

AN ORDINANCE REQUIRING A FRANCHISE OR LICENSE AGREEMENT FOR USE OF THE PUBLIC RIGHTS-OF-WAY OF BUSINESS ENTITIES PROVIDING SERVICES FOR PROFIT AND REQUIRING PAYMENT FOR COSTS INCURRED BY THE COUNTY OF GRANT, NEW MEXICO, FOR FRANCHISE OR LICENSE APPLICATION, NEGOTIATIONS AND REVIEW.

WHEREAS, the County of Grant ("County") is empowered to grant franchises and licenses to any business entity ("Applicant") which proposes to utilize streets, roads and other public rights-of-way of the County for the erection, construction or operation of a public utility and/or the installation or operation of equipment to provide transmission, sale, resale or distribution of services for profit, including but not limited to the following: power, water, waste, heating, telecommunications, audio, video, cable, data, monitoring, communication, information, and/or interactive services; and

WHEREAS, the negotiations of the terms and conditions of such franchise and license agreements are usually complicated, requiring extensive research and evaluation, and may require the services of outside consultants; and

WHEREAS, such negotiations constitute a substantial cost to County management of the public rights-of-way; and

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

WHEREAS, the County is empowered to require Applicants for franchise or license authority to reimburse the County for reasonable costs associated with such procedures; and

WHEREAS, such franchise and license negotiation and review costs are difficult to predict since negotiations for such terms are difficult and require the resolution of vastly different issues including community needs and assessments, consideration of existing infrastructure, local emergency communication needs, types of services being planned or provided, related engineering and maintenance requirements, term and type of rights-of-way grant of authority being sought, and additional provisions of State and/or federal laws which govern such franchises and licenses.

NOW, THEREFORE, BE IT ORDAINED, BY THE COUNTY COMMISSIONERS OF THE COUNTY OF GRANT, NEW MEXICO, THAT:

Section 1: PUBLIC RIGHTS-OF-WAY FRANCHISE OR LICENSE REQUIRED. All business entities using or seeking to use the streets, roads or other rights-of-way of the County for the erection, construction or operation of a public utility and/or the installation or operation of

equipment to provide transmission, sale, resale or distribution of services for profit, (including but not limited to the following: power, water, waste, heating, telecommunications, audio, video, cable, data, monitoring, communication, information, and/or interactive services), are required to apply for a franchise or license agreement with the County. 329

A license shall be required for any business entity who uses or intends to use the County streets, roads or other rights-of-way and requires interconnection to existing equipment for operations.

A franchise shall be required for any business entity who uses or intends to use the County streets, roads or other rights-of-way and requires location, collocation or relocation of equipment, facilities or plant in the public rights-of-way.

**Section 2: FRANCHISE AND LICENSE APPLICATION AND RENEWAL REQUIREMENTS.** Upon adoption of this Ordinance, all business entities using or seeking to use County rights-of-way shall notify the County within the timelines governed by federal, State and/or County laws and regulations if no current franchise or license agreement with the County exists. If there exists a current franchise or license agreement between the County and a business entity the business entity shall notify the County subject to the following deadlines:

- a. prior to nine (9) months before the expiration of the existing term of a public utility or telecommunications franchise or license;
- b. prior to thirty-six (36) months before the expiration of a cable franchise or license;
- c. prior to ninety (90) days before the expiration of any other type of franchise or license; and
- d. prior to 120 days before the transfer or revision of any type of franchise or license is sought by any business entity.

The County shall retain its discretion to inform any business entity of its duty under this section to notify the County of its use of or intention to use the County rights-of-way. In any case, the County may hold any business entity liable for fines and/or forfeiture for its failure to submit such notification.

**SECTION 3: SUBMITTAL REQUIREMENTS: APPLICATION OR LETTER OF INTENT.** All business entities using or seeking to use County rights-of-way under this Ordinance are required to submit to the office of the Grant County Manager either a complete application for franchise or license review, or a letter of intent to enter into negotiations for review of a franchise or license application with the County. Applications for franchise or license review may be obtained at the office of the Grant County Manager.

The County must receive the business entity's submittal no later than 30 days following either: 1) the receipt by the County of notification by the business entity that it is using or is seeking to use County rights-of-way; or 2) the receipt by any such business

entity of notification by the County of its submittal duties under this section.

Submittals by the business entity/Applicant, pursuant to this section shall include the following: the type of franchise or license agreement desired; the equipment to be used for sale and transmission of services; the origination and termination location of all such equipment; the extent and term of grant of authority being requested; current or estimated County subscribers served; the termination date of any existing franchise or license agreement(s) including an attachment of all such agreements; as well as the name(s) and location(s) of Applicant authorities designated to provide all further information necessary for franchise or license application, negotiations, and review.

**Section 4: FRANCHISE AND LICENSE FEE COMPENSATION.** All applications or letters of intent by business entities seeking to use the public rights-of-way to provide services for a profit shall be accompanied by \$2,500.00 for franchise application and \$500.00 for license application ("Review Fee"), to be paid to the Grant County Treasurer. This Review Fee is a partial payment to cover the costs of providing, acquiring and reviewing the information necessary to process each application, and must be paid in advance of application processing. The costs of processing an application include the costs of performance review for any previous franchises or licenses held, Applicants' previous business operations and management of such systems in similar areas, background investigation, safety and management procedures and any related legal requirements for regulated operations within the County public rights-of-way.

**Section 5: RECORD OF COUNTY EXPENSES.** The County shall maintain accurate records for all expenses incurred relating to the application process from the date of the initial notification receipt, through application, review, and negotiation procedures, up to and including the effective date of any new franchise or license, revision, renewal or transfer agreement, or the written notification of refusal to grant such agreement, or written termination of franchise or license review negotiations. Such County expense records shall include, but not be limited to, the following: staff costs; consulting fees; publication fees; legal fees; election expense and any other expenses related to the review process, including mapping, surveying, and inventory costs for local planning, interconnection, maintenance and emergency communication needs; customer service satisfaction surveys; safety and technical operations; compliance with federal and State mandated rules and regulations; and all damages and liability related to such costs for reviewing Applicant's operations in relation to the County management of local public rights-of-way.

**Section 6: FULL ACCOUNTING OF REVIEW COSTS.** Within 30 days after the effective date of any new franchise or license, revision, renewal or transfer agreement, 30 days after written notification of refusal to grant any such agreement, or 30 days after the written termination of review negotiations, the County shall send to the Applicant, by

certified mail, return receipt requested, a full accounting which shall contain an itemization of all costs incurred by the County as set forth in Section 5 above,

**Section 7: FINAL PAYMENT OF APPLICATION REVIEW FEE.** In the event the costs incurred by the County, as set forth in Section 6 above, are less than the Review Fee payment by the Applicant, the County shall refund the difference to the Applicant, which shall be mailed with the accounting. Should the costs incurred by the County exceed the Review Fee payment by the Applicant, the Applicant shall be required to pay the difference to the County within 30 days of the receipt of the accounting, which shall constitute the final payment of the entire Review Fee. In any case, all direct expense costs in the full accounting of the Review fee must be reimbursed to the County. Such costs incurred shall be separate and apart from any fair and reasonable compensation required by the County as fees for management of a public rights-of-way franchise, license or any authorized uses of the local rights-of-way (which may be negotiated as service or location agreements or contracts, for in-kind services, use of equipment, dedicated equipment and/or infrastructure capacity).

**Section 8: OBLIGATION FOR PAYMENT.** The Applicant's obligation to pay the entire Review Fee is not contingent on the granting of a franchise or license agreement and is due in full, upon receipt, to the County for collection. The Applicant's failure to pay the entire Review Fee shall also constitute a material breach of the terms of any franchise or license agreement granted and is enforceable under County authority to pursue collection for damages, in addition to the fines and penalties under this Ordinance.

**Section 9: REASONABLENESS OF FEE EXPENSES - REQUEST FOR ARBITRATION.** If any Applicant disputes the reasonableness of any full accounting of expenses in the Application Review Fee, as described in Section 4 above, the Applicant shall, within ten days of receipt of the full accounting, seek to negotiate with the County toward a good faith resolution of the dispute. If, within thirty days of the Applicant's receipt of the full accounting and after good faith negotiations, the parties have not resolved the dispute as to the reasonableness of the accounting, the Applicant may seek review of the expenses by submitting the disputed fee to binding arbitration pursuant to the New Mexico Uniform Arbitration Act, Sections 44-7-1 through 44-7-22 NMSA 1978 Comp. ("Arbitration Act"). If the Applicant fails to submit the disputed fee to arbitration within this thirty-day period, the entire Review Fee is deemed reasonable and shall be payable as set forth in Sections 6 through 8 above.

**Section 10: HEARING PROCEDURES.** In the event the Applicant submits the disputed fee to binding arbitration, the hearing procedure shall be as outlined in the Arbitration Act. At the arbitration hearing, the Applicant shall bear the burden of proving that the disputed fee is unreasonable, and may present evidence

regarding the reasonableness of expenses. The County may respond to any allegations of unreasonableness.

**Section 11: PURPOSE OF HEARING.** The arbitration hearing shall be for the purpose of considering the protest as to the reasonableness of the County's full accounting of expenses in the Review Fee. The arbitrator is not authorized to challenge the County's prerogative in incurring any expenses. 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.

**Section 12: ARBITRATION 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. The County and the Applicant shall share equally in the costs of arbitration.

**Section 13: ENFORCEMENT OF ORDERS AND DUTIES: MANDAMUS, INJUNCTION.** Pursuant to the authority granted to the County under Sections 4-37-1, et seq., and 62-1-3 NMSA, 1978 Comp., as amended, whenever the County Commission shall be of the opinion that any person or entity is failing or is about to fail to do anything required of it by this Ordinance or by any related order of the County Commission, or is doing anything or about to do anything, or permitting anything or about to permit anything to be done, contrary to or in violation of this Ordinance or of any related order of the County Commission, it may direct its attorney ("County Attorney") to commence an action or proceeding in the District Court in Grant County, in the name of the County of Grant of New Mexico for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. The County Attorney shall thereupon begin such action or proceeding by petition to the District Court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction.

**Section 14: VIOLATION OF ORDERS.** Pursuant to the authority granted to the County under Sections 4-37-1, et seq., and 62-1-3 NMSA, 1978 Comp., as amended, any person, entity or corporation which violates any provision of this Ordinance or which fails, omits or neglects to obey, observe or comply with any lawful related order, or any part or provision thereof of the County Commission, is subject to civil fines or forfeiture of not less than five hundred dollars (\$500) nor more than fifty thousand dollars (\$50,000) for each offense.

**Section 15: MISDEMEANOR.** Pursuant to the misdemeanor enforcement powers granted to Counties in Section 4-37-3 NMSA, 1978 Comp. (1996 Supp.), any person, entity or corporation which violates any provision of this Ordinance or which fails, omits or neglects to obey, observe or comply with any lawful related order, or any part or

provision thereof of the County Commission, is subject to penalties of a fine not exceeding three hundred dollars (\$300) or imprisonment for ninety days or both the fine and imprisonment for each offense.

**Section 16: SEPARATE OFFENSES.** Every violation of the provisions of this act or of any lawful related order of the County Commission, or any part or portion thereof by any entity, corporation or person is a separate and distinct offense, and in case of a continuing violation after a first conviction, each day's continuance thereof shall be deemed to be a separate and distinct offense.

**Section 17: PENALTY FINES AND FORFEITURES CUMULATIVE.** All fines and forfeitures as penalties accruing under this Ordinance shall be cumulative, and a suit to obtain a remedy or for the recovery of a penalty shall not be a bar to or affect the recovery of any other remedy or penalty against any public utility, telecommunication entity, corporation or any officer, director, agent or employee thereof, or any other corporation, entity or person.

**Section 18: ACTION TO RECOVER PENALTIES; RESPONDEAT SUPERIOR.** Actions to recover penalties under Section 14, above, shall be brought in the name of the County of Grant of New Mexico in the District Court of Grant County. In enforcing these penalties the act or omission of any officer, agent or employee of business entity/Applicant, within the scope of his authority, duties or employment, shall be deemed the act or omission of the business entity/Applicant.

**Section 19: CHALLENGE TO ORDINANCE.** Any entity or person challenging the validity, legality, or constitutionality of this Ordinance, if unsuccessful, will reimburse the County for all costs incurred, including attorneys' fees, in such litigation.

**Section 20: SUPERSESSION CLAUSE.** This Ordinance hereby supersedes Ordinance #95-11-02 A, and supersedes and repeals any previous Grant County ordinance dealing with franchise or license application requirements for the use the public rights-of-way to transmit, sell, resell, or distribute services for profit, including but not limited to the following: power, water, waste, heating, telecommunications, audio, video, cable, data, monitoring, communication, information, and/or interactive services.

**Section 21: SEVERABILITY CLAUSE.** If any of the sections, subsections, sentences, clauses or phrases of the Ordinance are for any reason held to be unconstitutional or invalid, the validity of the remaining portions of this Ordinance shall not be thereby affected since it is the express intent of the County Commission to pass each section, phrase, paragraph and word separately.

APPROVED AND ADOPTED at a hearing in the regular meeting of the Board of County Commissioners of the County of Grant, State of New Mexico, this 27th day of March, 1997.

Manuel T. Serna  
Manuel T. Serna, Chairman

Zeke Santa Maria  
Zeke Santa Maria, Member

Carl W. Scholl  
Carl W. Scholl, Member

ATTEST:

Gabriel Ramos  
Gabriel Ramos, County Clerk

STATE OF NEW MEXICO

County of Grant

I hereby certify that this instrument  
was filed for record on the 27  
day of March A.D., 1997  
at 8:30 o'clock A.M. M. and duly  
recorded in book 934 of the records  
of Grant Co., N.M.  
at page 3301-3302

Witness my hand and seal of office

Gabriel Ramos  
COUNTY CLERK, GRANT CO., N.M.  
J. L. Gandy, Deputy