

**ORDINANCE 2019-3
TOWN OF CASTLE VALLEY, UTAH
AN ORDINANCE GRANTING TO EMERY TELECOMMUNICATIONS & VIDEO,
INC., ITS SUCCESSORS AND ASSIGNS, A FRANCHISE FOR COMMUNICATIONS
SYSTEM**

WHEREAS, Emery Telecommunications & Video, Inc. (“Emery” or “Franchisee”) has requested that the Town grant it the right to install, operate, and maintain a communications system within, over, along, and across the Town’s public rights-of-way; and

WHEREAS, the Town Council has found it desirable for the welfare of the Town and its residents that such a non-exclusive franchise be granted to the Franchisee; and

WHEREAS, the Town Council has the authority under Article 1, Section 23 of the Constitution of the State of Utah and consistent with Article 11, Section 9 of the Constitution of the State of Utah, and the statutes of the United States and the State of Utah to grant franchises for the use of its streets and other public properties; and

WHEREAS, the Town is willing to grant the rights requested subject to certain terms and conditions.

NOW, THEREFORE, the Town Council of the Town of Castle Valley, Utah does ordain as follows:

1. Purpose. The purpose of this Franchise Ordinance is to grant a non-exclusive Franchise to install, operate and maintain a communications system in, on, over, upon, along, and across the public rights of way of the Town of Castle Valley, prescribing certain rights, duties, terms, and conditions with respect thereto and establishing an effective date.

2. Short Title. This Ordinance shall constitute the Emery Telecom Franchise Ordinance.

3. Definitions. For the purposes of this franchise, the following terms, phrases, words, and abbreviations shall have the meanings ascribed to them below. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number.

A. “Affiliate” means the entity which owns or controls, is owned or controlled by, or is under common ownership with the Franchisee.

B. “Town” means the Town of Castle Valley, Utah.

C. “Communication(s) Service” shall mean any communications services, communications capacity, or dark fiber, provided by the Franchisee using its Communication System or facilities, either directly or as a carrier for its subsidiaries, affiliates, or any other person engaged in Communication Service, including but not limited to, the transmission of

voice, data, or other electronic information, facsimile reproduction, burglar alarm monitoring, meter reading, and home shopping, or other subsequently developed technology that carries an electronic signal over fiber optic cable. Communication Service shall also include non-switched, dedicated, and private line, high capacity fiber optic transmission services to firms, businesses, or institutions within the Town.

D. "Communication System" or "Facilities" shall mean the Franchisee's fiber optic system constructed and operated within the Town's public ways and shall include all cables, wires, fibers, conduits, ducts, pedestals, and any associated converter, equipment, or other facilities within the Town's public ways designed and constructed for the purpose of providing Communication Service.

E. "FCC" means the Federal Communications Commission or any successor governmental entity hereto.

F. "Franchise" shall mean the initial authorization, or renewal thereof granted by the Town, through this ordinance or subsequently adopted ordinance, which authorizes construction and operation of the Franchisee's Communication System and associated Facilities for the purpose of offering Communications Service.

G. "Franchisee" means Emery Telecommunications & Video, Inc., a Utah corporation, or the lawful successor, transferee, assignee, or affiliate thereof.

H. "Person" means an individual, partnership association, joint stock company, trust, corporation, or governmental entity.

I. "Public Way" shall mean the surface of and any space above or below any public street, highway, freeway, bridge, path, alley, court, boulevard, sidewalk, lane, drive, circle, or any other public right of way including, but not limited to, public utility easements, utility strips, or rights of way dedicated for compatible uses and any temporary or permanent fixtures or improvements located thereon, now or hereafter held by the Town in the Service Area which shall entitle the Town and the Franchisee the use thereof for the purpose of installing, operating, repairing, and maintaining the Communications System. Public way shall also mean any easement now or hereafter held by the Town within the Service Area for the purpose of public travel, or for utility or public service use dedicated for compatible uses, and shall include other non-exclusive easements or rights of way which within their proper use and meaning, entitle the Town and the Franchisee the use thereof for the purposes of installing or transmitting the Franchisee's Communications Service over wires, cables, conductors, amplifiers, appliances, attachments, and other property as may be ordinarily and necessarily pertinent to the Communications System. Public Way shall not include Town parks, facilities, structures, or improvements of any kind.

J. "Service Area" means the present municipal boundaries of the Town and shall include any additions thereto by annexation or other legal means.

4. Grant of Franchise.

A. The Town hereby grants to the Franchisee subject to the terms and conditions hereinafter set forth, the right, privilege and authority to utilize the Public Ways of the Town for construction and operation of the Franchisee's Communications System and to acquire, construct, operate, maintain, replace, use, install, remove, repair, reconstruct, inspect, sell, lease, transfer, or to otherwise utilize in any lawful manner, all necessary equipment and facilities thereto for the Franchisee's Communications System, and to provide Communications Service.

B. The Franchisee shall pay all costs of publishing notice of this Ordinance.

5. Construction - Permits Required.

A. Prior to site specific location and installation of any portion of its Communications System within a Public Way, the Franchisee shall apply for and obtain a construction permit pursuant to the laws, rules and regulations of the Town presently existing or as amended from time to time.

B. Franchisee has submitted its initial plans for buried and aerial distribution plant based upon its USDA grant application. If Franchisee decides to add additional aerial distribution plant, Franchisee will be required to obtain a variance from the town. The drops will generally be the same as the distribution plant they connect to (if the distribution plant is buried where the drop leaves the distribution plant, the drop will likely be buried). The Franchisee will work with the property owners to determine the economic feasibility of aerial or buried drops off of that distribution plant. Town and Franchisee acknowledge that the build is dependent upon a USDA grant, which assumes a certain portion of the plant will be aerial to reduce costs. Additional buried distribution plant may result in the entire project becoming not feasible.

C. The Franchisee shall file plans or maps with the Town showing the proposed location of its Communication Facilities and pay all duly established permit and inspection fees associated with the processing of the permit. In no case shall any work commence within any Public Way without said permit except as otherwise provided in this Franchise.

D. Unless otherwise provided in said permit, the Franchisee shall give the Town at least forty-eight (48) hours' notice of the Franchisee's intent to commence work in the Public Ways.

6. Grant Limited to Occupation. Nothing contained herein shall be construed to grant or convey any right, title, or interest in the Public Ways of the Town to the Franchisee nor shall anything contained herein constitute a warranty of title.

7. Term. The first term of this Franchise shall be for a period of fifteen (15) years from the date of acceptance as set forth herein. At the expiration of the term, additional terms and extensions may be negotiated upon terms and conditions deemed reasonable to both the Town and the Franchisee.

8. Non-Exclusive Grant. This Franchise shall not in any manner prevent the Town from entering into other similar agreements or granting other or further franchises in, under, on, across, over, through, along or below any of the Public Ways of the Town. However, the Town shall not permit any such future Franchisee to physically interfere with the Franchisee's Communication Facilities. In the event that such physical interference or disruption occurs, the Town may assist the Franchisee and such subsequent Franchisee in resolving the dispute. Further, this Franchise shall in no way prevent or prohibit the Town from using any of its public ways or affect its jurisdiction over them or any part of them, and the Town shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of the same as the Town may deem fit, including the dedication, establishment, maintenance, and improvement of all new Public Ways all in compliance with this Franchise.

9. Provision of Services. Emery Telecom agrees to provide broadband on a non-discriminatory basis to the Town residents; however the Franchise may refuse based on economics

10. Maps and Records. After construction is complete, the Franchisee shall provide the Town with accurate copies of as-built plans and maps in a form and content prescribed by the Town. These plans and maps shall be provided at no cost to the Town and shall include hard copies and digital copies in a format specified by the Town.

11. Work in Public Ways

A During any period of relocation, construction, or maintenance, all surface structures, if any, shall be erected and used in such places and positions within said Public Ways and other public properties so as to interfere as little as possible with the free passage of traffic and the free use of adjoining property. The Franchisee shall, at all times, post and maintain proper barricades and comply with all applicable safety regulations during such period of construction as required by the ordinances of the Town or the laws of the State of Utah.

B. The Franchisee shall cooperate with the Town and all other persons with authority from the Town to occupy and use the Public Ways of the Town in coordinating construction activities and joint trenching projects. By June 1 of each calendar year, or such other date as the Town and the Franchisee may agree upon from year to year, the Franchisee shall provide the Town with a schedule of its proposed construction activities in, around, or that may affect the public ways of the Town. The Franchisee shall also meet with the Town and other grantees, franchisees, permittees, and other users of the public ways of the Town annually or as determined by the Town to schedule and coordinate construction activities. The Town shall coordinate all construction locations, activities and schedules to minimize public inconvenience, disruption, or damage to the public ways of the Town.

C. If either the Town or the Franchisee shall at any time after the installation of the facilities plan to make excavations in an area covered by this franchise and as described in this section, the party planning such excavation shall afford the other upon receipt of written request to do so an opportunity to share such an excavation provided that: (1) such joint use shall not unreasonably delay the work of the party causing the excavation to be made or unreasonably increase its costs; (2) such joint use shall be arranged and accomplished on terms and conditions

satisfactory to both parties; and (3) either party may deny such request for safety reasons or if their respective uses of the trench are incompatible.

12. Restoration after Construction. The Franchisee shall, after the installation, construction, relocation, maintenance, removal or repair of its Communication Facilities within the Public Ways restore the surface of the Public Ways and any other Town-owned property that may be disturbed by the work to at least the same condition the public way or Town-owned property was in immediately prior to any such installation, construction, relocation, maintenance or repair, reasonable wear and tear excepted. The Franchisee agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the public ways or other affected area at its sole cost and expense according to the time and terms specified in the construction permit issued by the Town in accordance with the applicable ordinances of the Town.

13 Emergency Work Permit Waiver. In the event of any emergency in which any of the Franchisees' Communication Facilities located in, above, or under any Public Way break, are damaged, or if the Franchisee's construction area is otherwise in such a condition as to immediately endanger the property, life, health, or safety of any individual, the Franchisee shall immediately take proper emergency measures to repair its facilities, to cure or remedy the dangerous conditions for the protection of property, life, health, or safety of individuals without first applying for and obtaining a permit as required by this franchise. However, this shall not relieve the Franchisee from the requirement of notifying the Town of the emergency work and obtaining any permits necessary for this purpose after the emergency work. The Franchisee shall notify the Town by telephone immediately upon learning of the emergency and shall apply for all required permits not later than the second succeeding day during which the Town Hall is open for business.

14. Relocation. In the event that at any time during the period of this Franchise, the Town shall lawfully elect to alter or change any street, alley, public utility easement, bridge, culvert or other public way requiring the relocation of Franchisee's Facilities, then in such event, Franchisee, upon reasonable notice by the Town, shall remove, relay and relocate the same at its own expense; except that Franchisee shall, in all cases, have the right, in Franchisee's sole discretion, to abandon its Facilities in place, in lieu of relocation. If public funds are available for such relocation pursuant to law, Franchisee shall not be required to pay the costs of such relocation.

In the event the Town requests relocation efforts from the Franchisee for aesthetic purposes, the Town agrees to pay all costs associated with relocation. Franchisee shall not be required to pay for the relocation of Franchisee's Facilities, and may require advance payment for costs and expense, to the extent such removal or relocation is request solely for aesthetic purposes, in cases where the original location of the Franchisee Facilities was approved by the Town through the permitting process.

Franchisee shall, upon the request of any person holding a building moving permit issued by the Town, temporarily raise or lower its lines to permit the moving of the building, provided: (a) the expense of such temporary removal shall be paid by the person(s) requesting the same, and Franchisee shall have the authority to require payment in advance; and (b) the Franchisee is

given not less than five (5) business days' advance notice to arrange for such temporary line changes.

15. Trimming. Franchisee shall have the authority to trim trees upon and overhanging the Public Ways so as to prevent the branches of such trees from coming into contact with Franchisee's Facilities. Franchisee shall, when practical, provide notice to the Town and to any property owner before commencing such work. Franchisee shall not be required to provide notice in advance of such work in emergency conditions.

16 Dangerous Conditions. Whenever construction, installation or excavation of the Communication Facilities authorized by this Franchise has caused or contributed to a condition that appears to substantially impair the lateral support of the adjoining Public Way, street, or public place, or endangers the public street, utilities or Town-owned property, the Town Engineer may reasonably request the Franchisee to take action to protect the public, adjacent public places, Town-owned property, streets, utilities and public ways. Such action may include compliance within a prescribed time. In the event that the Franchisee fails or refuses to promptly take the actions directed by the Town or fails to fully comply with such directions, or if emergency conditions exist which require immediate action, the Town may enter upon the property and take such actions as are necessary to protect the public, the adjacent streets, utilities, public ways to maintain the lateral support thereof or actions regarded as necessary safety precautions and the Franchisee shall be liable to the Town for the reasonable costs thereof.

17. Indemnification. The Town shall not at any time become liable or responsible to any person, firm, corporation, or individual for any damage, injury, including loss of life or loss by reason of the activities of Franchisee under this Franchise, and Franchisee hereby indemnifies, defends, and holds harmless the Town against all such liabilities, loss, cost, damage, or expense, including attorneys' costs and fees, which may be incurred by the Town arising out of this Franchise, including but not limited to Franchisee's exercise of rights hereunder or use of the Public Ways.

18. Insurance. The Franchisee shall procure and maintain insurance against claims for injuries to persons or damages to the property which may arise from, or in connection with the exercise of the rights, privileges, and authority granted hereunder to the Franchisee, its agents, representatives, or employees. The Franchisee shall provide to the Town for its inspection an insurance certificate naming the Town as an additional insured as its respective interests may appear prior to the commencement of any work or installation of any facilities pursuant to this franchise. Such insurance certificate shall evidence:

A. Comprehensive general liability insurance with limits inclusive of umbrella or excess liability coverage of not less than (1) \$2,000,000.00 for bodily injury or death to each person; and (2) \$3,000,000 for property damages resulting from any one accident.

B. Automobile liability for owned, non-owned, and hired vehicles with a limit inclusive of umbrella or excess liability coverage of \$300,000 for each person and \$500,000 for each accident.

C. Workers' compensation within statutory limits.

The liability insurance policies required by this section shall be maintained by the Franchisee throughout the Term and such other period of time during which the Franchisee is operating without a franchise hereunder, or is engaged in the removal of its Communication System. Payment of deductibles and self-insured retentions shall be the sole responsibility of the Franchisee. The insurance certificate required by this section shall contain a clause stating that the coverage shall apply separately to each insured against whom a claim is made or suit is brought except with respect to the limits of the insurer's liability. The Franchisee's insurance shall be primary insurance with respect to the Town. Any insurance maintained by the Town, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of the Franchisee's insurance and shall not contribute with it.

19. Abandonment and Removal of the Franchisee's Communication Facilities. Upon the expiration or termination of the rights granted under this Franchise, the Franchisee shall either, at Franchisee's sole option, remove all of its Communication Facilities from the Public Ways of the Town within ninety (90) days or abandon the Facilities in place and relinquish its rights to the same. Upon abandonment and Franchisee's agreements to transfer ownership of the Communication Facilities to the Town, the Franchisee shall submit to the Town a proposal and instruments for transferring ownership to the Town. In the alternative, upon abandonment initiated by the Franchisee, the Town may require the Franchisee to remove all or some of the aerial communication system any such facilities which are not permitted to be abandoned in place which are not removed within one (1) year of receipt of said notice shall automatically become the property of the Town.

20. Municipal Telecommunications License Tax. Upon the Town's approval of an Ordinance in compliance with the Utah Municipal Telecommunications License Tax Act, Utah Code Section 10-1-401, *et. seq.*, Franchisee shall be liable for payments to the Town in accordance with the Utah Municipal Telecommunications License Tax Act, less any business license fee or business license tax enacted by the Town. All payments shall be made to the Utah State Tax Commission:

Utah State Tax Commission
210 North 1950 West
Salt Lake City, Utah 84134

21. Modification. The Town and the Franchisee hereby reserve the right to alter, amend, or modify the terms and conditions of this franchise upon the written agreement of both parties to such alteration, amendment or modification. Said modifications shall be approved by the Town by ordinance and accepted by the Franchisee consistent with this section herein.

22. Default, Forfeiture, and Revocation.

A. Default occurs if Franchisee:

- (1) Fails to comply with the material provisions hereof and other provisions of the Town ordinances; or
- (2) Dissolves or files bankruptcy.

B. If the Town has reason to believe that the Franchisee is in violation of this Franchise or other provisions of the Town law, rules, or regulations, the following procedures shall be followed by the Town:

(1) The Town shall provide the Franchisee with a detailed, written notice by certified mail detailing the violation, the steps necessary to cure such violation, and the time period within which the violation must be cured. Within thirty (30) days thereafter, Franchisee shall respond demonstrating, to the satisfaction of the Town, that no violation occurred, that any problem has been corrected, or with a proposal to correct the problem within a specified period of time.

(2) Franchisee may request an extension of time to cure an alleged violation if construction is suspended or delayed by the Town or where unusual weather, natural consequences, extraordinary acts of third parties, or other circumstances which are reasonably beyond the control of the Franchisee delay progress, provided that the Franchisee has not, through its own actions or inactions, contributed to the delay.

(3) If said response is not satisfactory to the Town, the Town may declare the Franchisee to be in default with written notice by certified mail to Franchisee. Within ten (10) business days after notice to Franchisee, Franchisee may deliver to the Town a request for a hearing before the Town Council. If no such request is received, the Town may declare the franchise terminated for cause.

(4) If Franchisee files a timely written request for hearing before the Town Council, such hearing shall be held within thirty (30) days after the Town's receipt of the request therefor. Such hearing shall be open to the public and Franchisee and other interested parties may offer written and/or oral evidence explaining or mitigating such alleged noncompliance. Within ten (10) days after the hearing, the Town Council on the basis of the record will make the determination as to whether there is cause for termination and whether the franchise will be terminated. The Town Council may, in its sole discretion, fix an additional time period to cure violations. If the deficiency has not been cured at the expiration of any additional time period, or if the Town Council does not grant any additional period, the Town Council may, by resolution, declare the franchise to be terminated.

(5) If Franchisee appeals revocation and termination, such revocation may be held in abeyance pending judicial review by a court of competent jurisdiction provided the Franchisee is otherwise in compliance with this franchise.

C. Franchisee shall not be deemed to be in default failure, violation or noncompliance with any provision of this Franchise where performance was rendered impossible due to an act of God, fire, flood, storm, or other element or casualty, theft, war, disaster, strike, lockout, boycott, prevailing war, or war preparation, beyond the control of the Franchisee.

D. Notwithstanding Section 21.C, in the event of default by the Franchisee, the Town otherwise reserves all other remedies available to it under law, including commencement of an action for injunctive relief or money damages.

23. Town Ordinances and Regulations. Nothing herein shall be deemed to direct or restrict the Town's ability to adopt and enforce all necessary and appropriate ordinances regulating the performance of the conditions of this Franchise, including any valid ordinance made in the exercise of its police powers in the interest of public safety and for the welfare of the public. The Town shall have the authority at all times to control by appropriate regulations the locations, elevation, manner or construction and maintenance of facilities by the Franchisee and the Franchisee shall promptly conform with all such regulations unless compliance would cause the Franchisee to violate other requirements of the law.

24. Survival. All of the provisions, conditions and requirements of this Franchise shall be in addition to any and all other obligations and liabilities the Franchisee may have to the Town at common law by statute or by contract. The provisions, conditions and requirements of Section 8 Work in Public Ways; 9 Restoration after Construction; 13 Dangerous Conditions; 14 Non-Liability of Town for Acts of Franchisee; 15 Insurance; 16 Abandonment and Removal of the Franchisee's Communication Facilities; shall survive the expiration or termination of this Franchise and any renewals or extensions thereof and remain effective until such time as the Franchisee removes its Communication Facilities from the Public Ways, transfers ownership of said facilities to a third party, or abandons said system in place as provided herein. All of the provisions, conditions, regulations and requirements contained in this franchise shall further be binding upon the heirs, successors, executors, administrators, legal representatives, and assigns of the Franchisee and all privileges as well as all obligations and liabilities of the Franchisee shall inure to its heirs, successors and assigns equally as if they were specifically mentioned wherever the Franchisee is named herein.

25. Severability. If any section, sentence, clause or phrase of this Franchise shall be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this franchise.

26. Assignment. This Agreement may not be assigned or transferred without prior written notice to the Town except that the Franchisee may freely assign this franchise without notice in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization, or refinancing. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such notice shall not be required unless and until the secured party elects to realize upon the collateral.

Franchisee may, with the prior written notice to the Town, which shall not be unreasonably withheld: (1) lease the facilities or any portion thereof to another; (2) grant an indefeasible right of user interest in the facilities or any portion thereof to another; or (3) offer to provide capacity or band width in its facilities to another, provided that Franchisee at all times retains exclusive control over such facilities and remains responsible for locating, servicing, repairing, relocating, or removing its facilities pursuant to the terms and conditions of this Franchise.

27. Notice. Any notice or information required or permitted to be given to the parties under this Franchise may be sent to the following addresses unless otherwise specified:

Town:
Town of Castle Valley
HC 64 Box 2705
Castle Valley, Utah 84532

Franchisee:
Emery Telecommunications & Video, Inc.
445 Utah Highway 29
Orangeville, UT 84537
(435) 748-2223
Attn: CEO

Notice shall be deemed given upon receipt in the case of personal delivery or next day in the case of overnight delivery.

28. Entire Agreement. This Franchise constitutes the entire understanding and agreement between the parties as to the subject matter herein and no other agreements or understandings, written or otherwise, shall be binding upon the parties upon approval and acceptance of this Franchise.

29. Reservation of Rights. The Town and the Franchisee reserve all rights they may have under the law to the maximum extent possible and neither the Town nor the Franchisee shall be deemed to have waived any rights they may have or may acquire in the future by entering into this Franchise.

30. Attorney's Fees. If any suit or other action is instituted in connection with any controversy arising under this Franchise, the prevailing party shall be entitled to recover all of its reasonable costs and expenses, including attorneys' fees.

31. Governing Law/Venue. This Franchise shall be governed by and construed in accordance with the laws of the State of Utah. The venue and jurisdiction over any dispute related to this Franchise shall be with the Moab District Court, or with respect to any federal question, with the United States District Court for the District of Utah in Salt Lake City, Utah.

32. Acceptance. Within sixty (60) days after the passage and approval of this ordinance, this Franchise shall be accepted by the Franchisee by its filing with the Town Clerk an unconditional written acceptance thereof in a form satisfactory to the Town. Failure of the Franchisee to so accept this Franchise within said period of time shall be deemed a rejection thereof and the rights and privileges herein granted shall after the expiration of the sixty (60) day period, absolutely cease unless the time period is extended by ordinance duly passed for that purpose.

33. Effective Date. This Ordinance, being an exercise of power specifically delegated to the Town legislative body, is not subject to referendum and shall take effect five (5) days after the passage and publication of an approved summary thereof consisting of the title.


PASSED AND APPROVED this 18th day of December, 2019 by the following vote:


Those voting aye: Mayor Duncan, Council Members Drogin, Hill, Holland and O'Brien.

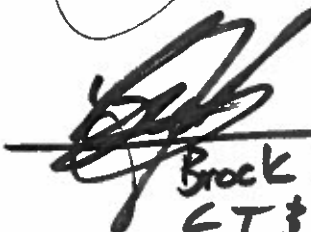
Those voting nay: None

Those absent: None

TOWN OF CASTLE VALLEY

By 
Jazmine Duncan Mayor

ATTEST: 
Jocelyn Buck Town Clerk
(SEAL)


Brock Johansen (CEO)
ET & V, Inc.