

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2010 - 38

INTRODUCED BY:

Mayor David Coss

AN ORDINANCE

**AMENDING VARIOUS SECTIONS OF THE TELECOMMUNICATIONS FACILITIES
IN THE PUBLIC RIGHTS-OF-WAY ORDINANCE, ARTICLE 27-2 SFCC 1987:
SECTIONS 27-2.2 (APPLICABILITY); PORTIONS OF 27-2.3 (DEFINITIONS); 27-2.4
(APPLICATIONS); 27-2.5 (COMPENSATIONS AND CHARGES); 27-2.7
(OBLIGATIONS OF PROVIDERS REGARDING THE PUBLIC RIGHTS-OF-WAY); 27-
2.13 (LAND USE REVIEW); AND CREATING A NEW SECTION 27-2.16
(SEVERABILITY); AND MAKING SUCH OTHER CHANGES AS ARE NECESSARY.**

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

Section 27-2.2 SFCC 1987 (being Ord. #2010-14, §4) is amended to read:

**Section 1. Section 27-2.2 SFCC 1987 (being Ord. #2010-14, §4) is amended to
read:**

27-2.2 Applicability.

**A. Article 27-2 SFCC 1987 shall apply to telecommunications networks located
within the public rights-of-way which shall be authorized by a franchise with the city. This**

1 includes the networks and/or facilities of cable television, electric, and other companies to the
 2 extent that these networks and/or facilities are used to provide telecommunications services. The
 3 provisions of Article 27-2 SFCC 1987 shall supersede the provisions of Section 14-6.2 E. SFCC
 4 1987 for telecommunications facilities in the public rights-of-way.

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

13 C. An application submitted under paragraph[s] B. above shall include a map, in
 14 such detail as the director shall reasonably require, identifying the location of all of the
 15 applicant's telecommunications facilities existing in the public rights-of-way at the time of
 16 application, to the extent such maps are available. The map becomes the approved plan for the
 17 purposes of Section 27-2.13L. regarding modifications to approved plans.

18 **Section 2. [REPEAL.] Section 27-2.3 SFCC 1987 (being Ord. #2010-14, §5)**
 19 **is amended to repeal the following definition:**

20 **27-2.3 Definitions.**

21 ~~[Affiliate means each person who falls into one or more of the following categories: (i)~~
 22 ~~each person having, directly or indirectly, a controlling interest in a provider; (ii) each person in~~
 23 ~~which a provider has, directly or indirectly, a controlling interest; (iii) each officer, director,~~
 24 ~~general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or~~
 25 ~~joint venture partner of a provider; and (iv) each person, directly or indirectly, controlling,~~

1 ~~controlled by, or under common control with the provider—provided that the affiliate shall in no~~
2 ~~event mean any limited partner holding an interest of less than five percent (5%) of such provider,~~
3 ~~or any creditor of such provider solely by virtue of its status as a creditor and which is not~~
4 ~~otherwise an affiliate by reason of owning a controlling interest in, being owned by, or being~~
5 ~~under common ownership, common management, or common control with such provider.]~~

6 **Section 3. Section 27-2.3 SFCC 1987 (being Ord. #2010-14, §5) is amended to**
7 **amend the following definitions:**

8 *Gross revenue* means:

9 A. Includes the following types of provider revenues derived from the provision of
10 telecommunications services to customers served from telecommunication facilities located in the
11 public rights of way:

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

15 (2) Revenues received [~~by a provider or an affiliate~~] from access fees,
16 interconnection fees, or any other fees relating to or arising out of the use of the
17 telecommunications network (including the facilities and equipment of such network) by
18 any person providing commercial mobile radio service, cellular, personal
19 communications service, or other communications service;

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

21 (4) Intralata toll revenue;

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

24 (6) Installation and service fees;

25 (7) Data transport or network charges;

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

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

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

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

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

11 (3) Revenue from direct advertising;

12 ~~[(4) Revenue of an affiliate of the provider reported to the city as gross~~
13 ~~revenue under the affiliate's own franchise;]~~

14 ~~[(5)]~~(4) Any amounts collected by a provider from its customers that are required
15 to be remitted to a federal or state agency as part of a universal service fund or other
16 government program;

17 ~~[(6)]~~(5) Amounts collected for taxes, fees or surcharges and paid to the federal,
18 state or local governments;

19 ~~[(7)]~~(6) Any franchise fee or tax; or

20 ~~[(8)]~~(7) Revenue from the sale or lease of equipment that is readily available in
21 the consumer retail market.

22 (8) Revenue from the provision of internet access services as defined in the
23 Federal Internet Tax Freedom Act, 47 U.S.C. §151, but only to the extent prohibited by
24 law.

25 C. Gross revenue as set forth above shall be interpreted consistent with FCC

1 regulations and rulings, and any relevant decision by a federal court and to the fullest extent
2 allowed by applicable law. Any change in federal law subsequent to the effective date of a
3 franchise shall not ~~[effect]~~ affect the definition of gross revenues unless the change specifically
4 preempts one of the components of the definition. Gross revenue shall be measured and
5 monitored periodically by the city. As telecommunications services continue to advance and
6 evolve, the definition of gross revenues will be read based on the intent reflected in the above list.
7 When a bundling of services is offered by a provider that includes services included in gross
8 revenues or excluded from gross revenues there will be a pro rata allocation between franchise
9 fees based services and nonfranchise fee categories based on the provider's product usage rate.

10 *Provider* means:

11 A. Any person who provides any telecommunications services within the city by
12 means of: (i) a telecommunications network owned by such person ~~[or its affiliate]~~; (ii)
13 specifically identifiable facilities of a telecommunications network reserved or made available for
14 the use of such person ~~[or its affiliate]~~ under a lease or any other arrangement for a term longer
15 than 120 days; or (iii) facilities of a telecommunications network not owned by such person ~~[or its~~
16 ~~affiliate]~~ and not specifically identifiable but obtained from another ~~[person (including another~~
17 ~~provider)]~~ provider if the use of such facilities is continuing and substantial. A person owning or
18 operating a telecommunications network that merely passes through the city and such person and
19 network do not ~~[offer]~~ provide telecommunications services to subscribers within the city shall
20 not be subject to this Article, provided that person has received other appropriate authorization
21 from the city to occupy the public rights-of-way.

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

1 *Public rights-of-way* means present and future surface, air space above the surface (but
2 not including air space used by carriers for the wireless transmission of telecommunications
3 services), and below the surface of the total area of land deeded or dedicated by plat to the city or
4 acquired by the city through a taking primarily for the use of the public for the movement of
5 people, goods and vehicles and for the installation and maintenance of utilities. Parks, open
6 space, trails not located in a public-rights-of-way, or other city owned land, are not public rights-
7 of-way and may only be used by separate agreement.

8 *Telecommunications network* means any system which includes telecommunications
9 facilities placed in the public rights-of-way and used to provide any telecommunications services,
10 even if said network is used for other purposes such as providing cable television or electric
11 services.

12 **Section 4. Section 27-2.4 SFCC 1987 (being Ord. #2010-14, §6) is amended to**
13 **read:**

14 **27-2.4 Application [~~to Provide Services~~] for Franchise.**

15 A. *Application Required.* Any person with a telecommunications facility in the
16 city's public rights-of-way as of July 5, 2010 or who proposes to [use] construct a
17 telecommunications facility in the city's public rights-of-way[~~, or is using the city's public rights-~~
18 of way as of the effective date of Article 27-2 SFCC 1987, to provide telecommunications
19 services, as defined in Section 27-2.3 SFCC 1987,] shall submit an application to the director.
20 The application, in a form prescribed by the director and as may be modified by the director from
21 time to time, shall expansively describe the applicant's current or proposed use of the public
22 rights-of-way.

23 B. *Authority of Director.* The director shall have the duty to review applications
24 submitted under this Article. The director shall review the application and shall notify the
25 applicant within ten business days of receipt of the application on whether or not the application

1 has been accepted as complete or rejected. If the application has been rejected, a new application
2 shall be required. The director shall negotiate the terms of franchises (to the extent not prescribed
3 in this Article) for adoption by the governing body. The director shall administer and enforce
4 compliance with respect to all franchises granted under this Article except as specifically
5 delegated to the land use director as set forth in Section 27-2.13 SFCC 1987.

6 C. *Governing Body Action.* All franchises granted under this Article shall be
7 adopted by ordinance following a public hearing and shall incorporate all applicable provisions of
8 this Article. The city shall apply any modifications or amendments to this Article in a manner
9 that does not unreasonably discriminate against any provider subject to this Article. The act of
10 granting, amending, denying, or terminating a franchise is a legislative function within the sound
11 discretion of the governing body. Prior to proceeding with a termination of a franchise granted
12 by the governing body, the city shall comply with the alternative dispute resolution provisions of
13 this Article. Any person who is denied a franchise or whose franchise is terminated shall petition
14 the governing body for reconsideration before seeking judicial remedies. The governing body
15 shall have 30 days from the date of the petition to reconsider such denial or termination.

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

19 **Section 5. Section 27-2.5 SFCC 1987 (being Ord. #2010-14, §7) is amended to**
20 **read:**

21 **27-2.5 Compensation and Charges.**

22 A. *Fees and Charges.*

23 (1) Franchise fee. As partial compensation for the use of the public rights-
24 of-way, each telecommunications services provider shall be subject to an annual fee of
25 three percent (3%) of the provider's gross revenue [~~obtained from the provision of the~~

1 ~~various telecommunications services~~].

2 (2) Franchise filing fee. Each applicant shall submit a non-refundable
3 application filing fee for each franchise request. The filing fee shall initially be \$2,500,
4 and may be adjusted annually by resolution of the governing body. Additional land use
5 review fees shall apply as set forth in Section 27-2.13 G. SFCC 1987.

6 (3) Non-monetary consideration. Upon mutual agreement between the city
7 and provider, a provider may pay up to one percent (1%) of the annual fee in the form of
8 non-monetary consideration, including, without limitation, network capacity, conduit,
9 equipment, or other infrastructure or services for use by the city for the purposes
10 specified below. This non-monetary consideration shall be negotiated with each provider
11 taking into account the unique characteristics of each provider's services and network.
12 Said consideration shall be valued in a fair manner based on the provider's actual costs,
13 including make-ready costs, maintenance, and repair charges, labor and material costs,
14 plus ten percent (10%) as reimbursement for supervision and general and administrative
15 costs. Further, any non-monetary consideration furnished to the city shall be for the city's
16 public and noncommercial purposes. Use by the city under Section 27-2.5(B)(7)(a)
17 SFCC 1987 below, shall be included in the calculation of non-monetary consideration
18 pursuant to this paragraph along with any other use of provider facilities by the city.

19 (4) Permit, inspection, and review/location charges. Each provider shall pay
20 all permit and inspection charges related to a provider's construction in the public rights-
21 of-way, as assessed by the director in accordance with city requirements including,
22 without limitation, Article 23-2 SFCC 1987.

23 B. *Payment of Franchise Fee.*

24 (1) Commencing the calendar quarter following the calendar quarter any
25 public rights-of-way franchise becomes effective, payment of the franchise fees and other

1 fees due hereunder are required to be made within 45 days after the end of each calendar
2 quarter. The fee shall be based on gross revenues received by the provider for the
3 preceding quarter. Such payment shall be made through an electronic deposit process as
4 established by the city treasurer.

5 (2) In the event that a fee payment is not received by the city on or before
6 the due date set forth in this section or in a franchise, or the fee owed is not fully paid, the
7 provider subject to the fee shall be charged a penalty[~~—The penalty shall be the greater~~
8 of:

9 (a) Two percent (2%) per quarter to a maximum of ten percent
10 (10%); and

11 (b) [plus i] Interest on the outstanding amount owed from the due
12 date at an interest rate equal to two percent (2%) above the rate for three-month
13 federal treasury bills at the most recent United States treasury department sale of
14 such treasury bills occurring prior to the due date of the franchise fee payment[;
15 ~~or~~

16 (b) ~~—The maximum interest rate permitted by state or federal law].~~

17 (3) The provider shall furnish to the city with each payment of compensation
18 required by this section a detailed written statement showing the amount of gross revenue
19 received by the provider within the city limit, broken out by provider's line of business
20 for the period covered by the payment. The city treasurer shall within a reasonable time
21 after submission determine the basis and accuracy of the amounts reported. Where the
22 amount paid by the provider is less than 98 percent of the amount actually due, the
23 provider shall also compensate the city for the city's costs in discovering and recovering
24 the underpayment. However, neither payment of the fee nor failure to make such
25 investigation shall estop the city in any way or prevent subsequent investigation,

1 collection, or return of any amount properly due.

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

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

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

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

18 (a) The city shall have and provider shall grant to it the right and
19 privilege at the city's expense to suspend and maintain wires and necessary
20 control boxes on poles placed by the provider in the public right-of-way if space
21 therein is available, which the city may require for fire, police, emergency, or
22 other municipal purposes. All such wires shall be placed in mutually agreed
23 upon locations on the poles or in the conduits so as not to interfere with the
24 service of the provider and shall not pose a danger to the provider's facilities,
25 customers, or customer's property. However, nothing in the franchise shall limit

1 the provider's right to reserve conduit space and/or pole space which in its sole
2 discretion it retains for purposes of assuring its ability to provide future services
3 or the safety or servicing of its facilities.

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

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

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

19 (1) Providers shall keep complete and accurate books of accounts and
20 records of their business and operations pursuant to any franchise granted hereunder in
21 accordance with generally accepted accounting principles. If required by the FCC,
22 providers shall use the system of accounts and the forms of books, accounts, records, and
23 memoranda prescribed by the FCC in 47 CFR or its successor, and as may be further
24 described herein. The director may require the keeping of additional records or accounts
25 which are reasonably necessary for purposes of identifying, accounting for, and reporting

1 gross revenue and uncollectibles for purposes of any franchise. Providers shall keep their
2 books of account and records in such a way that identification of revenues by type of
3 service within the city is available.

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

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

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

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

1 (6) In addition to paying all fees owed plus interest, in the event that the city
2 reviews the provider's franchise fee payments, and finds that the provider has underpaid
3 the fee owed for any year in an amount exceeding [~~2%~~] 5% of the franchise fees actually
4 paid, the provider shall pay the reasonable cost of the city's review and underpayment
5 recovery costs.

6 (7) The city will maintain confidentiality of information provided by
7 providers to the maximum extent permitted by law when providers have notified the city
8 of the confidential nature of specifically identified information reasonably marked by the
9 provider as "Confidential." The city will maintain the confidentiality of this information
10 to the maximum extent permitted by law.

11 **Section 6. Section 27-2.7 SFCC 1987 (being Ord. #2010-14, §9) is amended to**
12 **read:**

13 **27-2.7 Obligations of Providers Regarding the Public Rights-Of-Way.**

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

18 B. *Land Use Requirements.* Providers shall comply with Section 27-2.13 SFCC
19 1987 regarding land use requirements.

20 C. *Construction Plans and Drawings.*

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

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

1 safety; and

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

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

14 D. *Construction Forecast.* On or before the first day of June each year within three
15 years of which the provider anticipates constructing all or any identified and approved portion of
16 its telecommunications network in the city's public rights-of-way, the city and provider will meet
17 and exchange three year construction forecasts, including aerial builds, together with such
18 additional information as the city and provider deem appropriate relating to projects planned
19 within the city. Any such information may be designated by provider as proprietary if the
20 provider believes in good faith that such information is exempt from disclosure under the New
21 Mexico Inspection of Public Records Act, NMSA 1978, 14-2, or other applicable law. Provider
22 shall mark any such materials by clearly marking each page, or portion thereof, for which a
23 proprietary designation is claimed. The City shall maintain the confidentiality of such
24 information to the maximum extent permitted by law. The provider has the burden of
25 demonstrating that such information is exempt from disclosure. Provider will use best efforts to

1 forecast construction for the future, however, the city recognizes that construction is driven by
2 customer demand for service which is highly unpredictable. The provider shall not be subject to
3 termination, suspension, fines or other penalties if its actual construction does not meet the
4 timelines stated in the forecasts. The city and provider shall hold such additional meetings as
5 they deem necessary to exchange additional information with a view toward coordinating their
6 respective activities in these areas where such coordination will prove mutually beneficial to the
7 public by minimizing disruption costs to the public. Provider will comply with all building and
8 zoning codes and assure that aesthetic and other relevant planning principles have been given due
9 consideration. It is recognized that, notwithstanding the foregoing, the city retains absolute
10 discretion over the timing and all other aspects of the city's proposed projects. The parties will
11 make reasonable efforts to allow each party's work to be incorporated in the other's respective
12 projects. Provider will not cut or otherwise disturb any new or rehabilitated roadway within two
13 years of its placement as limited by and pursuant to Article 23-2 SFCC 1987 Excavations, Street
14 Cuts and Restoration Ordinance, except or unless in emergency conditions. Where conflict occurs
15 between the city's construction plans and schedules and the provider's construction plans and
16 schedules, the city's plans and schedules shall take precedence. Where unresolved conflicts
17 occur between the two or more providers' construction plans and schedules, the city shall
18 determine precedence.

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

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

25 (a) The provider shall not place any of its facilities on, over, under,

1 or within any city park, open space or trail not located in a public rights-of-way,
2 duly designated as such by the city except in accordance with city requirements;

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

7 (c) The city reserves the right to direct the coordination and
8 scheduling of any provider projects where such project may be reasonably
9 coordinated with the placement of other provider facilities. Otherwise, and
10 subject to city permitting processes and approvals, it is recognized that,
11 notwithstanding the foregoing, the provider retains discretion over the timing of
12 the provider's proposed projects. In directing these activities, the city will make a
13 good faith attempt to accommodate the provider's construction schedule and
14 desired service initiation dates as long as they were disclosed in the construction
15 schedule provided for in Section 27-2.7 D. SFCC 1987;

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

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

22 (2) Except in an emergency, not less than two working days prior to the
23 commencement of any work by the provider which involves excavation in any public
24 rights-of-way, the provider shall notify the director through the street cut permit process,
25 including payment for any and all fees, as set forth in Article 23-2 SFCC 1987. Provider

1 shall comply with Article 23-2 SFCC 1987 as it now or may exist in the future. In an
2 emergency, the director shall be notified the next working day and shall be provided with
3 a description of the emergency and the action taken. The right of the city to require a
4 post-emergency city permit(s), inspection(s) and fee(s) is preserved.

5 (3) Whenever work is performed in any public rights-of-way, the provider
6 shall take all reasonable precautions to minimize interruption to traffic flow, damage to
7 property, or creation of a hazardous condition. A plan for traffic control shall be
8 provided to the director for his approval prior to issuance of a permit.

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

25 (5) The provider shall be responsible for the maintenance of its own

1 equipment, facilities, and appurtenances placed upon, over, or under the public rights-of-
2 way, including the removal of all graffiti therefrom. If after [~~72 hours~~'] ten days' notice,
3 unless a lesser time period is required by another city ordinance, such graffiti has not
4 been removed, it may be removed by the city at provider's sole cost which shall be paid
5 in full by provider to city within 10 days of the date of the city's billing.

6 (6) The provider shall ensure its public facilities in public rights-of-way are
7 located and constructed in a manner such that the public's physical access to such rights-
8 of-way is not impaired and in full compliance with the Americans with Disabilities Act
9 (ADA). Where existing facilities constructed prior to ADA (legal nonconforming
10 facilities) are modified or replaced, the provider shall insure that such modification or
11 replacement shall then fully comply with ADA. Any intersection upgrades shall include
12 upgrading all four corners with ADA accessibility compliant ramps. Following notice by
13 the city of an ADA construction problem, the provider shall have 30 days or other
14 reasonable time to remedy the problem. In the event that the city and the provider cannot
15 agree that a problem exists, the city and the provider shall follow the dispute resolution
16 provisions of this Article.

17 F. *Location and Relocation of Facilities.*

18 (1) All facilities of the provider shall be placed so that they do not interfere
19 with the use of public rights-of-way by the city and shall only be placed after approval of
20 the location by the city's planning commission pursuant to Section 27-2.13 SFCC 1987
21 and by the director and in accordance with all barricade, excavation and permitting
22 ordinances and regulations adopted by the city governing the location of facilities. The
23 city reserves the right to construct, install, maintain, and operate any public improvement,
24 work, or facility, including without limitation, telecommunications facilities, do any work
25 that the city may find desirable on, over, or under any public rights-of-way, and vacate,

1 alter, or close any public rights-of-way subject to provider's rights and obligations under
2 Section 27-2.7F.(2) and (3) SFCC 1987. All such work shall be done, if possible, in such
3 a manner as not to obstruct, injure, or prevent use and operation of the provider's network
4 or system. Pursuant to any franchise, provider agrees to obtain the city's express written
5 approval before placing structures in public rights-of-way that do not currently exist in
6 public rights-of-way.

7 (2) The city may require the removal or relocation of facilities used by the
8 provider in any public rights-of-way as follows:

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

1 Notwithstanding the foregoing, provider shall not be required by the city to
2 relocate its facilities to accommodate another provider or other nongovernmental
3 third party in the city. The costs of any relocations occasioned by another
4 provider or authorized non-governmental rights-of-way user of the city in no
5 event shall be the responsibility of the city.

6 (b) The provider shall reconstruct, replace, or restore any street,
7 alley, or public way or place in a timely fashion and any water, sewer, sanitary
8 sewer, storm drainage, traffic signalization facilities, or other facility of the city
9 disturbed by the provider, without cost to the city, to the condition that existed
10 prior to the work by provider, consistent with city standards and specifications
11 for public works construction. Any facility so disturbed by the provider shall be
12 reconstructed, replaced, or restored only under the supervision of city personnel.

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

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

1 overhead with underground distribution facilities of a provider shall be paid for by such
2 provider.

3 G. *Public Works and Improvements.*

4 (1) The city reserves the right to construct, install, maintain, and operate any
5 public improvement, work, or facility and do any work that the city may find desirable
6 on, over, or under any public rights-of-way including rights-of-way facilities of any type
7 and nature owned or controlled by the city. All such work shall be done, if possible, in
8 such manner as not to obstruct, injure, or prevent free use and operation of the provider's
9 telecommunications network, and shall be performed as expressly provided in Section
10 27-2.7F.(2) SFCC 1987.

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

23 (3) Subject to the requirements of Section 27-2.7F. SFCC 1987, whenever
24 the city shall legally vacate (terminate all of the city's rights in) any public rights-of-way
25 for the convenience or benefit of any person or governmental agency or instrumentality,

the provider's rights shall be preserved as to any of its facilities then existing in such public rights-of-way.

H. *Moving of Buildings.* Whenever it becomes necessary to temporarily rearrange, remove, lower, or raise the aerial cables or wires or other apparatus of the provider to permit the passage of any building, machinery, or other object, the provider shall perform such rearrangement upon the receipt of written notice no less than 30 days (or less time in the event of an emergency as determined by the city) prior to the move from the person or persons desiring to move said building, machinery, or other objects. The written notice shall detail the route and timing of movement of the building, machinery, or other object. The costs incurred by the provider in making such rearrangements of its aerial plant will be borne, excepting the city, by the person or persons seeking such rearrangement, unless the aerial plant is placed or maintained in violation of the applicable rules of any local, state, or federal regulatory agency and thereby interferes with the movement.

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

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

1 reasonable.

2 K. *Interference.* The provider shall not be required to attach its facilities to the
3 facilities of any other person [~~or entity~~] or to permit the facilities of any other person [~~or entity~~] to
4 be attached to the provider's facilities if it can be shown to the reasonable satisfaction of the city
5 that the other person [~~or entity~~] is not willing to accept the terms of a joint use agreement, the
6 provider will be subjected to increased risks of interruption of service or if the facilities of such
7 other person [~~or entity~~] are not of the character, design, and construction required by, or are not
8 being maintained in accordance with industry standards or practice or in a manner permitted by
9 law.

10 L. *Supplying Maps.* Provider shall maintain on file all available maps, operational
11 data, and reports pertaining to its operations in the city. The city may inspect the maps, data, and
12 reports at any time during business hours. The provider shall furnish to the city, as soon as
13 practicable and without charge, current "As-Built" maps in the city's GIS format or compatible
14 data base, showing the location and dimension of its telecommunications network located in the
15 rights-of-way, but not other proprietary information, used in operating the provider's
16 telecommunications network within the city of Santa Fe.

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

24 Section 7. Section 27-2.11 SFCC 1987 (being Ord. #2010-14, §13) is amended to
25 read:

1 **27-2.11 Violations and Penalties.** Action by the city to impose fines and other
2 penalties under this section shall be initiated only after dispute resolution provisions of this
3 Article have concluded. All impositions of fines shall be stayed for up to 90 days during the
4 period of good faith activity under the dispute resolution provisions.

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

8 B. Failure of a provider to abide by the requirements of Section 27-2.5 SFCC 1987,
9 regarding compensation for use of the public rights-of-way, and the city's right to perform audits:
10 \$100.00 per day for each day such violation occurs.

11 C. Default and termination of franchise:

12 (1) The provider agrees that an event of default shall include but shall not be
13 limited to any of the following acts or failure to act by the provider:

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

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

18 (c) Failure to supply any mutually agreed-upon non-monetary
19 consideration.

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

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

24 (f) Failure to pay any permit fees, or failure to comply with any
25 rules, regulations, orders, approvals or directives of the city as set forth in this

Article or any franchise.

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

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

(i) Failure to use any of the telecommunications facilities in the public rights-of-way to transmit, receive, distribute, provide or offer telecommunications services for a period of six consecutive months, excepting facilities maintained for spare capacity and/or future use.

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

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

(b) Seek money damages from the provider as compensation for such event of default; or

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

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

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

3 (a) The director shall notify the provider, in writing, of an alleged
4 event of default. This written notice shall set forth with reasonable specificity the
5 facts the city believes are the basis for declaring that an event of default has
6 occurred. The provider shall within 30 calendar days of the date the notice is
7 postmarked, or such additional time as the director may specify in the notice,
8 cure the alleged event of default, or in writing present for review by the director a
9 reasonable time frame and method to cure the event of default. The provider, in
10 lieu of the cure of the event of default as set forth herein, may in writing present
11 facts and arguments as to why the provider disagrees that an event of default has
12 occurred.

13 (b) If the provider presents a written response that challenges
14 whether an event of default has occurred, the director shall within ten days
15 review the submitted materials and determine again whether an event of default
16 has occurred. If the director reaffirms that an event of default has occurred, the
17 provider shall be notified in writing of this decision and shall, within 30 calendar
18 days, cure the alleged event of default. The period to cure is tolled in the event
19 one party demands mediation until such time as mediation is completed.

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

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

5 (a) The city may determine that removal of facilities is not
6 necessary;

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

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

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

16 (e) The provider shall be responsible for all necessary removals of
17 the facilities and maintenance of the street area in the same manner and degree as
18 if the facilities were in active use, and the provider shall retain all liability
19 associated with such removals.

20 (f) As an alternative to removal, the provider may, subject to the
21 city's approval, abandon its facilities in place and transfer ownership of the
22 installed facilities to the city. Nothing herein shall cause the City to incur any
23 costs related to the removal of the provider's facilities or the transfer of
24 ownership of said facilities to the city.

25 D. *Dispute Resolution Provision.*

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

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

14 (3) Following the mediation session any unresolved claims shall be
15 submitted to arbitration pursuant to the New Mexico Uniform Arbitration Act, Section
16 44-7A-1, et seq., NMSA 1978 or as subsequently amended.

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

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

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

1 (d) The arbitrator's expenses shall be paid equally by each side.

2 Each party shall bear his or her own attorneys' fees, costs and expenses unless
3 otherwise determined by the arbitrator.

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

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

8 (g) In the event a party fails to proceed with arbitration of arbitrable
9 claims, unsuccessfully challenges the arbitrator's award, or fails to comply with
10 the arbitrator's award, the other party is entitled to costs of suit including
11 reasonable attorney's fee for having to compel arbitration or defend or enforce
12 the award.

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

16 E. *Remedies and Penalties Not Exclusive.* Subject to the provisions of Section 27-
17 2.11, all remedies and penalties granted pursuant to this Article and franchise are cumulative and
18 not exclusive, and the recovery or enforcement by one available remedy or imposition of any
19 penalty is not a bar to recovery or enforcement by any other such remedy or imposition of any
20 other penalty. The city shall not, however, pursue duplicative remedies or penalties against
21 provider for violations of other city ordinances or regulations arising from the same conduct. The
22 city reserves the right to enforce the penal provisions of any ordinance or resolution and to avail
23 itself of any and all remedies available at law or in equity. Failure to enforce shall not be
24 construed as a waiver of a breach of any term, condition, or obligation imposed upon the provider
25 by or pursuant to this Article or any franchise. A specific waiver of a particular breach of any

1 term, condition, or obligation imposed upon the provider by or pursuant to this Article or
2 franchise shall not be a waiver of any other or subsequent or future breach of the same or of any
3 other term, condition, or obligation, or a waiver of the term, condition, or obligation itself.

4 **Section 8. Section 27-2.13 SFCC 1987 (being Ord. #2010-14, §15) is amended to**
5 **read:**

6 **27-2.13 Land Use Review.**

7 A. *Zoning Districts; Location.* Telecommunications facilities are permitted in all
8 zoning districts, except self-supporting lattice and guyed towers are prohibited in the public
9 rights-of-way in residential and historic districts. However, to the maximum extent practicable,
10 telecommunications networks shall be designed in such a manner as to locate facilities:

- 11 (1) On existing structures;
- 12 (2) In nonresidential districts; and
- 13 (3) Along major arterials.

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

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

- 20 (1) Telecommunications facilities shall be installed underground to the
21 maximum extent feasible, including without limitation, in residential areas where
22 covenants regulate underground installations.
- 23 (2) If above ground, the telecommunications facilities shall be designed,
24 installed and maintained in such a manner as to minimize the visual impact. Acceptable
25 methods to minimize visual impact shall include, but not be limited to: concealment,

1 screening, camouflaging, color, materials, texture, shape, size and location.

2 (3) Consideration shall be given to minimize disruption to or alteration of
3 the natural environment.

4 (4) No permanent lighting is permitted unless the lighting is necessary for
5 compliance with federal, state or local law. Permanent lighting shall not include
6 equipment status indicating lights not exceeding 15 watts of power.

7 (5) Telecommunications facilities located within the historic districts shall
8 be reviewed by the historic design review board for compliance with this Section.

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

11 E. *Other Requirements.*

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

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

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

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

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

23 F. *Application to Land Use Department.* After approval of a franchise as set forth in
24 Section 27-2.4 SFCC 1987 and prior to construction, ~~[the provider]~~ any person proposing to
25 construct telecommunications facilities in the city's public rights-of-way shall submit an

1 application to the land use department for review by the planning commission.

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

4 (a) Describe the applicant's proposed telecommunications services
5 and facilities;

6 (b) Demonstrate compliance with this Section;

7 (c) Include a map at a suitable scale of the project area indicating the
8 proposed route and specific locations of telecommunications facilities and
9 specific information regarding a facility's radio frequency emissions;

10 (d) if a significant gap in coverage is claimed by the applicant, the
11 applicant shall prove by clear and compelling evidence that the proposed
12 facilities are necessary to close a defined and disclosed significant gap in service
13 coverage, and that its proposed facilities are the least intrusive means to close the
14 proven significant gap;

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

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

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

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

G. Land Use Review Fee. ~~[Applications]~~ Each application, which may include multiple phases as set forth in paragraph F.(3) of this Section, shall be accompanied by a nonrefundable fee of \$2,500 or the fee established by the governing body for development plan review, whichever is less. ~~[For applications showing multiple phases or locations, this fee shall be charged for each phase or location.]~~

H. *Staff Review of Application.* The land use department and other city staff as necessary shall review the application according to the standard procedures established by the land use department for applications to the planning commission.

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

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

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

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

(a) Place in the public right-of-way in a location approved by the

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

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

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

K. *Planning Commission Review.*

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

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

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

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

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

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

(4) The planning commission may place conditions upon its approval of the

1 application but the conditions shall not prohibit or have the effect of prohibiting the
2 provision of the telecommunications services.

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

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

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

8 (a) Be in writing, and

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

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

12 L. *Modifications to Approved Plans.*

13 (1) Modifications to [the] approved telecommunications facilities [plan]
14 plans that comply with the standards of this Article 27-2 and do not materially [alter]
15 modify the approved telecommunications plan may be approved by the land use director.

16 An example of a material [alteration] modification to the approved telecommunications
17 plan is a route for which residents did not receive notice of the planning commission
18 public hearing, or an increase in effective radiated power or any proposed increase in
19 frequency. Relocation of a single antenna to an adjacent structure along the approved
20 route is not a material [alteration] modification.

21 (2) The maintenance, repair, replacement-in-kind, or reinforcement of
22 existing telecommunications facilities, or the undergrounding of new telecommunications
23 facilities are not modifications to approved plans and shall not require approval of the
24 land use department or the planning commission.

25 M. *Waivers.*

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

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

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

8 (c) Will not jeopardize public safety and welfare;

9 (d) Will better serve the purposes contained in Article 27-2 SFCC
10 1987; and

11 (e) The applicant demonstrates that compliance with the
12 requirement is not practicable due to physical or legal constraints proven by the
13 applicant by clear and convincing evidence.

14 (2) The planning commission shall consider the following when granting a
15 waiver:

16 (a) The general appearance of the facility;

17 (b) The nature of uses on adjacent and nearby properties;

18 (c) The physical surroundings and constraints; and

19 (d) Improved telecommunications services including service
20 coverage and the potential for increasing the affordability of telecommunications
21 services through competition.

22 N. *Permits Required.* In addition to the permits required set forth elsewhere in
23 Article 27-2 and city code, the following permits are required from the land use department:

24 (1) Secondary electrical permit at each antenna or other facility site requiring
25 secondary electrical service; and

1 (2) Other permits as may be required.

2 O. *Monitoring Standards.*

3 (1) At all times, a telecommunications provider shall ensure that its
4 telecommunications facilities comply with the most current regulatory and operational
5 standards including but not limited to radio frequency emissions standards adopted by the
6 FCC and antenna height standards adopted by the Federal Aviation Administration.

7 (2) The telecommunications provider shall obtain and maintain the most
8 current information from the FCC regarding allowable radio frequency emissions and all
9 other applicable regulations and standards, and, at the following indicated times, shall file
10 a report with the land use director indicating whether the provider is in compliance with
11 such standards, advising the land use director of any regulatory changes that require
12 modifications to the telecommunications facilities and advising the land use director of
13 the measures taken by the provider to comply with such regulatory changes as follows:

14 (a) Prior to the commencement of the installation of the
15 telecommunications facility;

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

18 (c) Every year, on the anniversary of the submittal of the initial
19 compliance report, and

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

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

25 (3) Both the initial and updated certifications shall be subject to review and

1 approval by the city, and shall be public records.

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

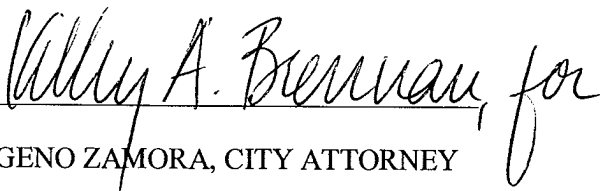
6 (5) All costs associated with the city's review of these certifications shall be
7 the responsibility of the provider, which shall promptly reimburse the city for the cost of
8 review.

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

12 **Section 8. A new Section 27-2.17 SFCC 1987 is ordained to read:**

13 **27-2.16 Severability.** The requirements and provisions of this Article 27-2 SFCC 1987
14 and its sections, parts, subparts, paragraphs and clauses are severable. In the event that any
15 requirement, provision, section, part, subpart, paragraph or clause of this Article, or the
16 application thereof to any person or circumstance, is held by a court of competent jurisdiction to
17 be invalid or unenforceable, it is the intent of the governing body that the remainder of the Article
18 be enforced to the maximum extent possible consistent with the purposes of the Article.

19 APPROVED AS TO FORM:

20 
21
22 GENO ZAMORA, CITY ATTORNEY