

**A BILL FOR AN ORDINANCE ESTABLISHING
A NON-EXCLUSIVE FRANCHISE FOR
LIGHTSPEED NETWORKS INC. DBA LS
NETWORKS**

) **ORDINANCE BILL NO. 15**
) **For 2010**
)
) **ORDINANCE NO. 2798**

WHEREAS, LightSpeed Networks, Inc. doing business LS Networks, is an Oregon Corporation that provides or intends to provide communication services in the City of Lebanon (the "City") and other surrounding areas;

WHEREAS, providing communication services requires the installation, operation and maintenance of wires, cables, conduits, poles, equipment, appliances, and associated structures to be located within the public ways of the City;

WHEREAS, the City desires to set forth the terms and conditions by which LS Networks shall use the public ways of the City;

THE CITY OF LEBANON ORDAINS AS FOLLOWS:

SECTION 1: Grant of Franchise and General Utility Easement

The City hereby grants to LS Networks, herein after referred to as Grantee, the right, privilege and authority to construct, maintain, operate, upgrade, and relocate its wires, cables, conduits, poles, equipment, appliances, and associated structures (collectively referred to herein as "Communication Facilities") in, under, along, over and across the present and future streets, alleys, public ways and public places (collectively referred to herein as "Public Ways") within the City, for the purpose of supplying and transmitting communication services to the inhabitants of the City and persons and corporations beyond the limits thereof.

SECTION 2: Term

The term of this Franchise Agreements is for five (5) years commencing on the date of acceptance by Grantee as set forth in Section 4 below and subsequent to review of the Public Utilities Commission of Oregon as per ORS 221.420(2)(c).

SECTION 3: Renewal

At least 120 days prior to the expiration of this Franchise, Grantee and the City either shall agree to extend the term of this Franchise for a mutually acceptable period of time or the parties shall use best faith efforts to renegotiate a replacement Franchise. Grantee shall have the continued right to use the Public Ways of the City as set forth herein in the event an extension or replacement Franchise is not entered into upon expiration of this Franchise.

SECTION 4: Acceptance by LS Networks

Within sixty (60) days after the passage of this ordinance by the City, Grantee shall file an unqualified written acceptance thereof with the City Recorder otherwise the ordinance and the rights granted herein shall be null and void.

SECTION 5: Non-Exclusive Franchise

The rights, privileges and franchise herein granted shall not be deemed exclusive and the right is hereby reserved to the City to grant any other persons, companies, corporations or associates similar rights.

SECTION 6: City Regulatory Authority

In addition to the provision herein contained, the City reserves the right to adopt such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties or exercise any other rights, powers, or duties required or authorized, under the Constitution of the State of Oregon, the laws of Oregon or City Ordinances.

SECTION 7: Indemnification

7.1 Grantee shall indemnify and hold City harmless from any and all damages of any kind or character growing out of or arising by reason of the installation and maintenance of the Grantee's communication facilities in the City, except when resulting from negligence or willful misconduct of the City's officers, employees, or agents.

7.2 Grantee also hereby agrees to indemnify and hold City harmless from any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its facilities within a six (6) month period following written notice from the City to relocate, unless Grantee's failure arises directly from the negligence or willful misconduct of the City's officers, employees, or agents or from causes beyond Grantee's reasonable control.

7.3 In any situation in which the City is found legally liable to Grantee for damage to Grantee's facilities, City's liability shall be limited to the cost of repair or replacement of the damaged facilities, whichever is less. City shall not be liable to Grantee for lost revenue, lost profits, incidental or consequential damages or claims of third parties arising from damage to Grantee's facilities. Grantee covenants that it will not assert any claim against the city for any liability, loss, or damage excluded under this Section 7.

SECTION 8: Annexation

8.1 **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 Communication Facilities owned, maintained, or operated by Grantee

located within any public ways of the annexed territory shall thereafter be subject to all of the terms hereof.

SECTION 9: Planning, Design, Construction and Installation of Company Facilities

9.1 Grantee's communication facilities shall take commercially reasonable efforts to contract with another City franchisee to employ that franchisee's above-ground facilities in place at the time this franchise is granted. It shall be lawful for Grantee to make all necessary excavations in any public way for the purpose of constructing and maintaining its communication facilities. Provided, however, that Grantee's use of the public way shall be subject to the City's authority to prescribe which public way will be used and the location within the public way, which authority is hereby expressly reserved to the City.

9.2 Grantee's use of the public way and all construction by Grantee shall be subject to and shall comply with all standard specifications and any special provisions of the City, the Charter and ordinances of the City, and all other applicable federal, state, and local laws and regulations. No work affecting the public way shall be done by the Grantee without first obtaining the permits required by the City, which may include plan submittal, approval and the payment of fees before work begins.

9.3 Where Grantee installs its communication facilities under or adjacent to any existing paved Public Way, the Public Way shall be overlaid with a new asphalt surface after construction. Where Grantee installs its communication facilities along the route of a planned bicycle path or pedestrian trail, City may require Grantee to construct the bicycle path as a condition of plan approval. All such path and trail repair and construction shall be at Grantee's expense.

9.4 Upon completion of construction of any new facilities, Grantee shall promptly furnish City with 2 sets of "as built" plans showing the exact location and construction details of all of Grantee's facilities. New plans will be furnished promptly for any additions or modifications.

9.5 Nothing in this ordinance shall be construed in any way to prevent the City from constructing and maintaining any public improvement in any public way. In its construction and maintenance of public improvements, the City shall endeavor not to obstruct or prevent the free use by Grantee of its communication facilities.

9.6 Grantee shall at all times maintain all of its communication facilities in a good state of repair. Motorized vehicles shall not be allowed on any public bicycle paths, pedestrian trails and landscaped areas, except when necessary to install, remove or repair Grantee's facilities. Except in an emergency, permission shall be obtained from the City before using motorized vehicles on any public bicycle paths, pedestrian trails and landscaped areas. Any damage to any public way caused by Grantee shall be repaired by Grantee at no cost to the city. Grantee shall have a representative available at established times through the City to locate Grantee's facilities for persons who need to excavate in the public way.

SECTION 10: Relocation of Facilities

10.1 The City shall have the right to require Grantee to change the location of any communication facility within the public way when the public convenience requires such change; and the expense thereof shall be paid by Grantee. Should Grantee fail to remove or relocate any such facilities by the date established by the City, the City may effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its facilities located within the City, the City will make a reasonable effort to provide Grantee with an alternate location for its facilities within the public way. City shall give Grantee written notice to relocate its facilities at least six months prior to the date established by the City as the deadline for relocation.

10.2 Should it ever become necessary to temporarily rearrange or temporarily remove Grantee's communications facilities at the request of a private person or business, Grantee shall perform such rearrangement or removal as expeditiously as possible upon receipt of reasonable written notice from the business or person desiring the temporary change of the communication facilities. The notice shall:

- (a) be approved by the City Manager,
- (b) detail the route of movement,
- (c) provide that the costs incurred by Grantee in making the temporary change be borne by the person or business giving said notice.
- (d) provide that the person or business giving the notice shall indemnify and hold harmless the Grantee of and from any and all damages or claims of whatsoever kind or nature caused directly or indirectly from such temporary change of the Grantee's communication facilities, and
- (e) if required by Grantee, be accompanied by a cash deposit or a good and sufficient bond to pay any and all of the Grantee's estimated costs as estimated by Grantee.

SECTION 11: Compensation

11.1 In consideration of the rights, privileges and franchise hereby granted, Grantee shall pay to City from and after the effective date of the acceptance of this franchise, annually, six percent (6%) of its gross revenues derived from its communication facilities that utilize the Public Way within the corporate limits of the City, less net uncollectibles.

- (a) **Gross Revenues:** Revenue of the Grantee or any affiliate of the Grantee in whatever form accrued from all sources in connection with operation of the communication facilities throughout the entire franchise area, and includes any amount even if separately identified or accounted for by the Grantee as franchise or other license fees,

including but not limited to, revenues from subscribers and customers, and other fees related to the communications service; advertising revenue; access and attachment charges paid to the Grantee by other communications services or carriers; and revenue from the sale or lease of any wire, cable, facility, pole, duct, conduit or similar transmission equipment, all as subject to FCC rules and regulations to exclude revenues from internet access services while prohibited by law.

11.2 To the extent that any separate fees are imposed by the City on Grantee for street openings, construction, inspection or maintenance of fixtures or facilities, such fees may be deducted from the franchise fee payments required by this section. However, Grantee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions or permit conditions from the franchise fee payments required by this section.

11.3 The payment of the franchise fee shall be in addition to, not in lieu of, any local business license tax, or other taxes and permit fees not within the scope of this franchise agreement.

11.4 Grantee shall allow City use of Grantee's facilities to provide communication services to City facilities. The reasonable value of any of Grantee's facilities used or reserved for use by the City without Grantee's prescribed charges shall be credited toward any payment due the City under this provision.

11.5 In the event that Grantee wishes to add Cable television services to its list of services, as regulated by the federal Communications Act of 1934, as amended, Grantee agrees that it must negotiate an additional agreement with City setting forth the terms and conditions governing such service.

11.6 Other than any fees payable due to additional services offered or provided by Grantee such as those mentioned in section 11.5, Grantee shall not be required to pay any additional fee, compensation or consideration to the City for its use of the public way. However, Grantee shall pay any charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions or permit conditions.

11.7 Grantee shall make quarterly payments to the City on or before the 15th day following the quarter immediately preceding. Grantee shall pay a pro rata fee for the last annual payment to the date of termination in addition to any other sums due the City and shall make such payment within 30 days of termination.

11.8 With each franchise fee payment, the Grantee shall furnish a sworn statement setting forth the amount and calculation of the payment. The statement shall detail the revenues received by the Grantee from its operations within the City, and shall specify the nature and amount of all exclusions and deductions from such revenues claimed by the Grantee in calculating the franchise fee.

11.9 The City shall have the right to annually audit the books and records of the Grantee to verify compliance with the terms and conditions of this franchise. At the City's request, the Grantee shall provide the City's agents access to the Grantee's books and records, as necessary, to conduct a thorough audit.

SECTION 12: No Waiver

Neither the City nor Grantee shall be excused from complying with any of the terms and conditions of this Franchise by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions.

SECTION 13: Transfer

13.1 Neither this franchise nor any property owned and operated by Grantee by authority hereof shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance.

13.2 Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of fiber optic cable system tangible assets for the purpose of financing the acquisition of equipment for or the construction and operation of the system without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this franchise.

13.3 Grantee shall not lease or sublease any of its pipes, wires, conduits, or other facilities, or the public right-of-way in which such are contained, without the City's consent as expressed by ordinance. However, Grantee may dedicate or lease its fiber optic cable system or any portion thereof, or otherwise make its fiber optic cable system available in the ordinary conduct of its business as a telecommunications company, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its fiber optic cable system, and so long as City's bandwidth or access speed are not diminished.

SECTION 14: Amendment

At any time during the term of this Franchise, the City or Grantee may propose amendments to this Franchise by giving thirty (30) days written notice to the other party of the proposed amendment(s) desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). No amendment or amendments to this Franchise shall be effective until mutually agreed upon by the City and Grantee and formally adopted as an ordinance amendment, which is accepted in writing by Grantee.

SECTION 15: Non-Contestability--Breach of Contract

15.1 Neither the City nor Grantee will take any action for the purpose of securing modification of this Franchise before either the Oregon Public Utility Commission or any Court of competent jurisdiction; provided, however, that neither shall be precluded from taking any action it deems necessary to resolve difference in interpretation of the Franchise nor shall Grantee be precluded from seeking relief from the Courts in the event Oregon Public Utility Commission orders, rules or regulations conflict with or make performance under the Franchise illegal.

15.2 In the event Grantee or the City fails to fulfill any of their respective obligations under this Franchise, the City, or Grantee, whichever the case may be, will have a breach of contract claim and remedy against the other in addition to any other remedy provided by law, provided that no remedy which would have the effect of amending the specific provisions of this Franchise shall become effective without such action which would be necessary to formally amend the Franchise.

SECTION 16: Notices

16.1 The City Manager or another designee named by City is authorized to act for the City in all matters pertaining to this franchise. Grantee may appeal any action of the City Manager to the City Council by giving written notice thereof within twenty-one days after Grantee was notified of such action. The City Council will hear the appeal and render a final decision within 30 days after the notice of appeal is given.

16.2 Whenever any notice is given pursuant to this ordinance, it shall be effective on the date it is sent in writing by registered or certified mail, addressed as follows:

To the City: City Manager
Lebanon City Hall
925 Main Street
Lebanon, Oregon 97355

To Grantee: LS Networks
921 SW Washington Street, Suite 370
Portland, Oregon 97205


Notice of change of address may be given in the same manner as any other notice.

SECTION 17: Severability

If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority including any state or federal regulatory authority having jurisdiction thereof or unconstitutional, illegal or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

Passed by the Lebanon City Council by a vote of 6 in favor and 0 against and approved by the Mayor on this 12th day of May, 2010.

CITY COUNCIL OF LEBANON, OREGON



Kenneth I. Toomb, Mayor
Bob Elliott, Council President

ATTEST:



Linda Kaser, City Clerk/Recorder