



CITY OF MILWAUKIE
"Dogwood City of the West"

Ordinance No. 2103

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, GRANTING ELECTRIC LIGHTWAVE, LLC. A NONEXCLUSIVE FRANCHISE FOR TEN YEARS TO OPERATE AS A TELECOMMUNICATIONS PROVIDER WITHIN THE CITY OF MILWAUKIE AND AUTHORIZING THE CITY MANAGER TO SIGN A FRANCHISE AGREEMENT WITH ELECTRIC LIGHTWAVE LLC. IN SUBSTANTIALLY THE FORM OF EXHIBIT A.

WHEREAS, Electric Lightwave LLC. d/b/a Integra Wholesale, a Delaware limited liability company, with headquarters at 18110 SE 34th Street, Vancouver, WA 98683 ("ELI") has been providing telecommunication services within the City of Milwaukie pursuant to the franchise that expired on October 31, 2013;

WHEREAS, the City has the authority to regulate the use of rights of way within the City and to charge for the use of those rights of way; and

WHEREAS, the City and ELI both desire ELI to continue to provide telecommunications service within the City of Milwaukie and to establish the terms by which ELI shall use rights of way within the City;

NOW THEREFORE, THE CITY OF MILWAUKIE DOES HEREBY ORDAIN:

The City hereby grants to ELI a non-exclusive franchise on the terms and conditions in the attached Exhibit A, for a period of ten (10) years from the effective date of this ordinance, to provide telecommunications service within the City of Milwaukie and authorizes the City Manager to sign a franchise agreement with ELI in substantially the form of Exhibit A ("Agreement").

Read the first time on 7/21/15, and moved to second reading by 5:0 vote of the City Council.

Read the second time and adopted by the City Council on 7/21/15.

Signed by the Mayor on 7/21/15.

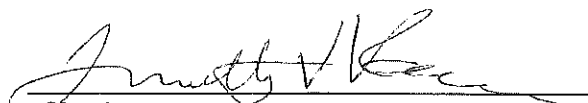


Mark Gamba, Mayor

ATTEST:

APPROVED AS TO FORM:
Jordan Ramis PC



Pat DuVal, City Recorder

City Attorney

Exhibit A
Franchise Agreement between
Milwaukie, Oregon and Electric Lightwave LLC.
September
2015

Section 1. Rights Granted

A. The City of Milwaukie ("City") grants to Electric Lightwave, LLC. d/b/a Integra Wholesale, a Delaware limited liability company, with headquarters at 18110 SE 34th Street, Vancouver, WA 98683 ("ELI"), its successors and assigns, a nonexclusive franchise to operate as a competitive telecommunications provider as defined by ORS 759.005 within the City as it now exists or may be extended in the future. The franchise includes the privilege to install, maintain and operate poles, wires, fixtures, equipment, and underground circuits necessary to supply telecommunications services, upon, over, along, under, and across the streets, alleys, roads and other public ways, parks and places. Nothing in this Agreement limits the City from granting others the right to carry on activities similar to, or different from, the ones described in this Agreement.

B. All facilities in possession of ELI currently located within rights of way are covered by this Agreement and are deemed lawfully placed in their current locations. The City may require relocation as further specified in Section 7 of this Agreement.

Section 2. Term

This Agreement shall be effective as of September 1, 2015 and shall remain effective through September 1, 2025 unless sooner terminated as provided in this Agreement.

Section 3. Construction Work

A. Before ELI conducts work involving excavation, new construction, including placement of new wires or major relocation work in public rights of way, property or places, ELI shall first notify the City Engineer and shall comply with any special conditions relating to scheduling, coordination and public safety as determined by the City Engineer. Special conditions would include work being done in the right of way by the City or other third parties and may include a requirement that the facility be placed underground. Grantee shall obtain all necessary City of Milwaukie 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) are to be evaluated by the most current public works standards at the time of receiving the permit applied to the construction within the Public Ways in the City, and (2) shall be maintained by the City as confidential and exempt from public disclosure to the maximum extent allowed by law, with such provision constituting an official request for such confidentiality under Oregon's public records laws. Work could include open cuts, boring, excavations, digging new pole holes in streets or sidewalks in the right of way. In emergencies, ELI may conduct emergency work at any time and must provide the City Engineer with written or oral notice of

emergency work as soon as reasonably possible, but no later than one (1) business day after the emergency work has commenced.

B. ELI shall file preliminary maps or drawings of its proposed construction work within the City with the City Engineer showing the location of the construction, extension or relocation of its facilities and services in public rights of way, property or place of the City. No facility may be placed other than in a location approved by the City, except in the event of an emergency.

C. Reasonable care. All work by ELI within the rights of way shall be conducted with reasonable care and with the goal of eliminating or minimizing the risk to those using City rights of way and to eliminate or minimize the risk of damage to public or private property. All work shall be performed in accordance with all applicable laws and regulations. Any work within the right of way may be inspected by the City and its officers to determine whether it has been placed in its approved location. If emergency work has been done and is determined to be in a place not approved by the City, the City will notify ELI and give sixty (60) days for the work to be corrected once the emergency has passed.

Section 4. Supplying Maps

ELI shall maintain maps and data pertaining to its facilities located as described in Section 1 (A) in the City on file at their Vancouver, Washington office. With 24 hours prior notice, the City may inspect the maps at any time during business hours. Upon request of the City and without charge, ELI shall furnish current maps to the City, either in a printed form, or, if the City maintains compatible data base capability, then by electronic data in read-only format, showing the location of any electrical system facilities, but not other proprietary information, used in operating ELI's transmission and distribution facilities within the City's Urban Growth Boundary area served by ELI. The City will not sell or transmit ELI maps or data to third parties unless permitted by ELI. The City will make available to ELI any City-prepared maps or data.

Section 5 Excavation

Subject to Sections 3 and 6 of this Agreement, ELI may make all necessary excavations within any right of way for the purpose of installing, pairing or maintaining any facility. Assuming sufficient right of way, all poles shall be placed between the sidewalk and the edge of the right of way unless another location is approved by the City Engineer. ELI shall take all reasonable precautions to minimize interruption to traffic flow, damage to property or creation of a hazardous condition.

Section 6. Restoration after Excavation

Except as otherwise provided in this section, ELI shall restore the surface of any right of way disturbed by any excavation by ELI to the same condition it was in prior to its excavation. In the event that ELI's work is coordinated with other construction work in the right of way, the City Engineer may excuse ELI from restoring the surface of the right of way, provided that as part of the coordinated work, the right of way surface is restored at least to the condition it was in prior to

any excavation. All restoration of right of way surface shall be subject to the approval of the City Engineer, who may issue an order requiring correction of the restoration work. If the correction order is not complied with within thirty (30) days, or such other time as may be specified in the order, the City may restore the surface of the right of way, in which case ELI shall pay the City for the cost of resurfacing, including all administrative costs of resurfacing and of issuing the correction order.

Section 7. Relocation

A. **Permanent Relocation – General.** In accordance with ORS 221.420, City may, by written order, require ELI to move any facility in the right of way. If the relocation is the result of a public project, ELI shall be responsible for the costs of relocation. If the relocation is required to accommodate a private party development or project, ELI shall have the right to seek reimbursement from the private party. In such event, the City shall not be responsible for the costs of relocation of any of ELI's facilities.

B. **Permanent Relocation - Under grounding.** As permitted by law, administrative rule, or regulation, the City may require ELI to remove any overhead facilities and replace those facilities within underground facilities at the same or different locations subject to ELI's engineering and safety standards. The expense of such a conversion shall be paid by ELI, and ELI shall recover its costs from its customers in accordance with state law, administrative rule, or regulation. Nothing in this paragraph prevents the City and ELI from agreeing to a different form of cost recovery consistent with applicable statutes, administrative rules, or regulations on a case-by-case basis.

C. **Temporary Relocation at Request of Third Parties.** Whenever it is necessary to temporarily relocate or rearrange any facility of ELI to permit the passage of any building, machinery or other object, ELI shall perform the work on thirty (30) business days' written notice from the persons desiring to move the building, machinery or other object. The notice shall: (1) bear the approval of the City Engineer; (2) detail the route of movement of the building, machinery, or other object; (3) provide that the person requesting the temporary relocation shall be responsible for ELI's costs; (4) provide that the requestor shall indemnify and hold harmless the City and ELI from any and all damages or claims resulting from the moving of the building, machinery or other object or from the temporary relocation of ELI facilities; and (5) be accompanied by a cash deposit or other security acceptable to ELI for the costs of relocation. ELI, in its sole discretion, may waive the security. The cash deposit or other security shall be in an amount reasonably calculated by ELI to cover ELI's costs of temporary relocation and restoration.

D. **Temporary Relocation at Request of City.** In accordance with ORS 221.420, the City may require ELI to remove and relocate transmission and distribution facilities maintained by ELI in any public rights of way, property, or place of the City by giving notice to ELI. Prior to such relocation the City agrees to provide a suitable location which includes a minimum or maximum square footage set by ELI and the required easements from private property owners for such relocated facilities sufficient to maintain service. The cost of removal or relocation of its facilities for public projects shall be paid by ELI; however when the City requires

more than one temporary relocation and both the initial and subsequent relocations are for public projects and not at the request of or to accommodate a private party, the initial relocation shall be at the expense of ELI and subsequent relocations occurring less than two (2) years after the initial relocation shall be at the expense of the City. In the event that any relocation is requested by or is to accommodate a private party, ELI shall seek reimbursement from the private party and not from the City. The City and ELI agree to cooperate to minimize the economic impact of such temporary relocation on each party.

E. **Notice.** The notice required by Section 7 (A), (B), (C) and (D) shall be in writing and shall be provided at least thirty (30) business days before the date that ELI is required to move its facilities. The City will endeavor to provide as much notice as possible. The notice shall specify the date by which the existing facilities must be removed. Nothing in this provision shall prevent the City and ELI from agreeing, either before or after notice is provided, to a schedule for relocation. In the event that ELI fails to comply with a notice to relocate and the City and ELI have not reached agreement on a schedule for relocation, the City may remove or relocate ELI's facilities that were the subject of the relocation notice at ELI's expense.

F. **Location for Relocated Facilities.** The City shall attempt to provide ELI with a suitable location in existing right of way sufficient to maintain service for all facilities required to be relocated pursuant to Section 7 (A), (B), and (D).

Section 8. City Public Works and Improvements

Nothing in this Agreement shall be construed in any way to prevent the City from excavating, grading, paving, planking, repairing, widening, altering, or doing any work that may be needed or convenient in any rights of way. The City shall coordinate any such work with ELI to avoid, to the extent reasonably foreseeable, any obstruction, injury or restriction on the use of any of ELI's facilities.

Section 9. Payment by ELI for Use of Rights of Way

A. In consideration for its use of rights of way and for the City's administration of the rights of way, ELI agrees to pay the City the greater of:

1. a minimum annual fee of \$3.00 per lineal foot of communication facilities. This amount shall remain fixed from the Effective Date of this Franchise through the fifth (5th) year. Beginning the sixth (6th) year of this Franchise, the fee shall be adjusted annually based on the CPI-U index for the previous year. City shall calculate the escalated per foot fee by November 1st of each year and notify ELI of the per foot fee prior to implementation of such fee.

2. an amount equal to seven percent (7%) of Gross City Revenues. Gross City Revenue is defined as any and all revenues derived by ELI for the provision of any and all products, services, or charges originating or terminating in Milwaukie, Oregon, billed to a circuit, switch, or address in Milwaukie, Oregon, including revenues from dedicated private networks. Gross Revenues shall include any and all revenues from leases for the Milwaukie portion of ELI's

system. Gross Revenues may be adjusted for the net write-off of uncollectible amounts of such revenues. In the event any law or valid rule or regulation applicable to this Franchise Agreement limits franchise fees below the seven percent (7%) of Gross Revenues required herein, ELI 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 franchise fee, then ELI shall pay the higher franchise fee up to the maximum allowable by law.

B. ELI shall pay the franchise fee quarterly on or before forty five (45) days after the preceding quarter. Payments shall be accompanied by a statement of how the total due amount was calculated. ELI shall have the right, without prior City approval, to lease capacity or bandwidth to its customers; provided that ELI shall, upon request from City, provide City with a list of the customers leasing space on the Milwaukie portion of ELI's system. Interest on late payments shall accrue from the due date at a rate equal to nine percent (9%) per annum and shall be computed based on the actual number of days elapsed from the due date until payment. Interest shall accrue without regard to whether the City has provided notice of delinquency. However, should payment be insufficient due to an error in computation, interest payments shall not begin to accrue until after the discovery of the error by ELI or receipt by ELI of notice of the error.

C. The City may audit ELI at any time while this Agreement is in effect to determine the accuracy of the reporting of gross revenues. ELI shall make all records available to the City and any auditor retained by the City on demand. Any difference of payment due the City following audit shall be payable within thirty (30) days after written notice to ELI, and shall bear interest at the rate of nine percent (9%) per annum. In the event the audit discloses that ELI has underpaid by more than three percent (3%) of its annual payment obligation, ELI shall pay the City's expenses of performing the audit.

D. The City shall retain the right, as permitted by Oregon Law, to charge a privilege tax in addition to the franchise fee set forth herein. The City agrees to notify ELI of the privilege tax in writing, sixty (60) days' prior to the date the tax goes into effect.

E. In consideration of ELI's agreement to pay the franchise fee and the City's Public Utilities Privilege Tax, if implemented, the City shall not impose other business license fees or taxes on ELI during the term of this ordinance. This provision does not exempt the property of the company from lawful ad valorem taxes, local improvement district assessments, or conditions, exactions, fees and charges that are generally applicable to businesses within the City as required by City ordinance.

F. The obligation to pay the franchise fee imposed by Section 9 (A) shall survive expiration of this Agreement as long as ELI continues to exercise the rights granted in Section (1). In the event this Agreement is terminated before expiration, ELI shall pay the City the appropriate fee for use of the City's right of way as determined by Section 9 (A) of this Agreement through the date of termination within ninety (90) days of the termination date.

G. ELI shall be responsible for all costs associated with its work and facilities in the right of way, except as otherwise specifically provided in this Agreement.

H. The City specifically reserves the right to impose a fee or tax, as allowed by law, on any new business undertaking of ELI that is operated within the City.

I. In the event ELI allows another telecommunications carrier to use ELI's facilities within the City, ELI shall require such carrier to represent that it has all necessary permits and licenses as required by the City.

Section 10. Performance Bond

ELI shall provide the City with a performance bond of \$25,000 as security for the full and complete performance of this franchise, including costs, expenses, damages or loss the City pays or incurs because of any failure attributable to ELI to comply with any codes, ordinances, rules, regulations, administrative rules or permits of the city.

Section 11. Vacation of Right of Way

Whenever the City initiates any proceeding to vacate any rights of way within which ELI has a facility, the City will notify ELI. The City will, where practicable, maintain a public utility easement for ELI's facility, if requested by ELI.

Section 12. Use of ELI Facilities by Wireless Communications Facilities

ELI shall allow third parties to place wireless communications facilities on ELI poles provided that (1) the placement will not interfere with ELI's operations, (2) the placement and operations of the wireless communications facilities will be consistent with all safety and other applicable regulations, and (3) ELI agrees to the amount of compensation from the third party. The third party shall be contractually responsible for compliance with all safety and other applicable regulations. ELI may extend any existing pole to allow such co-location, consistent with the City's regulations of wireless communications facilities. The City shall have no liability arising from the co-location of third party facilities on ELI poles.

Section 13. Termination

A. **By City for Nonpayment.** City may terminate this Agreement and ELI's franchise if ELI fails to pay the franchise fee. The City shall provide thirty (30) days' notice of termination prior to any termination for non-payment. This Agreement shall not be terminated if ELI pays the full amount, including interest, within thirty (30) days of the notice.

B. **By City for Cause.** If ELI ceases to maintain its facilities and the lack of maintenance increases the risk of personal injury or property damage, the City may terminate this Agreement by providing ELI thirty (30) days' notice of termination.

This Agreement shall not be terminated if ELI substantially eliminates such risk within thirty (30) days of the notice.

Section 14. Sale of Franchise

ELI shall not sell or assign this franchise without the prior written consent of the City. ELI shall notify the City not later than sixty (60) days' prior to any intended transfer and the City will not unreasonably withhold any consent required. Notwithstanding the foregoing, ELI may

assign this Agreement to (a) any affiliate of ELI, or (b) any person that purchases all or substantially all of the assets of ELI, or any other person formed by or surviving the merger or consolidation of ELI.

Section 15. Removal of Facilities

If this Agreement is terminated or expires on its own terms and is not replaced by a new franchise agreement or similar authorization, ELI and the City shall, by mutual agreement, decide whether ELI's facilities are to be removed or remain in place. In the event that ELI and the City are unable to reach agreement on the disposition of ELI facilities after termination, the City Engineer may issue an order requiring removal at ELI's expense and the property upon which the facilities were used restored by ELI to the condition it was in before installation.

Section 16. Hold Harmless

ELI shall indemnify and hold harmless the City, its officers, employees, agents, and representatives against any and all claims, damages, costs and expenses to which they may be subjected as a result of any negligent or wrongful act or omission of ELI, or any act or omission of ELI that is alleged to be negligent or wrongful, under this Agreement or otherwise arising from the rights and privileges granted by this Agreement. The obligations imposed by this section are intended to survive termination of this Agreement.

ELI agrees to forever indemnify City, its officers, employees, agents, and representatives, from and against any claims, costs, and expenses of any kind, whether direct or indirect, pursuant to any state or federal law, statute, regulation, or order, for the removal or remediation of any leaks, spills, contamination, or residues of hazardous substances, directly attributable to ELI's facilities. Hazardous substances has the meaning given by ORS 465.200.

Section 17. Insurance

ELI shall, as a condition of the franchise grant, secure and maintain the following liability insurance policies insuring ELI and its employees and shall provide City an endorsement naming City, its officers, employees, and agents as an additional insured:

1. Comprehensive general liability insurance with limits not less than:
 - a. Three million dollars for bodily injury or death to each person;
 - b. Three million dollars for property damage resulting from any one accident; and,
 - c. Three million dollars for all other types of liability.
2. Automobile liability for owned, non-owned and hired vehicles with a limit of three million dollars for each accident.
3. Workers' compensation within statutory limits and employers' liability insurance with limits of not less than one million dollars.
4. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars.
5. The liability insurance policies required by this section shall be maintained by the grantee throughout the term of the telecommunications franchise, and such other

period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its telecommunications facilities.

Section 18. Limitation on Privileges

All rights and authority granted to ELI by the City are conditioned on the understanding and agreement that the privileges in the rights of way are not to operate in any way so as to be an enhancement of ELI's properties or values or to be an asset or item of ownership in any appraisal thereof.

Section 19. Effect of Invalidity of a Portion of this Agreement

If any section, subsection, sentence, clause, phrase, or other portion of this franchise is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of this Agreement that are not held to be invalid or unconstitutional shall remain in effect until this Agreement is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this Agreement, either party may demand that the other party meet to discuss amending this Agreement to adjust the relationship of the parties to conform to their original intent in entering into this Agreement. If the parties are unable to agree on a revised franchise agreement within ninety (90) days after a portion of this Agreement is found to be invalid or unconstitutional, either party may terminate this Agreement on 180 days' notice to the other party.

Section 20. Definitions

A. "Facility" includes any poles, guy wires, anchors, wires, fixtures, equipment, conduit, circuits, vaults, ground mounted switch cabinets, ground mounted mineral oil filled transformers, ground mounted secondary junction cabinets, and other property necessary or convenient to the supply of electric energy owned or operated by ELI within the City.

B. "Right of way" means any right of way or public utility easement within the City and under City ownership, control or administration.

C. "Install" means to erect, construct, build, replace or place.

Authorized Signature: The City of Milwaukee

Authorized Signature: Electric Lightwave, LLC

BY: [Signature]
TITLE: CITY MANAGER
DATE: 7/21/15

BY: [Signature]
TITLE: SVP-CIO
DATE: 8-10-15