

ORDINANCE NO. 2129

**AN ORDINANCE of the City of Camas, Washington, granting unto Electric Lightwave, Inc., a Delaware corporation, its successors and assigns, the right, privilege, authority and franchise for five (5) years, to construct, maintain, operate, replace and repair a telecommunications system, in, across, over, along, under, through and below certain designated public rights-of-way and public properties of the City of Camas, Washington.**

**THE CITY COUNCIL OF THE CITY OF CAMAS, WASHINGTON**

**DOES HEREBY ORDAIN AS FOLLOWS:**

**Section 1. Franchise Granted.** Pursuant to RCW 35A.47.040, the City of Camas, a Washington municipal corporation (hereinafter the "City"), hereby grants to Electric Lightwave, Inc., a corporation organized under the laws of the State of Delaware (hereinafter "ELI"), its heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, a franchise for a period of **five (5)** years, beginning on the effective date of this Agreement.

This franchise grants ELI the right, privilege and authority to construct, operate, maintain, replace, and use all necessary equipment and facilities thereto for a telecommunications system, in, under, on, across, over, through, along or below the public right-of-ways located within the City of Camas, Washington.

**Section 2. Non-Exclusive Franchise Grant.** This Franchise is granted upon the express condition that it shall not in any manner prevent the City from granting other or further franchises in, along, over, through, under, below or across any of said right-of-ways, streets, avenues or all other public lands and properties of every type and description. This franchise shall in no way prevent or prohibit the City from using any of said roads, streets or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocation's, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including the dedication, establishment, maintenance, and improvement

of all new rights-of-ways, thoroughfares and other public properties of every type and description.

**Section 3. Relocation of Telecommunications System Facilities.** ELI agrees and covenants at its sole cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street, any of its installations when reasonably required by the City by reason of traffic conditions, public safety, dedications of new right-of-ways and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity, provided that ELI shall in all such cases have the privilege to temporarily bypass, in the authorized portion of the same street upon approval by the City, any section of cable required to be temporarily disconnected or removed.

If the City determines that the project necessitates the relocation of ELI's then existing facilities, the City shall:

- a) At least **sixty (60)** days prior to the commencement of such improvement project, provide ELI with written notice requiring such relocation; and
- b) Provide ELI with copies of pertinent portions of the plans and specifications for such improvement project and a proposed location for ELI's facilities so that ELI may relocate its facilities in other City right-of-way in order to accommodate such improvement project.
- c) After receipt of such notice and such plans and specifications, ELI shall complete relocation of its facilities at no charge or expense to the City so as to accommodate the improvement project at least **ten (10)** days prior to commencement of the project.

ELI may, after receipt of written notice requesting a relocation of its facilities, submit to the City written alternatives to such relocation. The City shall evaluate such alternatives and advise ELI in writing if one or more of the alternatives is suitable to accommodate the work

which would otherwise necessitate relocation of the facilities. If so requested by the City, ELI shall submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by ELI full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative or feasible alternative, ELI shall relocate its facilities as otherwise provided in this Section.

The provisions of this Section shall in no manner preclude or restrict ELI from making any arrangements it may deem appropriate when responding to a request for relocation of its facilities by any person or entity other than the City, where the facilities to be constructed by said person or entity are not or *will* not become City-owned, operated or maintained facilities, provided that such arrangements do not unduly delay a City construction project.

**Section 4. ELI's Maps and Records.** After construction is complete, and as a condition of this franchise, ELI shall provide to the City and at no cost, a copy of all as-built plans, maps and records.

**Section 5. Excavations.** During any period of relocation or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said public right-of-ways and other public properties so as to interfere as little as possible with the free passage of traffic and the free use of adjoining property, and ELI shall at all times post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the agreements of the City or the laws of the State of Washington, including RCW 39.04.180 for the construction of trench safety systems.

Whenever ELI shall excavate in any public right-of-way or other public property for the purpose of installation, construction, repair, maintenance or relocation of its cable or equipment, it shall apply to the City for a permit to do so and shall give the City at least **three (3)** working days notice hereof. In no case shall any work commence within any public right-of-way or other public property without a permit, except as otherwise provided in this franchise. During the progress of the work, ELI shall not unnecessarily obstruct the passage or

proper use of the right-of-way, and shall file as -built plans or maps with the City showing the proposed and final location of the cable.

If either the City or ELI shall at any time plan to make excavations in any area covered by this franchise and as described in this section, the party planning such excavation shall afford the other, upon receipt of a written request to do so, an opportunity to share such excavation, PROVIDED THAT: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made; (2) such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and (3) either party may deny such request for safety reasons.

**Section 6. Restoration after Construction.** ELI shall, after abandonment approved under Section 13 herein, or installation, construction, relocation, maintenance, or repair of cable/facilities within the franchise area, restore the surface of the right-of-way or public property to at least the condition same was in immediately prior to any such installation, construction, relocation, maintenance or repair. All landscape restoration work shall be done with landscape plans approved by the Public Works Director. The Public Works Director shall have final approval of the condition of such street and public places after restoration. All concrete encased monument which have been disturbed or displaced by such work shall be restored pursuant to all federal, state and local standards and specifications. ELI agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the franchise area or other affected area at its sole cost and expense.

**Section 7. Emergency Work -- Permit Waiver.** In the event of any emergency in which any facilities located in or under any street breaks are damaged, or if ELI's construction area is otherwise in such a condition as to immediately endanger the property,

life, health or safety of any individual, ELI shall immediately take the proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve ELI from the requirement of obtaining any permits necessary for this purpose, and ELI shall apply for all such permits not later than the next succeeding day during which the Camas City Hall is open for business.

**Section 8. Dangerous Conditions, Authority for City to Abate.** Whenever construction, installation or excavation of facilities authorized by this franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining street or public place, or endangers the public, an adjoining public place, street utilities or City property, the Public Works Director may direct ELI, at ELI's own expense, to take actions to protect the public, adjacent public places, City property or street utilities; and such action may include compliance within a prescribed time.

In the event that ELI fails or refuses to promptly take the actions directed by the City, or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the City may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, or street utilities, or to maintain the lateral support thereof, or actions regarded as necessary safety precautions; and ELI shall be liable to the City for the costs thereof.

**Section 9. Recovery of Costs.** ELI shall pay a filing fee for the City's administrative costs in drafting and processing this franchise and all work related thereto. ELI shall further be subject to all fees associated with activities undertaken through the authority granted in this franchise or under, the laws of the City. Where the City incurs costs and expenses for review, inspection or supervision of activities undertaken through the authority granted in this franchise or any agreements relating to the subject for which a permit fee is not established, ELI shall pay such costs and expenses directly to the City. In addition to the

above, ELI shall promptly reimburse the City for any and all costs it reasonably incurs in response to any emergency involving ELI's cable and facilities.

**Section 10. City's Reservation of Rights.** Pursuant to Section 35.21.860 of the Revised Code of Washington (RCW), the City is precluded from imposing a franchise fee on a telephone business as defined in RCW 82.04.065, except for administrative expenses or any tax authorized by RCW 35.21.865. ELI hereby warrants that its operations as authorized under this franchise are those of a telephone business as defined in RCW 82-04.065. As a result, the City will not impose a franchise fee under the agreement other than as described herein.

However, the City hereby reserves its right to impose a franchise fee on ELI for purposes other than to recover its administrative expenses or taxing, if ELI's operations as authorized by this franchise change so that not all uses of the franchise are those of a "telephone business" as defined in RCW 82.04.065; or, if statutory prohibitions on the imposition of such fees are removed. In the former instance, the City reserves its right to require that ELI obtain a separate franchise for its change in use, which franchise may include provisions intended to regulate ELI's operations, as allowed under applicable law.

**Section 11. Indemnification.** ELI hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by ELI's own employees to which ELI might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property of which the negligent acts or omissions of ELI, its agents, servants, officers or employees in performing this franchise are the proximate cause. ELI further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers and employees from any and all claims, costs, judgments, awards or liability to any person (including claims by ELI's own employees, including those claims to which ELI might otherwise have immunity under Title 51 RCW) arising against the City solely by virtue of the

City's ownership or control of the rights-of-way or other public properties, by virtue of ELI's exercise of the rights granted herein, or by virtue of the City's permitting ELI's use of the City's rights-of-way or other public property based upon on the inspection or lack of inspection of work performed by ELI, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this franchise or pursuant to any other permit or approval issued in connection with this franchise. This covenant of indemnification shall include, but not be limited by this reference, claims against the City arising as a result of the negligent acts or omissions of ELI, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work in any \public right-of-way or other public place in performance of work or services permitted under this franchise.

Inspection or acceptance by the City of any work performed by ELI at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that ELI refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of ELI, then ELI shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fees of recovering under this indemnification provision.

Should a court of competent jurisdiction determine that this franchise agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of

ELI and the City, its officers, employees and agents, ELI's liability hereunder shall be only to the extent of ELI's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes ELI's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

The provisions of this Section shall survive the expiration or termination of this franchise agreement.

**Section 12. Insurance.** ELI shall procure and maintain for the duration of the franchise, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to ELI, its agents, representatives or employees. ELI shall provide a copy of such insurance policy to the City for its inspection prior to the adoption of this franchise agreement, and such insurance shall evidence:

1. Automobile Liability insurance with limits no less than **\$3,000,000** Combined Single Limit per accident for bodily injury and property damage; and
2. Commercial General Liability insurance policy written on an occurrence basis with limits no less **\$5,000,000** combined singled limit per occurrence and **\$5,000,000** aggregate for personal injury, bodily injury and property damage. Coverage shall include but not be limited to: blanket contractual; products/completed operations; broad form property; explosion, collapse and underground (XCU); and Employer's Liability.
3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than **\$1,000,000**.

Any deductibles or self-insured retention's must be declared to and approved by the City. Payment of deductible or self-insured retention shall be the sole responsibility of ELI.

The insurance obtained by ELI shall name the City, its officers, employees and volunteers as insureds with regard to activities performed by or on behalf of ELI. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officers,



officials, employees or volunteers. In addition, the insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. ELI's insurance shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance maintained by the City, its officers, officials, employees or volunteers shall be excess of ELI's insurance and shall not contribute with it. The insurance policy or policies required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after **sixty (60) days'** prior written notice by certified mail, return receipt requested, has been given to the City.

Any failure to comply with the reporting provisions of the policies required herein shall not affect coverage provided to the City, its officer, employees, agents or volunteers.

**Section 13. Abandonment of ELI's Cable or Telecommunication System Facilities.** No cable, section of cable or facility laid in the street by ELI may be abandoned by ELI without the express written consent of the City. Any plan for abandonment or removal of ELI's cable and facilities must be first approved by the Public Works Director, and all necessary permits must be obtained prior to such work.

**Section 14. Commencement of Construction.** Construction of the facilities contemplated by this franchise agreement shall commence by **November 1, 1997**, provided that such time limit shall not apply to delays caused by acts of God, strikes or other occurrences over which ELI has no control, or eminent domain litigation.

**Section 15. Bond.** Before undertaking any of the work, installation, improvements, construction, repair, relocation or maintenance authorized by this franchise, ELI shall, upon the request of the City, furnish a bond executed by ELI and a corporate surety authorized to do a surety business in the State of Washington, in a sum to be set and approved

by the Director of Public Works as sufficient to ensure performance of ELI's obligations under this franchise. The bond shall be conditioned so that ELI shall observe all the covenants, terms and conditions and faithfully perform all of the obligations of this franchise, and to erect or replace any defective work or materials discovered in the replacement of the City's streets or property within a period of two years from the date of the replacement and acceptance of such repaired streets by the City.

**Section 16. Modification.** The City and ELI hereby reserve the right to alter, amend or modify the terms and conditions of this franchise upon written agreement of both parties to such alteration, amendment or modification.

**Section 17. Forfeiture and Revocation.** If ELI willfully violates or fails to comply with any of the provisions of this franchise, or through willful or unreasonable negligence fails to heed or comply with any notice given ELI by the City under the provisions of this franchise, then ELI shall, at the election of the Camas City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon reasonable notice to ELI. The City may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to obtain an order from the superior court having jurisdiction compelling ELI to comply with the provisions of this franchise and to recover damages and costs incurred by the City by reason of ELI's failure to comply.

**Section 18. Remedies to Enforce Compliance.** In addition to any other remedy provided herein, the City reserves the right to pursue any remedy to compel or force ELI and/or its successors and assigns to comply with the terms hereof, and the pursuit of any right or remedy by the City shall not prevent the City from thereafter declaring a forfeiture or revocation for breach of the conditions herein.

**Section 19. City Agreements and Regulations.** Nothing herein shall be deemed to direct or restrict the City's ability to adopt and enforce all necessary and appropriate agreements regulating the performance of the conditions of this franchise, including any reasonable agreement made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The City shall have the authority at all times to control by appropriate regulations the location, elevation, and manner of construction and maintenance of any fiber optic cable or cable facilities by ELI, and ELI shall promptly conform with all such regulations, unless compliance would cause ELI to violate other requirements of law.

**Section 20. Cost of Publication.** The cost of the publication of this ordinance granted to ELI shall be borne by ELI.

**Section 21. Acceptance.** After the passage and approval of this ordinance and within **sixty (60)** days after such approval, this franchise shall be accepted by ELI by its filing with the City Clerk an unconditional written acceptance thereof. Failure of ELI to so accept this franchise within said period of time shall be deemed a rejection thereof by ELI, and the rights and privileges herein granted shall, after the expiration of the sixty day (60) period, absolutely cease, unless the time period is extended by agreement duly passed for that purpose.

**Section 22. Survival.** All of the provisions, conditions and requirements of Sections 3, Relocation of Telecommunication Facilities; Section 5, Excavations; Section 6 Restoration after Construction; Section 8 Dangerous Conditions, Authority for City to Abate; Section 11, Indemnification; and Section 13, Abandonment of ELI's Cable of Telecommunications System Facilities, ~~(f)~~ this franchise shall be in addition to any and all other obligations and liabilities ELI may have to the City at common law, by statute, or by contract, and shall survive the City's franchise to ELI for the use of the areas mentioned in Section 1 herein, and any renewals or extensions thereof. All of the provisions, conditions, regulations and requirements contained in this franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives and assigns of ELI and all

privileges, as well as all obligations and liabilities of ELI shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever ELI is named herein.

**Section 23. Severability.** If any section, sentence, clause or phrase of this Franchise agreement should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise agreement. In the event that any of the provisions of this franchise are held to be invalid by a court of competent jurisdiction, the City reserves the right to reconsider the grant of this franchise and may amend, repeal, add, replace or modify any other provision of this franchise, or may terminate this franchise.

**Section 24. Assignment.** This franchise may not be assigned or transferred without the written approval of the City, except ELI may freely assign this franchise in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate reorganization or refinancing. ELI shall not be assigned or transferred within the first twelve (12) months of the initial grant. ELI shall provide prompt, written notice to the City of any such assignment.

**Section 25. Notice.** Any notice or information required or permitted to be given to the parties under this franchise agreement may be sent to the following addresses unless otherwise specified:

City of Camas  
Attn: Finance Director  
616 NE Fourth Ave.  
Camas, WA 98607

Electric Lightwave, Inc.  
Attn: Legal Affairs  
8100 NE Parkway Dr.  
Suite 150  
Vancouver, WA 98662

(360) 892-1000

**Section 26. Effective Date.** This ordinance has been submitted to the Camas City Attorney; granted an approving vote of at least a majority of the City Council at a regular meeting. This ordinance shall be effective **thirty (30)** days after execution.

**ADOPTED** by the Council at a regular meeting this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

**Signed:** \_\_\_\_\_  
Mayor

**ATTEST:** \_\_\_\_\_  
Clerk

**APPROVED** as to form:

\_\_\_\_\_  
City Attorney