

## ORDINANCE NO. 2428

### AN ORDINANCE GRANTING A NONEXCLUSIVE FRANCHISE TO LIGHTSPEED NETWORKS, INC., dba LS NETWORKS

#### Recitals

A. The City of Bend (the "City") requires utilities, including telecommunications service providers, to obtain a franchise to place utility facilities in City rights-of-way.

B. Lightspeed Networks, Inc, dba LS Networks ("Franchisee") is the holder of an existing telecommunications franchise granted by the City of Bend pursuant to Ordinance No. NS-1859, adopted February 5, 2003 and renewed by Ordinance Nos. NS-2108, adopted November 5, 2008 and NS-2277, adopted August 17, 2016. (the "Franchise").

B. The Franchise expires on December 31, 2021. Franchisee now wishes to enter into another franchise agreement for continued operation of its telecommunications system.

#### **BASED ON THESE FINDINGS, THE CITY OF BEND ORDAINS AS FOLLOWS:**

**Section 1. Grant of Authority.** City grants to Franchisee the right and privilege, subject to all City of Bend ordinances, policies, rules and regulations, to construct, install, maintain, repair, replace, upgrade and operate Facilities over, in, on and under present and future City rights of way, both within the existing City limits and any additional area acquired by annexation, for the purpose of providing telecommunication services on the terms stated in this Agreement. This Franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity at any time during the period of this Franchise. This grant is subject to all prior rights, interests, agreements, permits, easements, or licenses granted by the City, and to the City's and the public's right to use and administer the right-of-way for any purpose it deems fit, including the same or similar purposes allowed to Franchisee.

**Section 2. Terms of Franchise.** This franchise is granted on the terms stated in the Franchise Agreement attached as Exhibit A

**Section 3. Authority of City Manager.** The City Manager is authorized to sign the Franchise Agreement with Franchisee in substantially the form attached as Exhibit A.

**Section 4. Effectiveness.** This Ordinance shall be voidable at the City's sole discretion if Franchisee does not return a signed copy of the Franchise Agreement to the City within 30 days of the passage of this Ordinance or

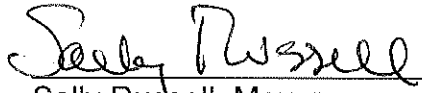
fails to provide a certificate of insurance and endorsement to the City covering the insurance required by the Franchise Agreement.

First Reading: November 17, 2021

Second reading and adoption by roll call vote: December 1, 2021

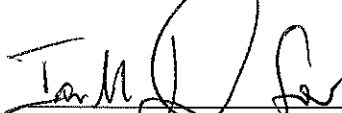
YES: Mayor Sally Russell  
Mayor Pro Tem Gena Goodman-Campbell  
Councilor Barb Campbell  
Councilor Melanie Kebler  
Councilor Anthony Broadman  
Councilor Megan Perkins

NO: None

  
Sally Russell, Mayor

Attest:

  
Robyn Christie, City Recorder

  
Mary Winters, City Attorney

# **NON-EXCLUSIVE TELECOMMUNICATIONS FRANCHISE AGREEMENT BETWEEN THE CITY OF BEND AND LIGHTSPEED NETWORKS, INC. dba LS NETWORKS**

This Agreement is between the City of Bend, an Oregon municipal corporation ("City") and Lightspeed Networks, Inc., dba LS Networks ("Franchisee").

## **Section 1. Definitions**

Any term defined in the Bend Code and not in this Agreement shall have the meaning provided by the Bend Code definition.

"Facilities" means the conduits, cables, optic fibers, poles, wires, vaults, fixtures, underground lines, and other physical components of Franchisee's Telecommunication System.

"Telecommunications System" means all facilities owned, operated or used by Franchisee to provide telecommunication services and located in Rights-of-Way administered by the City.

"Gross Revenues" means "gross operating revenue" as defined in Bend Code 3.20.010A.

"Right-of-Way" means the space on, above, or below the surface of the public streets, roads, highways, freeways, bridges, sidewalks, lanes, courts, ways, alleys, boulevards, and places used or intended to be used by general public for travel as the same may now or hereafter exist within the City's jurisdiction, including without limitation, all public utility easements and public service easements,

## **Section 2. Grant of Authority**

City grants to Franchisee the right to construct, install, maintain, repair, replace, upgrade and operate Facilities over, in, on and under present and future City Right-of-Way, both within the existing City limits and any additional area acquired by annexation, for the purpose of providing telecommunication services on the terms stated in this Agreement. This Franchise is not exclusive, and City reserves the right to grant a similar franchise to any other person or entity at any time during the period of this Franchise. This Franchise is subject to all prior rights, interests, agreements, permits, easements, or licenses granted by the City, and to the City's and the public's right to use and administer the Right-of-Way.

## **Section 3. Compliance with Laws, Rules and Regulations**

Franchisee shall comply with all applicable federal, state, and City laws and regulations, including but not limited to, Bend Code Title 3, other provisions or revisions of the Bend Code, and City ordinances, regulations, and standards and specifications, as may be amended from time to time. The locations and methods of installation and maintenance of all of Franchisee's Facilities shall be subject at all times to regulation by the City. All Facilities shall be constructed and maintained as to interfere as little as practicable with traffic and other use of Rights-of-Way. Except as otherwise provided for emergencies

by this Agreement, permits must be obtained prior to installation or construction of Facilities. In the event of an emergency, Franchisee may undertake work immediately to repair a break or restore service without a permit, but must inform the City as soon as reasonably possible and shall apply for a permit, applicable retroactively, within one working day. The City shall excuse a late application if Franchisee has good cause for any delay. All Facilities shall be installed and at all times maintained by Franchisee in accordance with telecommunications industry standards.

#### **Section 4. Franchisee Liability, Indemnification of City and Insurance**

A. Franchisee shall conduct its operations under this Franchise, including installation, construction, maintenance, repair, replacement, upgrade, and operation of its Facilities, in a safe and workmanlike manner so as not to present a danger to the public or City and subject to all lawful governmental regulations.

B. Franchisee shall defend, indemnify, and hold the City, its officers, agents, employees and volunteers harmless against all liability, claims, losses, demands, suits, fees and judgments (collectively known as 'claims') that may be based on, or arise out of damage or injury (including death) to persons or property caused by or resulting from any act or omission sustained in connection with the performance by Franchisee of this Agreement or based upon violation of any statute, ordinance or regulation by Franchisee. This indemnification shall not apply to claims to the extent caused by the sole negligence or willful misconduct of the City, its officers, agents, employees and volunteers. Franchisee agrees that it is not an agent of the City and is not entitled to indemnification and defense under ORS 30.285 and ORS 30.287.

C. Franchisee shall purchase and maintain at Franchisee's expense, commercial general liability and commercial automobile insurance covering bodily injury and property damage in an amount of \$5 million per occurrence and \$10 million in aggregate. The insurance policies obtained by Franchisee shall be primary and non-contributory. Franchisee shall remain fully responsible for any claims resulting from negligence or intentional misconduct of Franchisee or its subcontractors and their officials, agents and employees in performance of this Agreement, even if not covered by, or in excess of insurance limits.

D. Commercial general liability coverage shall name, by certificate and endorsement, the City, its officers, agents, employees and volunteers as additional insureds with respect to Franchisee's work or services conducted under this Agreement.

E. Franchisee shall obtain and maintain workers' compensation insurance as required by ORS Chapter 656 and meeting the minimum requirements therein. Franchisee shall ensure that each of its contractors and subcontractors obtains and maintains workers' compensation insurance and obtains proof of the coverage before performing work.

F. Coverages provided by Franchisee must be underwritten by an insurance company authorized to do business in the state of Oregon and with a Best's rating of A-VII or higher.

G. As evidence of the insurance coverage required by this Agreement, Franchisee shall provide proof of coverage required by acceptable certificate of insurance and endorsement from the carrier(s). The certificate and endorsement shall provide that there will be no cancellation, termination, material change or reduction in limits of the insurance coverage without a minimum 30-day written notice to the City except if such cancellation is due to failure to pay premiums in which case 10 days' prior written notice of cancellation is given to Company. The certificate and endorsement shall also state the deductible or self-insured retention level. This Agreement shall not be in effect until the required certificates and signed endorsements have been received and approved by City. Renewal certificates and endorsements will be sent to City prior to coverage expiration. The City may terminate this Agreement for failure to maintain the required insurance.

H. Franchisee grants a waiver of subrogation to the City, its officers, agents, employees and volunteers for any claims arising out of Franchisee's work or service. Further, Franchisee agrees that in the event of loss due to any of the risks for which it has agreed to provide insurance, recovery shall be solely with its insurance carrier, and also grants to City on behalf of any insurer providing coverage to either Franchisee or City with respect to the work or services of Franchisee a waiver of any right to subrogation which any insurer or subcontractor may acquire against City by virtue of the payment of any loss under the insurance coverage.

#### **Section 5. Performance Bond**

Before commencing any work in any right-of-way administered by the City, Franchisee must provide a performance bond in the amount of \$100,000, or a lesser amount as agreed to in writing by the City as being sufficient to assure proper restoration of any street, sidewalk or other surface disturbed by Franchisee. Franchisee must keep the bond in full force and effect during any activities that disturb the surface of any rights-of-way and for a period of at least one year after restoration of rights-of-way. The bond may be withdrawn one year after restoration of rights-of-way, but must be restored prior to any further action that would disturb any street, sidewalk, or other surface. The bond must be issued by surety authorized to do business in the state of Oregon and with a Best's rating of A- VII or higher.

City may, in the event of any construction which is likely to be substantially greater than \$100,000, or in the event the City's cost to complete or repair the construction upon Franchisee's failure to perform the same would be greater than \$100,000, as reasonably determined by the City, require the amount of the performance bond to be increased. The performance bond is subject to increase each time Franchisee applies for permits to perform work within the City of Bend. Franchisee must provide to City all

necessary documentation demonstrating Franchisee's cost estimation in a format reasonably acceptable to City.

## **Section 6. Construction and Conditions on Right-of-Way Occupancy**

A. Use. Franchisee shall construct, install, maintain and operate its Facilities in the Right-of-Way to industry standards and City's commercially reasonable satisfaction, in compliance with all City ordinances, rules, standards and specifications, policies and regulations; and in a manner so as to cause minimum interference with the proper use of the Right-of-Way for transportation and for other utility purposes and so as to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any Right-of-Way. Except in the case of emergency work described in Section 3, all work in the Right-of-Way will require a permit prior to any work being started and will require a traffic plan that is fully compliant with the City of Bend Design Standards and Specifications. Franchisee may prune all trees and vegetation within the Right-of-way to prevent interference with Franchisee's facilities, consistent with the American National Standard for Tree Care Operation.

B. Construction and Maps. The Franchisee shall at all times keep maps and records showing the locations and sizes of all Facilities and all appurtenant facilities constructed or owned by it within the City and surrounding urban growth boundary as defined in the City's Comprehensive Plan, and such maps and records shall be electronically available to the City at all times. Maps shall be provided in Geographical Information System (GIS) or other digital electronic format used by the City. All maps provided to City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law.

C. Restoration. In case of any disturbance of pavement, sidewalk, driveway or other surfacing by Franchisee, Franchisee shall, at its own cost and expense and in compliance with the City's pavement restoration policy and standards and specifications, promptly replace and restore all paving, sidewalk, driveway, landscaping or surface of any street or alley disturbed. Franchisee warrants all restoration work for a period of one year from completion of the work. If Franchisee fails to make restoration as required by this section or if the restoration fails within the one year warranty period, City may, after notice to Franchisee, cause the repairs to be made at the expense of Franchisee. If Franchisee fails to reimburse the City for any costs incurred under this section within 45 days' of demand for reimbursement, City may refuse to issue additional permits.

D. Notification. Franchisee shall comply with the requirements of Oregon Utility Notification Law and implementing rules and regulations.

E. Relocation. City may require Franchisee to relocate its Facilities. If the removal or relocation of Facilities is caused directly by development of private property or other third-party project, including projects of other public entities, and the removal or

relocation of Facilities occurs within the area to be developed, or is made for the convenience of a third-party, Franchisee may charge the expense of removal or relocation to the developer or other third-party. Franchisee shall be solely responsible for enforcing collection from the developer or other third-party, but Franchisee shall not be required to remove or relocate Facilities for the benefit of third-parties until it receives payment for the removal or relocation. If the removal or relocation of Facilities results from City's need to provide public facilities, is a City project, or is otherwise requested by City and is made for the purpose of improving a street to City standards or other improvement by a public governmental entity for the benefit of the public, Franchisee will remove or relocate its Facilities at Franchisee's expense within a reasonable time after notification by City. Franchisee shall reimburse City for the actual cost incurred as a result of any delays in City projects resulting from Franchisee's failure to relocate their Facilities in an expeditious and timely manner. City will make a reasonable effort to provide Franchisee with an alternate location for its Facilities within the City Right of Way. If the City requires the subsequent relocation of the same facility within five years of the initial relocation, City shall bear the expense of the subsequent relocation.

F. Right-of-Way Vacation. City shall retain public utility easements if it vacates any public Right-of-Way where Franchisee has Facilities. If Franchisee's facilities must be relocated from a vacated public Right-of-Way, the petitioner of the vacation will bear the expense of moving the facilities.

G. Placement of Facilities. Franchisee shall not knowingly place its Facilities where they will interfere with any existing or known future City utility, gas, electric or telephone fixture, power, sanitary sewer, storm sewer or water facility. Franchisee will consult with City Engineer prior to placement of Facilities, and will comply with all City ordinances, policies, rules and regulations in connection with its placement of Facilities. Franchisee shall also comply with all co-location and joint use requirements as set forth in state and local law, including the Bend Development Code and the Bend Standards and Specifications, as may be amended. Franchisee shall offer the City the opportunity to co-locate City conduit and lines in trenches dug by Franchisee in City rights-of-way and shall charge City only any incremental additional costs incurred in making the trenches available for City use.

H. Underground Conversion. Franchisee shall remove and replace overhead Facilities with underground Facilities at the request of the City. Cost responsibility shall be allocated in accordance with all applicable Oregon Administrative Rules and a schedule agreed upon by the City and Franchisee. The City shall require that each customer served from the existing overhead Facilities shall make all facility changes to the customer's premises in accordance with Franchisee's policies and standards necessary to receive service from the underground facilities as soon as they become available.

## **Section 7. Transfer of Franchise**

Franchisee shall not sell, assign, dispose of, lease or transfer in any manner whatsoever any interest in this Agreement or in the Facilities authorized by this Franchise, or any part of the Facilities, without prior written consent of City, which consent shall not be unreasonably withheld. The City may impose reasonable conditions on its approval of any transfer, including but not limited to the requirement that the transferee acknowledge in writing and agree to be bound by the terms of this Agreement. City shall have the right to collect from Franchisee City's actual administrative costs associated with processing a transfer request, including the cost of ascertaining the financial responsibility of the proposed transferee.

## **Section 8. City Rights in Franchise**

A. City Supervision and Inspection. City shall have the right to inspect all construction and installation of Franchisee's Facilities to ensure compliance with governing laws, ordinances, rules and regulations.

B. City Ordinances and Police Power. To the extent not inconsistent with applicable Law, the City may adopt and enforce and Franchisee will be subject to City's generally applicable, non-discriminatory, and competitively neutral local ordinances and regulations as may be determined by the City to be in the interest of public health, safety, welfare, convenience or necessity.

## **Section 9. Franchise Fee**

A. Franchisee shall pay monthly to City the applicable percentage of Franchisee's Gross Revenues received from customers within the City limits of the City as set forth in the Bend Municipal Code Section 3.20, as may be amended from time to time.

B. The fee required by this section shall be due and payable within 30 days after the end of each month. Any payment not made when due shall bear 9% annual interest, compounded monthly, from the date due until paid.

C. With each payment, Franchisee shall furnish City with a written statement in the format as provided in Exhibit A, under oath, executed by an officer of Franchisee, verifying the amount of gross revenues of Franchisee within City for the monthly period covered by payment.

D. Franchisee shall submit the payment and written statement of revenues required by this Section electronically via the City's then-operational online permit center and payment portal, or in another format as may be reasonably requested by the City.

E. City's acceptance of any payments due under this section shall not be considered a waiver by City of any breach of this franchise.



F. City will provide notice of any annexation of territory, including a map of the annexed territory, a legal description of the boundary change, each site address to be annexed as recorded on county assessment and tax rolls and a copy of the annexation ordinance within 10 days of the annexation. Franchisee's obligation to pay franchise fees on revenue generated by service to the annexed property shall begin 10 days after notice is actually provided.

G. The parties agree to meet and confer in good faith on a semi-annual basis to discuss proposals for partnering to provide Franchisee's low income customers with financial assistance using proceeds from the franchise fees or other funding mechanisms.

### **Section 10. Franchisee Records and Reports**

Franchisee shall keep accurate books of financial accounts at an office within the State of Oregon throughout the term of this Franchise and for six years after the expiration or termination of this Agreement. Franchisee shall produce all books and records directly concerning its gross revenues and other financial information deemed necessary by City for purposes of calculation of the franchise fee for inspection by City, upon 10 days' written notice, during normal working hours. City may require periodic reports from Franchisee relating to its operation within City. City shall have the right during the term of this Franchise or within 180 days after expiration or termination of the Agreement to audit Franchisee's records for the period of three years prior to the audit. If the audit reveals underpayment of 5% or more, the City may expand the audit to cover up to 6 years. The audits shall be undertaken by a qualified person or entity selected by City. The cost of the audit shall be borne by City, unless the results of the audit reveal an underpayment of more than 5% of the franchise fee for the period audited. In the case of underpayment of 5% or more, the full cost of the audit shall be paid by Franchisee. Franchisee shall immediately pay the amount of the underpayment as determined by the audit to City together with 9% annual interest from the date the payment should have been made to the date the payment is actually made. Any audit information obtained by City under these provisions shall be kept confidential to the maximum extent allowed by Oregon law, except that this obligation shall not prevent the City from introducing audit results in any forum where enforcement of the provisions of this Franchise is at issue.

### **Section 11. Permit and Inspection Fees**

Nothing in this Agreement shall be construed to limit the right of City to require Franchisee to pay permit fees or 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 Franchisee or its Facilities.

### **Section 12. Enforcement and Termination of Franchise**

A. Time of payment and performance are of the essence in the Agreement The following shall be events of default:

1. Default in Payments. The failure of Franchisee to pay City when due any amounts required by this Agreement and the failure continues for 10 days after the due date and written notice from the City.

2. Default in Other Provisions. Franchisee's failure to cure a default of any other provision of this Agreement within 30 days after notice from City of the default. If the default is curable but cannot reasonably be cured within 30 days, the City shall refrain from termination while Franchisee is diligently attempting to cure the default.

B. Termination for Defaults Not Cured. The City may terminate this Agreement for defaults that are not cured within the time allowed by Subsection A of this section by providing a notice of termination to Franchisee. Franchisee may challenge the notice of termination by providing a written protest to the City Manager within 10 business days of the date of the notice of termination. The City Manager, on receipt of the protest, shall either grant the protest, in which case the Agreement will remain in place, or refer the matter to the City Council for a decision. The termination will not become final until after the decision by the City Manager or City Council.

C. The Parties may terminate or amend any provision of this Agreement by mutual, signed agreement.

D. Termination or Abandonment of Franchise. Upon any termination of this Franchise, if City and Franchisee are not engaged in efforts to renew or renegotiate this Agreement all Facilities installed or used by Franchisee shall be removed by Franchisee at Franchisee's expense or abandoned in place with approval of City and the property on which the Facilities were used restored by Franchisee to the condition it was in before installation.

E. Except as otherwise provided in subsection F of this section, if all Facilities are not removed within one year after the termination or expiration of this Agreement or such further time as may be granted by City, the Facilities shall be considered forfeited and escheat to City.

F. City may notify Franchisee that it waives forfeiture and escheat under subsection E of this section and may cause the Facilities to be removed from the Rights-of-Way and may recover from Franchisee the cost of such removal and restoration of the rights-of-way following removal.

G. The Parties may agree to terminate this Agreement and replace it with a franchise or other agreement that covers all Franchisee Facilities in Rights-of-Way throughout the city. Such termination shall be made in writing, signed by both Parties.

### **Section 13. Remedies not Exclusive; Waiver**

All remedies granted the City under this Agreement are cumulative, and recovery or enforcement of one is not a bar to the recovery or enforcement of any other remedy. Remedies contained in this Agreement are not exclusive and City reserves the right to enforce penal provisions of any ordinance and also use any remedy available to City at law or in equity. Failure to enforce any provision of this Agreement shall not be construed as a waiver of a breach of any other term, condition or obligation of this Agreement.

### **Section 14. Franchise Term**

This Franchise is granted for a term of five (5) years beginning on the date on which the ordinance authorizing this Agreement is effective. The Agreement shall be extended for one five-year term if neither party provides written notice of non-renewal to the other party at least six months prior to the expiration of the initial term. In the event of any conflict between the terms of this Franchise and future City ordinance setting forth terms and conditions of general applicability to franchises, the terms and conditions of this Franchise shall govern; provided that City and Franchisee may amend this Franchise by any written agreement that is adopted by City and accepted in writing by Franchisee.

### **Section 15. Severability**

If any section, subsection, sentence, clause or portion of this Agreement is for any reason held invalid or rendered unconstitutional by any court of competent jurisdiction, that portion shall be deemed a separate, distinct, independent and severable provision and the holding shall not affect the validity or constitutionality of the remaining portion of this Agreement. If for any reason, the franchise fee is invalidated by any court or governmental agency, then the highest permissible franchise fee allowed shall be the franchise fee charged by this Agreement.

### **Section 16. Notices**

Any notice required or permitted under this Agreement shall be deemed given when received or when deposited with postage prepaid in the United States Mail as registered or certified mail addressed as follows:

TO CITY:                      City Manager  
                                    City of Bend  
                                    710 NW Wall Street  
                                    Bend, OR 97701

TO FRANCHISEE:          LS Networks  
                                    Attn: Contract Management  
                                    Leslie Boro  
                                    lboro@lsnetworks.net  
                                    921 SW Washington Street, Suite 310  
                                    Portland, OR 97205

or to other address specified by either party in writing.

**Section 17. Interpretation/Jurisdiction**

Interpretation of the Agreement shall be governed by laws of the State of Oregon and any legal action relating to this Agreement shall be brought in Deschutes County Circuit Court.

**Section 18. Entire Agreement**

This Agreement constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon execution and acceptance hereof.

CITY OF BEND

\_\_\_\_\_  
Eric King, City Manager

Date:

FRANCHISEE

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## EXHIBIT A

### Reporting form for Percentage Franchise Fees (If Applicable)

Company: \_\_\_\_\_

Reporting Period: \_\_\_\_\_

Description	Revenue and Fee Calculation
Gross revenues	\$ _____
Less: Revenues exempt from franchise fees	
Other adjustments to gross revenues	
Net revenues subject to franchise fees	\$ _____
Franchise fee	7%
Franchise fee remitted to City of Bend Finance Department PO Box 1024 Bend, OR 97709	\$ _____

### Certification by Officer or Authorized Representative:

I declare under the penalties for perjury that the information provided herein is true, complete and accurate to the best of my knowledge and belief.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_