

1 CITY OF SANTA FE NEW MEXICO

2 BILL NO. 2015-37

3 INTRODUCED BY:

4  
5 Councilor Peter N. Ives

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9  
10 AN ORDINANCE

11 RELATING TO THE CITY OF SANTA FE TELECOMMUNICATIONS FACILITIES IN  
12 THE PUBLIC RIGHTS-OF-WAY ORDINANCE; AMENDING SUBSECTION 27-2.1 SFCC  
13 1987 TO ESTABLISH LEGISLATIVE FINDINGS; AMENDING SUBSECTION 27-2.3 SFCC  
14 1987 TO REPEAL THE DEFINITION OF "GROSS REVENUE" AND ESTABLISH A NEW  
15 DEFINITION FOR "GROSS CHARGE"; AMENDING SUBSECTION 27-2.5 TO REPEAL  
16 THE FEE STRUCTURE AND ESTABLISH AN INFRASTRUCTURE MAINTENANCE  
17 FRANCHISE FEE; AND MAKING SUCH OTHER CHANGES AS ARE NECESSARY TO  
18 CARRY OUT THE INTENT OF THIS ORDINANCE.

19  
20 BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

21 Section 1. Subsection 27-2.3 SFCC 1987 (being Ord. #2010-14, §5, as amended) is  
22 amended to ordain, repeal and amend the following definitions:

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

1 Department means the department of public works.

2 Gross charge means the amount paid to a telecommunications retailer for the act or privilege  
3 of originating or receiving telecommunications in the city, and for all services rendered in connection  
4 therewith, including cash, credits, services, and property of every kind or nature, and shall be  
5 determined without any deduction on account of the cost of such telecommunications, the cost of the  
6 materials used, labor or service costs, or any other expense whatsoever. In case credit is extended, the  
7 amount thereof shall be included only as and when paid. "Gross charge" for private line service shall  
8 include charges imposed at each channel point within the city, charges for the channel mileage  
9 between each channel point within the city, and charges for that portion of the interstate inter-office  
10 channel provided within the city. "Gross charge" shall not include:

11 A. Any amounts added to a purchaser's bill because of a charge made under:

12 (1) the fee imposed by this chapter;

13 (2) additional charges added to a purchaser's bill under § 63-9D-8, 63-  
14 9F-12, or 63-9H-6, NMSA 1978;

15 (3) the tax imposed by the Telecommunications Excise Tax Act;

16 (4) the tax imposed by section 4251 of the Internal Revenue Code;

17 B. Charges for a sent collect telecommunication received outside of the city;

18 C. Charges for leased time on equipment or charges for the storage of data or  
19 information or subsequent retrieval or the processing of data or information intended to  
20 change its form or content. This definition applies, but is not limited to, the use of calculators,  
21 computers, data processing equipment, tabulating equipment, accounting equipment or voice  
22 mail systems, and also includes the usage of computers under a time-sharing agreement;

23 D. Charges for customer equipment, including equipment that is leased or rented  
24 by the customer from any source, but only if the charges are disaggregated and separately  
25 identified from other charges;

1           E. Charges for telecommunications and all services and equipment provided in  
2 connection therewith between a parent corporation and its wholly owned subsidiaries or  
3 between wholly owned subsidiaries, but only to the extent that the charges between the parent  
4 corporation and the wholly owned subsidiaries or between the wholly owned subsidiaries  
5 represent an expense allocation among the entities and not the generation of profit other than  
6 a regulatory required profit for the corporation rendering the telecommunications and related  
7 services;

8           F. Bad debts; provided, however, if any portion of a debt deemed to be bad is  
9 subsequently paid, the retailer shall report and pay the infrastructure maintenance franchise  
10 fee on that portion of the debt during the reporting period in which the payment is made;

11           G. Charges paid by inserting coins in coin-operated telecommunications  
12 devices; or

13           H. Charges for telecommunications and all services and equipment provided to  
14 the city.

15 In addition, retailer access charges, right of access charges, charges for use of intercompany facilities,  
16 and all telecommunications resold in the subsequent provision and used as a component of, or  
17 integrated into, end-to-end telecommunications service shall not be included in gross charges as sales  
18 for resale. Gross charges include charges for telecommunications and all services and equipment  
19 provided to any governmental entity other than the city.

20           ~~[Gross revenue means:~~

21           ~~A. — Includes the following types of provider revenues derived from the provision of~~  
22 ~~telecommunications services to customers within the city served from telecommunication facilities~~  
23 ~~located in the public rights-of-way:~~

24           ~~(1) — Recurring, nonrecurring and usage charges paid by customers for~~  
25 ~~telecommunications or other services provided through use of the telecommunications~~

1 network;

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

6 ~~(3) — Interlata (local access transit area) toll revenue;~~

7 ~~(4) — Intralata toll revenue;~~

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

10 ~~(6) — Installation and service fees;~~

11 ~~(7) — Data transport or network charges;~~

12 ~~(8) — Any amounts collected by a provider from its customers denominated as~~  
13 ~~reimbursement for expenses of construction, equipment and related expenses paid by~~  
14 ~~provider for the benefit of its customers; or~~

15 ~~(9) — Payments received by a provider from any federal or state agency or other~~  
16 ~~carriers pursuant to any universal service fund requirement.~~

17 ~~B. — Excludes the following types of revenue derived from the provision of~~  
18 ~~telecommunications services to customers within the city limits:~~

19 ~~(1) — Proceeds from the sale of bonds, mortgages, or other evidence of~~  
20 ~~indebtedness, securities or stocks;~~

21 ~~(2) — Bad debt write-offs and customer credits;~~

22 ~~(3) — Revenue from direct advertising;~~

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

1           ~~(5) — Amounts collected for taxes, fees or surcharges and paid to the federal, state~~  
2           ~~or local governments;~~

3           ~~(6) — Any franchise fee or tax; or~~

4           ~~(7) — Revenue from the sale or lease of equipment that is readily available in the~~  
5           ~~consumer retail market.~~

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

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

18           Public Right of Way has the meaning of § 3-1-2(M) NMSA 1978.

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

1 Service Address means the location of telecommunications equipment from which  
2 telecommunications services are originated or at which telecommunications services are received. If  
3 this location is not a defined location, as in the case of wireless telecommunications, paging systems,  
4 maritime systems, air-to-ground systems and the like, "service address" shall mean the location of the  
5 customer's primary use of the telecommunications equipment as defined by the location in the City  
6 where bills are sent.

7 *Telecommunications [means:*

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

12 B. ~~Telecommunications shall not include the following services:~~

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

15 (2) ~~Telecommunications services provided and used by a public utility~~  
16 ~~as that term is defined at § 62-3-3(G) NMSA 1978, or successor statute, for (i) the utility's~~  
17 ~~internal system communication needs; and (ii) provided directly or indirectly to its customers,~~  
18 ~~including but not limited to electronic meter reading, load control demand side management,~~  
19 ~~power quality monitoring, and other activities related to the delivery of electricity or natural~~  
20 ~~gas or water], in addition to the usual and popular meaning, includes, but is not limited to,~~  
21 messages or information transmitted through use of local, toll, and wide area telephone  
22 service, channel services, telegraph services, teletypewriter service, computer exchange  
23 services, private line services, specialized mobile radio services, or any other transmission of  
24 messages or information by electronic or similar means, between or among points by wire,  
25 cable, fiber optics, laser, microwave, radio, satellite, or similar facilities. Unless the context

1 clearly requires otherwise, "telecommunications" shall include wireless telecommunications  
2 as hereinafter defined. The definition of "telecommunications" shall not include (a) value  
3 added services in which computer processing applications are used to act on the form,  
4 content, code and protocol of the information for purposes other than transmission; (b) the  
5 purchase of telecommunications or telecommunications services by a retailer for use as a  
6 component part of a service provided to the ultimate retail consumer who originates or  
7 terminates the end-to-end communications; or (c) the provision of cable services through a  
8 cable system as defined in the Cable Communications Policy Act of 1984 (47 U.S.C.A.  
9 sections 521 and following), as now or hereafter amended, or through an open video system  
10 as defined in the rules of the Federal Communications Commission (47 CDF 76.1550 and  
11 following), as now or hereafter amended, or the provision of other video programming  
12 services equivalent to services provided through a cable system, or the provision of "direct-  
13 to-home satellite services" within the meaning of section 602 of the Federal  
14 Telecommunications Act of 1996 (Public Law Number 104-104), as now or hereafter  
15 amended.

16 *Telecommunications Provider* means:

- 17 A. any telecommunications retailer;  
18 B. any telecommunications reseller that is not a telecommunications retailer; or  
19 C. any person that is not a telecommunications retailer or telecommunications  
20 reseller that installs, owns, operates or controls equipment in the public way that is used or  
21 designed to be used to transmit telecommunications in any form.

22 *Telecommunications Retailer* or *retailer* or *carrier* means and includes every person engaged  
23 in the business of making sales of telecommunications at retail as defined in this chapter.

24 *Wireless Telecommunications* includes cellular mobile telephone services, personal wireless  
25 services as defined in Section 704(C) of the Telecommunications Act of 1996 (Public Law Number

1 104-104), as now or hereafter amended, including all commercial mobile radio services and paging  
2 services.

3 **Section 2. Subsection 27-2.4 SFCC 1987 (being Ord. #2010-14, §7, as amended) is**  
4 **amended to read:**

5 **27-2.4 Application for Franchise.**

6 A. *Application Required.* Any person with [a] telecommunications [facility]  
7 infrastructure in the city's public rights-of-way as of July 5, 2010 or who proposes to construct a  
8 telecommunications [facility] infrastructure in the city's public rights-of-way shall submit an  
9 application to the director. The application, in a form prescribed by the director and as may be  
10 modified by the director from time to time, shall expansively describe the applicant's current or  
11 proposed use of the public rights-of-way.

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

20 C. *Governing Body Action.* All franchises granted under this section shall be adopted by  
21 ordinance [~~following a public hearing~~] and shall incorporate by reference all applicable provisions of  
22 this section. The city shall apply any modifications or amendments to this section in a manner that  
23 does not unreasonably discriminate against any provider subject to this section. [~~The act of granting,~~  
24 ~~amending, denying, or terminating a franchise is a legislative function within the sound discretion of~~  
25 ~~the governing body.~~] Prior to proceeding with a termination of a franchise granted by the governing

1 body, the city shall comply with the alternative dispute resolution provisions of this section. Any  
2 person who is denied a franchise or whose franchise is terminated shall petition the governing body  
3 for reconsideration before seeking judicial remedies. The governing body shall have thirty (30) days  
4 from the date of the petition to reconsider such denial or termination.

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

8 **Section 3. Subsection 27-2.5 SFCC 1987 (being Ord. #2010-14, §7, as amended) is**  
9 **amended to read:**

10 **~~27-2.5 [Compensation and Charges] Fees; Audit.~~**

11 ~~[A. Fees and Charges.~~

12 ~~(1) Franchise fee. As partial compensation for the use of the public rights of-~~  
13 ~~way, each telecommunications services provider shall be subject to an annual fee of three~~  
14 ~~percent (3%) of the provider's gross revenue or for providers with telecommunications~~  
15 ~~networks and/or facilities in the public rights of way that do not provide telecommunications~~  
16 ~~services within the city three percent (3%) of that portion of the provider's gross revenue~~  
17 ~~attributable to the provider's telecommunications networks and/or facilities within the city~~  
18 ~~and not limited to revenues derived from the provision of telecommunications services within~~  
19 ~~the city.~~

20 ~~(2) Franchise filing fee. Each applicant shall submit a nonrefundable application~~  
21 ~~filing fee for each franchise request. The filing fee shall initially be two thousand five~~  
22 ~~hundred dollars (\$2,500), and may be adjusted annually by resolution of the governing body.~~  
23 ~~Additional land use review fees shall apply as set forth in subsection 27-2.13G. SFCC 1987.~~

24 ~~(3) Non-monetary consideration. Upon mutual agreement between the city and~~  
25 ~~provider, a provider may pay up to one percent (1%) of the annual fee in the form of non-~~

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

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

16 B. — *Payment of Franchise Fee.*

17 (1) — Commencing the calendar quarter following the calendar quarter any public  
18 rights of way franchise becomes effective, payment of the franchise fees and other fees due  
19 hereunder are required to be made within forty-five (45) days after the end of each calendar  
20 quarter. The fee shall be based on gross revenues received by the provider for the preceding  
21 quarter. Such payment shall be made through an electronic deposit process as established by  
22 the city treasurer.

23 (2) — In the event that a fee payment is not received by the city on or before the  
24 due date set forth in this subsection or in a franchise, or the fee owed is not fully paid, the  
25 provider subject to the fee shall be charged a penalty of:

1                   (a) ~~Two percent (2%) per quarter to a maximum of ten percent (10%);~~

2                   and

3                   (b) ~~Interest on the outstanding amount owed from the due date at an~~  
4                   ~~interest rate equal to two percent (2%) above the rate for three-month federal treasury~~  
5                   ~~bills at the most recent United States treasury department sale of such treasury bills~~  
6                   ~~occurring prior to the due date of the franchise fee payment.~~

7                   (3) ~~The provider shall furnish to the city with each payment of compensation~~  
8                   ~~required by this section a detailed written statement showing the amount of gross revenue~~  
9                   ~~received by the provider within the city limit or attributable to its telecommunications~~  
10                  ~~facilities within the city limit, broken out by provider's line of business for the period covered~~  
11                  ~~by the payment. The city treasurer shall within a reasonable time after submission determine~~  
12                  ~~the basis and accuracy of the amounts reported. Where the amount paid by the provider is less~~  
13                  ~~than ninety-five percent (95%) of the amount actually due, the provider shall also compensate~~  
14                  ~~the city for the city's costs in discovering and recovering the underpayment. However, neither~~  
15                  ~~payment of the fee nor failure to make such investigation shall estop the city in any way or~~  
16                  ~~prevent subsequent investigation, collection, or return of any amount properly due.~~

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

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

1           ~~(6) — Acceptance by the city of any payment due under a franchise shall not be~~  
2 ~~deemed to be a waiver by the city of any breach of the franchise occurring prior thereto, nor~~  
3 ~~shall the acceptance by the city of any such payments preclude the city from later establishing~~  
4 ~~that a larger amount was actually due under the franchise, or from collecting any balance due~~  
5 ~~to the city.~~

6           ~~(7) — In consideration of the rights and privileges granted by any franchise, the~~  
7 ~~following apply:~~

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

18                   ~~(b) — City agrees, in consideration of the establishment of the service and~~  
19 ~~furnishing of the facilities described in subsection 27-2.5B(7)(a) SFCC 1987, to hold~~  
20 ~~the provider free and harmless from all claims or liability for damage which may~~  
21 ~~arise out of the city's operation of such wires and control boxes. In no event shall the~~  
22 ~~city be required to pay any pole attachment fees in connection with the exercise of~~  
23 ~~the city's rights under this subsection; however, the fair market value of the city's use~~  
24 ~~of provider's wires or control boxes without recurring costs shall be included as part~~  
25 ~~of non-monetary consideration paid by the provider as further provided for in~~

1 subsection 27-2.5A(3) SFCC 1987.

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

7 *C. — City's Right to Audit.*

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

17 (2) ~~— Upon reasonable prior notice by the city of not less than thirty (30) days, or~~  
18 ~~such other time as may be agreed upon by the city and the provider, the city shall have the~~  
19 ~~right to review or audit the provider's books and records in accordance with regularly~~  
20 ~~accepted accounting and audit standards regarding any amounts which may be owed under a~~  
21 ~~franchise. This right includes the right to review and audit all books and records of revenue~~  
22 ~~not included in the calculation of the fee paid. The city shall give written notice to the~~  
23 ~~provider of any additional amount claimed to be due to the city as a result of the city's review.~~  
24 ~~If the provider disputes the additional amount allegedly due to the city, if any, the dispute~~  
25 ~~shall be determined according to the dispute resolution provisions of this section.~~

1           ~~(3) — In the event of an audit, the provider shall provide city specific books,~~  
2 ~~records, contracts, account codes, documents, and papers for its operations within the city.~~

3           ~~(4) — All such books, records, and accounts of the provider shall be retained by the~~  
4 ~~provider for a period of six (6) years, in accordance with § 37-1-3 NMSA 1978, or its~~  
5 ~~successor. The provider shall make such records as are necessary for the city to complete its~~  
6 ~~audit and be available for inspection by the city upon thirty (30) days notice from the city.~~

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

12           ~~(6) — In addition to paying all fees owed plus interest, in the event that the city~~  
13 ~~reviews the provider's franchise fee payments, and finds that the provider has underpaid the~~  
14 ~~fee owed for any year in an amount exceeding five percent (5%) of the franchise fees actually~~  
15 ~~paid, the provider shall pay the reasonable cost of the city's review and underpayment~~  
16 ~~recovery costs.~~

17           ~~(7) — The city will maintain confidentiality of information provided by providers~~  
18 ~~to the maximum extent permitted by law when providers have notified the city of the~~  
19 ~~confidential nature of specifically identified information reasonably marked by the provider~~  
20 ~~as "Confidential." The city will maintain the confidentiality of this information to the~~  
21 ~~maximum extent permitted by law.]~~

22       A.     Infrastructure Maintenance Franchise Fee.

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

1 telecommunications retailers to a service address in the city for telecommunications  
2 originating or received in the city.

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

5 **Section 4. A new Subsection 27-2.6 SFCC 1987 is ordained to read:**

6 **27-2.6 [NEW MATERIAL] Collection of Additional Charge by Retailers.**

7 A. Any retailer making or effectuating a sale of telecommunications at retail shall pay  
8 the infrastructure maintenance franchise fee to the department as provided by 27-2.5 of this chapter.  
9 The fee shall constitute a debt owed by the retailer to the city.

10 B. The retailer shall charge each customer an additional charge in an amount equal to  
11 the infrastructure maintenance franchise fee attributed to the customer's service address in the city.  
12 This additional charge to customers shall, when collected, be stated as a distance item on the bill to  
13 each customer separate and apart from the retailer's gross charges to its customers for  
14 telecommunications.

15 C. Each retailer may retain two percent (2%) of the additional charges it collects under  
16 this chapter to reimburse itself for expenses incurred in connection with accounting for and remitting  
17 the fee to the department.

18 **\* Editor's Note – Renumber the existing Subsection 27-2.6 as Subsection 27-2.7, renumber the**  
19 **existing Subsection 27-2.7 as Subsection 27-2.8, renumber the existing Subsection 27-2.8 as**  
20 **Subsection 27-2.9, and renumber the existing Subsection 27-2.9 as Subsection 27-2.10.**

21 **Section 5. A new Subsection 27-2.11 SFCC 1987 is ordained to read:**

22 **27-2.11 [NEW MATERIAL] Filing Returns and Payments by Retailers.**

23 A. On or before the last day of each calendar month, every retailer required to pay the  
24 infrastructure maintenance franchise fee imposed by this chapter shall file with the department a  
25 remittance return and shall pay the fee attributable to gross charges for the preceding calendar month.

1 The return shall be filed on a form prescribed by the director, and shall contain such information as  
2 the director may reasonably require.

3 B. No later than February 28th of each year, every telecommunications retailer shall  
4 provide to the department a report of an audit performed by an independent certified public  
5 accountant attesting to the amount of the infrastructure maintenance franchise fees paid to the  
6 department for the preceding calendar year, and that such amount complies with the requirements of  
7 this chapter.

8 **\* Editor's Note – Renumber the existing Subsection 27-2.11 as Subsection 27-2.17.**

9 **Section 6. A new Subsection 27-2.12 SFCC 1987 is ordained to read:**

10 **27-2.12 [NEW MATERIAL] Registration of Providers and Resellers.**

11 A. Every telecommunications provider within the meaning of this chapter shall register  
12 with the department within 90days after the effective date of the ordinance authorizing a franchise  
13 with that provider, on a form to be provided by the department, the name and address of every  
14 telecommunications reseller or other telecommunications provider with whom the registering  
15 telecommunications provider has a contractual relationship to provide telecommunications services or  
16 to make available telecommunications facilities in the public way. The telecommunications provider  
17 shall have a continuing duty to file with the department a revised registration forms within 45days  
18 after the date of occurrence of any changes in the information provided on the form, including the  
19 creation or termination of a contractual relationship described herein.

20 **\* Editor's Note – Renumber the existing Subsection 27-2.12 as Subsection 27-2.18.**

21 **Section 7. A new Subsection 27-2.13 SFCC 1987 is ordained to read:**

22 **27-2.13 [NEW MATERIAL] Resales.**

23 Whenever amounts are claimed to be excluded from gross charges as sales for resale under  
24 Section 27-2.3(H), the reseller shall furnish to the telecommunications provider the reseller's resale  
25 information. The telecommunications provider shall retain the resale information with its books and

1 records.

2 **\* Editor's Note – Renumber the existing Subsection 27-2.13 as Subsection 27-2.19.**

3 **Section 8. A new Subsection 27-2.14 SFCC 1987 is ordained to read:**

4 **27-2.14 [NEW MATERIAL] Maintaining Books and Records.**

5 Every retailer required to pay the fee imposed by this chapter, and every other  
6 telecommunications provider claiming an exclusion from gross charges as sales for resale under  
7 Section 27-2.9, shall keep accurate books and records of its business or activity, including original  
8 source documents and books of entry denoting the transactions that gave rise, or may have given rise,  
9 to any liability or exemption. All such books and records shall, at all times during business hours of  
10 the day, be subject to and available for inspection by the department.

11 **\* Editor's Note – Renumber the existing Subsection 27-2.14 as Subsection 27-2.20.**

12 **Section 9. Subsection 27-2.15 SFCC 1987 is hereby repealed, and a new Subsection**  
13 **27-2.15 is ordained to read:**

14 **27-2.15 [NEW MATERIAL] Application of Other Revenue Provisions.**

15 The infrastructure maintenance franchise fee imposed by this chapter is imposed in additional  
16 to all taxes, fees and other revenue measures imposed by the city, the state of New Mexico or any  
17 other political subdivision of the state; provided, however, that no fee or other compensation in  
18 additional to the infrastructure maintenance franchise fee provided in this chapter shall be required for  
19 the use of the public way by telecommunications carrier.

20 **\* Editor's Note – Renumber the existing Subsection 27-2.10 as Subsection 27-2.16.**

21 **Section 10. Subsection 27-2.11 SFCC 1987 (being Ord. #2010-14 §13, as amended) is**  
22 **hereby amended to read:**

23 **~~[27-2.11]~~ 27-2.17 ~~[Violations and]~~ Penalties; Remedies.**

24 ~~[Action by the city to impose fines and other penalties under this section shall be initiated~~  
25 ~~only after dispute resolution provisions of this section have concluded. All impositions of fines shall~~

1 ~~be stayed for up to ninety (90) days during the period of good faith activity under the dispute~~  
2 ~~resolution provisions:~~

3 ~~A. Failure of a provider to abide by the requirements of Section 27-2.7 SFCC 1987,~~  
4 ~~regarding the public rights of way: five hundred dollars (\$500.) per day for each day such violation~~  
5 ~~occurs on a per location basis, to a maximum of five thousand dollars (\$5,000.) per day for all~~  
6 ~~violations within a radius of one thousand feet (1,000').~~

7 ~~B. Failure of a provider to abide by the requirements of subsection 27-2.5 SFCC 1987,~~  
8 ~~regarding compensation for use of the public rights of way, and the city's right to perform audits: one~~  
9 ~~hundred dollars (\$100.) per day for each day such violation occurs.]~~

10 A. Any telecommunications retailer who fails to pay the infrastructure maintenance  
11 franchise fee as provided by this chapter shall be subject to a fine of not less than \$100 for each day  
12 that the failure to pay continues. Each day that the retailer's failure to pay continues shall constitute a  
13 separate and distinct violation and offense under this chapter. Any retailer who becomes subject to  
14 this fine may be enjoined from doing business in the city until the retailer has paid all sums due and  
15 owing under this chapter.

16 B. Any telecommunications provider who otherwise violates this chapter shall be  
17 subject to a fine of not less than \$100 for each offense. Each day the violation continues shall  
18 constitute a separate offense.

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 this  
23 section or the franchise.

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

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

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

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

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

10 (g) Failure to comply with any 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 (i) Failure to use any of the telecommunications facilities in the public  
15 rights-of-way to transmit, receive, distribute, provide or offer telecommunications  
16 services for a period of six (6) consecutive months, excepting facilities maintained  
17 for spare capacity and/or future use.

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

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

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

1 (c) Accelerate the expiration of the term of any franchise by decreasing  
2 the term of the franchise. The extent of such acceleration shall be determined by the  
3 city and may include any period of time, but not less than six (6) months, provided  
4 that at least six (6) months remain under the franchise; or

5 (d) As a last measure only, terminate the franchise and the city may  
6 require the provider at its sole cost to remove all of its facilities and reasonably  
7 restore all rights-of-way to their existing conditions within one hundred eighty (180)  
8 days after termination or the city may assume ownership of the facilities consistent  
9 with paragraph C(4)(f) below.

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

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

21 (b) If the provider presents a written response that challenges whether an  
22 event of default has occurred, the director shall within ten (10) days review the  
23 submitted materials and determine again whether an event of default has occurred. If  
24 the director reaffirms that an event of default has occurred, the provider shall be  
25 notified in writing of this decision and shall, within thirty (30) calendar days, cure the

1           alleged event of default. The period to cure is tolled in the event one (1) party  
2           demands mediation until such time as mediation is completed.

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

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

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

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

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

19                   (d)     The removal shall commence within thirty (30) days of an order to  
20           remove being issued by the director at the discretion of the governing body and shall  
21           be completed within one hundred eighty (180) days of the termination;

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

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

6 D. *Dispute Resolution Provision.*

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

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

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

23 ~~(a) — The city and provider shall first attempt to select an arbitrator~~  
24 ~~acceptable to both parties. If they are unable to mutually agree upon an acceptable~~  
25 ~~arbitrator within thirty (30) days from the date of the original written claim in~~

1 arbitration, then the Chief Judge of the First Judicial District Court shall appoint an  
2 arbitrator.

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

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

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

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

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

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

18 ~~(h) Nothing in this subsection shall prohibit a party from challenging the~~  
19 ~~legality of a ruling or decision of an arbitrator in any court of competent jurisdiction.]~~

20 E. *Remedies and Penalties Not Exclusive.* Subject to the provisions of subsection 27-  
21 2.11, all remedies and penalties granted pursuant to this section and franchise are cumulative and not  
22 exclusive, and the recovery or enforcement by one (1) available remedy or imposition of any penalty  
23 is not a bar to recovery or enforcement by any other such remedy or imposition of any other penalty.  
24 The city shall not, however, pursue duplicative remedies or penalties against provider for violations  
25 of other city ordinances or regulations arising from the same conduct. The city reserves the right to

1 enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies  
2 available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any  
3 term, condition, or obligation imposed upon the provider by or pursuant to this section or any  
4 franchise. A specific waiver of a particular breach of any term, condition, or obligation imposed upon  
5 the provider by or pursuant to this section or franchise shall not be a waiver of any other or  
6 subsequent or future breach of the same or of any other term, condition, or obligation, or a waiver of  
7 the term, condition, or obligation itself.

8 \* Editor's Note – Renumber the existing Subsection 27-2.17 as Subsection 27-2.22.

9 Section 11. Subsection 27-2.16 SFCC 1987 (being Ord. #2010-14, §18 as amended) is  
10 amended to read:

11 ~~[27-2.16]~~27-2.21 Appointment of Telecommunications Advisory Committee.

12 The mayor ~~[shall]~~ may solicit and appoint, with the advice and consent of the city council, a  
13 committee of ~~[no less than five (5) and no more than nine (9)]~~ individuals who shall advise, consult  
14 and work with city staff, including without limitation, the economic development division, the Santa  
15 Fe Complex, a local nonprofit; and the public ~~[in order to develop a telecommunications master plan  
16 and present such master plan to the governing body for its review and approval and to make  
17 recommendations to the governing body regarding amendments to Section 27-2 SFCC 1987 in order  
18 to facilitate implementation of the approved master plan].~~

19  
20 APPROVED AS TO FORM:

21   
22  
23 KELLEY A. BRENNAN, CITY ATTORNEY

24  
25 *M/Legislation/Bills 2015/Telecommunications*