

**ORDINANCE NO. 2018-05-1025**

**AN ORDINANCE OF THE CITY OF WHITE SALMON, WASHINGTON, GRANTING LIGHTSPEED NETWORKS, INC. DBA LS NETWORKS, AN OREGON CORPORATION, A NON- EXCLUSIVE FRANCHISE FOR TEN YEARS, TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR A FIBER OPTIC TELECOMMUNICATIONS SYSTEM, IN, ALONG, UNDER, THROUGH AND BELOW PUBLIC RIGHTS-OF-WAY OF THE CITY OF WHITE SALMON, WASHINGTON**

WHEREAS, LightSpeed Networks, Inc. dba LS Networks, an Oregon Corporation (“LS Networks”) has requested a non-exclusive franchise with the City of White Salmon (“City”) for a period of ten years for the operation of a fiber optic telecommunications system within the City Right-of- Way; and

WHEREAS, RCW 35A.11.020 grants the City broad authority to regulate the use of the public Right-of-Way; and

WHEREAS, RCW 35A.47.040 grants the City broad authority to grant non-exclusive franchises; and

WHEREAS, LS Networks wishes to construct, operate and maintain a fiber optic telecommunications system within the City Right-of-Way; and

WHEREAS, the City Council finds that it is in the best interests of the health, safety and welfare of residents of the White Salmon community to enter into a non-exclusive franchise to LS Networks for the operation of a fiber optic telecommunications system within the City Right-of-Way.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF WHITE SALMON, WASHINGTON, DO ORDAIN AS FOLLOWS:**

**Section I**

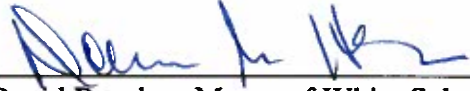
**Grant of Franchise**

The Franchise as set forth in the Franchise Agreement attached hereto as Exhibit “A” is hereby granted according to its terms.

**Section II**

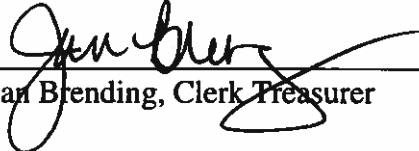
This ordinance shall take effect five (5) days after its publication according to law.

**PASSED** by the Council for the City of White Salmon at a regular meeting this 2nd day of May 2018.



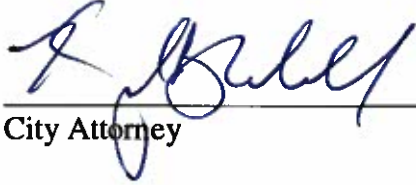
\_\_\_\_\_  
David Poucher, Mayor of White Salmon

**ATTEST:**



\_\_\_\_\_  
Jan Brending, Clerk Treasurer

**APPROVED AS TO FORM:**



\_\_\_\_\_  
City Attorney

## **EXHIBIT "A"**

### **FRANCHISE AGREEMENT**

This agreement is entered into effective May 2, 2018 between LightSpeed Networks, Inc. dba LS Networks, an Oregon Corporation provides Telecommunications services ("Franchisee") and the City of WHITE SALMON, Washington ("City").

#### **RECITALS**

**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 WHITE SALMON "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:

#### **AGREEMENT**

**NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:**

##### **Section 1: Definitions.**

**Gross Revenues:** Any and all revenue, of any kind, nature, or form derived from telecommunications services, without deduction for expense in the City of WHITE SALMON and is further defined in Section 11. 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, except that if at any time Franchisee provides cable television services Franchisee will provide the City not fewer than sixty days' prior written notice and comply with all requirements of WSMC Ch. 5.08.

**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, subject to requirements imposed by WSMC Ch. 12.02 relating to use of City rights of way.

**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 ten (10) years, commencing with the effective date of this Agreement. Thereafter, this Franchise shall continue in full force and effect for an additional ten (10) 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: Construction, Maintenance and Repair of Infrastructure.**

(a) Subject to any requirements or costs set forth in WSMC Ch. 12.02, Franchisee may make all needful excavations in any Right-of-Way for the purpose of placing, erecting, laying, maintaining or repairing Franchisee's infrastructure, and shall repair, renew and replace the same as reasonably possible to the condition that existed prior to such excavation. Franchisee shall obtain all necessary permits for such excavation and construction, and pay all applicable fees. Such work shall be done only in accordance with plans or designs submitted to, and approved by, the City, such plans (1) to be evaluated by the standards applied to the construction of other similar Telecommunications systems in the City, and (2) maintained by the City as confidential and exempt from public disclosure to the maximum extent allowed by law. Such work shall be performed in a good and workmanlike manner and in compliance with all rules, regulations, or ordinances which may, during the term of this Franchise, be adopted from time to time by the City, or any other authority having jurisdiction over Rights-of-Way. Prior to commencing excavation or construction, Franchisee shall give appropriate notice to other franchisees, licensees or permittees of the City owning or maintaining facilities which may be affected by the proposed excavation or construction.

(b) In the event emergency repairs are necessary for Franchisee's facilities, Franchisee may immediately initiate such emergency repairs. Franchisee shall give notice to the City's Department of Public Works by telephone, electronic data transmittal or other appropriate means as soon as is practicable after commencement of work performed under emergency conditions. Franchisee shall make such repairs in compliance with applicable ordinances and regulations, and shall apply for any necessary permits no later than the business day next following the discovery of the need for such repairs.

(c) Franchisee shall construct and maintain its Telecommunications system in such a manner so as to not interfere with City sewer or water systems, or other City facilities.

**Section 8: 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 cancellation provision requiring written notice stating should any of the below 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, 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) **Workers' compensation insurance for all subject workers; and**

(2) **General liability insurance with a combined single limit, or the equivalent, of not less than \$1,000,000 for each person, and \$1,000,000, for each occurrence of bodily injury and \$1,000,000 for property damage, which coverages shall include contractual liability coverage for the indemnity provided under this contract, and naming the City, its officials, officers, employees and agents as additional insureds with respect to Franchisee's activities pursuant to this Franchise.**

**Section 9: 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 10: 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.

The Franchisee further agrees, and has specifically negotiated, to waive its immunity under the State Industrial Insurance Act (RCW Title 51) to indemnify and hold the City harmless from any claims made against the City by the Franchisee's employees, agents, contractors, subcontractors or other representatives.

**Section 11: 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 five percent (5%) 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) Except for those charges required for right-of-way degradation recovery provided in WSMC Ch. 12.02, 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. In the event any required payment remains unpaid after its due date, the payment shall bear a five percent (5%) late charge. In the event the City is required to employ an attorney to collect any unpaid taxes, fees or charges, the City shall be entitled to its reasonable attorney fees at trial and on appeal.

**Section 12: 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 Agreement.

**Section 13: 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 within city limits in either .KMZ or .JPEG form; 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 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 agrees that information provided pursuant to this section is confidential and will take reasonable measures to protect such information from disclosure to third parties where allowed by Washington law. In the event of any third-party disclosure of Franchisee's confidential information, whether inadvertent or pursuant to a public records request, the City shall immediately notify Franchisee of such disclosure and take all reasonable measures to circumvent further dissemination of then confidential information. The parties state that the books and records of Franchisee are not owned, used or retained by Grantor or its representatives, except as to those records in the physical custody of the City and not exempt under RCW 42.56270(a) of (b), and are therefore not Public Records as defined in RCW 42.56.010(3), or otherwise subject to the Washington State Open Public Records Act, RCW Ch. 42.56.

**Section 14: Right to Perform Franchise Fee Audit or Review; Default.** In addition to all rights granted under Section 13, 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 three years after the date on which Franchise Fees for any period being audited or reviewed were due. The cost of any such audit or review shall be borne



by the City, provided, however, if any funds were found to be withheld or improperly reported contrary to the requirements of this agreement, the Franchisee shall reimburse the City for such audit costs up to \$500. 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.

**Section 15: 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 16: Limited Waiver of Sovereign Immunity; Venue.** (a) The City may have sovereign or other immunities which might prevent or impair enforcement or enjoyment of the terms of this Franchise. Without making a general waiver, limitation or modification of such sovereign or other immunity, the City hereby expressly grants, in favor of Franchisee, a limited, non-assignable waiver of its immunities for claims arising under this Franchise, it being the intent of the parties that the waivers herein provided shall result in the terms and conditions of this franchise being enforced in a competitively neutral manner.

(b) Venue for any proceeding brought to enforce any term or condition of this Franchise shall be the local Superior 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 the Eastern District of Washington in Yakima, Washington, with the parties stipulating to trial in Yakima, Washington.

**Section 17: 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 18: 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 Washington anti-trust law, RCW 19.86.010 – 19.86.120. 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 19: 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:

Department: Public Works  
Name: Patrick Munyan, Jr.  
Address: 100 N Main St PO Box 2139  
White Salmon, WA 98672  
Phone: 509-493-1133  
Email: patm@ci.white-salmon.wa.us

Contracts Management  
LS Networks  
921 SW Washington St., STE 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 20: 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 21: 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 22: 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.

[Signatures appear on next page]

Signed by duly authorized representatives of the parties effective the date first above written.

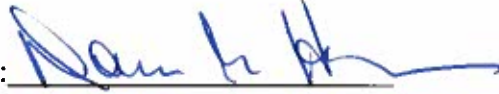
LightSpeed Networks, Inc. dba LS  
Networks, an Oregon Corporation

By 

Michael Weidman  
Title President and CEO

Date: 5/30/2018

CITY OF WHITE SALMON

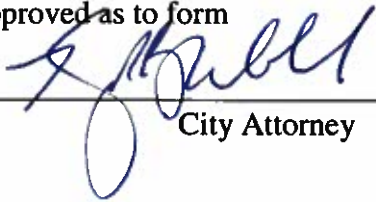
By: 

Mayor

Date: 5-2-2018

Approved by Council: May 2, 2018

Approved as to form

  
\_\_\_\_\_  
City Attorney