

1 CITY OF SANTA FE, NEW MEXICO

2 ORDINANCE NO. 2018-12

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4
5 AN ORDINANCE

6 GRANTING BROADBAND NETWORK OF NEW MEXICO, LLC A NON-EXCLUSIVE
7 FRANCHISE TO OPERATE A TELECOMMUNICATIONS NETWORK WITHIN THE
8 CITY OF SANTA FE; THE RIGHT TO USE CITY PUBLIC RIGHTS-OF-WAY TO
9 PROVIDE TELECOMMUNICATIONS SERVICES WITHIN THE CITY; AND FIXING
10 THE TERMS AND CONDITIONS THEREOF.

11
12 BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

13 Section 1. Legislative Findings. The governing body of the city of Santa Fe finds
14 that:

15 A. The granting of a franchise to Broadband Network of New Mexico, LLC (“the
16 Company”), is necessary for the access and use of public rights-of-way to provide
17 telecommunications services within the city limits in accordance with the terms and conditions of
18 this Ordinance and the Telecommunications in the Public Rights-of-Way Ordinance, Article 27-2
19 SFCC 1987 (“Article 27-2”).

20 B. The granting of such a franchise permits competitively neutral and
21 non-discriminatory access to the public rights-of-way for providers of telecommunications
22 services; and allows the city to appropriately manage the public rights-of-way in order to
23 minimize the impact and cost to the citizens of the placement of telecommunications facilities
24 within the public rights-of-way.

25 C. The granting of a franchise promotes competition among telecommunications

1 services providers and encourages the universal availability of telecommunications services to
2 residents and businesses of the city through the careful management of public rights-of-way.

3 D. It is the intent of the city in the granting of the franchise to obtain fair and
4 reasonable compensation for the use of public rights-of-way through the collection of fees and
5 charges, and to minimize the congestion, inconvenience, visual impact, and other adverse effects
6 on the public rights-of-way by Company's commercial use of public rights-of-way.

7 E. To the extent permitted by state and federal law, the granting of a franchise
8 allows the city to exercise such other powers, as the city may have to protect the public health,
9 safety, and welfare, ensure the continued quality of telecommunications services, and safeguard
10 the rights of consumers who are residents of the city.

11 F. In accordance with Article 27-2, Company submitted an application for a
12 franchise on May 27, 2016.

13 G. The city is authorized to grant one or more non-exclusive franchises for
14 telecommunications services within the city.

15 H. The city has reviewed Company's application and has determined that granting a
16 franchise in accordance with Article 27-2 is in the public interest and in the interest of the city
17 and its residents.

18 I. This franchise, as it relates to the city's costs, maintenance, management, and
19 necessary regulation of public rights-of-way, will assist in meeting the telecommunications
20 related needs and interests of the community.

21 J. When the Wireless Consumer Advanced Infrastructure Act, 2018 New Mexico
22 Laws Chapter. 17 (H.B. 38) becomes effective on September 1, 2018, this franchise will no
23 longer be of any force and effect. However, the parties agree to treat this agreement as one setting
24 forth the rates, fees and terms of the Company to place Small Wireless Facilities in the Public
25 Rights-of-Way, subject to the terms of the Act.

1 **Section 2. Franchise Terms.** In exchange for Company’s compliance with the
2 terms of this Ordinance, the provisions of Article 27-2, and other applicable city codes, there is
3 hereby granted by the city to Company permission to use public rights-of-way to provide
4 telecommunications services. All terms of Article 27-2 shall control Company’s use of the public
5 rights-of-way except as specifically set out in this Ordinance.

6 **A. Short Title; Purpose; Applicability.**

7 1. This Ordinance shall be cited as the “Broadband Network of New
8 Mexico Franchise Ordinance.”

9 2. The purpose of this Ordinance is to grant Company, the right, privilege,
10 and authority to:

11 a. Furnish and distribute telecommunications services in the city,
12 by means of its network, on, over, under, along and across public rights-of-way,
13 now or hereafter included in the boundaries of the city as such boundaries now
14 exist or may hereafter be extended; and

15 b. Construct, purchase, acquire, locate, maintain, and extend into,
16 within, and through the city, a telecommunications network for the period and
17 upon the terms and conditions specified in this franchise comprised of all
18 facilities and equipment used by Company to provide telecommunications
19 services, including “Small Wireless Facilities.”

20 This permission is not exclusive and does not prevent the city from issuing other
21 franchises or authorizations or prevent the city itself from constructing or operating its own
22 telecommunications network within the public rights-of-way, with or without a franchise.

23 3. This franchise applies to the placement of Small Wireless Facilities in
24 the city’s public rights-of-way.

25 **B. Definitions.**

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

4 *Collocate* means to install, mount, maintain, modify, operate or replace one or more
5 wireless facilities on, in or adjacent to a wireless support structure or utility pole.

6 *Department* means the department of public works.

7 *Private Telecommunications Service* means a system, including the construction,
8 maintenance or operation thereof, for the provision of telecommunications service, or any portion
9 of that service, by a person for the sole and exclusive use of that person and not for resale,
10 directly or indirectly. For purposes of this definition, the person that may use such service
11 includes any affiliates of the person if at least eighty percent of the assets or voting stock of the
12 affiliates is owned by the person. If any other person uses the telecommunications service,
13 whether for hire or not, the private telecommunications service is a public telecommunications
14 service; NMSA 1978, § 63-9A-3 (L).

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

16 *Public Telecommunications Service* means the transmission of signs, signals, writings,
17 images, sounds, messages, data or other information of any nature by wire, radio, light waves or
18 other electromagnetic means originating and terminating in this state regardless of actual call
19 routing. Public Telecommunications Service does not include the provision of terminal equipment
20 used to originate or terminate such service; private telecommunications service; broadcast
21 transmissions by radio, television and satellite broadcast stations regulated by the federal
22 communications commission; radio common carrier services, including mobile telephone service
23 and radio paging; or one-way cable television service; NMSA 1978, § 63-9A-3 (M)

24 *Telecommunications Company* means a person that provides public telecommunications
25 service; NMSA 1978, § 63-9A-3 (N).

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

8 *Service Address* means the location of telecommunications equipment from which
9 telecommunications services are originated or at which telecommunications services are received.
10 If this location is not a defined location, as in the case of wireless telecommunications, paging
11 systems, maritime systems, air-to-ground systems and the like, *Service Address* shall mean the
12 location of the customer's primary use of the telecommunications equipment as defined by the
13 location in the City where bills are sent.

14 *Small Wireless Facility* means a wireless facility whose:

- 15 1. Antennas are, or could fit, inside an enclosure with a volume of six or
16 fewer cubic feet; and
- 17 2. Other ground- or pole-mounted wireless equipment, not including the
18 following, is twenty-eight or fewer cubic feet in volume:
 - 19 a. electric meter;
 - 20 b. concealment elements;
 - 21 c. telecommunications demarcation box;
 - 22 d. grounding equipment;
 - 23 e. power transfer switch;
 - 24 f. cutoff switch;
 - 25 g. vertical cable runs for the connection of power and other

1 services; and

2 h. elements required by the city in accordance with Subsection H of
3 Section 3 of the Wireless Consumer Advanced Infrastructure Investment Act.

4 *Wireless Facility:*

5 1. Means equipment at a fixed location that enables wireless
6 communications between user equipment and a communications network, including:

7 a. equipment associated with wireless communications; and

8 b. radio transceivers, antennas, coaxial or fiber-optic cables, regular
9 and backup power supplies and comparable equipment, regardless of
10 technological configuration;

11 2. Includes a small wireless facility; and

12 3. Does not include:

13 a. the structure or improvements on, under or within which the
14 equipment is collocated;

15 b. a wireline backhaul facility, coaxial cable or fiber-optic cable
16 between wireless support structures or utility poles; or

17 c. coaxial or fiber-optic cable otherwise not immediately adjacent
18 to, or directly associated with, an antenna.

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

23 **C. Small Wireless Facility Franchise Fee.**

24 1. Pursuant to the authority granted by section § 3-42-1 NMSA 1978 and 47
25 U.S.C. 253(c), there is hereby imposed an annual fee of two hundred and fifty dollars

1 (\$250.00) multiplied by the number of small wireless facilities placed by the wireless
2 provider in the right of way and in the city limits.

3 2. On an annual basis, the rate for the use of the Public Right of Way shall
4 increase by an amount equal to one-half the annual change, if any, in the most recent
5 consumer price index for all urban consumers for New Mexico, as published by the
6 United States department of labor. The city shall notify the Company of the prospective
7 adjustment and shall make the adjustment effective sixty (60) days following that notice.

8 **D. Filing Returns and Payment of Franchise Fee.**

9 1. On or before the last day of January of each calendar year, the Company
10 is required to pay the small wireless facilities franchise fee imposed by this Section and
11 shall file with the city a remittance return and shall pay the fee attributable to the fee for
12 the preceding calendar year. The return shall contain such information as the director may
13 reasonably require.

14 2. No later than February 28th of each year beginning in 2019, the
15 Company shall provide to the city a report attesting to the amount of the small wireless
16 facility franchise fees paid to the city for the preceding calendar year, and that such
17 amount complies with the requirements of this chapter.

18 **E. Company's Right to Enter into Sublicense Agreements.**

19 The parties agree and acknowledge that, notwithstanding anything in this Ordinance to
20 the contrary, certain Equipment put in place by Company pursuant to this Ordinance may be
21 owned and/or operated by Company's third-party wireless carrier customers ("Carriers") and
22 installed and maintained by Company pursuant to license agreements between Company and
23 Carriers. Such Equipment shall be treated as Company's Equipment for all purposes under this
24 Ordinance and each Equipment Lease provided that:

25 1. Company remains responsible and liable for all performance obligations

1 under this Ordinance and each Equipment Lease with respect to such Equipment;

2 2. the city's sole point of contact regarding such Equipment shall be
3 Company; and

4 3. the Company shall have the right to remove and relocate the Equipment.

5 **F. Registration of Providers, Resellers and Sublicensees.**

6 1. Within ninety (90) days after the effective date of the ordinance
7 authorizing a franchise with the Company, the Company shall provide the name and
8 address of every telecommunications reseller, sublicensee or other telecommunications
9 company with whom the Company has a contractual relationship to provide
10 telecommunications services or to make available telecommunications facilities in the
11 public way. The Company shall have a continuing duty to file with the city, within forty-
12 five (45) days after the date of occurrence of any changes in the information provided to
13 the city, including the creation or termination of a contractual relationship described
14 herein.

15 2. *Resales.* Whenever amounts are claimed to be excluded from gross
16 charges as sales for resale, the reseller shall furnish to the Company the reseller's resale
17 information. The Company shall retain the resale information with its books and records.

18 **G. Maintaining Books and Records.**

19 The Company shall keep accurate books and records of its business or activity, including
20 original source documents and books of entry denoting the transactions that gave rise, or may
21 have given rise, to any liability or exemption. All such books and records shall, at all times during
22 business hours of the day, be subject to and available for inspection by the city.

23 **H. Insurance Requirements.**

24 Company shall comply with the provisions of Section 27-2.9 SFCC 1987, and Company
25 shall obtain and maintain in full force and effect throughout the term of this franchise the

1 following types of insurance:

- 2 1. Commercial comprehensive general liability insurance;
- 3 2. Workers' Compensation insurance as required by law; and
- 4 3. Commercial automobile liability insurance providing a minimum
5 coverage in the amount required under the New Mexico Tort Claims Act.

6 I. **Term of Franchise.** The term of this franchise, and the rights, privileges, and
7 authority granted hereunder shall continue until the Wireless Consumer Advanced Infrastructure
8 Act, 2018 New Mexico Laws Ch. 17 (H.B. 38) becomes effective on September 1, 2018. At that
9 point in time this agreement shall be automatically be renewed annually unless Company
10 provides notice to city of its intent not to renew at least thirty (30) days prior to expiration of the
11 then current term. Company may surrender permits at any time and remove its
12 telecommunications facilities at any particular location upon thirty (30) days' prior written notice
13 to city. Company shall not be obligated to pay the annual fee for such location following removal
14 of its telecommunications facilities.

15 J. **Indemnity.** Company and city agree to defend, indemnify, and hold harmless
16 each other and its officials, agents, volunteers, and employees from and against any and all
17 claims, actions, suits, or proceedings of any kind brought against said parties because of any
18 injury or damage received or sustained by any person, persons, or property arising out of or
19 resulting from the activities of the indemnifying party pursuant to this franchise, except to the
20 extent caused by the negligence or willful misconduct of the indemnitee or by reason of any
21 asserted act or omission, neglect, or misconduct of the indemnitee, or it's agents or employees, or
22 any subcontractor or its agents or employees. The indemnity required hereunder shall not be
23 limited by reason of the specification of any particular insurance coverage. Neither party shall be
24 liable to the other for consequential, indirect or punitive damages (including lost revenues, loss of
25 service, or loss of data) for any cause of action, whether in contract, tort or otherwise, even if the

1 party was or should have been aware of the possibility of these damages, whether under theory of
2 contract, tort (including negligence), strict liability or otherwise. The maximum liability of either
3 party to the other hereunder shall be the amount paid or payable during the preceding twelve (12)
4 months.

5 **K. Violations and Penalties.** Only if the parties have agreed in writing that it is
6 applicable, and if the Company fails to pay the small wireless facilities franchise fee, as provided
7 by this Chapter, the Company shall be subject to a fine of not less than one hundred dollars
8 (\$100.00) for each day that the failure to pay continues. Each day that the Company fails to pay
9 shall constitute a separate and distinct violation under this Chapter. Any retailer that becomes
10 subject to this fine may be enjoined from doing business in the city until the Company has paid
11 all sums due under this Chapter.

12 Any telecommunications company who otherwise violates this chapter shall be subject to
13 a fine of not less than one hundred dollars (\$100.00) for each offense. Each day the violation
14 continues shall constitute a separate offense.

15 **L. Dispute Resolution Provision.**

16 1. In the event of any other dispute arising from or relating to the franchise
17 or breach thereof, and if the dispute cannot be settled through negotiations, the following
18 process will be followed during which any of the above remedies and penalties may be
19 imposed.

20 2. All disputes will be mediated prior to litigation. The costs of such
21 mediation will be equally split. The place of the mediation session shall be in Santa Fe,
22 New Mexico. The city and the Company will select a mediator or mediators by mutual
23 agreement and, in cooperation with the mediator(s), shall determine all necessary rules
24 and procedures for the mediation. The city and the Company will fully cooperate in the
25 mediation activities. All mediation communications shall be confidential, not subject to

1 disclosure and shall not be used as evidence in any arbitration, judicial, or administrative
2 proceeding, as set forth in the Mediation Procedures Act, NMSA 1978, §§ 44-7b-1
3 through 44-7b-6.

4 M. **Unauthorized Use of Public Rights-Of-Way Unlawful.** In accordance with
5 Section 27-2.12 SFCC 1987, Company shall not:

6 1. Use public rights-of-way to provide telecommunications services that
7 have not been authorized by the city.

8 2. Place facilities on public structures or utility infrastructure to provide
9 telecommunications services which are not allowed under the terms of this franchise.

10 Each unauthorized use shall be deemed to be a distinct and separate offense. The
11 provisions of this paragraph do not apply to any dispute between the city and Company under this
12 franchise where the city alleges that Company has failed to comply with the terms of this
13 franchise.

14 N. **Land Use Review.** After approval of this franchise by the governing body, if
15 Company proposes to construct additional telecommunications facilities in the city's public
16 rights-of-way, Company shall comply with the provisions of Section 27-2.19 SFCC 1987 to the
17 extent the functionality of any particular telecommunications facility is not impaired, which shall
18 include, without limitation:

19 1. **Application and Fees.** This section applies to the activities of the
20 Company in installing a new, replacement or modified utility pole associated with the
21 collocation of a small wireless facility in a right of way.

22 a. The city shall process an application for a permit to install a new,
23 replacement or modified utility pole associated with the collocation of a small
24 wireless facility within one hundred fifty days after receiving the application. If
25 the city fails to approve or deny the application within that period, the authority

1 shall deem the application approved. The application fee for the installation,
2 modification and, replacement of a utility pole shall be seven hundred and fifty
3 dollars (\$750.00).

4 b. This section applies to a wireless provider's *collocation* activities
5 within a right of way.

6 The Company shall pay an application fee in the amount of one hundred dollars
7 (\$100.00) for each of up to five small wireless facilities and fifty dollars (\$50.00) for each
8 additional small wireless facility whose collocation is requested in a single application.

9 2. *Additional Permits.* In addition to the permits required set forth
10 elsewhere in Article 27-2 and city code, the following permits are required from the city:

- 11 a. Street cut permits pursuant to Article 23-2 SFCC 1987;
- 12 b. Secondary electrical permits at each antenna or other facility site
13 requiring secondary electrical service; and
- 14 c. Other permits as may be required.

15 O. **Compliance with Law.**

16 1. Company shall comply with the terms and conditions of Article 27-2
17 SFCC 1987 except as set forth herein, all other applicable city ordinances, and federal
18 and state laws.

19 2. Company is explicitly subject to the police powers of the city, all other
20 applicable governmental powers, and the city's rights under state and federal laws.

21 P. **Severability.** The requirements and provisions of this Ordinance and its
22 sections, parts, subparts, paragraphs, and clauses are severable. In the event that any requirement,
23 provision, section, part, subpart, paragraph, or clause of this Ordinance, or the application thereof
24 to any person or circumstance, is held by a court of competent jurisdiction to be invalid or
25 unenforceable, it is the intent of the governing body that the remainder of the Ordinance be

1 enforced to the maximum extent possible consistent with the purposes of this Ordinance.

2 Q. **Effective Date; Publication.** As provided by NMSA 1978, Section 3-42-1, this
3 Ordinance shall not become effective until at least thirty (30) days after its adoption, during
4 which time this Ordinance shall be twice published in full, not less than seven days apart. As
5 required by law, Company shall pay the publication cost.

6 R. **Acceptance.** Company, within thirty (30) days of the date of adoption of this
7 Ordinance, shall file with the city clerk an unconditional acceptance of this Ordinance, on a form
8 prescribed by the city. Within ten (10) days after the filing of the acceptance, the city clerk shall
9 acknowledge in writing the receipt of Company's acceptance. If Company does not file said
10 acceptance this Ordinance shall not be or become effective.

11 S. **Notice.** For the purpose of this Ordinance:

- 12 1. Notice to the city shall be to:
13 City Manager
14 City of Santa Fe
15 Post Office Box 909
16 Santa Fe, New Mexico 87504-0909

17 With a copy to:
18 City Attorney
19 City of Santa Fe
20 Post Office Box 909
21 Santa Fe, New Mexico 87504-0909

- 22 2. Notice to Company will be to:
23 Attn.: Legal Department
24 Broadband Network of New Mexico, LLC
25 660 Newport Center Drive, Suite 200

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Newport Beach, CA 92660

With a copy to:

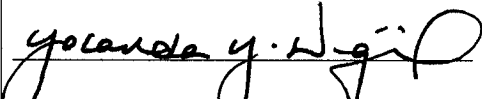
Attn: Asset Management
Broadband Network of New Mexico, LLC
660 Newport Center Drive, Suite 200
Newport Beach, CA 92660

3. Notice shall be effective upon delivery at the above addresses until the city or Company notifies the other in writing, of a change in address. All notices shall be delivered personally or sent by certified mail, return receipt requested to the parties at their respective addresses set forth above.

PASSED APPROVED and ADOPTED this 9th day of May, 2018.


ALAN M. WEBBER, MAYOR

ATTEST:


YOLANDA Y. VIGIL, CITY CLERK

APPROVED AS TO FORM:


GENO ZAMORA, INTERIM CITY ATTORNEY