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CITY OF SANTA FE, NEW MEXICO

ORDINANCE NO. 2022-5

AN ORDINANCE

GRANTING NTS COMMUNICATIONS, LLC, DBA VEXUS FIBER, A NON-EXCLUSIVE FRANCHISE, TO OPERATE A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF SANTA FE; THE RIGHT TO USE CITY PUBLIC RIGHTS-OF-WAY TO PROVIDE TELECOMMUNICATIONS SERVICES WITHIN THE CITY; AND FIXING THE TERMS AND CONDITIONS THEREOF.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Legislative Findings. The governing body of the city of Santa Fe finds that:

A. The granting of a franchise to NTS Communications, dba Vexus Fiber. (“the Company”), is necessary for the access and use of public rights-of-way to provide telecommunications services within the city limits in accordance with the terms and conditions of this Ordinance and the Telecommunications in the Public Rights-of-Way Ordinance, Article 27-2 SFCC 1987 (“Article 27-2”).

B. The granting of such a franchise permits competitively neutral and non-discriminatory access to the public rights-of-way for providers of telecommunications services; and allows the city to appropriately manage the public rights-of-way in order to minimize the impact and cost to the citizens of the placement of telecommunications facilities within the public rights-of-way.

C. The granting of a franchise promotes competition among telecommunications

1 services providers and encourages the universal availability of telecommunications services to
2 residents and businesses of the city through the careful management of public rights-of-way.

3 D. It is the intent of the city in the granting of the franchise to obtain fair and
4 reasonable compensation for the use of public rights-of-way through the collection of fees and
5 charges, and to minimize the congestion, inconvenience, visual impact, and other adverse effects
6 on the public rights-of-way by Company's commercial use of public rights-of-way.

7 E. To the extent permitted by state and federal law, the granting of a franchise
8 allows the city to exercise such other powers, as the city may have to protect the public health,
9 safety, and welfare, ensure the continued quality of telecommunications services, and safeguard
10 the rights of consumers who are residents of the city.

11 F. In accordance with Article 27-2, Company submitted an application for a
12 franchise on October 22, 2021.

13 G. The city is authorized to grant one or more non-exclusive franchises for
14 telecommunications services within the city.

15 H. The city has reviewed Company's application and has determined that granting a
16 franchise in accordance with Article 27-2 is in the public interest and in the interest of the city
17 and its residents.

18 I. This franchise, as it relates to the city's costs, maintenance, management, and
19 necessary regulation of public rights-of-way, will assist in meeting the telecommunications
20 related needs and interests of the community.

21 **Section 2. Franchise Terms.** In exchange for Company's compliance with the terms
22 of this Ordinance, the provisions of Article 27-2, and other applicable city codes, there is hereby
23 granted by the city to Company permission to use public rights-of-way to provide
24 telecommunications services. All terms of Article 27-2 shall control Company's use of the public
25 rights-of-way except as specifically set out in this Ordinance.

1 A. **Short Title; Purpose; Applicability.**

2 1. This Ordinance shall be cited as the “Vexus Fiber Franchise Ordinance”.

3 2. The purpose of this Ordinance is to grant Company, the right, privilege,
4 and authority to:

5 (a) Furnish and distribute telecommunications services in the city, by
6 means of its network, on, over, under, along and across public rights-of-way, now or hereafter
7 included in the boundaries of the city as such boundaries now exist or may hereafter be extended;
8 and

9 (b) Construct, purchase, acquire, locate, maintain, and extend into,
10 within, and through the city, a telecommunications network for the period and upon the terms and
11 conditions specified in this franchise comprised of all facilities and equipment used by Company
12 to provide telecommunications services, including but not limited to “Backhaul Equipment” and
13 “Wireless Communication Equipment.”

14 This permission is not exclusive and does not prevent the city from
15 issuing other franchises or authorizations or prevent the city itself from constructing or operating
16 its own telecommunications network within the public rights-of-way, with or without a franchise.

17 3. This franchise applies to the placement of telecommunications facilities in
18 the city’s public rights-of-way.

19 B. Definitions.

20 *Bad Debt* means any portion of a debt that is related to a sale of telecommunications at
21 retail, for which gross charges are not otherwise deductible or excludable, that has become
22 worthless or uncollectible as determined under applicable federal income tax standards.

23 *Department* means the department of public works.

24 *Gross Charge.*

25 1. Includes all revenues derived directly or indirectly by a Provider from or

1 in connection with the Telecommunications Services offered within the City through or by means
2 of a Telecommunications Network within the City, exclusive of any Franchise Fee or tax passed
3 through to consumers on behalf of governmental agencies, received by the Provider for services
4 provided to customers through use of the Network. *Gross Charge* shall include any revenue
5 received by a Provider or any Affiliate through any means that is intended to have the effect of
6 evading the payment of compensation that would otherwise be paid to the City for Franchise
7 Contract granted pursuant to this ordinance.

8 2. *Gross Charge* shall not include (i) proceeds from the sale of bonds,
9 mortgages, or other evidence of indebtedness, securities, or stocks; or (ii) gross receipts taxes, bad
10 debt write-offs, and customer credits; or (iii) revenue of any Affiliate or Provider from long distance
11 service, commercial mobile radio service, cellular, personal communications service, other wireless
12 communications service, or directory advertising. Each of the above are not included in the
13 definition of *Gross Charge* and, therefore, are not included in the calculation of any fee due under
14 a Franchise.

15 3. *Gross Charge* shall be measured and monitored periodically.

16 *Sale of Telecommunications at Retail* means the transmitting, supplying, or furnishing of
17 telecommunications and all services rendered in connection therewith for consideration, other than
18 between a parent corporation and its wholly owned subsidiaries or between wholly owned
19 subsidiaries, but only when the infrastructure maintenance fee imposed by this chapter previously
20 has been paid to a retailer and the gross charge made by one such corporation to another such
21 corporation is not greater than the gross charge paid to the retailer for use or consumption and not
22 for resale.

23 *Service Address* means the location of telecommunications equipment from which
24 telecommunications services are originated or at which telecommunications services are received.
25 If this location is not a defined location, as in the case of wireless telecommunications, paging

1 systems, maritime systems, air-to-ground systems and the like, “service address” shall mean the
2 location of the customer’s primary use of the telecommunications equipment as defined by the
3 location in the City where bills are sent.

4 *Telecommunications.*

5 1. All transmissions between or among points specified by the user of
6 information of the user's choosing (whether voice, video, or data), without change in the form or
7 content of the information as sent and received, where such transmissions are accomplished by
8 means of a Telecommunications Network.

9 2. *Telecommunications* shall not include cable services as defined in Title
10 47, Chapter 5, Subchapter V-A of the United States Code, as amended (47 USC § 521 et seq.) and
11 shall not include telecommunications services provided and used by a public utility as that term is
12 defined at § 62-3-3(G) NMSA 1978, or successor statute, for (i) its internal system communication
13 needs; and (ii) provided directly or indirectly to its customers, including but not limited to electronic
14 meter reading, load control, demand side management, power quality monitoring, and other
15 activities related to the delivery of electricity or natural gas.

16 *Telecommunications Network* means any System which includes facilities and/or
17 equipment placed in the Public Rights-of-Way and used to provide any Telecommunications
18 Service.

19 *Telecommunications Provider (“Provider”)* means:

20 1. Any Person who provides any Telecommunications Service within the
21 City by means of:

22 (a) a Telecommunications Network owned by such Person or its
23 Affiliate;

24 (b) specifically identifiable facilities of a Telecommunications
25 Network reserved or made available for the use of such Person or its Affiliate under a lease or any

1 other arrangement for a term longer than 120 days; or

2 (c) facilities of a Telecommunications Network not owned by such
3 Person or its Affiliate and not specifically identifiable but obtained from another Person (including
4 another Provider) if the use of such facilities is continuing and substantial. A Person owning or
5 operating telecommunications facilities that merely pass through the City and such Person and
6 facilities do not offer Telecommunications Service to subscribers within the City shall not be
7 subject to this ordinance, provided that Person has received other appropriate authorization from
8 the City to rent or occupy the Public Rights-of-Way.

9 2. Except to the extent that a *Provider* or a Person uses the Public Rights-of-
10 Way, a *Provider* or any Person which provides commercial mobile radio service, cellular, personal
11 communications service, or other wireless communications service shall not be subject to this
12 ordinance with respect to such service.

13 *Telecommunications Service.* The offering of Telecommunications within the City for a
14 fee directly to the public, or to such classes of users as to be effectively available directly to the
15 public.

16 *Trenchless excavation* means any line installation, replacement or rehabilitation through
17 the use of boring, jacking, horizontal drilling or tunneling.

18 *Wireless Telecommunications* includes cellular mobile telephone services, personal
19 wireless services as defined in Section 704(C) of the Telecommunications Act of 1996 (Public Law
20 Number 104-104), as now or hereafter amended, including all commercial mobile radio services
21 and paging services.

22 **C. Infrastructure Maintenance Franchise Fee.**

23 1. Pursuant to the authority granted by section § 3-42-1 NMSA 1978 and 47
24 U.S.C. 253(c), there is hereby imposed an infrastructure maintenance franchise fee upon the
25 Company at the rate of two percent (2%) of all gross charges charged by the Company to a service

1 address in the city for telecommunications originating or received in the city.

2 2. The fee imposed by this chapter shall not be imposed in any circumstances
3 in which the imposition of the fee would violate the Constitution or statutes of the United States.

4 **D. Filing Returns and Payment of Franchise Fee.**

5 1. On or before the last day of each quarter, the Company is required to pay
6 the infrastructure maintenance fee imposed by this chapter and shall file with the City a remittance
7 return and shall pay the fee attributable to gross charges for the preceding calendar month. The
8 return shall contain such information as the director may reasonably require.

9 2. On or before the last day of the fourth quarter of 2022, the Company shall
10 provide to the City a report certified by an independent certified public accountant attesting to the
11 amount of the infrastructure maintenance fees paid to the department for the preceding calendar
12 year, and that such amount complies with the requirements of this chapter.

13 **E. Collection of Additional Charges by Retailers.**

14 1. When the Company makes or effectuates a sale of telecommunications at
15 retail, it shall pay the infrastructure maintenance fee to the department as provided by section C,
16 of this chapter. The fee shall constitute a debt owed by the retailer to the city.

17 2. The retailer may charge each customer an additional charge in an amount
18 equal to the infrastructure maintenance fee attributed to the customer's service address in the city.
19 This additional charge to customers shall, when collected, be stated as a distinct item on the bill
20 to each customer separate and apart from the retailer's gross charges to its customers for
21 telecommunications.

22 3. Each retailer may retain 2% of the additional charges it collects under this
23 chapter to reimburse itself for expenses incurred in connection with accounting for and remitting
24 the fee to the department.

25 **F. Registration of Providers and Resellers.**

1 1. Within ninety (90) days after the effective date of the ordinance
2 authorizing a franchise with the Company, the Company shall provide the name and address of
3 every telecommunications reseller or other telecommunications company with whom the Company
4 has a contractual relationship to provide telecommunications services or to make available
5 telecommunications facilities in the public way. The Company shall have a continuing duty to file
6 with the City, within 45 days after the date of occurrence of any changes in the information provided
7 to the City, including the creation or termination of a contractual relationship described herein.

8 2. *Resales.* Whenever amounts are claimed to be excluded from gross
9 charges as sales for resale, the reseller shall furnish to the Company the reseller's resale
10 information. The Company shall retain the resale information with its books and records.

11 **G. Maintaining Books and Records.**

12 The Company shall keep accurate books and records of its business or activity, including
13 original source documents and books of entry denoting the transactions that gave rise, or may have
14 given rise, to any liability or exemption. All such books and records shall, at all times during
15 business hours of the day, be subject to and available for inspection by the department with twenty-
16 four (24) hour notice.

17 **H. Insurance Requirements.** Company shall comply with the provisions of Section
18 27-2.9 SFCC 1987, and Company shall obtain and maintain in full force and effect throughout the
19 term of this franchise the following types of insurance:

- 20 1. Commercial comprehensive general liability insurance; and
- 21 2. Workers' Compensation insurance as required by law.

22 **I. Term of Franchise.** The term of this franchise, and the rights, privileges, and
23 authority granted hereunder shall continue for a period of ten (10) years from the effective date
24 hereof. The term of this franchise shall automatically be renewed annually unless Company
25 provides notice to City of its intent not to renew at least thirty (30) days prior to expiration of the

1 then current term. Company may surrender permits at any time and remove its
2 telecommunications facilities at any particular location upon thirty (30) days' prior written notice
3 to City. Company shall not be obligated to pay the franchise fee for such location following
4 removal of its telecommunications facilities.

5 **J. Indemnity.** Company and City agree to defend, indemnify, and hold harmless
6 each other and its officials, agents, volunteers, and employees from and against any and all claims,
7 actions, suits, or proceedings of any kind brought against said parties because of any injury or
8 damage received or sustained by any person, persons, or property arising out of or resulting from
9 the activities of the indemnifying party pursuant to this franchise, except to the extent caused by
10 the negligence or willful misconduct of the indemnitee or by reason of any asserted act or omission,
11 neglect, or misconduct of the indemnitee, or its agents or employees, or any subcontractor or its
12 agents or employees. The indemnity required hereunder shall not be limited by reason of the
13 specification of any particular insurance coverage. Neither party shall be liable to the other for
14 consequential, indirect or punitive damages (including lost revenues, loss of service, or loss of data)
15 for any cause of action, whether in contract, tort or otherwise, even if the party was or should have
16 been aware of the possibility of these damages, whether under theory of contract, tort (including
17 negligence), strict liability or otherwise. The maximum liability of either party to the other
18 hereunder shall be the amount paid or payable during the preceding twelve (12) months.

19 **K. Violations and Penalties.** If the Company fails to pay the infrastructure
20 maintenance franchise fee, as provided by this Chapter, the Company shall be subject to a fine of
21 \$100 for each day that the failure to pay continues. Each day that the Company fails to pay shall
22 constitute a separate and distinct violation under this Chapter. Any retailer that becomes subject to
23 this fine may be enjoined from doing business in the City until the Company has paid all sums due
24 under this Chapter.

25 Any telecommunications company who otherwise violates this chapter shall be subject to

1 a fine of \$100 for each offense. Each day the violation continues shall constitute a separate offense.

2 **L. Dispute Resolution Provision.**

3 1. In the event of any other dispute arising from or relating to the franchise
4 or breach thereof, and if the dispute cannot be settled through negotiations, the following process
5 will be followed during which any of the above remedies and penalties may be imposed.

6 2. All disputes will be mediated prior to litigation. The costs of such
7 mediation will be equally split. The place of the mediation session shall be in Santa Fe, New
8 Mexico. The city and the Company will select a mediator or mediators by mutual agreement and,
9 in cooperation with the mediator(s), shall determine all necessary rules and procedures for the
10 mediation. The city and the Company will fully cooperate in the mediation activities. All mediation
11 communications shall be confidential, not subject to disclosure and shall not be used as evidence
12 in any arbitration, judicial, or administrative proceeding, as set forth in the Mediation Procedures
13 Act, NMSA 1978, §§ 44-7b-1 through 44-7b-6.

14 **M. Unauthorized Use of Public Rights-Of-Way Unlawful.** In accordance with
15 Section 27-2.8 SFCC 1987, Company shall not:

16 1. Use public rights-of-way without authorization to provide
17 telecommunications services.

18 2. Place facilities on public structures or public utility infrastructure to
19 provide telecommunications services which are not allowed under the terms of this franchise.

20 Each unauthorized use shall be deemed to be a distinct and separate offense. The provisions of this
21 paragraph do not apply to any dispute between the city and Company under this franchise where
22 the city alleges that Company has failed to comply with the terms of this franchise.

23 **N. Obligations of Providers Regarding the Public Rights of Way.** The Provider
24 shall comply with the provisions of 27-2.8 regarding the public right of way. Before the provider
25 may conduct underground work involving excavation, new construction, or major relocation work

1 in any public rights-of-way, the provider shall first notify the city through the acquisition of a street
2 cut permit as per Section 23-2 SFCC 1987 and shall comply with any special conditions relating to
3 location, scheduling, coordination, and public safety as more particularly described by 27-2.8.

4 **O. Compliance with Law.**

5 1. Company and City shall comply with the terms and conditions of
6 Article 27-2 SFCC 1987 except as set forth herein, all other applicable city ordinances, and
7 federal and state laws.

8 2. Company is explicitly subject to the police powers of the city, all other
9 applicable governmental powers, and the city's rights under state and federal laws.

10 **P. Severability.** The requirements and provisions of this Ordinance and its sections,
11 parts, subparts, paragraphs, and clauses are severable. In the event that any requirement, provision,
12 section, part, subpart, paragraph, or clause of this Ordinance, or the application thereof to any
13 person or circumstance, is held by a court of competent jurisdiction to be invalid or unenforceable,
14 it is the intent of the governing body that the remainder of the Ordinance be enforced to the
15 maximum extent possible consistent with the purposes of this Ordinance.

16 **Q. Effective Date; Publication.** As provided by NMSA 1978, Section 3-42-1, this
17 Ordinance shall not become effective until at least thirty (30) days after its adoption, during which
18 time this Ordinance shall be twice published in full, not less than seven days apart. As required by
19 law, Company shall pay the publication cost.

20 **R. Acceptance.** Company, within thirty (30) days of the date of adoption of this
21 Ordinance, shall file with the city clerk an unconditional acceptance of this Ordinance, on a form
22 prescribed by the city. Within ten (10) days after the filing of the acceptance, the city clerk shall
23 acknowledge in writing the receipt of Company's acceptance. If Company does not file said
24 acceptance this Ordinance shall not be or become effective.

25 **S. Notice.** For the purpose of this Ordinance:

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1. Notice to the city shall be to:
City Manager
City of Santa Fe
Post Office Box 909
Santa Fe, New Mexico 87504-0909

With a copy to:
City Attorney
City of Santa Fe
Post Office Box 909
Santa Fe, New Mexico 87504-0909

2. Notice to Company will be to:
Attn.: Keith Davidson, CFO
NTS Communications, LLC dba Vexus Fiber
912 S. Main Suite 106
Sikeston, MO 63801
573-481-2265
Keith.davidson@vexusfiber.com

3. Notice shall be effective upon delivery at the above addresses until the city or Company notifies the other in writing, of a change in address. All notices shall be delivered personally or sent by certified mail, return receipt requested to the parties at their respective addresses set forth above.

PASSED, APPROVED, and ADOPTED this 9th day of March, 2022.


ALAN WEBBER, MAYOR

1 ATTEST:

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4 KRISTINE MIHELICIC, CITY CLERK

5 APPROVED AS TO FORM:

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8 ERIN K. McSHERRY, CITY ATTORNEY

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Bill No. 2202-5

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Legislation/2022/Ordinances/2202-5 Vexus Fiber Telecom Franchise Agreement