the City such increased tax rate upon the effective date of such increase and throughout the term of this Franchise.

(c) Modification Resulting from Action by Law. Upon thirty days notice and in the event any law or valid rule or regulation applicable to this Franchise limits the Utility Tax below the amount provided herein, or as subsequently modified, the Franchisee agrees to and shall pay the maximum permissible amount and, if such law or valid rule or regulation is later repealed or amended to allow a higher permissible amount, then Franchisee shall pay the higher amount commencing from the date of such repeal or amendment, up to the maximum allowable by law.

(d) Payment of Utility Tax. Payments due under this provision shall be computed and paid quarterly for the preceding quarter, as of March 31, June 30, September 30, and December 31, each quarterly payment due and payable no later than 45 days after such dates. Not later than the date of each payment, the Franchisee shall file with the City a written statement, in a form satisfactory to the City and signed under penalty of perjury by an officer of the Franchisee, identifying in detail the amount of gross revenue received by the Franchisee, the computation basis and method, for the quarter for which payment is made.

(e) Administrative Fee. Pursuant to RCW 35.21.860, Franchisee has paid a one-time administrative fee of \$500 for reimbursement of costs associated with the preparation, processing and approval of this Franchise, including posting and publication costs, wages, benefits, overhead expenses, meetings, attorneys' fees, negotiations, and other functions related to the

approval. The administrative fee excludes normal permit fees required for work in the Right-of-Way.

(f) Reservation. Nothing in this Franchise shall limit the City's right of taxation as authorized by law.

**Section 13: Extension of City Limits.** Upon the annexation of any territory to the City, the rights granted herein shall extend to the annexed territory to the extent the City has such authority. All Facilities owned, maintained, or operated by Franchisee located within any public Rights-of-Ways of the annexed territory shall be subject to all of the terms of this Ordinance.

**Section 14: Right to Inspect Records.** In order to manage the Franchisee's use of Rights-of-Way pursuant to this Franchise, and to determine and verify the amount of compensation due to the City under this Franchise, the Franchisee shall provide, upon request, the following information in such form as may be reasonably required by the City: maps of the Franchisee's Telecommunications System; the amount collected by the Franchisee from users of Telecommunications Service provided by Franchisee via its Telecommunications network; the character and extent of the Telecommunications Service rendered therefore to them; and any other related financial information required for the exercise of any other lawful right of Franchisee under this Franchise. The City agrees that such information is confidential and that the City will use such information only for the purpose of managing its Rights-of-Way, determining compliance with the terms of this Franchise, and verifying the adequacy of Franchisee's fee payments. The City further agrees to protect such information from disclosure to third parties to the maximum extent allowed by Washington law.

**Section 15: Right to Perform Franchise Fee Audit or Review; Default.** In addition to all rights granted under Section 13, the City shall have the right to have performed, a formal audit or a professional review of the Franchisee's books and records by an independent private auditor, for the sole purpose of determining the Gross Receipts of the Franchisee generated through the provision of Telecommunications Services under this Franchise and the accuracy of amounts paid as Franchise fees to the City by the Franchisee; provided, however, that any audit or review must be commenced not later than 3 years after the date on which Franchise fees for any period being audited or reviewed were due. The cost of any such audit or review shall be borne by the City. The City agrees to protect from disclosure to third parties, to the maximum extent allowed by State law, any information obtained as a result of its rights pursuant to this Section, or any compilation or other derivative works created using information obtained pursuant to the exercise of its rights.

**Section 16: Right to Inspect Construction.** The City or its representatives shall have the right to inspect all construction or installation work performed pursuant to this Franchise and to make such tests as it shall find necessary to ensure compliance with the terms of this Franchise and other pertinent provisions of law relating to management of the City's Rights-of-Way.

**Section 17: Law and Venue.** This Franchise shall be governed by and construed in accordance with the laws of the State of Washington. Venue for any proceeding brought to enforce any term or condition of this Franchise shall be in Yakima County Superior Court; provided, however, that

should any proceeding be brought in a federal forum, such proceeding shall be brought in the U.S. District Court for the Eastern District of Washington. In any action or suit to enforce any right or remedy under this Franchise, the prevailing party shall be entitled to recover its costs, including without limitation attorney's fees.

**Section 18: Limitation of Liability.** The City and the Franchisee agree that neither shall be liable to the other for any indirect, special, or consequential damages, or any lost profits, arising out of any provision or requirement contained herein, or, in the event this Franchise, or any part hereof, is determined or declared to be invalid.

**Section 19: Compliance With Applicable Laws.** Franchisee shall comply with all applicable federal, state, and local laws, ordinances, and regulations, whether now in existence or hereinafter enacted. Nothing contained in this Franchise shall be construed as authorizing the Franchisee, its officers, employees or agents, to violate any federal, state or local law, whether now in existence or hereinafter enacted, including, by way of illustration but not of limitation, any provision of Washington anti-trust law, RCW 19.86.010 – 19.86.120. Nothing contained in this section shall be construed as requiring Franchisee to comply with any federal, state or local law that is repealed or otherwise rendered unenforceable subsequent to the adoption of this Franchise.

**Section 20: Notice.** Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the other party or deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested; (2) sent overnight by commercial air courier; or (3) sent by facsimile transmission, provided receipt of such facsimile is confirmed, in writing, on the first business day following the date of transmission. Notice shall be sent to the following address, or such other address as each party may specify in writing:

Delilah Saenz  
City Clerk/~~Treasurer~~  
Sunnyside, WA 99353  
Phone: (509) 836-6310  
Facsimile: (509) 837-3268

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Contracts Administration  
LS Networks  
921 SW Washington St., STE 370  
Portland, OR 97205  
Phone: (503) 294-5300  
Facsimile: (503) 227-8585

Notice shall be deemed effective upon the earliest date of actual delivery; three business days after deposit in the U.S. mail as provided herein; one business day after shipment by commercial air courier; or the same day as transmitted by facsimile, provided transmission of such facsimile is confirmed in writing as provided herein.

**Section 21: Captions.** The captions to sections of this Franchise are intended solely to facilitate reading and reference of the sections and provisions contained herein, and shall not affect the meaning or interpretation of any section or provision of this Franchise.

**Section 22: Severability.** If any part of this Franchise becomes or is held to be invalid for any reason, the determination will affect only the invalid portion of this Franchise. In all other

respects this Franchise will stand and remain in full force and effect as if the invalid provision had not been part of this Franchise.

**Section 23: Waiver.**

(a) The City is vested with the power and authority to reasonably regulate, and manage, its Rights-of-Way in a competitively neutral and non-discriminatory manner, and in the public interest. Franchisee shall not be relieved of its obligations to comply with any provision of this Franchise by reason of the failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

(b) No provision of this Franchise will be deemed waived unless such waiver is in writing and signed by the party waiving its rights. However, if Franchisee gives written notice of a failure or inability to cure or comply with a provision of this Franchise, and the City fails to object within a reasonable time after receipt of such notice, such provision shall be deemed waived.

PASSED by the City Council and approved by the Mayor 6/25, 2012.

APPROVED:   
Mayor, Mike Farmer

Attest:   
City Clerk/Treasurer  
Delilah Saenz

CITY CONTRACT NO: A 2012-44  
RESOLUTION NO: Ord 2012-11  
COUNCIL MTG: 6-25-12

Approved as to form  
  
City Attorney

Accepted 7/10/12 (date)

LightSpeed Networks, Inc.

By   
Michael Weidman, President and CEO