ORDINANCE NO. 07-11

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COVINGTON, KING COUNTY, WASHINGTON GRANTING UNTO ELECTRIC LIGHTWAVE, LLC, A DELAWARE LIMITED LIABILITY COMPANY, ITS SUCCESSORS AND ASSIGNS, FOR THE RIGHT, PRIVILEGE, AUTHORITY AND NON-EXCLUSIVE FRANCHISE FOR FIVE YEARS TO CONSTRUCT, MAINTAIN, OPERATE, REPLACE AND REPAIR TELECOMMUNICATIONS SYSTEM, IN, ACROSS, OVER, ALONG, UNDER, THROUGH AND BELOW CERTAIN DESIGNATED PUBLIC RIGHTS-OF-WAY OF THE CITY OF COVINGTON, WASHINGTON.

WHEREAS, Electric Lightwave, LLC (ELI) has requested that the City of Covington ("City") grant it a non-exclusive telecommunications franchise; and

WHEREAS, the City has the authority to grant franchises for the use of its streets and other public properties (RCW 35A.47.040);

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF COVINGTON, KING COUNTY, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Franchise Granted. Pursuant to Section 35A.47.040 of the Revised Code of Washington (RCW), the City hereby grants to ELI, a company organized under the laws of the State of Delaware, its successors, and assigns, subject to the terms and conditions hereinafter set forth, a non-exclusive franchise for a period of five (5) years, beginning on the effective date of this ordinance.

This franchise shall grant 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 in the City, as approved under City permits issued pursuant to this franchise. Said facilities shall not include towers, mono poles, antennas, or other equipment for the transmission of public wireless telecommunications. However, antennas for GPS timing, GPS locating, or other monitoring or sensor equipment for ELI's internal use, shall be permitted. Public "rights-of-way" as used herein means all public streets, roads, alleys and highways of the City as now or hereafter laid out, platted, dedicated or improved.

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. This franchise shall in no way prevent or prohibit the City from using any of said roads, streets or other public properties or affect its jurisdiction over them or any part of them, and the City shall retain power to make all necessary changes, relocations, 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. Location of Telecommunications System Facilities. ELI is authorized to place its telecommunication system facilities in, under, on, across, over, through, along, or below the public right-of-ways of the City as approved under City permits issued pursuant to this franchise.

Section 4. Relocation of Telecommunications System Facilities.

4.1 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 so required by the City by reason of traffic conditions or public safety, dedications of new 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.

4.2 Any condition or requirement imposed by the City upon any person or entities (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals for permit for zoning, land use, construction or development) which reasonably necessitates the relocation of ELI's facilities within the franchise area shall be a required relocation for purposes of subsection 4.1 above.

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

4.3.1 At least sixty (60) days prior to the commencement of such improvement project, provide ELI with written notice requiring such relocation.

4.3.2 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.

4.3.3 After receipt of such notice and such plans and specifications, ELI shall complete relocation of its facilities at least ten (10) days prior to commencement of the City's project at no charge or expense to the City.

4.3.4 Relocation shall be accomplished in such a manner as to accommodate the City's project.

4.4 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 are 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 reasonaable or feasible alternative, ELI shall relocate its facilities as otherwise provided in this Section. The provisions of this Section shall survive the expiration or termination of this franchise agreement for a period of three (3) years.

4.5 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 factilities, provided that such arrangements do not unduly delay a City construction project.

Section 5. Undergrounding of Facilities. In any area of the City in which there are no aerial facilities, or in any area in which telephone, electric power wires and cables have been placed underground, ELI shall not be permitted to erect poles or to run or suspend wires, cables or other facilities thereon, but shall lay such wires, cables or other facilities underground in the manner required by the City. ELI acknowledges and agrees that if the City does not require the undergrounding of its facilities at the time of permit application, the City may, at any time in the future, require the conversion of ELI's aerial facilities to underground installation at ELI's expense.

Whenever the City may require the undergrounding of the aerial utilities in any area of the City, ELI shall undergournd its aerial facilities in the manner specified by the City, concurrently with and in the area of the other affected utilities. Where other utilities are present and involved in the undergrounding project, ELI shall only be required to pay its fair share of common costs borne by all utilities, in addition to the costs specifically attributable to the undergroudning of ELI's own facilities. "Common costs" shall include necessary costs not specifically attributable to the undergrounding of any particular facility, such as costs for common trenching and utility vaults. "Fair share" shall be determined for a project on the basis of the number and size of ELI facilities being undergrounded in comparison to the total number and size of all other utility facilities being undergrounded.

Section 6. Maps and Records. After construction is complete, and as a condition of this franchise, ELI shall provide the City upon request and at no cost, a copy of all as-built plans, maps and records revealing the final location and condition of its facilities within the public right-of-ways and public places.

Section 7. Excavations. During any period of relocation, construction or maintenance, all work performed by ELI or its contractors shall be accomplished in a safe and workmanlike manner so to minimize interference with the free passage of

traffic and the free use of adjoining property, whether public or private. 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 ordinances 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 for the purpose of installation, construction, reair, maintenance or relocation of its cable or equipment, it shall apply to the City for a permit to do so and, in addition, shall give the City at least five (5) working days prior notice of its intent to commence work in the public right-of-way. In no case shall any work commence within any public right-of-way without a permit, except as otherwise provided in this franchise ordinance.

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:

A. Such joint use shall not unreasonably delay the work of the party causing the excavation to be made; and

B. Such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties; and

C. Either party may deny such request for safety reasons. The provisions of this Section shall survive the expiration or termination of this franchise agreement.

Section 8. Restoration after Construction. ELI shall, after abandonment approved under Section 15 herein, or installation, construction, relocation, maintenance or repair of its facilities within the franchise area, restore the surface of the right-of-way to at least the same condition the property was in immediately prior to any such installation, construction, relocation, maintenance or repair. The City's Public Works Director shall have final approval of the condition of such streets and public places after restoration. All concrete encased monuments 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. The provisions of this Section shall survive the expiration, revocation or termination by other means of this franchise, for a period of three (3) years.

Section 9. Emergency Work – Permit Waiver. In the event of any emergency in which any of ELI's facilities located in or under any street breaks, become damaged, or if ELI's construction area is otherwise in such a condition as to immediately endanger the property, life, health or safety of individuals necessitating emergency work, ELI may perform said work 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 Covington City Hall is open for business.

Section 10. Dangerous Conditions. Authority for City to Abate. Whenever the 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 City's 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 therof, or actions regarded as necessary safety precautions, and ELI shall be liable to the City for the costs thereof. The provisions of this Section shall survive the expiration, revocation or termination of this franchise, for a period of three (3) years.

Section 11. Recovery of Costs. ELI shall pay a filing free for the City's administrative costs in drafting and processing this franchise agreement and all work related thereto. ELI shall further be subject to all permit fees associated with activities undertaken through the authority granted in this franchise ordinance 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 ordinances 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 the City reasonably incurs in response to any emergency involving ELI's cable and facilities. All City costs, fees, or expenses which are reimbursable by the terms of this agreement shall be subject to RCW 35.21.860.

Section 12. City's Reservation of Rights. Pursuant to RCW 35.21.860, 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 terms of this ordinance, 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 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 either instance, the City also 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 13. Indemnification: ELI hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representativies from any and all claims, costs, judgements, awards or liability to any person, including claims by ELI's own employees for which ELI might otherwise be immune under Title 51 RCW, for injury or death of any person or damage to property caused by or arising out of the negligent acts or omissions of ELI, its agents, sevants, officers or employees in the performance of this franchise, and any rights granted hereunder.

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 by ELI of any of its obligations under this Section. 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 provision 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 reasonable and documented costs for defense of the action, including all expert witness fees, costs, and attorney's fees, including costs and fees incurred in recovering under this indemnification provision.

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 provision 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 for a period of three (3) years.

Section 14. 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 certificate to the City for its inspection prior to the adoption of this franchise ordinance, and such insurance shall include:

A. Automobile Liability insurance with limits no less than $1,000,000 combined single limit per occurrence for bodily injury and property damage; and

B. Commercial General Liability insurance, written on an occurrence basis with limits no less than $1,000,000 combined single limit per occurrence and $2,000,000 aggregate for personal injury, bodily

injury and property damage. Coverage shall include but not be limited to: blanket contractual; products and completed operations; broad form property damage; explosion, collapse and underground (XCU); and employer's liability.

Any deductibles or self-insured retentions 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 policies obtained by ELI shall name the City (its officers, employees and volunteers) as an additional insured with regard to activities performed by or on behalf of ELI. The coverage shall contain no special limitations on the scope of protection afforded by 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, employees, agents and volunteers. Any insurance maintained by the City, its officers, employees, agents or volunteers shall be excess of ELI's insurance and shall not contribute with it. The insurance certificate required by this clause shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice 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 officeres, employees, agents or volunteers.

Section 15. 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 City's Public Works Director and all necessary permits must be obatined prior to such work. The provisions of this Section shall survive the expiration, revocation or termination of this franchise agreement for a period of three (3) years.

Section 16. 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 reasonal sum to be set and approved by the City's 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 17. City Requested Facilities. At any time that ELI is constructing, relocating, or placing ducts or conduits in public rights-of-way, the City may require ELI to provide additional duct or conduit and related access structures. ELI agrees to perform such requests at the sole expense of the City and pursuant to RCW 35.99.070 and the applicable terms of this franchise agreement.

Section 18. 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 19. Forfeiture and Revocation: If ELI willfully violates or fails to comply with any of the provisions of this franchise, or through willful misconduct or gross 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 Covington City Council, forfeit all rights conferred hereunder and this franchise may be revoked or annulled by the Council after a hearing held upon notice to ELI.

Section 20. Remedies to Enforce Compliance. 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 ordinance and to recover damages and costs incurred by the City by reason of ELI's failure to comply. 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 21. City Ordinances and Regulations. Nothing herein shall be deemed to restrict the City's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this franchise, including any valid ordinance 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, 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. In the event of a conflict between the provisions of this franchise and any other ordinance(s) enacted under the City's police power authority, such other ordinance(s) shall take precedence over the provisions set forth herein.

Section 22. Cost of Publication. The cost of publication of this ordinance shall be borne by ELI.

Section 23. Acceptance. Within sixty (60) days after the passage and approval of this ordinance, this franchise may 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 (60) day period,

absolutely cease and determine, unless the time period is extended by ordinance duly passed for that purpose.

Section 24. Survival. All of the provisions, conditions and requirements of Sections 4 – Relocation of Telecommunications Facilities; 5 – Undergrounding of Facilities; 7 – Excavation; 8 – Restoration after Construction; 10 – Dangerous Conditions; 13 – Indemnification; and 15 – Abandonment of ELI's Facilities, of 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, for a period of three (3) years. All of the provisions, conditions, regulations and requirements contained in this franchise Ordinance shall further be binding upon the successors and assigns of ELI and all privleges, 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 25. Assignment. This agreement may not be assigned or transferred without the written approval of the City, except ELI may freely assign this agreement in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing. In the case of transer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such consent shall not be required unless and until the secured party elects to realize upon the collateral. ELI shall provide prompt, written notice to the City of any such assignment.

Section 26. 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 COVINGTON
Attn: City Manager
16720 SE 271st Street, Suite 100
Covington, WA 98042

ELECTRIC LIGHTWAVE,LLC.
Attn: VP Treasurer & Finance
1201 NE Lloyd Boulevard, Suite 500
Portland, OR 97232

With a copy to:

CITY OF COVINGTON
Attn: Public Works Director
16720 SE 271st Street, Suite 100
Covington, WA 98042

ELECTRIC LIGHTWAVE,LLC.
Attn: Department of Law & Policy
1201 NE Lloyd Boulevard, Suite 500
Portland, OR 97232

Section 27. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconsitutional by the 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 ordinance.

If any provision of this ordinance, or ordinance modified by it, is determined to be invalid or unenforceable for any reason, the remaining provisions of this ordinance and

ordinances and/or resolutions modified by it shall remain in force and effect.

Section 28. Effective Date. This ordinance shall be in full force and effect on July 13, 2011. A summary of this ordinance may be published in lieu of publishing the ordinance in its entirety.

Passed by the City Council on the 28th day of June, 2011.

Margaret Harto
Mayor Margaret Harto

PUBLISHED: July 8, 2011
EFFECTIVE: July 13, 2011

ATTESTED:

Sharon Scott
City Clerk

APPROVED AS TO FORM:

Sara Springer
City Attorney