



VILLAGE OF CORRALES
ORDINANCE NO. 18-005

AN ORDINANCE GRANTING UNITE PRIVATE NETWORKS, LLC, A FRANCHISE AND RIGHT TO OWN, CONSTRUCT, OPERATE, MAINTAIN, UPGRADE, AND REPAIR ITS COMMUNICATIONS SYSTEM ALONG THE RIGHTS-OF-WAY WITHIN THE VILLAGE, AND THE RIGHT TO RENT, USE AND OCCUPY THE RIGHTS-OF-WAY WITHIN THE VILLAGE; ESTABLISHING THE TERMS AND CONDITIONS OF THE FRANCHISE; AND ESTABLISHING CERTAIN REMEDIES FOR THE VIOLATION OF THE FRANCHISE.

WHEREAS, the Village Council, the governing body of the Village desires to authorize Unite Private Networks, LLC use and occupation of Village Rights-of-way, in exchange for the consideration granted herein.

BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE VILLAGE OF CORRALES:

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FRANCHISE AGREEMENT

THIS AGREEMENT (the "Agreement") is entered into by and between the Village of Corrales, New Mexico, a municipal corporation ("Village"), and Unite Private Networks, LLC ("Franchisee"), collectively, the "Parties." In consideration of the covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby covenant and agree as follows:

Section 1. Definitions.

For the purposes of this Franchise Agreement, the following terms, phrases, words, and their derivations shall have the meanings set forth herein, unless the context clearly indicates that another meaning is intended. Words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory, and "may" is permissive.

(A) "Affiliate" means each person who falls into one or more of the following categories:

- (1) Each person having, directly or indirectly, a controlling interest in Franchisee.
- (2) Each person in which Franchisee has, directly or indirectly, a controlling interest.
- (3) Each person that, directly or indirectly, is controlled by a third party which also directly or indirectly controls Franchisee.
- (4) Affiliate shall in no event mean any creditor of Franchisee solely by virtue of its status as a creditor and which is not otherwise an affiliate by reason of owning a controlling interest in, being owned by, or being under common ownership, common management, or common control with, Franchisee.

(B) "Attachment" means any wire, optical fiber or other cable, or any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

(C) "Business License" means the written authorization of the Village to engage in the business for which the license was issued in accordance with Chapter 10 of the Village Code of Ordinances

(D) "Code" or "Village Code" means the Village Code of Ordinances as amended from time to time.

(E) "CPI-U" means the Consumer Price Index for All Urban Consumers, U.S. City Average, as published by the U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C.

(F) "Director" means the Director of the Public Works Department of the Village, or any successor department, or his or her designee.

(G) "Easement" means an interest in and the right to use the real property of another, but not including licenses or leases.

(H) "Emergency" means those conditions which are not in the control of Franchisee, including, but not limited to, natural disasters, civil disturbance and severe weather.

(I) "Facility" or "Facilities" means, collectively, any and all fiber optic cable or appurtenant facilities and any other property to be located in, upon, along, across, under or over the Village's Rights-of-Way.

(J) "Franchise" means the nonexclusive privilege granted by the Village to Franchisee to construct, operate and maintain its System in the Village's Rights-of-Way.

(K) "Franchise Agreement" or "Agreement" means this agreement.

(L) "Franchise Area" means the area within the jurisdictional boundaries of the Village and any area annexed by the Village during the term of this Agreement.

(M) "Franchisee" means Unite Private Networks, LLC and its lawful successors or assigns.

(N) "Gross Revenue" includes any and all revenue received by Franchisee for Services provided to customers through use of its Facilities including but not limited to: all revenues for Services charged on a flat rate, usage or mileage basis; all revenues from installation, connection or disconnection charges or fees; all revenues from penalties or charges to customers for checks returned from banks, net of bank costs paid; all revenues from equipment sold or rented to customers on customers' premises; all revenues from joint pole or conduit use; all revenues from charges for access to local and long distance networks (however, gross revenue shall not include such access revenues if a local exchange carrier has paid a franchise fee on any such revenue); all revenues from the authorized rental, lease, resale or use of any portion of Franchisee's Facilities in the Village including plant, facilities or capacity leased to others; recoveries of bad debts previously written off and revenues from the sale or assignment of bad debts; all revenues from enhanced data service; all interconnect revenues from interexchange carriers (however, gross revenue shall not include interconnection services revenues received from any source if a local exchange carrier has paid a franchise fee on any such revenue; and all revenues from co-location connection fees. "Gross Revenue" shall not include: (a) any revenue or charges by Franchisee to customers outside of the Franchise Area; (b) any bad debt; provided, however, that any portion of such debt which is written off but subsequently collected shall be included in Gross Revenue in the period collected; (c) any gross receipts taxes on services furnished by Franchisee that are imposed directly on any customer or user by the State, the Village or other governmental entity and which

are collected by Franchisee on behalf of said governmental unit, or (d) proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks.

(O) "Person" means a natural person or any form of business or social organization, including but not limited to the estate of a natural person, a corporation, limited-liability company, partnership, association, trust, or any other form of legal entity.

(P) "Public Improvement" means, by way of illustration and without limitation, any improvements for roadways and pavements, sidewalks, curbs and gutters, landscaping, street lights, foundations, poles and traffic signal conduits, water mains, sanitary and storm sewers, tunnels, subways, people movers, viaducts, bridges, underpasses, overpasses, public buildings or public structures, or other public installations or improvements which are to be used by the general public.

(Q) "Public Regulation Commission" or "NMPRC" means the New Mexico Public Regulation Commission and its predecessors and successors.

(R) "Rights-of-Way" means the surface of, and the space above and below, any and all public highways, streets, roads, alleys, avenues, tunnels, parkways, and Easements granted to the Village as the same now or may hereafter exist within the Village, including State highways now or hereafter established within the Village to whatever extent the Village may have jurisdiction to authorize the use of same for the purposes herein specified. Rights-of-way shall not include property that is under the control of the Village that is not a public right-of-way, including but not limited to Village owned or used buildings and structures, dedicated or other parks, Village owned utility and light poles, traffic signals, and pedestrian and bike paths.

(S) "Services" means dark fiber services, lit fiber services including without limitation private network services (including point-to-point, hub and local area network), optical and other Ethernet applications, Internet services, colocation services, data center services, cloud connection and related services, voice (through voice over the internet (voip) and switched voice), other customized network applications, any switched or other one-way or two-way transmission of voice or data, including but not necessarily limited to: services interconnecting interexchange carriers, services connecting interexchange carriers or competitive access carriers to local exchange providers, private line point-to-point service for end users, local exchange telephone services or other services directly regulated by the NMPRC. "Services" shall not include cable services as defined in Title 47, Chapter 5. Subchapter V-A of the United States Code, as amended (47 USCA § 521, et seq.) or as recognized by the FCC. Before proposing to provide such cable services in the Village, Franchisee agrees to obtain a separate franchise from the Village for the provision of this service.

(T) "System" means the entirety of all Franchisee Facilities.

(U) "Transfer" or "Assignment" means any transaction in which: (1) any ownership or other right, title or interest of more than five percent (5%) in Franchisee or its Facilities is transferred, sold, assigned, leased or sublet, directly or indirectly, in whole or in part; (2) there is any change or transfer of control of Franchisee or its Facilities; or

(3) the rights and/or obligations held by Franchisee under this Agreement are transferred, directly or indirectly, to another party. A "transfer" or "assignment" shall not include a mortgage, pledge or other encumbrance as security for money owed.

(V) "Village" means the Village of Corrales, a municipal corporation of the State of New Mexico in its incorporated form or in any subsequent consolidated, reorganized, enlarged, annexed or reincorporated form.

(W) "Village Council" means the elected governing body of the Village.

(X) "Village Administrator" means the person appointed to perform such administrative functions of the Village government as may be required of him or her by the Village Council or Village Mayor, or his or her designee.

Section 2. Term.

This Agreement shall commence on the first day of June 2018 ("Effective Date"), and shall supersede all prior franchise agreements between the parties. This Agreement shall continue in full force and effect through May 31, 2023, or until this Agreement shall be terminated for noncompliance by Franchisee with the terms and conditions imposed herein, or with such reasonable restrictions, limitations and regulations as the Village Council may from time to time impose by ordinance, or until Franchisee shall permit its corporate existence to expire without renewal, whichever of the foregoing shall first occur. The Franchise shall not terminate solely by reason of a merger, sale or other consolidation if the NMPRC approves such merger, sale or other consolidation and a successor to Franchisee assumes the obligations of Franchisee hereunder.

Section 3. Non-Exclusivity.

Franchise granted by this Agreement is not exclusive, and the Village hereby reserves the right, power, and authority to grant similar rights, privileges, permission and authority to any person at any time.

Section 4. Grant of Franchise.

Subject to the terms and conditions of this Agreement and applicable Village ordinances, the Village hereby grants Franchisee the right to own, construct, operate, maintain, upgrade, and repair its System along the Rights-of-Way within the Franchise Area, and the right to rent, use and occupy the Rights-of-way within the Franchise Area, for the sole purpose of providing its Services.

Section 5. Limitations on Grant of Franchise.

- 5.1 LIMITATIONS. Nothing contained in this Agreement shall be construed as authorizing Franchisee to use, or permit the use of any portion of its System for any purpose other than those reasonably necessary for the transmission or distribution of its Services, unless prior written approval is obtained from the Village.

- 5.2 **SHARED USE OF RIGHTS-OF-WAY.** The right of Franchisee to maintain Facilities in the Rights-of-Way pursuant to this Agreement and the Village Code shall be equal to similar rights of other utilities, except that earlier-installed facilities shall have a prior right to occupy the necessary and reasonable amount of space in the Rights-of-Way.
- 5.3 **FRANCHISEE'S ACQUISITION OF PROPERTY RIGHTS.** Franchisee shall not acquire as a result of the location of its Facilities in any existing or proposed Rights-of-Way, even though such location was approved by the Village, any vested right or interest in any particular Rights-of-Way location by virtue of the Franchise.
- 5.4 **AMERICANS WITH DISABILITIES ACT ("ADA").**
- (a) Facilities installed in the Rights-of-Way during the term of this Agreement, or Facilities in the Rights-of-Way which are altered such that application of the ADA is triggered, shall comply with the requirements of the ADA.
 - (b) With respect to existing Facilities located in Rights-of-Way which prevent disabled persons' use of and access to buildings, structures, facilities, sidewalks, streets, alleys or other paths of travel in violation of the requirements of the ADA, the Franchisee shall correct such violations in good faith, up to an annual maximum of \$50,000, which amount shall escalate annually in accordance with the CPI-U, during the term of the Agreement so long as access barriers caused by the Facilities remain ("ADA Fund").
 - (c) Franchisee will meet periodically with the Village to coordinate and establish plans and time frames for removal of access barriers caused by the Facilities, with priority given to more serious access barriers. Further, within thirty (30) days of the Franchisee's receipt of a notice of a third-party complaint from the Village or others identifying Facilities that may cause access barriers in violation of the ADA, the Parties shall meet to review the complaint and determine an appropriate response and required repair, if any. If repair is required, the Parties shall establish plans and time frames for the repair. Franchisee's scope of work shall consist of removal and or relocation of Facilities, and the ADA Fund shall be limited to the costs to accomplish such work, including costs to acquire Easements for relocated Facilities, if necessary.
 - (d) Notwithstanding the Parties' efforts to eliminate access barriers in the Village, Franchisee does not assume the Village's duties and obligations under the ADA, and nothing in this Agreement shall be deemed by the Parties to modify the Franchisee's obligations with regard to its Facilities under the ADA.

Section 6. Franchise Fees; Payments And Financial Controls.

- 6.1 **FRANCHISE FEE.** As compensation for the benefits and privileges granted under this Agreement and in consideration of permission to rent, use and occupy the Village Rights-of-Way, Franchisee shall pay as a Franchise Fee to the Village throughout the duration of this Agreement, an amount equal to four percent (4%) of Franchisee's annual Gross Revenues provided that Franchisee shall not pay less than SIX THOUSAND DOLLARS (\$6,000.00) annually, paid in quarterly installments. The minimum annual fee shall be trued up in the December payment for the prior calendar year.
- 6.2 **PAYMENTS.** Franchise Fee payments to the Village, whether computed or assessed at the minimum, shall be computed and paid quarterly for the preceding calendar quarter ending March 31, June 30, September 30, and December 31. Each quarterly payment shall be due and payable no later than thirty (30) days after said dates.
- 6.3 **ACCEPTANCE OF PAYMENT AND RECOMPUTATION.** No acceptance of any payment shall be construed as an accord by the Village that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the Village may have for further or additional sums payable or for the performance of any other obligation of Franchisee.
- 6.4 **FRANCHISE FEE REPORTS.** Each payment shall be accompanied by a written report to the Village, verified by an authorized representative of Franchisee, containing an accurate statement in summarized form, as well as in detail, of Franchisee's Gross Revenues and the computation of the payment amount. Such reports shall detail all Gross Revenues of the System.
- 6.5 **ANNUAL FRANCHISE FEE REPORTS.** Franchisee shall, within sixty (60) days after the end of each year, furnish to the Village a statement stating the total amount of Gross Revenues for the year and all payments, deductions and computations for the period. Such statement shall be audited by a certified public accountant, who may also be the chief financial officer or controller of Franchisee, prior to submission to the Village. Such reports shall be subject to the audit provisions contained in Section 26.
- 6.6 **LATE PAYMENTS.** In the event any payment is not received within thirty (30) days in accordance with this Section, Franchisee shall pay at the rate of eight percent (8%) per annum, compounded quarterly calculated from the date the payment was originally due until the date the Village receives the payment.
- 6.7 **UNDERPAYMENTS.** If a net Franchise Fee underpayment is discovered as the result of an audit, Franchisee shall pay interest at the rate of the eight percent (8%) per annum, compounded quarterly, calculated from the date each portion of the underpayment was originally due until the date Franchisee remits the underpayment to the Village.

- 6.8 ALTERNATIVE COMPENSATION. In the event the obligation of Franchisee to compensate the Village through Franchise Fee payments is lawfully suspended or eliminated, in whole or part, then Franchisee shall pay to the Village compensation equivalent to the compensation paid to the Village by other similarly situated users of the Village's Rights-of-Way for Franchisee's use of the Village's Rights-of-Way, provided that in no event shall such payments exceed the equivalent of five percent (5%) of Franchisee's Gross Revenue.

Section 7. Franchisee's Use of Village Property.

- 7.1 FRANCHISEE'S FUTURE ATTACHMENTS TO VILLAGE PROPERTY. The Franchise granted herein does not authorize Franchisee to attach any part of its Facilities to Village property located within or outside of the Rights-of-Way until and unless Franchisee has entered into a separate written agreement with the Village for the rights of attachment and use. Nothing in this Agreement obligates the Village to approve Franchisee's attachments to any use of any particular Village property, and the Village may, in its sole discretion, withhold its consent to any such proposed attachments and use.
- 7.2 FRANCHISEE'S PRIOR ATTACHMENTS TO VILLAGE PROPERTY. If Franchisee has attached some of its Facilities to Village property without separate written agreements with the Village authorizing the attachments to and use of such property, then no later than six months after the Effective Date of this Agreement, Franchisee shall provide the Village a list of all Village-owned, known facilities to which Facilities are attached. Franchisee shall notify the Village of additional attachments to Village facilities within a reasonable amount of time, as it becomes aware of them throughout the course of Franchisee's normal operations, but no less than semiannually.
- 7.3 INDEMNIFICATION OBLIGATIONS. Franchisee acknowledges that its indemnification obligations under Section 23 of this Agreement extend to any and all claims or liabilities of whatever nature arising out of Franchisee's attachments to or use of Village property.

Section 8. Third-Party Attachment to Franchisee's Facilities; Undergrounding; Pole Ownership.

- 8.1 PRIOR AUTHORIZATION BY VILLAGE REQUIRED FOR ATTACHMENT TO FRANCHISEE'S FACILITIES BY THIRD-PARTY. Franchisee shall not allow the attachment to any of its Facilities in the Rights-of-Way by a third party unless the third party is authorized by the Village, as follows:
- (a) Upon a third party's initial request to enter into an attachment agreement, Franchisee shall notify Village in writing of the name and address of such third party;
 - (b) Upon verification by Village that said third party is duly licensed,

franchised or otherwise permitted to occupy the Rights-of-way, or if no response is provided by Village within 45 days after Franchisee's notification to Village, Franchisee may permit such third party to attach its facilities to Franchisee's Facilities within the Rights-of-Way;

- (c) If the third party presents written confirmation from the Village of its legal right to use the Rights-of-Way, including but not limited to an appropriate franchise agreement, rights-of-way agreement, license agreement or similar agreement between the Village and the third party, Franchisee shall not be required to verify the third party's status with the Village.

8.2 **UNAUTHORIZED USE OF RIGHTS-OF-WAY; ENFORCEMENT.** Franchisee acknowledges that, notwithstanding any legal rights that a telecommunications provider, cable television provider or any other service provider may have to use the Franchisee's Facilities in Rights-of-Way, including pole attachments, the Village retains a paramount interest in managing the Rights-of-Way. The Village shall be solely responsible for enforcement of its permitting requirements as a result of a third party's use of Facilities. If Franchisee permits a third party to use its Facilities without satisfying the requirements of Subsection 7.1, it may be subject to a claim for liquidated damages pursuant to Section 22.

8.3 **DISCLOSURE OF THIRD PARTIES' PRIOR ATTACHMENTS.** If Franchisee has previously permitted the attachment of third parties on some of its Facilities, then no later than six months after the Effective Date of this Agreement, Franchisee shall provide the Village in writing the name and address of such third party, a general description of the location of such attachments, and copies of all pole attachment agreements or similar agreements concerning the use of Franchisee's Facilities by third parties.

8.4 **RELOCATION REQUIREMENTS.** Whenever Franchisee intends to relocate or place underground any of its overhead Facilities which are in the Rights-of-Way, Franchisee shall, at the earliest date possible, provide written notice to the Director and to all third parties that have attached their own facilities to such overhead Facility of the anticipated relocation of the overhead Facility. Such notice shall include an estimated timetable for completion of the relocation taking into consideration third party attachments. As between the Village and Franchisee, Franchisee shall remain responsible for all claims and liabilities of whatever nature related to the overhead Facility until such time as such Facility has been completely removed and the Rights-of-Way repaired and restored to the satisfaction of the Director.

Section 9. Quality of Use; Construction; Maintenance; Expansion; Reconstruction.

9.1 **WORKMANLIKE MANNER.** Franchisee agrees that all of its System within

the Village shall be installed, used and maintained in a good, workmanlike manner and in accordance with good engineering practices, and in compliance with all applicable laws, ordinances, rules and regulations of the United States, the State of New Mexico, and the Village from time to time in effect, including but not limited to applicable portions of the National Electrical Safety Code, and all applicable Village Code.

- 9.2 SAFETY AND QUIET ENJOYMENT OF PROPERTY. Franchisee agrees that the installation, use, and maintenance of its System, including, but not limited to, all poles and power lines shall be attached and secured, or otherwise constructed and maintained, in such a manner as to avoid unreasonable danger to persons and property and as to cause minimum interference with the proper use of public roads or with any reasonable use and enjoyment of adjacent property by owners.
- 9.3 INTERFERENCE WITH VILLAGE FACILITIES. The installation, use and maintenance of Franchisee's System within the Rights-of-Way shall be in a manner so as not to interfere with the placement, construction, use and maintenance of Village street lighting, drains, sewers, traffic signal systems or other Village systems that have been, or may be, authorized by the Village Council, Village Administrator, or the Village Council acting as the governing body of any special district or entity, now or hereafter created for any purpose.
- 9.4 PERMITS. Prior to the installation, construction, reconstruction, replacement, extension or relocation of any portion of the System authorized herein, Franchisee shall apply for and obtain from the Village all applicable permits as the same may be required by Village Code. The Village shall issue such permit to Franchisee on such conditions as are reasonable and necessary to ensure compliance with the terms and conditions of this Agreement.
- 9.5 NOTICE TO ADJOINING PROPERTIES. Except in the case of an emergency, before commencing a project (for which Franchisee, or its contractor, has pulled the applicable permit) in Rights-of-Way upon which residential property is located or is abutting thereto, Franchisee shall notify such abutting residents at least two (2) days prior to the date that Franchisee proposes to commence construction. Notice shall be in writing by one of the following methods: in person, by posted notice on the Rights-of-Way where the proposed project is scheduled to be built (which notice is to be capable of being read by passing motorists), by door hanger, or by mail, with a description of the proposed project and the name of Franchisee and its telephone number.
- 9.6 RESTORATION OF RIGHTS-OF-WAY. With respect to projects for which Franchisee, or its contractor, has pulled the applicable permit, Franchisee shall, at its own expense, after installation, construction, relocation, maintenance, removal or repair of any of Franchisee's Facilities within the Rights-of-Way, restore the surface of the Rights-of-Way and other Village

property which may be disturbed or damaged by such work, to at least the same condition as it was in immediately prior to any such work. The Village shall have the final approval of the condition of the Rights-of-Way and any other Village property after restoration pursuant to the provisions of applicable Village Codes, ordinances, regulations, standards and procedures as now exist or may be hereafter amended or suspended.

- 9.7 SURVEY MONUMENTS. All survey monuments which are disturbed or displaced by Franchisee in its performance of any work under this Agreement shall be referenced and restored by Franchisee in accordance with all pertinent federal, state and local standards and specifications.

Section 10. Work by Others; Abandonment of Rights-of-Way.

- 10.1 VILLAGE AND OTHER UTILITY PROVIDERS. The Village reserves the right to lay and permit to be laid, sewer, gas, water, electrical, telecommunications, cable television and other pipe lines or cables and conduits, and to do and permit to be done, any underground and overhead work, and any attachment, restructuring or changes in aerial facilities that the Village Administrator requires in, across, along, over or under any Rights-of-Way occupied by Franchisee, and to change any curb or sidewalk or the grade of any street. The Village also reserves the right to lay, construct, erect, install, use, operate, repair, remove, relocate, re-grade, widen, realign or maintain any public roads or any surfaces or subsurface improvements. In allowing work to be performed, the Village shall not be liable to Franchisee for any damages, except those caused by the willful misconduct of the Village; provided, however, nothing herein shall relieve any other person or entity, including any contractor, subcontractor, or agent of the Village from liability for damages to Franchisee.
- 10.2 ADJACENT PROPERTY OWNERS. In the event that during the term of this Agreement, the Village authorizes abutting landowners to occupy space under the surface of any Rights-of-Way, such grant to an abutting landowner shall be subject to the rights herein granted to Franchisee.

Section 11. Undergrounding of Facilities.

Franchisee acknowledges that the Village desires to promote a policy of undergrounding of Facilities within the Franchise Area. To that end Franchisee expressly acknowledges Village Ordinance No. 17-012 passed, approved and adopted on October 24, 2017 and agrees to comply in all respects with such Ordinance as the same may be amended from time to time.

Section 12. Relocation of Facilities.

- 12.1 REMOVAL OR RELOCATION OF FACILITIES BY FRANCHISEE. Upon written notice from the Village, Franchisee shall, at its own expense, remove, relocate, or reconstruct any portion of its Facilities as reasonably necessary

to accommodate any Village Public Improvement, project and all other rights reserved by the Village in this Agreement.

12.2 PERMITS FOR REMOVAL OF FACILITIES. Franchisee agrees to obtain a permit as required under Subsection 8.4, and to remove, relocate, or reconstruct said Facilities as provided herein.

12.3 NOTICE TO RELOCATE; FRANCHISEE'S ACKNOWLEDGMENT OF NOTICE TO RELOCATE; DESIGNATION OF NEW LOCATION.

(a) Upon initiation of a new public improvement project ("Improvement"), the Village shall notify the Franchisee in a timely manner of the general scope of the Improvement and requirement to reconstruct, remove or relocate its Facilities ("Notice"). The Notice shall include the plans for the Improvement, which plan may include, as applicable, grading, utility (current and future utility locations and depths), trails, bridge and wall, and other designs and construction plans for the Improvement. Within thirty (30) days after receiving the Notice, the Franchisee shall meet with the Village and establish a time schedule, mutually agreeable to the Parties, reasonable in the circumstances given the nature and scope of the work required for removal or relocation of said Facilities and based on standard practices in the construction industry.

(b) If Franchisee identifies a recommended location for its relocated Facilities within the Rights-of-Way, the Director shall provide that location or a reasonable alternate location within the Rights-of-Way.

12.4 REVISION IN SCOPE OF WORK; EXTENSION OF TIME; APPEAL OF EXTENSION DENIAL. If, following the delivery of the plans for an Improvement there is a substantial change in the scope of the relocation work related to the Improvement, or other circumstances beyond the control and without the fault or negligence of Franchisee, including, but not limited to, changes in elevation or changes affecting Rights-of-Way alignment and widths of alignment, the Village shall notify Franchisee of the substantial changes. Based on the substantial changes, Franchisee may seek an extension of the schedule by written request submitted to the Director along with relevant supporting information. The Director shall grant such request if he or she determines additional time is required due to circumstances beyond the control and without the fault or negligence of Franchisee. If the request for extension of time is denied, Franchisee may appeal the denial to the Village Council by notice to the Village Administrator within fourteen (14) days from the receipt of notice of denial. The decision of the Village Council shall be final.

12.5 EMERGENCY RELOCATION; COST; CONTACT NUMBER. In the event an emergency posing a threat to public safety or welfare requires the relocation of Franchisee's Facilities, the Village shall give Franchisee notice

of the emergency as soon as reasonably practicable. Upon receipt of such notice from the Village, Franchisee shall, at its own expense, respond as soon as reasonably practicable to relocate the affected Facilities. Franchisee shall at all times keep the Village informed of Franchisee's contact persons for emergencies and their telephone numbers where they can be reached twenty-four (24) hours a day.

- 12.6 **THIRD PARTY REQUEST.** Whenever any third party requires the relocation of Franchisee's Facilities to accommodate work of such third party within the Franchise Area, including requests by the Village on behalf of or for the benefit of such third party, Franchisee shall have the right as a condition of any such relocation to require payment by such third party to Franchisee, for any and all costs and expenses incurred by Franchisee in the relocation of the Facilities. Any condition or requirement imposed by the Village upon any third party (including, without limitation, any condition or requirement imposed pursuant to any contract or in conjunction with approvals or permits obtained pursuant to any zoning, land use, construction or other development regulation) which requires the relocation of Franchisee's Facilities shall be a condition or requirement causing relocation of Franchisee's Facilities to occur in accordance with this subsection.
- 12.7 **REMOVAL OF FACILITIES BY VILLAGE; DAMAGES.** If Franchisee fails to remove or relocate its Facilities as required by this Section, the Village may remove or relocate said Facilities and charge the cost of removal or relocation to Franchisee. The Village will not be held liable for any losses or damages resulting from the Village's removal or relocation of such Facilities. In addition to any other remedy for damages provided in this Agreement, the Village may recover from Franchisee actual third-party damages incurred by the Village if Franchisee fails to complete the reconstruction, removal or relocation of its Facilities within the time schedule established pursuant to this Section 11.
- 12.8 **COOPERATION.** The Village and Franchisee will cooperate on the planning for the relocation and selection of a new location for any of Franchisee's Facilities to minimize the cost of such relocation.
- 12.9 **TEMPORARY REMOVAL; RELOCATION.** If applicable, Franchisee shall, on request of any person holding a permit to move a building, temporarily raise or lower its wires or cables to permit the movement of the building. The expense of temporary removal or raising or lowering of wires and cables shall be paid by the person requesting the same, and Franchisee shall have the authority to require such payment in advance. Franchisee shall be given at least thirty (30) days advance written notice to arrange for such temporary removal or relocation.

- 12.10 PRIOR RIGHTS OF FRANCHISEE. Notwithstanding any other provision of this Agreement to the contrary, if the Village requires Franchisee to relocate any Facilities that are located in the Rights-of-way and Franchisee holds an Easement on which such Facilities are located, the Village shall grant Franchisee a replacement Easement. If the Village requires that Franchisee relinquish an Easement it holds in the Rights-of-Way which does not have Franchisee's Facilities located thereon, Franchisee shall not be required to relinquish such Easement until the Village has either granted Franchisee a replacement Easement within the Rights-of-Way or has compensated Franchisee for its Easement.

Section 13. Village's Use of Facilities.

- 13.1 JOINT USE AGREEMENT. During the term of this Agreement, and with respect to poles that are owned by Franchisee (in whole or part), the Village may, subject to the Franchisee's prior written consent, which shall not be unreasonably withheld, install and maintain Village-owned; street lights, communications equipment, wires and/or fiber.
- 13.2. INSTALLATION; MAINTENANCE. Installation and maintenance shall be done by the Village at its sole risk and expense, in accordance with all applicable laws, and subject to such reasonable requirements as Franchisee may specify from time to time including, without limitation, requirements accommodating Franchisee's Facilities or the facilities of other parties having the right to use Franchisee's Facilities.
- 13.3 LIABILITY; DAMAGES. Except in the event of willful misconduct by Franchisee, Franchisee shall have no obligation arising under the indemnity and insurance provisions of this Agreement as to any circumstances directly or indirectly caused by or related to such Village-owned lighting or communications equipment, wires and/or fiber or the installation or maintenance thereof.
- 13.4 COST; FEES. Franchisee shall not bear any cost or expense in connection with any such Village installation and/or maintenance by the Village. Franchisee may charge the Village an administrative fee for the purpose of reviewing an application and inspecting the installation, but shall not charge the Village any attachment, rental, or other fees for the use of Franchisee's poles.

Section 14. Coordination; Shared Excavations.

- 14.1 COORDINATION. Franchisee and the Village shall exercise reasonable efforts to coordinate any construction work that either may undertake within the Franchise Area so as to promote the orderly and expeditious performance and completion of the work. Such efforts shall include, at a minimum, reasonable and diligent efforts to keep the other party and other utilities within the Franchise Area informed of its intent to undertake such construction work. Franchisee and the Village shall further exercise reasonable efforts to minimize any delay or hindrance to any construction work undertaken by the other party or other utilities within the Franchise Area.
- 14.2 SHARED EXCAVATIONS. If either the Franchisee or the Village shall cause excavations to be made within the Franchise Area, the party causing such excavation to be made shall afford the other, upon receipt of a written request to do so, an opportunity to use such excavation, provided that: (1) such joint use shall not delay the work of the party causing the excavation to be made; and (2) such joint use shall be arranged and accomplished on terms and conditions satisfactory to both parties.

Section 15. Business License.

Franchisee shall maintain a valid, unexpired business license and pay all applicable business license fees in accordance with the Village Code during the entire term of this Agreement.

Section 16. Conflicts between Village Code and Agreement.

This Agreement hereby incorporates all applicable provisions of the Village Code. Any conflict between the provisions of this Agreement and the Village Code, except as otherwise provided in this Agreement, shall be resolved in favor of the provisions of the Village Code. The Village represents that it is unaware of any conflicts between this Agreement and the Village Code.

Section 17. Public Records.

- 17.1 ACKNOWLEDGMENT OF PUBLIC RECORDS LAW. Franchisee acknowledges that information submitted to the Village is open to public inspection and copying in accordance with the New Mexico Inspection of Public Records Act.
- 17.2 IDENTIFYING CONFIDENTIAL RECORDS. Franchisee may identify information, such as trade secrets, proprietary financial records, customer information or technical information, submitted to the Village as confidential. Franchisee shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information prior to submitting such information to the Village. The Village shall treat

any information so marked as confidential until the Village receives any request for disclosure of such information. Within five (5) working days of receiving any such request, the Village shall provide Franchisee with written notice of the request, including a copy of the request. Franchisee shall have five (5) working days within which to provide a written response to the Village before the Village may disclose any of the requested confidential information. The Village retains the final discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

Section 18. Records of Installation and Planning.

- 18.1 **POTENTIAL IMPROVEMENTS.** Upon the Village's reasonable request, Franchisee shall provide to the Village copies of any plans prepared by Franchisee for potential improvements, relocations and conversions of its Facilities within the Franchise Area; provided, however, any such plans so submitted shall be for Informational purposes only and shall not obligate Franchisee to undertake any specific improvements within the Franchise Area.
- 18.2 **"AS-BUILT" DRAWINGS.** The Village may inspect Franchisee's drawings and maps at Franchisee's offices upon reasonable notice. At no cost to the Village, Franchisee shall supply the Village with a set of "as-built" drawings of its Facilities related to public works projects. Additional "as-built" drawings of other Facilities shall be provided to the Village for its use as the Parties reasonably agree. The drawings shall be submitted in the Franchisee's standard format and may be delivered in either paper or electronic form at the discretion of the Franchisee. Such additional drawings remain the property of Franchisee and are to be held confidential for public safety and security concerns, are for the internal use of the Village, and shall not be provided to third parties unless the third party is working for the Village.
- 18.3 **LOCATION DRAWINGS.** Upon the Village's request, Franchisee shall provide to the Village copies of available drawings in use by Franchisee showing the location of its Facilities at specific locations within the Franchise Area.
- 18.4 **PUBLIC WORK PROJECTS.** Upon the Village's request, in connection with the design of any Public Improvement or public works project, Franchisee shall verify the location of its underground Facilities within the Franchise Area in accordance with the requirements of applicable law at no expense to the Village. In the event Franchisee's verification requires excavation, any restoration of the disturbed area shall bring such area to substantially the same condition as existed immediately prior to the excavation.

18.5 USE OF DRAWINGS. Any drawings and/or information concerning the location of Franchisee's Facilities provided by Franchisee shall be used by the Village solely for management of the Franchise Area, exercising due care for Franchisee's safety and security concerns.

18.6 REQUIREMENT TO DISCLOSE LOCATION OF UTILITY FACILITIES. Notwithstanding the foregoing, nothing in this Section 18 is intended (nor shall be construed) to relieve either party of its respective obligations arising under applicable law with respect to determining the location of utility facilities.

Section 19. Service Interruption.

Whenever it is necessary to shut off or interrupt services for the purposes of installing, maintaining, or using any of its Facilities, Franchisee shall do so at such time as will cause the least amount of inconvenience to its customers, and unless such interruption is unforeseen and immediately necessary, it shall comply with all requirements set by law regarding service interruptions, including, if applicable, notice to its customers.

Section 20. Right of Acquisition.

This Agreement shall not in any way or to any extent impair or affect the right of the Village to acquire the property of Franchisee, either by purchase or through the exercise of eminent domain, and nothing herein contained shall be construed to contract away, modify, or abridge the Village's right to exercise the power of eminent domain.

Section 21. Transfers and Assignments.

The following conditions for transfer or assignment of this Agreement and the Franchise shall apply:

- (A) Franchisee must give written notice to the Village of its intent to sell, transfer, assign, lease or otherwise dispose of, in whole or in part, voluntary or involuntary, any of the rights, privileges, permission, or authority granted pursuant to the provisions of this Agreement.
- (B) The intended buyer, transferee, assignee or lessee must hold a valid, unexpired Village business license.
- (C) If Franchisee holds a certificate of convenience and necessity issued by the NMPRC, and transfer or assignment of its certificate of public convenience and necessity has been approved by the NMPRC, the Franchise may be transferred or assigned to the same person to whom the certificate of public convenience and necessity was transferred or assigned, or to such other person as approved by the NMPRC, without the prior approval of the Village Council, except that the transferee or assignee must obtain a valid Village business license pursuant to the Village Code

within thirty (30) days of the transfer or assignment, and Franchisee and its transferee or assignee must provide a notarized document to the Village Administrator acknowledging the transfer or assignment and the assumption by the transferee or assignee of all terms and conditions of this Agreement, including all obligations and/or defaults under this Agreement occurring prior to the transfer (whether known or unknown), signed by Franchisee's and its transferee's or assignee's respective officers duly authorized to do so, on a form approved by the Village Administrator.

Section 22. Violation; Default; Remedies; Liquidated Damages.

- 22.1 VIOLATION.** Each condition of this Agreement is a material and essential condition to the granting of this franchise. Except for causes beyond the reasonable control of Franchisee, if Franchisee fails to comply with any of the conditions and obligations imposed hereunder, the Village shall deliver to Franchisee a reasonably detailed written notice describing the violation on the part of the Franchisee. If Franchisee fails to correct such defect within thirty (30) days, the Village shall have the right to terminate this Agreement, in addition to any other rights or remedies set forth in this Agreement or provided by law.
- 22.2 CONDITIONS BEYOND REASONABLE CONTROL OF FRANCHISEE.** If (i) the nature of the violation is such that it cannot be fully cured within thirty (30) days, or (ii) an intervening circumstance occurs which substantially impairs Franchisee's ability to cure; and in either case Franchisee so indicates in writing to the Village, the period of time for Franchisee to cure the violation may be extended for such additional time reasonably necessary to complete the cure, provided that: (1) Franchisee promptly begins its efforts to cure, and (2) Franchisee diligently pursues its efforts to cure.
- 22.3 LIQUIDATED DAMAGES.** If a violation has not been cured within the time allowed under Subsections 22.1 or 22.2, Franchisee shall be liable for liquidated damages for failure to comply with the Village's requirements concerning the usage of the Village's Rights-of-way or other requirements of this Agreement: ONE HUNDRED DOLLARS (\$100.00) per day, and for each day such failure continues. In no event shall these damages exceed THREE THOUSAND DOLLARS (\$3,000).
- 22.4 NOT EXCLUSIVE REMEDY.** No provision in this Agreement made for the purpose of securing enforcement of the terms and conditions of this Agreement shall be deemed an exclusive remedy or to afford the exclusive procedure for the enforcement of said terms and conditions, but the remedies herein provided are deemed to be cumulative.
- 22.5 WAIVER.** The Village reserves the right to waive any specific breach of the terms and conditions imposed by this Agreement, and such waiver shall not

be deemed to be continuous with respect to any future breaches on the part of Franchisee.

- 22.6 DENIAL OF PERMITS.** When in default of this Agreement, Franchisee may be denied further encroachment, excavation or similar permits until such time as Franchisee comes in compliance.

Section 23. Indemnification and Hold Harmless.

- 23.1 INDEMNIFY; DEFEND; HOLD HARMLESS.** Franchisee, for itself and its agents, employees, subcontractors, and the agents and employees of any subcontractors, shall, at its own expense and throughout the terms of this Agreement, indemnify, defend, and hold harmless the Village and any of its elected or appointed officers and employees, from any and all claims, demands, actions or suits (including on and through any final appeal), damages, decrees, judgments, attorney fees, costs, and expenses which the Village, or such elected or appointed officers or employees, may suffer, or which may be recovered from, or obtainable against the Village, or such elected or appointed officers or employees, as a result of, by reason of, or arising out of the installation, use, or maintenance by franchisee of its System or the exercise by Franchisee of any or all of the rights, privileges, permission, and authority conferred herein, or as a result of any alleged act or omission on the part of Franchisee in performing or failing to perform any of its obligations under this Agreement. Franchisee is not, however, liable and is not required to indemnify or hold harmless the Village for any damages caused by the negligence of any agents, servants and/or employees of the Village.
- 23.2 RISKS ASSOCIATED WITH OPERATION OF FRANCHISEE'S FACILITIES; LIABILITY LIMITS.** Franchisee shall assume all risks in its operations of Facilities and shall be solely responsible and answerable for any and all injuries to persons or property arising out of the existence or performance of this Agreement. The amounts and types of required insurance coverages, as set forth in this Agreement, shall in no way be construed as the limiting scope of indemnity or liability set forth in this Section.
- 23.3 RECOURSE FOR LOSS.** Franchisee shall have no recourse whatsoever against the Village for any loss, cost, expense, or damage arising out of the enforcement or lack of enforcement of any provision or requirement of the Village Code or this Agreement.
- 23.4 DAMAGES RELATED TO UNTIMELY REMOVAL; RELOCATION.** Franchisee shall indemnify, hold harmless, and defend the Village, its elected or appointed officers and employees from claims for damages asserted by third parties against the Village, including but not limited to

costs, expenses, fees, and the actual amount of damage asserted by third parties, arising from delays of reconstruction, removal, or relocation work of Franchisee.

23.5 NOTICE OF CLAIM; TERMINATION OF CLAIM. In the event a claim against Franchisee and the Village is received first by the Village, the Village will promptly notify Franchisee of such claim. The parties will fully cooperate with each other in defense of such claim. The Village will not settle or otherwise compromise any claim covered by Franchisee's indemnity without Franchisee's written consent. Any claim against the Village which is covered by this section or compromised by Franchisee shall contain written provisions in such settlement or compromise terminating with prejudice such claim against the Village.

23.6 CLAIM PROCEDURES. The following procedures shall apply to all claims for indemnification under this Section 23.

- (a) If the Village receives notice of or otherwise has actual knowledge of a claim which it believes is within the scope of indemnification owed to it under this Section 23 by Franchisee, it shall by writing as soon as practicable:
 - (i) Inform the Franchisee of such claim;
 - (ii) Send to Franchisee a copy of all written materials the Village has received asserting such claims; and
 - (iii) Notify Franchisee that either (1) the defense of such claims is being tendered to the Franchisee or (2) the Village has elected to conduct its own defense for a reason set forth in Subsection 23.6 (e) below.
- (b) If the insurer under any applicable insurance policy accepts tender of defense, the Franchisee and the Village shall cooperate in the defense as required by the insurance policy. If no defense is provided by insurers under potentially applicable insurance policies, then Subsections 23.6 (c), (d), (e) and (f) below shall apply.
- (c) If the defense is tendered to the Franchisee, it shall within 45 days of said tender deliver to the Village a written notice stating that the Franchisee:
 - (i) Accepts the tender of defense and confirms that the claims are subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

- (ii) Accepts the tender of defense but with a "reservation of rights" in whole or in part; or
- (iii) Rejects the tender of defense if it reasonably determines it is not required to indemnify against the claims under this Section 23.

If such notice is not delivered within such 45 days, the tender of defense shall be deemed rejected.

- (d) If the Village gives notice under Subsection 23.6 (a)(iii)(1) above, the Franchisee shall have the right to select legal counsel for the Village, and the Franchisee shall otherwise control the defense of such claims, including settlement, and bear the fees and costs of defending and settling such claims, including on and through any final appeal. During such defense:
 - (i) The Franchisee shall at the Franchisee's expense, fully and regularly inform the Village of the progress of the defense and of any settlement discussions; and
 - (ii) The Village shall, at the Franchisee's expense, (1) fully cooperate in said defense, (2) provide to the Franchisee all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Village, and (3) maintain the confidentiality of all communications between it and the Franchisee concerning such defense.
- (e) Village shall be entitled to select its own legal counsel and otherwise control the defense of such claims if:
 - (i) The defense is tendered to the Franchisee and it refuses the tender of defense, or fails to accept such tender within 45 days, or reserves any right to deny or disclaim such full indemnification thereafter; or
 - (ii) Village, at the time it gives notice of the claims or at any time thereafter, reasonably determines that (1) a conflict exists between it and the Franchisee which prevents or potentially prevents the Franchisee from presenting a full and effective defense, (2) the Franchisee is otherwise not providing an effective defense in connection with the claims or (3) the Franchisee lacks the financial capacity to satisfy potential liability or to provide an effective defense.

- (iii) Village may assume its own defense pursuant to this Subsection 23.6 (e) by delivering to the Franchisee written notice of such election and the reasons therefor. A refusal of, or failure to accept, a tender of defense may be treated by Village as claims against the Franchisee.
- (f) If Village is entitled and elects to conduct its own, all reasonable costs and expenses it incurs in investigating and defending claims for which it is entitled to indemnification hereunder shall be reimbursed by the Franchisee on a current basis. In the event the Village is entitled to and elects to conduct its own defense, then it shall have the right to settle or compromise the claims with the Franchisee's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court, and with the full benefit of the Franchisee's indemnity.

Section 24. Insurance.

- 24.1 SECURING AND MAINTAINING INSURANCE.** Franchisee shall procure and maintain for the duration of the Franchise insurance against all claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to Franchisee, its agents, representatives or employees.
- 24.2 PROOF OF INSURANCE; POLICY LIMITS.** Franchisee shall provide evidence of an insurance certificate, together with an endorsement naming the Village, its elected and appointed officers and employees as additional insureds, to the Village for its inspection prior to the commencement of any work or installation of any Facilities pursuant to this Agreement or not later than ten (10) days after approval of this Agreement by the Village Council, whichever comes sooner, and such insurance certificate shall evidence the following minimum coverages:
 - (a) Commercial general liability coverage for personal injuries, death, environmental and property damage in an amount no less than \$1,000,000 per occurrence and \$2,000,000 aggregate;
 - (b) Automobile coverage in an amount no less than \$1,000,000 per occurrence and \$2,000,000 aggregate; and
 - (c) Workers compensation and disability insurance in the amounts required by state statute.
- 24.3 SINGLE PRIMARY; UMBRELLA POLICY.** The minimum limits may be provided for through a single primary insurance policy providing such coverage or through addition of an umbrella policy written in excess of the general liability and automobile liability policies.

24.4 CERTIFICATE OF INSURANCE REQUIREMENTS. Any certificate of insurance required by this Section 24 shall provide that the described policies and coverages will not be canceled or modified before the expiration date thereof, without the issuing company giving sixty (60) days written notice to the certificate holder and those named as additional insureds. In the event of any cancellation, modification or intent not to renew, Franchisee shall obtain and furnish to the Village evidence of replacement insurance policies meeting the requirements of this Section 24 by the cancellation or modification date.

24.5 POLICY LIMIT INCREASES. The insurance policy limits required by this Section 24 shall be adjusted every three (3) years after the Effective Date of this Agreement based upon the percentage of change in the CPI-U. Policy limits changes shall be effective as of July 1 following the third, sixth and ninth anniversary dates of this Agreement, and shall be based upon the percentage change in the CPI-U for the preceding three calendar years. The provisions of this Section shall survive the expiration of the initial term should this Agreement continue on an implied basis by operation of law without formal enactment by the Village Council. Thus, assuming this Agreement continues on an implied basis into a twelfth or fifteenth year, the insurance policy limits required by this Section 24 shall continue to be adjusted every three (3) years after the Effective Date of this Agreement based upon the percentage of change in the CPI-U.

24.6 CARRIER RATING. Any commercial insurance carrier providing any required coverage must have an A.M. Best rating of A-VII or higher.

Section 25. Security for Performance.

25.1 CASH DEPOSIT; PLEDGE OF CERTIFICATE OF DEPOSIT; LETTER OF CREDIT; PERFORMANCE BOND. No later than ten (10) days after approval of this Agreement by the Village Council, Franchisee, as security for compliance with the terms of this Agreement and applicable Village Code provisions, shall provide security to the Village in the form of either cash deposited with the Village Administrator, or an irrevocable pledge of certificate of deposit, an irrevocable letter of credit, or a performance bond, payable in each instance to the Village, in an amount of SEVENTY FIVE THOUSAND DOLLARS (\$75,000.00), to remain in full force and effect for the term of this Agreement, or unless changed by Village Code, any or all of which may be claimed by the Village as payment for fees, liquidated damages and penalties, and to recover losses resulting to the Village from Franchisee's failure to perform its duties pursuant to this Agreement.

25.2 BOND CONDITIONS. If bonds are used to satisfy these security requirements, they shall be in accordance with the following:

- (a) All bonds shall, in addition to all other costs, provide for payment of reasonable attorneys' fees.
- (b) All bonds shall be issued by a surety company authorized to do business in the State of New Mexico, and which is listed in the U.S. Department of the Treasury Fiscal Service (Department Circular 570, Current Revision): companies holding certificates of authority as acceptable sureties on federal bonds and as acceptable reinsuring companies.
- (c) Franchisee shall require the attorney-in-fact who executes the bonds on behalf of the surety to affix thereto a certified and current copy of his or her power of attorney.
- (d) All bonds shall guarantee the performance of all Franchisee's obligations under this agreement and all applicable laws

25.3 REPLENISH SECURITY. If at any time the Village draws upon such performance security, Franchisee shall within thirty (30) days of notice from the Village replenish such performance security to the original minimum amount required by this Section 25.

Section 26. Accounts; Records; Reports; Investigations; Late Payment Penalty.

26.1 RECORD KEEPING. Franchisee shall at all times maintain complete and accurate books of account and records regarding Franchisee and operation of its System, including, without limitation, chart of accounts, account summary detail, books of account and records adequate to enable Franchisee to demonstrate that at all times it has been in compliance with the Franchise Agreement. The Village shall have the right to inspect, copy and audit the following at any time during normal business hours, and after giving reasonable advance notice of not less than fifteen (15) business days, at Franchisee's office in the Albuquerque Metro Area: all books, receipts, as-built maps, financial statements, contracts, records of requests for service, computer records, legends, or any other records used in the normal course of business and disks or other storage media and other like material which are appropriate in order to monitor compliance with the terms of this Agreement. This includes not only the books and records of Franchisee, but any books and records, to the extent such books or records relate to a larger system of Franchisee's affiliates, and upon a showing by the Village that such affiliates' records are necessary to monitor compliance with this Agreement. Franchisee is responsible for collecting the information and producing it at the location specified above, and by accepting this Franchise it affirms that it can and will do so. Franchisee may request that the inspection take place at some other location, provided that: (1) Franchisee must make necessary arrangements for copying documents selected by the Village after review; (2) Franchisee shall maintain financial records that allow analysis and review of its Gross Revenue within the

Franchise Area; and (3) access to Franchisee's records shall not be denied by Franchisee for any reason, including alleged proprietary information.

- 26.2 GROSS REVENUE REPORTS.** Franchisee shall submit quarterly reports of Gross Revenue in such form as may be agreed to by the Village and Franchisee. Franchisee agrees to cooperate with the Village to develop such reporting forms in such formats as will provide the Village with usable information regarding usage and revenue trends and patterns, and that do not require Franchisee to incur an unreasonable level of expenses to develop and implement.
- 26.3 RECORD RETENTION.** Franchisee shall keep said records once an audit is commenced until completion of the audit.
- 26.4 RECORD REQUESTS BY VILLAGE.** Franchisee shall provide records within fifteen (15) business days of a request by the Village for production of the same unless the Village agrees to additional time. Failure to provide records in a timely manner shall subject Franchisee to liquidated damages under Section 22. If any person other than Franchisee maintains records on Franchisee's behalf Franchisee shall be responsible for making such records available to the Village for auditing purposes pursuant to this Section.
- 26.5 AUDIT EXPENSE; ADDITIONAL PAYMENTS BASED ON AUDIT FINDINGS.** The Village's audit expenses shall be borne by the Village unless the audit discloses an underpayment in excess of five percent (5%) of the amount paid during the audit period, in which case the costs of the audit shall be borne by Franchisee as a cost incidental to the enforcement of the Franchise. The Village may re-compute any amounts determined to be payable under this Agreement based on this audit findings. Any additional amount due to the Village shall be paid within thirty (30) days following written notice to Franchisee by the Village, and such delinquent amount shall be subject to a penalty of two percent (2%) simple interest a month on the unpaid balance, computed from the date the fees were due. Penalties and interest shall not be included in the determination of responsibility for audit costs.
- 26.6 VILLAGE'S REQUEST FOR ADDITIONAL INFORMATION.** The Village may require such additional information, records, and documents from Franchisee from time to time as are appropriate and reasonable in order to monitor compliance with the terms of this Agreement.

Section 27. Severability.

If any section, subsection, sentence, clause, phrase, or other portion of this Agreement is, for any reason, declared invalid, in whole or in part, by any court, agency, commission, legislative body, or other authority of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent portion. Such declaration shall not affect the validity of the remaining portions hereof which other portions shall continue in

full force and effect. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the parties and shall thereafter be binding on Franchisee and the Village. If the terms of this Agreement are materially altered due to changes in or rulings regarding governing law, then the parties agree to negotiate in good faith to amend this Agreement so as to restore the original intent of Franchisee and Village and preserve the benefits bargained for by each party.

Section 28. No Third Party Beneficiary.

It is not intended by any of the provisions of this Agreement to create for the public, or any member thereof, a third-party beneficiary right or remedy, or to authorize anyone to maintain a suit for personal injuries or property damage pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Village with respect to third parties shall remain as imposed by New Mexico law.

Section 29. Effect of Compliance Inspections.

Any inspections or subsequent approvals undertaken by the Village pursuant to this Agreement are undertaken solely to ensure compliance with this Agreement and are not undertaken for the safety or other benefit of any individual or group of individuals as members of the public. Provisions of the Village Code dealing with inspection or approval by the Village do not expand the Village's general law duties, nor does any inspection or approval by the Village reduce or eliminate any liability of Franchisee.

Section 30. Notice to the Parties.

Unless otherwise expressly stated herein, all notices shall be in writing and shall be sufficiently given and served upon the other party by personal service or by registered or certified mail, return receipt requested, postage prepaid, and addressed as follows:

VILLAGE:

Village Administrator
Village of Corrales
4324 Corrales Road
Corrales, New Mexico 87048
Phone: 505-897-0502 Fax: 505-897-7217

With Copy to:

Mayor
Village of Corrales
4324 Corrales Road
Corrales, New Mexico 87048
Phone: 505-897-0502 Fax: 505-897-7217

FRANCHISEE:

Unite Private Networks, LLC
7200 NW 86th St, Suite M
Kansas City, MO 64153
Attn: VP, Real Estate

With copy to:

Unite Private Networks, LLC
7200 NW 86th St, Suite M
Kansas City, MO 64153
Attn: General Counsel

Section 31. Force Majeure.

The time within which Franchisee shall be required to perform any act under this Agreement shall be extended by a period of time equal to the number of days performance is delayed due to force majeure, and Franchisee shall not be subject to any penalty because of acts or failure to act due to force majeure. The term force majeure shall mean delays due to acts of God, fire, unavoidable casualty, construction delays due to weather, failure of suppliers, or for other similar causes beyond the control of Franchisee, but does not include civil disturbances that have the potential to cause harm to Franchisee's workforce.

Section 32. Construction of Agreement.

The terms and provisions of this Agreement shall not be construed strictly in favor of or against either party, regardless of which party drafted any of its provisions. This Agreement shall be construed in accordance with the fair meaning of its terms.

Section 33. Regulation of Rates and Service.

As may be applicable, Franchisee shall maintain and operate its Facilities and render efficient service in accordance with the rates, rules, tariffs, and regulations prescribed by the NMPRC.

Section 34. Governing Law.

This Agreement and the Franchise granted herein will be governed by the laws of the State of New Mexico with respect to both their interpretation and performance.

Section 35. Compliance with Federal, State and Local Laws; Police Power.

Franchisee shall at all times comply with all applicable federal, state and local laws, rules and regulations, including all ordinances, rules or regulations adopted in the future by the Village.

Section 36. Section and Paragraph Headings.

The headings of the sections and paragraphs of this Agreement are for convenience of reference only and are not intended to restrict, affect or be of any weight in the interpretation or construction of the provisions of such sections or paragraphs.

Section 37. Survival of Provisions.

All provisions, conditions and requirements of this Agreement that may be reasonably construed to survive the termination or expiration of this Agreement shall survive the termination or expiration of this agreement, including, but not limited to, all of Franchisee's indemnification obligations under Section 23 of this agreement.

Section 38. Time of the Essence.

The parties agree that time is of the essence with regard to the performance of Franchisee's obligations under this agreement.

Section 39. Severability Clause.

Should any section, paragraph, clause or provision of this Ordinance be held to be invalid or unenforceable for any reason, the invalidity or unenforceability of such section, paragraph, clause or provision shall not affect any of the remaining provisions of this Ordinance. The Governing Body of the Village of Corrales hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, word or phrase thereof irrespective of anyone or more sections, subsections, sentences, clauses, words or phrases being declared unconstitutional or otherwise invalid.

Section 40. Compiling Clause.

This Ordinance shall be incorporated in and compiled as a part of the Code of Ordinances of the Village of Corrales, as provided herein.

Section 41. Effective Date and Publication.

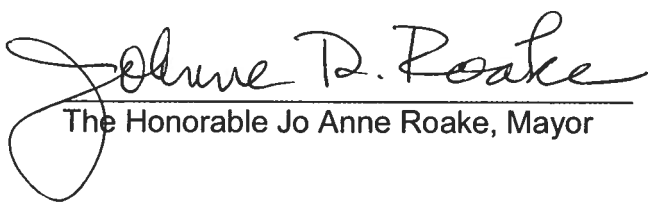
This Ordinance shall become effective and be in full force and effect from and after its passage, publication and posting, according to law.

PASSED, APPROVED, ADOPTED AND SIGNED at a duly called regular Meeting of the governing body of the Village of Corrales on this 8th day of August 2018 in the Village of Corrales, New Mexico.

APPROVED:

ATTEST:


Village Clerk


The Honorable Jo Anne Roake, Mayor