



CITY OF

PORTLAND, OREGON

OFFICE OF CABLE COMMUNICATIONS
AND FRANCHISE MANAGEMENT

Earl Blumenauer, Commissioner of Public Works

David C. Olson, Director

1211 SW Fifth Ave., Rm. 1160

Portland, OR 97204-3711

(503) 823-5385

FAX: (503) 823-5370

TDD #: (503) 823-6868

April 8, 1996

Mark Kaplan
Public Notices
Daily Journal of Commerce
2414 - 24th Avenue Northwest
Portland, Oregon 97210-0127

RECEIVED
APR 11 2 52 PM '96
BARBARA CLAR, AUDITOR
CITY OF PORTLAND, OR.
BY _____

Dear Mark,

Please publish the attached franchise in the Daily Journal of Commerce on April 22, 1996 under the "Public Notices - Cities" section. The introduction should read as follows:

CITY OF PORTLAND Notice of Proposed Franchise Electric Lightwave, Inc. The following proposed franchise ordinance was filed with the Auditor of the City of Portland, Oregon, on the 12th of April, 1996, and conforming to the requirements of Section 10-207 of the Charter, said proposed franchise ordinance is hereby published at the expense of the applicant for such proposed franchise. Ordinance No. Grant a franchise to.....etc.

I can provide the documents on diskette in WordPerfect 6.1. When I talked with your staff, however, I was informed you would not be able to use a diskette. I would like a proof of publication affidavit. Please let me know if you need any further information. Please contact Dee Johnson or Sebastian Rodrigues at 823-5385 if you have any questions. Thanks.

Sincerely,

Mary Beth Henry

cc: Olson, Kershner, Walters

c:elinotic.djc



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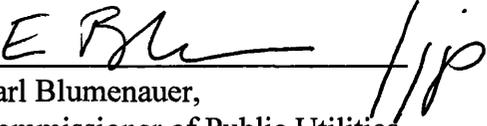
TDD #: (503) 823-6868

April 17, 1996

REPORT TO COUNCIL**TO THE COUNCIL:****SUBJ: TEMPORARY REVOCABLE PERMIT AND FRANCHISE FOR ELECTRIC
LIGHTWAVE, INC.**

I enclose a report from David C. Olson, Director of the Office of Cable Communications and Franchise Management, to accompany two ordinances: one granting a temporary revocable permit to Electric Lightwave (Emergency Ordinance), for a period of one year and another granting a Franchise (First Reading), for a period of 10 years.

I recommend Council approval of the ordinances.



Earl Blumenauer,
Commissioner of Public Utilities

c:elcovrpt



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April 17, 1996

REPORT TO COUNCIL

TO: Commissioner Earl Blumenauer

FROM: David C. Olson, Director
Office of Cable Communications and
Franchise Management

RE: Temporary Revocable Permit and Franchise for Electric Lightwave, Inc.

Background

In January 1996 the Office of Cable Communications and Franchise Management entered into discussions to renegotiate a franchise with Electric Lightwave, Inc.(ELI). ELI received a franchise from the City of Portland in 1990 to construct, operate and maintain a telecommunications system in the right of way. The major purpose of the system was to provide competitive access and local private line telecommunications services. The original franchise did not contemplate that ELI would provide local exchange access or dialtone services. The updated franchise would allow ELI to provide a wide variety of telecommunications services including local exchange access. ELI has already received authority from the PUC to provide local exchange access services in Portland.

ELI is a Competitive Access Provider (CAP). CAP's are competitors to the traditional monopoly telephone company. Their customers are primarily large to medium sized businesses who are heavily dependent upon reliable communications. CAP's build completely separate physical networks and use fiber optic technology almost exclusively. CAP's offer customers a choice so that they are no longer dependent upon one company for their critical telecommunications needs. As the City of Portland continues to attract businesses from around the country, having fiber optic systems in place will serve to strengthen the City's telecommunications infrastructure. The millions of telephone calls, data transmissions and electronic transfers that occur each day form the basis of an efficient economy in the City of Portland, and competitive access providers can help ensure the City of Portland remains at the forefront of telecommunications technology. The State Public Utility Commission has established policies which encourage competition in local telecommunications services.

The Cable/Franchise Office, leading a negotiating team that included representatives from the

City Attorney's Office, the Office of Transportation and the Division of Telecommunications within General Services, reached agreement with Electric Lightwave, Inc. in March. The City Charter requires a 4-month approval process for franchises, which includes publication of the franchise and two readings before Council. Electric Lightwave, Inc. has requested a temporary revocable permit in order to begin construction this summer. The City has used this procedure in the past with AT&T, MCI Metro and MFS. The permit and first reading will be heard by the City Council on May 15. The permit contains all the applicable language from the franchise.

Highlights of the Temporary Revocable Permit

Nature and Terms of Revocable Permit

The temporary revocable permit will be in effect for one year or until the franchise becomes effective. The Permit gives Electric Lightwave, Inc. the immediate ability to move forward with construction of a telecommunications system within the City of Portland right of way. The permit restates all relevant conditions of the franchise.

Compensation

The permit requires a minimum compensation of \$4,000 or 5% of gross revenues, whichever is greater. Since ELI has already constructed a significant portion of its Telecommunications System, the 5% of gross revenue formula will be applicable from the time the temporary revocable permit is issued until the end of the franchise. ELI currently pays the City approximately \$55,000 annually. This figure is expected to increase once ELI begins providing dialtone as an additional service.

City Fibers

Electric Lightwave, Inc. will provide one pair (two) of fibers for City use on its downtown loop. Additionally ELI will install and maintain two pair of optical fibers for the City for all new construction. The City fibers may be used to meet City telecommunications needs. If requested by the City, Electric Lightwave, Inc. will build and install connections to City Buildings at a charge of its direct costs plus ten percent (10%). The Cable/Franchise Office will facilitate a technical advisory committee to make recommendations on how to use the City optical fibers and conduit space made available through the City's various telecommunications franchises.

Other

The remaining sections of the permit and franchise contain standard language that has been reviewed and approved by the relevant City bureaus. Electric Lightwave, Inc. will pay for the cost of publishing the entire franchise in the Daily Journal of Commerce as required by the City Charter.



170283

ORDINANCE NO.

Grant a franchise to Electric Lightwave, Inc., for a period of ten years.

The City of Portland ordains:

Section 1. NATURE AND TERM OF GRANT

1.1 Grant of Franchise.

(A) The City of Portland (City), does hereby grant to Electric Lightwave, Inc., a Washington corporation qualified to do business in Oregon, (Grantee), and to its successors and assigns, as approved by Section 15 of this Franchise, a franchise to construct, operate and maintain a telecommunications system, with all necessary facilities, in, under, and over the surface of the City's Streets.

(B) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City" and Electric Lightwave, Inc., shall be referred to as the "Grantee".

(C) This Franchise does not authorize the Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C.A §522 (Supp.1996).

1.2 Duration of Franchise. The term of this Franchise, and all rights and obligations pertaining thereto, shall be ten years from the effective date of the Franchise unless terminated sooner as provided herein.

1.3 Effective Date. The effective date of this Franchise shall be 60 days after passage of the Franchise by the City Council unless Grantee fails to file an unconditional written acceptance of this Franchise, in accordance with Section 21 herein, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

1.4 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant rights or Franchises to other Persons, within defined term, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee hereunder, by Franchise, permit or otherwise.

1.5 Charter and General Ordinances To Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a

part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

Section 2. DEFINITIONS

2.1 (A) Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

(B) Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

2.2 "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

2.3 "City Council" means the Council of the City of Portland.

2.4 "Facility" means any tangible component of the Telecommunications System.

2.5 "Franchise" means this Franchise agreement, as fully executed by the City and the Grantee.

2.6 "Gross Revenues" shall mean gross revenues derived by Grantee for the provision of Telecommunications Services (I) originating or terminating in Portland, Oregon and (ii) charged to a circuit location in Portland, Oregon regardless of where the circuit is billed or paid.

2.7 "Minimum Annual Franchise Fee" shall mean \$4,000 in the first year of this Franchise, and shall increase by \$1,000 annually, until reaching a minimum of \$13,000 in year 10 of this Franchise.

2.8 "Penalties" means any and all monetary penalties provided for in this Franchise.

2.9 "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

2.10 "Streets" means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public, to the extent the City has the right to allow the Grantee to use them.

2.11 "Telecommunications Services" means:

(A) Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

(B) Services connecting interexchange carriers and/or competitive carriers to telephone companies providing local exchange services for the purpose of voice, video, or data transmission;

(C) Services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carrier, or telephone company providing local exchange services, for the purpose of voice, video, or data transmission;

(D) Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission; and

(E) This Franchise does not authorize the Grantee to operate as a telecommunications services provider. Prior to providing such services, Grantee shall apply for and obtain such authority as is necessary from the Oregon Public Utility Commission and/or Federal Communications Commission. Grantee shall provide the City with documentation of such authority, upon written request.

(F) Other telecommunications services as authorized by the Federal Communications Commission or the Oregon Public Utility Commission.

(G) Nothing herein shall preclude Electric Lightwave, Inc. from entering into a contract for the use of any portion of its Telecommunications System with any Person or other entity for any services, whether specified herein or not, provided that said Person or entity is another Franchisee, licensee, or permittee and has assumed responsibility for obtaining any required authority from the City.

2.12 "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles and other necessary Facilities owned or used by the Grantee for the purpose of providing Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City Franchisee, licensee or permittee.

2.13 "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

Section 3. COMPENSATION AND AUDITING

3.1 Amount of compensation. As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of a Minimum Annual Franchise Fee or an amount equal to five percent (5%) of the Grantee's Gross Revenues.

3.2 City Use of Telecommunications Services and/or Telecommunications System. If the City requests Telecommunications Services from the Grantee, or installation or maintenance work under Section 9.2 herein, Grantee may deduct the charges for such services from Franchise fee payments. Grantee shall charge the City Grantee's most favorable rate offered at the time of the City's request charged to a similar user within Oregon for a similar volume of service, subject to any of Grantee's tariffs and regulations on file with the Oregon Public Utility Commission. Other terms and conditions of such services may be specified in a separate agreement between the City and Grantee.

3.3 Franchise Fee Payments.

(A) Grantee's Minimum Annual Franchise Fee payable under Section 3.1 shall be paid to the City annually following the effective date of this Franchise. Each annual payment shall be made for the immediately preceding calendar year ending December 31. Each annual payment of the Grantee's Minimum Annual Franchise Fee shall be paid on or before the forty-fifth (45th) day following December 31st.

(B) The Gross Revenue based Franchise fee payable under Section 3.1 shall be computed and paid on or before the forty-fifth (45th) day following each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) during the term of this Franchise.

(C) Franchise Fee payments not received by the City on or before the due date shall be assessed interest at the rate of one percent (1%) over the existing prime rate as set by the bank with which the City contracts for its banking services, compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

3.4 Reports. Each payment shall be accompanied by a written report to the City, verified by an officer or other authorized representative of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's Gross Revenues and the computation basis and method. Such reports shall be in a form satisfactory to the City.

3.5 Cost of Pre-franchising and Publication. Grantee shall reimburse the City for such reasonable pre-franchising costs as the City incurs in entering into this Franchise with the City up to \$5,000. Grantee shall also pay the cost of publication of this Franchise and any amendments thereto, as such publication is required by the City Charter. The City shall provide Grantee with an itemized invoice for any such expenses prior to reimbursement by Grantee.

3.6 Acceptance of Payment and Recomputation. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within two (2) years of the date any audited and recomputed payment is due. If no such audit is

conducted within the two (2) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. The Grantee agrees to reimburse the City for:

(A) The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the Franchise fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit; or

(B) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid more than 95% but less than 98% of the Franchise fees owing for the period at issue.

(C) The City's costs which may be reimbursed under this subsection shall not exceed \$5,000.00.

(D) If the City determines that Grantee made any underpayment, and that the underpayment exceeded 5% of the amount due, Grantee shall pay interest compounded monthly at the rate of one percent (1%) over the existing prime rate as set by the bank with which the City contracts for its banking services. Interest shall be due on the entire underpayment from the date on which payment was due until the date on which full payment is received.

3.7 If the Grantee disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account until final resolution.

3.8 All Grantee's books, maps, and records directly concerning its Gross Revenues under this Franchise and its calculation of Franchise fee payments to the City shall be open for inspection by the proper officers or agents of the City, upon no less than 48 hours prior written notice, during normal business hours to determine the amount of compensation due the City under this Franchise, and shall be kept so as to accurately show the same. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

3.9 Payment of this Franchise fee shall not exempt Grantee from the payment of any other license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax or charge.

Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS

4.1 Insurance.

(A) The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 5. The insurance shall provide coverage at all times of not

less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a replacement policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of this Franchise.

(B) The Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the reasonable approval of the City Attorney.

(C) In the alternative to providing a certificate of insurance to the City, certifying liability insurance coverage as required in this Section, Grantee may provide the City with a statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for the Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon Grantee's election to provide self-insurance coverage under this subsection, any failure by the Grantee to maintain adequate self-insurance shall be cause for termination of this Franchise under Section 16.

4.2 Faithful Performance Bond.

(A) Upon the effective date of the Franchise, the Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of \$100,000, conditioned that the Grantee shall well and truly observe, fulfill, and perform each term and condition of the Franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of the Franchise, including, if necessary, the time required for removal of all of Grantee's Telecommunications System installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without prior to 30 days written notice first being given to the City Auditor. The bond shall be reviewed and approved as to form by the City Attorney.

(B) During the term of the Franchise, Grantee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However,

in no event shall the City exercise its rights against the performance bond under Subsection 4.2 A. if a bona fide, good faith dispute exists between the City and the Grantee.

4.3 Construction Bond. During all times when Grantee is performing any construction work in or under the Streets requiring a street opening permit, Grantee shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum of \$100,000. The bond or letter of credit shall be conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition under Section 6. Grantee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of Grantee's construction work in or under the Streets by the City Engineer which shall not be unreasonably withheld or delayed. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Grantee shall file with the City Auditor a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the reasonable approval of the City Attorney as to its adequacy under the requirements of this Section.

Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

5.1 Indemnification.

(A) Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Telecommunications System in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee prompt notice of any such claim which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

(B) Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

Section 6. CONSTRUCTION AND RELOCATION.

6.1 (A) Subject to applicable regulations of the City, Grantee may perform all necessary construction to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System Facilities within Streets incident to Grantee's provision of Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City Streets. Grantee shall pay all applicable fees due for City construction permits.

(B) (1) Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When Grantee's construction in the Streets is completed, Grantee shall provide the City with a map showing the location of its installed Telecommunications System in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) One year after the effective date of this Franchise, and annually thereafter, Grantee shall provide a map to the City's Office of Cable Communications and Franchise Management, or its successor, showing the location of Grantee's optical fibers in the Streets on a scale of 3500' (feet) per inch or whatever standard scale the City adopts for general use.

(C) Grantee may make excavations in City Streets for any Facility needed for the maintenance or extension of the Grantee's Telecommunications System subject to obtaining permits from the City. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any further Franchisees, licensees or permittees of the City, or bureaus of the City, or other units of government owning or maintaining facilities which may be affected by the proposed excavation.

(D) In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

6.2 (A) Locates. Grantee is responsible for becoming familiar with, and understanding, the provisions of Oregon Revised Statutes (ORS) 757.541 through 757.571 (1995) (the "One-Call statutes"). Grantee shall comply with the terms and conditions set forth in the One-Call statutes.

(B) The One-Call statutes apply to the location of underground facilities. As an example of how these provisions apply: Within forty-eight (48) business day hours after any City bureau or City Franchisee, licensee or permittee notifies Grantee of a proposed street excavation, the Grantee shall: 1. Mark all of its locatable underground cables, ducts, conduits, or other Facilities within the area of the proposed excavation; 2. Notify the excavator of any unlocatable underground Facilities in the area of the proposed excavation; or, 3. Notify the excavator that the Grantee does not have any underground Facilities in the vicinity of the

proposed excavation.

6.3 Relocation. The City shall have the right to require Grantee to change the location of its Telecommunications System within the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide the Grantee with the standard notice given under the circumstances to other franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such facilities by the date established by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all direct, indirect and/or consequential costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its facilities within the City's Streets.

6.4 Grantee's system shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other facilities that may have been laid in the Streets by or under the City's authority.

6.5 Upon Grantee's acquisition of any Telecommunications System Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Streets, the Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by Franchise or any other form of prior right, and specifying the location of all such Facilities. Such Facilities shall immediately be subject to the terms of this Franchise.

Section 7. RESTORATION OF STREETS.

7.1 Whenever Grantee disturbs the surface of any Street for any purpose, Grantee shall promptly restore the street to at least its prior condition, to the satisfaction of the City Engineer. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer.

7.2 If Grantee excavates the surface of any Street, Grantee shall be responsible for restoration of the Street and its surface within the area affected by the excavation. The City may, after providing notice to Grantee, refill and/or repave any opening made by Grantee in the Street, and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under Section 7 shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

7.3 Tree Trimming.

(A) Only upon obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Telecommunications System. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For purposes of this Section, an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of Grantee's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.

(B) The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, the Grantee or its agents, fails to use proper arboricultural practices.

Section 8. RESERVATION OF CITY STREET RIGHTS.

Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the unrestricted use and operation of the Telecommunications Systems of the Grantee under this Franchise. However, if any of the Grantee's Telecommunications System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, the Grantee's System shall be removed or replaced in the manner the City shall direct provided, however, the City will cooperate with the Grantee to identify alternate locations within the Streets. Any and all such removal or replacement shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

Section 9. CITY FIBER OPTIC PAIRS AND USE OF DUCTS BY CITY.

9.1 Fiber Optic Lines.

(A) Grantee shall give prior notice to the City in the event of any new construction or installation of fiber optic lines with the City. In any such construction or installations, Grantee shall install two pair (4) of optical fibers for the City, excluding single cable of twenty-four (24) fibers or less installed specifically in the Streets for services distribution to a single customer or building.

(B) Within six (6) months from the effective date of this Franchise, Grantee shall provide the City with a single pair (2) of optical fiber within Grantee's existing fiber optic loop in the City's downtown core. The location of Grantee's existing fiber optic loop is specifically described in the map provided by Grantee, attached to this Franchise as Exhibit A.

(C) The City shall use the optical fiber described in Subsections 9.1(A) and (B) above for municipal purposes only. The Grantee shall not deduct the cost of building or installing such optical fiber lines or cable from Franchise fees, or any other payments to the City, or otherwise charge the City for such lines or cable. The City shall have no rights of physical access to such lines for construction, interconnections or splicing without the Grantee's consent.

9.2 Fiber Optic Connections: Upon written request from the City, Grantee shall build and install connections to City fiber optic lines provided by Grantee under Section 9.1 above, for the City who shall use such connections only for municipal purposes. Grantee shall build and install such connections at a charge of its direct costs of materials and labor, plus ten percent (10%). The City shall be responsible for obtaining any necessary authority for Grantee to enter any premises necessary for building and installing the connections requested by the City.

9.3 (A) The City may install or affix and maintain wires and equipment for municipal purposes within any of Grantee's surplus conduit or ducts, as defined in Section 12, without charge to the City. All work to affix and/or maintain City wires and equipment shall be performed by Grantee and shall be performed at City expense at a charge of its direct costs of material and labor, plus 10 percent (10%). The City shall not have access to Grantee's surplus conduits or ducts without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for access.

(B) For the purposes of Section 9, the term "municipal purposes" includes but is not limited to the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems. The term "municipal purposes" does not include: (1) the sale or lease of telecommunications services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater.

(C) The value of the City's use of Grantee's surplus conduits or ducts may not be deducted from Grantee's Franchise fee, and/or other fees payable to the City. Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of City's use of Grantee's surplus conduits or ducts.

Section 10. STREET VACATION.

If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its

installation in the vacated Street, Grantee shall, without expense to the City, forthwith remove its Telecommunications System Facilities from such Street, and restore, repair or reconstruct the Street where such removal has occurred, and place the Street in such condition as may be required by the Council which shall be no better than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty days' notice by City Council, to repair, improve or maintain such Street, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City will cooperate with Grantee to identify alternative locations within the Streets.

Section 11. MAINTENANCE OF FACILITIES.

Grantee shall provide and put in use all Telecommunications System Facilities necessary to control and carry Grantee's Telecommunications Services so as to prevent injury to the City's property or property belonging to any Person within the City. Grantee, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Telecommunications System in a manner that requires any customer, except the City, to install cables, ducts, conduits, or other facilities, in, under or over the City's Streets.

Section 12. COMMON USERS.

12.1 For the purposes of Section 12:

(A) "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

(B) "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such facilities in the Grantee's Telecommunications System.

(C) "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

(D) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Streets. For the purpose of Section 12, the Grantee shall not be construed to be a "Licensee" as defined herein.

(E) "Surplus ducts or conduits" are Conduit Facilities other than those occupied by the Grantee or any prior Licensee, one unoccupied duct held by Grantee as an emergency use spare, and other unoccupied ducts that the Grantee reasonably expects to use within the next 18 months.

12.2 Grantee acknowledges that the Streets have a finite capacity for containing conduits. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to permit construction of an underground conduit system by any other person which may at the time have authority from the City to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such person the right to use Grantee's surplus ducts or conduits in common with the Grantee, pursuant to the terms and conditions of an agreement for use of surplus conduits and ducts being entered into by the Grantee and the Licensee.

12.3 A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

12.4 The Grantee shall give a Licensee and the City 120 written days notice of its need to occupy licensed conduit and shall propose that the Licensee take the first feasible action listed:

(A) Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the Grantee's space needs; or

(B) Pay revised conduit rent based on the cost of new conduit constructed to meet the Grantee's space needs; or

(C) Vacate ducts that are no longer surplus; or

(D) Construct and maintain sufficient new conduit to meet the Grantee's space needs.

12.5 When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the revised cost.

12.6 All attachments shall meet local, state, and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between the Grantee and the Licensee. The Grantee may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the Grantee for any fines, fees, damages, or other reasonable costs the Licensee's attachments cause the Grantee to incur.

Section 13. DISCONTINUED USE OF FACILITIES.

Whenever Grantee intends to discontinue use of its Telecommunications System within all or part of a particular portion of the Streets and does not intend to use said facilities again in the future, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the facility and the date on which the Grantee intends to discontinue using the facility. Grantee may remove the facility or request that the City permit it to remain in place, which permission shall not be unreasonably withheld or delayed. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership

of Facilities in the City's Streets shall transfer to the City and Grantee shall have no further obligation therefor. Notwithstanding the Grantee's request that any such facility remain in place, the City Engineer may require the Grantee to remove the facility from the street area or modify the facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Grantee to perform a combination of modification and removal of the facility. Grantee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as Grantee removes or modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as restoration of the Street, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.

Section 14. HAZARDOUS SUBSTANCES

14.1 Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to Grantee's Telecommunications System in the Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (1995).

14.2 (A) Grantee shall maintain and inspect its Telecommunications System located in the Streets. Upon reasonable notice to Grantee and in the presence of an authorized representative of Grantee, the City may inspect Grantee's facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System.

(B) In removing or modifying Grantee's facilities as provided in Section 13 of this Franchise, Grantee shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

14.3 Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of a Telecommunications System in the Streets.

Section 15. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

15.1 Neither this Franchise nor any of Grantee's Telecommunications System located in the Streets by authority of this Franchise shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior written consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's

Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Franchise.

15.2 Grantee shall not lease any of its Telecommunications System facilities, or the public right-of-way in which such are contained, without the City's prior consent as expressed by ordinance. However, Grantee may lease its Telecommunications System, or any portion thereof, in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System.

15.3 Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof. No sale, lease, mortgage, assignment, transfer or merger may occur until the successor, assignee or lessee has complied with the requirements of Section 4 of this Franchise.

15.4 For the purpose of determining whether the City will consent to any assignment, transfer, merger, lease or mortgage, the City may inquire into the qualifications of the prospective party. The Grantee shall assist the City in any such inquiry. The City may condition any sale, assignment, transfer, merger, lease or mortgage upon such conditions as it deems appropriate.

Section 16. FORFEITURE AND REMEDIES.

16.1 Forfeiture.

(A) In addition to any other rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture of the Franchise, and all of Grantee's rights arising thereunder, in the event that:

1. The Grantee violates any material provision of the Franchise;
2. The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City; or
3. There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Telecommunications System within the City.

(B) For purposes of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:

1. The invalidation, failure to pay or any suspension of Grantee's payments of

Franchise fees to the City for use of the Streets under this Franchise;

2. Any failure by the Grantee to submit timely reports regarding the calculation of its gross revenues based Franchise fees to the City;

3. Any failure by Grantee to maintain the liability insurance required under this Franchise;

4. Any failure by Grantee to maintain the performance bond required under this Franchise;

5. Any failure by Grantee to otherwise fully comply with the requirements of Section 3 through Section 15 of this Franchise.

16.2 Additional Remedies. In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:

(A) Impose a financial penalty of up to \$1,000.00 per Franchise violation; or,

(B) Suspend the Grantee's Franchise rights, until the Grantee corrects or otherwise remedies the violation.

16.3 In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

16.4 Notice and Opportunity to Cure. The City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if the Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if the Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and the Grantee.

Section 17. RENEGOTIATION.

In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or the Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and the Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the

offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation.

Section 18. EXPIRATION.

Upon the expiration of this Franchise, on application made by the Grantee for Franchise renewal or additional authority to exercise the privileges, or any of them, hereby granted, the Grantee shall have the first and preferential right to take and receive such authority upon terms and conditions approved by the City. If the Grantee does not promptly apply for such renewal or additional authority, or if the Grantee rejects the terms and conditions of such authority offered by the City, the City may, within one year from the expiration of the prior Franchise, grant a permit or Franchise to any other corporation, association, firm, individual or individuals. In the event of such a grant, such other corporation, association, firm, individual or individuals taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to the Grantee, at or before the time such new or additional authority takes effect, and before the Grantee shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the third party and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be submitted for a declaratory determination by the courts of the State of Oregon. Until such time as the City exercises its rights as set forth in this Section, the Grantee's rights and responsibilities within the City shall continue to be controlled by the terms and conditions of this Franchise.

Section 19. PUBLIC RECORDS

19.1 (A) Grantee acknowledges that information submitted to the City is open to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505 (1993). Grantee is responsible for becoming familiar and understanding the provisions of the Oregon Public Records Law.

(B) Grantee may identify information, such as trade secrets, financial records, customer information or technical information, submitted to the City as confidential. Grantee shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information, prior to submitting such information to the City. The City shall treat any information so marked as confidential until the City receives any request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City will disclose any of the requested confidential information. The City shall retain the final discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

Section 20. MISCELLANEOUS PROVISIONS

20.1 Compliance With Laws.

(A) Both Grantee and the City shall comply with all applicable federal and state laws.

(B) Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

20.2 Severability. If any Section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Franchise shall not be affected, unless City Council determines such Section, provision, or clause was material to the City's agreement to issue a Franchise to the Grantee.

20.3 Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Franchise in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any 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.

20.4 Force Majeure.

(A) For purposes of this subsection, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts or terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto.

(B) If the Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Franchise, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Franchise.

20.5 Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

20.6 Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City: Office of Cable Communications and Franchise Management
City of Portland, Oregon
1211 SW 5th Avenue, Room 1160
Portland, Oregon 97204
FAX# (503) 823-5370

With a copy to: City Attorney's Office, Room 315, City Hall
1220 SW 5th Avenue
Portland, Oregon 97204
FAX (503) 823-3089

If to the Grantee: Legal Department, Electric Lightwave, Inc.
8100 NE Parkway Drive
Vancouver, WA 98662
Fax (360) 253-4425

with a copy to: David Sharkey, Electric Lightwave, Inc.
8100 NE Parkway Drive
Vancouver, WA 98662
Fax (360) 253-4425

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

Section 21. WRITTEN ACCEPTANCE.

On or before the thirtieth day after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by the Grantee, meeting the approval of the City Attorney. A failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Section 22. OTHER AUTHORITY SUPERSEDED.

Upon effectiveness of this Franchise, any and all authority to operate previously granted to Grantee by the City shall be superseded by this Franchise.

Passed by the Council, **JUN 19 1996**

Commissioner Blumenauer
Henry/Walters
April 9, 1996

BARBARA CLARK
Auditor of the City of Portland
By *Butta Olson* Deputy

