

1 as of the effective date of this Ordinance shall be deemed legally conforming to the extent that
2 such facilities are in compliance with the requirements of this Article; provided that if such
3 facilities are not in compliance with the requirements of this Article, they shall be deemed legally
4 nonconforming and subject to city requirements; and further provided, that the owner of such
5 facilities files an application for a franchise within ninety (90) days of the effective date of this
6 Ordinance (or such later date as the director may agree to) and complies from such application
7 date with this Article.

8 C. An application submitted under paragraph B. above shall include a map, in such
9 detail as the director shall reasonably require, identifying the location of all of the applicant's
10 telecommunications facilities existing in the public rights-of-way at the time of application, to the
11 extent such maps are available. The map becomes the approved plan for the purposes of Section
12 27-2.13L. regarding modifications to approved plans.

13 **Section 2. [REPEAL.] Section 27-2.3 SFCC 1987 (being Ord. #2010-14, §5)**
14 **is amended to repeal the following definition:**

15 [~~*Affiliate* means each person who falls into one or more of the following categories: (i)~~
16 ~~each person having, directly or indirectly, a controlling interest in a provider; (ii) each person in~~
17 ~~which a provider has, directly or indirectly, a controlling interest; (iii) each officer, director,~~
18 ~~general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or~~
19 ~~joint venture partner of a provider; and (iv) each person, directly or indirectly, controlling,~~
20 ~~controlled by, or under common control with the provider— provided that the affiliate shall in no~~
21 ~~event mean any limited partner holding an interest of less than five percent (5%) of such provider,~~
22 ~~or any creditor of such provider solely by virtue of its status as a creditor and which is not~~
23 ~~otherwise an affiliate by reason of owning a controlling interest in, being owned by, or being~~
24 ~~under common ownership, common management, or common control with such provider.]~~

25 **Section 3. Section 27-2.3 SFCC 1987 (being Ord. #2010-14, §5) is amended to**

1 **amend the following definitions:**

2 *Gross revenue* means:

3 A. Includes the following types of provider revenues derived from the provision of
4 telecommunications services to customers served from telecommunication facilities located in the
5 public rights-of-way:

6 (1) Recurring, non-recurring and usage charges paid by customers for
7 telecommunications or other services provided through use of the telecommunications
8 network;

9 (2) Revenues received from access fees, interconnection fees, or any other
10 fees relating to or arising out of the use of the telecommunications network (including the
11 facilities and equipment of such network) by any person providing commercial mobile
12 radio service, cellular, personal communications service, or other communications
13 service;

14 (3) Interlata (local access transit area) toll revenue;

15 (4) Intralata toll revenue;

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

18 (6) Installation and service fees;

19 (7) Data transport or network charges;

20 (8) Any amounts collected by a provider from its customers denominated as
21 reimbursement for expenses of construction, equipment and related expenses paid by
22 provider for the benefit of its customers; or

23 (9) Payments received by a provider from any federal or state agency or
24 other carriers pursuant to any universal service fund requirement.

25 B. Excludes the following types of revenue derived from the provision of

1 telecommunications services to customers within the city limits:

2 (1) Proceeds from the sale of bonds, mortgages, or other evidence of
3 indebtedness, securities or stocks;

4 (2) Bad debt write-offs and customer credits;

5 (3) Revenue from direct advertising;

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

9 (5) Amounts collected for taxes, fees or surcharges and paid to the federal,
10 state or local governments;

11 (6) Any franchise fee or tax; or

12 (7) Revenue from the sale or lease of equipment that is readily available in
13 the consumer retail market.

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

17 C. Gross revenue as set forth above shall be interpreted consistent with FCC
18 regulations and rulings, and any relevant decision by a federal court and to the fullest extent
19 allowed by applicable law. Any change in federal law subsequent to the effective date of a
20 franchise shall not affect the definition of gross revenues unless the change specifically preempts
21 one of the components of the definition. Gross revenue shall be measured and monitored
22 periodically by the city. As telecommunications services continue to advance and evolve, the
23 definition of gross revenues will be read based on the intent reflected in the above list. When a
24 bundling of services is offered by a provider that includes services included in gross revenues or
25 excluded from gross revenues there will be a pro rata allocation between franchise fees based

1 services and nonfranchise fee categories based on the provider's product usage rate.

2 *Provider* means:

3 A. Any person who provides any telecommunications services within the city by
4 means of: (i) a telecommunications network owned by such person; (ii) specifically identifiable
5 facilities of a telecommunications network reserved or made available for the use of such person
6 under a lease or any other arrangement for a term longer than 120 days; or (iii) facilities of a
7 telecommunications network not owned by such person and not specifically identifiable but
8 obtained from another provider if the use of such facilities is continuing and substantial. A person
9 owning or operating a telecommunications network that merely passes through the city and such
10 person and network do not provide telecommunications services to subscribers within the city
11 shall not be subject to this Article, provided that person has received other appropriate
12 authorization from the city to occupy the public rights-of-way.

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

17 *Public rights-of-way* means present and future surface, air space above the surface (but
18 not including air space used by carriers for the wireless transmission of telecommunications
19 services), and below the surface of the total area of land deeded or dedicated by plat to the city or
20 acquired by the city through a taking primarily for the use of the public for the movement of
21 people, goods and vehicles and for the installation and maintenance of utilities. Parks, open
22 space, trails not located in a public rights-of-way, or other city owned land, are not public rights-
23 of-way and may only be used by separate agreement.

24 *Telecommunications network* means any system which includes telecommunications
25 facilities placed in the public rights-of-way and used to provide any telecommunications services,

1 even if said network is also used for other purposes such as providing cable television or in the
2 delivery of electric utility services.

3 **Section 4. Section 27-2.4 SFCC 1987 (being Ord. #2010-14, §6) is amended to**
4 **read:**

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

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

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

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

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

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

8 **Section 5. Section 27-2.5 SFCC 1987 (being Ord. #2010-14, §7) is amended to**
9 **read:**

10 **27-2.5 Compensation and Charges.**

11 A. *Fees and Charges.*

12 (1) Franchise fee. As partial compensation for the use of the public rights-
13 of-way, each telecommunications services provider shall be subject to an annual fee of
14 three percent (3%) of the provider's gross revenue.

15 (2) Franchise filing fee. Each applicant shall submit a non-refundable
16 application filing fee for each franchise request. The filing fee shall initially be \$2,500,
17 and may be adjusted annually by resolution of the governing body. Additional land use
18 review fees shall apply as set forth in Section 27-2.13 G. SFCC 1987.

19 (3) Non-monetary consideration. Upon mutual agreement between the city
20 and provider, a provider may pay up to one percent (1%) of the annual fee in the form of
21 non-monetary consideration, including, without limitation, network capacity, conduit,
22 equipment, or other infrastructure or services for use by the city for the purposes
23 specified below. This non-monetary consideration shall be negotiated with each provider
24 taking into account the unique characteristics of each provider's services and network.
25 Said consideration shall be valued in a fair manner based on the provider's actual costs,

1 including make-ready costs, maintenance, and repair charges, labor and material costs,
2 plus ten percent (10%) as reimbursement for supervision and general and administrative
3 costs. Further, any non-monetary consideration furnished to the city shall be for the city's
4 public and noncommercial purposes. Use by the city under Section 27-2.5(B)(7)(a)
5 SFCC 1987 below, shall be included in the calculation of non-monetary consideration
6 pursuant to this paragraph along with any other use of provider facilities by the city.

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

11 B. *Payment of Franchise Fee.*

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

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

21 (a) Two percent (2%) per quarter to a maximum of ten percent
22 (10%); and

23 (b) Interest on the outstanding amount owed from the due date at an
24 interest rate equal to two percent (2%) above the rate for three-month federal
25 treasury bills at the most recent United States treasury department sale of such

1 treasury bills occurring prior to the due date of the franchise fee payment.

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

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

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

21 (6) Acceptance by the city of any payment due under a franchise shall not be
22 deemed to be a waiver by the city of any breach of the franchise occurring prior thereto,
23 nor shall the acceptance by the city of any such payments preclude the city from later
24 establishing that a larger amount was actually due under the franchise, or from collecting
25 any balance due to the city.

1 (7) In consideration of the rights and privileges granted by any franchise, the
2 following apply:

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

14 (b) City agrees, in consideration of the establishment of the service
15 and furnishing of the facilities described in Section 27-2.5(B)(7)(a) SFCC 1987,
16 to hold the provider free and harmless from all claims or liability for damage
17 which may arise out of the city's operation of such wires and control boxes. In
18 no event shall the city be required to pay any pole attachment fees in connection
19 with the exercise of the city's rights under this section; however, the fair market
20 value of the city's use of provider's wires or control boxes without recurring
21 costs shall be included as part of non-monetary consideration paid by the
22 provider as further provided for in Section 27-2.5(A)(3) SFCC 1987.

23 (8) To facilitate the city's annual budget process, on or before the 1st of
24 November and each succeeding 1st of November thereafter during the term of any
25 franchise granted under this Article, the provider will provide the city with an estimate of

1 the gross revenue and resultant fee for the following calendar year. Nothing herein shall
2 preclude the provider and the city from agreeing to a revised payment schedule.

3 C. *City's Right to Audit.*

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

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

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

1 city.

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

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

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

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

21 **Section 6. Section 27-2.7 SFCC 1987 (being Ord. #2010-14, §9) is amended to**
22 **read:**

23 **27-2.7 Obligations of Providers Regarding the Public Rights-Of-Way.**

24 A. *Compliance with Law.* Providers are explicitly subject to the police powers of
25 the city, all other lawful governmental powers, and the city's rights as a property owner under

1 state and federal laws. This Article is governed by and construed and enforced in accordance
2 with the laws of the state of New Mexico.

3 B. *Land Use Requirements.* Providers shall comply with Section 27-2.13 SFCC
4 1987 regarding land use requirements.

5 C. *Construction Plans and Drawings.*

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

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

12 (b) The provider shall file maps and/or drawings with the director
13 showing the location of any construction or extension of its facilities and services
14 in any public rights-of-way of the city. For multi-conduit duct banks, maps and
15 drawings shall show overall size, material, and configuration of the duct bank
16 showing the horizontal and vertical locations within the rights-of-way, size and
17 type of equipment and materials and location of other utilities. The provider
18 shall provide city with updates of the maps and drawings showing the location of
19 any new construction, extension, or relocation of its underground facilities or line
20 spot such facilities.

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

24 D. *Construction Forecast.* On or before the first day of June each year within three
25 years of which the provider anticipates constructing all or any identified and approved portion of

1 its telecommunications network in the city's public rights-of-way, the city and provider will meet
2 and exchange three year construction forecasts, including aerial builds, together with such
3 additional information as the city and provider deem appropriate relating to projects planned
4 within the city. Any such information may be designated by provider as proprietary if the
5 provider believes in good faith that such information is exempt from disclosure under the New
6 Mexico Inspection of Public Records Act, NMSA 1978, 14-2, or other applicable law. Provider
7 shall mark any such materials by clearly marking each page, or portion thereof, for which a
8 proprietary designation is claimed. The City shall maintain the confidentiality of such
9 information to the maximum extent permitted by law. The provider has the burden of
10 demonstrating that such information is exempt from disclosure. Provider will use best efforts to
11 forecast construction for the future, however, the city recognizes that construction is driven by
12 customer demand for service which is highly unpredictable. The provider shall not be subject to
13 termination, suspension, fines or other penalties if its actual construction does not meet the
14 timelines stated in the forecasts. The city and provider shall hold such additional meetings as
15 they deem necessary to exchange additional information with a view toward coordinating their
16 respective activities in these areas where such coordination will prove mutually beneficial to the
17 public by minimizing disruption costs to the public. Provider will comply with all building and
18 zoning codes and assure that aesthetic and other relevant planning principles have been given due
19 consideration. It is recognized that, notwithstanding the foregoing, the city retains absolute
20 discretion over the timing and all other aspects of the city's proposed projects. The parties will
21 make reasonable efforts to allow each party's work to be incorporated in the other's respective
22 projects. Provider will not cut or otherwise disturb any new or rehabilitated roadway within two
23 years of its placement as limited by and pursuant to Article 23-2 SFCC 1987 Excavations, Street
24 Cuts and Restoration Ordinance, except or unless in emergency conditions. Where conflict occurs
25 between the city's construction plans and schedules and the provider's construction plans and

1 schedules, the city's plans and schedules shall take precedence. Where unresolved conflicts
2 occur between the two or more providers' construction plans and schedules, the city shall
3 determine precedence.

4 E. *Installations, Excavations, and Restorations.*

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

10 (a) The provider shall not place any of its facilities on, over, under,
11 or within any city park, open space or trail not located in a public rights-of-way,
12 duly designated as such by the city except in accordance with city requirements;

13 (b) Where appropriate and as may be required by the city through
14 any permitting process, installation, excavations, and restorations affecting street
15 and/or lane closures shall be approved by the city and in accordance with current
16 city policies and ordinances;

17 (c) The city reserves the right to direct the coordination and
18 scheduling of any provider projects where such project may be reasonably
19 coordinated with the placement of other provider facilities. Otherwise, and
20 subject to city permitting processes and approvals, it is recognized that,
21 notwithstanding the foregoing, the provider retains discretion over the timing of
22 the provider's proposed projects. In directing these activities, the city will make a
23 good faith attempt to accommodate the provider's construction schedule and
24 desired service initiation dates as long as they were disclosed in the construction
25 schedule provided for in Section 27-2.7 D. SFCC 1987;

1 (d) The provider shall, to the extent feasible, employ “trenchless”
2 technology (for example, directional boring) in the placement of its underground
3 facilities; and

4 (e) A franchise does not include the right to use the city’s sewer or
5 storm sewers, which requires a separate discretionary license from the city and
6 fee for such application and use.

7 (2) Except in an emergency, not less than two working days prior to the
8 commencement of any work by the provider which involves excavation in any public
9 rights-of-way, the provider shall notify the director through the street cut permit process,
10 including payment for any and all fees, as set forth in Article 23-2 SFCC 1987. Provider
11 shall comply with Article 23-2 SFCC 1987 as it now or may exist in the future. In an
12 emergency, the director shall be notified the next working day and shall be provided with
13 a description of the emergency and the action taken. The right of the city to require a
14 post-emergency city permit(s), inspection(s) and fee(s) is preserved.

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

19 (4) After any excavation shall be made and after work is completed, the
20 provider, at provider expense, shall as soon as practicable but not longer than forty-eight
21 (48) hours, weather permitting, remove all surplus material in compliance with
22 specifications, requirements, and regulations of the city in effect at the time of such
23 restoration and restore the portion of the public rights-of-way to the same condition as
24 nearly as practicable to its condition before the start of construction and in a manner
25 consistent with the normal specifications and requirements of the city. All vegetation,

1 landscaping and grounds removed, damaged or disturbed as a result of the construction,
2 installation, maintenance, repair or replacement of telecommunications facilities, shall be
3 replaced, or restored, as nearly as may be practicable, to the condition existing prior to
4 performance of work. If the provider fails to restore promptly the affected portion of the
5 public rights-of-way following written notice to provider, and reasonable opportunity to
6 cure, the city may make the restoration in a manner satisfactory to city, and all reasonable
7 and documented costs incurred for such restoration, whether done with city work forces
8 and equipment or otherwise, shall be paid by the provider, or recovered from any posted
9 bonds, including the cost of any inspectors the city may assign to the project.

10 (5) The provider shall be responsible for the maintenance of its own
11 equipment, facilities, and appurtenances placed upon, over, or under the public rights-of-
12 way, including the removal of all graffiti therefrom. If after ten days' notice, unless a
13 lesser time period is required by another city ordinance, such graffiti has not been
14 removed, it may be removed by the city at provider's sole cost which shall be paid in full
15 by provider to city within ten days of the date of the city's billing.

16 (6) The provider shall ensure its public facilities in public rights-of-way are
17 located and constructed in a manner such that the public's physical access to such rights-
18 of-way is not impaired and in full compliance with the Americans with Disabilities Act
19 (ADA). Where existing facilities constructed prior to ADA (legal nonconforming
20 facilities) are modified or replaced, the provider shall insure that such modification or
21 replacement shall then fully comply with ADA. Any intersection upgrades shall include
22 upgrading all four corners with ADA accessibility compliant ramps. Following notice by
23 the city of an ADA construction problem, the provider shall have 30 days or other
24 reasonable time to remedy the problem. In the event that the city and the provider cannot
25 agree that a problem exists, the city and the provider shall follow the dispute resolution

1 provisions of this Article.

2 F. *Location and Relocation of Facilities.*

3 (1) All facilities of the provider shall be placed so that they do not interfere
4 with the use of public rights-of-way by the city and shall only be placed after approval of
5 the location by the city's planning commission pursuant to Section 27-2.13 SFCC 1987
6 and by the director and in accordance with all barricade, excavation and permitting
7 ordinances and regulations adopted by the city governing the location of facilities. The
8 city reserves the right to construct, install, maintain, and operate any public improvement,
9 work, or facility, including without limitation, telecommunications facilities, do any work
10 that the city may find desirable on, over, or under any public rights-of-way, and vacate,
11 alter, or close any public rights-of-way subject to provider's rights and obligations under
12 Section 27-2.7F.(2) and (3) SFCC 1987. All such work shall be done, if possible, in such
13 a manner as not to obstruct, injure, or prevent use and operation of the provider's network
14 or system. Pursuant to any franchise, provider agrees to obtain the city's express written
15 approval before placing structures in public rights-of-way that do not currently exist in
16 public rights-of-way.

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

19 (a) After notice to the provider, where relocation cannot reasonably
20 be avoided and where the city and the provider agree that no reasonable
21 alternative exists, the city may require the removal or relocation of facilities used
22 by the provider in any public rights-of-way as may reasonably be required by the
23 city or caused or occasioned by any city project, including but not limited to the
24 installation of water, sanitary sewer, storm drainage, or traffic signal facilities,
25 road reconstruction, or other public right-of-way construction. The provider shall

1 complete the removal and relocation of such facilities within 60 days following
2 notice to do so from the city. Projects requiring, in the opinion of the director
3 after consultation with the provider, in excess of 60 days to complete shall be
4 completed in a time frame determined by director on a project specific basis.
5 Prior to any such relocation, the city agrees to provide for a suitable similarly
6 sized location for such relocated facilities sufficient to maintain service. The cost
7 of any removal or relocation of its facilities shall be borne by the provider. To
8 the extent that a delay in a city project is due to provider's relocation, then such
9 provider shall pay all reasonable, documented expenses and costs incurred by the
10 city as a result of and proportionate to its contribution to the delay.

11 Notwithstanding the foregoing, provider shall not be required by the city to
12 relocate its facilities to accommodate another provider or other nongovernmental
13 third party in the city. The costs of any relocations occasioned by another
14 provider or authorized non-governmental rights-of-way user of the city in no
15 event shall be the responsibility of the city.

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

23 (c) Subject to the provisions of this section and upon notice to the
24 city and receipt of all required city permits, the provider may remove or relocate
25 facilities maintained by the provider on its own initiative.

1 (3) Where the city, acting through itself, an agent, contractor, or permit
2 holder, proposes to improve a street, which requires the relocation of an existing aerial
3 facility within the public rights-of-way under its jurisdiction or control, the provider shall
4 replace such overhead distribution facilities as are then within the affected right-of-way
5 with underground facilities unless the provider can demonstrate to the city that such
6 facilities cannot functionally be located underground or that the cost of relocation is
7 economically unreasonable. All such relocations of provider facilities shall be at such
8 provider's expense. The conversion from overhead to underground shall be non-
9 discriminatory and shall be conditioned upon the city requiring the under grounding of all
10 existing and new facilities located or to be located in the area. Such replacement of
11 overhead with underground distribution facilities of a provider shall be paid for by such
12 provider.

13 G. *Public Works and Improvements.*

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

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

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

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

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

24 I. *Safety Standards.* The facilities of the provider shall at all times be constructed,
25 operated, and maintained so as to protect and safeguard the health and safety of the public, and to

1 this end provider shall observe all rules pertaining thereto now or hereinafter existing prescribed
2 by any local, state, or federal regulatory authority.

3 J. *Joint Use Agreements.* The provider is authorized and encouraged to enter into
4 joint-use agreements with any person or entity franchised by the city with respect to the
5 placement or use of a telecommunications facility or network. The provider may require any
6 such person or entity to pay reasonable compensation for such joint use and to furnish evidence of
7 adequate insurance covering the provider and adequate bonds covering the performance of the
8 person or entity attaching to the provider's telecommunications network as a condition precedent
9 to granting permission to any such person or entity to attach its telecommunications network to
10 the provider's network, provided that the provider's requirements for such insurance shall be
11 reasonable.

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

19 L. *Supplying Maps.* Provider shall maintain on file all available maps, operational
20 data, and reports pertaining to its operations in the city. The city may inspect the maps, data, and
21 reports at any time during business hours. The provider shall furnish to the city, as soon as
22 practicable and without charge, current "As-Built" maps in the city's GIS format or compatible
23 data base, showing the location and dimension of its telecommunications network located in the
24 rights-of-way, but not other proprietary information, used in operating the provider's
25 telecommunications network within the city of Santa Fe.

1 M. *Limitation on Privileges.* All rights, authority, and grants contained or conferred
2 are also conditioned upon the understanding and agreement that the exercise of these privileges in
3 the public rights-of-way of the city are not to operate in any way so as to be an enhancement of
4 the provider's properties or values or to be an asset or item of ownership in any appraisal thereof
5 in the event of a city acquisition, by purchase or otherwise. In the event that the city shall at any
6 time hereafter acquire the property of the provider, by purchase or otherwise, the value of any
7 franchise shall be fixed and determined at \$1.00 (one dollar).

8 **Section 7. Section 27-2.11 SFCC 1987 (being Ord. #2010-14, §13) is amended to**
9 **read:**

10 **27-2.11 Violations and Penalties.** Action by the city to impose fines and other
11 penalties under this section shall be initiated only after dispute resolution provisions of this
12 Article have concluded. All impositions of fines shall be stayed for up to 90 days during the
13 period of good faith activity under the dispute resolution provisions.

14 A. Failure of a provider to abide by the requirements of Section 27-2.7 SFCC 1987,
15 regarding the public rights-of-way: \$500.00 per day for each day such violation occurs on a per-
16 location basis, to a maximum of \$5,000.00 per day for all violations within a radius of 1,000 feet.

17 B. Failure of a provider to abide by the requirements of Section 27-2.5 SFCC 1987,
18 regarding compensation for use of the public rights-of-way, and the city's right to perform audits:
19 \$100.00 per day for each day such violation occurs.

20 C. Default and termination of franchise:

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

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

25 (b) Failure to comply with the assignment of or transfer of control

1 provisions of this Article or the franchise.

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

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

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

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

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

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

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

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

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

25 (b) Seek money damages from the provider as compensation for

1 such event of default; or

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

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

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

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

23 (b) If the provider presents a written response that challenges
24 whether an event of default has occurred, the director shall within ten days
25 review the submitted materials and determine again whether an event of default

1 has occurred. If the director reaffirms that an event of default has occurred, the
2 provider shall be notified in writing of this decision and shall, within 30 calendar
3 days, cure the alleged event of default. The period to cure is tolled in the event
4 one party demands mediation until such time as mediation is completed.

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

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

15 (a) The city may determine that removal of facilities is not
16 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
19 leave 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
22 conditions of public rights-of-way after removal has occurred;

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

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

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

10 D. *Dispute Resolution Provision.*

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

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

24 (3) Following the mediation session any unresolved claims shall be
25 submitted to arbitration pursuant to the New Mexico Uniform Arbitration Act, Section

1 44-7A-1, et seq., NMSA 1978 or as subsequently amended.

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

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

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

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

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

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

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

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

23 (h) Nothing in this section shall prohibit a party from challenging
24 the legality of a ruling or decision of an arbitrator in any court of competent
25 jurisdiction.

1 E. *Remedies and Penalties Not Exclusive.* Subject to the provisions of Section 27-
2 2.11, all remedies and penalties granted pursuant to this Article and franchise are cumulative and
3 not exclusive, and the recovery or enforcement by one available remedy or imposition of any
4 penalty is not a bar to recovery or enforcement by any other such remedy or imposition of any
5 other penalty. The city shall not, however, pursue duplicative remedies or penalties against
6 provider for violations of other city ordinances or regulations arising from the same conduct. The
7 city reserves the right to enforce the penal provisions of any ordinance or resolution and to avail
8 itself of any and all remedies available at law or in equity. Failure to enforce shall not be
9 construed as a waiver of a breach of any term, condition, or obligation imposed upon the provider
10 by or pursuant to this Article or any franchise. A specific waiver of a particular breach of any
11 term, condition, or obligation imposed upon the provider by or pursuant to this Article or
12 franchise shall not be a waiver of any other or subsequent or future breach of the same or of any
13 other term, condition, or obligation, or a waiver of the term, condition, or obligation itself.

14 **Section 8. Section 27-2.13 SFCC 1987 (being Ord. #2010-14, §15) is amended to**
15 **read:**

16 **27-2.13 Land Use Review.**

17 A. *Zoning Districts; Location.* Telecommunications facilities are permitted in all
18 zoning districts, except self-supporting lattice and guyed towers are prohibited in the public
19 rights-of-way in residential and historic districts. However, to the maximum extent practicable,
20 telecommunications networks shall be designed in such a manner as to locate facilities:

- 21 (1) On existing structures;
- 22 (2) In nonresidential districts; and
- 23 (3) Along major arterials.

24 B. *Maximum Height.* Telecommunications facilities located on existing structures
25 shall not exceed the height of the structure upon which the facility is located.

1 Telecommunications facilities located on new structures shall not exceed the maximum height for
2 buildings otherwise permitted as set forth in Chapter 14 SFCC 1987.

3 C. *Aesthetic Requirements.* Subject to applicable federal standards, the following
4 criteria shall be met:

5 (1) Telecommunications facilities shall be installed underground to the
6 maximum extent feasible, including without limitation, in residential areas where
7 covenants regulate underground installations.

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

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

14 (4) No permanent lighting is permitted unless the lighting is necessary for
15 compliance with federal, state or local law. Permanent lighting shall not include
16 equipment status indicating lights not exceeding 15 watts of power.

17 (5) Telecommunications facilities located within the historic districts shall
18 be reviewed by the historic design review board for compliance with this Section.

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

21 E. *Other Requirements.*

22 (1) No signs are permitted unless the sign is required for safety reasons or
23 for compliance with the federal, state or local law, or unless permitted by the city.

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

1 (3) All telecommunications facilities shall be designed, constructed and
2 installed in such a manner as to minimize noise to the maximum extent possible, but in
3 no event shall it exceed the standards set forth in Article 10-2 SFCC 1987.

4 (4) All lockable telecommunications facilities shall be kept locked when not
5 being actively serviced by the provider.

6 (5) All non-lockable telecommunications facilities shall be kept closed when
7 not being actively serviced by the provider.

8 F. *Application to Land Use Department.* After approval of a franchise as set forth in
9 Section 27-2.4 SFCC 1987 and prior to construction, any person proposing to construct
10 telecommunications facilities in the city's public rights-of-way shall submit an application to the
11 land use department for review by the planning commission.

12 (1) The application, in a form prescribed and as necessary updated by the
13 land use department, shall, without limitation:

14 (a) Describe the applicant's proposed telecommunications services
15 and facilities;

16 (b) Demonstrate compliance with this Section;

17 (c) Include a map at a suitable scale of the project area indicating the
18 proposed route and specific locations of telecommunications facilities and
19 specific information regarding a facility's radio frequency emissions;

20 (d) if a significant gap in coverage is claimed by the applicant, the
21 applicant shall prove by clear and compelling evidence that the proposed
22 facilities are necessary to close a defined and disclosed significant gap in service
23 coverage, and that its proposed facilities are the least intrusive means to close the
24 proven significant gap;

25 (e) To the extent that facilities are located in the Historic or

1 Escarpment Overlay Districts or do not comply with the priorities set forth in
2 Section 27-2.13A (1) – (3) of this Article, demonstrate that the applicant has
3 investigated alternative siting and that no other practicable alternative exists; and

4 (f) Demonstrate that the applicant has complied with the National
5 Historic Preservation Act for the siting of proposed facilities that may affect sites
6 that are listed or eligible for listing in the National Register of Historic Places.

7 (2) The application shall be in writing with the accompanying data in a
8 format acceptable to the city that can be posted on the city’s website in the same
9 descriptive format as tendered in physical form (i.e., by use of PDF or other similar page
10 reproduction software).

11 (3) The applicant may submit one application showing multiple phases or
12 may submit a new application for each successive phase.

13 G. *Land Use Review Fee.* Each application, which may include multiple phases as
14 set forth in paragraph F.(3) of this Section, shall be accompanied by a nonrefundable fee of
15 \$2,500 or the fee established by the governing body for development plan review, whichever is
16 less.

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

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

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

25 (1) The planning commission agenda shall be mailed and published by the

1 land use department as set forth in Section 14-3.1 (H)(1)(a)(i) SFCC 1987.

2 (2) No less than 15 days prior to the public hearing, the applicant shall give
3 notice to the public as set forth below. The posters, mailings and display advertisements
4 shall state the nature of the application; the date, time and place of the public hearing; and
5 the availability for the public to review the application as set forth above. In addition, the
6 mailings and display advertisement shall include a map of the project area indicating the
7 proposed route and specific locations of all proposed above ground facilities and
8 equipment. The applicant shall:

9 (a) Place in the public right-of-way in a location approved by the
10 city, or if the project is on private or public property immediately adjacent to the
11 public right-of-way in a location approved by the city, one poster obtained from
12 the land use department at each major intersection within the project area
13 provided that there shall be no less than one poster every one-quarter mile along
14 the proposed route.

15 (b) Mail by first class mail a notice in a format approved by the land
16 use department to all property owners and physical addresses adjacent to the
17 public rights-of-way where the telecommunications services are to be located.

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

20 K. *Planning Commission Review.*

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

23 (2) In approving an application, the planning commission shall determine
24 that:

25 (a) The application is in compliance with this Section;

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(b) The application is necessary in order to close a proven significant gap in service coverage, either generally or of the applicant; and

(c) The applicant has demonstrated that no other less intrusive means or alternative to the approved facilities siting exists.

(3) The planning commission may not regulate the placement of telecommunications facilities on the basis of the environmental effects of radio frequency emissions where such telecommunications facilities comply with 47 C.F.R. 1.1310 et seq.

(4) The planning commission may place conditions upon its approval of the application but the conditions shall not prohibit or have the effect of prohibiting the provision of the telecommunications services.

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

(6) A decision of the planning commission is appealable as set forth in Section 14-3.17 SFCC 1987.

(7) Any denial of an application or any approval of an application containing any conditions not accepted by the applicant shall

- (a) Be in writing, and
- (b) Shall cite to the administrative record, and
- (c) Shall not become final until approved by the same body at its next regularly scheduled meeting.

L. *Modifications to Approved Plans.*

(1) Modifications to approved telecommunications facilities plans that comply with the standards of this Article 27-2 and do not materially modify the approved telecommunications plan may be approved by the land use director. An example of a material modification to the approved telecommunications plan is a route for which

1 residents did not receive notice of the planning commission public hearing, or an increase
2 in effective radiated power or any proposed increase in frequency. Relocation of a single
3 antenna to an adjacent structure along the approved route is not a material modification.

4 (2) The maintenance, repair, replacement-in-kind, or reinforcement of
5 existing telecommunications facilities, or the undergrounding of new telecommunications
6 facilities are not modifications to approved plans and shall not require approval of the
7 land use department or the planning commission.

8 M. *Waivers.*

9 (1) The planning commission may grant a waiver of the requirements set
10 forth in this Section 27-2.13 SFCC 1987 provided that the commission finds based on
11 clear and convincing evidence provided by the applicant that the waiver:

12 (a) Is necessary to assure continuing service coverage by the
13 applicant at the same level, or is necessary to close a significant gap in coverage
14 proven by clear and convincing evidence;

15 (b) Is in the best interest of the community as a whole;

16 (c) Will not jeopardize public safety and welfare;

17 (d) Will better serve the purposes contained in Article 27-2 SFCC
18 1987; and

19 (e) The applicant demonstrates that compliance with the
20 requirement is not practicable due to physical or legal constraints proven by the
21 applicant by clear and convincing evidence.

22 (2) The planning commission shall consider the following when granting a
23 waiver:

24 (a) The general appearance of the facility;

25 (b) The nature of uses on adjacent and nearby properties;

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(c) The physical surroundings and constraints; and

(d) Improved telecommunications services including service coverage and the potential for increasing the affordability of telecommunications services through competition.

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

(1) Secondary electrical permit at each antenna or other facility site requiring secondary electrical service; and

(2) Other permits as may be required.

O. *Monitoring Standards.*

(1) At all times, a telecommunications provider shall ensure that its telecommunications facilities comply with the most current regulatory and operational standards including but not limited to radio frequency emissions standards adopted by the FCC and antenna height standards adopted by the Federal Aviation Administration.

(2) The telecommunications provider shall obtain and maintain the most current information from the FCC regarding allowable radio frequency emissions and all other applicable regulations and standards, and, at the following indicated times, shall file a report with the land use director indicating whether the provider is in compliance with such standards, advising the land use director of any regulatory changes that require modifications to the telecommunications facilities and advising the land use director of the measures taken by the provider to comply with such regulatory changes as follows:

(a) Prior to the commencement of the installation of the telecommunications facility;

(b) Within 10 days after initial activation of the telecommunications facility (the initial compliance report);

1 (c) Every year, on the anniversary of the submittal of the initial
2 compliance report, and

3 (d) Upon any proposed increase of at least ten percent (10%) in the
4 effective radiated power or any proposed change to frequency use, and

5 (e) Within 10 days after the activation of the proposed increase in
6 effective radiated power or change in frequency use of the telecommunications
7 facility.

8 (3) Both the initial and updated certifications shall be subject to review and
9 approval by the city, and shall be public records.

10 (4) At the land use directors' sole discretion, a qualified independent radio
11 frequency engineer, selected by and under contract to the city, may be retained to review
12 said certifications for compliance with FCC regulations and for actual compliance with
13 the FCC regulations at the telecommunications facility.

14 (5) All costs associated with the city's review of these certifications shall be
15 the responsibility of the provider, which shall promptly reimburse the city for the cost of
16 review.

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

20 **Section 8. A new Section 27-2.17 SFCC 1987 is ordained to read:**

21 **27-2.17 [NEW MATERIAL.] Severability.** The requirements and provisions of this
22 Article 27-2 SFCC 1987 and its sections, parts, subparts, paragraphs and clauses are severable. In
23 the event that any requirement, provision, section, part, subpart, paragraph or clause of this
24 Article, or the application thereof to any person or circumstance, is held by a court of competent
25 jurisdiction to be invalid or unenforceable, it is the intent of the governing body that the

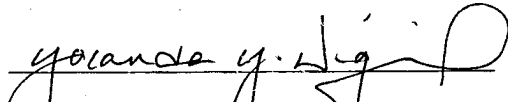
1 remainder of the Article be enforced to the maximum extent possible consistent with the purposes
2 of the Article.

3 PASSED, APPROVED and ADOPTED this 8th day of December, 2010.

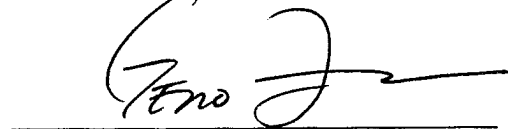
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6 DAVID COSS, MAYOR

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8 ATTEST:

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11 YOLANDA Y. VIGIL, CITY CLERK

12
13 APPROVED AS TO FORM:

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15

16 GENO ZAMORA, CITY ATTORNEY