

1 **CITY OF SANTA FE, NEW MEXICO**

2 **BILL NO. 2024-15**

3 **INTRODUCED BY:**

4
5 Mayor Webber

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9
10 **A BILL**

11 **GRANTING EZEE FIBER TEXAS, LLC, A NON-EXCLUSIVE FRANCHISE, TO**
12 **OPERATE A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF SANTA**
13 **FE; THE RIGHT TO USE CITY PUBLIC RIGHTS-OF-WAY TO PROVIDE**
14 **TELECOMMUNICATIONS SERVICES WITHIN THE CITY; AND FIXING THE**
15 **TERMS AND CONDITIONS THEREOF.**

16
17 **BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:**

18 **Section 1. Appendix G, Telecommunication Franchises, shall include a new**
19 **Article VII, ordained to read as follows:**

20
21 **Section 1. - Legislative Findings.** The governing body of the city of Santa Fe finds that:

22 A. The granting of a franchise to Ezee Fiber Texas, LLC. (“the Company”), is
23 necessary for the access and use of public rights of way to provide telecommunications services
24 within the city of Santa Fe (“city”) limits in accordance with the terms and conditions of the
25 Ordinance and the Telecommunications in the Public Rights of Way Ordinance, Article 27-2

1 SFCC 1987 (“Section 27-2”).

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

7 C. The granting of a franchise promotes competition among telecommunications
8 services providers and encourages the universal availability of telecommunications services to
9 residents and businesses of the city through the careful management of public rights of way.

10 D. It is the intent of the city in the granting of the franchise to obtain fair and
11 reasonable compensation for the use of public rights of way through the collection of fees and
12 charges, and to minimize the congestion, inconvenience, visual impact, and other adverse effects
13 on the public rights of way by Company’s commercial use of public rights of way.

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

18 F. In accordance with Article 27-2, Company submitted an application for a
19 franchise on February 6, 2024.

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

22 H. The city has reviewed Company’s application and has determined that granting a
23 franchise in accordance with Article 27-2 is in the public interest and in the interest of the city
24 and its residents.

25 I. This franchise, as it relates to the city’s costs, maintenance, management, and

1 necessary regulation of public rights of way, will assist in meeting the telecommunications related
2 needs and interests of the community.

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

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

9 1. This Ordinance shall be cited as the “Ezee Fiber Texas
10 FranchiseOrdinance”.

11 2. The purpose of this Ordinance is to grant Company, the right, privilege,
12 and authority to take the following actions:

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

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

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

25 3. This franchise applies to the placement of telecommunications facilities

1 in the city's public rights-of-way.

2 **B. Definitions.**

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

6 *Department* means the department of public works.

7 *Gross Charge*.

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

16 2. *Gross Charge* shall not include (i) proceeds from the sale of bonds,
17 mortgages, or other evidence of indebtedness, securities, or stocks; or (ii) gross receipts taxes, bad
18 debt write-offs, and customer credits; or (iii) revenue of any Affiliate or Provider from long
19 distance service, commercial mobile radio service, cellular, personal communications service,
20 other wireless communications service, or directory advertising. Each of the above are not
21 included in the definition of *Gross Charge* and, therefore, are not included in the calculation of
22 any fee due under a Franchise.

23 3. *Gross Charge* shall be measured and monitored periodically.

24 *Sale of Telecommunications at Retail* means the transmitting, supplying, or furnishing of
25 telecommunications and all services rendered in connection therewith for consideration, other

1 than between a parent corporation and its wholly owned subsidiaries or between wholly owned
2 subsidiaries, but only when the infrastructure maintenance fee imposed by this chapter previously
3 has been paid to a retailer and the gross charge made by one such corporation to another such
4 corporation is not greater than the gross charge paid to the retailer for use or consumption and not
5 for resale.

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

12 *Telecommunications.*

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

17 2. *Telecommunications* shall not include cable services as defined in Title
18 47, Chapter 5, Subchapter V-A of the United States Code, as amended (47 USC § 521 et seq.) and
19 shall not include telecommunications services provided and used by a public utility as that term is
20 defined at NMSA 1978, § 62-3-3(G) , or successor statute, for (i) its internal system
21 communication needs; and (ii) provided directly or indirectly to its customers, including but not
22 limited to electronic meter reading, load control, demand side management, power quality
23 monitoring, and other activities related to the delivery of electricity or natural gas.

24 *Telecommunications Network* means any System which includes facilities and/or
25 equipment placed in the Public Rights-of-Way and used to provide any Telecommunications

1 Service.

2 *Telecommunications Provider (“Provider”)* means:

3 1. Any Person who provides any Telecommunications Service within the
4 City by means of the following methods:

5 (a) a Telecommunications Network owned by such Person or its
6 Affiliate;

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

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

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

21 *Telecommunications Service.* The offering of Telecommunications within the City for a
22 fee directly to the public, or to such classes of users as to be effectively available directly to the
23 public.

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

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

5 **C. Infrastructure Maintenance Franchise Fee.**

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

10 2. The fee imposed by this chapter shall not be imposed in any
11 circumstances in which the imposition of the fee would violate the Constitution or statutes of the
12 United States.

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

14 1. On or before the last day of each quarter, the Company is required to
15 pay the infrastructure maintenance fee imposed by this chapter and shall file with the City a
16 remittance return and shall pay the fee attributable to gross charges for the preceding calendar
17 month. The return shall contain such information as the director may reasonably require.

18 2. On or before the last day of the fourth quarter of 2024, the Company
19 shall provide to the City a report certified by an independent certified public accountant attesting
20 to the amount of the infrastructure maintenance fees paid to the department for the preceding
21 calendar year, and that such amount complies with the requirements of this chapter.

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

23 1. When the Company makes or effectuates a sale of telecommunications at
24 retail, it shall pay the infrastructure maintenance fee to the department as provided by section C,
25 of this chapter. The fee shall constitute a debt owed by the retailer to the city.

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

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

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

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

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

21 **G. Maintaining Books and Records.**

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

1 twenty-four (24) hour notice.

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

- 5 1. Commercial comprehensive general liability insurance; and
- 6 2. Workers' Compensation insurance, as required by law.

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

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

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

5 **K. Violations and Penalties.** If the Company fails to pay the infrastructure
6 maintenance franchise fee, as provided by this Chapter, the Company shall be subject to a fine of
7 \$100 for each day that the failure to pay continues. Each day that the Company fails to pay shall
8 constitute a separate and distinct violation under this Chapter. Any retailer that becomes subject
9 to this fine may be enjoined from doing business in the city until the Company has paid all sums
10 due under this Chapter.

11 Any telecommunications company who otherwise violates this chapter shall be subject to
12 a fine of \$100 for each offense. Each day the violation continues shall constitute a separate
13 offense.

14 **L. Dispute Resolution Provision.**

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

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

1 M. **Unauthorized Use of Public Rights-Of-Way Unlawful.** In accordance with
2 Section 27-2.8 SFCC 1987, Company shall not:

3 1. Use public rights-of-way without authorization to provide
4 telecommunications services.

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

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

10 N. **Obligations of Providers Regarding the Public Rights of Way.** The Provider
11 shall comply with the provisions of Section 27-2.8 regarding the public right of way. Before the
12 provider may conduct underground work involving excavation, new construction, or major
13 relocation work in any public rights-of-way, the provider shall first notify the City through the
14 acquisition of a street cut permit as per Section 23-2 SFCC 1987 and shall comply with any
15 special conditions relating to location, scheduling, coordination, and public safety as more
16 particularly described by Section 27-2.8.

17 O. **Compliance with Law.**

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

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

23 P. **Severability.** The requirements and provisions of this Ordinance and its
24 sections, parts, subparts, paragraphs, and clauses are severable. In the event that any requirement,
25 provision, section, part, subpart, paragraph, or clause of this Ordinance, or the application thereof

1 to any person or circumstance, is held by a court of competent jurisdiction to be invalid or
2 unenforceable, it is the intent of the governing body that the remainder of the Ordinance be
3 enforced to the maximum extent possible consistent with the purposes of this Ordinance.

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

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

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

14 1. Notice to the city shall be to:

15 City Manager

16 City of Santa Fe

17 Post Office Box 909

18 Santa Fe, New Mexico 87504-0909

19 With a copy to:

20 City Attorney

21 City of Santa Fe

22 Post Office Box 909

23 Santa Fe, New Mexico 87504-0909

24 2. Notice to Company will be to:

25 General Manager, Southwest Region

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Ezee Fiber Texas, LLC
14850 Woodham Drive
Suite B-105
Houston, TX 77073
Attn.: Carlos Rosa, Senior Vice President

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 _____ day of _____, 2024.

APPROVED AS TO FORM:



ERIN K. McSHERRY, CITY ATTORNEY