

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2010-2

INTRODUCED BY:

AN ORDINANCE

**REPEALING CHAPTER 27 SFCC 1987 AND CREATING A NEW CHAPTER 27 SFCC
1987 REGARDING TELECOMMUNICATION AND CABLE 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66 and §§68-76 as amended) is repealed.**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.] TELECOMMUNICATION AND CABLE
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 TELECOMMUNICATION NETWORKS AND CABLE SYSTEMS
AUTHORIZED IN THE PUBLIC RIGHTS-OF-WAY.**

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

1 A. Article 27-2 shall be cited as the “Telecommunication Networks and Cable
2 Systems in the Public Rights-of-Way Ordinance.”

3 B. The purpose of Article 27-2 SFCC 1987 is to establish a ~~competitively neutral~~
4 policy for use of the public rights-of-way for telecommunication networks and cable systems and
5 enable the city to:

6 (1) Permit competitively neutral and non-discriminatory access to the public
7 rights-of-way for providers of telecommunication and cable services;

8 (2) Manage the public rights-of-way in order to minimize the impact and
9 cost to the citizens of the placement of telecommunication networks and cable systems
10 within the public rights-of-way;

11 (3) Promote competition among telecommunication and cable service
12 providers and encourage the universal availability of telecommunication and cable
13 service to residents and businesses of the city;

14 (4) Obtain fair and reasonable compensation for the ~~rental and~~ use of public
15 rights-of-way through collection of fees and charges;

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

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

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

23 **27-2.2 [NEW MATERIAL.] Applicability.**

24 A. Article 27-2 SFCC 1987 shall apply to telecommunication networks and cable
25 systems located within the public rights-of-way authorized by a franchise with the city. ~~The~~

1 provisions of Article 27-2 SFCC 1987 shall supersede the provisions of Section 14-6.2 E. SFCC
2 1987.

3 B. Any franchise for telecommunication or cable services with the city existing
4 prior to _____, 2010 (adoption of this Ordinance) shall remain in full force and effect
5 until it expires at which time the franchise shall come into compliance with this Chapter and all
6 other ~~pertinent~~applicable city code.

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

8 **27-2.3 [NEW MATERIAL.] Definitions.**

9 *Access* means the availability of cable system or open video system for noncommercial
10 use by various eligible agencies, institutions, organizations, groups and individuals in the
11 community, including the city and its designees, to acquire, create, receive, and distribute
12 programming and signals as permitted under applicable law including, but not limited to:

13 A. *Public access* means access where community based, noncommercial
14 organizations, groups or individual members of the public, on a nondiscriminatory basis,
15 are the primary users.

16 B. *Educational access* means access where schools are the primary users
17 having editorial control over non-commercial programming and services. For purposes of
18 this definition, "school" means any State accredited public educational institution with a
19 minimum enrollment of one hundred students.

20 C. *Government access* means access where governmental institutions or
21 their designees are the primary users having editorial control over noncommercial
22 programming and services.

23 D. *Access channel* means any channel, or portion thereof, designated for
24 access purposes or otherwise made available to facilitate or transmit access programming
25 or services.

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

11 *Applicant* means any person who files an application with the city under Section 27-2.4
12 SFCC 1987 in order to obtain ~~the necessary permission~~ a franchise to use the public rights-of-
13 way to provide telecommunication or cable service within the city.

14 *Cable Services* means:

15 A. The one-way transmission to subscribers of (i) video programming or (ii)
16 other programming services, such as digital audio; and subscriber interaction, if any,
17 which is required for the selection or use of such video programming or other
18 programming service; or

19 B. A two-way activated system that provides access to the Internet and data
20 transmission at speeds at least as great as 200 kilobits per second.

21 *Cable system* shall mean a facility consisting of a set of closed transmission paths and
22 associated signal generation, reception, and control equipment that is designed to provide cable
23 service ~~which is provided~~ to multiple subscribers, but such term does not include (i) a facility that
24 serves only to re-transmit the television signals of one or more television broadcast stations; (ii) a
25 facility that serves subscribers without using any public right of way; (iii) a facility of a common

1 carrier which is subject, in whole or in part, to the provisions of Title II of the Communications
2 Act of 1934, as amended, except that such a facility shall be considered a cable system (other
3 than for purposes of Section 621 (c) of such Act) to the extent such facility is used in the
4 transmission of video programming directly to subscribers, unless the extent of such use is solely
5 to provide interactive on-demand services; (iv) an open video system that complies with Section
6 653 of Title VI of the Communications Act of 1934, as amended; or (v) any facilities of any
7 electric utility used solely for operating its electric utility system.

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

11 *City clerk* means the city clerk of the city of Santa Fe or a designated representative.

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

15 *Designated access provider* means the entity or entities designated by the city to manage
16 or co-manage the public, educational or governmental access channel and facilities. The city may
17 be a designated access provider.

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

21 *Emergency* means the repair, restoration, or replacement of an existing structure made
22 necessary because of a sudden unexpected event which has created a condition which is an
23 immediate and continuing threat to the safety of property or persons or the operations of a
24 provider.

25 *Franchise* means the non-exclusive authorization to operate a telecommunication or cable

1 service within the city and the right granted by the city to ~~rent and~~ use city public rights-of-way to
2 provide telecommunications or cable service within the city, to the public, or to other providers,
3 as specified by the terms of individual franchise agreement between the city and the applicant.

4 *Governing body* means the mayor and the city councilors together.

5 *Gross revenue* means:

6 A. For cable services:

7 (1) Includes any and all revenue received by the provider including
8 provider's affiliates, from the operation of the provider's cable system to provide cable
9 and other services to customers within the city limits and include, by way of example and
10 not limitation:

11 (a) Revenues from equipment sales and rentals, services,
12 installation, and other subscriber charges, advertising and shopping services,
13 revenues from program guides;

14 (b) Revenue from data transmissions;

15 (c) Revenue from the sale of other cable services; or

16 (d) Revenues of provider's affiliates (other than those revenues
17 which are already treated as the revenues of the provider upon which a fee is
18 paid), only to the extent necessary to prevent avoidance of fees owed on
19 provider's gross revenues from the delivery of cable services.

20 (2) Excludes the following types of revenue derived from the provision of
21 cable services to customers within the city limits:

22 (a) To the extent consistent with GAAP, bad debt, refunds or credits
23 issued; provided, however, that all or part of any bad debt that is written off but
24 subsequently collected shall be included in gross revenues in the period
25 collected;

1 (b) Any capital payments by the provider for PEG (public,
2 educational or government) access equipment as specified in a franchise;

3 (c) Any amounts received by the provider as a tax, fee or assessment
4 of general applicability collected by the provider for pass-through to a
5 governmental agency, except that a franchise fee is not a fee of general
6 applicability; or

7 (d) Any value assigned to non-monetary transactions for cable or
8 other services provided by provider.

9 B. For telecommunication services:

10 (1) Includes the following types of revenues derived from the provision of
11 telecommunications services to customers within the city limits:

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

15 (b) 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 wireless
17 use of the telecommunications network (including the facilities and equipment of
18 such network) by any person providing commercial mobile radio service,
19 cellular, personal communications service, other wireless communications
20 service;

21 (c) Interlata (local access transit area) toll revenue;

22 (d) Intralata toll revenue;

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

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- (f) Installation and service fees;
 - (g) Data transport or network charges;
 - (h) Any amounts collected by provider from its customers denominated as reimbursement for expenses of construction, equipment and related expenses paid by provider for the benefit of its customers; or
 - (i) Payments received by a provider from any federal or state agency or other carriers pursuant to any universal service fund requirement.
- (2) Excludes the following types of revenue derived from the provision of telecommunication services to customers within the city limits:
- (a) Proceeds from the sale of bonds, mortgages, or other evidence of indebtedness, securities or stocks;
 - (b) Bad debt write-offs and customer credits;
 - (c) Revenue from direct advertising;
 - (d) Revenue of an affiliate of the provider reported to the city as gross revenue under the affiliate's own franchise ;
 - (e) Any amounts collected by provider from its customers that are required to be remitted to a federal or state agency as part of a universal service fund or other government program;
 - (f) Amounts collected for taxes, fees or surcharges and paid to the federal, state or local governments;
 - ~~(g) Any amount received directly from the state of New Mexico or United States government pursuant to any universal service fund requirement;~~
 - ~~(g)~~ Any franchise fee or tax; or
 - ~~(g)~~ Revenue from the sale or lease of equipment that is readily available in the consumer retail market.

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

11 *PEG channel* means any channel on the cable system set aside by the cable provider for
12 public, educational or government use.

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

15 *Provider* means:

16 A. Any person who provides any telecommunication cable or other service within
17 the city by means of: (i) a telecommunications network or cable system owned by such person or
18 its affiliate; (ii) specifically identifiable facilities of a telecommunications network or cable
19 system reserved or made available for the use of such person or its affiliate under a lease or any
20 other arrangement for a term longer than 120 days; or (iii) facilities of a telecommunications
21 network or cable system not owned by such person or its affiliate and not specifically identifiable
22 but obtained from another person (including another provider) if the use of such facilities is
23 continuing and substantial. A person owning or operating telecommunication network or cable
24 system that merely pass through the city and such person and network or system do not offer
25 telecommunications or cable service to subscribers within the city shall not be subject to this

1 Article, provided that person has received other appropriate authorization from the city to ~~rent or~~
2 occupy the public rights-of-way.

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

7 *Public rights-of-way* means present and future surface, air space above the surface (but
8 not including air space used by wireless carriers for the transmission of telecommunications
9 services), and area below the surface of any public street, highway, lane, alley, sidewalk,
10 boulevard, drive, bridge, tunnel, easement in which the city holds any property interest or
11 exercises any rights of management or control and which, consistent with the purposes for which
12 it was acquired or dedicated, may be used for the installation, maintenance, and operation of a
13 telecommunications network or cable system. Parks, open space, trails or other city owned land
14 are not considered public rights-of-way.

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

16 *Structure* means anything that is constructed or erected with a fixed location on the
17 ground or attached to something having a fixed location on the ground. Structures include but are
18 not limited to walls, buildings, fences, poles, street lights, street signs, other signs, mobile homes,
19 swimming pools, spas, microwave satellite receiving dishes, TV antennas, communication
20 devices and tennis courts.

21 *Telecommunications* means:

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

1 B. Telecommunications shall not include the following services:

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

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

10 ~~Telecommunications facilities means the plant, equipment and property, including but not~~
11 ~~limited to, fiber optic lines, cables, wires, conduits, ducts, pedestals, underground vaults, towers,~~
12 ~~antennas, electronics and other appurtenances used or to be used to transmit, receive, distribute,~~
13 ~~provide or offer telecommunications services.~~

14 *Telecommunications service* means the offering of telecommunications within the city for
15 a fee directly to the public, or to such classes of users as to be effectively available directly to the
16 public.

17 *Telecommunications network* means any system which includes telecommunication
18 facilities ~~and/or equipment~~ placed in the public rights-of-way and used to provide any
19 telecommunications service.

20 ~~*Telecommunications system* means the telecommunications system which is to be~~
21 ~~constructed, operated, and maintained by a provider, pursuant to this Article and an agreement~~
22 ~~between the city and the provider, consisting of conduit systems, cable, wires, optical fibers, and~~
23 ~~all hardware used to attach the foregoing.~~

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

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

2 **27-2.4 [NEW MATERIAL.] Application to Provide Services.**

3 A. *Application Required.* Any person who proposes to use the city's public rights-
4 of-way to provide telecommunication or cable services shall submit an application to the director.
5 The application, in a form prescribed by the director, shall describe applicant's proposed use of
6 the public rights-of-way.

7 B. *Authority of Director.* The director shall have the duty to review applications
8 submitted under this Article. The director shall review the application and shall notify the
9 applicant within ten business days of receipt of the application on whether or not the application
10 has been accepted or rejected. If the application has been rejected, a new application shall be
11 required. The director shall negotiate the terms of franchises (to the extent not prescribed in this
12 Article) for adoption by the governing body. The director shall administer and enforce
13 compliance with respect to all franchises granted under this Article except as specifically
14 delegated to the Land Use Director as set forth in Section 27-2.14 SFCC 1987.

15 C. *Governing Body Action.* All franchises granted under this Article shall
16 incorporate each applicable provision of this Article. The city shall apply any modifications or
17 amendments to this Article in a manner that does not discriminate against any provider subject to
18 this Article. The act of granting, amending, denying, or terminating a franchise is a legislative
19 function within the sound discretion of the governing body. Prior to proceeding with a
20 termination of a franchise granted by the governing body, the city shall comply with the
21 alternative dispute resolution provisions of this Article. Any person who is denied a franchise or
22 whose franchise is terminated shall petition the governing body for reconsideration before
23 seeking judicial remedies. The governing body shall have 30 days from the date of the petition to
24 reconsider such denial or termination.

25 ~~DE.~~ *Franchise granted.* A franchise granted under this Article shall authorize an

1 applicant to use public rights-of-way to provide either telecommunications service or cable
2 service subject to compliance with this Article and other applicable requirements of city code.

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

4 **27-2.5 [NEW MATERIAL.] Compensation and Charges.**

5 A. *Fees and Charges.*

6 (1) Franchise fee. As partial compensation for the use of the public rights-
7 of-way, each provider shall be subject to an annual fee of five percent (5%) of gross
8 revenue obtained from the provision of the various telecommunication or cable services.
9 Nothing contained in this Article shall prohibit or otherwise prevent a provider or other
10 person from passing through any franchise fee to the ultimate end user of
11 telecommunication or cable service.

12 (2) Filing fee. Each applicant shall submit a \$2,500 non-refundable
13 application for each franchise request.

14 (3) Non-monetary consideration. Upon mutual agreement between the city
15 and provider, a provider may pay up to one percent (1%) of the annual fee in the form of
16 non-monetary consideration, including, without limitation, network or system capacity,
17 conduit, equipment, or other infrastructure or services for use by the city for the purposes
18 specified below. This consideration shall be negotiated with each provider taking into
19 account the unique characteristics of each. Said consideration shall be valued in a
20 nondiscriminatory manner based on the provider's actual costs, including make-ready
21 costs, maintenance, and repair charges, labor and material costs, plus ten percent (10%)
22 as reimbursement for supervision and general and administrative costs. Further, any non-
23 monetary consideration furnished to the city shall be for the city's public and
24 noncommercial purposes. Use by the city under Section 27-2.5(B)(5)(a) ~~and (5)(b)~~ SFCC
25 1987 below, shall be included in the calculation of non-monetary consideration pursuant

1 to this paragraph along with any other use of provider facilities by the city.

2 (4) Cable providers shall provide on the cable system in the basic tier of
3 service (and in the lowest tier of service if different) the following channels collectively
4 known as "PEG channels":

5 (a) One public access channel for use by members of the general
6 public, to be administered by the city or its designee, or the Santa Fe community
7 college; and

8 (b) One educational channel administered by the city or its designee,
9 or the Santa Fe community college or its designee. Provider shall provide the
10 channel thirty (30) days after receiving notice from the city that there is a
11 contract in force to administer and provide programming for the channel.

12 (c) One government channel administered by the city, or its
13 designee, or such other unit of state or local government as the city may from
14 time to time allow. The provider shall provide the channel thirty (30) days after
15 receiving notice from the city that it is prepared to offer programming on the
16 channel.

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

20 B. *Payment of Franchise Fee.*

21 (1) Commencing the calendar quarter following the calendar quarter any
22 public rights-of-way or franchise contract becomes effective, payment of the fees are
23 required to be made within 45 days of the end of each calendar quarter. The fee shall be
24 based on gross revenues received by the provider for the preceding quarter. Such
25 payment shall be made through an electronic deposit process as established by the city

1 treasurer. In the event that a fee payment is not received by the city on or before the due
2 date set forth in this section or in a franchise, or the fee owed is not fully paid, the
3 provider subject to the fee shall be charged a penalty of two percent (2%) per quarter to a
4 maximum of 10% plus interest on the outstanding amount owed from the due date at an
5 interest rate equal to two percent (2%) above the rate for three-month federal treasury
6 bills at the most recent United States treasury department sale of such treasury bills
7 occurring prior to the due date of the franchise fee payment. The provider shall furnish to
8 the city with each payment of compensation required by this section a detailed written
9 statement showing the amount of gross revenue received by the provider within the city
10 limit, broken out by provider's line of business for the period covered by the payment.
11 Within such reasonable time as he/she may require, the city treasurer shall determine the
12 accuracy of the amounts reported. However, neither payment of the fee nor failure to
13 make such investigation shall estop the city in any way or prevent subsequent
14 investigation, collection, or return of any amount properly due.

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

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

24 (4) Acceptance by the city of any payment due under a franchise shall not be
25 deemed to be a waiver by the city of any breach of the franchise occurring prior thereto,

1 nor shall the acceptance by the city of any such payments preclude the city from later
2 establishing that a larger amount was actually due under the franchise, or from collecting
3 any balance due to the city.

4 (5) In consideration of the rights and privileges granted by any franchise, the
5 following apply:

6 (a) The city shall have and provider shall grant to it the right and
7 privilege at the city's expense to suspend and maintain wires and necessary
8 control boxes on poles placed by the provider in the public right-of-way if space
9 therein is available, which the city may require for fire, police, emergency, or
10 other municipal purposes. All such wires shall be placed in mutually agreed
11 upon locations on the poles or in the conduits so as not to interfere with the
12 service of the provider and shall not pose a danger to the provider's facilities,
13 customers, or customer's property. However, nothing in the franchise shall limit
14 the provider's right to reserve conduit space and/or pole space which in its sole
15 discretion it retains for purposes of assuring its ability to provide future services
16 or the safety of or servicing of its facilities.

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

1 further described herein. The director may require the keeping of additional records or
2 accounts which are reasonably necessary for purposes of identifying, accounting for, and
3 reporting gross revenue and uncollectibles for purposes of any franchise. Providers shall
4 keep their books of account and records in such a way that identification of revenues by
5 type of service within the city is available.

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

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

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

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

1 be unreasonably withheld.

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

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 the information. The information required to be provided to
9 the city under this paragraph is trade secret. The city will maintain the confidentiality of
10 this information to the maximum extent permitted by law. Provider shall label such
11 material as confidential.

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

13 **27-2.6 [NEW MATERIAL.] Transfers of Franchise.**

14 A. No franchise granted under this Article, the assets held by providers for use under
15 such franchise which are in the public rights-of-way, or any rights or privileges of providers
16 under a franchise, either separately or collectively, shall be sold, resold, assigned, transferred,
17 leased, or conveyed by providers to any other person, without notice to the city ~~within 30 days of~~
18 no less than 30 days prior to such proposed sale, transfer, or conveyance. Provider shall submit
19 all information reasonably requested by the city relating to the financial, technical, and
20 operational qualifications of the transferee. Prior to consummation of such sale, transfer, or
21 conveyance, transferee shall affirmatively, and in writing, assume all obligations, rights, and
22 liabilities of provider as specified in any franchise. Upon request of the provider, the city shall
23 keep confidential any and all information related to a proposed sale, transfer or conveyance to the
24 fullest extent allowed by law.

25 B. Any change of control of a provider shall constitute a transfer under this section.

1 A mortgage or other pledge of assets to a bank or lending institution in a bona fide lending
2 transaction shall not be considered an assignment.

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

4 **27-2.7 [NEW MATERIAL.] Obligations of Providers Regarding the Public**
5 **Rights-Of-Way.**

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

10 B. *Land Use Requirements.* Providers shall comply with Section 27-2.14 SFCC
11 1987 regarding land use requirements.

12 BC. *Construction Plans and Drawings.*

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

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

19 (b) The provider shall file maps and/or drawings with the director
20 and with the city ~~communications manager~~ ITT Director showing the location of
21 any construction or extension of its facilities and services in any public rights-of-
22 way of the city. For multi-conduit duct banks, maps and drawings shall show
23 overall size, material, and configuration of the duct bank showing the horizontal
24 and vertical locations within the rights-of-way, size and type of equipment and
25 materials and location of other utilities. ~~Upon request from the city, t~~The

1 provider shall provide city with updates of the maps and drawings showing the
2 location of any new construction, extension, or relocation of its underground
3 facilities or line spot such facilities. ~~The information required to be provided to~~
4 ~~the city under this paragraph is trade secret. Provider shall label the information~~
5 ~~as confidential. All materials provided pursuant to this section shall be kept~~
6 ~~confidential to the fullest extent possible under the law.~~

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

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

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

10 ~~DE.~~ *Installations, Excavations, and Restorations.*

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

16 (a) The provider shall not place any of its facilities on, over, under,
17 or within any city park, duly designated as such by the city, but nothing herein
18 contained shall preclude the city from granting a ~~revocable permit license~~
19 therefore;

20 ~~(b) — The provider shall not place any of its facilities on, over, or~~
21 ~~within the median portion of any boulevard or parkway, except for perpendicular~~
22 ~~crossings, without first having obtained the written permission of the city;~~

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

1 city policies and ordinances;

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

12 ~~(e)(d)~~ The provider shall, to the extent feasible, employ "trenchless"
13 technology in the placement of its facilities; ~~and~~

14 ~~(e) _____ A franchise does not include the right to use the city's sewer or~~
15 ~~storm sewers which requires a license from the city.~~

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

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

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

23 (6) The provider shall ensure its public facilities in public rights-of-way are
24 located and constructed in a manner such that physical access is not impaired in
25 compliance with the Americans with Disabilities Act (ADA). Any intersection upgrades

1 shall include upgrading all four corners with ADA accessibility compliant ramps.
2 Following notice by the city of an ADA construction problem, the provider shall have 30
3 days or other reasonable time to remedy the problem. In the event that the city and the
4 provider cannot agree that a problem exists, the city and the provider shall follow the
5 dispute resolution provisions of this Article.

6 ~~EF.~~ *Location and Relocation of Facilities.*

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

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

22 (a) After notice to the provider, where relocation cannot reasonably
23 be avoided and where the city and the provider agree that no alternative exists,
24 the city may require the removal or relocation of facilities used by the provider in
25 any public rights-of-way as may reasonably be required by the city or caused or

1 occasioned by any city project, including but not limited to the installation of
2 water, sanitary sewer, storm drainage, or traffic signal facilities, road
3 reconstruction, or other public right-of-way construction. The provider shall
4 remove and relocate such facilities within 60 days following notice to do so from
5 the city. Projects requiring, in the opinion of the provider and the director, in
6 excess of 60 days to complete shall be completed in a time frame determined on
7 a project specific basis. Prior to any such relocation, the city agrees to provide
8 for a suitable location for such relocated facilities sufficient to maintain service.
9 The cost of any removal or relocation of its facilities shall be paid by the
10 provider. To the extent that a delay in a city project is due to provider's
11 relocation, then such provider shall pay all reasonable, documented expenses
12 incurred by the city as a result of and proportionate to its contribution to the
13 delay. Notwithstanding the foregoing, provider shall not be required by the city
14 to relocate its facilities to accommodate another franchisee, provider or other
15 nongovernmental third party in the city. The costs of any relocations occasioned
16 by another franchisee of the city in no event shall be the responsibility of the city.

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

24 (c) Subject to the provisions of this section and upon notice to the
25 city, the provider may remove or relocate facilities maintained by the provider on

1 its own initiative.

2 (3) Where the city, acting through itself, an agent, contractor, or permit
3 holder, proposes to improve a street, which requires the relocation of an existing aerial
4 facility within the public rights-of-way under its jurisdiction or control, the provider shall
5 replace such overhead distribution facilities as are then within the affected right-of-way
6 with underground facilities unless the provider can demonstrate to the city that the cost of
7 relocation is economically unreasonable. All such relocations of provider facilities shall
8 be at such provider's expense. The conversion from overhead to underground shall be
9 non-discriminatory and shall be conditioned upon the city requiring the under grounding
10 of all existing and new facilities located or to be located in the area. Such replacement of
11 overhead with underground distribution facilities of a provider shall be paid for by such
12 provider.

13 **FG.** *Public Works and Improvements.*

14 (1) The city reserves the right to construct, install, maintain, and operate any
15 public improvement, work, or facility and do any work that the city may find desirable
16 on, over, or under any public rights-of-way including telecommunication facilities owned
17 by the city. All such work shall be done, if possible, in such manner as not to obstruct,
18 injure, or prevent free use and operation of the provider's telecommunication network or
19 cable system, and shall be performed as expressly provided in Section 27-2.7~~(E)~~F(2)
20 SFCC 1987.

21 (2) Whenever the city shall excavate or perform any work in any present
22 and/or future public rights-of-way of the city, or shall contract, for such excavation or
23 work, where such excavation or work may disturb but not require removal or relocation
24 of provider's facilities, the city shall notify the provider sufficiently in advance of such
25 contemplated excavation or work to enable the provider to take such measures as may be

1 deemed necessary to protect and support such facilities from damage and possible
2 inconvenience or injury to the public or the city's public rights-of-way. If the provider
3 cannot take such measures, the provider shall be required to relocate its facilities in
4 accordance with this Article. In such case, the provider upon request shall furnish field
5 markings to the city or contractor, as the case may be, showing the location of all its
6 facilities in the area involved in such proposed excavation or other work.

7 (3) Subject to the requirements of Section 27-2.7~~(E)~~E, SFCC 1987,
8 whenever the city shall vacate any public rights-of-way for the convenience or benefit of
9 any person or governmental agency or instrumentality, the provider's rights shall be
10 preserved as to any of its facilities then existing in such public rights-of-way.

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

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

25 I.J. *Joint Use Agreements.* The provider is authorized and encouraged to enter into

1 joint-use agreements with any person or entity franchised by the city with respect to the
2 placement of a telecommunication network or cable system. The provider may require any such
3 person or entity to pay reasonable compensation for such joint use and to furnish evidence of
4 adequate insurance covering the provider and adequate bonds covering the performance of the
5 person or entity attaching to the provider's telecommunication network or cable system as a
6 condition precedent to granting permission to any such person or entity to attach its
7 telecommunication network or cable system to the provider's network or system , provided that
8 the provider's requirements for such insurance shall be reasonable.

9 ~~JK~~. *Interference*. The provider shall not be required to attach its facilities to the
10 facilities of any other person or entity or to permit the facilities of any other person or entity to be
11 attached to the provider's facilities if it can be shown to the reasonable satisfaction of the city that
12 the other person or entity is not willing to accept the terms of a joint use agreement, the provider
13 will be subjected to increased risks of interruption of service or to increased liability for
14 accidents, or if the facilities of such other person or entity are not of the character, design, and
15 construction required by, or are not being maintained in accordance with industry standards or
16 practice.

17 ~~KL~~. *Supplying Maps*. Provider shall maintain on file all available maps, operational
18 data, and reports pertaining to its operations in the city. The city may inspect the maps, data, and
19 reports at any time during business hours. ~~Upon request of the city, the~~ The provider shall
20 furnish to the city, as soon as practicable without charge, current maps, either in a "hard copy"
21 printed form or in the city's GIS format or compatible data base, showing the location and
22 dimension of its telecommunication network or cable system located in the rights-of-way, but not
23 other proprietary information, used in operating the provider's telecommunication network or
24 cable system within the city of Santa Fe. ~~The information required to be provided to the city~~
25 ~~under this paragraph is trade secret. The city will maintain the confidentiality of this information~~

1 ~~to the maximum extent permitted by law. Provider shall label all such maps as confidential.~~

2 EM. *Limitation on Privileges.* All rights, authority, and grants contained or conferred
3 are also conditioned upon the understanding and agreement that the exercise of these privileges in
4 the public rights-of-way of the city are not to operate in any way so as to be an enhancement of
5 the provider's properties or values or to be an asset or item of ownership in any appraisal thereof
6 in the event of a city acquisition, by purchase or otherwise. In the event that the city shall at any
7 time hereafter acquire the property of the provider, by purchase or otherwise, the value of any
8 franchise shall be fixed and determined at \$1.

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

10 **27-2.8 [NEW MATERIAL.] Insurance Requirements.**

11 A. Providers shall obtain and maintain in full force and effect throughout the term of
12 a franchise granted under this Article insurance with an insurance provider licensed to do
13 business in the state of New Mexico and acceptable to the city or shall provide evidence that it is
14 a qualified self-insured. All insurance providers will be required to be rated A-VI or better by
15 A.M. Best or A or better by Standard and Poors. Providers shall furnish the city with proof of
16 such insurance so required at the time of the filing of the acceptance of a franchise. The city
17 reserves the right to review these insurance requirements during the effective period of any
18 franchise and to reasonably adjust insurance coverage and its limits when deemed necessary and
19 prudent by the city's risk manager, based upon changes in statutory law, court decisions, or the
20 claims history of the industry or the insurance provider. The city shall provide notice to the
21 provider no less than 60 days in advance of any change of insurance requirements and provider
22 shall have the opportunity to negotiate with the city to adjust the new requirement based on
23 reasonable industry standards.

24 B. Subject to providers' right to maintain reasonable deductibles in such amounts as
25 are approved by the director, providers shall obtain and maintain in full force and effect for the

1 duration of any franchise, at providers' sole expense, insurance coverage ~~in the amount of one~~
2 ~~million dollars. as follows:~~

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

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

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

10 C. ~~The director shall be entitled, upon request and without expense, to receive~~ The
11 provider shall submit copies of certificates of insurance evidencing the coverage required above.

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

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

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

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

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

25 E. The insurance certificates obtained by providers in compliance with this section

1 shall be subject to approval by the city, and such proof of insurance shall be filed and maintained
2 with the director and the office of risk management during the term of a franchise, or any
3 extension or renewal thereof, and may be changed from time to time to reflect changing liability
4 limits, as required by the city. Providers shall timely advise the city attorney of any actual
5 litigation that would materially affect said provider's insurance coverage as required pursuant to
6 this section.

7 F. Insurers shall have no right of recovery against the city, it being the intention that
8 the insurance policies shall protect providers and the city and shall be primary coverage for all
9 losses covered by the policies.

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

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

16 **27-2.9 Customer Service Standards for Cable Service.** Cable providers shall
17 comply with the customer service standards and rules set forth in Part 76, § 76.309 of the FCC's
18 rules and regulations. Cable providers shall comply in all respects with the customer service
19 requirements established by the FCC pursuant to § 632 (c) of the Cable Act as amended.

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

21 **27-2.10 [NEW MATERIAL.] Term of Franchise.** The term of each franchise granted
22 under this Article shall be subject to negotiation with applicants but in no event shall exceed ten
23 years.

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

25 **27-2.11 [NEW MATERIAL.] Indemnity.** Each franchise granted under this Article

1 shall contain provisions whereby the provider agrees to defend, indemnify, and hold harmless the
2 city and its officials, agents, and employees from and against any and all claims, actions, suits, or
3 proceedings of any kind brought against said parties because of any injury or damage received or
4 sustained by any person, persons, or property arising out of or resulting from the franchise
5 granted to provider or by reason of any asserted act or omission, neglect, or misconduct of the
6 provider, or provider's agents or employees, or any subcontractor or its agents or employees. The
7 indemnity required hereunder shall not be limited by reason of the specification of any particular
8 insurance coverage.

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

10 **27-2.12 [NEW MATERIAL.] Violations and Penalties.** Action by the city to impose
11 fines and other penalties under this section shall be initiated only after dispute resolution
12 provisions of this Article have concluded. All impositions of fines shall be stayed for up to 90
13 days during the period of good faith activity under the dispute resolution provisions.

14 A. Failure of a provider to abide by the requirements of Section 27-2.7 SFCC 1987,
15 regarding the public rights-of-way: \$100.00 per day for each day such violation occurs.

16 B. Failure of a provider to abide by the requirements of Section 27-2.5 SFCC 1987,
17 regarding compensation for use of the public rights-of-way, and the city's right to perform audits:
18 \$100.00 per day for each day such violation occurs.

19 C. Default and termination of franchise:

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

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

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

1 (c) Failure to supply any mutually agreed-upon non-monetary
2 consideration.

3 (d) Failure to supply bonds as may be required by the city to assure
4 the proper completion of any construction performed.

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

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

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

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

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

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

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

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

1 (d) As a last measure only, terminate the franchise.

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

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

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

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

1 as set forth herein.

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

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

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

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

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

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.~~4~~12(C)(3) SFCC 1987,
2 above or in the event of any other dispute arising from or relating to the franchise or
3 breach thereof, and if the dispute cannot be settled through negotiations, the following
4 process will be followed during which any of the above remedies and penalties may be
5 imposed.

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

15 (3) Following the mediation session any unresolved claims shall be
16 submitted to arbitration pursuant to the New Mexico Uniform Arbitration Act, Section
17 44-7A-1, et seq., NMSA 1978 or as subsequently amended.

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

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

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

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

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

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

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

9 (g) In the event a party fails to proceed with arbitration,
10 unsuccessfully challenges the arbitrator's award, or fails to comply with the
11 arbitrator's award, the other party is entitled to costs of suit including reasonable
12 attorney's fee for having to compel arbitration or defend or enforce 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 2.4+12, all remedies and penalties granted pursuant to this Article and franchise are cumulative
18 and 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 15. A new Section 27-2.13 SFCC 1987 is ordained to read:**

5 **27-2.13 [NEW MATERIAL.] Unauthorized Use of Public Rights-Of-Way**

6 **Unlawful.**

7 A. It shall be unlawful for any person to use the public rights-of-way to provide
8 telecommunication or cable service that has not been authorized by the city in accordance with
9 the terms of this Article.

10 B. It shall be unlawful for any person to place facilities on public structures or utility
11 infrastructure to provide telecommunication or cable service not allowed under the terms of a
12 franchise.

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

15 D. The provisions of this section do not apply to any dispute between the city and a
16 provider under a franchise where the city alleges that the provider has failed to comply with the
17 terms of the franchise.

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

19 **27-2.14 [NEW MATERIAL.] Land Use Review for Telecommunication Franchises.**

20 **A. Zoning Districts. Telecommunications facilities are permitted in all zoning**
21 **districts.**

22 **B. Maximum Height. Telecommunications facilities shall not exceed the height of**
23 **the structure upon which such facilities are collocated. New telecommunications facilities located**
24 **on new structures shall not exceed the maximum height otherwise permitted as set forth in**
25 **Chapter 14 SFCC 1987.**

1 C. Aesthetic Requirements. Subject to applicable federal standards, the following
2 criteria shall be met:

3 (1) Depending upon the type of telecommunication facilities,
4 telecommunications facilities shall be installed underground to the maximum extent
5 feasible.

6 (2) If above ground, the telecommunications facilities shall be designed,
7 installed and maintained in such a manner as to minimize the visual impact. Acceptable
8 methods to minimize visual impact shall include, but not be limited to: screening, color,
9 materials, texture, shape, size and location.

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

12 (4) No lighting is permitted unless the lighting is necessary for compliance
13 with federal, state or local law.

14 (5) Telecommunications facilities located within the historic districts shall
15 be reviewed for compliance with the standards set forth in this Section by the historic
16 preservation staff and approved, denied or conditionally approved.

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

19 E. Other Requirements.

20 (1) No signs are permitted unless the sign required for safety reasons or for
21 compliance with the federal, state or local law.

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

24 (3) All telecommunications facilities shall be designed, constructed and
25 installed in such a manner as to minimize noise to the maximum extent possible but in no

1 event shall it exceed the standards set forth in Article 10-2 SFCC 1987.

2 F. *Application to Land Use Department.* After approval of a franchise as set forth in
3 Section 27-2.4 SFCC 1987 and prior to construction, the franchisee shall submit an application to
4 the land use department for review by the planning commission. The application, in a form
5 prescribed by the land use department, shall describe applicant's proposed telecommunications
6 services and facilities and shall demonstrate compliance with this Section. The application shall
7 include a map at a suitable scale of the project area indicating the proposed route and specific
8 locations of telecommunications facilities and specific information regarding radio frequency
9 emissions. The application shall be in writing with the accompanying data in a format acceptable
10 to the city that can be posted on the city's website. The applicant may submit one application
11 showing multiple phases or may submit a new application for each successive phase.

12 G. *Fee.* Applications shall be accompanied by a nonrefundable fee of \$2,500 or the
13 fee established by the governing body for development plan review, whichever is less.

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

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

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

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

24 (2) No less than 15 days prior to the public hearing, the applicant shall give
25 notice to the public as set forth below. The posters, mailings and display advertisements

1 shall state the nature of the application; the date, time and place of the public hearing; and
2 the availability for the public to review the application as set forth above. In addition, the
3 mailings and display advertisement shall include a map of the project area indicating the
4 proposed route and specific locations of all proposed above ground facilities and
5 equipment. The applicant shall:

6 (a) Place in the public right-of-way, one poster obtained from the
7 land use department at each major intersection within the project area provided
8 that there shall be no less than one poster every one-quarter mile along the
9 proposed route.

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

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

15 K. *Planning Commission Review.*

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

18 (2) The planning commission may not regulate the placement of
19 telecommunications services on the basis of the environmental effects of radio frequency
20 emissions.

21 (3) The planning commissions may place conditions upon its approval of the
22 application but the conditions shall not have a prohibitory effect on the provision of
23 telecommunications services.

24 (4) Findings of fact and conclusions of law shall be prepared and approved.

25 (5) A decision of the planning commission is appealable as set forth in

1 Section 14-3.17 SFCC 1987.

2 L. *Modifications.* Modifications to the approved telecommunications facilities plan
3 that comply with the standards of this Article 27-2 and do not materially alter the approved
4 telecommunications plan may be approved by the land use director. An example of a material
5 alteration to the approved telecommunications plan is a route for which residents did not receive
6 notice of the planning commission public hearing.

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

9 (1) *Secondary electrical permit at each antenna site; and*

10 (2) *Other permits as may be required.*

11 N. *Annual Verification of Compliance.* Telecommunication providers shall submit
12 an annual report to the city certifying that it is in full compliance with all applicable federal, state
13 and local laws, rules, regulations, codes and conditions of approval. The report shall disclose any
14 enforcement actions taken by the FCC or other regulatory body against the telecommunications
15 provider as related to services provided in the city of Santa Fe and the outcome of such action.

16 O. *Enforcement.* The land use director has the authority to interpret this Section in
17 accordance with the purpose of this Article and shall administer and enforce the provisions of this
18 Section.

19 **Section 1617. A new Section 27-2.1415 SFCC 1987 is ordained to read:**

20 **27-2.1415 [NEW MATERIAL.] Compliance with Other Codes.**

21 Telecommunication networks or cable systems granted approval under this article shall be
22 constructed, installed, operated and maintained in accordance with all applicable federal, state
23 and local codes, rules and regulations, ~~including, but not limited to, the following:~~

24 ~~A. *Towers or antennas associated with a franchise approved under this Article*~~
25 ~~located within the planning and platting jurisdiction of the city upon private or public land shall~~

1 ~~be subject to Section 14 6.2(E) SFCC 1987 “Land Development Laws”.~~

2 ~~B. Any trenching within the city may require an archaeological clearance permit~~
3 ~~pursuant to Section 14 3.13 SFCC 1987. Notwithstanding any requirements of this Article 27-2 to~~
4 ~~the contrary, said permit shall be obtained prior to any construction.~~

5 **Section 18. A new Section 27-2.16 SFCC 1987 is ordained to read:**

6 **27-2.16 [NEW MATERIAL.] Effective Date. Article 27-2 SFCC 1987 is effective**

7 **_____ , 2010 (date of adoption).**

8
9
10 APPROVED AS TO FORM:

11
12 _____
13 GENO ZAMORA, CITY ATTORNEY