

ORDINANCE NO. 2072

An Ordinance Granting Lightspeed Networks, Inc., a 10-year Non-Exclusive Franchise to Use, Erect and Maintain its Facilities in the City's Public Rights-of-Way (Franchise Agreement – Lightspeed Networks, Inc., an Oregon corporation)

WHEREAS, Lightspeed Networks, Inc., dba "LS Networks" hereinafter referred to as "Franchisee" or "Grantee," is a telecommunications carrier that erects and maintains infrastructure within the public right-of-way that supports telecommunication services including telephone, internet and related telecommunication services to the citizens of the City of Hood River (the "City") and other surrounding areas; and

WHEREAS, Franchisee proposes to erect and maintain physical structures within the City's public rights-of-way, which requires the installation, operation and maintenance of poles or attachments and extensions to existing poles and other related facilities located within the City's rights-of-ways;

WHEREAS, Franchisee seeks permission to use the public rights-of-way in accordance with the Hood River Municipal Code (HRMC) Chapter 13.36 (Excavation in City Rights-of-Way;

WHEREAS, the City Council may enter into a written franchise agreement to clarify, expand, waive or vary the provisions of HRMC Chapter 13.36 if the Council determines that the public interest warrants;

WHEREAS, the City and Franchisee desire to clarify their respective rights and obligations with respect to erection, maintenance and subsequent relocation or removal of Franchisee's facilities; and

WHEREAS, the public interest warrants that the City and Franchisee enter into this franchise agreement;

NOW, THEREFORE, based on the foregoing recitals, the City Council for the City of Hood River, Oregon Ordains as follows:

SECTION 1. Definitions. The following definitions shall apply to the interpretation of this Franchise Agreement:

- A. "Facilities" means the conduits, fiber/coaxial cables, wireless equipment, appliances, wood or steel poles, vaults, conduits, fixtures, underground lines, antenna, antenna equipment, including other technical facilities or buildings necessary for the purpose of providing fiber-based voice, video and data services as further defined below.
- B. "Gross Revenues" means any and all revenue derived from telecommunications services, of any kind, nature, or form, without deduction for expense in the City of Hood River and as further defined in Section 13. All such revenue remains subject to applicable FCC rules and regulations which exclude revenues from internet access services while prohibited by law.

- C. "Rights-of-Way" mean 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.
- D. "Telecommunications" means 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.
- E. "Telecommunications Network" means infrastructure owned by Grantee 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.
- G. "Telecommunications Service" means the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities' uses.

SECTION 2. Grant of Franchise.

- A. Pursuant to HRMC Chapter 13.36, the City of Hood River ("City") hereby grants to Franchisee, an Oregon domestic business corporation and its successors and assigns (collectively and individually "Grantee") the non-exclusive right and privilege 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 facilities or telecommunication-based facilities as defined in Section 1 for the purpose of providing intrastate, interexchange, switched telecommunications services (toll) and non-switched, private line service (i.e., dedicated transmission service) statewide in Oregon, including access to the Internet.
- B. The scope of this Franchise allows the installation, maintenance and repair of facilities or telecommunication-based service facilities installed by Grantee in the City's rights-of-way to provide the telecommunication services described above. During the term of this Franchise Agreement, the City Engineer may authorize Franchisee to construct additional facilities, subject to all of the terms and conditions of this Franchise Agreement, including submission for all necessary right-of-way work permits and City engineering review, and payment of compensation under Section 13 for the additional facilities.
- C. The City must process all of Grantee's applications to install facilities on a nondiscriminatory basis and may deny an application subject to this Franchise Agreement if the proposed facility: (1) Materially and demonstrably interferes with the safe operation of traffic control equipment; (2) Materially and demonstrably interferes with sight lines or clear zones for transportation or pedestrians; (3) Materially fails to comply with the Americans with Disabilities Act or similar federal, state, or local laws, standards and regulations regarding pedestrian access or movement; (4) Fails to comply with applicable codes, standards and regulations, including the City's Engineering Standards; or (5) Fails to comply with the provisions in HRMC Chapter 13.36.

SECTION 3. Initial Term of Franchise and Renewal.

- A. Initial Term. The franchise granted pursuant to this Agreement shall be in effect for a term of 10 years, beginning on the effective date of this Agreement.
- B. Renewal. At the conclusion of the initial 10-year term, this Franchise shall automatically renew for two successive 5-year renewal terms, unless either party provides notice to the other party at least 120 days prior to the expiration of a term of the party's decision to not renew. In that case, the Franchise will not renew but will expire at the conclusion of the term in which notice was provided. If the Franchise is not renewed, Grantee shall have 120 days after the conclusion of the term to remove its facilities from the public rights-of-way; after which, the City may remove without further notice.

SECTION 4. Franchise Territory. The specific rights-of-way or specific geographic area of the City to be served by Grantee, and the public rights-of-way necessary to serve such areas are the entire city. Upon the annexation of any territory to the City, the rights granted herein shall extend to the annexed territory to the extent the City has such authority. All Facilities owned, maintained, or operated by Grantee located within any public Rights-of-Ways of the annexed territory shall be subject to all of the terms of this Ordinance.

SECTION 5. Excavations, Construction, Relocation of Facilities.

- A. Subject to compliance with all requirements of HRMC Chapter 13.36 (Excavation in City Rights-of-Way) and the City's Engineering Standards, Grantee may make all needful excavations in any street, alley, avenue, thoroughfare, public utility easement and public highway, in the City where excavation has been authorized for the purpose of placing facilities or telecommunication-based service facilities, or repairing, renewing or replacing the same. A "Public utility easement" means the space in, upon, above, along, across, over, or under an easement for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of utility facilities. A "Public utility easement" does not include an easement solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of City facilities, or where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the City. The authority granted in this section shall apply 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 or telecommunication-based service facilities. Any such work shall be done in compliance with HRMC Chapter 13.36, and all other applicable local, state and federal laws, rules, regulations, ordinances and orders, as may be amended from time to time by the City or other regulatory authority.
- B. Grantee shall obtain from the City all applicable permits for work within the right-of-way, which will require plan submittal, approval, and the payment of fees before work begins. Grantee shall file with the City maps showing the location of any construction, extension, or relocation or any of the facilities or telecommunication-based service facilities of the Grantee and shall obtain the City's approval of the location and plans prior to the commencement of the work. All Facilities installed by Grantee within the City shall be so located as to cause minimum interference with the proper use of streets, bridges, and other public ways and places, and 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.
- C. Unless approved by the City, Grantee shall not excavate or disturb any newly overlaid street or newly constructed street for a period of 10 years from the time of completion of

the street overlay or the street constructed. In the event that moling, boring, or shoulder work are not feasible to repair a system failure or construct system improvements, at Grantee request, the City will consider approval of a street cut prior to the 10-year moratorium described herein.

- D. When any excavation is made by Grantee, Grantee shall promptly restore the affected portion of the street, bridge, easement area, or public place to the reasonably same or better condition 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 Grantee fails to restore promptly the affected portion of the street, bridge, easement area, 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 Grantee.
- E. The City reserves the right to require Grantee to relocate its Facilities within the right-of-way in the interest of public convenience, necessity, health, safety or welfare at no cost to the City and in accordance with HRMC Chapter 13.36. The City shall provide Grantee 90-days' written notice of the requirement to relocate its Facilities, after which Grantee shall promptly commence the relocation of its Facilities at no cost to the City. Before requiring a relocation of Facilities, the City shall, with the assistance of Grantee make a reasonable effort to identify a reasonable location for the relocated facilities within the Public Ways of the City. If the removal or relocation of Facilities is necessitated as a direct result of a private development, Grantee may charge the expense of removal or relocation to the developer. Grantee shall be solely responsible for enforcing collection from the developer.
- F. Grantee shall not be obligated to pay the cost of any relocation that is required or made a condition of a private development. If the removal or relocation of facilities is caused directly or otherwise by an identifiable development of property in the area, or is made for the convenience of a customer, Grantee may charge the expense of removal or relocation to the developer or customer. The City agrees that it shall reasonably cooperate with Grantee's efforts to collect reimbursement from such developers or customers as described in this Section.
- G. Grantee shall provide the City with an accurate map or maps certifying the location of all of its Facilities in the City. The first of such maps shall be provided within 30 days after completion of facility installation in public rights-of-way. Grantee shall provide updated maps thereafter upon reasonable request by the City.

SECTION 4. Construction and Performance Bond. Prior to the commencement of any construction work in the public right-of-way, Grantee shall file both a construction and performance bond in an amount approved by the City in favor of the City and any other person who may suffer damages as a result of the breach of any duty by Grantee assured by such bond. Such bond as contemplated herein shall be in a form approved by the City and shall, among other matters, cover the cost of removal of any property of Grantee. In no event shall the amount of said bond be construed to limit the liability of the Grantee for damages. The City, at its sole option, may waive this requirement, or permit the consolidation of the construction bond with the performance bond.

SECTION 5. Improvements – Utility Obstruction Prohibited. 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 Section shall be construed in any way to prevent the proper authorities of the City from installing sanitary sewer or storm sewer facilities, 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 Grantee's Facilities 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 Facilities, and the moving of Grantee's Facilities, where required due to such work by the City, will be done by Grantee within 120 days of notice by the City without cost to the City. Grantee shall furnish maps or drawings to the City or contractor, as the case may be, showing the approximate location of all its conduits or fiber optic cable in the area involved in such proposed work.

SECTION 6. Maintenance of Facilities and Removal when No Longer in Use. Grantee shall maintain in good and functioning condition all of its Facilities at all times, including any light poles or similar fixtures that provide service beyond Grantee's business needs. In the event any of Grantee's facilities need repair or replacement, the City may give written notice of what is needed, and Grantee shall have no more than 30 calendar days to affect the repair or replacement, including light bulb replacement. Grantee shall remove all/any of its Facilities from the public right-of-way within 90 days of its no longer being used. If Grantee fails to so remove its Facilities, the City may provide written notice to do so, in which case Grantee shall remove the Facility within 90 calendar days of the City's notice.

SECTION 7. Emergency Removal and Alternate Routing of Facilities. If, at any time, in case of fire, disaster, or other threat to public safety in the franchise territory, it becomes necessary in the reasonable judgment of the City to cut or move any of Grantee's Facilities, such cutting or moving may be done. Any repairs rendered necessary thereby shall be made by Grantee, at its sole expense, provided that such repairs are not necessitated by a negligent act of the City, in which case costs for repairs shall be borne by the City. The City shall notify the Grantee of any action under this section immediately by phone call to its 24/7 Network Operations Center (NOC) at (866) 366-2638.

SECTION 8. Right to Inspect Records. In order to manage the Grantee'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 Grantee's Telecommunications System; the amount collected by the Franchisee from users of Telecommunications Service provided by Grantee 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 Grantee 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 Grantee's Fee payments. The City further agrees to protect such information from disclosure to third parties to the extent allowed by Oregon law.

SECTION 9. Right to Perform Franchise Fee Audit or Review; Default. In addition to all rights granted under Section 8, the City shall have the right to have performed, a formal audit or a professional review of the Grantee's books and records by an independent private auditor, for

the sole purpose of determining Grantee's Gross Receipts generated through the provision of Telecommunications Services under this Franchise and the accuracy of amounts paid as Franchise Fees to the City by the Grantee. The cost of any such audit or review shall be borne by the Grantee. The City agrees to protect from disclosure to third parties, to the maximum extent allowed by State law, any information obtained as a result of its rights pursuant to this Section, or any compilation or other derivative works created using information obtained pursuant to the exercise of its rights hereunder.

SECTION 10. 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 11. Compliance with Laws, Rules and Regulations. At all times during the term of this franchise, Grantee shall comply with all applicable laws, ordinances, rules and regulations of the United States of America, the State of Oregon, and the City of Hood River, including all agencies and subdivisions thereof. Grantee shall be subject to the lawful exercise of the police power of the City of Hood River and to such reasonable regulations of general applicability as the City may from time to time hereafter, by resolution or ordinance, provide insofar as such regulations or ordinances do not materially alter or impair the express provisions of this Franchise. No provision of this Franchise shall be construed as a waiver of local, state or federal law, or as a limit of liability. Grantee shall at all times keep and maintain all of its Facilities in a good state of repair and shall at all times conduct its operations under this Franchise, including installation, construction or maintenance of its Facilities, in a safe and workmanlike manner so as not to present a danger to the public or the City. The location, construction, extension, installation, maintenance, removal and relocation of Grantee's Facilities shall conform to the requirements of the State and Federal statutes and regulations adopted pursuant thereto in force at the time of such work, and such reasonable specifications in force at the time of such work, as the City may from time to time adopt. All installations, re-arrangements, removals, lowering or raising of the Facilities shall be done in conformance with the requirements of the National Electric Safety Code, the laws of the State of Oregon and the ordinances of the City. The City may provide such specifications relating thereto as may be necessary or convenient for public safety or the orderly development of the City. The City may amend and add to such specifications from time to time.

SECTION 12. Indemnification and Insurance.

- A. Grantee shall pay, save harmless, defend and indemnify the City from any loss, suit or claim of any kind against the City on account of, or in connection with, any activity or Facility of Grantee, including the construction, operation, maintenance or existence of its Facilities. Grantee will not be required to indemnify the City for the negligent or willful misconduct of the City or its officials, boards, commissions, agents or employees, to the extent that such conduct is the proximate cause of any claim.
- B. Grantee shall, for the purposes of carrying out the provisions of this Section, prior to commencing construction of any kind, have in full force and effect, and file and maintain during the term of the Franchise a Certificate of Insurance evidence thereto with the City Manager, with good and sufficient policies covering:
 - 1) Worker's Compensation Insurance as required by the State of Oregon including Employers Liability with limits not less than \$1,000,000; Grantee shall ensure that

each of its sub-contractors complies with these same requirements and shall contain a Waiver of Subrogation against the City consistent with its indemnity obligations; and

- 2) Commercial General Liability Insurance with limits of at least \$5,000,000 per occurrence and \$5,000,000 general aggregate; and
 - 3) Business Automobile Liability Insurance, for any owned, hired or non-owned vehicles used in the performance of this agreement with combined single limits of \$1,000,000 each accident.
- C. The City of Hood River, its officers, agents, and employees, shall be named an Additional Insured in said policy for losses caused in whole or in part by reason of the exercise of the rights and privileges herein granted.
- D. Upon any material alteration or cancellation of any of the coverage, Grantee shall give the City notice as allowed per insured's insurance policy in advance of the effective date of the alteration or cancellation of the coverage.
- E. Each policy, Commercial General Liability, Auto Liability and Workers' Compensation, shall contain a waiver of subrogation against the City, consistent with Grantee's indemnity obligations.

SECTION 13. Compensation. The City may charge, and Grantee shall pay, the following fee for its use of the City's rights-of-way under this Franchise:

- 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 Grantee shall pay to City during the term of this Franchise an amount equal to five percent (5%) of the Grantee'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 30 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, Grantee 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 Grantee 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 section 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 30 days after such dates. Not later than the date of each payment, the Grantee 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 Grantee, identifying in detail the amount of gross revenue received by the Grantee, the computation basis and method, for the quarter for which payment is made.

- D. The Franchise Fee includes all compensation for the use of the City's Rights-of-Way. Grantee 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 Grantee's property.

SECTION 14. No Waiver. Neither City nor Grantee shall be excused from complying with any of the terms and conditions of this Franchise or any city requirement or Engineering Standard by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions.

SECTION 15. Amendment. At any time during the term of this Franchise, the City through its City Council, or Grantee may propose amendments to this Franchise by giving 30-days' written notice to the other party of the proposed amendment(s) desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). No amendment or amendments to this Franchise shall be effective until mutually agreed upon by the City and Grantee and formally adopted as an ordinance amendment.

SECTION 16. Forfeiture and Remedies. In addition to any other rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture of the Franchise, subject to 45-day right to cure, and all of the Grantee's rights arising thereunder in the event that Grantee violates any material provision of the Franchise including, but not limited to, failing to pay or any suspension of Grantee's payments of Franchise Fees to the City under this Franchise, failure to maintain the liability insurance and/or bonds required under this Franchise, or failure to comply with all other state, federal or local laws as set forth in this Franchise. All remedies and penalties under this chapter, including termination of the Franchise, are cumulative, and the recovery or enforcement of one is not a bar to the recovery or enforcement of any other such remedy or penalty. The remedies and penalties contained in this chapter, including termination of the Franchise, are not exclusive, and the City reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon Grantee by, or pursuant to, this Ordinance. A specific waiver of a particular breach of any term, condition or obligation imposed upon Grantee by, or pursuant to, this chapter or acceptance of any payment due shall not be deemed a waiver of any other or subsequent or future breach of the same or any other term, condition or obligation itself.

SECTION 17. Severability. In the event any of the provisions of this Franchise are determined by a court of competent jurisdiction to be void, invalid or unenforceable, that provision shall be severed from the remainder of this Franchise so as not to cause the invalidity or unenforceability of the remainder of this Franchise. All remaining provisions of this Franchise shall continue in full force and effect. If any provision shall be deemed invalid due to its scope and breadth, such provisions shall be deemed valid to the extent of the scope and breadth permitted by law.

SECTION 18. Successors and Assigns. This Franchise is binding upon and will inure to the benefit of all parties hereto, their respective heirs, legal representatives, successors and assigns. Grantee, however, shall not make any assignment or transfer without the written consent of the City, which consent shall not be unreasonably withheld. Any assignment or

transfer made without the City's consent shall be null and void; provided, however, that nothing in this Franchise requires the City's consent for any sale, lease, mortgage, assignment, merger, or other transfer to entities that control, are controlled by, or under the common control of the Grantee. If the Grantee wishes to assign or transfer this Franchise, Grantee shall give City written notice of the proposed transfer, and shall request City's consent to transfer.

SECTION 19. Notices. Unless expressly otherwise agreed between the parties, every notice or response required by this Franchise to be served upon the City or the Grantee shall be in writing, and shall be deemed to have been duly given to the required party when placed in a properly sealed and correctly addressed envelope: a) upon receipt when hand delivered with receipt/acknowledgment, b) upon receipt when sent certified, registered mail, or c) within 5 business days after having been posted in the regular mail to the following addresses:

For the City: City Manager
City of Hood River
211 Second Street
Hood River, OR 97031
Phone: (541) 387-5252

For Grantee: LS Networks
Contracts Management
921 SW Washington Street, Suite 210
Portland, OR 97205
Phone: (503) 294-5300
Facsimile: (503) 214-7397

The City and Grantee may designate such other address or addresses from time to time by giving notice to the other in the manner provided for in this Section.

SECTION 20. Acceptance and Effective Date. Grantee shall, within 30 days from the date the City Council passes an ordinance approving this Franchise, file with the City its written unconditional acceptance of this Franchise. This Franchise shall be effective as of January 1, 2023, if Grantee provides the City with its written unconditional acceptance as required in this Section. In the event the Grantee fails to do so, this ordinance shall be void.

READ FOR THE FIRST TIME on _____, 2022.

READ FOR THE SECOND TIME and adopted on _____, 2022. This Ordinance shall take effect on the 31st day following the second reading.

Kate McBride, Mayor

ATTEST:

APPROVED AS TO FORM:

Jennifer Gray, City Recorder

Daniel Kearns, City Attorney

ACCEPTANCE

Lightspeed Networks, Inc., Franchisee herein, hereby accepts the terms and provisions of foregoing Franchise Agreement adopted and approved by the Hood River City Council on December 12, 2022 (the "Franchise"). Franchisee agrees to abide by each and every term of the Franchise Agreement, which shall become effective upon Franchisee's acceptance.

BY _____
(Name)

Title: _____

Date: _____