

ORDINANCE NO. 2024-03

AN ORDINANCE GRANTING A FRANCHISE TO BRIGHTSPEED OF VIRGINIA, LLC, F/K/A THE CENTRAL TELEPHONE COMPANY OF VIRGINIA (“BRIGHTSPEED”) TO OPERATE AND MAINTAIN A TELECOMMUNICATIONS SYSTEM (“THE SYSTEM”) IN THE CITY OF LEXINGTON, VIRGINIA (“THE CITY”).

The City hereby ordains that it is in the public interest to grant Brightspeed a Franchise to operate the System pursuant to the terms and conditions contained herein.

SECTION 1. Grant of Franchise. The City hereby grants to Brightspeed the right, privilege and authority to construct, install, maintain, operate, upgrade, replace, renovate, adjust, protect, support, raise, lower, disconnect, remove and relocate its cables, poles, pedestals, boxes, wires, conduits, conductors, pipes and related appurtenances (“Facilities”) for its System in, under, along, over and across the present and future streets, alleys and public ways of the City (“Public Ways”), for the purpose of providing telecommunication services to the City’s inhabitants and businesses. Brightspeed’s use of the Public Ways shall not unreasonably interfere with the City’s or any third party’s use of the Public Ways.

SECTION 2. Acceptance by Brightspeed. Within sixty (60) days after the passage of this Ordinance by the City, Brightspeed shall file a signed copy thereof with the City Clerk, otherwise the Ordinance and the rights granted herein shall be null and void.

SECTION 3. Term. The Term of this Franchise is (15) years commencing on the date of Acceptance by Brightspeed as set forth in Section 2, above. This Franchise will automatically renew for three additional five (5) year terms. Within ninety (90) days following the termination of the Franchise, Brightspeed must remove all of its Facilities from the Public Ways unless otherwise agreed.

SECTION 4. Franchise Fee. Within sixty (60) days after the date of Brightspeed’s Acceptance of this Ordinance and until its expiration, Brightspeed will pay the City one (1) percent (%) of Brightspeed’s local exchange access service Gross Revenue (as defined in Appendix A hereto). Payment shall be made quarterly within sixty (60) days after the end of each quarter during the Term of this Franchise.

SECTION 5. Records Inspection. Brightspeed shall make available to the City, upon reasonable advance written notice of no less than thirty (30) days, such information pertinent only to enforcing the terms of this Ordinance in such form and at such times as Brightspeed can reasonably make available. Subject to applicable laws, any information that is provided to the City and/or that the City reviews *in camera* is confidential and proprietary and shall not be disclosed or used for any purpose other than verifying compliance with the terms of this Ordinance. Any such information provided to the City shall be promptly returned to Brightspeed following review. The City will not make copies of such information.

SECTION 6. Non-Exclusive Franchise. The right to use and occupy the Public Ways of the City shall be nonexclusive, and the City reserves the right to use the Public Ways for itself or any other entity. The City's use, however, shall not unreasonably interfere with Brightspeed's Facilities.

SECTION 7. City Regulatory Authority. The City reserves the right to adopt and enforce such additional ordinances and regulations as may be deemed necessary in the exercise of its police power for the protection of the health, safety and welfare of its citizens and their properties consistent with applicable federal and state law.

SECTION 8. Indemnification. The City shall not be liable for any property damage or loss or injury to or death of any person that occurs in the construction, operation, maintenance, or repair by Brightspeed of its Facilities. Brightspeed shall indemnify, defend and hold the City harmless from and against third party claims, demands, liens and all liability or damage of whatsoever kind on account of Brightspeed's use of the Public Ways. The City shall: (a) give prompt written notice to Brightspeed of any claim, demand or lien with respect to which the City seeks indemnification hereunder; and (b) permit Brightspeed to assume the defense of such claim, demand, or lien. Brightspeed shall not be subject to liability for any settlement made without its consent. Notwithstanding the other provisions contained herein, Brightspeed shall in no event be required to indemnify the City for any claims, demands, or liens arising from the sole and exclusive negligence or wrongful actions or inactions of the City, its officials, boards, commissions, agents, contractors, and/or employees.

SECTION 9. Insurance Requirements. Brightspeed will maintain in full force and effect for the Term of the Franchise, at Brightspeed's expense, a comprehensive liability insurance policy written by a company authorized to do business in the Commonwealth of Virginia, or will provide self-insurance reasonably satisfactory to the City, protecting it against liability for loss, personal injury and property damage occasioned by the construction, operation, maintenance, or repair of the System by Brightspeed. Such insurance will be in an amount not less than \$1,000,000.00 per occurrence and \$10,000,000 annual aggregate including applicable umbrella coverage. Brightspeed will also maintain Worker's Compensation coverage throughout the term of this Franchise as required by law. The City may review the status of Brightspeed's insurance at www.Brightspeed.com/moi.

SECTION 10. Annexation. When any territory is approved for annexation to the City, the City shall within thirty (30) business days provide by certified mail to Brightspeed: (a) each site address to be annexed as recorded on City assessment and tax rolls; (b) a legal description of the proposed boundary change; and (c) a copy of the City's ordinance approving the proposed annexation.

SECTION 11. Plan, Design, Construction and Installation of Brightspeed's Facilities.

11.1 All Facilities under authority of this Ordinance shall be used, constructed, maintained, and repaired in accordance with applicable law and the terms of this Ordinance.

11.2 Brightspeed shall, prior to commencing new construction or major reconstruction or repair work in Public Ways or other public places, apply for any required permit from the City, which the City shall process in its customary manner. Brightspeed will abide by all applicable ordinances and rules, regulations and requirements of the City consistent with applicable law, and the City may

inspect the manner of such work and require remedies as may be reasonably necessary to assure compliance. Notwithstanding the foregoing, Brightspeed shall not be obligated to obtain a permit to perform emergency repairs, though, as soon as reasonably possible in light of the emergency and the nature of the needed repairs, Brightspeed must provide the City with notice of the emergency, the need for the repairs, and such other information concerning the repairs as may be required in the typical permitting process.

11.3 To the extent practical and consistent with any permit issued by the City, all Facilities shall be located so as to cause minimum interference with the Public Ways and shall be constructed, installed, maintained, renovated, repaired, or replaced in accordance with all applicable rules, ordinances and regulations of the City.

11.4 If, during the course of any work on its Facilities, Brightspeed causes damage to or alters the Public Way or other public property, Brightspeed must repair, replace, and restore such Public Way or public property at Brightspeed's expense to a condition reasonably identical to the condition that existed immediately prior to such damage or alteration, as reasonably determined by the City. This obligation shall include, but not be limited to, paving, concrete, hardscapes, and landscaping.

11.5 Brightspeed shall have the right to excavate the Public Ways subject to reasonable conditions and requirements of the City and to the repair, replacement, and restoration obligation in the preceding section. Before installing new underground facilities or replacing existing underground facilities, each party shall first notify the other of such work in accordance with applicable law. In no event will the City be required to secure Brightspeed's permission or consent to operate or construct in the City's Public Ways. To the extent practicable under the circumstances, each party may allow the other party, at its own expense, to share a trench for laying its own facilities therein, provided that such action will not unreasonably interfere with the first party's use of the trench or unreasonably delay project completion.

11.6 Nothing in this Ordinance shall be construed to prevent the City from constructing, maintaining, repairing, or relocating its sewers, streets, water mains, sidewalks, or other public property. However, before commencing any work within a Public Way that may affect Brightspeed's Facilities, the City shall give written notice to Brightspeed in accordance with applicable law, and all such work shall be done, insofar as practicable, in such a manner as not to obstruct, injure, or prevent the free use and operation of either Party's Facilities. The two parties shall work together to ensure that all of their facilities are protected and the project is completed.

11.7 Brightspeed shall not attach to, or otherwise use or commit to use, any pole owned by City until a separate pole attachment agreement has been executed by the parties.

SECTION 12. Relocation of Facilities.

12.1 Relocation for the City. Brightspeed shall, upon receipt of advance written notice of not less than one hundred twenty (120) days, protect, adjust, support, raise, lower, temporarily disconnect, relocate or remove any Brightspeed property located in a Public Way when required by the City consistent with its police powers. Brightspeed shall be responsible for any costs

associated with these obligations to the same extent as other users of the respective Public Way and as otherwise required by applicable state or federal law.

12.2 Relocation for a Third Party. Brightspeed shall, at the request of any person holding a lawful permit issued by the City, protect, adjust, support, raise, lower, temporarily disconnect, relocate or remove any Brightspeed property located in a Public Way, provided that the cost of such action is borne by the person requesting it and Brightspeed is given reasonable advance written notice. In such situation, Brightspeed may also require advance payment. For purposes of this subsection 12.2, “reasonable advance written notice” shall mean no less than thirty (30) days for a temporary relocation, and no less than one hundred twenty (120) days for a permanent relocation.

12.3 Alternatives to Relocation. Brightspeed may, after receipt of written notice requesting a relocation of Facilities, submit to the City written alternatives to such relocation. Such alternatives shall include the use and operation of temporary transmitting facilities in adjacent Public Ways. The City shall promptly evaluate such alternatives and advise Brightspeed in writing if one or more of the alternatives are suitable. If requested by the City, Brightspeed shall promptly submit additional information to assist the City in making such evaluation. The City shall give each alternative proposed by Brightspeed full and fair consideration. In the event the City ultimately determines that there is no other reasonable alternative, Brightspeed shall relocate the components of the System as otherwise provided herein. Notwithstanding the foregoing, Brightspeed shall in all cases have the right to abandon the Facilities.

SECTION 13. Vegetation Management. Brightspeed shall have the authority, following advance written notice to and coordination with the City, to trim trees and other natural growth in the Public Ways in order to access and maintain the Facilities in compliance with applicable law and industry standards. This grant shall in no way impose a duty on Brightspeed; instead, this grant gives permission to Brightspeed should Brightspeed elect to conduct such activities from time-to-time in order to access and maintain its Facilities.

SECTION 14. Renewal. At least one hundred twenty (120) days prior to the expiration of this Franchise, Brightspeed and the City shall either agree to extend the Term or use best faith efforts to renegotiate a replacement Franchise agreement.

SECTION 15. Revocation of Franchise for Noncompliance.

15.1 In the event that the City believes that Brightspeed has not complied with the terms of the Franchise, the City shall informally discuss the matter with Brightspeed. If these discussions do not lead to resolution of the problem, the City shall notify Brightspeed in writing of the nature of the alleged noncompliance.

15.2 Brightspeed shall have thirty (30) days from receipt of the written notice described in subsection 15.1 to either respond to the City, contesting the assertion of noncompliance, or otherwise initiate reasonable steps to remedy the asserted noncompliance issue, notifying the City of the steps being taken and the projected date that they will be completed.

15.3 In the event that Brightspeed does not comply with subsection 15.2, above, the City shall schedule a public hearing to address the asserted noncompliance issue. The City shall provide

Brightspeed at least ten (10) days prior written notice of and the opportunity to be heard at the hearing.

15.4 Subject to applicable federal and state law, in the event the City, after the hearing set forth in subsection 15.3, determines that Brightspeed is noncompliant with this Ordinance, the City may:

- A. Seek specific performance of any provision which reasonably lends itself to such remedy, as an alternative to damages; or
- B. Commence an action at law for monetary damages or other equitable relief; or
- C. In the case of noncompliance with a material provision of the Ordinance, seek to revoke the Franchise in accordance with subsection 15.5.

15.5 Should the City seek to revoke the Franchise after following the procedures set forth above, the City shall give written notice to Brightspeed. Brightspeed shall have ninety (90) days from receipt of such notice to object in writing and state its reason(s) for such objection. Thereafter, the City may seek revocation of the Franchise at a public hearing. The City shall provide written notice to Brightspeed, at least thirty (30) days prior to such public hearing, specifying the time and place of such hearing and stating its intent to revoke the Franchise. At the designated hearing, the City shall give Brightspeed an opportunity to state its position on the matter, after which the City shall determine whether or not the Franchise shall be revoked. Brightspeed may appeal the City's determination to the Rockbridge County Circuit Court only to the extent permitted by applicable law. The City may, at its sole discretion, take any lawful action which it deems appropriate to enforce its rights under this Ordinance in lieu of revocation.

15.6 Notwithstanding the foregoing provisions in this Section 15, neither Brightspeed nor the City waives any of their rights under applicable law.

SECTION 16. No Waiver of Rights. Neither the City nor Brightspeed shall be excused from complying with any of the terms and conditions contained herein by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions to insist upon or to seek compliance with any such terms and conditions. Each party expressly reserves any and all rights, remedies, and arguments it may have at law or equity, without limitation, and to argue, assert, and/or take any position as to the legality or appropriateness of any provision in this Ordinance that is inconsistent with State or Federal law, as may be amended.

SECTION 17. Transfer of Franchise. Brightspeed's right, title, or interest in the Franchise shall not be sold, transferred, assigned, or otherwise encumbered without notice to the City, except when said sale, transfer, assignment, or encumbrance is to an entity controlling, controlled by, or under common control with Brightspeed, or for transfers in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of Brightspeed in the Franchise or Facilities in order to secure indebtedness. Brightspeed must provide the City with written notice of a qualifying transfer of the franchise within thirty (30) days of the transfer.

SECTION 18. Amendment. Amendments to the terms and conditions contained herein shall be mutually agreed upon by the City and Brightspeed and formally adopted by the City Council as an ordinance amendment.

SECTION 19. Notices. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within two (2) business days after such notice is deposited in the United States Mail, postage prepaid, certified, and addressed to the Parties as set forth below:

The City:
City of Lexington
Attention: City Manager
300 East Washington Street
Lexington, Virginia 24450

Brightspeed:
1120 S. Tryon St., Ste. 700
Charlotte, NC 28203

SECTION 20. Publication. In accordance with Virginia Statute, the City shall be responsible for publication of this Ordinance, and any amendments thereof. Brightspeed shall be responsible for payment of all necessary and reasonable costs of publication of this Ordinance, and any amendments thereof.

SECTION 21. Severability. If any section, sentence, paragraph, term or provision hereof is for any reason determined to be illegal, invalid, or superseded by other lawful authority, including any state or federal regulatory authority having jurisdiction thereof, or unconstitutional, illegal or invalid by any court of common jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such determination shall have no effect on the validity of any other section, sentence, paragraph, term or provision hereof, all of which will remain in full force and effect for the term of the Franchise or any renewal or renewals thereof.

CONSIDERED and APPROVED this 18th day of April, 2024.

CITY OF LEXINGTON

By: _____


Frank Friedman, Mayor

ACCEPTED BY BRIGHTSPEED:

BY: Todd Stults

TITLE: Project Manager - Right-of-Way

DATE: 05/02/2024

APPENDIX A

LISTING OF SERVICE CATEGORIES INCLUDED IN “GROSS REVENUE”

FOR CALCULATION OF FRANCHISE FEES

Business Local Access—including Flat Rate, Multiparty, and Extended Area Service

Business Measured Usage Local Access Service

Flat Usage Local Access Trunks

Low Income Telephone Assistance Program Local Access

Measured Rate Local Access Trunk Usage

Message Rate Local Access Trunk Usage

Public Access Line (PAL) Service

Residential Local Access—including Flat Rate, Multiparty, and Extended Area Service

Residential Measured Usage

THE FOLLOWING IS A NON-EXCLUSIVE LISTING OF CATEGORIES OF REVENUE NOT REPRESENTING THE RETAIL SALE OF LOCAL ACCESS SERVICES AND THEREFORE EXCLUDED FROM THE DEFINITION OF “GROSS REVENUES” AND, THEREFORE, ARE NOT INCLUDED IN THE CALCULATION OF ANY FEE DUE TO THE CITY

Proceeds from the sale of bonds, mortgages, or other evidences of indebtedness, securities or stocks

Bad debt write-offs and customer credits

Revenue from directory advertising

Any amounts collected from customers that are to be remitted to a federal or state agency as part of a Universal Service Fund or other government program, including but not limited to support for the hearing impaired

Any amounts collected for taxes, fees, or surcharges and paid to the federal, state or local governments

Revenues from internet access

Revenues from digital or other electronic content, such as computer software, music and video downloads

Revenues from equipment sales, rentals, installation and maintenance

Revenues from any carrier purchased for resale

Revenues from private line services not for switched local access service