

# CITY OF COOS BAY CITY COUNCIL

## Agenda Staff Report

MEETING DATE February 19, 2013	AGENDA ITEM NUMBER
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TO: Mayor Shoji and City Councilors

FROM: Susanne Baker, Finance Director *SB*

THROUGH: Rodger Craddock, City Manager *RC*

ISSUE Ordinance – Establish a franchise with telecommunications provider LSN

### BACKGROUND

The City of Coos Bay was approached by LSN to negotiate a franchise agreement for fiber connectivity. Staff has been negotiating the agreement over the last couple of months and it has been completed with the final review of the attorneys. LSN is a telecommunications company in the Pacific Northwest that is a privately-held inter-exchange network services provider and competitive local exchange carrier, headquartered in Portland, Oregon. LS Networks is owned by upwards of 60,000 Oregonians (consisting of rural electric power cooperatives' members and a tribal nation).

LSN operates a fiber optic backbone throughout Oregon, focusing on bringing state-of-the-art connectivity (improved internet and 4G) to state/local governmental agencies, schools, hospitals, wholesale opportunities, and businesses. LSN does not provide service directly to small business or households but does contract with providers who do provide services. Verizon is the major wireless carrier for LSN providing connectivity and improved "back haul" for their existing cell towers. LSN typically contracts with local companies with a preexisting relationship with LSN.

### ADVANTAGES:

Improved telecommunications will benefit the community with installation of the infrastructure anticipated to begin at the end of March 2013.

### DISADVANTAGES:

None.

### BUDGET:

The franchise revenue, seven percent of the franchisee's gross revenues, is anticipated to start being received late 2013 or early 2014.

### RECOMMENDATION:

If it pleases the Council, hold a public hearing to take input and enact the proposed ordinance.

Attachment: Ordinance

G:\Finance\Common\Council FYE13\LSN Franchise Staff Report

## ORDINANCE NO. ###

### AN ORDINANCE GRANTING TO LIGHTSPEED NETWORKS, INC., DBA "LSN" AN OREGON CORPORATION, A FRANCHISE TO CONSTRUCT, OPERATE, AND MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF COOS BAY, OREGON

The City of Coos Bay Ordains as follows:

#### Section 1: Definitions.

1. Gross Revenues: Any and all revenue, of any kind, nature, or form, without deduction for expense in the City of Coos Bay and is further defined in Section 11. All such revenue remains subject to applicable FCC rules and regulations.
2. 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.
3. 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.
4. 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.
5. 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.

**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.

**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 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 Ordinance. Thereafter, this Franchise shall continue in full force and effect for an additional ten (10) years unless notice is given by either party not

less than 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. The City may perform the work and collect the cost thereof from the Franchisee plus an additional 10% of the cost of removal to cover the City's administrative expenses.

#### **Section 5: No Limitation of City Authority.**

1. 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.
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. 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 the new relocation request is made by the City.
4. 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, license, 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: Nondiscriminatory Basis.** The City shall impose, on a 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.**

1. 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 to City engineering standards and approval, 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. With the initial installations during the first six months after the franchise has been executed, advance notice of construction will be provided as soon as possible. After the initial construction the Franchisee will provide an advanced construction schedule 12 months prior to work and updated at three months prior to construction.

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 Public Works and Development Department by telephone, electronic data transmittal or other appropriate means as soon as is practicable after commencement of work performed under emergency conditions and no later than 24 hours after the work commenced. 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. 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. Franchisee will provide construction plans and obtain permits prior to commencing work.

#### **Section 8: 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. Insurance will be updated annually to comply with City insurance requirements.
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, a Level 5 City of Coos Bay insurance coverage, subject to annual updates by the Oregon Tort Claim Act. If infrastructure is not installed on city property (transfer stations, poles, etc.,) the builder's risk/installation floater insurance requirement may be removed.

## **Section 9: 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 not less than 90 days prior to the contemplated 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 void. The City shall have 90 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 90 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.

## **Section 10: Indemnification.**

1. Subject to the limitations of the Oregon Tort Claims Act, City agrees to defend, indemnify and save harmless Franchisee, its employees, agents, and volunteers, against any and all loss, damage, liability, claims, demands, or costs resulting from injury or harm to persons or property to the extent arising out of or in any way connected with the negligence of the City, and/or its employees or agents.
2. Franchisee agrees to defend, indemnify and save harmless City, its elected officials, employees, agents, and volunteers, against any and all loss, damage, liability, claims, demands, or costs resulting from injury or harm to persons or property to the extent arising out of or in any way connected with the negligence of the Franchisee, and/or its employees or agents.

3. 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.

### **Section 11: 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 Franchise 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. 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.
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 30 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 Franchise Fee includes all compensation for the use of the City's rights-of-way. 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. Late franchise fee payments will be subject to late fees calculated on the basis of nine percent (9%) per annum of the amount past due. No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the City may have for further or additional sums payable under the provisions of this Franchise. All amounts paid shall be subject to audit and recomputation by the City.

**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 ordinance.

**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; 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 party competitors to the maximum extent allowed by Oregon law.

**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 (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.

**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: 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 Medford, Oregon, with the parties stipulating to trial in Medford, Oregon.

**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 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.

**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:

City Manager  
City of Coos Bay  
500 Central Avenue  
Coos Bay, Oregon 97420  
(541) 269-8912  
(541) 267-5912

Contracts Administration  
LSN  
921 SW Oregon 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.**

1. The City is vested with the power and authority to reasonably regulate, and manage, its rights-of-way 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.

**Section 23: Revocation.**

**(a) General.** In addition to any rights set out elsewhere in this document, the City reserves the right to declare a forfeiture or otherwise revoke this Franchise, and all rights and privileges pertaining thereto, under the following circumstances:

1. Following a hearing as provided herein, the Franchisee is determined to be in violation of any material provision of this Franchise and fails to correct the violation after written notice of the violation, proposed forfeiture and reasonable opportunity thereafter to cure;
2. the Franchisee becomes insolvent, unable or unwilling to pay its debts, or is



adjudged bankrupt;

3. the Franchisee is found to have engaged in fraud or deceit upon the City or any other persons;
4. the Franchisee fails to obtain and maintain any permit required by any federal or state regulatory body for the construction, maintenance and operation of its telecommunications system; provided, however, that the Franchisee shall be allowed a reasonable time to cure failure to obtain any permit, and that such permit is material to the operation of Franchisee's telecommunications system or the City's management of its rights-of-way; or
5. the Franchisee fails to maintain the full amount of its insurance as required under the terms of this Franchise.

Upon the occurrence of one of the events set out above, and following not less than 30 days written notice, the City shall conduct a hearing upon the proposed forfeiture. The Franchisee shall be afforded due process rights as if the hearing were a contested case hearing subject to ORS Chapter 183, including the right to present evidence, to subpoena and cross-examine witnesses, to subpoena documents, and to require that all testimony be on the record. Findings from the hearing shall be written and shall stipulate the reasons for the City's decision. If the City finds that the Franchise should be forfeited, the City shall by ordinance declare a forfeiture of the Franchise. In the event that the Franchisee believes that the City has improperly declared a forfeiture, the Franchisee may file such proceeding as is appropriate in a court of competent jurisdiction to determine whether the City has properly declared a forfeiture. If a forfeiture is lawfully declared by a court of competent jurisdiction, all rights of the Franchisee shall immediately be divested without a further act upon the part of the City.

**(b) Receivership.** In addition to its other rights and remedies as set forth in this Franchise, the City shall have the right, subject to federal law, to declare a forfeiture of this Franchise one hundred and twenty (120) days after the appointment of a receiver or trustee to take over and conduct the Franchisee's business, whether in receivership, reorganization, bankruptcy or other similar action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred and twenty (120) days, or unless: a) within one hundred and twenty (120) days after such appointment, the receiver or trustee shall have fully complied with all provisions of this Franchise and remedied any and all violations or defaults, as approved by a City Council resolution; and b) within said one hundred and twenty (120) days, such receiver or trustee shall have executed an agreement with the City, duly approved by the City and the court having competent jurisdiction, in which such receiver or trustee assumes and agrees to be bound by each and every provision of this Franchise.

**Section 24. Right to Require Removal of Property.** At the expiration of the Initial Term for which the Franchise is granted, or the last renewal thereof, or upon forfeiture or revocation as provided for herein, the City shall have the right to require the Franchisee to remove, at Franchisee's own expense, all or any part of the telecommunications system from rights-of-way within the Franchise area. If the Franchisee fails to do so within one hundred and eighty (180) days after receipt of notice from the City, the City may perform the work and collect the cost thereof from the Franchisee plus an additional 10% of the cost of removal to cover the City's administrative expenses. Notwithstanding the other provisions of this Section, the Franchisee, by written notice to the City, may elect to abandon underground cable in place, in which event the Franchisee shall have no further obligation hereunder as to the abandoned cable; except that the City may nevertheless, by written notice, require the Franchisee to remove cable, at Franchisee's

own expense, as deemed necessary by the City to provide space for other authorized uses or to accomplish or enable the accomplishment of other public purposes.

The foregoing ordinance was enacted by the City Council of the City of Coos Bay this \_\_\_\_\_ day of February 2013 by the following vote:

Yes:

No:

Absent:

\_\_\_\_\_  
Crystal Shoji  
Mayor of the City of Coos Bay  
Coos County, Oregon

ATTEST:

\_\_\_\_\_  
Susanne Baker,  
City Recorder of the City of Coos Bay  
Coos County, Oregon