

ORDINANCE NO. 1291

**AN ORDINANCE GRANTING A TELECOMMUNICATIONS FRANCHISE TO
FATBEAM, LLC.**

Sponsored by: Councilor Aiman-Smith

WHEREAS, the Town of Silver City (the Franchising Authority) has determined that the financial, legal and technical ability of Fatbeam, LLC, (the “Grantee”), is reasonably sufficient to provide services, facilities, and equipment necessary to meet the present and future telecommunications needs of the community; and

WHEREAS, the Town of Silver City desires into a Franchise Agreement with Fatbeam, LLC, for the operation of a telecommunication system on the terms set forth herein:

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE TOWN OF SILVER CITY:

This Ordinance shall be known and may be cited as the Fatbeam Franchise Ordinance.

Section 1. - Grant of franchise.

There is hereby granted by the Town of Silver City (the Town or Municipality) to Fatbeam, LLC, its successors and assigns, the right and privilege to do a telecommunications business within said Town of Silver City and to place, erect, lay, maintain and operate in, upon, over and under the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within said town, poles, wires and other appliances and conductors for all telephone and other communication purposes. Such wires and other appliances and conductors may be strung upon poles or other fixtures above ground, or at the option of Fatbeam, LLC, its successors and assigns, may be laid underground, and such other apparatus may be used as may be necessary or proper to operate and maintain the same. Any and all changes made by Fatbeam, LLC solely for the benefit of Fatbeam, LLC specific reasons in the location of the poles, wires, cables, underground conduits, manholes and other communications facilities shall not require the Town to pay for the change in any street, roadway or traffic control facility caused by the change of Fatbeam, LLC and the cost thereof shall be paid by Fatbeam, LLC, subject to the exceptions outlined below and in Section 4.

Section 2. - Excavations.

It shall be lawful for Fatbeam, LLC, its successors and assigns, to make all needful excavations in any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds in said town for the purpose of placing, erecting, laying and maintaining poles or other supports or conduits or such wires and appliances and auxiliary apparatus or repairing, renewing or replacing the same. The work shall be done in compliance with the necessary rules, regulations, ordinances or orders, which may during the continuance of this franchise be adopted from time to time by the Town of Silver City.

Section 3. - Restoration.

Whenever Fatbeam, LLC, its successors and assigns, shall disturb any of the Town's infrastructure within the Town's rights-of-way for the purpose aforesaid, it or they shall restore the same good order and condition as soon as practicable all in conformance with current standards and requirements contained in the Town's Municipal Code without unnecessary delay, and failing to do so the Town of Silver City shall have the right to fix a reasonable time within which such repairs and restoration of the Town's infrastructure within the Town's rights-of-way shall be completed, and upon failure of such repairs being made by Fatbeam, LLC, its successors and assigns, the said Town shall cause the repairs to be made at the expense of Fatbeam, LLC, its successors and assigns.

Section 4. - Relocation.

Nothing in this ordinance shall be construed in any way to prevent the proper authorities of the Town of Silver City from sewerage, grading, planking, rocking, paving, repairing, altering or improving any of the streets, alleys, avenues, thoroughfares, and public highways, places and grounds within the Town's public rights-of-way in or upon which the poles, wires or conductors of Fatbeam, LLC shall be placed, but all such work or improvements shall be done if possible so as not to obstruct or prevent the free use of said poles, wires, conductors, conduits, pipes or other apparatus. In the event that the Town requires that Fatbeam, LLC move, alter, change, adapt or conform its facilities, where such move is necessary, reasonable and for reasons pertaining to the health, welfare and safety of its citizens, Fatbeam, LLC shall pay the cost of the relocation. Prior to such move in the pre-design phase of any such project, the Town and Fatbeam, LLC shall coordinate such activity to avoid unnecessary relocation and cost for both parties. If such move is for aesthetic purposes, for the Town's benefit to compete with Fatbeam, LLC as a telecommunications service provider or which is necessitated for the development of a non-roadway structure, the Town shall reimburse Fatbeam, LLC for relocation. If such move is for the benefit or convenience of, or at the request of a third party, including a private developer or development, such costs shall be borne by the third party. The Town shall not require Fatbeam, LLC to remove or relocate its facilities or vacate any street, alley or other public way incidental to any public housing or renewal project without reserving Fatbeam, LLC's right therein or without requiring Fatbeam, LLC to be compensated for the costs thereof.

Section 5. - Moving aerials.

Whenever it becomes necessary to temporarily rearrange, remove, lower or raise the aerial cables or wires or other apparatus of Fatbeam, LLC to permit the passage of any building, machinery or other object moved over the roads, streets, alleys, avenues, thoroughfares and public highways within the Town, Fatbeam, LLC will perform such a rearrangement within a reasonable period after written notice from the owner or contractor-mover desiring to move said building, machinery or other objects. Said notice shall bear the approval of the Town, shall detail the route of movement of the building, machinery or object, shall provide that the costs incurred by Fatbeam, LLC in making such a rearrangement of its aerial facilities will be borne by the contractor-mover and shall further provide that the contractor-mover will indemnify and save Fatbeam, LLC harmless of and from any and all damages of claims whatsoever kind or nature caused directly or indirectly from such temporary rearrangement of the facilities of Fatbeam, LLC, and if required by Fatbeam, LLC, shall be accompanied by cash deposit or a good and sufficient bond to pay any and all such costs as estimated by Fatbeam, LLC.

Section 6. - Payment by grantee.

In consideration of the rights, privileges, and franchise hereby granted, said Fatbeam, LLC, its successors and assigns, shall pay the Town of Silver City from and after the date of the acceptance of this franchise an amount equal to three percent of the monthly recurring revenues received for basic local exchange service within the Town limits of Silver City for in town services listed in Appendix A, less net uncollectibles (“Franchise Fee”). Payment shall be made quarterly on or before 60 days after the end of each calendar quarter. The Franchise Fee shall also serve as payment of any license, privilege or occupation tax or fee for revenue or regulation, franchise fee, or any permit or inspection fees or similar charges for street openings, installations, construction or for any other purpose now or hereafter, or other forms of excise or revenue taxes based upon or measured by revenues, employees, payroll, property, facilities or equipment of Fatbeam, LLC to be imposed by the Town of Silver City upon Fatbeam, LLC during the term of this franchise. Notwithstanding that no permit or inspection fees will be assessed upon Fatbeam, LLC by the Town, Fatbeam, LLC shall apply for permits and inspections pursuant to the requirements of the applicable provisions of the Town's Municipal Code.

Section 7. - Term.

The rights, privileges and franchise herein granted shall continue and be in force for the period of ten years from and after the date this ordinance becomes effective, except that it is understood and agreed that either party may terminate this ordinance after 180 days notice in writing. This ordinance shall be subject to any and all state or federal legislative enactments. The right to cancel this franchise agreement on the part of the Town shall be limited to cause wherein the franchisee has demonstrated a pattern of non-compliance with the franchise agreement and the obligations thereunder.

Section 8. - Reservation of rights.

By accepting this ordinance, Fatbeam, LLC reserves all rights under the law including, but not limited to, those rights arising under section 253 of the Federal Telecommunications Act and the law of the State of New Mexico. In the event additional and subsequent telecommunication franchise agreements are adopted by the Town, Fatbeam, LLC will be offered the opportunity to adopt and operate under any new franchise provisions which are in variance with the provisions herein.

Section 9. - Inspection of Fatbeam, LLC's books.

Fatbeam, LLC shall make available to the Town, upon reasonable advance written notice of no less than 30 days, such information pertinent only to enforcing the terms of this ordinance in such form and at such times as Fatbeam, LLC can reasonably make available. Subject to New Mexico public records laws, any information that is provided to the Town and/or that the Town reviews in camera is confidential and proprietary and shall not be disclosed or use for any purpose, other than verifying compliance with the terms of this ordinance. If such information is provided to the Town, it shall be immediately returned to Fatbeam, LLC upon review. The Town will not make copies of such information.

Section 10. - Indemnification.

Subject to and in compliance with New Mexico Tort Claims Act, including state, federal and

the New Mexico Public Regulation Commission laws, the Town and Fatbeam, LLC shall indemnify and save the other harmless from any liabilities, claims or demands (including the costs, expenses and reasonable attorney's fees on account thereof) that may be made by anyone for personal injuries, including death, or damage to tangible property, resulting from the negligence and/or willful misconduct of that party, its employees or agents in its performance under this ordinance. The Town and Fatbeam, LLC shall defend the other at the other's request against any such liability, claim or demand. The Town and Fatbeam, LLC shall notify the other promptly of written claims or demands against such party of which the other party is responsible hereunder.

Section 11. - Effective date.

This ordinance shall, if accepted by Fatbeam, LLC, as signified by Fatbeam, LLC's filing with the Town Manager of the Town of Silver City its written acceptance of all the terms and conditions of the ordinance, take effect and be in force 30 days from the passage and approval of this ordinance.

PASSED, ADOPTED AND APPROVED by vote of the Council of the Town of Silver City, Grant County, New Mexico, this 14th day of July, 2020.

(Seal)

TOWN OF SILVER CITY

Ken Ladner, Mayor

Attest:

Ann L. Mackie, Town Clerk

APPENDIX A. [LISTING OF CATEGORIES]

LISTING OF SERVICE CATEGORIES INCLUDED IN GROSS REVENUE FOR CALCULATION OF FRANCHISE FEES:

- Business Local Access—Including Flat Rate, Multiparty, and Extended Area Service.
- Business Measured Usage Local Access Service.
- Flat Usage Local Access Trunks.
- Low Income Telephone Assistance Program Local Access.
- Measured Rate Local Access Trunk Usage.
- Message Rate Local Access Trunk Usage.
- Public Access Line (PAL) Service.
- Residential Local Access—Including Flat Rate, Multiparty, and Extended Area Service.
- Residential Measured Usage.

THE FOLLOWING IS A NON-EXCLUSIVE LISTING OF CATEGORIES OF REVENUE NOT REPRESENTING THE RETAIL SALE OF LOCAL ACCESS SERVICES AND THEREFORE EXCLUDED FROM THE DEFINITION OF GROSS REVENUES AND, THEREFORE, ARE NOT INCLUDED IN THE CALCULATION OF ANY FEE DUE TO THE TOWN:

- Proceeds from the sale of bonds, mortgages, or other evidences of indebtedness, securities or stocks.
- Bad debt write-offs and customer credits.
- Revenue from directory advertising.
- Any amounts collected from customers that are to be remitted to a federal or state agency as part of a Universal Service Fund or other government program, including but not limited to support for the hearing impaired.
- Any amounts collected for taxes, fees, or surcharges and paid to the federal, state or local governments.
- Revenues from internet access.
- Revenues from digital or other electronic content, such as computer software, music and video downloads.
- Revenues from equipment sales, rentals, installation and maintenance.
- Revenues from any carrier purchased for resale.
- Revenues from private line services not for switched local access service.