

**City of St. Helens**  
**ORDINANCE NO. 3234**

**AN ORDINANCE GRANTING TO LIGHTSPEED NETWORKS, INC.,  
dba LS NETWORKS THE RIGHT TO CONSTRUCT, OPERATE,  
AND MAINTAIN TELECOMMUNICATION SERVICES IN THE CITY  
OF ST. HELENS, OREGON**

**THE CITY OF ST. HELENS ORDAINS AS FOLLOWS:**

**Section 1. Definitions - as used in this ordinance:**

1. "City" means City of St. Helens, Oregon.
2. "Company" means Lightspeed Networks Inc. dba LS Networks, the grantee of rights under this Franchise, including its successors or assigns.
3. "Council" means the City Council of the City of St. Helens, Oregon.
4. "Franchise" means this document embodying the agreement of City and Company.
5. "Gross revenues" means any and all revenues derived by Company for the provision of any and all products, services, or charges originating or terminating in St. Helens, Oregon billed to a circuit, switch or address in St. Helens, Oregon, including revenues from dedicated private networks. Gross revenues shall include any and all revenues from leases of Grantee's system in St. Helens, Oregon. Gross revenues may be adjusted for the net write-off of uncollectible amounts of such revenues.
6. "Person" means any person, firm, partnership, association, corporation, limited liability company, entity, or organization of any kind.
7. "Right-of-way" means the present and future streets, viaducts, elevated roadways, alleys, public highways and avenues in the City, including the subsurface and air space over or under those areas, including areas held in fee or by easement or dedication.
8. "Telecommunications" means the transmission of information chosen by a person, between or among points specified by the person.
9. "Telecommunications service" means telecommunications service as defined in 47 U.S.C. §153(53).
10. "Telecommunications service providers" means any entity that pays a franchise or permit fee to City for the use of Company's facilities.

11. "Uncollectible accounts of customers" means any Company account, on which Company derives revenue from the sale of goods or services to persons within the corporate limits of the City, towards which Company has made a reasonable, good-faith effort to collect and that Company has written off as Uncollectible for purposes of Company's public accounting.

## **Section 2. Grant of Non-exclusive Franchise.**

1. City grants to Company the right and privilege to construct, install, maintain and operate in, on, and under the present and future City rights of way of the City of St. Helens, conduits, cables and other technical facilities necessary for the purpose of providing Telecommunication services and internet access services. This Ordinance, upon acceptance by Company, constitutes a contract between City and Company. The Franchise does not convey any right, title or interest in the right-of-way, but is a grant to use and occupy the right-of-way for the limited purposes and term stated in this Franchise.
2. The Franchise granted herein 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.
3. City shall grant similarly situated Telecommunications franchises in a competitively neutral and non-discriminatory manner with respect to the rights, privileges and authorities afforded Franchisee. Any requirement imposed on Franchisee that is determined by a court to not be in compliance with this subparagraph shall be unenforceable against Franchisee to the extent exceeding the terms and conditions upon similarly situated providers.

## **Section 3. No Limit on City Authority, Compliance with Laws, Rules and Regulations.**

At all times during the term of this Franchise, Company shall comply with all applicable laws, rules and regulations of the United States of America, the State of Oregon, and the City of St. Helens including all agencies and subdivisions thereof. All terms and conditions applicable to Telecommunications carriers, contained in the St. Helens Municipal Code or other applicable law, apply to Company even if not recited in this Franchise. Company shall be subject to the lawful exercise of the police power of City and to such generally applicable regulations as City may from time to time hereafter by resolutions or ordinance provide. City will administer this Franchise and exercise its police power on a reasonable, uniform, non-discriminatory basis with respect to other telecommunications franchises.

## **Section 4. Company Liability, Insurance.**

1. Company shall at all times conduct its operations under this Franchise, including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as not to present a danger to the public or City.
2. Company shall maintain at all times the following insurance.
  - a. Workers compensation insurance for all subject workers and general comprehensive

liability insurance with a combined single limit, or the equivalent of \$1,000,000 for each person and \$2,000,000 for each occurrence of bodily injury and \$1,000,000 for property damage.

- b. City, and its elected and appointed officers, agents, and employees shall be added as additional insured with respect to the comprehensive liability insurance policy.
  - c. Upon any cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage, Company shall provide notice to City within thirty (30) days of receiving notice from the insurance company.
  - d. Coverages provided by Company must be underwritten by an insurance company deemed reasonably acceptable by City. City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.
  - e. As evidence of the insurance coverage required by this Franchise, Company shall furnish to City a Certificate of Insurance and additional insured endorsement. A renewal certificate will be sent to City ten (10) days prior to coverage expiration.
3. In the event that City's tort liability limits are raised by the Oregon Legislature to exceed the limits described in this section, Company shall obtain and maintain insurance in the amount of City's tort liability limits.

#### **Section 5. Indemnification**

1. Each party agrees to defend, indemnify, and hold the other, and their respective officers, employees, agents, and representatives harmless from and against any and all damages, losses, and expenses, including reasonable attorney fees and costs of suit or defense, arising out of the actions or failure act, errors, omissions or misconduct of the party or its affiliates, officers, employees, agents, contractors, or subcontractors, arising from or relating to this Franchise. City's obligations under this Section 5.1 are subject to the terms and limitations of the Oregon Tort Claims Act.
2. Company agrees to indemnify City, its officers, employees, agents, and representatives, from and against any claims, costs, and expenses of any kind, whether direct or indirect, pursuant to any state or federal law, statute, regulation, or order, for the removal or remediation of any leaks, spills, contamination, or residues of hazardous substances, directly attributable to Company's facilities. Hazardous substances has the meaning given by ORS 465.200.
3. This Section 5 shall survive termination or expiration of the Franchise.

#### **Section 6. Performance Bond.**

1. Upon the effective date of this Franchise, Company shall furnish proof of the posting of a performance bond running to City, with good and sufficient surety approved by City, in the penal sum of \$10,000, conditioned that Company shall well and truly observe, fulfill, and perform each term and condition of this Franchise. Company shall pay all premiums charged

for the bond, and shall keep the bond in full force and effect at all times throughout the term of this Franchise, including, if necessary, the time required for removal of all of Company's Telecommunications system installed in City's right of way. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice first being given to City. The bond shall be reviewed and approved as to form by the City Attorney.

2. During the term of this Franchise, Company shall file with City a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall City exercise its rights against the performance bond under Section 6.1 if a bona fide, good faith dispute exists between City and Company.
3. City may, based upon inflation or other identifiable needs, require the amount of the performance bond and any construction bond that may be required under Section 6.4 below to be increased to an amount recommended by City's insurance carrier after notice to Company.
4. City may require Company to acquire one or more separate performance securities to protect the City's interests when Company constructs facilities. The amount of such security depends on the project's impacts, thus the amount will be determined in connection with the permitting process.

#### **Section 7. Conditions on Right of Way Occupancy.**

1. Routing maps and construction plans must be approved by City's Department of Public Works before any work is started. Company must obtain a permit prior to any construction in the right of way, pursuant to St. Helens Municipal Code 12.24 as it may be amended.
2. Company shall construct, install, maintain and operate its fiber optic cable facilities in designated City rights of way to the industry standard and City's satisfaction; and in a manner so as to cause minimum interference with the proper use of the right-of-way and to cause minimum interference with utilities and franchisee and with property owners who adjoin any of right-of-way. Company's facilities shall be installed consistent with all laws, rules, regulations, and ordinances that apply to such work.
3. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Company, including any unimproved surface, Company shall, at its own cost and expense and in a manner approved by City, replace and restore all surfaces disturbed to their prior condition to the extent reasonably practicable. If Company fails to make restoration as required, City shall cause the repairs to be made at the expense of Company. All work within City rights of way shall be in accordance with the City of St. Helens' Standards and Specifications in effect at the time.

#### 4. Relocation.

- a. Except as provided below, if the removal or relocation of facilities is caused directly by an identifiable development of property and the removal or relocation of facilities occurs within the area to be developed, or is made for the convenience of a customer, Company may charge the expense of removal or relocation to the developer or customer. If the removal or relocation of facilities is required by the City in the interest of the public, including as a condition of development approval, the City may require Company to remove or relocate its facilities at Company's expense.
  - b. Prior to commencing excavation or construction, Company shall give appropriate notice to the City and to other franchisees, licensees or permittees of City owning or maintaining facilities that may be affected. Company will supply, at no cost to City, any information reasonably requested by the City to coordinate municipal functions with Company's activities and fulfill any municipal obligations under State law. Said information shall include, at a minimum, as-built drawings of Company Facilities, installation inventory, and maps and plans showing the location of existing or planned facilities within City. Said information may be requested either in hard copy and/or electronic geographic information service (GIS) format, and shall be provided in the format requested if reasonably possible.
  - c. In the event emergency repairs are necessary, Company may immediately initiate such emergency repairs. Company shall give notice to City's Department of Public Works as soon as practicable after commencement of work and shall apply for all necessary permits no later than the business day next following the discovery of the need for such repairs.
5. Company shall not place its facilities where they will interfere with any existing or planned City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer, water facility, or public improvement. All facilities placed in City rights of way shall be placed as City directs.
6. Company shall, upon receipt of seven (7) days written notice from anyone desiring to move a building or other object according to City ordinances regulating the moving of buildings, arrange to temporarily raise, lower, or otherwise move its facilities to permit the moving of buildings or other objects if the Person wishing to move the building or other object makes a reasonable arrangement to reimburse Company for its expenses in rearranging its facilities. Nothing contained in this section shall preclude City from requiring Company to move its facilities at Company's own expense when public convenience requires the move, as described in Subsection 4 of this section.

#### **Section 8. Transfer of Franchise.**

1. 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 consent of the City,

expressed in writing, such consent not to be unreasonably withheld. 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.

2. Any transfer of ownership affected without the written consent of the City shall render this Franchise subject to revocation. The City shall have 60 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 60 days, the request shall be deemed granted unless the Franchisee and the City agree to an extension of time.
3. The Franchisee, upon any transfer, shall within 60 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.
4. 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 System of the Franchisee or any affiliate of the Franchisee. However, the Telecommunications System franchised hereunder, including portions thereof used as collateral, shall at all times continue to be subject to the provisions of this Franchise.
5. 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 9. City Rights in Franchise.**

1. City shall have the right to supervise all construction or installation of Company's facilities subject to the provisions of this Franchise and make such inspections as it shall find reasonably necessary to ensure compliance with governing laws, rules and regulations.
2. Upon any termination or expiration of this Franchise, all facilities installed or used by Company shall be removed by Company at Company's expense and the property upon which the facilities were used restored by Company to the condition it was in before installation except that City may elect to acquire the facilities for their fair market value as provided by law. Value shall be determined by an appraiser who is mutually acceptable to City and Company. City agrees to provide Company with written notice of its intention to acquire Company's facilities pursuant to this section within 120 days after termination of this Franchise by City, or City's declaration of facilities abandonment by Company, with the closing of any acquisition to occur as soon thereafter as is practicable.

## **Section 10. Franchise Fee.**

1. In consideration for a grant of franchise and in addition to and not in lieu of any generally applicable fee payable to City for an application for a franchise or for any permits required to work on facilities or to work in the right-of-way, Company shall pay to City an amount equal to seven percent (7%) of Gross Revenues. Revenue from point to point or multi-point services is based on the pro-rata share of the revenue from those services.
2. Any amounts owed under Section 10.1 shall be paid to City quarterly, on or before July 20th, October 20th, January 20th, and April 20th of each year for the preceding three (3) month period.
3. Any failure to pay fees owed under Section 10 when due shall be subject to a delinquency charge of five percent (5%) of the unpaid amount. Delinquency charges are due within thirty (30) days of the applicable payment due date. Failure to make full payment and associated delinquency charges within sixty (60) days of the applicable payment date shall constitute a violation of this Franchise. In addition, any overdue amounts, including delinquency charges, shall bear interest as described in Section 10.4 below.
4. Franchise fee payments not received by City on or before the due date shall be assessed interest based on the average prime interest rate set by City's bank on December 31st of the previous year, plus three hundred (300) basis points (3%).
5. Company may, at its option, deduct Uncollectible accounts of customers within the corporate limits of City from Company's gross revenues.
6. With each payment, Company shall at the end of each twelve month period, furnish City with a written statement under oath, executed by an officer of Company, verifying the amount of gross revenues of Company within City for the annual period covered by payment computed on the basis set out in this section.
7. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this Franchise.
8. Upon thirty days' notice and in the event any law or valid rule or regulation applicable to this Franchise limits the Franchise Fee below the amount provided herein, or as subsequently modified, Company 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 Company shall pay the higher amount commencing from the date of such repeal or amendment, up to the maximum allowable by law.
9. Except for fees and taxes as provided in subsection 10, below, the Franchise fee includes all compensation for the use of the City's Rights-of-Way. Company may offset against the Franchise fee the amount of any fee or charge paid to the City in connection with the Grantee's use of the Rights-of-Way if the fee or charge is not imposed under a generally applicable ordinance, resolution or statute.
10. Except as otherwise provided by law, and subject to subsection 9, above, 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 including but not limited to ad valorem real or personal property taxes 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, resolution or statute

### **Section 11. Company Records and Reports, Audit**

1. 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 to maintain such information as confidential to the extent permitted by law and that City will use such information only for the purpose of managing its Rights-of-Way, determining compliance with or enforcing the terms of this Franchise, and verifying the adequacy of Franchisee's Fee payments.
2. In addition to all rights granted in this Franchise, 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 except that if the audit establishes that payments tendered to City by Franchisee were less than the amounts due by a differential of five percent (5%) or more, all costs for such audit shall be paid by Franchisee. The City agrees to protect from disclosure to third parties, to the 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 hereunder.

**Section 12. Permit and Inspection Fees.** Nothing in this ordinance shall be construed to limit the right of City to inspect all construction or installation work performed pursuant to this Franchise and to require Company to obtain permits and pay reasonable costs incurred by City in connection with the issuance of a permit, making an inspection, or performing any other service for or in connection with Company or its facilities, whether pursuant to this ordinance or any other ordinance or regulation now in effect hereafter adopted by City.

### **Section 13. Enforcement and Termination of Franchise for Violation.**

1. Default. Time is of the essence of this Franchise. The following shall be events of default:



- a. Default in Payments. The failure of Company to pay City when due any amounts required by the Franchise and such failure continues for a period of ten (10) days after the due date.
- b. Default in Other Covenants. The failure of either party to perform any of the terms and conditions required herein to be kept and performed and such failure continues for a period of thirty (30) days after notice and opportunity to cure provided by the party alleging a breach.

## 2. Remedies.

- a. **Termination**. Upon the occurrence of an event of default, this Franchise may be terminated by the City Council after providing notice in writing to Company given within thirty (30) days of the date of default. Company shall be granted a reasonable opportunity to be heard by the City Council prior to revocation. In determining whether to revoke the Franchise or pursue a lesser remedy, City Council shall consider the nature, extent, circumstances and gravity of the breach, including whether the breach was intentional, resulted in substantial harm and the history of compliance or noncompliance
- b. In lieu of termination, City may impose a penalty of the sum of \$200 per day for each day the default continues along with any additional damages suffered by City as a result of Company's default. City may not assess penalties under the previous sentence in excess of \$8,000 per year. Damages are not included in the cap.
- c. In addition to the remedies specified above, the parties shall have all remedies available by law, including in contract. Nothing herein limits or restricts City's authority to enforce its municipal code in the exercise of its police powers.

## **Section 14. Waiver.**

1. 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.
2. 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 Company 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 (but no less than 60 days), such provision shall be deemed waived.

**Section 15. Franchise Term.** This Franchise is granted for a term of ten (10) years beginning on the date on which this Franchise ordinance is approved. City agrees to renegotiate in good faith a renewal of this Franchise for a similar term if this Franchise is not in default at its expiration.



should any proceeding be brought in a federal forum, such proceeding shall be brought in the U.S. District Court of Oregon in Portland, Oregon, with the parties stipulating to trial in Portland, Oregon . Interpretation of the Franchise shall be governed by laws of the State of Oregon; to this end, on behalf of the City the City Administrator has the initial authority to interpret this Franchise, with the City Council retaining final authority, in its discretion, to interpret this Franchise. Neither party shall be considered the drafter of this Franchise for purposes of application of the rules of construction.

APPROVED AND ADOPTED this 2nd day of ~~December, 2018~~ <sup>January 2019</sup> by the following vote:

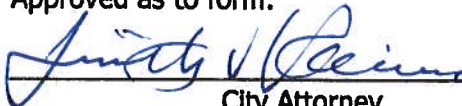
Ayes: Locke, Carlson, Morten, Scholl

Abstain: Topaz


Nays: None

APPROVED:   
Rick Scholl, Mayor


Attest:   
Kathy Payne, City Recorder

Approved as to form:  
  
City Attorney

LIGHTSPEED NETWORKS, INC.  
dba LS NETWORKS

By:   
Name: LEIF HANSON  
Title: DIRECTOR OF ENGINEERING  
Date: 12/7/18

CITY OF ST. HELENS, OREGON

By:   
Name: Jane Walsh  
Title: City Administrator  
Date: 1/3/19