

CITY OF SILVERTON
ORDINANCE
18-07

AN ORDINANCE OF THE SILVERTON CITY COUNCIL GRANTING A NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE TO LIGHTSPEED NETWORKS, INC., DECLARING AN EMERGENCY, AND STATING AN EFFECTIVE DATE

THE CITY OF SILVERTON ORDAINS AS FOLLOWS:

Section 1: **Purpose.** The purpose of this Ordinance is to set forth the terms and conditions upon which LightSpeed Networks, Inc., dba LS Networks (“Grantee”), may be permitted to occupy the right-of-way within the City of Silverton pursuant to the powers of the City of Silverton, the Oregon Constitution and Oregon State Law, and except as to matters preemptively regulated by state or federal authorities. This Ordinance and the written acceptance by Grantee constitutes a contract between the City and Grantee (hereinafter referred to as the “Franchise”) and is binding upon and inures to the benefit of Grantee and its permitted successors, legal representatives and assigns under the conditions imposed herein.

Section 2: **Definitions and Explanation.**

- A. As used in this Franchise, the following words, except where the context clearly indicates otherwise, mean:
- i. **City.** Means the City of Silverton, an Oregon municipal corporation and individuals authorized to act on the City’s behalf, and includes the area within its boundaries, and its boundaries as extended in the future.
 - ii. **City Council.** Means the legislative body of the City or as defined by the Charter of the City of Silverton.
 - iii. **Facilities.** Means the cable, wire, equipment, antennas, poles and associated facilities used by Grantee to provide telecommunications services.
 - iv. **Person.** Includes an individual, corporation, association, firm, sole proprietorship, company, partnership, co-partnership, joint stock company, trust, limited liability company, governmental entity, or other organization, including any natural person or any other legal entity.
 - v. **Right-of-way.** Means streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public utility easements and all other public ways for use by the public for transportation purposes, including the subsurface under and air space over these areas, but only to the extent of the city’s right, title, interest or authority to grant a franchise to occupy and use such spaces for Grantee’s facilities.
 - vi. **Telecommunications service.** Means any service provided for the purpose of voice, video or data transmission, including but not limited to local exchange service, access service, extended area service, call origination, interconnection, switching, transport, call termination and/or any other telecommunications service identified and authorized by the Federal Communications Commission (FCC) or the Public Utility Commission of Oregon. Telecommunications service includes any service that enables a third party to provide such services, including but not limited to wholesale

services, provision of dark fiber and/or authorization to use facilities to provide such services except where such authorization is required by applicable state or federal law or administrative rule. As used in this Franchise, telecommunications service does not include: 1) cable service as defined by 47 U.S.C. §522; 2) open video system service as defined in 47 C.F.R 76; 3) private communications system services provided without using the right-of-way; 4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the FCC or any successor thereto; and 5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

B. As used in this Franchise, the singular number may include the plural and the plural number may include the singular.

Section 3: Rights Granted.

A. Subject to the conditions and reservations contained in this Franchise and subject to any applicable ordinances and regulations of the City, including but not limited to ordinances and regulations regarding zoning, development, tree pruning or removal, erosion control and excavation in the right-of-way, the City hereby grants to Grantee the privilege and non-exclusive Franchise to occupy right-of-way for the purpose of constructing, using, maintaining and operating a system to provide telecommunications services within the City. This grant includes the authority, subject to the conditions and reservations contained in this Franchise and subject to any applicable ordinances and regulations of the City, to place, erect, lay and maintain facilities customarily associated with telecommunications systems. This Franchise does not authorize Grantee to place, erect or install wireless antennas and related equipment within the right-of-way.

B. This Franchise does not convey any right, title or interest in the right-of-way, but shall be deemed a grant to use and occupy the right-of-way for the limited purposes and term stated in this Franchise. This Franchise does not authorize Grantee to provide cable services or other services not included in the definition of telecommunications services herein. Grantee agrees that prior to providing cable or any non-telecommunications services in the City, it must obtain all necessary and applicable authorizations from the City for use of the right-of-way for such provision, including entering into a separate franchise with the City and paying a separate franchise fee to the City.

C. Grantee shall, at all times during the term of this Franchise, be subject to and comply with all applicable laws, including the lawful exercise of the police power by the City and such regulation as the City shall hereafter provide.

Section 4: Construction. Grantee's construction, installation, work or operation of facilities within the right-of-way shall be subject to and comply with SMC 12.40.120 through 12.40.290, as amended from time to time, as if fully incorporated in this Franchise and regardless of whether or not Grantee is a "telecommunications carrier," provides "telecommunications services" or has "telecommunications facilities" as those terms are defined in SMC 12.40.050.

Section 5: Location of Facilities. The location and relocation of Grantee’s facilities shall be subject to and comply with SMC 12.40.300 through 12.40.340, as amended from time to time, as if fully incorporated in this Franchise and regardless of whether or not Grantee is a “telecommunications carrier,” provides “telecommunications services” or has “telecommunications facilities” as those terms are defined in SMC 12.40.050.

Section 6: Duration. The privileges set forth in this Franchise are hereby granted for a period of five (5) years from and after the effective date of this Franchise. However, this Franchise shall be inoperative unless it is accepted in writing by Grantee as provided in Section 21.

Section 7: Franchise Not Exclusive. This Franchise is not exclusive and shall not be construed as a limitation on the City in:

- i. Granting rights, privileges and authority to other persons similar to or different from those granted by this Franchise; or
- ii. Constructing, installing, maintaining or operating any City-owned public utility.

Section 8: Public Works and Improvements. Nothing in this Franchise shall be construed in any way to prevent the proper authorities of the City or other public entities operating within the City from sewerage, grading, paving, repairing, altering, maintaining, constructing or improving any right-of-way in or upon which facilities of Grantee may have been placed. Unless directly and proximately caused by willful, intentional or malicious acts by the City, the City shall not be liable for any damage to or loss of any Grantee facility within the right-of-way as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the right-of-way by or on behalf of the City, or for any consequential losses resulting directly or indirectly therefrom.

Section 9: Compensation.

(1) As compensation for the Franchise granted by this Ordinance, Grantee shall pay to the City an annual Franchise fee of five percent (5%) of the gross revenue subject to applicable limitations imposed by federal and state law. “Gross revenues” means any and all revenue for the telecommunications services rendered within the City limits less net uncollectables subject to applicable state and federal law. Gross revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks. The City reserves the right to increase the fee rate at any time upon thirty (30) days’ written notice to Grantee, provided the rate is not greater than the percentage rate charged to the incumbent provider. If the incumbent provider’s percentage rate is increased, Grantee’s percentage rate will automatically increase to the same percentage rate without protest.

(2) Compensation required by this Section shall be due and payable quarterly, based on a calendar year as determined by the City. Payments are due within thirty (30) days after the close of each quarter. Late franchise fee payments will be subject to a late fee

calculated on the basis of ten percent (10%) per annum of the amount past due. Within ninety (90) days after the termination of this Franchise, compensation shall be paid for the period elapsing since the close of the last quarter for which compensation has been paid and operations terminated.

(3) Grantee shall furnish to the City with each payment of compensation required by this Section a written statement, under oath, executed by an officer of Grantee showing the amount of gross revenue of Grantee within the City for the period covered by the payment. The compensation for the period covered by the statement shall be computed on the basis of the gross revenue so reported. If Grantee fails to pay the entire amount of compensation due the City through error or otherwise, the difference due the City shall be paid by Grantee within fifteen (15) days from discovery of the error or determination of the correct amount. .

(4) Grantee shall keep accurate books of account at an office in Oregon for the purpose of determining the amounts due to the City under the provisions of this Franchise. The City may inspect the books of account as provided in Section 10, and may audit the books from time to time but no more often than once per calendar year and may not re-audit periods already audited and may not audit any period more than three (3) years prior to the date of the audit. For purposes of conducting the audit (which, as used in this Section, includes a franchise fee review), Grantee shall provide the City copies of requested records within thirty (30) days. Should such an audit reveal that payments tendered by Grantee to the City are less than the amounts due under the terms of this Franchise, Grantee shall promptly remit the amounts due the City, together with interest at a rate of nine percent (9%) per annum from the date such payment was originally due. If an audit reveals that payments tendered by Grantee to City were less than the amounts due under the terms of this Franchise by a differential of five percent (5%) or greater, all costs incurred by the City, including but not limited to accountant's fees and attorney's fees, for such audit are to be fully paid by Grantee.

(5) Acceptance by the City of any payment due under this Franchise shall not be deemed to be a waiver by the City of any other obligation of Grantee under this Franchise, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due, or from collecting any balance due to the City. Should Grantee fail or neglect to pay any of said quarterly payments provided for in this Section for thirty (30) days after any quarterly payment shall become due and payable and after thirty (30) days written notice from the City, the City, by its properly constituted authority, may at its option either continue this Franchise in force and/or proceed by suit or action to collect such payment or declare a forfeiture of this Franchise because of the failure to make payment, but without waiving the right to collect earned Franchise payment.

(6) Upon no less than thirty (30) days prior written notice by either party to the other, the amount of such compensation shall be subject to renegotiation and redetermination before the expiration of each calendar year, of the terms of the Franchise hereby granted, for the ensuing period of said Franchise term.

Section 10: Duty to Provide Information. Except as provided in Section 9, upon ten (10) days prior written request from the City, the Grantee shall furnish the City with information sufficient to demonstrate that Grantee has complied with all requirements of this Franchise. The City may require periodic reports from Grantee relating to its operations, revenues, and services within the City. Grantee shall maintain current maps showing the location of its facilities, fixtures, appliances and structures within the right-of-way of the City. The City shall be allowed to inspect such maps at any time upon at least ten (10) days prior written notice. If requested by City, Grantee shall furnish, without charge and within a reasonable time, maps relating to specified areas of the City.

Section 11: Indemnification. Grantee hereby agrees and covenants to defend, indemnify and hold the City and its officers, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the Grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of Grantee's facilities, and from providing or offering telecommunications services over the facilities, whether such acts or omissions are authorized, allowed or prohibited by this Franchise.

Grantee also hereby agrees to indemnify the City for 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 all or any portion of its facilities in a timely manner pursuant to provisions of this Franchise, unless Grantee's failure arises directly from the City or its agents or contractor's negligence or willful misconduct.

Section 12: Performance Surety. Before the effective date of this Franchise, the Grantee shall provide the performance bond required by SMC 12.40.290.

Section 13: Assignment or Transfer of Franchise.

A. Ownership or control of a majority interest in Grantee's facilities or this Franchise may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the Grantee, by operation of law or otherwise, without the prior consent of the City, which consent shall not be unreasonably withheld or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

B. Grantee and the proposed assignee or transferee of the Franchise or facilities shall provide and certify the following information to the City not less than one hundred twenty (120) days prior to the proposed date of transfer:

i. Complete information setting forth the nature, terms and condition of the proposed transfer or assignment;

- ii. All information required of a telecommunications franchise applicant pursuant to SMC 12.40.360 with respect to the proposed transferee or assignee;
- iii. Any other information reasonably required by the City.

C. No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other requisite qualifications to own, hold and operate the facilities pursuant to this Franchise.

D. Grantee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign this Franchise.

E. Any transfer or assignment of this Franchise or the facilities without prior approval of the City under this Section shall be void and is cause for revocation of this Franchise.

Section 14. Reservation of Statutory Authority. The City reserves the right to exercise, with regard to this Franchise and Grantee, all authority now or hereafter reserved or granted to the City by the Oregon Constitution, the City Charter and state and federal statutes.

Section 15: Insurance.

A. Grantee shall secure and maintain the following liability insurance policies insuring both the Grantee and the City, and its elected and appointed officers, officials, agents and employees as coinsured:

- i. Comprehensive general liability insurance with limits not less than:
 - (a) Three million dollars (\$3,000,000) for bodily injury or death to each person;
 - (b) Three million dollars (\$3,000,000) for property damage resulting from any one accident; and
 - (c) Three million dollars (\$3,000,000) for all other types of liability.
- ii. Automobile liability for owned, non-owned and hired vehicles with a limit of one million dollars (\$1,000,000) for each person and three million dollars (\$3,000,000) for each accident.
- iii. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than one million dollars (\$1,000,000).
- iv. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars (\$3,000,000).

B. The liability insurance policies required by this Section shall be maintained by the Grantee throughout the term of this Franchise or for such time Grantee is engaged in the removal of its facilities. Each insurance policy shall contain the following endorsement: "It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until thirty (30) days after receipt by the City, by registered mail, of a written notice addressed to the Public Works of such intent to cancel or not to renew."

C. Within sixty (60) days after receipt by the City of the notice set forth in subsection B of this Section, and in no event later than thirty (30) days prior to cancellation, the Grantee shall obtain and furnish to the City evidence that the Grantee meets the requirements of this Section.

Section 16: Breach and Termination of Franchise.

A. The City may declare a breach and terminate or revoke this Franchise as provided in this Section for the following reasons:

- i. Construction or operation in the City or in the right-of-way of the City without a construction permit.
- ii. Construction or operation at an unauthorized location.
- iii. Failure to comply with Section 13 with respect to transfer or assignment of the facilities or this Franchise.
- iv. Misrepresentation by or on behalf of Grantee in any application to the City.
- v. Abandonment of facilities in the right-of-way.
- vi. Failure to relocate or remove facilities as required in this Franchise.
- vii. Failure to pay taxes, compensation, fees or costs when and as due the City.
- viii. Insolvency or bankruptcy of the Grantee.
- ix. Violation of material provisions of this Franchise.

B. In the event that the City believes that grounds exist for revocation of this Franchise, the City shall give the Grantee written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the Grantee a reasonable period of time not exceeding thirty (30) days to furnish evidence:

- i. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance.
- ii. That rebuts the alleged violation or noncompliance.
- iii. That it would be in the public interest to impose some penalty or sanction less than revocation.

C. In the event that the Grantee fails to provide evidence reasonably satisfactory to the City as provided in subsection B of this Section, the city manager shall refer the apparent violation or noncompliance to the City Council. The City Council shall provide the Grantee with notice and a reasonable opportunity to be heard concerning the matter.

D. If persuaded that the Grantee has violated or failed to comply with material provisions of this Franchise, the City Council shall determine whether to revoke this Franchise, or to establish some lesser sanction and cure, considering the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:

- i. Whether the misconduct was egregious.
- ii. Whether substantial harm resulted.
- iii. Whether the violation was intentional.
- iv. Whether there is a history of prior violations of the same or other requirements.
- v. Whether there is a history of overall compliance.

vi. Whether the violation was voluntarily disclosed, admitted or cured.

E. Other sanctions include, but are not limited to, penalties of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs.

F. Upon any termination of this Franchise, whether before or upon the expiration of the Franchise, all facilities installed or used by Grantee under this Franchise shall be removed by Grantee at Grantee's expense and the property upon which the facilities were used shall be restored by Grantee to the same or better condition it was in before installation or use by Grantee, as directed by the City. Notwithstanding the preceding sentence, the City may in its sole discretion permit Grantee in writing to abandon its facilities, or any portion thereof, in place, in which case the ownership of such facilities shall transfer to the City.

Section 17: Remedies Not Exclusive, When Requirement Waived. All remedies and penalties provided under this Franchise, the common law, the statutes of this State, the statutes of the United States and the ordinances and regulations of the City, are cumulative and the enforcement or recovery of one is not a bar to the enforcement or recovery of any other remedy or penalty. The remedies and penalties contained in this Franchise are not exclusive, and the City reserves the right to enforce and to avail itself of any and all remedies available at law or in equity. Failure to enforce any right accruing to or available to the City whether arising under this Franchise or otherwise, shall not be construed as a waiver of a breach of any term, condition or obligation of this Franchise or a violation of any requirement of law. A specific waiver of any particular breach of any term, condition or obligation pursuant to this Franchise shall not be a waiver of any other, subsequent or future breach of the same or of any other term, condition, or obligation or as a waiver of the term, condition or obligation itself.

Section 18: Additional Remedy. In addition to any rights available at law or in equity, including, without limitation, any rights set out elsewhere in this Franchise, as well as its rights under the City Code, if there is a material violation of this Franchise by Grantee the City reserves the right at its sole option to suspend issuance of any permits and/or approvals to Grantee until Grantee corrects or otherwise remedies the violation.

Section 19: Notice. Any notice provided under Sections 15 and 16 of this Franchise shall be sufficient if in writing and (1) delivered to the other party or deposited in the U.S. Mail, postage prepaid, certified mail; (2) sent by commercial air courier; or (3) sent by facsimile transmission, provided receipt of such facsimile is confirmed in writing. Notice shall be sent to the following address, or such other address as each party may specify in writing:

City of Silverton
306 South Water Street
Silverton, OR 97381

LS Networks, Contracts Management
921 SW Washington Street, Suite 370
Portland, OR 97203

Phone: 503-874-2207
Fax: 503-873-3210

Phone: 503-294-5300
Fax: 503-227-8585

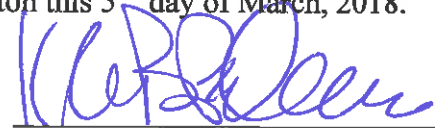
Any notice provided under this Franchise, other than pursuant to Sections 15 and 16, may be by the methods set forth above or any other reasonable means, including email.

Section 20: Severability. The provisions of this Franchise are severable. If any portion of this Franchise is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Franchise.

Section 21: Acceptance of Franchise. Grantee shall, within thirty (30) days from the date this Franchise takes effect, file with the City its written unconditional acceptance of this Franchise in the form attached hereto as Exhibit A, and if Grantee fails to do so, this Franchise shall be null and void and of no force or effect.

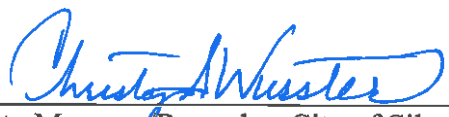
Section 22: Effective Date. The general welfare of the public will be promoted if this ordinance takes effect immediately. Therefore, an emergency is declared and this ordinance shall take effect immediately upon its passage by the Council and approval by the Mayor provided Grantee files with the City its written unconditional acceptance of this Franchise as required in Section 21.

Ordinance passed by the City Council of the City of Silverton this 5th day of March, 2018.



Mayor, City of Silverton
Kyle Palmer

ATTEST



City Manager/Recorder, City of Silverton
Christy S. Wurster

**EXHIBIT A
ACCEPTANCE**

Christy Wurster
City Manager
306 S Water St
Silverton, Oregon 97381

This is to advise the City of Silverton, Oregon that LightSpeed Networks, Inc. (the "Grantee") hereby unconditionally accepts the terms and provisions of Ordinance No.18-___, passed by the City Council on _____, 2018 (the "Franchise") granting a Franchise to Grantee. The Grantee agrees to abide by each and every term and condition of the Franchise.

LIGHTSPEED NETWORKS, INC.

BY _____

TITLE _____

DATE _____