

ORDINANCE NO. 2017-13

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

WHEREAS: LightSpeed Networks, Inc., an Oregon Corporation, dba LS Networks provides Telecommunications services within the City of Seaside, Oregon; and

WHEREAS: Franchisee has applied for a Telecommunications Franchise pursuant to local ordinances relating to Telecommunications located in the public rights of way, and the City of Seaside "City" has reviewed said application and has determined that it meets the requirements of the City's Ordinance subject to the terms and conditions stated herein:

NOW THEREFORE, THE CITY OF SEASIDE ORDAINS AS FOLLOWS:

Section 1: Definitions.

**Gross Revenues:** Any and all revenue derived from telecommunications services, of any kind, nature, or form, without deduction for expense in the City of Seaside and is further defined in Section 13. 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:** 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: Term and Termination.** The term of this Franchise shall be five (5) years, commencing with the effective date of this Ordinance. Thereafter, this Franchise shall continue in full force and effect for an additional five (5) 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, Grantee shall, within one hundred and eighty days (180), remove all its facilities from the City's Rights-of-Way. Should the Grantee fail to remove its facilities within the one hundred and eighty day period (180), the City may remove.

**Section 5: No Limitation of City Authority.**

(a) Except as provided in Section 6 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) Where the Franchisee had paid for the relocation costs of the same facilities at the request of the City within the past five (5) years, the Franchisee's share of the cost of relocation will be paid by the City if it requested the subsequent relocation.

(d) Except as otherwise provided by law, and subject to Section 6 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 6: Competitively Neutral Application.** The City shall impose, on a competitively neutral and nondiscriminatory basis, similar terms, and conditions 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 6 shall be unenforceable against Franchisee.

**Section 7: Control of Construction.**

The Franchisee shall file with the City maps showing the location of any construction, extension, or relocation of its telecommunications equipment in the right of way and public places of the City and shall obtain from the City approval of the location and plans prior to commencement of the work. The City may require the Franchisee to obtain a permit before commencing the construction, extension, or relocation of any of its telecommunications equipment.

**Section 8: Right of Way Excavations and Restorations.**

(a) Subject to the provisions of this agreement, the Franchisee may make necessary excavations for the purpose of constructing, installing, maintaining, and operating its facilities. In the performance of routine service connections and ordinary maintenance, prior to making an excavation in the traveled portion of any right of way or public place, and, when required by the City, in any untraveled portion of any right of way or any public place, the Franchisee shall obtain from the City approval of the proposed excavation and of its location. Except in emergencies, Franchisee must first obtain a City of Seaside Public Street/Alley Opening Permit. Franchisee shall give notice to the City by telephone, electronic data transmittal or other appropriate means prior to the commencement of service or maintenance work and as soon as is practicable after the commencement of work performed under emergency conditions.

(b) When any excavation is made by the Franchisee, a Public Street/Alley Opening Permit must be obtained including the cost of the permit. The Franchisee shall be responsible for prompt restoration of the affected portion of right of way or public place to the same condition in which it was prior to the excavation.

The restoration shall be in compliance with specifications, requirements, and regulations of the City in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of a right of way or public place to the same condition in which it was prior to the excavation, upon thirty (30) days prior written notice to Franchisee, the City may make the restoration and the cost thereof shall be paid by the Franchisee.

(c) City right of ways that have been newly constructed or overlaid shall not be cut for a period of 10 years. City right of ways that have been slurry or crack sealed shall not be cut for a period of 3 years. Franchisee may request a waiver from the Seaside Public Works Director. City shall notify Franchisee at least 30 days in advance of any planned new roadway or overlay projects.

**Section 9: Location and Relocation of Facilities.**

(a) All facilities of the Franchisee shall be placed so that they do not interfere unreasonably with the use by the City and the public of the right of way and public places and in accordance with any specifications adopted by the City governing the location of facilities.

(b) The City may require, in the public interest, the removal, or relocation of facilities maintained by the Franchisee in the rights of way and public places of the City, and the Franchisee shall remove and relocate such facilities within a reasonable time after receiving notice to do so from the City. The cost of such removal or relocation of its facilities shall be paid by the Franchisee, but when such removal or relocation is required for the convenience or benefit of any person, governmental agency, or instrumentality other than the City, Franchisee shall be entitled to reimbursement for the reasonable cost thereof from such person, agency, or instrumentality. The City shall provide the Franchisee with timely notice of any anticipated requirement to remove or relocate its facilities and shall cooperate with the Franchisee in the matter of assigning or allocating the costs of removal or relocation.

**Section 10: Insurance.**

(a) **General.** At all times during the term of this Franchise, Franchisee, at its own cost and expense, shall provide the insurance specified in this section.

(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 shall maintain in force, at its own expense, the following insurance:

(1) The Franchisee shall maintain throughout the term of the Franchise insurance in amounts at least as follows:

Workers' Compensation	Limits as required by State Law
Commercial General Liability Liability	\$1,000,000 per occurrence, Combined Single
General Aggregate	\$2,000,000
Auto Liability including coverage on all owned, non-owned hired autos Umbrella Liability	\$1,000,000 per occurrence
Umbrella Liability	\$1,000,000 per occurrence

(2) The City shall be added as an additional insured to the above Commercial General Liability, Auto Liability and Umbrella Liability insurance coverage.

(3) The Franchisee shall furnish the City with current certificates of insurance evidencing such coverage upon request.

**Section 11: Transfers and Change in Control.**

(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 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.

(b) 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.

(c) 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.

(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 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.

(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 12: Indemnification.** Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties or injuries incurred by any third party, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims. The indemnifying party shall have the sole right to defend such claims at its own expense. The other party shall provide, at the indemnifying party's expense, such assistance in investigating and defending such claims as the indemnifying party may reasonably request. This indemnity shall survive the termination of this Agreement.

**Section 13: Compensation.**

(a) **Franchise Fee.** In consideration of permission to use the streets and Rights-of-Way of the City for the construction, operation, and maintenance of a Telecommunications system within the Franchise area the Franchise shall pay to City during the term of this Franchise an amount equal to seven percent (7%) of the Franchisee's Gross Revenues ("Franchise Fee"). 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 or multi-point services is based on the pro-rata share of the revenue from those services.

(b) **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 Franchise Fee 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.

(c) **Payment of Franchise Fees.** 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.

(d) The Franchise Fee includes all compensation for the use of the City's Rights-of-Way. Franchisee 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 when the fee or charge is not imposed under a generally applicable ordinance or resolution. The Franchise Fee shall not be deemed to be in lieu of or a waiver of any ad valorem property tax which the City may now or hereafter be entitled to, or to participate in, or to levy upon the property of Franchisee.

**Section 14: 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 Grantee located within any public Rights-of-Ways of the annexed territory shall be subject to all of the terms of this Ordinance.

**Section 15: 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 Council may require periodic reports from the Franchisee relating to its operations and revenues within the City. 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 Oregon law.

**Section 16: Right to Perform Franchise Fee Audit or Review; Default.** In addition to all rights granted under Section 15, 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 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 hereunder.

**Section 17: 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 18: Venue.** Venue for any proceeding brought to enforce any term or condition of this Franchise shall be the local Circuit Court for the City; provided, however, that 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.

**Section 19: 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 20: 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 Oregon anti-trust law, ORS 646.750-646.836, or the Oregon Unlawful Trade Practices Act, ORS 646.650-646.652. 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 21: 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:

City Manager  
City of Seaside  
989 Broadway  
Seaside, OR  
Phone: (503) 738-5511  
Facsimile: (503) 738-5514

Contracts Management  
LS Networks  
921 SW Washington Street, Suite 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 22: 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 23: 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 24: 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.

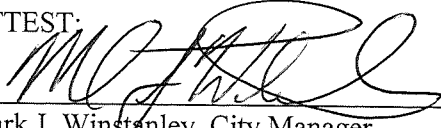
(b) No provision of this Franchise will be deemed waived unless such waiver is in writing and signed by the party waiving its rights. However, if Franchisee gives written notice of a failure or inability to cure or comply with a provision of this Franchise, and the City fails to object within a reasonable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

**ADOPTED** by the City Council of the City of Seaside on this 13 day of November, 2017, by the following roll call vote:

YEAS: FRANK, BARBER, WRIGHT, PHILLIPS, MORRISEY, HORNING  
NAYS: NONE  
ABSTAIN: NONE  
ABSENT: MONTERO

**SUBMITTED** to and **APPROVED** by the Mayor on this 14 day of November, 2017.

  
\_\_\_\_\_  
JAY BARBER, MAYOR

ATTEST:  
  
\_\_\_\_\_  
Mark J. Winstanley, City Manager

Accepted \_\_\_\_\_ (date)

LightSpeed Networks, Inc.  
By \_\_\_\_\_  
Michael Weidman  
President and CEO