

ORDINANCE #95-11-02 A

COUNTY OF GRANT, NEW MEXICO

AN ORDINANCE REQUIRING FRANCHISE FOR USE OF PUBLIC
RIGHTS OF WAY AND PAYMENT FOR COSTS INCURRED BY
THE COUNTY OF GRANT IN FRANCHISE NEGOTIATIONS

WHEREAS, the County of Grant (hereinafter "County") is empowered to grant franchises to business entities (hereinafter "the franchisee") which propose to utilize streets, roads and rights of way of the County for the erection, construction or operation of a public utility and/or for telecommunication, audio, video, data or interactive transmission services; and,

WHEREAS, the negotiations of the terms and conditions of franchise agreements are complicated and extensive and frequently require the assistance of outside consultants; and,

WHEREAS, such negotiations constitute a substantial cost to the County; and,

WHEREAS, the costs incurred in such negotiations by the County are a direct result of the desire of the franchisee to utilize in a permanent manner the streets, roads and rights of way of the County for its benefit; and,

WHEREAS, the County is empowered to require applicants for franchise privileges to reimburse and hold the County harmless from the costs associated with the application procedure; and,

WHEREAS, such franchise negotiation costs are difficult to predict since franchise negotiations are infrequent and may involve the resolution of vastly different issues, depending upon the nature of the franchise sought.

NOW, THEREFORE, BE IT ORDAINED by the County Commission of the County of Grant, New Mexico, that:

1. FRANCHISE REQUIRED; REVIEW FEE. All business entities using or seeking to use the streets, roads and rights of way of the County for the erection, construction or operation of a public utility and/or for telecommunication services shall enter into negotiations with the County for franchise application, renewal or transfer. Upon adoption of this Ordinance, any such business entities shall be notified within 30 days of the requirement to submit a letter of intent to enter into franchise negotiations, accompanied with an application and a partial review fee of \$2,500.00.

2. RECORD OF COUNTY EXPENSES. From the time of the initial franchise application, through franchise negotiations, and up to and including the time that a new franchise or franchise renewal takes effect, the County shall maintain accurate records

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Fees Paid in Advance

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for all expenses incurred, including but not limited to staff costs, consulting fees, publication fees, legal fees, election expenses, and any other expenses related to the franchising process.

3. **NOTIFICATION TO FRANCHISEE OF FINAL REVIEW COSTS.**

Within thirty days after the effective date of the Franchise Ordinance, or thirty days after the termination of franchise negotiations, the County shall send to the franchisee, by certified mail, return receipt requested, an accounting which shall contain an itemization of all costs incurred by the County as set forth in Section 2 above.

4. **FINAL PAYMENT OF REVIEW FEE.** In the event that the costs incurred by the County, as set forth in Section 3 above, are less than the franchisee's initial \$2,500.00 payment, the County shall refund the difference to the franchisee, which shall be mailed with the accounting. Should the costs incurred by the County exceed the initial payment made by the franchisee, the franchisee shall be required to pay the difference to the County within thirty days of the receipt of the accounting, which payment shall constitute the final installment of the franchise application review fee.

5. **FAILURE TO PAY.** Any franchise agreement entered into by the County shall contain a provision acknowledging that a franchisee's failure to pay the franchise application review fee as set forth in this Ordinance shall constitute a material breach of the terms of the franchise agreement.

6. **REVIEW OF FRANCHISE APPLICATION REVIEW FEE.**

a. **Request for Review.** If the franchisee disputes the reasonableness of the final franchise application review fee, as described in Section 4 above, the franchisee shall, upon receipt of the charges seek to negotiate with the County toward a good faith resolution of the dispute. If, within fifteen days of the franchisee's receipt of the accounting statement and after good faith negotiations, the parties have not resolved the dispute as to the reasonableness of the charges, the franchisee may seek review of the charges by submitting the disputed fee to binding arbitration pursuant to the New Mexico Uniform Arbitration Act, Sections 44-7-1 to 44-7-22 NMSA 1978 Comp. (hereinafter "Arbitration Act"). If the franchisee fails to submit to arbitration within this fifteen-day period, the fee is deemed reasonable and shall be payable as set out in Section 4 above. Failure to pay any final application review fee payment due shall constitute a material breach of the terms of the franchise agreement.

b. **Hearing Procedure.** In the event the franchisee submits the disputed fee to binding arbitration, the hearing procedure shall be as outlined in the Arbitration Act. At the

arbitration hearing, the franchisee shall bear the burden of proving that the charges are unreasonable, and may present evidence regarding the reasonableness of the charges. The County may respond to any allegations of unreasonableness.

c. Purpose of Hearing. The arbitration hearing shall be for the purpose of considering the protest as to the reasonableness of the County's incurred expenses in the franchising process. The arbitrator is not authorized to challenge the County's prerogative in incurring any expenses.

d. Evidence. Evidence may be received in the form of documents, exhibits and testimony from witnesses. The arbitrator shall have all powers necessary to insure the fair and efficient conduct of the hearing but shall not be bound by the New Mexico Rules of Evidence.

e. Decision. The decision of the arbitrator is final and binding upon the parties. Any fee payment determined by the arbitrator to be due either party must be made to the party within seven days of the decision.

f. Costs. The County and the franchisee shall share equally in the costs of arbitration.

7. CHALLENGE TO ORDINANCE/ATTORNEYS' FEES. In the event that any legal action is brought to challenge the validity, legality, or constitutionality of this Ordinance, the prevailing party in any such action shall recover from the other party as part of the costs of the action, all costs incurred, including reasonable attorneys' fees, in such litigation.

8. SEVERABILITY CLAUSE. If any portion of this Ordinance is found invalid for any reason, the remaining sections will be severable and enforceable.

PASSED, APPROVED AND ADOPTED by the Board of County Commissioners of Grant County, this 2nd day of November, 1995.

Manuel T. Serna
Manuel T. Serna, Chairman

Zeke Santa Maria
Zeke Santa Maria, Member

ATTEST:

Rena Madrid-Cope
Rena Madrid-Cope, County Clerk

FRANCHISE AND REVIEW FEE ORDINANCE

Carl W. Schatz
Carl W. Schatz, Member

I hereby certify that this instrument was filed for record on the 13th day of January A.D. 1996 at 12:00 o'clock P.M. and duly recorded in book 301 of the records of Ordinances at page 705-7.
Witness my hand and seal of office
Rena Madrid-Cope
COUNTY CLERK, GRANT CO., NM