

BOOK# 251

ORDINANCE NO. # 98-11-12

COUNTY OF GRANT, NEW MEXICO

I hereby certify that this instrument  
was filed for record on the 17  
day of Nov, A.D., 1998  
at 8:44 o'clock A.M. and duly  
recorded in book 251 of the records  
of Ordinance  
at page 7549-7558  
Witness my hand and seal of office  
John P. Ramar  
COUNTY CLERK, GRANT CO., N.M.  
Donet Villagor Deputy

AN ORDINANCE OF GRANT COUNTY ("COUNTY")  
GRANT COUNTY, NEW MEXICO, SETTING FORTH  
CONDITIONS ACCOMPANYING GRANTS OF AUTHORITY FOR  
FRANCHISES AND LICENSES AND REGULATIONS FOR  
THE OCCUPANCY, USE, AND CIVIL TRESPASS  
OF COUNTY PUBLIC RIGHTS-OF-WAY.

WHEREAS, under Section 4-37-1 NMSA 1978 "all counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants;" and

WHEREAS, under Section 4-37-2, NMSA 1978, "county ordinances are effective within the boundaries of the county, including privately owned land or land owned by the United States. However, ordinances are not effective within the limits of any incorporated municipality," given that "when New Mexico became a state, it acquired sovereignty and dominion over the lands of the United States within the State of New Mexico...so long as the State does not interfere with the use enjoyed by the United States government, the proprietor of the land," State of New Mexico v. McCormack (100 NM 657); and

WHEREAS, under Section 4-38-18 NMSA 1978, boards of county commissioners are authorized "to represent the county and have the care of the county property and the management of the interest of the county in all cases where no other provision is made by law," and "also to perform such other duties respecting roads as may be required by law," under Section 4-38-24 NMSA 1978; and

WHEREAS, under Section 4-38-13 NMSA 1978, "the board of county commissioners shall have power at any session to make such orders concerning the property belonging to the county as they may deem expedient;" and

WHEREAS, under Section 101(d) of the Omnibus Consolidated Appropriations Act of 1997, "no final rule or regulation of any

disclosed by such government;" and  
nondiscriminatory basis, if the compensation required is publicly  
nondiscriminatory basis, for use of public rights-of-way on a  
telecommunications providers, on a competitively neutral and  
rights-of-way or to require fair and reasonable compensation from  
the authority of a state or local government "to manage the public  
WHEREAS, the Telecommunications Act of 1996 does not affect

section;" and  
expenses incurred in the granting of any franchise pursuant to this  
commissioners is authorized to impose charges for reasonable actual  
purposes within their respective jurisdictions. A board of  
not exceeding twenty-five years' duration to corporations for such  
incorporated cities and towns are authorized to grant franchises  
boards of county commissioners and municipal authorities of  
unnecessarily obstruct public travel and provided further that the  
appliances and structures; provided that such use shall not  
conducts, towers, transformer stations and other fixtures,  
unincorporated towns for their pipes, poles, wires, cables,  
1978] to use the public highways and the streets and alleys of  
Telecommunications Act [Section 63-9A-1 to Section 63-9A-20 NMSA  
of Chapter 62 NMSA 1978] and companies that provide public  
utilities under the Public Utility Act [Articles 1 to 6 and 8 to 13  
corporations organized pursuant to Section 62-1-1 NMSA 1978, public  
commissioners of the several counties are authorized to permit  
WHEREAS, under Section 62-1-3 NMSA 1978, "the boards of county

service the adjacent public, particularly in urban areas;" and  
of public ways, utility lines could not reach or economically  
uses are for the benefit of the public served. Without making use  
authorized pursuant to the laws of this state, and such utility  
are also for proper utility uses in serving the public, as  
intended principally for public travel and transportation; but they  
WHEREAS, under Section 67-8-15 NMSA 1978, "public highways are

created by the legislature or otherwise;" and  
regardless of whether the public road, street or highway was  
abandonment," and "the right to abandon and vacate shall exist  
abandoned by formal written declaration of vacation or  
revert until such property or property rights are vacated or  
the state for public road, street or highway purposes shall not  
commission, department, bureau, agency or political subdivision of  
acquired by purchase or condemnation by the state or any  
board of county commissioners;" and "property or property rights  
new roads or changes in location in roads, shall be acquired by the  
of-way deemed necessary by the board of county commissioners for  
WHEREAS, under Sections 67-4-12 and 67-2-6 NMSA 1978, "rights-

agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act," which includes all rights-of-way granted under the Mining Act of July 26, 1866, 14 Statute 253, later codified at 43 U.S.C. 932 "for the construction of highways over public lands, not reserved for public uses;" and

WHEREAS, under Ordinance 93-12-03, "All roads in Grant County on Federal Lands created prior to the U.S. Forest reservation, or Bureau of Land Management creation are defined and declared public roads;" and

WHEREAS, under Ordinance 97-03-27 B, "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 are required to apply for a franchise or license agreement with the County;" and

WHEREAS, public rights-of-way are held in trust by the County for the public, pursuant to Pikes Peak Power Co. v. Colorado Springs, 105 F. 1, and to be managed by the County, Gallegos v. Conroy, 38 NM 154, as parens patriae in the public interest, Albuquerque v. PSC, 115 NM 521; and

WHEREAS, the grant of authority to boards of county commissioners to manage County property, and County interests in all cases where no other provision is made by law, provides the county commissioners with wide discretionary powers, 1915-16 Op. Att'y Gen. 64 and 1967 Op. Att'y Gen. No. 67-145; and

WHEREAS, the exercise of police powers in the management of local public rights-of-way in New Mexico has been recognized as a separate, but contingent, power to the granting of franchises in City of Roswell v. Mountain States Telephone, 78 F.2d 379, and the granting of such authority is within the purpose of public highways, State ex rel. City of Albuquerque v. Lavender, 69 NM 365, and Hall v. Lea County Elec. Coop., 78 NM 792; and

WHEREAS, it is the intent of the Board of County Commissioners of Grant County to regulate use of the public rights-of-way in a reasonable and nondiscriminatory manner as authorized by the State of New Mexico for public purpose, consistent with Public Service Co. v. New Mexico PSC, 112 NM 379, and in the interests of the public health, safety and convenience of the citizens of Grant County.

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

SECTION 1. SHORT TITLE. This Ordinance shall be known as "The Grant County Public Rights-of-Way Ordinance."

SECTION 2. DEFINITIONS. The following terms, phrases, words, abbreviations and their derivations shall have the meaning herein given. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the sense requires. The words "shall" and "will" are mandatory and the word "may" is permissive. Words not defined shall be given their common and ordinary meaning.

1. ADVANCED TELECOMMUNICATIONS SERVICE means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include cable television services.

2. AFFILIATED INTEREST means a person who directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control of a business entity, corporation or another person. Control includes instances where a person is an officer, director, partner, trustee or person of similar status or function or who owns directly or indirectly or has a beneficial interest in ten percent or more of any class of securities of a person.

3. CABLE TELEVISION SERVICE means the one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, that is required for the selection of such video programming or other programming service.

4. CIVIL TRESPASS or TRESPASS means the unauthorized or unprivileged interest in, possession of, holding over, entry upon, or the use of any County right-of-way, including any unlawful intrusion, interference, continued presence, or permanent invasion, by a person, structure, chattel, or other thing, on the surface of, or above or beneath any rights-of-way, within the jurisdiction of the County.

5. COUNTY means Grant County, New Mexico and all territory within its present and future boundaries and including any area over which the County exercises jurisdiction.

6. COUNTY ATTORNEY means an attorney employed by Grant County or the District Attorney for the Sixth Judicial District Court or any attorney privately retained by the County.

7. DEDICATED CAPACITY means a form of access to the services or physical plant of any person, that is set aside for County use as a condition for occupying the public rights-of-way and is dedicated to public health, safety or convenience.

8. DOE means the Department of Energy, or any successor governmental entity thereto.

9. EASEMENT means a permanent assignment of authority to occupy or use County land for a specific purpose in the public interest.

10. FCC means the Federal Communications Commission, or any successor governmental entity thereto.

11. FEE means a charge fixed by law for services of public officers or for use of a privilege under control of government.

12. FRANCHISE means a grant of authority to any person for a specific term for the occupancy or use of the public rights-of-way to locate, construct, operate and/or maintain any plant, equipment, facility, fixture or other property in any public rights-of-way for the provision of a public service. Such grant must be accepted to be valid and thereafter may be held or transferred by the grantee as provided by law, but does not waive the County's exercise of police power to regulate the design, location, construction, operation and/or maintenance of any plant, equipment, facility, fixture or other property located in any County right-of-way.

13. GRANTEE means any person who is granted, and accepts, authority from the County for the occupancy and/or use of any County public rights-of-way under a franchise, license, lease or other agreement.

14. IN-KIND means goods or services provided to the County, without charge or payment, as a condition for the occupancy or use of any public rights-of-way.

15. INTERCONNECTION means the authorized use of public rights-of-way for the location, collocation, or virtual collocation of any plant, equipment, facility, fixture, or property owned by one person and connected to any plant, equipment, facility, fixture or property owned by another person that is being used in the provision of a public service.

16. LAND means any and all land and interests in land whether freehold or leasehold or otherwise, including land held by original

title, land held in trust by the County, land held in fee simple, land held under lease, easement, permit or otherwise, whether restricted or unrestricted, and includes all rights and incidents appurtenant to any land or interests in land, including but not limited to, rights to water and to minerals, whether surface or underground or subsurface, and to airspace, as defined by federal, State and local law.

17. **LEASE** means a temporary agreement to occupy or use County property or land for a public purpose.

18. **LICENSE** means a grant of authority to any person for a specific term for the occupancy and use of any public rights-of-way that does not require a franchise. Such grant must be accepted to be valid and thereafter may be held or transferred by a grantee, as provided in law, but does not waive the County's exercise of police power to regulate the design, location, construction, operation and/or maintenance of any plant, equipment, facility, fixture or other property, used in the exercise of such license, that is located in County public rights-of-way.

19. **LOCAL EXCHANGE COMPANY** means a person, company, corporation, partnership, cooperative, joint venture or other business organization or association not engaged solely in interstate business that provides services or facilities for the transmission of two-way interactive switched voice communications over a telephone line within a local exchange area for single-line customers.

20. **LOCATION** means the physical or intended placement of any plant, equipment, facility, fixture or other property in a public right-of-way.

21. **NETWORK** means any system designed to provide one or more access paths for communication between users at different geographic locations; provided that a system may be designed for voice, video, data, or any combination thereof, and may feature limited or open access that employs appropriate analog, digital switching or transmission technologies in its elements, facilities, plant or equipment.

22. **NOTICE** means actual information of fact or summons communicated, according to law, by an authorized person to any other person or the public.

23. **OCCUPANCY** means the lawful exercise of property rights as authorized under certain conditions by contract, franchise, easement, license, or other public law.

24. **PERMIT** means a temporary grant of authority to enter the public rights-of-way for a public purpose.

25. PERSON means any individual, firm, joint venture, partnership, corporation, association, state, municipality, ~~political subdivision, cooperative association, joint stock association~~ or any combination thereof and includes any receiver, trustee, assignee or personal representative thereof.

26. PROPERTY means an aggregate of rights which are guaranteed and protected by the government and which extend to every species of valuable right and interest.

27. PUBLIC ACCESS means the power or opportunity of the public to enter, communicate or pass through any public rights-of-way, as accepted or managed by the County Board of Commissioners.

28. PUBLIC HIGHWAY means any right-of-way of the County declared to a public road, thoroughfare, or other way open to the public, including carriage-ways, bridle-ways, horse paths, foot-ways, railroads, navigable rivers, bridges, canals, ferries, and any other ways used for the transportation of commodities or for communication, as established by the laws of the territory or State to be dedicated and accepted under law by the County, or as otherwise prescribed by law, or established by public use for a long period of years and which has not been abandoned by the County.

29. PUBLIC INSTITUTIONAL TELECOMMUNICATIONS USER means an elementary or secondary school, library, or health care provider, or other public institution or facility that provides public access to advanced telecommunications services convenient to education, public health, public safety or welfare, or other public interests.

30. PUBLIC PLACE means all sidewalks, alleys or other public ways and any and all public sources, spaces, grounds and buildings of the County under the jurisdiction of the Board of Commissioners.

31. PUBLIC RIGHTS-OF-WAY means all property and interests of the County that are acquired, acknowledged, asserted, dedicated, prescribed or intended for use as a public place, or subject to public easements, and all extensions of land now or hereafter held on the surface of, above, or beneath the boundaries of the County designated for the purposes of public passage, the provision of utilities or services, or other uses compatible with the public interest in such property, whether designated as a street, way, highway, parkway, thoroughfare, expressway, road, avenue, boulevard, place, circle, or however otherwise designated. Such property and interests are designated to be held in trust for the public, by the County, and to be managed by the County for public purposes. Public Rights-of-Way shall also mean all easements now or hereafter held by the County for any lawful purpose consistent with every reasonable method of public travel, transportation or communication, and shall include any other easement or right-of-way

as shall be defined within their proper use and meaning by County and State statute.

32. PUBLIC SERVICE or SERVICE means every performance of a labor or duty for sale or benefit to the general public, that is provided in, upon, above, below or through any County public rights-of-way, including, but not limited to, the transportation of goods, communication of signals or messages, or other transmission of natural resources for the purpose of heat, power, water, light, sewage or other general public uses, whether or not such services are considered of public convenience or necessity.

33. PUBLIC UTILITY or UTILITY means every person not engaged solely in interstate business and, except as otherwise restricted by State statute, (stated in Sections 62-3-4 and 62-3-4.1 NMSA 1978), that may own, operate, lease or control:

a. any plant, property or facility for the generation, transmission or distribution, sale or furnishing to or for the public of electricity for light, heat or power or other uses;

b. any plant, property or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas or mixed or liquefied petroleum gas, for light, heat or power or for other uses; but the term "public utility" or "utility" shall not include any plant, property or facility used for or in connection with the business of the manufacture, storage, distribution, sale or furnishing of liquefied petroleum gas in enclosed containers or tank truck for use by others than consumers who receive their supply through any pipeline system operating under municipal authority or franchise and distributing to the public;

c. any plant, property or facility for the supplying, storage, distribution or furnishing to or for the public of water for manufacturing, municipal, domestic or other uses; provided, however, nothing contained in this paragraph shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation;

d. any plant, property or facility for the production, transmission, conveyance, delivery or furnishing to or for the public of steam for heat or power or other uses; or

e. any plant, property or facility for the supplying and furnishing to or for the public of sanitary sewers for transmission and disposal of sewage produced by manufacturing, municipal, domestic or other uses; provided that the terms "public utility" or "utility" as used in the Public Utility Act do not include any utility owned or operated by any class A county as described in Section 4-36-10 NMSA 1978 or any class B county as described in



Section 4-36-8 NMSA 1978 either directly or through a corporation owned by or under contract with such a county.

34. RIGHT-OF-WAY means any County land or other place, property or interest therein, acquired, acknowledged, asserted, dedicated, prescribed or intended for use as a County way for any public purpose, as authorized by federal, State and local law.

35. ROAD or ROADWAY means that portion of a right-of-way open to the public as a thoroughfare, or a public highway for the transportation of any good, service or person.

36. SCC means the State Corporation Commission, or any successor governmental entity thereto, of the State of New Mexico.

37. STREET means a public or private thoroughfare or roadway, open to the public, which affords the principal means of access from a lot, parcel, or area of land to other lots, parcels, or areas of land and that has been accepted by the County Board of Commissioners as a public rights-of-way.

38. SUBSCRIBER means any recipient of a public service.

39. TELECOMMUNICATIONS PROVIDER means any telegraph company, telephone company, transmission company, telecommunications common carrier, telecommunications company, cellular service company, pay telephone provider, or affiliated person regulated in whole or in part by the SCC under law, including but not limited to Article 11 of the constitution of New Mexico, Section 11 of the Public Regulation Commission Act, the Telephone and Telegraph Company Certification Act, the New Mexico Telecommunications Act, the Cellular Telephone Services Act and Sections 63-9E-1 and 63-9E-3 NMSA 1978.

40. THOROUGHFARE means that portion of a right-of-way open to the public through which one can travel, as accepted by the County, and including such improvements as may comprise pavement, shoulders, gutters, curbs, sidewalks, parking areas, but does not include service entrances or driveways leading off from the street onto adjoining premises, easements for other purposes, or other rights-of-way.

SECTION 3. PUBLIC PURPOSE. All the requirements provided in this Ordinance are hereby declared to be for a public purpose to promote the health, safety, and convenience of the general public in the management of County Public Rights-of-Way for uses authorized by the State, as intended in the Grant County Comprehensive Plan and related County ordinances, policies, rules, regulations and agreements. Any member of the governing body or County official or employee charged with the enforcement of this Ordinance, acting for the County in the discharge of his or her

duties, shall not thereby render himself or herself personally liable; and he or she is hereby relieved from all personal liability for any damage that might accrue to any Person or property as a result of any act required or permitted in the discharge of his or her said duties.

**SECTION 4. NON-EXCLUSIVE GRANTS.** All grants of authority or permission to use or occupy Grant County Public Rights-of-Way under 62-1-3 NMSA 1978 shall be limited to the rights and conditions of any Franchise, License, or other agreement that grants such authority or permission and shall not be exclusive. Any additional grants of authority by the County for such services shall be on a competitively neutral and nondiscriminatory basis, provided that the existing franchises, licenses or other agreements are in compliance with County Public Rights-of-Way ordinances and authority.

**SECTION 5. CONTENTS OF FRANCHISES AND LICENSES.** Every Franchise or License shall provide the name, title and address of the Person accepting such Franchise or License and the name, title and address of the Person to whom required legal notices shall be sent. The County shall be promptly notified of any changes in such names and these names at all times shall be accessible to anyone having any interest in such information. Every Franchise or License shall also contain a provision setting forth the minimum consideration or requirements to be rendered to the public by the Grantee of any such Franchise or License and shall also include, in addition to other requirements in County ordinances, any such terms, provisions, and conditions as the Board of County Commissioners requires in the interest of the public health, safety and/or convenience. Where requirements for such consideration in a Franchise or License are precluded, or prohibited, any Person using the Public Rights-of-Way to provide a Public Service shall owe the County the same consideration by agreement as in any Franchise or License for similar services and as determined by the Board of County Commissioners, in a nondiscriminatory manner, to be due. No business entity or Person shall occupy or use Grant County Public Rights-of-Way for the provision of a Public Service without owing such consideration to the County.

**SECTION 6. MONETARY CONSIDERATION.** As partial consideration for the granting of any Franchise or License by the County, every Grantee shall pay a fair and reasonable amount annually as a user fee for the management of County Public Rights-of-Way. This fee shall be set by the Board of County Commissioners for the County, on a nondiscriminatory basis, for the Occupancy and/or use of the Public Rights-of-Way by any Person in accordance with the profit or non-profit purpose of said Occupancy or use.

**SECTION 7. NON-MONETARY CONSIDERATION.** Upon mutual agreement between the County and any Grantee, such Grantee shall furnish to

the County non-monetary consideration in the form of network capacity, conduit, equipment or other infrastructure or services necessary for County management of the Public Rights-of-Way. This consideration shall be negotiated with the Grantee, taking into account the unique characteristics of each Grantee and said consideration shall be valued in a nondiscriminatory manner. Further, any non-monetary consideration furnished to the County shall be for the County's internal and noncommercial purposes, not for resale, and for the County's sole and exclusive use.

**SECTION 8. DEDICATED ACCESS.** As a condition for occupying the Public Rights-of-Way to provide a Public Service, the County may also require that reasonable and nondiscriminatory forms of Dedicated Capacity be provided by each Grantee for dedicated Public Access or proper County management of the Public Rights-of-Way. Such capacity may include, but is not limited to: dark fiber, access lines, access to facilities, interconnection, collocation, virtual collocation, joint easements or access to rights-of-way, or other reasonable forms of goods or services, as shall be determined by the County to be in the interest of public health, safety and/or convenience.

1. **Use of System by County.** The County shall have the privilege, during the term of any Franchise or License, free of charge, where aerial construction exists, of maintaining upon the poles of any Grantee within the County cable, wire and pole fixtures necessary for a police and fire alarm, emergency communication and/or other government communication system, providing such cable, wires and fixtures be installed and maintained under the supervision of the Grantee. The County, in its use and maintenance of such cables, wires and fixtures, shall at all times comply with the safety rules and regulations of Grantee and the provisions of the latest edition of the National Electrical Safety Code, so that there may be a minimum danger of contact or conflict between the cables, wires and fixtures of the Grantee and the wires and fixtures of the County. It is further agreed, in order to avoid danger to life and property, that the above privilege is granted on condition that the County shall be solely responsible for all injury to persons or damage to property arising out of the construction or maintenance of said County cables, wires and/or fixtures, or arising out of the attachment, maintenance or removal of said County cables, wires and/or fixtures to the poles of the Grantee. In cases of rearrangement of any Grantee's plant or removal of poles or fixtures under this Section, the County shall care for or remove its own fixtures, and shall save harmless from any damage or injury to persons or property, including Property of the County, arising out of the removal or construction of said County cables, wires and/or other fixtures.

2. **Joint Right-of-Way.** As further consideration of the rights and privileges granted by any Franchise, License, Lease or

other agreement, and upon reasonable request by the County and to the extent the Grantee or Person holding a Franchise, License, Lease or other agreement can reasonably do so, pursuant to other leases and agreements, the Grantee or Person will grant joint use of any right-of-way which it now, or in the future, has an interest in to the County for purposes including, but not limited to parks, drainage facilities, bikeways, traffic conduits, mass transit corridors, sanitary sewer lines, pedestrian area parking, open spaces and electric, cable, natural gas and water service distribution, provided that said Grantee or Person shall not be required to make such an offer in any circumstance where such offer would unreasonably interfere with the Grantee's or Person's use of such rights-of-way. Any improvements deemed appropriate by the County shall be made by the County at its sole expense.

**SECTION 9. RULES AND REGULATIONS.** The Board of County Commissioners may promulgate such rules and regulations as, from time to time, may be necessary to carry out the provisions of this Ordinance. Such rules and regulations shall include:

1. regulations governing the determination of administrative fines, civil penalties and damages for unlawful acts;
2. rules and regulations governing administration of this Ordinance by the County Manager, Attorney or other County staff.

**SECTION 10. RIGHTS RESERVED.** The County reserves the right to its lawful exercise of police powers, under all Franchises, Licenses, Leases and other agreements. The County, among other things, does not waive requirements of various codes, ordinances, and resolutions, including zoning codes, subdivision codes, codes regarding building, construction, excavation, or inspection permits and fees, or time or manner of construction, insofar as such codes, ordinances and resolutions are non-discriminatory and generally applicable. Any fees or charges so paid, as long as generally applicable and not unreasonably discriminatory, shall be paid in addition to any Franchise or License fees required under this Ordinance.

**SECTION 11. GRANTEE LIABILITY.** Every Grantee shall, at all times during the term of any Franchise, License, Lease or other agreement, be subject to all lawful exercise of the police power by the County and to such reasonable regulation as the County may, by resolution or ordinance, hereafter provide. Every Grantee shall save the County harmless from all loss sustained by the County on account of any suit, judgment, execution, claim or demand whatsoever, resulting from negligence on the part of any Grantee in the construction, operation or maintenance of any Network, plant, equipment, fixture, facility or other property used in the provision of any Public Service within the County.

SECTION 12. ACCEPTANCE. By accepting a Franchise, License, Lease or other agreement, every Grantee: (a) acknowledges and accepts the County's legal right to issue and enforce the Franchise, License, Lease or other agreement; (b) accepts and agrees to each and every provision contained therein; and (c) agrees that the Franchise, License, Lease or other agreement was granted pursuant to processes and procedures consistent with applicable law, and agrees it will not raise any claim or defense to the contrary.

SECTION 13. CONSTRUCTION, PERFORMANCE AND INSPECTION. Every Grantee of a Franchise or License shall provide the County with all proof of performance test results required by FCC, SCC or other federal or State regulations, and every Grantee or other Person using County Public Rights-of-Way to provide a Public Service, shall, at all times, be in compliance with all federal, State and local laws and regulations governing their operations.

1. Location, Survey and Map Requirements. Before any Grantee or Person may conduct work involving excavation, construction or major relocation work in any Public Rights-of-Way or Public Place, (a) the Grantee or Person shall first notify the County and shall comply with any conditions relating to Location, scheduling, coordination and public safety and (b) the Grantee or Person shall file maps and drawings with the County Engineer showing the location of any construction or extension of its facilities and services in any Public Rights-of-Way or Public Place of the County, and (c) for multi-conduit duct banks, maps and drawings shall show overall size, material and configuration of the duct bank. Any Grantee, or Person occupying or using the County Public Rights-of-Way shall provide the County upon request, or order, any maps and drawings showing the Location of any plant, equipment, facility, fixture, or other property located in County Public Rights-of-Way and any interconnection, collocation, extension or relocation thereof used to provide a Public Service. All materials provided pursuant to this Section shall be kept confidential to the fullest extent possible under the law.

All proposed construction work to be done by any Person using the Public Rights-of-Way to provide Public Service shall be performed in a safe manner subject to the approval of the County in accordance with Ordinance 80-6-6, Grant County Subdivision Regulations, and all other applicable federal and State laws, County ordinances, regulations and permitting requirements now or hereinafter existing, as they may be amended from time to time of the County. All work done on such Public Rights-of-Way shall require a Sidewalk, Drivepad, Curb and Gutter Bond securing payment of permit fees and evidence in an amount equal to that required by the New Mexico Tort Claims Act.

All persons providing any Public Service in the County shall maintain on file maps and operational data pertaining to their

operations in any County Public Rights-of-Way. The County may inspect the maps and data at any time during business hours. Upon request of the County, such persons shall furnish to the County as soon as practicable without charge, current maps either in a "hard copy" printed form or in the County's ARC/INFO Export.E00 or DXF format or compatible data base, showing the Location and dimension of any plant, equipment, facility, fixture, or other property in the Public Rights-of-Way, but not other proprietary information used in its operation.

2. Construction Tests, Inspection and Acceptance. Standard admission, functional, acceptance and operational tests shall be performed at appropriate times for all construction located in the County Public Rights-of-Way. Copies and documentation of such tests shall be made available to the County's Engineer, or designated representative, upon request. All other existing tests, related to the public health, safety and/or convenience of any plant, equipment or facility located in the Public Rights-of-Way shall be available for inspection, at any time, upon request by the County's Engineer, or a designated representative of County, as a prior condition for acceptance. The County may make such inspections as are reasonably necessary to enforce this Ordinance.

Acceptance of tests or inspection by the County does not prevent the County from asserting any claim against any Person for incomplete or defective workmanship or materials. Permits required under Ordinance 80-6-6 may be denied to any Person that is currently occupying or using the County Public Rights-of-Way unlawfully.

3. Completion of Construction. Construction shall be deemed completed by approval of inspection by the County Manager or other designated representative of the County given to the Person holding the Franchise or License.

#### SECTION 14. CONDITIONS ON USE OF STREETS, ROADS AND ALLEYS.

1. Trimming/Cutting Trees. Any Grantee or Person using the Public Rights-of-Way to provide a Public Service shall have the right and responsibility to trim and keep clear of its poles, wires, cables, underground conduits, manholes, and other conductors and fixtures, the trees in and along the streets. In the exercise of such right, no Grantee or Person shall cut or otherwise injure any tree to any greater extent than is reasonably necessary.

2. Cultural Artifacts Procedures. In the case of any cultural resources and/or artifacts found during excavation or alteration of any County Public Rights-of-Way, the County shall be promptly notified. Every Grantee or Person occupying or using the Public Rights-of-Way shall be responsible for the protection from damage of all identified cultural resources within the Public

Rights-of-Way that may be affected by any action of said Person. In addition, all persons shall be liable for any damage or injury caused to any cultural resources and/or artifacts located in County Public Rights-of-Way. Said persons shall immediately notify the County if any damage occurs to any cultural resource and/or artifacts and immediately halt work in the area in which damage has occurred until authorized by the County to proceed.

3. **Preservation of Rights-of-Way.** Any Grantee or Person occupying or using the Public Rights-of-Way shall restore, reconstruct, or repair, at their own cost and expense, and in a manner entirely satisfactory to the County and subject to the jurisdiction of the County, any street, pavement, sidewalk, driveway or other surfacing in the County Public Rights-of-Way, or any sewer or gas or water main, pipe, fire alarm, or other facility, fixture or installation on County Property, disturbed or destroyed by the exercise of any right granted under a Franchise or License, or caused by the construction, operation or maintenance of any plant, equipment, facility, fixture, or property unlawfully located or used in the County Public Rights-of-Way, in violation of this or any other County ordinance or any provision of a Franchise, License or other agreement, to as good a condition as before said disturbance, including removal and clean-up of all waste related products.

4. **Safety.** Any Person occupying or using the County Public Rights-of-Way shall at all times employ ordinary care and shall install and maintain in use commonly accepted methods and devices in accordance with national standards and County ordinances that govern the management of Public Rights-of-Way for public health, safety and convenience.

5. **Temporary Moving of Wires.** Any Grantee or Person using the Public Rights-of-Way to provide a Public Service shall, on the request of any other Person holding a building moving permit issued by the County, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal or raising or lowering of wires shall be paid by the Person requesting the same, and such payment may be required in advance. Not less than three (3) business days notice shall be required to arrange for any such temporary wire changes.

6. **Location, Interconnection and Relocation of Facilities.** Any Grantee or Person occupying or using the Public Rights-of-Way shall install and maintain all cables, wires, fixtures, and any other plant, equipment, facility, fixture, or property in accordance with County ordinance and in such a manner as does not interfere with the Location or use of any County plant, equipment, facility, fixture, or other property occupying the Public Rights-of-Way or other Public Place and shall only be placed after approval of the Location by the County Engineer or Road Supervisor

and in accordance with any specifications adopted by the County governing the Location of any plant, equipment, facility, fixture or other property in Public Rights-of-Way.

The County reserves the right to construct, install, maintain and operate any public improvement, work or facility, do any work that the County may find desirable on, over or under any Public Rights-of-Way or Public Place, and vacate, alter or close any Public Rights-of-Way or Public Place. All such work shall be done, if possible, in such manner as not to obstruct, injure, or prevent free use and operation of any plant, equipment, facility, fixture, or other property lawfully authorized to be located and/or used in said Public Rights-of-Way or other Public Places, under a Franchise, License, Lease or other agreement.

7. Moving of Property in the Public Rights-of-Way. Any Grantee or Person using County Public Rights-of-Way to provide any Public Service will, upon reasonable notice from the County, protect, support, temporarily disconnect or relocate any plant, equipment, facility, fixture or other property in any Public Rights-of-Way or Public Place, or remove said from such Public Rights-of-Way or Public Place at its own expense, when so required by the County for public health, safety or convenience.

8. Location and Distribution Lines, Poles and Underground Cable. All plant, equipment, facility, fixture or other property used for the distribution of any Public Service shall be, wherever possible, located in the Public Rights-of-Way, and wherever not located on County Property, an easement for joint right-of-way shall be granted to the County by any Person owning said property, to the extent possible. All poles shall be, to the extent possible, those currently erected and maintained by either the power company or the telephone company or both, whenever a pole attachment agreement can be reached with the owners of such poles. Any Grantee will have the right to erect and maintain poles where none exist. No poles or other wireholding structure shall be erected by any Grantee without prior approval of the County. The County agrees that such prior approval to any Grantee will be given on a timely basis and will not be unreasonably withheld. The Location of any pole or structure in the Public Rights-of-Way shall be removed or modified by the Grantee or Person owning it at said Grantee or Person's expense whenever the County determines that public health, safety or convenience requires it. All transmission, and distribution structures, lines and equipment erected in the Public Rights-of-Way or any Public Place shall be so located as to cause minimum interference with the other authorized usages thereof and to cause minimum interference with the rights of property owners who join any said Public Rights-of-Way or Public Places.



For all new residential structures in which undergrounding is required by the County, the builder, subdivider or developer of such structure at his sole cost and expense, shall provide, in accordance with County's current specifications, all conduits, trenches to buildings' point of entry, from the boundary of the development, back fill and restoration of trench area.

The installation of any plant, equipment, facility, fixture or other property used to offer any Public Service to residents or businesses of Grant County, shall be located wherever possible, in the County Public Rights-of-Way, and when not so located, the space within which it is located shall be dedicated as a joint right-of-way to the County, wherever possible.

## SECTION 15. INDEMNIFICATION; INSURANCE.

1. Indemnification. Every Grantee, as a condition of the grant of any Franchise or License, and in consideration thereof, shall protect, indemnify, and hold the County harmless against all claims for damages to persons or property by reason of the construction, maintenance and operation of any facilities, and conduct of business, or any way arising out of performance under a Franchise or License, directly, or indirectly, when or to the extent injury is caused, or alleged to have been caused, wholly or in part, by any act, omission, negligence, or misconduct of a Grantee or any of its contractors, subcontractors, officers, agents, or employees, or by any person for whose act, omission, negligence, or misconduct, the Grantee is by law responsible.

### 2. Insurance.

a. General Liability. Every Grantee shall obtain and maintain for the term of any Franchise or License, at Grantee's expense, a comprehensive general liability insurance policy or policies with the County named as an additional insured, written by a company authorized to do business with the State of New Mexico, in amounts not less than those required under the New Mexico Tort Claims Act, such insurance to provide that the County will be notified no less than forty-five (45) days prior to the expiration date. Every Grantee shall furnish the County with a copy of certificates of insurance coverage or other evidence of said Grantee obtaining and maintaining such insurance coverages as are required as a continuing obligation under any Franchise or License.

b. Workers' Compensation. Every Grantee shall secure and maintain all necessary Workers' Compensation insurance as may be required by law to cover the Grantee's employees under New Mexico State law.

c. Vehicle Coverage. Every Grantee shall secure and maintain vehicle liability, property damage and medical coverage

insurance in the amounts of maximum liability under the New Mexico Tort Claims Act and shall furnish the County with a copy of evidence of the Grantee obtaining and maintaining such insurance coverage as is required under New Mexico State law.

#### SECTION 16. FRANCHISE OR LICENSE TRANSFER AND ASSIGNMENT.

1. No Grantee shall be permitted to sell or transfer any Franchise or License granted by the County, without prior written consent of the County, as governed by this Ordinance and Ordinance 97-03-27-B.

2. For the purpose of determining whether it shall consent to such change, transfer or acquisition of control, the County may inquire into the prospective transferee, and the Grantee and transferee shall assist the County in any such inquiry in accordance with any related State or federal statutes and/or regulations. The Grantee and transferee shall provide all information requested in writing by the County which the County requires in order to determine whether it will consent to the proposed transfer except any confidential information as may be allowed by federal law. The County may condition its consent upon such terms and conditions as it deems appropriate, related to the qualifications of the prospective transferee to perform the obligations under said Franchise or License. Any transfer of ownership effected without the written consent of the County shall render the Franchise or License subject to revocation. The County shall have 120 days, or the maximum amount of time otherwise allowed by law, to act upon any request for approval of a transfer. If the County fails to render a final decision on the request within said time limit, the request shall be deemed granted unless the Grantee and the County agree to an extension of time. The County shall have a reasonable time to act upon any request for approval of a transfer in accordance with Ordinance 97-03-27-B.

The Grantee, upon any transfer as heretofore described, shall within sixty (60) days thereafter file with the County a copy of the deed, agreement, mortgage, Lease or other written instrument evidencing such sale, Lease, mortgage, assignment or transfer, certified and sworn to as correct by the Grantee. Any such transfer as heretofore described shall be deemed void and of no effect unless Grantee shall within sixty (60) days after the same shall have been made, file such certified copy as required.

#### SECTION 17. CUSTOMER SERVICE AND COMPLAINTS POLICY.

1. Standards. All Grantees shall comply with all customer service standards required by federal, state or local regulations, in addition to the following minimum requirements.

2. **Complaints.** All complaints by Subscribers regarding equipment malfunctions, quality of service and similar matters shall be acted upon by the Grantee as soon as possible, and Grantee shall provide and maintain an aggregate summary of such complaints on a quarterly basis, if requested by the County. Grantee shall also provide each Subscriber written notice of its customer service and complaint resolution policy upon initial subscription to said Service, and annually thereafter.

As of the effective date of any Franchise or License, every Grantee shall keep a daily record of all complaints received by the Grantee from Subscribers by phone, letter or in person. Each entry shall indicate date, time, customer account number, nature and location of complaint, date of response, respondent and actions taken to resolve each complaint by Grantee, in a manner that can be aggregated for the County upon request. These records shall be maintained at a local office for the term of the Franchise or License and shall be available for County inspection upon request during regular business hours.

When there have been similar complaints made or where there exists other reliable evidence, which, in the judgment of the County casts doubt on the performance of the operating system in relation to the technical standards set forth by federal law or required by Franchise or License, the County shall have the right and authority, upon providing the Grantee with Notice of such evidence, to require the Grantee to test, analyze, and report on the performance of the system. Such report shall include the following information: the nature of the complaints or evidence which precipitated the system tests, a detailed description of all repairs made to the system following the Notice, what system component was tested in response to the Notice and procedures employed in such testing, the results of such tests, and the method in which such complaints or performance deficiency were resolved.

Such tests and analyses shall be observed by a representative of the County, upon request, and supervised by a qualified person, on the regional or corporate staff of the Grantee, who shall forward to the County, or its designated representative, the aforementioned report, within sixty (60) days of receipt of the Notice.

**SECTION 18. CONTINUOUS SERVICE-ALTERNATIVE OPERATOR.** Any Grantee or Person providing any Public Service through Grant County Public Rights-of-Way is required to provide continuous service to Subscribers in return for payment of the established fee. If the County revokes or fails to renew a Franchise or License or finds any Person providing a Public Service in violation of this Ordinance and commences an enforcement procedure, including termination, the Grantee or Person providing such Service is required to continuously provide the Public Service until an

orderly change of control is effectuated under the law. In the event the Grantee or Person fails to provide said Service for thirty (30) consecutive days, without prior approval of the County, the County may elect to terminate or otherwise enforce the Franchise or License or pursue the enforcement of fines, forfeiture, civil penalties, damages, removal of property, or other action under this Ordinance.

**SECTION 19. REPORTING REQUIREMENTS.** The County shall have the right and authority under this Ordinance to require that every Grantee or Person using the County Public Rights-of-Way to provide a Public Service maintain records and provide reports, requested documents and information necessary to assume compliance with their Franchise or License and/or for proper management of the Grant County Public Rights-of-Way. Every Grantee, or Person using the County Public Rights-of-Way to provide a Public Service shall furnish the County with the following information, as specified.

1. **Annual System Reports.** No later than one year subsequent to the effective date of any Franchise or License, and each year thereafter, every Grantee shall submit a written report to the County for the Grantee's fiscal year ending May 31, which shall include:

a. Copies of all reports filed with the Securities and Exchange Commission and relating to any matters affecting the use of County streets, alleys and Public Rights-of-Way and/or the Public Services authorized pursuant to any Franchise or License granted under this Ordinance;

b. A summary of the previous year activities and development of the operating system, including, but not limited to, services begun or dropped, Subscriber gain or loss, and copies of all Subscriber complaint logs, as recorded for each business day of the previous year according to Section 18 of this Ordinance.

c. Any annual financial report of a Grantee or Person, parent corporation, and any affiliate in interest of Grantee or Person which controls Grantee or Person and issues such annual report;

d. Copies of statements of Gross Revenues for the preceding fiscal year within the County certified by a senior financial officer of Grantee;

e. Copies of any reports of industry standard signal quality testing required;

f. A list of officers and members of the board of the Grantee or Person and the parent corporation, if any; and,

g. A list of all stockholders, and percentage of stock held, for each Person holding three percent or more of the voting stock of the Grantee or Person and the parent corporation, if any.

h. Any other annual reporting requirement specified by Grantee's Franchise or License with the County.

After initial submission, items f. and g. will be required in years subsequent to the second anniversary of the effective date of a Franchise or License, or in the event of any change in such lists.

2. Management Reports. Every Grantee shall provide a written management report to accompany each Franchise or License fee payment showing the following:

a. Copies of any application or petition by the Grantee or Person holding a Franchise or License filed with the State Corporation Commission, Public Utilities Commission or any successor agency for that affected time period, as well as copies of all show cause orders filed by those agencies;

b. Monthly Subscriber totals for each category of Service, as well as any system extensions and the amount of contribution and number of contributing subscribers and costs associated with any such extension made;

c. Upon request, copies of all work orders or a monthly summary showing the number of service calls received by type in a form that can be reasonably interpreted by the County;

d. A summary of number of outages and number of planned outages, by date, time approximate duration in a form that can be reasonably interpreted by the County; and,

e. Revenues received, by distinct category of Service, in a form that can be reasonably interpreted by the County, for the preceding time period.

### 3. Books of Account and Reports.

a. The County shall have the right to review or audit any Grantee's books and records in accordance with generally accepted accounting and audit standards regarding any amounts which may be owed or rates charged under a Franchise or License for services provided in or to the County. This right includes the right to review and audit all books and records of revenue not included in the calculation of the fee paid, but which may be reasonably considered by the County to be included in Gross Revenues and thus subject to a Franchise or License management fee.

The County shall give written Notice to any Grantee of any additional amount claimed to be due to the County as a result of the County's review. The additional amount due the County, if any, shall be paid within thirty (30) days following Notice by the County that such amount is due and payable. The Grantee shall have the right to appeal the County's determination to the Board of County Commissioners.

b. Every Grantee shall keep complete and accurate books and records of business and operations pursuant to any Franchise or License in accordance with generally accepted accounting principles and in accordance with the rules and regulations of the State regulatory authority. Every Grantee shall keep books of account and records in such a way that breakdowns of revenues within the County are available by journal code to the County.

c. In the event of an audit, the Grantee shall provide County-specific books, records, contracts, accounts, documents and papers for its operations within the County.

d. All such books, records, and accounts of the Grantee shall be retained by the Grantee for a period of six (6) years. The Grantee shall make such records, as are necessary for the County to complete its audit, available for inspection by the County, in the County, upon thirty (30) days from receipt of Notice by the County.

e. All audits will take place on Grantee's premises when located within the County. The County's auditors may review all directly relevant materials and may take copies of any materials with the approval of the Grantee. Such approval shall not be unreasonably withheld.

f. Within thirty (30) days of request by the County, any Grantee shall provide to the County by U.S. mail, postage prepaid, a copy of all papers filed by the Grantee, its affiliates, or parent corporation, with any federal, State or local regulatory agency or court pertaining to the Grantee's Location of any plant, equipment, fixtures or facilities, any operation of such facilities, or provision of any Public Service in Grant County.

4. Requests for Information. Every Grantee or Person using the Public Rights-of-Way to provide a Public Service, any parent corporation, or affiliate in interest in control or possession of information respecting the Grantee's or Person's operations in the County shall respond to all reasonable inquiries from the County, or its designated representative, concerning the construction, operation, installation or maintenance of the operating system, plans for its expansion, or the Grantee's or Person's, parent corporation's or affiliate's financial or legal status. The Grantee or Person, parent corporation or affiliate shall provide

the information requested within thirty (30) days of request. Requests for extensions of time to respond shall not be unreasonably denied.

5. **Records Maintained.** In addition to public file records and maps, every Grantee shall maintain records of the following:

a. Records of outages, indicating date, duration, area and the estimated number of Subscribers affected, type of outage and cause in a form that can be reasonably interpreted by the County;

b. All work-order records of Service calls for repair and maintenance, indicating date and time Service was requested, date of acknowledgment and date and time Service was scheduled (if scheduled), the date and time service was provided and (if different) the date and time the problem was solved. Every Grantee shall maintain a work-order log that will contain this information in a form that can be reasonably interpreted by the County; and,

c. Records of installation/reconnection and requests for Service extension, indicating date of request, date of acknowledgment, and date and time Service was extended. Grantees' work orders shall contain this information in a form that can be reasonably interpreted by the County.

Cumulative records of complaints, as defined in Section 18, and the records required above, shall contain this information in a form that can be reasonably interpreted by the County. These records shall be kept at the Grantee's local office and shall be available for County review and copying upon reasonable notice during normal business hours. Grantees shall cooperate to revise form requirements by agreement so that the County has access to information to evaluate Grantees' compliance with a Franchise or License and so that Grantees may amend their forms as its services evolve.

6. **Documents to be Provided.** Every Grantee or Person using the County Public Rights-of-Way to provide a Public Service shall provide the following documents to the County in a timely manner, or upon request by the County for review, so as to permit the County to protect any interests it may have in any proceedings, but in no event later than thirty (30) days from the date the documents are requested, without regard to whether the documents are received or filed by Grantee or Person, a parent corporation or an affiliate:

a. Any notice of deficiency, forfeiture, or other document issued by any state or federal agency instituting any investigation or civil or criminal proceeding, regarding operations in the County, Grantee or Person, parent corporation or any

affiliate of Grantee or Person, to the extent the same may directly affect or bear upon operations in the County; and,

b. Any request for protection by a Grantee or Person using the County Public Rights-of-Way to provide a Public Service under Bankruptcy laws, or any judgment related to a declaration of bankruptcy.

SECTION 20. FRANCHISE OR LICENSE RENEWAL. Any Franchise or License must be renewed in compliance with federal, state and local Ordinance 97-03-27-B.

SECTION 21. PERFORMANCE GUARANTEES AND REMEDIES.

1. Performance Bond. Prior to any upgrade or rebuild of its local system, the Grantee shall establish in the County's favor a Fifty Thousand Dollars (\$50,000.00) performance bond. Such bond may be released upon completion of the upgrade or rebuild.

2. Security Fund.

a. Prior to any Franchise or License becoming effective, every Grantee shall post with the County a cash security deposit to be used as a security fund to ensure the Grantee's faithful performance of and compliance with all material provisions of the Franchise or License and compliance with all material orders, permits, and directions of the County, pursuant to the Franchise or License. The amount of the security fund shall be established for a maximum of Fifty Thousand Dollars (\$50,000.00).

b. In lieu of a cash security fund, the Grantee may agree to file and maintain with the County an irrevocable letter of credit in the amount specified in the preceding paragraph to serve the same purposes as set forth therein. Said letter of credit shall remain in effect for the full term of the Franchise or License plus an additional six (6) months thereafter. The Grantee and its surety shall be jointly and severally liable under the terms of the letter of credit for the Grantee's failure to ensure its faithful performance of and compliance with all material orders, permits, and requirements of the Board of County Commissioners pursuant to the Franchise or License.

c. Whenever the County shall receive payment of any amount against a Grantee's letter of credit, the Grantee shall pay to or deposit with the financial institution with whom it maintains said letter of credit to its full value within fifteen (15) days after the Grantee has been tendered delivery by registered mail, return receipt requested, of the Notice from the County Manager, or designee, of the reason for the withdrawal, the date of withdrawal and the amount thereof. The Grantee shall verify that the County Manager has been sent a statement from the financial institution



holding the letter of credit showing restoration of the letter of credit to its full value within forty-eight (48) hours after receipt by said financial institution of sufficient funds from the Grantee to restore said letter of credit to its full amount. This letter of credit shall not be subject to cancellation while the Grantee is in material violation or default.

d. Neither the filing of a letter of credit with the County, nor the receipt of any damages recovered by the County thereunder, shall be construed to excuse faithful performance by the Grantee or limit the liability of the Grantee, either to the full amount of the letter of credit or otherwise.

e. The rights reserved to the County with respect to the security fund shall be in addition to all other rights of the County, whether reserved by a Franchise, License, Lease or other agreement, or authorized by other law, and no action, proceeding, or exercise of a right with respect to such security fund or letter of credit will affect any other right the County may have.

## SECTION 22. MATERIAL VIOLATIONS OR DEFAULT; ADMINISTRATIVE FINES; PROCEDURES; ENFORCEMENT.

1. **Material Violations or Default.** Upon the occurrence of any material violation or default, in accordance with the procedures provided for in this Ordinance or any Franchise, License, Lease or other agreement, the County may:

a. Require any Person holding a Franchise, License, Lease or other agreement, any Person owning property located in the County Public Rights-of-Way, or otherwise occupying or using said Public Rights-of-Way, to take such actions as the County deems are appropriate; or

b. Impose fines and seek monetary damages from any said Person as compensation for such violation; or

c. Accelerate the expiration of the term of any Franchise, License, Lease or other agreement by decreasing said term. The extent of such acceleration shall be determined by the County and may include any period of time, but not less than six (6) months, provided that six (6) months remain under the Franchise, License, Lease or other agreement; or

d. As a last measure only, terminate the Franchise, License, Lease or other agreement.

2. **Administrative Fines.** The Board of County Commissioners may impose fines as liquidated damages on any Person for an act or omission that any Person knew, or should have known, was a material violation of any applicable Franchise, License, Lease or other

agreement pursuant to this Ordinance. Administrative fines shall be chargeable to the letter of credit and the holder or Grantee of any Franchise, License, Lease or other agreement.

a. For failure to complete system construction in accordance with any construction plan, unless the Board of County Commissioners specifically approves the delay by motion or resolution, due to the occurrence of conditions beyond a Grantee's reasonable control, a Grantee may be fined as follows:

(1) Up to two hundred fifty dollars (\$250.00) per day for the first sixty (60) days or part thereof the deficiency continues;

(2) Between sixty (60) days and six (6) months, up to five hundred dollars (\$500.00) per day or part thereof the deficiency continues;

(3) After six (6) months, up to one thousand dollars (\$1,000.00) per day or part thereof the deficiency continues.

b. For any of the following violations related to a Franchise, License or Lease, the Board of County Commissioners may impose administrative fines as follows:

(1) For failure to test, analyze and report on the performance of the system following a request pursuant to any Franchise or License, the Grantee or holder of such Franchise or License may be fined up to one hundred dollars (\$100.00) per day for each day, or part thereof, that such noncompliance continues.

(2) For failure to provide data, documents, reports, information or to cooperate with County during an application process or review of operations, the Franchise, License, or Lease holder or Grantee may be fined up to one hundred dollars (\$100.00) per day for each day, or part thereof, the violation occurs or continues.

(3) For failure to obtain any applicable permits from the County pursuant to any ordinance, the Board of County Commissioners may fine any Grantee or holder of a Franchise or License up to one hundred dollars (\$100.00) per day, for each day or part thereof, the violation continues or occurs.

(4) For failure to pay any Permit fees, or failure to comply with any rules, resolutions, orders or directives of the County as set forth in this Ordinance or any Franchise, License or Lease, the Board of County Commissioners may fine any Grantee or holder of a Franchise or License up to one hundred fifty dollars (\$150.00) per day, for each day or part thereof, the violation continues or occurs.

b. If the Grantee or Person presents a written response that challenges whether a material violation or default has occurred, the County Manager shall within fifteen (15) days review the submitted materials and determine again whether a material

a. The County Manager shall notify any Grantee or Person holding a Franchise, License, Lease or other agreement, in writing, of any alleged material violation or default. This written Notice of material violation or default shall set forth with reasonable specificity the facts the County believes are the basis for declaring that a material violation or default has occurred. The Grantee or Person shall, within thirty (30) calendar days of the date the Notice is postmarked, or such additional time as the County Manager may specify in the Notice, cure the alleged material violation or default, or, in writing, present for review by the County Manager a reasonable time frame and method to cure the material violation or default. The Grantee or Person, in lieu of the cure of the material violation or default as set forth herein, may, in writing, present facts and arguments as to why the Grantee or Person disagrees that a material violation or default has occurred.

3. Procedures. The County shall exercise the rights set forth in this Section in accordance with the following procedures:

(8) For any other material violation, the Board of County Commissioners may fine any Grantee or holder of a Franchise or License up to two hundred fifty dollars (\$250.00) per day, for each day or part thereof, the violation continues or occurs.

(7) For failure to supply bonds as may be required by the County to assure the proper completion of any construction performed pursuant to any ordinance, Franchise or License, the Board of County Commissioners may fine any Grantee or holder of a Franchise or License up to five hundred dollars (\$500.00) per day, for each day or part thereof, the violation continues or occurs.

(6) For failure to supply any required monetary or non-monetary consideration pursuant to any ordinance, Franchise, License, Lease or other agreement, the Board of County Commissioners may fine any Grantee or holder of a Franchise, License, Lease or other agreement up to two hundred fifty dollars (\$250.00) per day, for each day or part thereof, the violation continues or occurs.

(5) For failure to make any payment pursuant to any Ordinance or any Franchise, License, Lease or other agreement, the Board of County Commissioners may fine any Grantee or holder of a Franchise, License, Lease or other agreement up to one hundred fifty dollars (\$150.00) per day, for each day or part thereof, the violation continues or occurs.

violation or default has occurred. If the County Manager reaffirms that a material violation or default has occurred, the Grantee or Person shall be notified in writing of this decision and shall, within thirty (30) calendar days, cure the alleged material violation or default.

c. If the Grantee or Person fails to cure any material violation or default so declared pursuant to this Section within the time permitted by the County Manager, the County Manager shall prepare a written report to the Board of County Commissioners and recommend a hearing of the action to be taken. If the Board of County Commissioners, after consideration of this report and hearing, agrees that a material violation or default has occurred and should not be waived, it may order any appropriate remedy set forth in this Ordinance.

d. Any appeal of action by the County pursuant to this Section shall be made to the Sixth Judicial District Court in the County of Grant, New Mexico.

4. **Enforcement of Orders; Mandamus; Injunction.** Pursuant to the authority granted to the County under Sections 4-37-1, et seq. and Sections 4-38-13, 4-38-18, 30-14-7, 62-1-3, 67-2-6, 67-4-12, 67-7-2, 67-7-10, and 67-8-15 NMSA, 1978 Comp., whenever the Board of County Commissioners shall be of the opinion that any Person is failing or is about to fail to do anything required of it by this Ordinance or by any related order of the Board of County Commissioners, 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 Board of County Commissioners, it may direct the 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 23. FINES, PENALTIES AND FORFEITURES CUMULATIVE.** All fines, penalties and forfeitures 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 against any Person, or any officer, director, agent of employee thereof, or any Affiliated Interest or Person.

**SECTION 24. ACTION TO RECOVER PENALTIES; RESPONDENT SUPERIOR.** Actions to recover fines, penalties or damages under this Ordinance shall be brought in the name of the County of Grant, New Mexico in the Sixth Judicial Court in the County of Grant, New Mexico. In

enforcing these fines, penalties or damages, the act or omission of any Person, or any officer, agent or employee of any Person, acting within the scope of his or her authority, duties or employment, shall be deemed the act or omission of the Person. The County is entitled to recover its full costs, expenses and attorney's fees in enforcing this Ordinance. The County Attorney may institute any civil action for the enforcement of this Ordinance in the Sixth Judicial District Court in the County of Grant, New Mexico. An action for relief may include, but is not limited to, a request for any and all legal and equitable relief available to the County.

**SECTION 25. CRIMINAL PENALTIES.** Pursuant to the misdemeanor enforcement powers granted to Counties in Section 4-37-3 NMSA, 1978 Comp. (1996 Supp.), any Person that 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 also subject to criminal 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 26. NON-RENEWAL; TERMINATION; REVOCATION OR FORFEITURE.** Any right of Occupancy under a Franchise, License, Lease, or other agreement shall terminate on the expiration date of any term thereof or, at the County's option, any right or permissive use of County Public Rights-of-Way may be terminated, revoked or forfeited for the reasons set forth in this Section.

1. **Substantial Breach or Material Violation.** In addition to all other rights and powers retained by the County under this Ordinance or otherwise, the County reserves the right to terminate any Franchise, License, Lease or other agreement and all rights and privileges of any Person thereunder, to order the revocation of any permissive use or forfeiture of any property of or in the County Public Rights-of-Way, in the event of any substantial breach of Franchise, License, Lease or other agreement terms or conditions, or any material violation of this Ordinance. Such breach or violation shall include, but shall not be limited to, the following:

a. violation of any material provision under this Ordinance or any Franchise, License, Lease or other agreement or any material rule, order, regulation or determination of the County made pursuant to such;

b. attempt to dispose of any plant, equipment, facilities, fixtures, or other property located in County Public Rights-of-Way or used for the provision of a Public Service to prevent the County from purchasing it, as provided for herein;

c. attempt to evade any provision of a Franchise, License, Lease or other agreement or to practice any fraud or deceit upon the County or its subscribers or customers;

d. failure to begin or complete any system construction or system extension for the delivery or sale of any Public Service as provided for under any Franchise, License, Lease or other agreement, or failure to obtain any licenses, permits or other authorizations for any construction or provision of any Public Service prior to the scheduled dates respectively for commencing construction or commencing Service to Subscribers by law;

e. failure to provide the types or quality of service as required by any Franchise, License, Lease or other agreement or by any State or federal license, authority, or certification;

f. failure to restore service after ninety-six (96) consecutive hours of interrupted service, except when approval of such interruption is obtained from the County;

g. revocation of any charter or other authorization to conduct business in New Mexico, or any other license which is required to conduct business in the County;

h. adjudication that any Grantee or Person is bankrupt;

i. material misrepresentation of any fact in the application for or in negotiation of any Franchise, License, Lease or other agreement;

j. failure to replenish any fund secured by a letter of credit within thirty (30) days after withdrawal by the County; and

k. failure to maintain any bonds and/or insurance required by this Ordinance or any Franchise, License, Lease or other agreement.

2. No Fault Circumstances. The foregoing shall not constitute a substantial breach or material violation if the violation occurs but it is without fault of the Grantee or Person, or occurs as a result of circumstances beyond its reasonable control. Circumstances beyond the control of a Grantee or Person shall include, but not be limited to, acts of God; strikes, lockouts or other labor disturbances; unavailability of labor or materials; failure of other utilities to perform walkout and make ready and to locate underground utilities in a timely manner; or orders or restraints of any kind of the government of the United States or the State of New Mexico. A Grantee or Person shall not be excused by mere economic hardship, nor by misfeasance or malfeasance of its directors, officers or employees.

3. Notice of Termination, Revocation or Forfeiture. In the event that the County determines that any Grantee or Person has materially violated any provision of this Ordinance or any Franchise, License, Lease or other agreement, any rule or regulation promulgated pursuant thereto, or any applicable federal, State or local law, the County Manager may serve a written Notice of termination, revocation or forfeiture, by registered mail, return receipt requested, upon the Grantee or Person that continued violations may be cause for termination, revocation or forfeiture. The County shall give said Grantee or Person thirty (30) days after service of the aforementioned Notice to cure the violation.

If the violation, breach, failure, refusal or neglect is not remedied within thirty (30) days following such written Notice of termination, revocation or forfeiture and if there is no written proof that corrective action has been taken or is being actively and expeditiously pursued, the County shall place the issue of termination, revocation or forfeiture before the Board of County Commissioners.

4. Public Hearing. A public hearing shall be held under proceedings which afford the public affected by the Notice of termination, revocation or forfeiture and the Grantee or Person so noticed to be provided with an opportunity to be heard. Appropriate notice to said Grantee or Person shall include participation in the public hearing and shall constitute written notice, by registered mail, return receipt requested, of the cause for termination, revocation or forfeiture, the intent to order termination or forfeiture, and the time and place of said public hearing.

The Board of County Commissioners shall hear and consider the issue and shall hear any Person interested therein, and shall determine, in its discretion, what action should be taken, whether the Franchise, License, Lease or other agreement should be terminated or whether any permissive use should be revoked or property should be forfeited.

5. Commission Determination of Remedy and Compliance. If the Board of County Commissioners shall determine the substantial breach or material violation by the Grantee or Person was the fault of Grantee or Person and within its control, the Commissioners may, by resolution, order that the Franchise, License, Lease or other agreement be terminated, any permissive use of County Public Rights-of-Way be revoked or any property located in the Public Rights-of-Way should be forfeited; such resolution may also include resolutory conditions specifying any compliance within such period as the Commissioners may fix, such period not to be less than sixty (60) days; provided, however, that the Commissioners may not give a Grantee or Person any opportunity to comply where fraud and/or

misrepresentation has been alleged and proved to the Board of County Commissioners satisfaction.

6. Commission May Order Termination, Revocation or Forfeiture. The issue of termination, revocation, or forfeiture shall automatically be placed by the County Clerk upon the Board of County Commissioners agenda, if resolatory conditions are permitted, at the expiration of the time set by it for compliance. The Commissioners then may order the termination of any Franchise, License, Lease or other agreement, the revocation of any permissive use of County Public Rights-of-Way, or the forfeiture of any property forthwith upon finding that any Grantee or Person has failed to achieve compliance or may further extend the period in its discretion.

7. Judicial Proceeding for Termination or Forfeiture. In the event the Board of County Commissioners terminates any Franchise, License or Lease or orders the forfeiture of any property, the Grantee or Person owning said property shall have one hundred twenty (120) days after receiving Notice of termination or forfeiture in which to commence an action. Any action pursuant to this Section shall be filed in the Sixth Judicial District Court in the County of Grant, New Mexico. During such period and until a court of competent jurisdiction has decided the matter and the time for appeal has elapsed, any Franchise, License, Lease or other agreement shall remain in full force and effect, unless sooner expired and not renewed in accordance with law, and continuous service shall be provided. The County is entitled to recover its full costs, expenses and attorney's fees in the enforcement of this Section.

8. Judicial Proceeding for Non-Renewal. In the event the County makes a final decision not to renew a Franchise or License, a Grantee shall have a period of one hundred twenty (120) days after receiving Notice of the final determination in which to commence an action. Any action pursuant to this Section shall be filed in the Sixth Judicial District Court in the County of Grant, New Mexico. During such period and until a court of competent jurisdiction has decided the matter and the time for appeal has elapsed, the Franchise, License or Lease shall remain in full force and effect and continuous service provided, unless sooner terminated in accordance with law. The County is entitled to recover its full costs, expenses and attorney's fees in the enforcement of this Section.

9. Sale of System on Non-Renewal, Termination, Revocation or Forfeiture. Without limiting the rights of the County under any other provisions of federal, State or local law, if the renewal of a Franchise, License, Lease or other agreement is denied, or any Franchise, License, Lease or other agreement is terminated for cause, or any permissive use of the County Public Rights-of-Way is



revoked, or any property located in the County Public Rights-of-Way is ordered forfeited, the County shall have an option to acquire ownership of any plant, equipment, facility, fixture, or other property located in the County Public Rights-of-Way, or used to provide any Public Service within the County, or to require that the Grantee or Person owning said property transfer ownership to another Person.

10. Notification of Option. The County shall notify the Grantee or Person owning any said plant, equipment, facility, fixture, or other property of its intent to exercise its option to buy upon any order for termination, forfeiture of any property, revocation of any permissive use, or final denial of renewal within thirty (30) days of the final determination of the validity of the County's decision. The County and Grantee, or Person owning said plant, equipment, facility, fixture, or other property, shall enter into good faith negotiations promptly to establish price in accordance with this Ordinance and terms and conditions under the law.

a. If the County elects to purchase any plant, equipment, facility, fixture, or other property at the normal expiration of any Franchise, License or Lease term, the value of the Franchise, License or Lease shall be the fair market value as an outgoing business concern of the Grantee as determined by a panel of three (3) independent appraisers agreed upon by the County and the Grantee, but with the value of any Franchise, License or Lease fixed and determined at one and No/100 Dollars (\$1.00). Should the County and Grantee fail to agree upon the selection of three (3) independent appraisers, each shall select one appraiser. The two (2) appraisers so selected shall then select a third. Any determination agreed upon by two (2) of the three (3) appraisers shall be binding and controlling on both parties. Failure to provide continuous service until transfer to the County is completed shall result in devaluation or liquidation of equipment in service and any other fines or penalties for such failure allowable under this Ordinance.

b. In the event the County and any Grantee cannot agree upon the value of said plant, equipment, facility, fixture, or other property after the normal expiration of any Franchise, License or Lease term, either may give notice of a demand to the other for arbitration. Arbitration shall commence pursuant to the binding arbitration procedures in the New Mexico Uniform Arbitration Act, Sections 44-7-1 through 44-7-22 NMSA 1978 Comp. before a sole arbitrator to be mutually selected by the parties. If the parties are unable to agree upon the selection of an arbitrator, either party may petition the Sixth Judicial Court in Grant County, New Mexico for the appointment of an arbitrator. 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. The decision of the arbitrator is final and binding upon all parties. Any fee payment determined by the arbitrator to be due by either party must be made to the party within seven (7) days of the decision.

11. Right of First Refusal; Value. In the event of any forfeiture, revocation of any permissive use, or termination of any Franchise, License, Lease, or other agreement, pursuant to the provisions of this Ordinance or of any Franchise, License, Lease, or other agreement, or at the normal expiration of any Franchise, License, Lease, or other agreement term, the County shall have the right of first refusal, directly or as an intermediary, to purchase any plant, equipment, fixture, facility or other property located in the County Public Rights-of-Way or used to provide any Public Service within the County.

a. If the County elects to purchase any said plant, equipment, facility, fixture, or other property in the event of a forfeiture, revocation of any permissive use, or termination prior to the normal expiration date of any Franchise, License, Lease or other agreement, the purchase price to be paid by the County shall be the capitalization cost less depreciation, and continuous service shall be provided until transfer to the County of the sale is complete. "Capitalization cost" shall mean the monies invested for tangible assets, without any value assigned to intangible or goodwill assets, including the Franchise, License or Lease. The date of valuation shall be no earlier than the day following the date of such forfeiture, termination or revocation. Failure to provide continuous service until transfer to the County is complete shall result in the devaluation or liquidation of any plant, equipment, facility, fixture or other property used in the delivery of a Public Service and any other fines or penalties for such failure allowable under this Ordinance.

12. Limitation on Privileges. All rights, authority and grants contained or conferred are also conditioned upon the understanding and agreement that these privileges in the Public Rights-of-Way of the County are not to operate in any way so as to be an enhancement of any Person's properties or values or to be an asset or item of ownership in any appraisal thereof in the event of a County acquisition, by purchase or otherwise.

13. Transfer to County. Upon exercise of its option to buy any plant, equipment, fixture, facility or other property under this Ordinance, and payment of the sum required by the County, the Grantee, or any Person receiving said payment of sum from the County, shall transfer to the County possession and title to all plant, equipment, facilities, fixtures, or other property, real and personal, free from any and all liens and encumbrances not agreed to be assumed by the County in lieu of some portion of the purchase price set forth above; and the Grantee, or Person receiving said

payment, shall execute such warranty deeds or other instruments of conveyance to County as shall be necessary for this purpose.

#### SECTION 27. FORECLOSURE AND RECEIVERSHIP.

1. Upon the foreclosure or other judicial sale of any or all of any Grantee's or Person's Franchise, License, Lease or other agreement holdings, or upon the termination of any other lease, or right of Occupancy, covering all or a substantial part of any Franchise, License, Lease or other agreement, the Grantee or Person shall notify the County of such fact, and such notification shall be treated as a notification that a change in control of the Grantee or Person has taken place, and the provisions of the Franchise, License, Lease or other agreement governing the consent of the Board of County Commissioners to such transfer, sale or change in control shall apply.

2. The Board of County Commissioners shall have the right to cancel any Franchise, License, Lease or other agreement one hundred twenty (120) days after the appointment of a receiver, or trustee to take over and conduct the business of any Grantee, whether in receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred twenty (120) days, or unless:

a. Within one hundred twenty (120) days after election or appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and the Franchise, License, Lease or other agreement and remedied all defaults thereunder; and

b. Such receiver or trustee, within said one hundred twenty (120) days, shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the Franchise, License, Lease or other agreement granted hereunder.

SECTION 28. REMOVAL OF PROPERTY. In addition to other rights under this Ordinance, the Board of County Commissioners may upon any termination of a Franchise, License, Lease or other agreement, failure to comply with any Notice of Civil Trespass, or revocation of any permissive use, at its sole discretion, order any Grantee or holder of said Franchise, License, Lease or other agreement or other Person owning any plant, equipment, facilities, fixtures, or other property located in the Grant County Public Rights-of-Way to remove, at the said Grantee's or Person's sole cost and expense, any or all of said property from the County Public Rights-of-Way, subject to the following:

# CIVIL TRESPASS PENALTIES

1. the Commissioners may determine that the removal of property is not necessary;

2. in removing any part of the property, the Grantee, or the Person owning said property or holding any Franchise, License, Lease or other agreement for the use thereof, shall refill and compact, at its own expense, any excavation that shall be made by it and shall leave all Public Rights-of-Way in as good a condition as that prevailing prior to the Grantee's or Person's removal of said property;

3. the County shall have the right to inspect and approve the conditions of Public Rights-of-Way after removal has occurred;

4. the removal shall commence within thirty (30) days of an order to remove being issued by the Board of County Commissioners;

5. the Grantee, or Person owning said property or holding any Franchise, License, Lease or other agreement for the use thereof, shall be responsible for all necessary removals of the property and maintenance of the Public Rights-of-Way in the same manner and degree as if the property was in active use, and the Grantee, or Person owning said property or holding any Franchise, License, Lease or other agreement for the use thereof, shall retain all liability associated with such removals.

6. As an alternative to removal, any Grantee, or Person owning said property or holding a Franchise, License, Lease or other agreement for the use thereof, may, subject to the County's approval, abandon its property in place and transfer ownership of said property to the County. Nothing herein shall cause the County to incur any costs related to the removal of said property or the transfer of ownership of said property to the County.

## SECTION 29. PROCEDURES FOR CIVIL PENALTIES AND DAMAGES.

1. Prior to the assessment of any civil penalties or damages under this Ordinance, the Code Enforcement Officer shall notify any Person of any alleged violation or unlawful act that may warrant said penalty or damages, which Notice of violation shall:

a. describe the specific alleged violation or unlawful act;

b. direct the Person to correct or to show cause why the alleged violation or unlawful act should not be corrected; and,

c. state the time for response which shall be no less than thirty (30) days from the date Person is sent Notice.

2. Within the time designated, the Person must:

a. cease the unlawful act and cure any violation or (in the event the violation cannot be cured with the time period specified) take reasonable steps to begin to cure, and submit a written response acceptable to the Code Enforcement Officer within the time designated, identifying the specific steps taken; or,

b. contest the unlawful act or violation, describing all facts relevant to claim, supported by affidavits and documents. No further opportunity to cure is required before the County exercises its rights under this Ordinance. Any Grantee's duty to cure includes a duty to pay any liquidated damages owed to the County from the date of the initial violation, in accordance with the procedures described in Section 22.

3. If any Person contests the County's assertion of an unlawful act or violation, or fails to completely cure the violation or default, the Person may appear before the Board of County Commissioners to request a hearing to review the unlawful act or violation, or the County Manager or Code Enforcement Officer, having concluded that such unlawful act or violation did occur and was not cured, may request a hearing for any Notice of further action to be placed on the agenda of the next available meeting of the Board of County Commissioners, following the expiration of the time so designated to cure any said unlawful act or violation.

4. The County shall cause to be served upon any such Person, at least fourteen (14) days prior to the date of such hearing, a written Notice of the County's intent to review, the potential remedies sought, and the time and place of the meeting, notice of which shall be published at least once, no later than seven (7) days before such meeting in a newspaper of general circulation within the County. The County shall hear any Person interested therein, and shall specifically provide the Person charged with allegedly committing the unlawful act or violating any provision of this Ordinance, any related ordinance, or any provision of a Franchise, License, Lease or other agreement, with the opportunity to be heard, and shall determine whether or not any alleged unlawful act or violation by that Person was with just cause.

5. If the County shall determine such unlawful act or violation by the Person was without just cause, then the County may take any other actions it is permitted to take under this Ordinance or applicable law.

6. **Civil Penalties and Forfeiture.** Pursuant to the authority granted to the County under Sections 4-37-1, et seq. and Sections 4-38-13, 4-38-18, 62-1-3, 67-2-6, 67-4-12, and 67-8-15 NMSA, 1978 Comp., as amended, any Person that violates any material

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 Grant County Board of Commissioners, may be subject to civil penalties or forfeiture of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000), for each offense.

a. Any Person who knowingly or intentionally violates any material provision of this Ordinance, prior to receiving any Notice thereof by the Code Enforcement Officer, shall be subject to a civil penalty not to exceed five thousand dollars (\$5,000) for each violation ceased or cured.

b. Any Person who negligently violates any material provision of this Ordinance, prior to receiving a Notice thereof by the Code Enforcement Officer, shall be subject to a civil penalty not to exceed one thousand dollars (\$1,000) for each violation ceased or cured.

c. For failure to obtain any applicable permits from the County to enter the Public Rights-of-Way or to provide any requested or required maps, information, or other documents to the County, the Board of County Commissioners may impose a civil penalty of one hundred dollars (\$100.00) per day on any Person committing such act for each day, or part thereof, the material violation continues or occurs.

d. For failure to pay any said Permit fees, failure to comply with any material rules, resolutions, orders or directives of the County as set forth in this Ordinance, the Board of County Commissioners may impose a civil penalty of one hundred fifty dollars (\$150.00) per day on any Person committing such act for each day, or part thereof, the material violation continues or occurs.

e. For initiating or using a procedure or device for procuring voice or data information from a Subscriber's or customer's terminal, dwelling or business without the prior valid authorization of the affected Subscriber or customer, the Board of County Commissioners may impose a civil penalty of five hundred dollars (\$500.00) per day on any Person committing such act for each day, or part thereof, the material violation continues or occurs.

f. For selling, providing or otherwise making available to anyone any information about subscribers obtained by monitoring transmission of any type of signal from a Subscriber's terminal, dwelling or place of business without the specific written authorization of the Subscriber, the Board of County Commissioners may impose a civil penalty of five thousand dollars (\$5,000.00) on any Person committing such act for each such material violation.

In addition, the total amount of funds received for this information shall be forfeited to the County.

g. For tapping, monitoring or for arranging to tap or monitor, or knowingly permitting the tapping of, any cable, line, signal, input device or Subscriber outlet or receiver for any purpose whatsoever without the specific written authorization of the Subscriber or pursuant to court order, the Board of County Commissioners may impose a civil penalty of ten thousand dollars (\$10,000.00) per day on any Person committing such act for each day, or part thereof, the material violation occurs or continues.

h. Notwithstanding any other material provision of this Ordinance, the Board of County Commissioners may impose a civil penalty not to exceed twenty thousand dollars (\$20,000) for any single violation of a Person that:

(1) results in substantial harm to the subscribers of any Public Service provided through the County Public Rights-of-Way or substantial harm to the public interest at large, or

(2) is outside the scope of an existing Franchise, License, Lease or other agreement or not in substantial compliance with Ordinance 97-03-27-B.

7. Board of Commissioners Material Review. The Board of County Commissioners may initiate a proceeding to impose a civil penalty, remedy, damages proximate or any other lawful action under this Ordinance by giving written Notice to any Person alleged to have committed an unlawful act or material violation of this Ordinance at least (14) fourteen days prior to such proceeding that the Commissioners have facts as set forth in the Notice that, if not rebutted, may lead to an order imposing a civil penalty, damages proximate or other remedy or action under this Ordinance and that the Person alleged to have committed the material violation has an opportunity for a hearing.

a. The Commissioners may initiate a proceeding to impose a civil penalty and/or damages proximate within two years from the date of the Commissioners' discovery of the material violation, but in no event shall a proceeding be initiated more than five years after the date of the violation. This limitation shall not run against any act or omission constituting a violation under this section for a period during which any Person has fraudulently concealed the violation.

b. In determining the amount of a civil penalty, the Board of County Commissioners shall review the seriousness of the material violation or violations, damages proximate including the economic benefit, if any, resulting from the violation, any history of such violations, any good-faith efforts to comply with

applicable requirements, and such other factors as equity may require.

8. Remedies Cumulative. Remedies provided herein are cumulative and in addition to other rights the County may have at law or equity, which it may exercise at any time. The County is entitled to its costs, expenses and attorney's fees in the enforcement of this Ordinance.

**SECTION 30. UNLAWFUL ACTS; CIVIL TRESPASS; DAMAGES PROXIMATE; INVESTIGATION; NOTICES; APPEAL.**

1. Applicability. It is unlawful for any Person to locate any plant, equipment, facility, fixture, or other property in County Public Rights-of-Way without written permission for each and every Location, so authorized in compliance with County ordinances governing the Public Rights-of-Way. It is also unlawful for any Person to use any said plant, equipment, facility, fixture, or other property located in County Public Rights-of-Way, or to otherwise claim any right of Occupancy thereto, without written grant of authority in a Franchise, License, Lease or other agreement from the County for each and every use or right so claimed. Any Person who owns, controls, installs, constructs, operates, maintains, or in any other manner uses or causes to be used, in the provision of a Public Service, any plant, equipment, facility, fixture or other property unlawfully located in or occupying any Public Rights-of-Way, may be charged with Civil Trespass. Except as otherwise provided in Subsection a., this Section shall apply to all County Property and to all Persons holding or claiming an interest in, possessing, holding over upon, entering upon, or otherwise using County Property.

a. This Section shall not apply to Persons, holding or claiming an interest in, possessing, entering upon, or otherwise using County Property pursuant to and in compliance with a valid Franchise, License, Lease, or other agreement issued by the County in accordance with applicable law or laws.

b. No Person shall have an interest in, or to, or possess, occupy, enter upon or use County Property, except pursuant to and in strict compliance with the terms and conditions of a valid Franchise, License, Lease, or other agreement, or in substantial compliance with County Ordinance 97-03-27 B.

As used in this Ordinance, "substantial compliance" includes, but is not limited to, any authorized use of County Property under an expired Franchise or License, subsequent to a timely application for renewal under Ordinance 97-03-27 B that has been received by the County and which remains pending, or any unauthorized use of County Property subsequent to an application for such use under Ordinance 97-03-27 B that has been received by the County and which



remains pending, with the exception of any application that remains pending for more than one year or for which the Board of County Commissioners has adopted an ordinance authorizing such use that was not accepted by the applicant.

2. **Unlawful Acts.** It shall be unlawful to occupy, possess, hold over upon, enter upon or otherwise use County Property in violation of any provision of this Section. Each day that a Person shall so violate any provision of this Section shall constitute a separate violation. Each violation with respect to a separate parcel of County Property shall constitute a separate violation. A parcel shall be considered "separate" for purposes of this Section where rights to or interests in it are created by a separate instrument, is physically noncontiguous, or is put to separate use. The County may further define "separate parcel" in regulations adopted in accordance with Section 9 this Ordinance.

3. **Damages Proximate.**

a. Any person who violates any provision of this Section shall be liable to the County of Grant, New Mexico, for all damages proximately caused by such violation, in addition to any civil penalties or other remedies available to the County under this Ordinance.

b. Damage proximately caused by a violation shall be determined by the County based upon:

(1) the higher of the economic benefit to the violator or the detriment to the County (including, but not limited to, staff costs, legal costs, lost opportunity costs, and the cost for enforcement of violations under this Ordinance) and;

(2) all other consequential or special damages proximately flowing from the violation.

4. **Information and Investigation.**

a. Any person may provide information to the County Commissioners, County Manager, Code Enforcement Officer or other County staff in writing concerning facts which indicate a Trespass upon County Property.

b. Any employee or official of the County with knowledge of facts which indicate a Trespass upon County Property shall promptly report such information to the County Manager or County Attorney in writing.

c. Upon receipt of information indicating a Trespass upon County Property, the County Manager or County Attorney shall:

(1) Notify affected divisions, departments or programs; and

(2) Instruct the Code Enforcement Officer to undertake such investigation as may be necessary to determine whether a Trespass, or other violation of this or other Ordinance has occurred, and to proceed with the issuance of any Notice of violation pursuant to Section 29 of this Ordinance.

d. The Code Enforcement Officer shall undertake any such investigation as may be necessary to determine whether a Trespass has occurred. County staff shall be requested to provide such information as may be necessary to complete the investigation and shall consult with any affected divisions, departments or programs to determine if evidence of Civil Trespass or other violation is found.

e. Within ten (10) days of the expiration of any time designated in a Notice of violation issued under Section 29, and upon the basis of information available that Civil Trespass has occurred, the Code Enforcement Officer shall submit a written report to the County Manager or County Attorney, who may then take any of the following actions or combination of actions:

(1) Submit a Notice of trespass and Order to comply to the Board of County Commissioners for action, in accordance with Section 29 of this Ordinance;

(2) Submit a Notice of assessment for penalties, fines, and damages to the Board of County Commissioners for action, in accordance with Section 29 of this Ordinance;

(3) Submit a Notice of forfeiture, revocation of permissive use, option to buy, or Order to remove property under this Ordinance to the Board of County Commissioners for action;

(4) Enforce the Franchise, License, Lease or other agreement, in accordance with this Ordinance; or

(5) Bring a civil action, in accordance with Section 24 of this Ordinance.

##### 5. Notice of Trespass and Order to Comply.

a. A Notice of trespass and Order to comply shall be in writing and shall identify the Person who is trespassing, the location and date of the trespass, and shall contain a short statement of facts indicating the nature and circumstances of the trespass.

b. The Notice and Order shall specify what action to remedy the trespass is required of the Person who is trespassing. Action required may include:

(1) removal of persons or property from County Property;

(2) strict compliance with the terms, conditions, covenants or restrictions of any applicable Franchise, License, Lease or other agreement; and

(3) such other action as may be necessary to cure a violation.

c. The Notice and Order shall specify a reasonable period of time within which to comply.

d. The Notice and Order shall not require any action or specify any time period inconsistent with any provision of an applicable Franchise, License, Lease or other agreement.

e. The Notice and Order shall advise the Person identified therein of the rights available under Section 31 of this Ordinance.

f. The Notice shall be served upon the Person identified in the Notice as allegedly having committed the violation or any Grantee or Person specified in any applicable Franchise, License, Lease or other agreement as being responsible for such violations.

g. Nothing in this section shall prohibit the assessment of penalties, fines and/or damages for trespasses occurring prior to service of a Notice and Order or prior to the completion of any compliance period provided for by a Notice and Order.

#### 6. Notice of Assessment of Penalty and/or Damages.

a. A Notice of assessment of penalty or damages may be served with a Notice of trespass and Order to comply or at any time thereafter.

b. The Notice of assessment of penalty or damages shall be in writing and shall identify the Person who is trespassing, the location and date of the trespass, and shall contain a short statement of fact indicating the nature and circumstances of the trespass.

c. The Notice shall specify:

d. the amount of penalties assessed in accordance with Section 29 of this Ordinance;

e. the amount of damages assessed in accordance with Section 30 of this Ordinance; and

f. the time period for which each assessment is made.

g. Each item of assessment of penalty or damages shall reference the provisions of this Ordinance or of regulations adopted pursuant to this Ordinance which govern the assessment and shall be accompanied by a short description of the method by which the amount of said assessment was determined.

h. The Notice shall specify the date payment is due to the County and shall recite the provisions of subsections 5. a, b, and c of this Section.

i. The Notice shall advise the Person identified therein of the rights available under Section 31 of this Ordinance.

j. The Notice shall be served upon the Person identified in the Notice as allegedly having committed the violation or the Person specified in any applicable Franchise, License, Lease or other agreement, as responsible for such violations.

7. Processing of Notices. The Grant County Code Enforcement Officer shall deliver a copy of the Notice of trespass and Order to comply and/or the Notice of assessment of penalties, fines, and damages, and any subsequent notices, pleadings, orders or other documents or materials filed by or with the County Manager or Attorney, or by any party to any appeal, to the Person identified in the Notice, with a copy to:

Grant County Manager  
P.O. Box 898  
Silver City, NM 88062

AND:

Grant County Attorney  
P.O. Box 898  
Silver City, NM 88062

Notice shall be by overnight mail or verified hand-delivery. Notice is effective upon verified receipt of the County Manager or the County Attorney and the Person having allegedly committed the unlawful act.

8. Notice of Appeal; Hearing and Decision. Any appeal of action by the County pursuant to this Section shall be made to the Sixth Judicial District Court in the County of Grant, New Mexico.

The County is entitled to its full costs, expenses and attorney's fees in the enforcement of this Section.

**SECTION 31. PRIVATE RIGHT OF ACTION.** Any Person shall be entitled to initiate an action in the Sixth Judicial District Court in the County of Grant, New Mexico, to challenge any action by the County pursuant to Sections 22, 26, 29, 30 and 33 of this Ordinance. Once such an action is initiated, any fines or penalties assessed by the Board of County Commissioners under this Ordinance shall be deposited into an escrow account by the Person initiating such action. In the event that the County's decision with regard to the assessment is upheld, the assessments for the entire period, without any stay pending the Court's decision, shall be due and payable to the County, in addition to the County's costs, expenses and attorney's fees.

**SECTION 32. NOTIFICATION OF PROCEEDINGS.**

1. Any public proceedings, inquiry, investigation, or other action to be taken publicly or proposed to be taken publicly by the County in regard to authority granted under any Franchise, License, Lease or other agreement, shall be taken only after:

a. the minimum legally required public Notice of such action or proposed action is published in a local newspaper having general circulation in the County, (and in the absence of any such legal requirement, the Notice shall be published at least seven (7) days prior to the date of the proposed action);

b. the public Notice required by this action shall state clearly the action or proposed action to be taken, the time provided for response and the Person or persons in authority to whom such responses should be addressed, and such other procedures as may be specified by the County. If a hearing is to be held, the public Notice shall give the date and time of such hearing, whether public participation will be allowed and the procedures by which such participation may be obtained. The Grantee shall be an indispensable party to any hearing conducted and shall have the opportunity to be heard, either in person or in writing, in regard to any public proceeding or investigation of its operations.

**SECTION 33. MISCELLANEOUS.**

1. **Nondiscrimination.** No Grantee or Person holding a Franchise, License or Lease from the County to deliver a Public Service shall deny any said Service, Public Access, or otherwise discriminate against subscribers, potential subscribers, or general citizens on the basis of race, color, religion, ancestry, national origin, age, sex, marital status or physical or mental handicap; or deny any Service or Public Access to any group of potential subscribers because of the income of the residents of the area in

which a group of potential subscribers reside; providing that, nothing shall prohibit any Grantee from providing a "lifeline" type of service to the poor, elderly, the developmentally disabled or physically disabled.

Every Grantee or Person holding a Franchise, License, Lease or other agreement shall ensure that all of its facilities in Public Rights-of-Way are located and constructed in a manner such that Public Access is not impaired in compliance with the Americans with Disabilities Act ("ADA"). Following Notice by the County of an ADA construction problem, the Grantee or Person holding a Franchise, License, Lease or other agreement shall have thirty (30) days or other reasonable time to remedy the problem. In the event the County and the Person holding a Franchise, License, Lease or other agreement cannot agree that a problem exists, any dispute shall be submitted to nonbinding arbitration.

## **2. Payment of Any Fines, Penalties or Damages.**

a. All fines, penalties and damages assessed pursuant to this Ordinance shall be due and payable upon receipt of Notice thereof and shall become delinquent twenty-five (25) days thereafter.

b. Payments shall be made by certified check made payable to the order of Grant County, New Mexico.

c. Interest on any delinquent payment of fines, penalties and damages shall accrue from the date of Notice thereof until paid. Said interest shall be assessed at five percent (5%) above the highest prime rate listed on the date of Notice by any bank operating within Grant County, and said rate shall continue in effect until assessment of said fine, penalty or damage is paid or otherwise discharged.

d. Monies collected "through payment" of assessments of penalties, fines and damages, and any interest thereon, shall be deposited in the Grant County Public Rights-of-Way Management Fund.

**3. Governance of Law.** Every Grantee or Person holding a Franchise, License, Lease or other agreement from the County is explicitly subject to the exercise of police powers by the County, any other governmental powers, and the County's rights as a property owner under State and federal laws. This Ordinance is governed by and construed and enforced in accordance with the Constitution and the laws of the State of New Mexico.

**4. Time Limit For Recourse In the Court.** Every action to vacate or set aside any determination or order of the Board of County Commissioners or to enjoin the enforcement or to prevent the order or determination from becoming effective, unless otherwise

specified in this Ordinance or other law, shall be commenced and every appeal or right of recourse to the courts shall be taken or exercised within thirty (30) days after the entry or rendition of the order or determination. The right to commence any such action or to take or exercise any appeal or right of recourse to the courts shall terminate absolutely at the end of the thirty (30) days.

5. Remedies and Penalties Not Exclusive. All remedies, fines and penalties granted pursuant to this Ordinance and any Franchise, License, Lease, or other agreement are cumulative and not exclusive, and the recovery or enforcement by one available remedy or imposition of any fine or penalty is not a bar to recovery or enforcement by any other such remedy or imposition of any other penalty. The County reserves the right to enforce the penal provisions of any ordinance or resolution and to avail itself of any and all remedies available at law or in equity. Failure to enforce shall not be construed as a waiver of a breach of any term, condition or obligation imposed upon any Person holding a Franchise, License, Lease or other agreement by or pursuant to this Ordinance or any other ordinance governing the Public Rights-of-Way. A specific waiver of a particular breach of any term, condition or obligation imposed upon any Person holding a Franchise, License, Lease or other agreement by or pursuant to this Ordinance or any Franchise, License, Lease, or other agreement shall not be a waiver of any other or subsequent or future breach of the same or of any other term, condition or obligation, or a waiver of the term, condition or obligation itself.

6. Compliance with Local Ordinances. In accepting any Franchise, License, Lease or other agreement, every Person acknowledges that it shall at all times during the term of its Franchise, License, Lease or other agreement be subject to all lawful exercise of the police power by the County to manage its Public Rights-of-Way through ordinances of general applicability. The County reserves the right to adopt from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of its police power.

7. Compliance with State and Federal Laws. Notwithstanding any other provisions of this Ordinance to the contrary, the County and any Grantee or Person occupying or using the County Public Rights-of-Way to provide a Public Service shall at all times comply with all laws and regulations of the State of New Mexico and federal government or any administrative agency thereof.

8. No Limitation. The duty of every Grantee to prepare reports, submit documents and conduct tests under this Ordinance shall not limit the County's right to inspect documents, or any Grantee's or Person's duty to respond to requests for information

under other provisions of a Franchise, License, Lease or other agreement or other generally applicable law.

9. **Confidentiality of Information.** A Grantee, or any other Person occupying or using the Public Rights-of-Way, shall mark any information which it produces to the County which constitutes a business or trade secret "Confidential," or produce it to a designated representative of the County, if necessary for purposes of holding such information confidential. To the extent permitted under applicable law, and except where to do so could be inconsistent with its obligations under any Franchise, License, Lease or other agreement and applicable law, information produced by a Grantee which contains business or trade secrets shall be kept confidential. The County shall promptly notify a Grantee, or any Person occupying or using the Public Rights-of-Way, if any other Person requests access to the information under the New Mexico Open Records Act, or if the County determines that it will be necessary to reveal the information in the discharge of its obligations under a Franchise, License, Lease or other agreement and applicable law, so that the Grantee, or Person occupying or using the Public Rights-of-Way, may take appropriate steps as may be available to protect any rights it may claim to have to prevent disclosure.

10. **Non-enforcement.** Any Grantee, or other Person occupying or using the Public Rights-of-Way, shall not be relieved of its obligation to comply with any of the provisions of this Ordinance by reason of any failure of the County to enforce prompt compliance.

11. **Captions.** The captions to sections throughout this Ordinance are intended solely to facilitate reading and reference. Such captions shall not affect the meaning or interpretation of this agreement.

12. **Severability.** If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason illegal, invalid or unconstitutional by the decision of any court or regulatory body of competent jurisdiction, such decision shall not affect the validity of the remaining portions hereof. The Board of County Commissioners hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases be declared illegal, invalid or unconstitutional. The invalidity of any portion of this Ordinance shall not abate, reduce or otherwise affect any consideration or other obligation required of any Person under the Ordinance. All ordinances and parts of ordinances in conflict with the provisions of this Ordinance are hereby repealed.



13. Notice to County. For the purpose of this Ordinance, requirements for Notice to the County will be to:

Grant County Manager  
P.O. Box 898  
Silver City, NM 88062

With a copy to:

Grant County Attorney  
P.O. Box 898  
Silver City, NM 88062

Notice shall be by overnight mail or verified hand-delivery. Notice is effective upon verified receipt of delivery to the Grant County Manager or the Grant County Attorney, unless the County provides notice, in writing, of a change in the addresses above.


14. Reservation of Rights. Acceptance of the terms and conditions of any Franchise, License, Lease or other agreement will not constitute, or be deemed to constitute, a waiver, either expressly or impliedly of any constitutional or legal right which the County may have or may be subsequently determined to have either by subsequent legislation or court decisions. The County reserves all rights under applicable federal and State Constitution and laws.

15. Force Majeure. In respect to any provision of this Ordinance, the violation or noncompliance of which could result in the imposition of a fine, penalty, forfeiture or other sanction upon any Grantee, such violation or noncompliance shall be excused where such violation or noncompliance is the result of Acts of God, war, civil disturbance, strike or other labor unrest, or similar events, the occurrence of which was not reasonably foreseeable by the Grantee or is beyond the Grantee's reasonable control.


16. Public Notification Requirements. Notice of Intent to adopt this Ordinance was published in a newspaper of general circulation not less than two weeks prior to its adoption at a meeting, called and held in accordance with Section 3-17-3, NMSA 1978 Comp. During the period of publication, a copy of this Ordinance was available for public review at the Grant County Clerk's Office.

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 12th day of November, 1998.

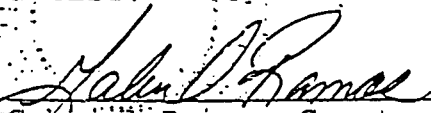
GRANT COUNTY BOARD OF  
COMMISSIONERS

  
Manuel T. Serna, Chairman

  
Zeke Santa Maria, Member

  
Carl W. Scholl, Member

ATTEST:

  
Gabriel Ramos, County Clerk

Reviewed and approved as to form:

\_\_\_\_\_  
Grant County Attorney