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**CITY OF SANTA FE, NEW MEXICO**  
**ORDINANCE NO. 2018-15**

**AN ORDINANCE**

**GRANTING CYBER MESA COMPUTER SYSTEMS, INCORPORATED A NON-EXCLUSIVE FRANCHISE TO OPERATE A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF SANTA FE; THE RIGHT TO USE CITY PUBLIC RIGHTS-OF-WAY TO PROVIDE TELECOMMUNICATIONS SERVICES WITHIN THE CITY; AND FIXING THE TERMS AND CONDITIONS THEREOF.**

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

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

A. The granting of a franchise to Cyber Mesa Computer Systems, Inc. (“the Company”), is necessary for the access and use of public rights-of-way to provide telecommunications services within the city limits in accordance with the terms and conditions of this Ordinance and the Telecommunications in the Public Rights-of-Way Ordinance, Article 27-2 SFCC 1987 (“Article 27-2”).

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

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 September 7, 2012.

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

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

1. This Ordinance shall be cited as the “Cyber Mesa Franchise Ordinance”.

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

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

b. Construct, purchase, acquire, locate, maintain, and extend into, within, and through the city, a telecommunications network for the period and upon the terms and conditions specified in this franchise comprised of all facilities and equipment used by Company to provide telecommunications services, including but not limited to “Backhaul Equipment” and “Wireless Communication Equipment.”

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

3. This franchise applies to the placement of telecommunications facilities in the city’s public rights-of-way.

**B. Definitions.**

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

*Department* means the department of public works.

1            *Gross Charge.*

2            1.        Includes all revenues derived directly or indirectly by a Provider from or  
3            in connection with the Telecommunications Services offered within the city through or  
4            by means of a Telecommunications Network within the city, exclusive of any Franchise  
5            Fee or tax passed through to consumers on behalf of governmental agencies, received by  
6            the Provider for services provided to customers through use of the Network. *Gross*  
7            *Charge* shall include any revenue received by a Provider or any Affiliate through any  
8            means that is intended to have the effect of evading the payment of compensation that  
9            would otherwise be paid to the city for Franchise Contract granted pursuant to this  
10          ordinance.

11          2.        *Gross Charge* shall not include:

- 12                  a.        proceeds from the sale of bonds, mortgages, or other evidence of  
13                  indebtedness, securities, or stocks; or
- 14                  b.        gross receipts taxes, bad debt write-offs, and customer credits; or
- 15                  c.        revenue of any Affiliate or Provider from long distance service,  
16                  commercial mobile radio service, cellular, personal communications service,  
17                  other wireless communications service, or directory advertising. Each of the  
18                  above are not included in the definition of *Gross Charge* and, therefore, are not  
19                  included in the calculation of any fee due under a Franchise.

20          3.        *Gross Charge* shall not include the wholesale revenue of any Provider to  
21          the extent that the Person providing such wholesale revenue to the Provider pays to the  
22          city, pursuant to an agreement with the city, an annual Franchise Fee under § 27-2.5, or  
23          an amount equivalent thereto, calculated on the basis of such Person's *Gross Charge* (as  
24          defined in this ordinance) from the provision of Telecommunications Service in the city.

25          4.        *Gross Charge* shall be measured and monitored periodically.

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 fee imposed by this chapter previously  
5 has been paid to a retailer and the gross charge made by one such corporation to another such  
6 corporation is not greater than the gross charge paid to the retailer for use or consumption and not  
7 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           *Telecommunications Network Any System* which includes facilities and/or equipment  
15 placed in the Public Rights-of-Way and used to provide any Telecommunications Service.

16           *Telecommunications.*

17           1.       All transmissions between or among points specified by the user of  
18 information of the user's choosing (whether voice, video, or data), without change in the  
19 form or content of the information as sent and received, where such transmissions are  
20 accomplished by means of a Telecommunications Network.

21           2.       *Telecommunications* shall not include cable services as defined in Title  
22 47, Chapter 5, Subchapter V-A of the United States Code, as amended (47 USC § 521 et  
23 seq.) and shall not include telecommunications services provided and used by a public  
24 utility as that term is defined at § 62-3-3(G) NMSA 1978, or successor statute, for:

25           a.       its internal system communication needs; and

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b. provided directly or indirectly to its customers, including but not limited to electronic meter reading, load control, demand side management, power quality monitoring, and other activities related to the delivery of electricity or natural gas.

*Telecommunications Provider ("Provider")* means:

1. Any Person who provides any Telecommunications Service within the city by means of:

a. a Telecommunications Network owned by such Person or its Affiliate;

b. specifically identifiable facilities of a Telecommunications Network reserved or made available for the use of such Person or its Affiliate under a lease or any other arrangement for a term longer than one hundred and twenty (120) days; or

c. facilities of a Telecommunications Network not owned by such Person or its Affiliate and not specifically identifiable but obtained from another Person (including another Provider) if the use of such facilities is continuing and substantial. A Person owning or operating telecommunications facilities that merely pass through the city and such Person and facilities do not offer Telecommunications Service to subscribers within the city shall not be subject to this ordinance, provided that Person has received other appropriate authorization from the city to rent or occupy the Public Rights-of-Way.

2. Except to the extent that a *Provider* or a Person uses the Public Rights-of-Way, a *Provider* or any Person which provides commercial mobile radio service, cellular, personal communications service, or other wireless communications service shall not be subject to this ordinance with respect to such service.

1           *Telecommunications Service.* The offering of Telecommunications within the city for a  
2 fee directly to the public, or to such classes of users as to be effectively available directly to the  
3 public.

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

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

10           **C.       Infrastructure Maintenance Franchise Fee.**

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

16           2.       The fee imposed by this Section shall not be imposed in any  
17 circumstances in which the imposition of the fee would violate the Constitution or  
18 statutes of the United States.

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

20           1.       On or before the last day of each quarter, the Company is required to  
21 pay the infrastructure maintenance fee imposed by this Section and shall file with the city  
22 a remittance return and shall pay the fee attributable to gross charges for the preceding  
23 quarter. The return shall contain such information as the director may reasonably require.

24           2.       No later than February 28th of each year beginning in 2019, the  
25 Company shall provide to the city a report certified by an independent certified public

1 accountant attesting to the amount of the infrastructure maintenance fees paid to the city  
2 for the preceding calendar year, and that such amount complies with the requirements of  
3 this chapter.

4 **E. Collection of Additional Charges by Retailers.**

5 1. When the Company makes or effectuates a sale of telecommunications at  
6 retail, it shall pay the infrastructure maintenance fee to the city as provided by subsection  
7 C, of this Section. The fee shall constitute a debt owed by the retailer to the city.

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

13 3. Each retailer may retain two percent (2%) of the additional charges it  
14 collects under this Section to reimburse itself for expenses incurred in connection with  
15 accounting for and remitting the fee to the city.

16 **F. Registration of Providers and Resellers.**

17 1. Within ninety (90) days after the effective date of the ordinance  
18 authorizing a franchise with the Company, the Company shall provide the name and  
19 address of every telecommunications reseller or other telecommunications company with  
20 whom the Company has a contractual relationship to provide telecommunications  
21 services or to make available telecommunications facilities in the public way. The  
22 Company shall have a continuing duty to file with the city, within forty-five (45) days  
23 after the date of occurrence of any changes in the information provided to the city,  
24 including the creation or termination of a contractual relationship described herein.

25 2. *Resales.* Whenever amounts are claimed to be excluded from gross



1 charges as sales for resale, the reseller shall furnish to the Company the reseller's resale  
2 information. The Company shall retain the resale information with its books and records.

3 **G. Maintaining Books and Records.**

4 The Company shall keep accurate books and records of its business or activity, including  
5 original source documents and books of entry denoting the transactions that gave rise, or may  
6 have given rise, to any liability or exemption. All such books and records shall, at all times during  
7 business hours of the day, be subject to and available for inspection by the city with twenty-four  
8 (24) hour notice.

9 **H. Insurance Requirements.** Company shall comply with the provisions of  
10 Section 27-2.9 SFCC 1987, and Company shall obtain and maintain in full force and effect  
11 throughout the term of this franchise the following types of insurance:

- 12 a. Commercial comprehensive general liability insurance;
- 13 b. Workers' Compensation insurance as required by law; and
- 14 c. Commercial automobile liability insurance providing a minimum  
15 coverage in the amount required under the New Mexico Tort Claims Act.

16 **I. Term of Franchise.** The term of this franchise, and the rights, privileges, and  
17 authority granted hereunder shall continue for a period of ten (10) years from the effective date  
18 hereof. The term of this franchise shall automatically be renewed annually unless Company  
19 provides notice to city of its intent not to renew at least thirty (30) days prior to expiration of the  
20 then current term. Company may surrender permits at any time and remove its  
21 telecommunications facilities at any particular location upon thirty (30) days' prior written notice  
22 to city. Company shall not be obligated to pay the franchise fee for such location following  
23 removal of its telecommunications facilities.

24 **J. Indemnity.** Company and city agree to defend, indemnify, and hold harmless  
25 each other and its officials, agents, volunteers, and employees from and against any and all

1 claims, actions, suits, or proceedings of any kind brought against said parties because of any  
2 injury or damage received or sustained by any person, persons, or property arising out of or  
3 resulting from the activities of the indemnifying party pursuant to this franchise, except to the  
4 extent caused by the negligence or willful misconduct of the indemnitee or by reason of any  
5 asserted act or omission, neglect, or misconduct of the indemnitee, or its agents or employees, or  
6 any subcontractor or its agents or employees. The indemnity required hereunder shall not be  
7 limited by reason of the specification of any particular insurance coverage. Neither party shall be  
8 liable to the other for consequential, indirect or punitive damages (including lost revenues, loss of  
9 service, or loss of data) for any cause of action, whether in contract, tort or otherwise, even if the  
10 party was or should have been aware of the possibility of these damages, whether under theory of  
11 contract, tort (including negligence), strict liability or otherwise. The maximum liability of either  
12 party to the other hereunder shall be the amount paid or payable during the preceding twelve (12)  
13 months.

14           **K.       Violations and Penalties.** If the Company fails to pay the infrastructure  
15 maintenance franchise fee, as provided by this Chapter, the Company shall be subject to a fine of  
16 one hundred dollars (\$100.00) for each day that the failure to pay continues. Each day that the  
17 Company fails to pay shall constitute a separate and distinct violation under this Chapter. Any  
18 retailer that becomes subject to this fine may be enjoined from doing business in the city until the  
19 Company has paid all sums due under this Chapter.

20           Any telecommunications company who otherwise violates this chapter shall be subject to  
21 a fine of one hundred dollars (\$100.00) for each offense. Each day the violation continues shall  
22 constitute a separate offense.

23           **L.       Dispute Resolution Provision.**

24           1.       In the event of any other dispute arising from or relating to the franchise  
25           or breach thereof, and if the dispute cannot be settled through negotiations, the following

1 process will be followed during which any of the above remedies and penalties may be  
2 imposed.

3 2. All disputes will be mediated prior to litigation. The costs of such  
4 mediation will be equally split. The place of the mediation session shall be in Santa Fe,  
5 New Mexico. The city and the Company will select a mediator or mediators by mutual  
6 agreement and, in cooperation with the mediator(s), shall determine all necessary rules  
7 and procedures for the mediation. The city and the Company will fully cooperate in the  
8 mediation activities. All mediation communications shall be confidential, not subject to  
9 disclosure and shall not be used as evidence in any arbitration, judicial, or administrative  
10 proceeding, as set forth in the Mediation Procedures Act, NMSA 1978, §§ 44-7b-1  
11 through 44-7b-6.

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

14 1. Use public rights-of-way without authorization to provide  
15 telecommunications services.

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

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

23 N. **Land Use Review.** After approval of this franchise by the governing body, if  
24 Company proposes to construct additional telecommunications facilities the applicant shall  
25 comply with the provisions of 27-2.19.

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**O. Compliance with Law.**

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

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

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

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

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

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

- 1. Notice to the city shall be to:  
City Manager  
City of Santa Fe

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Post Office Box 909  
Santa Fe, New Mexico 87504-0909


With a copy to:

City Attorney  
City of Santa Fe  
Post Office Box 909  
Santa Fe, New Mexico 87504-0909

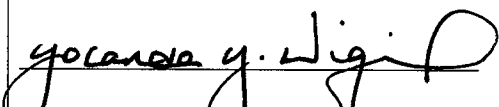
2. Notice to Company will be to:  
Attn.: Jane Hill, President  
Cyber Mesa Computer Systems, Inc.  
4200 Rodeo Road  
Santa Fe, NM 87507

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 9<sup>th</sup> day of May, 2018.

  
ALAN M. WEBBER, MAYOR

ATTEST:

  
YOLANDA Y. VIGIL, CITY CLERK

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APPROVED AS TO FORM:

  
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GENO ZAMORA, INTERIM CITY ATTORNEY