

## Chapter 3.22

### GRANTING A 5- YEAR FRANCHISE TO LIGHTSPEED NETWORKS, INC., DBA LS NETWORKS

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#### 3.22.000 Purpose

Lightspeed Networks, Inc., dba LS Networks, an Oregon Corporation, provides Telecommunications services within the City of Port Orford, Oregon; and Franchisee has applied for a five year Telecommunications Franchise pursuant to local ordinances relating to Telecommunications located in the public

rights of way, and the City of Port Orford "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 within this Ordinance

#### 3.22.010 Definitions.

**Gross Revenues:** Any and all compensation, of any kind, nature, or form (grant, subsidy, received directly or indirectly by Grantee for any Communications Services (as defined in this section) provided within the franchise areas or in any way connected with the operation of Grantee's facilities, including but not limited to: revenues from customers; any fees related to Grantee's Communications Services; use, access, or attachment charges paid to the Grantee by other communications services or carriers; and revenue from the sale or lease of and Grantee Facilities, including wire, cable, facility, pole, duct, conduit or similar transmission equipment. All such revenues remain subject to applicable FCC rules and regulations, which exclude revenues from internet access services while prohibited by law. Gross Revenues do not include any taxes or services furnished by Grantee imposed directly on subscribers by any city, state or other governmental unit and collected by Grantee for such governmental unit. Gross Revenues shall also not include uncollectible accounts or any taxes, fees, or assessments imposed or assessed by any governmental authority.

#### **Communication Services:**

##### **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.

**Telecommunication 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.

**3.22.020 Grant of Franchise.**

There is hereby granted by the City of Port Orford, hereinafter referred to as "City", to LightSpeed Networks, Inc. hereinafter referred to as "LS Networks", an Oregon corporation authorized to conduct business in Oregon, their successor and assigns, hereinafter each referred to as "Franchisee", the nonexclusive right and privilege to conduct business as a telecommunications carrier as that term is defined in ORS 133.721(8) within the City and to place, erect, lay, maintain and operate in, upon, over and under streets, alleys, avenues, thoroughfares and public highways, places and grounds within the City, poles, wires and other appliance and conductors for all telephone, telegraph and other communication purposes. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of the Franchisee, its successors or assigns, may be laid underground, and such other apparatus may be used as may be necessary to properly operate and maintain the same. Notwithstanding the foregoing, the City Council or their designee shall have the authority or prescribe which public ways will be used and the location of the communications facilities within the public

ways as may be necessary to minimize public inconvenience.

**3.22.030 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.

**3.22.040 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.

**3.22.050 No Limitation of City Authority.**

1. 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.

2. 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.

3. Except as otherwise provided by law, 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.

4. In addition to the reservations contained in this Franchise and existing applicable ordinances, adopt such additional generally applicable regulation for the construction, maintenance, and operation of the Grantee's Facilities as the City find necessary in the exercise of its police powers or for the orderly development of the City (including but not limited to: zoning, land use, historic preservation ordinances, standard specifications, design standards and drawings, other safety or construction standards, and other applicable requirements, or for the protected of City Facilities.

### **3.22.060 Construction, Maintenance and Repair of Infrastructure**

1. It shall be lawful for Franchisee to make all needful excavations in any of such streets, alleys, avenues, thoroughfares and public highways, places and grounds in

the City for the purpose of placing, erecting, laying and maintaining poles, or other supports or conduits for said wires and appliances and auxiliary apparatuses or repairing, renewing, or replacing the same. Said work shall be done in compliance with state and federal laws as well as local rules, regulations, ordinances and orders, which may during the continuance of this franchise be adopted from to time by the City. Franchisee shall obtain from the City all applicable permits, which will require plan submittal, approval, and the payment of fees before work begins. The Franchisee shall file with the City maps showing the location of any constructions, extension, or relocation or any of the facilities of the Franchisee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All transmission and distribution structures, lines and equipment erected by the Franchisee within the City shall be so located as to cause minimum interference with the rights or reasonable convenience of property owners who adjoin any of the streets, bridges, or other public ways or places. Franchisee shall, protect, support, temporarily disconnect or relocate any of its equipment as required to do so by the City by reason of traffic conditions or public safety in a timely manner in order to protect the public. Franchisee shall protect, support, temporarily disconnect or relocate any of its equipment as required to do so by the City by reason of street vacation, highway and street construction, change or establishment of street grade, installation of sewers, drains, water pipes, power lines, signal lines, and tracks, or any other type of structures or improvements by the City. This work shall be completed within 120 days of notice from the City. When any excavation is made by the Franchisee, the Franchisee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same conditions in which it was prior to the excavation. The

restoration shall be done in compliance with City specifications, requirements, and regulations in effect at the time of such restoration. If the Franchisee fails to restore promptly the affected portion of the street, bridge, or public place to the same condition in which it was prior to the excavation, the City may make the restoration; and the reasonable costs of making the restoration, including the cost of inspection, supervision, and administration shall be paid by the Franchisee.

2. 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.

3. The City reserves the right to construct, install, maintain, and operate any public improvement, work or facility, to do any work that the City may find desirable on, over, or under any street, bridge or public place, and to vacate, alter or close any street, bridge or public place. Nothing in this chapter shall be construed in any way to prevent the proper authorities of the City from sewerage (sanitary and storm), providing water service, grading, planking, rocking, paving, repairing, altering, or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the City in or upon which the poles, wires or other conductors of Franchisee shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes, or other

apparatus, and the moving of company facilities, where required due to such work by the City, will be done by Franchisee within 120 days of notice by the City without cost to the City. The Franchisee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its structures in the area involved in such proposed work. Any such work done for or at the request of a private individual, entity, developer or development shall be done at the expense of such private individual, entity, developer or development. 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.

### **3.22.070 Abandonment.**

If the Franchisee goes out of business or withdraws service from the area and as a consequence refuses to renew the agreement, all rights to the use of the connection media revert to the City who may sell, lease or otherwise use the connection media at its sole discretion. The connection media shall be left in working order and not be intentionally cut or destroyed. The City may require the media be removed from all posts and underground conduits by the former Franchisee at its own expense.

### **3.22.080 Insurance.**

1. **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.

2. **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.

**3. 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.

**4. Insurance Required.** During the term of this contract, Franchisee shall maintain in force, at its own expense, the following insurance:

(A) Workers' compensation insurance for all subject workers; and

(B) General liability insurance with a combined single limit, or the equivalent, of not less than \$500,000 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 insured's with respect to Franchisee's activities pursuant to this Franchise.

### **3.22.090 Transfers and Change in Control.**

**1. 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.

**2.** 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.

**3.** 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.

**4.** 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.

**5.** 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.

**3.22.100 Indemnification.**

1. The Franchisee shall defend, indemnify, and hold harmless the City, its agents, officers and employees from any and all claims demands, and damages of any kind, including attorney's fees which may arise, from any negligent act or omissions of the Franchisee, its agents, officers or employees, in connection with the Franchisee's operations pursuant to this franchise.

2. In any situation in which the City is found legally liable to Grantee for damage to Grantee's facilities, City's liability shall be limited to the cost of repair or replacement of the damaged facilities, whichever is less. City shall not be liable to Grantee for lost revenue, lost profits, incidental or consequential damages or claims of third parties arising from damage to Grantee's facilities. Grantee covenants that it will not assert any claim against the City for any liability, loss, or damage excluded under Section 8.

**3.22.110 Compensation.**

1. **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 Franchisee 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.

2. **Modification Resulting from Action by Law.** Notwithstanding any provision to the contrary, at any time during the time of this Franchise, City may elect to increase the Franchise fee amount as may then be allowed by State Law. City shall provide Grantee written notice of such increase following the adoption of the change in percentage by City. The increase shall be effective thirty (30) days after City has provided Grantee with such notice.

3. **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.

4. The payment of the Franchise fee shall be in addition to, not in lieu of, any local business license tax, or other taxes and permit fees not within the scope of this Franchise agreement. Grantee shall pay all generally applicable permit or licensing fees for the construction, maintenance, or inspection of street openings or any other Grantee work on its Facilities. Grantee shall not deduct charges and penalties imposed by the City for noncompliance with charter provisions, ordinances, resolutions or permit conditions from the Franchise fee payments required by this section. 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.

5. If at any time, Grantee installs infrastructure on a route consistent with serving City Hall and/or the Visitor Center, Grantee will install at no charge to City, two (2) connections to City Hall and one (1) connection to the Visitor's Center.

6. In the event that Grantee wishes to add cable services or any other services not listed in this agreement to its list of services, Grantee agrees that it must negotiate an additional agreement with the City, setting forth the terms and conditions governing such services.

7. Other than any fees payable due to additional services offered or provided by Grantee in 6. above, or the generally applicable permit and licensing fees, Grantee shall not be required to pay any additional fee, compensation or consideration to the City for its use of the Right-of-way. However, Grantee shall pay any ad valorem property taxes now or hereafter levied against real or personal property within the City.

**3.22.120 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.

**3.22.130 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 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.

**3.22.140 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 3 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. 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.

**3.22.150 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.

**3.22.160 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 Eugene, Oregon, with the parties stipulating to trial in Eugene , Oregon.

**3.22.170 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.

**3.22.180 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.

**3.22.190 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:

Name: City of Port Orford, ATTN: Mike Murphy	Name: Contracts Administration
Title: City Manager	Title: LS Networks
Address: P.O. Box 310	Address: 921 SW Oregon St., STE 370
Port Orford, OR 97465	Portland, OR 97205
Phone: (541) 332-3681	Phone: (503) 294-5300
Facsimile: (541) 332-3830	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.

**3.22.200 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.



**3.22.210 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.

**3.22.220 Waiver.**

1. 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.

2. 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.