

## ORDINANCE NO. 23-02

AN ORDINANCE GRANTING TO LIGHTSPEED NETWORKS, INC DBA LS NETWORKS, AN OREGON CORPORATION, A NONEXCLUSIVE RIGHT AND FRANCHISE FOR A PERIOD OF TEN (10) YEARS TO CONSTRUCT, MAINTAIN AND OPERATE, IN, ON AND UNDER THE RIGHTS OF WAY OF THE CITY OF ASTORIA, CLATSOP COUNTY, OREGON, TELCOMMUNICATIONS FACILITIES FOR SERVICE TO THE CITY OF ASTORIA, THE INHABITANTS THEREOF AND OTHERS, SUBJECT TO THE TERMS AND CONDITIONS AND TO THE MAKING OF PAYMENTS SPECIFIED IN THIS ORDINANCE.

THE CITY OF ASTORIA DOES ORDAIN AS FOLLOWS:

**SECTION 1. Grant of Franchise** The City hereby grants to Lightspeed Networks, Inc. dba LS Networks ("Lightspeed") the privilege to operate Utility Facilities in, under, along, over and across Rights of Way within the City, for the purpose of providing Communications services to the inhabitants of the City and persons and corporations beyond the limits thereof.

### **SECTION 2. Definitions.**

"Utility facility" or "facilities" means any physical component of a system, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, transmitters, plant, equipment and other facilities, located within, under or above the rights of way, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service.

"Communications services" means any service provided for the transmission of information including, but not limited to, voice, video, or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications service does not include: (1) cable service; (2) open video system service, as defined in 47 C.F.R. 76; (3) private communications system services provided without using the public rights of way; (4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

"Gross Revenue" means any revenues received from utility operations within the City of Astoria less related net uncollectibles. Gross revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks, sales at wholesale by one utility to another when the utility purchasing the service is not the ultimate customer, or revenue from joint pole use.

"Rights of Way" mean the present and future streets, alleys, and other public ways.

**SECTION 3. Term.** The term of this Franchise shall commence on the date of acceptance by Lightspeed., as set forth in Section 4 below for Ten (10) years or until cancelled as provided herein.

**SECTION 4. Acceptance by Lightspeed Networks, Inc.** Within thirty (30) days after the passage of this ordinance by the City, Lightspeed Networks, Inc. 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 right to use and occupy the Rights of Way shall be nonexclusive and the City reserves the right to use the Rights of Way for itself and to grant others the right to use its rights of way.

**SECTION 6. City Regulatory Authority.** Lightspeed Networks, Inc. shall comply with the Charter and all ordinances, rules and regulations adopted by the City. The City reserves its right to amend or adopt additional ordinances rules and regulations as may be desirable in the interests of its citizens in the exercise of its authority as an Oregon home rule city.

**SECTION 7. Indemnification.** The City shall in no way be liable or responsible for any loss or damage to property or any injury to, or death, of any person that may occur in the construction, operation, or maintenance by Lightspeed of its Utility Facilities. Lightspeed shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of Lightspeed's use of the Rights of Way within the City, and shall pay the costs of defense plus reasonable attorneys' fees for any claim, demand or lien brought thereunder. Notwithstanding any provision hereof to the contrary, Lightspeed shall not be obligated to indemnify, defend, or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any negligent or willful act or failure to act of the City or any of its officers or employees.

**SECTION 8. Annexation.** 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 Lightspeed located within any Rights of Way of the annexed territory shall thereafter be subject to all of the terms hereof.

**SECTION 9. Planning, Design, Construction and Installation of Company Facilities.** All Utility Facilities installed or used under authority of this Franchise shall be used, constructed and maintained in accordance with applicable federal, state and city laws, codes and regulations. Any maintenance, operation, upgrading, and relocation may only be done in compliance with the applicable law and the ordinances of the City of Astoria.

**SECTION 10. Vegetation Management.** Lightspeed or its contractor may prune all trees and vegetation which overhang the Rights of Way, whether such trees or vegetation originate within or outside the Rights of Way, to prevent the branches or limbs or other part of such trees or vegetation from interfering with Lightspeed's Utility Facilities. Such pruning shall comply with the *American National Standard for Tree Care Operation (ANSI A300)* and be conducted under the direction of an arborist certified with the International Society of Arboriculture. A growth inhibitor treatment may be used for trees and vegetation species that are fast-growing and problematic. Nothing contained in this Section shall prevent Lightspeed, when necessary and with the approval of the owner of the property on which they may be located, from cutting down and removing any trees which overhang streets.

**Section 11: Insurance.** At all times during the term of this Franchise, Lightspeed, at its own cost and expense, shall provide the insurance specified in this section.

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

11.2 Policies shall include a provision requiring written notice by the insurer or insurers to the City with a notice of cancellation stating, "should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions." If insurance coverage is canceled, reduced or materially changed, Lightspeed 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. Lightspeed 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.

11.3 During the term of this contract, Lightspeed shall maintain in force, at its own expense, the following insurance:

- (1) Workers' compensation insurance for all subject workers; and
- (2) Commercial General Liability Insurance with an insurance company acceptable to City, written on an occurrence basis, in amounts not less than the limitations on liability for local public bodies provided in ORS 30.272 and ORS 30.273:

11.4 The insurance policy limits required in section 11.3 may be satisfied through a combination of the underlying insurance policy and umbrella (excess) liability policies so long as said umbrella policies are, at a minimum, "follow form" and provide insurance equal to or greater than coverage afforded by the underlying liability policies.

## **SECTION 12. Compensation.**

12.1 In consideration of the rights, privileges, and franchise hereby granted, Lightspeed shall pay to the City from and after the effective date of the acceptance of this franchise, seven percent (7.0%) of its gross revenues derived from within the corporate limits of City. Payment shall be made to the City on a quarterly basis on January 1st, April 1st, July 1st and October 1st of each year. All amounts due under this Section 12 shall be subject to review by the City; and Lightspeed shall provide any information reasonably requested by City to conduct such review; provided that only payments which occurred during a period of thirty-six (36) months prior to the date the City notifies Lightspeed of its intent to conduct a review shall be subject to such review.

12.2 The Franchise Fee shall be in addition to the City's annual Occupational Tax, Astoria Code § 8.000 *et seq*, and the Utility Permit fee, Astoria Code § 2.700 *et seq*.

12.3 Lightspeed shall maintain a current name and telephone number for a contact person to address questions by the City concerning compensation due the City or provision of services within the City.

12.4 Lightspeed shall provide an annual report April 1, 2023 and each April 1st thereafter, Licensee shall submit to the City Council an annual written report consisting of the following: (a) Summary of Lightspeed's activities during the previous year, including any operational changes or improvements to services within the City; (b) Planned changes for the current year, including any operational changes or improvements to property or structures related to services within the City; (c) Lightspeed's Gross Income for the previous year and a projection of Gross Income for the current year.

**SECTION 13. Renewal.** At least 120 days prior to the expiration of this Franchise, Lightspeed and the City shall agree to either extend the term of this Franchise for a mutually acceptable period or the parties shall use best faith efforts to renegotiate a replacement Franchise. Lightspeed shall have the continued right to use the Rights of Way of the City as set forth herein for a reasonable period in the event an extension or replacement Franchise is in the process of negotiation after expiration of this Franchise.

**SECTION 14. Waiver.** A provision or condition of this Agreement may only be waived in writing by the party entitled to the benefit of such provision or condition. Waiver of any breach of any provision will not be a waiver of any succeeding breach of the provision or a waiver of the provision itself or any other provision.

**SECTION 15. Transfer of Franchise.** Neither this Franchise nor any of the rights, interests, or obligations under this Agreement may be assigned by any Lightspeed, except to a successor in interest, without the prior written consent of the City which consent will not be unreasonably withheld.

**SECTION 16. Amendment.** Except as provided in § 12.2, no amendment to this Franchise shall be effective until mutually agreed upon by the City and Lightspeed and formally adopted as an ordinance amendment.

**SECTION 17. Non-Contestability--Breach of Contract.**

17.1 Neither party will attempt to amend this Franchise before the Oregon Public Utility Commission or any Court; provided, however, that neither shall be precluded from taking any action it deems necessary to resolve difference in interpretation of the Franchise nor shall Lightspeed be precluded from seeking judicial relief in the event Oregon Public Utility Commission orders, rules or regulations conflict with or make performance under the Franchise illegal.

17.2 The parties agree that the remedy at law for any breach or threatened breach by a party may, by its nature, be inadequate, and that in addition to damages, the other parties will be entitled to a restraining order, temporary and permanent injunctive relief, specific performance, and other appropriate equitable relief, without showing or proving that any monetary damage has been sustained.

**SECTION 18. Notices.**

18.1 Unless otherwise specified herein all notices from Lightspeed to the City pursuant to or concerning this Franchise shall be delivered to:

The Astoria City Manager  
1095 Duane Street  
Astoria, OR 97103

18.2 Unless otherwise specified herein, all notices from the City to Lightspeed pursuant to or concerning this Franchise shall be delivered to:

LS Networks  
Attn: Contracts Administration  
921 SW Washington St. STE 210  
Portland, OR 97205  
(503) 294-5300

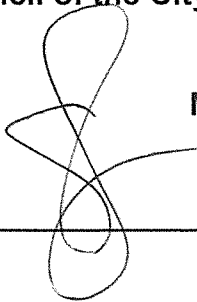
18.3 Either party may change their notice address by written notice to the other.

**SECTION 19. Severability.** If any provision of this Agreement is deemed to be invalid or unenforceable in any respect for any reason, the validity and enforceability of such provision in any other respect and of the remaining provisions of this Agreement will not be impaired in any way.

**SECTION 20. Joint Use.** The City shall have the right to use all poles and suitable overhead structures owned by Lightspeed within Public Ways for City wires used in connection with its fire alarms, police signal systems, or other communication lines used for governmental purposes; provided, however, any such uses shall be for activities owned, operated or used by the City for a public purpose and shall not include the provision of CATV, internet, or similar services to the public. Provided further, that Lightspeed shall assume no liability nor shall it incur, directly or indirectly, any additional expense in connection therewith, and the use of said poles and structures by the City shall be in such a manner as to prevent safety hazards or interferences with Lightspeed's use of same. Acceptance of City attachments shall be subject to standard pole attachment requirements and shall be installed and maintained in accordance with the reasonable requirements of Lightspeed and the current edition of the National Electrical Safety Code pertaining to such construction and may be attached or installed only after written approval by Lightspeed.

**SECTION 21:** This ordinance repeals any previous franchise between the parties and shall take effect thirty (30) days after its enactment by the Council, approval by the Mayor, and the filing of Lightspeed's written acceptance described in §4.

**PASSED** by the City Council of the City of Astoria Oregon this 6 day of March 2023

  
MAYOR

**ATTEST:**

  
FINANCE DIRECTOR, CITY OF ASTORIA

Date: 3/6/2023

ROLL CALL ON ADOPTION		<u>YEA</u>	NAY	ABSENT
Councillor	Davis	X		
	Brownson	X		
	Adams	X		
	Hilton	X		
Mayor	Fitzpatrick	X		