

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2010-16

INTRODUCED BY:

AN ORDINANCE

**REPEALING CHAPTER 27 SFCC 1987 AND CREATING A NEW CHAPTER 27 SFCC
1987 REGARDING TELECOMMUNICATIONS SERVICES.**

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

**Section 1. [REPEAL.] Chapter 27 SFCC 1987 (being Ord. # 1998-16 §§32-
66 and §§68-76 as amended) is repealed.**

**Section 2. A new Chapter 27 SFCC 1987 is ordained to read:
27 [NEW MATERIAL.] TELECOMMUNICATIONS SERVICES.**

**Section 3. A new Article 27-1 SFCC 1987 is ordained to read:
27-1 Reserved.**

**Section 4. A new Article 27-2 SFCC 1987 is ordained to read:
27-2 TELECOMMUNICATIONS FACILITIES AUTHORIZED IN THE
PUBLIC RIGHTS-OF-WAY.**

27-2.1 [NEW MATERIAL.] Short Title; Purpose.

A. Article 27-2 shall be cited as the “Telecommunications Facilities in the Public

1 Rights-of-Way Ordinance.”

2 B. The purpose of Article 27-2 SFCC 1987 is to establish a policy for use of the
3 public rights-of-way for telecommunications networks and enable the city to:

4 (1) Permit competitively neutral and non-discriminatory access to the public
5 rights-of-way for providers of telecommunications services;

6 (2) Manage the public rights-of-way in order to minimize the impact and
7 cost to the citizens of the placement of telecommunications facilities within the public
8 rights-of-way;

9 (3) Promote competition among telecommunications services providers and
10 encourage the universal availability of telecommunications services to residents and
11 businesses of the city by careful management of the public rights-of-way;

12 (4) Obtain fair and reasonable compensation for the use of public rights-of-
13 way through collection of fees and charges;

14 (5) Minimize the congestion, inconvenience, visual impact, and other
15 adverse effects on the city's public rights-of-way, and to other users of those rights-of-
16 way; and

17 (6) To the extent permitted by state and federal law, exercise such other
18 powers as the city may have to protect the public health, safety, and welfare, ensure the
19 continued quality of telecommunications services, and safeguard the rights of consumers.

20 **Section 4. A new Section 27-2.2 SFCC 1987 is ordained to read:**

21 **27-2.2 [NEW MATERIAL.] Applicability.**

22 A. Article 27-2 SFCC 1987 shall apply to telecommunications networks located
23 within the public rights-of-way which shall be authorized by a franchise with the city. The
24 provisions of Article 27-2 SFCC 1987 shall supersede the provisions of Section 14-6.2 E. SFCC
25 1987 for telecommunications facilities in the public rights-of-way.

1 B. Any telecommunications facilities installed or located in the public rights-of-way
2 as of _____, 2010 (adoption of this Ordinance) shall be deemed legally
3 conforming to the extent that such facilities are in compliance with the requirements of this
4 Article; provided that if such facilities are not in compliance with the requirements of this Article,
5 they shall be deemed legally nonconforming and subject to city requirements; and further
6 provided, that the owner of such facilities files an application for a franchise within ninety (90)
7 days of the effective date of this Ordinance (or such later date as the director may agree to) and
8 complies from such application date with this Article.

9 C. An application submitted under paragraphs B. above shall include a map, in such
10 detail as the director shall require, identifying the location of all telecommunications facilities
11 existing in the public rights-of-way at the time of application.

12 **Section 5. A new Section 27-2.3 SFCC 1987 is ordained to read:**

13 **27-2.3 [NEW MATERIAL.] Definitions.**

14 *Affiliate* means each person who falls into one or more of the following categories: (i)
15 each person having, directly or indirectly, a controlling interest in a provider; (ii) each person in
16 which a provider has, directly or indirectly, a controlling interest; (iii) each officer, director,
17 general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or
18 joint venture partner of a provider; and (iv) each person, directly or indirectly, controlling,
19 controlled by, or under common control with the provider—provided that the affiliate shall in no
20 event mean any limited partner holding an interest of less than five percent (5%) of such provider,
21 or any creditor of such provider solely by virtue of its status as a creditor and which is not
22 otherwise an affiliate by reason of owning a controlling interest in, being owned by, or being
23 under common ownership, common management, or common control with such provider.

24 *Applicant* means any person who files an application with the city under Section 27-2.4
25 SFCC 1987 in order to obtain a franchise to use the public rights-of-way to provide

1 telecommunications services within the city.

2 *City* means the city of Santa Fe, New Mexico, a home rule municipal corporation, or as
3 appropriate, any board, bureau, authority, agency, commission, department or any other entity of
4 the city of Santa Fe, or any authorized officer, official, employee, or agent thereof.

5 *City clerk* means the city clerk of the city of Santa Fe or the city clerk's designated
6 representative.

7 *City requirements* means all laws, rules, regulations, policies, and directives of general
8 application of the city of Santa Fe in effect at present or to be adopted in the future by the
9 governing body or the city.

10 *Director* means, unless specifically referring to the director of the land use department,
11 the director of the public works department of the city or the director's designee, charged with the
12 administration of the public rights-of-way.

13 *Emergency* means a sudden unexpected event which has created a condition which is an
14 immediate and continuing threat to the safety of property or persons or the operations of a
15 provider.

16 *Emergency repair* means the repair, restoration, or replacement of an existing structure
17 made necessary because of an emergency.

18 *Franchise* means the non-exclusive authorization to operate a telecommunications
19 network within the city and the right granted by the city to use city public rights-of-way to
20 provide telecommunications services within the city, to the public, or to other providers, as
21 specified by the terms of individual franchise agreement between the city and the applicant.

22 *Governing body* means the mayor and the city councilors of the city, together.

23 *Gross revenue* means:

24 A. Includes the following types of revenues derived from the provision of
25 telecommunications services to customers within the city limits:

1 (1) Recurring, non-recurring and usage charges paid by customers
2 for telecommunications or other services provided through use of the
3 telecommunications network;

4 (2) Revenues received by a provider or an affiliate from access fees,
5 interconnection fees, or any other fees relating to or arising out of the use of the
6 telecommunications network (including the facilities and equipment of such
7 network) by any person providing commercial mobile radio service, cellular,
8 personal communications service, other communications service;

9 (3) Interlata (local access transit area) toll revenue;

10 (4) Intralata toll revenue;

11 (5) Equipment lease and sale revenue not to include revenue from
12 the sale or lease of equipment that is readily available in the consumer retail
13 market;

14 (6) Installation and service fees;

15 (7) Data transport or network charges;

16 (8) Any amounts collected by a provider from its customers
17 denominated as reimbursement for expenses of construction, equipment and
18 related expenses paid by provider for the benefit of its customers; or

19 (9) Payments received by a provider from any federal or state
20 agency or other carriers pursuant to any universal service fund requirement.

21 B. Excludes the following types of revenue derived from the provision of
22 telecommunications services to customers within the city limits:

23 (1) Proceeds from the sale of bonds, mortgages, or other evidence of
24 indebtedness, securities or stocks;

25 (2) Bad debt write-offs and customer credits;

1 (3) Revenue from direct advertising;

2 (4) Revenue of an affiliate of the provider reported to the city as
3 gross revenue under the affiliate's own franchise;

4 (5) Any amounts collected by a provider from its customers that are
5 required to be remitted to a federal or state agency as part of a universal service
6 fund or other government program;

7 (6) Amounts collected for taxes, fees or surcharges and paid to the
8 federal, state or local governments;

9 (7) Any franchise fee or tax; or

10 (8) Revenue from the sale or lease of equipment that is readily
11 available in the consumer retail market.

12 C. Gross revenue as set forth above shall be interpreted consistent with FCC
13 regulations and rulings, and any relevant decision by a federal court and to the fullest extent
14 allowed by applicable law. Any change in federal law subsequent to the effective date of a
15 franchise shall not effect the definition of gross revenues unless the change specifically preempts
16 one of the components of the definition. Gross revenue shall be measured and monitored
17 periodically by the city. As telecommunications services continue to advance and evolve, the
18 definition of gross revenues will be read based on the intent reflected in the above list. When a
19 bundling of services is offered by a provider that includes services included in gross revenues or
20 excluded from gross revenues there will be a pro rata allocation between franchise fees based
21 services and nonfranchise fee categories based on the provider's product usage rate.

22 *Person* means an individual, corporation, association, partnership, joint venture, or other
23 legally recognized entity, whether for profit or not for profit, but shall not mean the city.

24 *Provider* means:

25 A. Any person who provides any telecommunications services within the city by

1 means of: (i) a telecommunications network owned by such person or its affiliate; (ii) specifically
2 identifiable facilities of a telecommunications network reserved or made available for the use of
3 such person or its affiliate under a lease or any other arrangement for a term longer than 120 days;
4 or (iii) facilities of a telecommunications network not owned by such person or its affiliate and
5 not specifically identifiable but obtained from another person (including another provider) if the
6 use of such facilities is continuing and substantial. A person owning or operating a
7 telecommunications network that merely passes through the city and such person and network do
8 not offer telecommunications services to subscribers within the city shall not be subject to this
9 Article, provided that person has received other appropriate authorization from the city to occupy
10 the public rights-of-way.

11 B. Except to the extent that a provider or a person uses the public rights-of-way, a
12 provider or any person which provides commercial mobile radio service, cellular, personal
13 communications service, or other communications service shall not be subject to this Article with
14 respect to such service.

15 *Public rights-of-way* means present and future surface, air space above the surface (but
16 not including air space used by carriers for the transmission of telecommunications services), and
17 area below the surface of any public street, private street subject to public right-of-way easements
18 or similar dedication, highway, lane, alley, sidewalk, boulevard, drive, bridge, or tunnel, over
19 which the city exercises rights of management or control and which, consistent with the purposes
20 for which it was acquired or dedicated, may be used for the installation, maintenance, and
21 operation of a telecommunications network. Parks, open space, trails not located in a public-
22 rights-of-way or other city owned land are not public rights-of-way.

23 *Public structure* means any building or structure owned by the city.

24 *Structure* means anything that is constructed or erected with a fixed location on the
25 ground or attached to something having a fixed location on the ground. Structures include but are

1 not limited to walls, buildings, fences, poles, street lights, street signs, and other signs.

2 *Telecommunications* means:

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

7 B. Telecommunications shall not include the following services:

8 (1) Cable services as defined in Title 47, Chapter 5, Subchapter V-A of the
9 United States Code, as amended (47 USC § 521 et seq.); or

10 (2) Telecommunications services provided and used by a public utility as
11 that term is defined at § 62-3-3(G) NMSA 1978, or successor statute, for (i) the utility's
12 internal system communication needs; and (ii) provided directly or indirectly to its
13 customers, including but not limited to electronic meter reading, load control, demand
14 side management, power quality monitoring, and other activities related to the delivery of
15 electricity or natural gas.

16 *Telecommunications facilities* means the inside and outside plant equipment and
17 property, including but not limited to, fiber optic lines, cables, wires, conduits, ducts, pedestals,
18 underground vaults, towers, poles, antennas, electronics and other appurtenances whatsoever used
19 or to be used to transmit, receive, distribute, provide or offer telecommunications services.

20 *Telecommunications services* means the offering of telecommunications within the city
21 for a fee directly to the public, or to such classes of users as to be effectively available directly to
22 the public, regardless of the facilities used.

23 *Telecommunications network* means any system which includes telecommunications
24 facilities placed in the public rights-of-way and used to provide any telecommunications services.

25 *Trenchless excavation* means any line installation, replacement or rehabilitation through

1 the use of boring, jacking, horizontal drilling or tunneling.

2 **Section 6. A new Section 27-2.4 SFCC 1987 is ordained to read:**

3 **27-2.4 [NEW MATERIAL.] Application to Provide Services.**

4 A. *Application Required.* Any person who proposes to use the city's public rights-
5 of-way, or is using the city's public rights-of-way as of the effective date of Article 27-2 SFCC
6 1987, to provide telecommunications services, as defined in Section 27-2.3 SFCC 1987, shall
7 submit an application to the director. The application, in a form prescribed by the director and as
8 may be modified by the director from time to time, shall expansively describe the applicant's
9 proposed use of the public rights-of-way.

10 B. *Authority of Director.* The director shall have the duty to review applications
11 submitted under this Article. The director shall review the application and shall notify the
12 applicant within ten business days of receipt of the application on whether or not the application
13 has been accepted or rejected. If the application has been rejected, a new application shall be
14 required. The director shall negotiate the terms of franchises (to the extent not prescribed in this
15 Article) for adoption by the governing body. The director shall administer and enforce
16 compliance with respect to all franchises granted under this Article except as specifically
17 delegated to the land use director as set forth in Section 27-2.13 SFCC 1987.

18 C. *Governing Body Action.* All franchises granted under this Article shall
19 incorporate all applicable provisions of this Article. The city shall apply any modifications or
20 amendments to this Article in a manner that does not unreasonably discriminate against any
21 provider subject to this Article. The act of granting, amending, denying, or terminating a
22 franchise is a legislative function within the sound discretion of the governing body. Prior to
23 proceeding with a termination of a franchise granted by the governing body, the city shall comply
24 with the alternative dispute resolution provisions of this Article. Any person who is denied a
25 franchise or whose franchise is terminated shall petition the governing body for reconsideration

1 before seeking judicial remedies. The governing body shall have 30 days from the date of the
2 petition to reconsider such denial or termination.

3 D. *Franchise granted.* Subject to compliance with this Article and other applicable
4 requirements of city code, a franchise granted under this Article shall authorize an applicant to
5 use public rights-of-way to provide telecommunications services.

6 **Section 7. A new Section 27-2.5 SFCC 1987 is ordained to read:**

7 **27-2.5 [NEW MATERIAL.] Compensation and Charges.**

8 A. *Fees and Charges.*

9 (1) Franchise fee. As partial compensation for the use of the public rights-
10 of-way, each telecommunications services provider shall be subject to an annual fee of
11 three percent (3%) of gross revenue obtained from the provision of the various
12 telecommunications services.

13 (2) Filing fee. Each applicant shall submit a non-refundable application
14 filing fee for each franchise request. The filing fee shall initially be \$2,500, and may be
15 adjusted annually by resolution of the governing body.

16 (3) Non-monetary consideration. Upon mutual agreement between the city
17 and provider, a provider may pay up to one percent (1%) of the annual fee in the form of
18 non-monetary consideration, including, without limitation, network capacity, conduit,
19 equipment, or other infrastructure or services for use by the city for the purposes
20 specified below. This non-monetary consideration shall be negotiated with each provider
21 taking into account the unique characteristics of each provider's services and network.
22 Said consideration shall be valued in a fair manner based on the provider's actual costs,
23 including make-ready costs, maintenance, and repair charges, labor and material costs,
24 plus ten percent (10%) as reimbursement for supervision and general and administrative
25 costs. Further, any non-monetary consideration furnished to the city shall be for the city's

1 public and noncommercial purposes. Use by the city under Section 27-2.5(B)(5)(a)
2 SFCC 1987 below, shall be included in the calculation of non-monetary consideration
3 pursuant to this paragraph along with any other use of provider facilities by the city.

4 (4) Permit, inspection, and review/location charges. Each provider shall pay
5 all permit and inspection charges related to a provider's construction in the public rights-
6 of-way, as assessed by the director in accordance with city requirements.

7 B. *Payment of Franchise Fee.*

8 (1) Commencing the calendar quarter following the calendar quarter any
9 public rights-of-way franchise becomes effective, payment of the franchise fees and other
10 fees due hereunder are required to be made within 45 days after the end of each calendar
11 quarter. The fee shall be based on gross revenues received by the provider for the
12 preceding quarter. Such payment shall be made through an electronic deposit process as
13 established by the city treasurer.

14 (2) In the event that a fee payment is not received by the city on or before
15 the due date set forth in this section or in a franchise, or the fee owed is not fully paid, the
16 provider subject to the fee shall be charged a penalty. The penalty shall be the greater of:

17 (a) Two percent (2%) per quarter to a maximum of ten percent
18 (10%) plus interest on the outstanding amount owed from the due date at an
19 interest rate equal to two percent (2%) above the rate for three-month federal
20 treasury bills at the most recent United States treasury department sale of such
21 treasury bills occurring prior to the due date of the franchise fee payment; or

22 (b) The maximum interest rate permitted by state or federal law.

23 (3) The provider shall furnish to the city with each payment of compensation
24 required by this section a detailed written statement showing the amount of gross revenue
25 received by the provider within the city limit, broken out by provider's line of business

1 for the period covered by the payment. The city treasurer shall within a reasonable time
2 after submission determine the basis and accuracy of the amounts reported. Where the
3 amount paid by the provider is less than 98 percent of the amount actually due, the
4 provider shall also compensate the city for the city's costs in discovering and recovering
5 the underpayment. However, neither payment of the fee nor failure to make such
6 investigation shall estop the city in any way or prevent subsequent investigation,
7 collection, or return of any amount properly due.

8 (4) In the event that it is claimed by the city that the amount of the fee paid
9 for any calendar year is insufficient, or in the event that the provider claims that the
10 amount is excessive, and the parties cannot agree, the city and the provider shall follow
11 the dispute resolution provisions of this Article.

12 (5) In the event that the fee or portion thereof set forth in any franchise is
13 declared illegal, unconstitutional, or void for any reason by any court or proper authority,
14 the provider shall be contractually bound to pay the city an amount equal to the
15 reasonable use of the city's public rights-of-way. This section, however, shall not
16 constitute a waiver of any claim the provider may assert against the city.

17 (6) Acceptance by the city of any payment due under a franchise shall not be
18 deemed to be a waiver by the city of any breach of the franchise occurring prior thereto,
19 nor shall the acceptance by the city of any such payments preclude the city from later
20 establishing that a larger amount was actually due under the franchise, or from collecting
21 any balance due to the city.

22 (7) In consideration of the rights and privileges granted by any franchise, the
23 following apply:

24 (a) The city shall have and provider shall grant to it the right and
25 privilege at the city's expense to suspend and maintain wires and necessary

1 control boxes on poles placed by the provider in the public right-of-way if space
2 therein is available, which the city may require for fire, police, emergency, or
3 other municipal purposes. All such wires shall be placed in mutually agreed
4 upon locations on the poles or in the conduits so as not to interfere with the
5 service of the provider and shall not pose a danger to the provider's facilities,
6 customers, or customer's property. However, nothing in the franchise shall limit
7 the provider's right to reserve conduit space and/or pole space which in its sole
8 discretion it retains for purposes of assuring its ability to provide future services
9 or the safety or servicing of its facilities.

10 (b) City agrees, in consideration of the establishment of the service
11 and furnishing of the facilities described in Section 27-2.5(B)(7)(a) SFCC 1987,
12 to hold the provider free and harmless from all claims or liability for damage
13 which may arise out of the city's operation of such wires and control boxes. In
14 no event shall the city be required to pay any pole attachment fees in connection
15 with the exercise of the city's rights under this section; however, the fair market
16 value of the city's use of provider's wires or control boxes without recurring
17 costs shall be included as part of non-monetary consideration paid by the
18 provider as further provided for in Section 27-2.5(A)(3) SFCC 1987.

19 (8) To facilitate the city's annual budget process, on or before the 1st of
20 November and each succeeding 1st of November thereafter during the term of any
21 franchise granted under this Article, the provider will provide the city with an estimate of
22 the gross revenue and resultant fee for the following calendar year. Nothing herein shall
23 preclude the provider and the city from agreeing to a revised payment schedule.

24 C. *City's Right to Audit.*

25 (1) Providers shall keep complete and accurate books of accounts and

1 records of their business and operations pursuant to any franchise granted hereunder in
2 accordance with generally accepted accounting principles. If required by the FCC,
3 providers shall use the system of accounts and the forms of books, accounts, records, and
4 memoranda prescribed by the FCC in 47 CFR or its successor, and as may be further
5 described herein. The director may require the keeping of additional records or accounts
6 which are reasonably necessary for purposes of identifying, accounting for, and reporting
7 gross revenue and uncollectibles for purposes of any franchise. Providers shall keep their
8 books of account and records in such a way that identification of revenues by type of
9 service within the city is available.

10 (2) Upon reasonable prior notice by the city of not less than 30 days, the city
11 shall have the right to review or audit the provider's books and records in accordance with
12 regularly accepted accounting and audit standards regarding any amounts which may be
13 owed under a franchise. This right includes the right to review and audit all books and
14 records of revenue not included in the calculation of the fee paid. The city shall give
15 written notice to the provider of any additional amount claimed to be due to the city as a
16 result of the city's review. If the provider disputes the additional amount allegedly due to
17 the city, if any, the dispute shall be determined according to the dispute resolution
18 provisions of this Article.

19 (3) In the event of an audit, the provider shall provide city-specific books,
20 records, contracts, account codes, documents, and papers for its operations within the
21 city.

22 (4) All such books, records, and accounts of the provider shall be retained by
23 the provider for a period of six years, in accordance with § 37-1-3 NMSA 1978, or its
24 successor. The provider shall make such records as are necessary for the city to complete
25 its audit and be available for inspection by the city upon 30 days notice from the city.

1 (5) All audits will take place on provider premises within the city of Santa
2 Fe or provider will pay the reasonable, documented costs required for the auditor to go to
3 provider's offices. The city's auditors may review all directly relevant materials and may
4 make copies of any materials with the approval of the provider. Such approval will not
5 be unreasonably withheld.

6 (6) In addition to paying all fees owed plus interest, in the event that the city
7 reviews the provider's franchise fee payments, and finds that the provider has underpaid
8 the fee owed for any year in an amount exceeding 2% of the franchise fees actually paid,
9 the provider shall pay the reasonable cost of the city's review and underpayment recovery
10 costs.

11 (7) The city will maintain confidentiality of information provided by
12 providers to the maximum extent permitted by law when providers have notified the city
13 of the confidential nature of specifically identified information reasonably marked by the
14 provider as "Confidential." The city will maintain the confidentiality of this information
15 to the maximum extent permitted by law.

16 **Section 8. A new Section 27-2.6 SFCC 1987 is ordained to read:**

17 **27-2.6 [NEW MATERIAL.] Transfers of Franchise.**

18 A. No franchise granted under this Article, the assets held by providers for use under
19 such franchise which are in the public rights-of-way, or any rights or privileges of providers
20 under a franchise, either separately or collectively, shall be sold, resold, assigned, transferred,
21 leased, or conveyed by providers to any other person, without notice to the city no less than 90
22 days prior to the consummation of such proposed sale, transfer, or conveyance. Provider shall
23 submit all information reasonably requested by the city relating to the financial, technical, and
24 operational qualifications of the transferee. Prior to consummation of such sale, transfer, or
25 conveyance, an authorized corporate officer of the proposed transferee shall without limitation or

1 exclusion affirmatively and in writing assume all obligations, rights, and liabilities whatsoever of
2 the current provider as specified in any franchise. Upon request of the provider, the city shall
3 keep confidential any and all information related to a proposed sale, transfer or conveyance to the
4 fullest extent allowed by law.

5 B. Any change of control of a provider shall constitute a transfer under this section.
6 A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending
7 transaction shall not be considered an assignment or change of control.

8 **Section 9. A new Section 27-2.7 SFCC 1987 is ordained to read:**

9 **27-2.7 [NEW MATERIAL.] Obligations of Providers Regarding the Public**

10 **Rights-Of-Way.**

11 A. *Compliance with Law.* Providers are explicitly subject to the police powers of
12 the city, all other governmental powers, and the city's rights as a property owner under state and
13 federal laws. This Article is governed by and construed and enforced in accordance with the laws
14 of the state of New Mexico.

15 B. *Land Use Requirements.* Providers shall comply with Section 27-2.13 SFCC
16 1987 regarding land use requirements.

17 C. *Construction Plans and Drawings.*

18 (1) Before the provider may conduct underground work involving
19 excavation, new construction, or major relocation work in any public rights-of-way:

20 (a) The provider shall first notify the city through the acquisition of
21 a street cut permit as per Article 23-2 SFCC 1987 and shall comply with any
22 special conditions relating to location, scheduling, coordination, and public
23 safety; and

24 (b) The provider shall file maps and/or drawings with the director
25 showing the location of any construction or extension of its facilities and services

1 in any public rights-of-way of the city. For multi-conduit duct banks, maps and
2 drawings shall show overall size, material, and configuration of the duct bank
3 showing the horizontal and vertical locations within the rights-of-way, size and
4 type of equipment and materials and location of other utilities. The provider
5 shall provide city with updates of the maps and drawings showing the location of
6 any new construction, extension, or relocation of its underground facilities or line
7 spot such facilities.

8 (2) Proposed construction work to be done by the provider shall be
9 performed in a safe manner and in accordance with applicable federal and state laws and
10 city requirements now or hereinafter existing.

11 D. *Construction Forecast.* On or before the first day of June each year within three
12 years of which the provider anticipates constructing all or any identified and approved portion of
13 its telecommunications network in the city's public rights-of-way, the city and provider will meet
14 and exchange three year construction forecasts, including aerial builds, together with such
15 additional information as the city and provider deem appropriate relating to projects planned
16 within the city. Provider will use best efforts to forecast construction for the future, however, the
17 city recognizes that construction is driven by customer demand for service which is highly
18 unpredictable. The information required to be provided to the city under this paragraph is trade
19 secret. The city will maintain the confidentiality of this information to the maximum extent
20 allowed by law. Provider shall label all material as confidential. The provider shall not be
21 subject to termination, suspension, fines or other penalties if its actual construction does not meet
22 the timelines stated in the forecasts. The city and provider shall hold such additional meetings as
23 they deem necessary to exchange additional information with a view toward coordinating their
24 respective activities in these areas where such coordination will prove mutually beneficial to the
25 public by minimizing disruption costs to the public. Provider will comply with all building and

1 zoning codes and assure that aesthetic and other relevant planning principles have been given due
2 consideration. It is recognized that, notwithstanding the foregoing, the city retains absolute
3 discretion over the timing and all other aspects of the city's proposed projects. The parties will
4 make reasonable efforts to allow each party's work to be incorporated in the other's respective
5 projects. Provider will not cut or otherwise disturb any new or rehabilitated roadway within two
6 years of its placement as limited by and pursuant to Article 23-2 SFCC 1987 Excavations, Street
7 Cuts and Restoration Ordinance, except or unless in emergency conditions. Where conflict occurs
8 between the city's construction plans and schedules and the provider's construction plans and
9 schedules, the city's plans and schedules shall take precedence. Where unresolved conflicts
10 occur between the two or more providers' construction plans and schedules, the city shall
11 determine precedence.

12 E. *Installations, Excavations, and Restorations.*

13 (1) Pursuant to any franchise granted under this Article, the provider shall
14 have the right to excavate in, occupy, and use any and all public rights-of-way for the
15 purpose of installing, erecting, constructing, repairing, maintaining, removing, relocating,
16 and operating its facilities after obtaining any and all appropriate permits from the city,
17 and in compliance therewith provided, however, that:

18 (a) The provider shall not place any of its facilities on, over, under,
19 or within any city park, open space or trail not located in a public rights-of-way,
20 duly designated as such by the city except in accordance with city requirements;

21 (b) Where appropriate and as may be required by the city through
22 any permitting process, installation, excavations, and restorations affecting street
23 and/or lane closures shall be approved by the city and in accordance with current
24 city policies and ordinances;

25 (c) The city reserves the right to direct the coordination and

1 scheduling of any provider projects where such project may be reasonably
2 coordinated with the placement of other provider facilities. Otherwise, and
3 subject to city permitting processes and approvals, it is recognized that,
4 notwithstanding the foregoing, the provider retains discretion over the timing of
5 the provider's proposed projects. In directing these activities, the city will make a
6 good faith attempt to accommodate the provider's construction schedule and
7 desired service initiation dates as long as they were disclosed in the construction
8 schedule provided for in Section 27-2.7 D. SFCC 1987;

9 (d) The provider shall, to the extent feasible, employ "trenchless"
10 technology (for example, directional boring) in the placement of its underground
11 facilities; and

12 (e) A franchise does not include the right to use the city's sewer or
13 storm sewers, which requires a separate discretionary license from the city and
14 fee for such application and use.

15 (2) Except in an emergency, not less than two working days prior to the
16 commencement of any work by the provider which involves excavation in any public
17 rights-of-way, the provider shall notify the director through the street cut permit process,
18 including payment for any and all fees, as set forth in Article 23-2 SFCC 1987. Provider
19 shall comply with Article 23-2 SFCC 1987 as it now or may exist in the future. In an
20 emergency, the director shall be notified the next working day and shall be provided with
21 a description of the emergency and the action taken. The right of the city to require a
22 post-emergency city permit(s), inspection(s) and fee(s) is preserved.

23 (3) Whenever work is performed in any public rights-of-way, the provider
24 shall take all reasonable precautions to minimize interruption to traffic flow, damage to
25 property, or creation of a hazardous condition. A plan for traffic control shall be

1 provided to the director for his approval prior to issuance of a permit.

2 (4) After any excavation shall be made and after work is completed, the
3 provider, at provider expense, shall as soon as practicable but not longer than twenty-four
4 hours, weather permitting, remove all surplus material in compliance with specifications,
5 requirements, and regulations of the city in effect at the time of such restoration and
6 restore the portion of the public rights-of-way to the same condition as nearly as
7 practicable to its condition before the start of construction and in a manner consistent
8 with the normal specifications and requirements of the city. All vegetation, landscaping
9 and grounds removed, damaged or disturbed as a result of the construction, installation,
10 maintenance, repair or replacement of telecommunications facilities, shall be replaced, or
11 restored, as nearly as may be practicable, to the condition existing prior to performance of
12 work. If the provider fails to restore promptly the affected portion of the public rights-of-
13 way following written notice to provider, and reasonable opportunity to cure, the city
14 may make the restoration in a manner satisfactory to city, and all reasonable and
15 documented costs incurred for such restoration, whether done with city work forces and
16 equipment or otherwise, shall be paid by the provider, or recovered from any posted
17 bonds, including the cost of any inspectors the city may assign to the project.

18 (5) The provider shall be responsible for the maintenance of its own
19 equipment, facilities, and appurtenances placed upon, over, or under the public rights-of-
20 way, including the removal of all graffiti therefrom. If after 72 hours' notice, unless a
21 lesser time period is required by another city ordinance, such graffiti has not been
22 removed, it may be removed by the city at provider's sole cost which shall be paid in full
23 by provider to city within 10 days of the date of the city's billing.

24 (6) The provider shall ensure its public facilities in public rights-of-way are
25 located and constructed in a manner such that the public's physical access to such rights-

1 of-way is not impaired and in full compliance with the Americans with Disabilities Act
2 (ADA). Where existing facilities constructed prior to ADA (legal nonconforming
3 facilities) are modified or replaced, the provider shall insure that such modification or
4 replacement shall then fully comply with ADA. Any intersection upgrades shall include
5 upgrading all four corners with ADA accessibility compliant ramps. Following notice by
6 the city of an ADA construction problem, the provider shall have 30 days or other
7 reasonable time to remedy the problem. In the event that the city and the provider cannot
8 agree that a problem exists, the city and the provider shall follow the dispute resolution
9 provisions of this Article.

10 F. *Location and Relocation of Facilities.*

11 (1) All facilities of the provider shall be placed so that they do not interfere
12 with the use of public rights-of-way by the city and shall only be placed after approval of
13 the location by the city's planning commission pursuant to Section 27-2.13 SFCC 1987
14 and by the director and in accordance with all barricade, excavation and permitting
15 ordinances and regulations adopted by the city governing the location of facilities. The
16 city reserves the right to construct, install, maintain, and operate any public improvement,
17 work, or facility, including without limitation, telecommunications facilities, do any work
18 that the city may find desirable on, over, or under any public rights-of-way, and vacate,
19 alter, or close any public rights-of-way subject to provider's rights and obligations under
20 Section 27-2.7F.(2) and (3) SFCC 1987. All such work shall be done, if possible, in such
21 a manner as not to obstruct, injure, or prevent use and operation of the provider's network
22 or system. Pursuant to any franchise, provider agrees to obtain the city's express written
23 approval before placing structures in public rights-of-way that do not currently exist in
24 public rights-of-way.

25 (2) The city may require the removal or relocation of facilities used by the

1 provider in any public rights-of-way as follows:

2 (a) After notice to the provider, where relocation cannot reasonably
3 be avoided and where the city and the provider agree that no reasonable
4 alternative exists, the city may require the removal or relocation of facilities used
5 by the provider in any public rights-of-way as may reasonably be required by the
6 city or caused or occasioned by any city project, including but not limited to the
7 installation of water, sanitary sewer, storm drainage, or traffic signal facilities,
8 road reconstruction, or other public right-of-way construction. The provider shall
9 complete the removal and relocation of such facilities within 60 days following
10 notice to do so from the city. Projects requiring, in the opinion of the director
11 after consultation with the provider, in excess of 60 days to complete shall be
12 completed in a time frame determined by director on a project specific basis.
13 Prior to any such relocation, the city agrees to provide for a suitable similarly
14 sized location for such relocated facilities sufficient to maintain service. The cost
15 of any removal or relocation of its facilities shall be borne by the provider. To
16 the extent that a delay in a city project is due to provider's relocation, then such
17 provider shall pay all reasonable, documented expenses and costs incurred by the
18 city as a result of and proportionate to its contribution to the delay.
19 Notwithstanding the foregoing, provider shall not be required by the city to
20 relocate its facilities to accommodate another provider or other nongovernmental
21 third party in the city. The costs of any relocations occasioned by another
22 provider or authorized non-governmental rights-of-way user of the city in no
23 event shall be the responsibility of the city.

24 (b) The provider shall reconstruct, replace, or restore any street,
25 alley, or public way or place in a timely fashion and any water, sewer, sanitary

1 sewer, storm drainage, traffic signalization facilities, or other facility of the city
2 disturbed by the provider, without cost to the city, to the condition that existed
3 prior to the work by provider, consistent with city standards and specifications
4 for public works construction. Any facility so disturbed by the provider shall be
5 reconstructed, replaced, or restored only under the supervision of city personnel.

6 (c) Subject to the provisions of this section and upon notice to the
7 city and receipt of all required city permits, the provider may remove or relocate
8 facilities maintained by the provider on its own initiative.

9 (3) Where the city, acting through itself, an agent, contractor, or permit
10 holder, proposes to improve a street, which requires the relocation of an existing aerial
11 facility within the public rights-of-way under its jurisdiction or control, the provider shall
12 replace such overhead distribution facilities as are then within the affected right-of-way
13 with underground facilities unless the provider can demonstrate to the city that such
14 facilities cannot functionally be located underground or that the cost of relocation is
15 economically unreasonable. All such relocations of provider facilities shall be at such
16 provider's expense. The conversion from overhead to underground shall be non-
17 discriminatory and shall be conditioned upon the city requiring the under grounding of all
18 existing and new facilities located or to be located in the area. Such replacement of
19 overhead with underground distribution facilities of a provider shall be paid for by such
20 provider.

21 G. *Public Works and Improvements.*

22 (1) The city reserves the right to construct, install, maintain, and operate any
23 public improvement, work, or facility and do any work that the city may find desirable
24 on, over, or under any public rights-of-way including rights-of-way facilities of any type
25 and nature owned or controlled by the city. All such work shall be done, if possible, in

1 such manner as not to obstruct, injure, or prevent free use and operation of the provider's
2 telecommunications network, and shall be performed as expressly provided in Section
3 27-2.7F.(2) SFCC 1987.

4 (2) Whenever the city shall excavate or perform any work in any present
5 and/or future public rights-of-way of the city, or shall contract for such excavation or
6 work, where such excavation or work may disturb but not require removal or relocation
7 of provider's facilities, the city shall notify the provider sufficiently in advance of such
8 contemplated excavation or work to enable the provider to take such measures as may be
9 deemed necessary to protect and support such facilities from damage and possible
10 inconvenience or injury to the public or the city's public rights-of-way. If the provider
11 cannot take such measures, or if the city's work is performed in response to an
12 emergency, the provider shall be required to relocate its facilities in accordance with this
13 Article. In such case, the provider upon request shall furnish field markings to the city or
14 its contractor, as the case may be, showing the location of all its facilities in the area
15 involved in such proposed excavation or other work.

16 (3) Subject to the requirements of Section 27-2.7F. SFCC 1987, whenever
17 the city shall legally vacate (terminate all of the city's rights in) any public rights-of-way
18 for the convenience or benefit of any person or governmental agency or instrumentality,
19 the provider's rights shall be preserved as to any of its facilities then existing in such
20 public rights-of-way.

21 H. *Moving of Buildings.* Whenever it becomes necessary to temporarily rearrange,
22 remove, lower, or raise the aerial cables or wires or other apparatus of the provider to permit the
23 passage of any building, machinery, or other object, the provider shall perform such
24 rearrangement upon the receipt of written notice no less than 30 days (or less time in the event of
25 an emergency as determined by the city) prior to the move from the person or persons desiring to

1 move said building, machinery, or other objects. The written notice shall detail the route and
2 timing of movement of the building, machinery, or other object. The costs incurred by the
3 provider in making such rearrangements of its aerial plant will be borne, excepting the city, by the
4 person or persons seeking such rearrangement, unless the aerial plant is placed or maintained in
5 violation of the applicable rules of any local, state, or federal regulatory agency and thereby
6 interferes with the movement.

7 I. *Safety Standards.* The facilities of the provider shall at all times be constructed,
8 operated, and maintained so as to protect and safeguard the health and safety of the public, and to
9 this end provider shall observe all rules pertaining thereto now or hereinafter existing prescribed
10 by any local, state, or federal regulatory authority.

11 J. *Joint Use Agreements.* The provider is authorized and encouraged to enter into
12 joint-use agreements with any person or entity franchised by the city with respect to the
13 placement or use of a telecommunications facility or network. The provider may require any
14 such person or entity to pay reasonable compensation for such joint use and to furnish evidence of
15 adequate insurance covering the provider and adequate bonds covering the performance of the
16 person or entity attaching to the provider's telecommunications network as a condition precedent
17 to granting permission to any such person or entity to attach its telecommunications network to
18 the provider's network, provided that the provider's requirements for such insurance shall be
19 reasonable.

20 K. *Interference.* The provider shall not be required to attach its facilities to the
21 facilities of any other person or entity or to permit the facilities of any other person or entity to be
22 attached to the provider's facilities if it can be shown to the reasonable satisfaction of the city that
23 the other person or entity is not willing to accept the terms of a joint use agreement, the provider
24 will be subjected to increased risks of interruption of service or if the facilities of such other
25 person or entity are not of the character, design, and construction required by, or are not being

1 maintained in accordance with industry standards or practice or in a manner permitted by law.

2 L. *Supplying Maps.* Provider shall maintain on file all available maps, operational
3 data, and reports pertaining to its operations in the city. The city may inspect the maps, data, and
4 reports at any time during business hours. The provider shall furnish to the city, as soon as
5 practicable without charge, current "As-Built" maps, either in a "hard copy" printed form or in
6 the city's GIS format or compatible data base, showing the location and dimension of its
7 telecommunications network located in the rights-of-way, but not other proprietary information,
8 used in operating the provider's telecommunications network within the city of Santa Fe.

9 M. *Limitation on Privileges.* All rights, authority, and grants contained or conferred
10 are also conditioned upon the understanding and agreement that the exercise of these privileges in
11 the public rights-of-way of the city are not to operate in any way so as to be an enhancement of
12 the provider's properties or values or to be an asset or item of ownership in any appraisal thereof
13 in the event of a city acquisition, by purchase or otherwise. In the event that the city shall at any
14 time hereafter acquire the property of the provider, by purchase or otherwise, the value of any
15 franchise shall be fixed and determined at \$1.00 (one dollar).

16 **Section 10. A new Section 27-2.8 SFCC 1987 is ordained to read:**

17 **27-2.8 [NEW MATERIAL.] Insurance Requirements.**

18 A. Providers shall obtain and maintain in full force and effect throughout the term of
19 a franchise granted under this Article insurance with an insurance provider licensed to do
20 business in the state of New Mexico and acceptable to the city or shall provide evidence that it is
21 a qualified self-insured. All insurance providers will be required to be rated A-VI or better by
22 A.M. Best or A or better by Standard and Poors. Providers shall furnish the city with proof of
23 such insurance so required at the time of the filing of the acceptance of a franchise. The city
24 reserves the right to review these insurance requirements during the effective period of any
25 franchise and to reasonably adjust insurance coverage and its limits when deemed necessary and

1 prudent by the city's risk manager, based upon changes in statutory law, court decisions, or the
2 claims history of the industry or the insurance provider. The city shall provide notice to the
3 provider no less than 60 days in advance of any change of insurance requirements and provider
4 shall have the opportunity to negotiate with the city to adjust the new requirement based on
5 reasonable industry standards.

6 B. Subject to providers' right to maintain reasonable deductibles in such amounts as
7 are approved by the director, providers shall obtain and maintain in full force and effect for the
8 duration of any franchise, at providers' sole expense, insurance coverage as follows:

9 (1) Commercial comprehensive general liability insurance covering bodily
10 injury and property damage liability with limits of coverage in the maximum amount
11 which the City could be held liable under the New Mexico Tort Claims Act for each
12 person injured and for each accident resulting in damage to property;

13 (2) Workers' Compensation insurance as required by law; and

14 (3) Commercial automobile liability insurance providing a minimum
15 coverage in the amount required under the New Mexico Tort Claims Act.

16 C. The provider shall submit originals of authorized certificates of insurance
17 evidencing the coverage required above on forms reasonably acceptable to the city's risk
18 manager.

19 D. Providers shall agree that with respect to the above-required insurance, all
20 insurance certificates will contain the following required provisions:

21 (1) Name the city of Santa Fe and its officers, employees, board members,
22 volunteers, and elected representatives as additional insureds (as the interests of each
23 insured may appear) as to all applicable coverage;

24 (2) Provide for 30 days notice to the city for cancellation, non-renewal, or
25 material change;

1 (3) Provide for notice to both the director and the office of risk management
2 by certified mail; and

3 (4) Provide that all provisions of this Article and the franchise, as amended,
4 concerning liability, duty, and standard of care, including the indemnity section, shall be
5 underwritten by contractual coverage sufficient to include such obligations within
6 applicable policies, subject to policy terms and conditions.

7 E. The insurance certificates obtained by providers in compliance with this section
8 shall be subject to approval by the city, and such proof of insurance shall be filed and maintained
9 with the director and the office of risk management during the term of a franchise, or any
10 extension or renewal thereof, and may be changed from time to time to reflect changing liability
11 limits, as required by the city. Providers shall timely advise the city attorney of any actual
12 litigation that would materially affect said provider's insurance coverage as required pursuant to
13 this section.

14 F. Insurers shall have no right of recovery against the city, it being the intention that
15 the insurance policies shall protect providers and the city and shall be primary coverage for all
16 losses covered by the policies. Where a right of recovery against the city shall occur in
17 contravention of this section, the provider shall indemnify the city for any losses and costs
18 associated therewith.

19 G. Companies issuing the insurance policies shall have no recourse against the city
20 for payment of any premiums or assessments, which all are set at the sole risk of the providers.
21 Insurance policies obtained by provider shall provide that the issuing company waives all right of
22 recovery by way of subrogation against the city in connection with any damage covered by these
23 policies.

24 **Section 11. A new Section 27-2.9 SFCC 1987 is ordained to read:**

25 **27-2.9 [NEW MATERIAL.] Term of Franchise.** The term of each franchise granted

1 under this Article shall be subject to negotiation with applicants but in no event shall exceed ten
2 years.

3 **Section 12. A new Section 27-2.10 SFCC 1987 is ordained to read:**

4 **27-2.10 [NEW MATERIAL.] Indemnity.** Each franchise granted under this Article
5 shall contain provisions whereby the provider agrees to defend, indemnify, and hold harmless the
6 city 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 franchise granted to provider or by reason of any asserted act or omission, neglect, or
10 misconduct of the provider, or provider's agents or employees, or any subcontractor or its agents
11 or employees. The indemnity required hereunder shall not be limited by reason of the
12 specification of any particular insurance coverage.

13 **Section 13. A new Section 27-2.11 SFCC 1987 is ordained to read:**

14 **27-2.11 [NEW MATERIAL.] Violations and Penalties.** Action by the city to impose
15 fines and other penalties under this section shall be initiated only after dispute resolution
16 provisions of this Article have concluded. All impositions of fines shall be stayed for up to 90
17 days during the period of good faith activity under the dispute resolution provisions.

18 A. Failure of a provider to abide by the requirements of Section 27-2.7 SFCC 1987,
19 regarding the public rights-of-way: \$500.00 per day for each day such violation occurs on a per-
20 location basis, to a maximum of \$5,000.00 per day for all violations within a radius of 1,000 feet.

21 B. Failure of a provider to abide by the requirements of Section 27-2.5 SFCC 1987,
22 regarding compensation for use of the public rights-of-way, and the city's right to perform audits:
23 \$100.00 per day for each day such violation occurs.

24 C. Default and termination of franchise:

25 (1) The provider agrees that an event of default shall include but shall not be

1 limited to any of the following acts or failure to act by the provider:

2 (a) Failure to obtain any applicable permits from the city pursuant to
3 this Article or the franchise.

4 (b) Failure to comply with the assignment of or transfer of control
5 provisions of this Article or the franchise.

6 (c) Failure to supply any mutually agreed-upon non-monetary
7 consideration.

8 (d) Failure to supply or maintain bonds as may be required by the
9 city to assure the proper completion of any construction performed.

10 (e) Failure to make any of the payments set forth in this Article or as
11 required in any franchise.

12 (f) Failure to pay any permit fees, or failure to comply with any
13 rules, regulations, orders, approvals or directives of the city as set forth in this
14 Article or any franchise.

15 (g) Failure to comply with any federal, state or local laws upon
16 enforcement.

17 (h) Failure to submit maps, operational data, reports, insurance
18 certificates or other required documents.

19 (2) Upon the occurrence of an event of default, in accordance with the
20 procedures provided for in this Article or any franchise, the city may take any of the
21 following actions so long as the city does not also take action to impose penalties for the
22 same conduct under another ordinance or regulation:

23 (a) Require the provider to take such actions as the city deems
24 appropriate that are consistent with provider's duties under its franchise; or

25 (b) Seek money damages from the provider as compensation for

1 such event of default; or

2 (c) Accelerate the expiration of the term of any franchise by
3 decreasing the term of the franchise. The extent of such acceleration shall be
4 determined by the city and may include any period of time, but not less than six
5 months, provided that at least six months remain under the franchise; or

6 (d) As a last measure only, terminate the franchise and the city may
7 require the provider at its sole cost to remove all of its facilities and reasonably
8 restore all rights-of-way to their existing conditions within 180 days after
9 termination.

10 (3) The city shall exercise the rights set forth in this section in accordance
11 with the following procedures:

12 (a) The director shall notify the provider, in writing, of an alleged
13 event of default. This written notice shall set forth with reasonable specificity the
14 facts the city believes are the basis for declaring that an event of default has
15 occurred. The provider shall within 30 calendar days of the date the notice is
16 postmarked, or such additional time as the director may specify in the notice,
17 cure the alleged event of default, or in writing present for review by the director a
18 reasonable time frame and method to cure the event of default. The provider, in
19 lieu of the cure of the event of default as set forth herein, may in writing present
20 facts and arguments as to why the provider disagrees that an event of default has
21 occurred.

22 (b) If the provider presents a written response that challenges
23 whether an event of default has occurred, the director shall within ten days
24 review the submitted materials and determine again whether an event of default
25 has occurred. If the director reaffirms that an event of default has occurred, the

1 provider shall be notified in writing of this decision and shall, within 30 calendar
2 days, cure the alleged event of default. The period to cure is tolled in the event
3 one party demands mediation until such time as mediation is completed.

4 (c) If the provider fails to cure the event of default so declared
5 pursuant to this section within the time permitted by the director, the director
6 shall prepare a written report to the governing body and recommend action to be
7 taken. If the governing body, after consideration of this report and hearing,
8 agrees that an event of default has occurred, it may order an appropriate remedy
9 as set forth herein.

10 (4) In addition to the rights under this section, the city, upon any
11 termination, may, at its sole discretion, direct the provider to remove, at the provider's
12 sole cost and expense, any or all of its facilities from all public rights-of-way within the
13 city, subject to the following:

14 (a) The city may determine that removal of facilities is not
15 necessary;

16 (b) In removing any part of the facilities, the provider shall refill and
17 compact, at its own expense, any excavation that shall be made by it and shall
18 leave all public rights-of-way in as good a condition as that prevailing prior to the
19 provider's removal of the facilities;

20 (c) The city shall have the right to inspect and approve the
21 conditions of public rights-of-way after removal has occurred;

22 (d) The removal shall commence within 30 days of an order to
23 remove being issued by the director at the discretion of the governing body and
24 shall be completed within 180 days of the termination;

25 (e) The provider shall be responsible for all necessary removals of

1 the facilities and maintenance of the street area in the same manner and degree as
2 if the facilities were in active use, and the provider shall retain all liability
3 associated with such removals.

4 (f) As an alternative to removal, the provider may, subject to the
5 city's approval, abandon its facilities in place and transfer ownership of the
6 installed facilities to the city. Nothing herein shall cause the City to incur any
7 costs related to the removal of the provider's facilities or the transfer of
8 ownership of said facilities to the city.

9 D. *Dispute Resolution Provision.*

10 (1) Following the notice set out in Section 27-2.11(C)(3) SFCC 1987, above
11 or in the event of any other dispute arising from or relating to the franchise or breach
12 thereof, and if the dispute cannot be settled through negotiations, the following process
13 will be followed during which any of the above remedies and penalties may be imposed.

14 (2) All disputes will be mediated before resorting to arbitration. The costs of
15 such mediation will be equally split. The place of the mediation session shall be in Santa
16 Fe, New Mexico. The city and the provider will select a mediator or mediators by mutual
17 agreement and, in cooperation with the mediator(s), shall determine all necessary rules
18 and procedures for the mediation. The city and the provider will fully cooperate in the
19 mediation activities. All mediation communications shall be confidential, not subject to
20 disclosure and shall not be used as evidence in any arbitration, judicial, or administrative
21 proceeding, as set forth in the Mediation Procedures Act, Chapter 11 NMSA (2007
22 Supp.) or as subsequently amended.

23 (3) Following the mediation session any unresolved claims shall be
24 submitted to arbitration pursuant to the New Mexico Uniform Arbitration Act, Section
25 44-7A-1, et seq., NMSA 1978 or as subsequently amended.

1 (a) The city and provider shall first attempt to select an arbitrator
2 acceptable to both parties. If they are unable to mutually agree upon an
3 acceptable arbitrator within 30 days from the date of the original written claim in
4 arbitration, then the Chief Judge of the First Judicial District Court shall appoint
5 an arbitrator.

6 (b) The city and the provider shall retain the right to object to the
7 arbitrator selected by said Chief Judge. If a party objects to the arbitrator, it shall
8 request that the court appoint another arbitrator.

9 (c) The arbitrator shall hear the arbitration as soon as is practicable.

10 (d) The arbitrator's expenses shall be paid equally by each side.
11 Each party shall bear his or her own attorneys' fees, costs and expenses unless
12 otherwise determined by the arbitrator.

13 (e) The place of the arbitration shall be Santa Fe, New Mexico.

14 (f) After a party receives notice of the arbitration award, and upon
15 motion to the court, the court shall issue a confirming order unless the award is
16 modified, corrected, or vacated.

17 (g) In the event a party fails to proceed with arbitration,
18 unsuccessfully challenges the arbitrator's award, or fails to comply with the
19 arbitrator's award, the other party is entitled to costs of suit including reasonable
20 attorney's fee for having to compel arbitration or defend or enforce the award.

21 (h) Nothing in this section shall prohibit a party from challenging
22 the legality of a ruling or decision of an arbitrator in any court of competent
23 jurisdiction.

24 E. *Remedies and Penalties Not Exclusive.* Subject to the provisions of Section 27-
25 2.11, all remedies and penalties granted pursuant to this Article and franchise are cumulative and

1 not exclusive, and the recovery or enforcement by one available remedy or imposition of any
2 penalty is not a bar to recovery or enforcement by any other such remedy or imposition of any
3 other penalty. The city shall not, however, pursue duplicative remedies or penalties against
4 provider for violations of other city ordinances or regulations arising from the same conduct. The
5 city reserves the right to enforce the penal provisions of any ordinance or resolution and to avail
6 itself of any and all remedies available at law or in equity. Failure to enforce shall not be
7 construed as a waiver of a breach of any term, condition, or obligation imposed upon the provider
8 by or pursuant to this Article or any franchise. A specific waiver of a particular breach of any
9 term, condition, or obligation imposed upon the provider by or pursuant to this Article or
10 franchise shall not be a waiver of any other or subsequent or future breach of the same or of any
11 other term, condition, or obligation, or a waiver of the term, condition, or obligation itself.

12 **Section 14. A new Section 27-2.12 SFCC 1987 is ordained to read:**

13 **27-2.12 [NEW MATERIAL.] Unauthorized Use of Public Rights-Of-Way**

14 **Unlawful.**

15 A. It shall be unlawful for any person to use the public rights-of-way to provide
16 telecommunications services that has not been authorized by the city in accordance with the terms
17 of this Article.

18 B. It shall be unlawful for any person to place facilities on public structures or utility
19 infrastructure to provide telecommunications services not allowed under the terms of a franchise.

20 C. Each unauthorized use shall be deemed to be a distinct and separate offense.
21 Each day a violation of this Article continues shall constitute a distinct and separate offense.

22 D. The provisions of this section do not apply to any dispute between the city and a
23 provider under a franchise where the city alleges that the provider has failed to comply with the
24 terms of the provider's franchise.

25 **Section 15. A new Section 27-2.13 SFCC 1987 is ordained to read:**

1 **27-2.13 [NEW MATERIAL.] Land Use Review.**

2 A. *Zoning Districts; Location.* Telecommunications facilities are permitted in all
3 zoning districts. However, to the maximum extent practicable, telecommunications networks
4 shall be designed in such a manner as to locate facilities:

- 5 (1) On existing structures;
- 6 (2) In nonresidential districts; and
- 7 (3) Along major arterials.

8 B. *Maximum Height.* Telecommunications facilities located on existing structures
9 shall not exceed the height of the structure upon which the facility is located.
10 Telecommunications facilities located on new structures shall not exceed the maximum height for
11 buildings otherwise permitted as set forth in Chapter 14 SFCC 1987.

12 C. *Aesthetic Requirements.* Subject to applicable federal standards, the following
13 criteria shall be met:

- 14 (1) Telecommunications facilities shall be installed underground to the
15 maximum extent feasible.
- 16 (2) If above ground, the telecommunications facilities shall be designed,
17 installed and maintained in such a manner as to minimize the visual impact. Acceptable
18 methods to minimize visual impact shall include, but not be limited to: concealment,
19 screening, camouflaging, color, materials, texture, shape, size and location.
- 20 (3) Consideration shall be given to minimize disruption to or alteration of
21 the natural environment.
- 22 (4) No permanent lighting is permitted unless the lighting is necessary for
23 compliance with federal, state or local law. Permanent lighting shall not include
24 equipment status indicating lights not exceeding 15 watts of power.
- 25 (5) Telecommunications facilities located within the historic districts shall

1 be reviewed by the historic preservation division staff for compliance with this Section
2 and any additional guidelines adopted by the historic design review board.

3 D. *Archaeological Requirements.* The provider shall comply with Section 14-5.3
4 SFCC 1987 regarding the city's archaeological review districts.

5 E. *Other Requirements.*

6 (1) No signs are permitted unless the sign is required for safety reasons or
7 for compliance with the federal, state or local law, or unless permitted by the city.

8 (2) All above ground telecommunications facilities shall be maintained so as
9 to be orderly and attractive.

10 (3) All telecommunications facilities shall be designed, constructed and
11 installed in such a manner as to minimize noise to the maximum extent possible, but in
12 no event shall it exceed the standards set forth in Article 10-2 SFCC 1987.

13 (4) All lockable telecommunications facilities shall be kept locked when not
14 being actively serviced by the provider.

15 (5) All non-lockable telecommunications facilities shall be kept closed when
16 not being actively serviced by the provider.

17 F. *Application to Land Use Department.* After approval of a franchise as set forth in
18 Section 27-2.4 SFCC 1987 and prior to construction, the provider shall submit an application to
19 the land use department for review by the planning commission.

20 (1) The application, in a form prescribed and as necessary updated by the
21 land use department, shall, without limitation:

22 (a) Describe the applicant's proposed telecommunications services
23 and facilities;

24 (b) Demonstrate compliance with this Section;

25 (c) Include a map at a suitable scale of the project area indicating the

1 proposed route and specific locations of telecommunications facilities and
2 specific information regarding a facility's radio frequency emissions;

3 (d) if a significant gap in coverage is claimed by the applicant, the
4 applicant shall prove by clear and compelling evidence that the proposed
5 facilities are necessary to close a defined and disclosed significant gap in service
6 coverage, and that its proposed facilities are the least intrusive means to close the
7 proven significant gap;

8 (e) To the extent that facilities are located in the Historic or
9 Escarpment Overlay Districts or do not comply with the priorities set forth in
10 Section 27-2.13A (1) – (3) of this Article, demonstrate that the applicant has
11 investigated alternative siting and that no other practicable alternative exists; and

12 (f) Demonstrate that the applicant has complied with the National
13 Historic Preservation Act for the siting of proposed facilities that may affect sites
14 that are listed or eligible for listing in the National Register of Historic Places.

15 (2) The application shall be in writing with the accompanying data in a
16 format acceptable to the city that can be posted on the city's website in the same
17 descriptive format as tendered in physical form (i.e., by use of PDF or other similar page
18 reproduction software).

19 (3) The applicant may submit one application showing multiple phases or
20 may submit a new application for each successive phase.

21 G. *Fee.* Applications shall be accompanied by a nonrefundable fee of \$2,500 or the
22 fee established by the governing body for development plan review, whichever is less. For
23 applications showing multiple phases or locations, this fee shall be charged for each phase or
24 location.

25 H. *Staff Review of Application.* The land use department and other city staff as

1 necessary shall review the application according to the standard procedures established by the
2 land use department for applications to the planning commission.

3 I. *Community Information Availability.* Following verification by the land use
4 department that the application is complete, the application and related submittal documents shall
5 be made available to the public on the city's website and in the land use department at least 15
6 days prior to the planning commission hearing.

7 J. *Public Notice of Public Hearing and Review by Planning Commission.*

8 (1) The planning commission agenda shall be mailed and published by the
9 land use department as set forth in Section 14-3.1 (H)(1)(a)(i) SFCC 1987.

10 (2) No less than 15 days prior to the public hearing, the applicant shall give
11 notice to the public as set forth below. The posters, mailings and display advertisements
12 shall state the nature of the application; the date, time and place of the public hearing; and
13 the availability for the public to review the application as set forth above. In addition, the
14 mailings and display advertisement shall include a map of the project area indicating the
15 proposed route and specific locations of all proposed above ground facilities and
16 equipment. The applicant shall:

17 (a) Place in the public right-of-way in a location approved by the
18 city, or if the project is on private or public property immediately adjacent to the
19 public right-of-way in a location approved by the city, one poster obtained from
20 the land use department at each major intersection within the project area
21 provided that there shall be no less than one poster every one-quarter mile along
22 the proposed route.

23 (b) Mail by first class mail a notice in a format approved by the land
24 use department to all property owners and physical addresses adjacent to the
25 public rights-of-way where the telecommunications services are to be located.

1 (c) Publish a display advertisement in the local daily newspaper of
2 general circulation.

3 K. *Planning Commission Review.*

4 (1) The planning commission shall review the application for compliance
5 with this Section and all relevant city codes.

6 (2) In approving an application, the planning commission shall determine
7 that:

8 (a) The application is in compliance with this Section;

9 (b) The application is necessary in order to close a proven
10 significant gap in service coverage, either generally or of the applicant; and

11 (c) The applicant has demonstrated that no other less intrusive
12 means or alternative to the approved facilities siting exists.

13 (3) The planning commission may not regulate the placement of
14 telecommunications facilities on the basis of the environmental effects of radio frequency
15 emissions where such telecommunications facilities comply with 47 C.F.R. 1.1310 et.
16 seq.

17 (4) The planning commission may place conditions upon its approval of the
18 application but the conditions shall not prohibit or have the effect of prohibiting the
19 provision of the telecommunications services.

20 (5) Findings of fact and conclusions of law shall be prepared and approved.

21 (6) A decision of the planning commission is appealable as set forth in
22 Section 14-3.17 SFCC 1987.

23 (7) Any denial of an application or any approval of an application containing
24 any conditions not accepted by the applicant shall

25 (a) Be in writing, and

1 (b) Shall cite to the administrative record, and

2 (c) Shall not become final until approved by the same body at its
3 next regularly scheduled meeting.

4 L. *Modifications.* Modifications to the approved telecommunications facilities plan
5 that comply with the standards of this Article 27-2 and do not materially alter the approved
6 telecommunications plan may be approved by the land use director. An example of a material
7 alteration to the approved telecommunications plan is a route for which residents did not receive
8 notice of the planning commission public hearing, or an increase in effective radiated power or
9 any proposed increase in frequency. Relocation of a single antenna to an adjacent structure along
10 the approved route is not a material alteration.

11 M. *Waivers.*

12 (1) The planning commission may grant a waiver of the requirements set
13 forth in this Section 27-2.13 SFCC 1987 provided that the commission finds based on
14 clear and convincing evidence provided by the applicant that the waiver:

15 (a) Is necessary to assure continuing service coverage by the
16 applicant at the same level, or is necessary to close a significant gap in coverage
17 proven by clear and convincing evidence;

18 (b) Is in the best interest of the community as a whole;

19 (b) Will not jeopardize public safety and welfare;

20 (c) Will better serve the purposes contained in Article 27-2 SFCC
21 1987; and

22 (d) The applicant demonstrates that compliance with the
23 requirement is not practicable due to physical or legal constraints proven by the
24 applicant by clear and convincing evidence.

25 (2) The planning commission shall consider the following when granting a

1 waiver:

- 2 (a) The general appearance of the facility;
- 3 (b) The nature of uses on adjacent and nearby properties;
- 4 (c) The physical surroundings and constraints; and
- 5 (d) Improved telecommunications services including service
- 6 coverage and the potential for increasing the affordability of telecommunications
- 7 services through competition.

8 N. *Permits Required.* In addition to the permits required set forth elsewhere in

9 Article 27-2 and city code, the following permits are required from the land use department:

10 (1) Secondary electrical permit at each antenna or other facility site requiring

11 secondary electrical service; and

12 (2) Other permits as may be required.

13 O. *Monitoring Standards.*

14 (1) At all times, a telecommunications provider shall ensure that its

15 telecommunications facilities comply with the most current regulatory and operational

16 standards including but not limited to radio frequency emissions standards adopted by the

17 FCC and antenna height standards adopted by the Federal Aviation Administration.

18 (2) The telecommunications provider shall obtain and maintain the most

19 current information from the FCC regarding allowable radio frequency emissions and all

20 other applicable regulations and standards, and, at the following indicated times, shall file

21 a report with the land use director indicating whether the provider is in compliance with

22 such standards, advising the land use director of any regulatory changes that require

23 modifications to the telecommunications facilities and advising the land use director of

24 the measures taken by the provider to comply with such regulatory changes as follows:

25 (a) Prior to the commencement of the installation of the

1 telecommunications facility;

2 (b) Within 10 days after initial activation of the telecommunications
3 facility (the initial compliance report);

4 (c) Every year, on the anniversary of the submittal of the initial
5 compliance report, and

6 (d) Upon any proposed increase of at least ten percent (10%) in the
7 effective radiated power or any proposed change to frequency use, and

8 (e) Within 10 days after the activation of the proposed increase in
9 effective radiated power or change in frequency use of the telecommunications
10 facility.

11 (3) Both the initial and updated certifications shall be subject to review and
12 approval by the city, and shall be public records.

13 (4) At the land use directors' sole discretion, a qualified independent radio
14 frequency engineer, selected by and under contract to the city, may be retained to review
15 said certifications for compliance with FCC regulations and for actual compliance with
16 the FCC regulations at the telecommunications facility.

17 (5) All costs associated with the city's review of these certifications shall be
18 the responsibility of the provider, which shall promptly reimburse the city for the cost of
19 review.

20 P. *Enforcement.* The land use director has the authority to interpret this Section in
21 accordance with the purpose of this Article and shall administer and enforce the provisions of this
22 Section.

23 **Section 16. A new Section 27-2.14 SFCC 1987 is ordained to read:**

24 **27-2.14 [NEW MATERIAL.] Compliance with Other Codes.** Telecommunications
25 networks granted approval under this article shall be constructed, installed, operated and

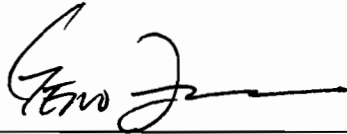
1 maintained in accordance with all applicable federal, state and local codes, rules and regulations.

2 **Section 17. A new Section 27-2.15 SFCC 1987 is ordained to read:**

3 **27-2.15 [NEW MATERIAL.] Effective Date; Review.** Article 27-2 SFCC 1987 is
4 effective _____, 2010 (date of adoption). Staff shall make a report to the Governing
5 Body regarding the implementation, management, enforcement and fiscal impact of Article 27-2
6 no later than SFCC 1987 _____ (one year after adoption of this Ordinance).

7 The governing body may periodically review the Ordinance and consider amendments.

8 APPROVED AS TO FORM:

9
10 

11 GENO ZAMORA, CITY ATTORNEY