

1 CITY OF SANTA FE NEW MEXICO

2 ORDINANCE NO. 2016-42

3
4
5 AN ORDINANCE

6 RELATING TO THE CITY OF SANTA FE TELECOMMUNICATIONS FACILITIES IN
7 THE PUBLIC RIGHTS-OF-WAY ORDINANCE; AMENDING SUBSECTION 27-2.1 SFCC
8 1987 TO ESTABLISH LEGISLATIVE FINDINGS; AMENDING SUBSECTION 27-2.3 SFCC
9 1987 TO REPEAL THE DEFINITION OF "GROSS REVENUE" AND ESTABLISH A NEW
10 DEFINITION FOR "GROSS CHARGE"; AMENDING SUBSECTION 27-2.5 TO REPEAL
11 THE FEE STRUCTURE AND ESTABLISH AN INFRASTRUCTURE MAINTENANCE
12 FRANCHISE FEE; AND MAKING SUCH OTHER CHANGES AS ARE NECESSARY TO
13 CARRY OUT THE INTENT OF THIS ORDINANCE.

14
15 BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

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

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

21 *Department* means the department of public works.

22 *Gross charge* means the amount paid to a telecommunications retailer for the act or privilege
23 of originating or receiving telecommunications in the city, and for all services rendered in connection
24 therewith, including cash, credits, services, and property of every kind or nature, and shall be
25 determined without any deduction on account of the cost of such telecommunications, the cost of the

1 materials used, labor or service costs, or any other expense whatsoever. In case credit is extended, the
2 amount thereof shall be included only as and when paid. "Gross charge" for private line service shall
3 include charges imposed at each channel point within the city, charges for the channel mileage
4 between each channel point within the city, and charges for that portion of the interstate inter-office
5 channel provided within the city. "Gross charge" shall not include:

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

7 (1) the fee imposed by this chapter;

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

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

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

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

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

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

21 E. Charges for telecommunications and all services and equipment provided in
22 connection therewith between a parent corporation and its wholly owned subsidiaries or between
23 wholly owned subsidiaries, but only to the extent that the charges between the parent corporation and
24 the wholly owned subsidiaries or between the wholly owned subsidiaries represent an expense
25 allocation among the entities and not the generation of profit other than a regulatory required profit

1 for the corporation rendering the telecommunications and related services;

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

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

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

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

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

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

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

1 *Telecommunications*, in addition to the usual and popular meaning, includes, but is not
2 limited to, messages or information transmitted through use of local, toll, and wide area telephone
3 service, channel services, telegraph services, teletypewriter service, computer exchange services,
4 private line services, specialized mobile radio services, or any other transmission of messages or
5 information by electronic or similar means, between or among points by wire, cable, fiber optics,
6 laser, microwave, radio, satellite, or similar facilities. Unless the context clearly requires otherwise,
7 “telecommunications” shall include wireless telecommunications as hereinafter defined. The
8 definition of "telecommunications" shall not include (a) value added services in which computer
9 processing applications are used to act on the form, content, code and protocol of the information for
10 purposes other than transmission; (b) the purchase of telecommunications or telecommunications
11 services by a retailer for use as a component part of a service provided to the ultimate retail consumer
12 who originates or terminates the end-to-end communications; or (c) the provision of cable services
13 through a cable system as defined in the Cable Communications Policy Act of 1984 (47 U.S.C.A.
14 sections 521 and following), as now or hereafter amended, or through an open video system as
15 defined in the rules of the Federal Communications Commission (47 CDF 76.1550 and following), as
16 now or hereafter amended, or the provision of other video programming services equivalent to
17 services provided through a cable system, or the provision of "direct-to-home satellite services"
18 within the meaning of section 602 of the Federal Telecommunications Act of 1996 (Public Law
19 Number 104-104), as now or hereafter amended.

20 *Telecommunications Provider* means:

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

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

3 *Wireless telecommunications* includes cellular mobile telephone services, personal wireless
4 services as defined in Section 704(C) of the Telecommunications Act of 1996 (Public Law Number
5 104-104), as now or hereafter amended, including all commercial mobile radio services and paging
6 services.

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

9 **27-2.4 Application for Franchise.**

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

15 B. *Authority of Director.* The director shall have the duty to review applications
16 submitted under this section. The director shall review the application and shall notify the applicant
17 within ten (10) business days of receipt of the application on whether or not the application has been
18 accepted as complete or rejected. If the application has been rejected, a new application shall be
19 required. The director shall negotiate the terms of franchises (to the extent not prescribed in this
20 section) for adoption by the governing body. The director shall administer and enforce compliance
21 with respect to all franchises granted under this section except as specifically delegated to the land
22 use director as set forth in subsection 27-2.19 SFCC 1987.

23 C. *Governing Body Action.* All franchises granted under this section shall be adopted by
24 ordinance and shall incorporate by reference all applicable provisions of this section. The city shall
25 apply any modifications or amendments to this section in a manner that does not unreasonably

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

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

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

11 **27-2.5 Fees; Audit.**

12 A. *Infrastructure Maintenance Franchise Fee.*

13 (1) Pursuant to the authority granted by section § 3-42-1 NMSA 1978 and 47
14 U.S.C. 253(c), there is hereby imposed an infrastructure maintenance franchise fee upon
15 telecommunications retailers at the rate of two percent (2%) of all gross charges charged by
16 telecommunications retailers to a service address in the city for telecommunications
17 originating or received in the city.

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

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

21 **27-2.6 Collection of Additional Charge by Retailers.**

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

25 B. The retailer shall charge each customer an additional charge in an amount equal to

1 the infrastructure maintenance franchise fee attributed to the customer's service address in the city.
2 This additional charge to customers shall, when collected, be stated as a distance item on the bill to
3 each customer separate and apart from the retailer's gross charges to its customers for
4 telecommunications.

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

8 * **Editor's Note – Renumber the existing Subsection 27-2.6 as Subsection 27-2.7, renumber the**
9 **existing Subsection 27-2.7 as Subsection 27-2.8, renumber the existing Subsection 27-2.8 as**
10 **Subsection 27-2.9, and renumber the existing Subsection 27-2.9 as Subsection 27-2.10.**

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

12 **27-2.11 Filing Returns and Payments by Retailers.**

13 A. On or before the last day of each calendar month, every retailer required to pay the
14 infrastructure maintenance franchise fee imposed by this chapter shall file with the department a
15 remittance return and shall pay the fee attributable to gross charges for the preceding calendar month.
16 The return shall be filed on a form prescribed by the director, and shall contain such information as
17 the director may reasonably require.

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

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

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

25 **27-2.12 Registration of Providers and Resellers.**

1 A. Every telecommunications provider within the meaning of this chapter shall register
2 with the department within ninety (90) days after the effective date of the ordinance authorizing a
3 franchise with that provider, on a form to be provided by the department, the name and address of
4 every telecommunications reseller or other telecommunications provider with whom the registering
5 telecommunications provider has a contractual relationship to provide telecommunications services or
6 to make available telecommunications facilities in the public way. The telecommunications provider
7 shall have a continuing duty to file with the department a revised registration forms within forty-five
8 (45) days after the date of occurrence of any changes in the information provided on the form,
9 including the creation or termination of a contractual relationship described herein.

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

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

12 **27-2.13 Resales.**

13 Whenever amounts are claimed to be excluded from gross charges as sales for resale under
14 the definition of gross charge, the reseller shall furnish to the telecommunications provider the
15 reseller's resale information. The telecommunications provider shall retain the resale information
16 with its books and records.

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

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

19 **27-2.14 Maintaining Books and Records.**

20 Every retailer required to pay the fee imposed by this chapter, and every other
21 telecommunications provider claiming an exclusion from gross charges as sales for resale under
22 Subsection 27-2.13, shall keep accurate books and records of its business or activity, including
23 original source documents and books of entry denoting the transactions that gave rise, or may have
24 given rise, to any liability or exemption. All such books and records shall, at all times during business
25 hours of the day, be subject to and available for inspection by the department.

1 * **Editor’s Note – Renumber the existing Subsection 27-2.14 as Subsection 27-2.20.**

2 **Section 9. Subsection 27-2.15 SFCC 1987 is hereby repealed, and a new Subsection**
3 **27-2.15 is ordained to read:**

4 **27-2.15 Application of Other Revenue Provisions.**

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

10 * **Editor’s Note – Renumber the existing Subsection 27-2.10 as Subsection 27-2.16.**

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

13 **27-2.17 Penalties; Remedies.**

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

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

23 C. *Default and Termination of Franchise:*

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

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

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

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

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

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

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

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

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

18 (i) Failure to use any of the telecommunications facilities in the public
19 rights-of-way to transmit, receive, distribute, provide or offer telecommunications
20 services for a period of six (6) consecutive months, excepting facilities maintained
21 for spare capacity and/or future use.

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

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

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

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

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

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

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

25 (b) If the provider presents a written response that challenges whether an

1 event of default has occurred, the director shall within ten (10) days review the
2 submitted materials and determine again whether an event of default has occurred. If
3 the director reaffirms that an event of default has occurred, the provider shall be
4 notified in writing of this decision and shall, within thirty (30) calendar days, cure the
5 alleged event of default. The period to cure is tolled in the event one (1) party
6 demands mediation until such time as mediation is completed.

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

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

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

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

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

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

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

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

10 D. *Dispute Resolution Provision.*

11 (1) Following the notice set out in subsection 27-2.17C(3) SFCC 1987, above or
12 in the event of any other dispute arising from or relating to the franchise or breach thereof,
13 and if the dispute cannot be settled through negotiations, the following process will be
14 followed during which any of the above remedies and penalties may be imposed.

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

23 E. *Remedies and Penalties Not Exclusive.* Subject to the provisions of subsection 27-
24 2.17, all remedies and penalties granted pursuant to this section and franchise are cumulative and not
25 exclusive, and the recovery or enforcement by one (1) available remedy or imposition of any penalty

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

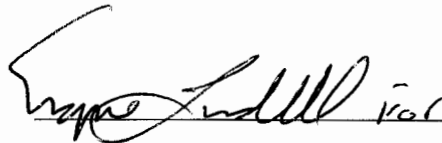
11 * **Editor's Note – Renumber the existing Subsection 27-2.17 as Subsection 27-2.22.**

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

14 **27-2.21 Appointment of Telecommunications Advisory Committee.**

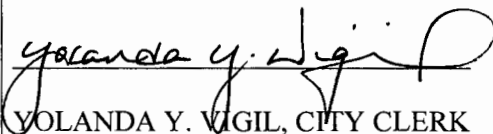
15 The mayor shall solicit and appoint, with the advice and consent of the city council, a
16 committee of individuals who shall advise, consult and work with city staff, including without
17 limitation, the economic development division, the Santa Fe Complex, a local nonprofit; and the
18 public.

19 PASSED, APPROVED and ADOPTED, this 9th day of November, 2016.


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22 JAVIER M. GONZALES, MAYOR

23 ATTEST:

24 
25 YOLANDA Y. VIGIL, CITY CLERK

1 APPROVED AS TO FORM:

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4 KELLEY A. BRENNAN, CITY ATTORNEY

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25 *M/Legislation/Ordinances 2016/2016-42 Telecommunications*