

ORDINANCE NO. F-543

ORDINANCE NO. F-3 (Third Revision)

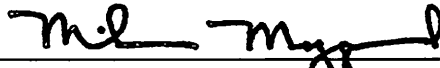
AN ORDINANCE OF THE BOARD OF SUPERVISORS OF THE COUNTY OF KERN, STATE OF CALIFORNIA, AMENDING ORDINANCE F-3 (SECOND REVISION) OF THE COUNTY OF KERN, PERTAINING TO GRANTING RIGHT OF WAY PRIVILEGE

The following Ordinance, consisting of two (2) sections, was duly and regularly passed and adopted by the Board of Supervisors of the County of Kern, State of California, at a regular meeting of the Board of Supervisors held on the 22nd day of March, 2011, by the following vote, to wit:

AYES: McQuiston, Scrivner, Maggard, Watson, Goh

NOES: None

ABSENT: None



Chairman of the Board of Supervisors of
the County of Kern, State of California

(SEAL)

ATTEST:

KATHLEEN KRAUSE
Clerk of the Board of Supervisors
County of Kern, State of California



By Karen L Winn, Deputy Clerk

THE BOARD OF SUPERVISORS OF THE COUNTY OF KERN ORDAINS AS FOLLOWS:

Section 1. This Ordinance shall take effect and be in full force on and after the 21st day of April, 2011 shall be published once in the *Bakersfield Californian*, a newspaper of general circulation published in the County of Kern (hereinafter "County"), State of California, together with the names of the members of the Board of Supervisors voting for and against the same.

Ord. F-543

Section 2. Ordinance F-3 (Second Revision) (effective February 19, 1991) is hereby; renamed Ordinance F-3 (Third Revision) and amended to read as follows:

PART I— PURPOSE OF ORDINANCE

Section 1. A compilation of the necessary terms and conditions of granted right of way privilege by the County for any public road and highway herein pursuant to section 26001 of the Government Code and pursuant to Division 3 (commencing at section 6201) of the Public Utilities Code (as amended) is set out in this Ordinance.

Section 2. When any ordinance granting right of way privilege by way of: ordinance, ordinance granting a franchise, license, resolution or notice, refers to the standard terms and conditions hereinafter set out they shall be a part thereof as if fully set out in this Ordinance.

Section 3. The terms and conditions set out in Part II hereof shall be known and referred to as “Terms and Conditions” of right of way privilege as provided by this Ordinance.

Section 4. Nothing herein shall prevent an ordinance for right of way privilege from containing additional or contrary terms and conditions specifically set out in such ordinance.

PART II — TERMS AND CONDITIONS OF RIGHT OF WAY PRIVILEGE

Section 1. “Grantee” is the “successful bidder” for a right of way privilege or a successful applicant of a right of way privilege process. Grantees include all successors and assigns.

Section 2. The Grantee shall pay the cost of publishing the notice of intention to grant, and for publishing the summary of granting ordinance.

Section 3. “Board” means the Board of Supervisors of the County of Kern.

Section 4. The term of an ordinance begins on the date the granting of right of way privilege becomes effective.

Section 5. “Public Roads” means the public highways, streets, roads, ways, alleys and places as they now or hereafter exist within the County, and are subject to the jurisdiction of the County.

Section 6. “Public Utilities” shall mean utilities owned by public entities or those publicly regulated utilities possessing a franchise granted by the Board Pursuant to Government Code Sections 6201, et seq. (the 1937 Franchise Act).

Section 7. “Facility” means the particular kind of privilege to be exercised under this right of way privilege as described in the granting Ordinance.

Section 8. “Installation” means the actual construction, erection or laying of the means of transmission or operation of the facility.

Section 9. Permitting: No facility installation, repair or maintenance, which disturbs the surface of any highway or obstructs its public use, shall be started without first obtaining a permit from the Board or the officer designated by said Board. All installations under the Ordinance shall be performed in accordance with the provisions and conditions prescribed by law and of all applicable ordinances and regulations of the County and with the least possible hindrance to the use of the highways for purposes of travel. Any excavations in the highways shall be backfilled and the surface placed in as good condition as it was at the time of beginning such work and to the reasonable satisfaction of the County. County may, but is not require to, perform repairs of any highway or any portion of any highway in which Grantee may have excavated for the purpose of making installations there under. Workmanship and costs thereof shall be consistent with the industry standards and rates. All costs and expenses incurred by County as a result thereof shall be invoiced to Grantee and Grantee agrees to pay upon demand. No action taken by County pursuant to this Section shall constitute a waiver of any of Grantee’s obligations hereunder.

Section 10. Construction Time Line: The installation shall be commenced in good faith within not more than six (6) months from the date of granting of the Ordinance and if not so commenced within said time, said Ordinance so granted may be declared forfeited. The work of installation shall be prosecuted diligently and in good faith so as to satisfy the reasonable purposes for which this right of way privilege is granted.

Section 11. Construction Requirements: Within thirty (30) days after any installation by Grantee under this right of way privilege, Grantee shall file with the Board or the officer designated by said Board, a map showing in detail the length and details of such installation and the location of the same with its beginning and terminus in the highway both with reference to the surface and with reference to the property lines along said highway.

All installations constructed and maintained under the provisions of the Ordinance upon any highway which becomes or has become a state highway within any portion of the territory covered by this right of way privilege shall be constructed and maintained in conformity with all the laws of the State of California relating to the control and maintenance of any such State Highway and all rules and regulations prescribed by the Department of Engineering or other offices of the State of California which may be authorized by law to exercise power and control over such State Highway.

Section 12. Surety Bond: Within five (5) days after said Ordinance is awarded, the Grantee shall file with the Board a bond running to the County in a penal sum set by said Board, with at least two (2) good and sufficient sureties or executed by a surety company authorized to do business in the State of California, conditioned that said bidder shall well and truly observe, fulfill and perform each and every term and condition of said ordinance and in case of any breach of condition of said bond the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages and shall be recoverable from the Grantee. If said bond is not so filed, the award of said ordinance will be set aside and any money paid therefore will be forfeited. Franchised public utilities pursuant to the 1937 Franchise Act shall only be required to file one bond as set forth in their respective franchises, which shall cover all work in the public rights of way.

The amount of the required Surety Bond shall be based on the size of the franchise area, base on miles of right of way used: Projects two (2) miles or less shall provide a Surety Bond of ten thousand dollars (\$10,000). Projects between two (2) miles and four (4) miles shall provide a Surety Bond of twenty-five thousand dollars (\$25,000). Projects greater than four (4) miles shall provide a Surety Bond of fifty thousand dollars (\$50,000).

In lieu of a faithful performance bond and if the application for an ordinance is filed pursuant to section 26001 of the Government Code and pursuant to Chapter 2, Division 3 of the Public Utilities Code, then any Grantee may deposit money, a certificate of deposit, bearer bonds or bearer note of the United States or the State of California, savings accounts assigned to the County, or investment certificates or shared accounts assigned to the County, or certificates for funds or shared accounts assigned to the County pursuant to California Code of Civil Procedures section 995.710 and in the form approved by the Board and for a penal sum set by said Board. The amount of the penal sum of a bond or certificate of deposit shall be taken if Grantee fails to well and timely observe, fulfill, and perform each term and condition of the Ordinance. It is understood that in the event of the taking of said bond or certificate of deposit, that said action shall be in addition to those remedies outlined in the Ordinance granted to the party.

Said bond, a substitution bond or certificate of deposit shall be kept on file with the Board throughout the term of the Ordinance. Any substitution of said bond with another bond shall be preceded by sixty (60) days prior written notice to the Property Management Division of the General Services Department of the County.

Section 13. Public Utility and Publicly-Regulated Utility Fees: The Grantee shall during the life of the ordinance pay to County two percent (2%) of the gross annual receipts of Grantee arising from its use, operation or possession. All applicable fees shall be due and payable annually on or before April 15th.

Notwithstanding any other provision of this section, if the Grantee of a right of way privilege is filed pursuant to Chapter 2, Division 3 of the Public Utilities Code (commencing at section 6201) and said application is for the purpose of transmitting, electricity, natural gas, or domestic water, Grantee shall pay to the County during the life of the ordinance two percent (2%) of the gross annual receipts of Grantee arising from the use, operation or possession of the right of way privilege; provided, however, that such payment shall in no event be less than one percent (1%) of the gross annual receipts of Grantee derived from the production or sale within the limits of the County of the utility service for which the ordinance is awarded.

Notwithstanding any other provision of this section, if the Grantee of a right of way privilege for the purpose of transmitting oil or products thereof the Grantee shall pay an annual fee pursuant to Section 6231.5 of the Public Utilities Code.

Section 14. Non-Public Utility Pipeline Fees: If the application is for a right of way privilege for a non-public utility pipeline for the purpose of transmitting oil or products thereof, natural gas, bio-gas, wet gas, or any energy producing substance, the applicant shall pay to County annual fees as follows: The annual fee shall be paid by Grantee to County for the right of way area occupied by the pipelines, using the actual external diameter including the casing, at an annual rate of one dollar fifty-five cents (\$1.55) per cubic foot adjusted annually throughout the term pursuant to

Section 17 herein below.

Section 15. Non-Potable Water: If the application is for a right of way privilege for a non-public utility pipeline for the purpose of transmitting non-potable water the Grantee shall pay to County annual fees of fifteen cents (\$.15) times the linear foot of the pipeline, regardless of the diameter adjusted annually throughout the term pursuant to Section 17 herein below.

Section 16. Non-Public Electric Transmission Fee:

a. If the application is for a right of way privilege for a non-public utility pole line or underground line for the purpose of transmitting electricity, Grantee shall pay to County during the life of the ordinance three dollars (\$3.00) per linear foot, adjusted annually throughout the term pursuant to Section 17 herein below.

b. If the application is for a right of way privilege for a stand-alone nonpublic utility pole line for fiber optics, or insertion of fiber optics cable or any other cable into an existing pipeline for the purpose of transmitting telecommunications, broad band communications, or data, Grantee shall pay to County during the life of the ordinance one dollar fifty cents (\$1.50) per linear foot (“Base Fee”) of transition line adjusted annually throughout the term pursuant to Section 17 herein below.

Section 17 CPI Adjustments: The procedure for adjustment shall be as follows: The Consumer Price Index - All Urban Consumers - Los Angeles-Riverside-Orange County hereinafter (“Index”) as published by the United States Department of Labor’s Bureau of Labor Statistics (hereinafter “Bureau”), will be the basis for fee adjustments. March 2011 shall be used as the “Base Month Index” for the entire term. County shall review the Index annually and compare it with the Base Month Index. If there has been an increase in the Index, the fee for the succeeding year shall be increased by an amount equal to the Base Fee multiplied by the percentage of the increase over the Base Month Index. In no event shall the fee be adjusted downward to an amount less than the previous year’s fee. Should the Bureau discontinue the publication of the Index, or publish the Index less frequently, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

Section 18. Payments: It shall be the duty of Grantee to file with the Board, or the officer designated by said Board, on or before April 1st of each year, to provide a statement verified by the oath of the manager or presiding officer of said Grantee showing in detail the gross receipts and gross earnings collected or received by said Grantee, its successors or assigns, during the preceding twelve (12) months through the use of any part of the facilities for the construction and operation of which said right of way privilege is granted; and within ten (10) days after the time for filing the aforesaid statement it shall be the duty of said Grantee, its successors or assigns, to pay to the County Treasurer of the County the aggregate sum of the said percentage upon the amount of the gross annual receipts arising from the use, operation or possession of this right of way privilege and if the amount paid is incorrect in the judgment of the Board, they may order the payment of such additional sum as they may find due hereunder and if not paid, the same may be collected by suit.

Notwithstanding any other provision of this section, if the application for a right of way privilege is filed pursuant to Chapter 2, Division 3 of the Public Utilities Code (commencing at

section 6201), the verified statement by Grantee shall be filed within three (3) months after the expiration of the calendar year or fractional calendar year, following the date of the granting of the right of way privilege and within three (3) months after the expiration of each calendar year thereafter.

Section 19. Late Payments: The right of way privilege fee shall be paid annually during the life of the right of way privilege, including the year of granting the right of way privilege. Right of way privilege fees shall be paid on all facilities, not removed or abandoned in place as described herein below, in accordance with the terms of this Ordinance.

Right of way fees paid late (after April 1st) shall be subject to a late charge penalty of fifteen percent (15%) of the amount due for each year or portion thereof such fees are in arrears. This amount is not interest and therefore shall not be prorated.

Section 20. Grounds for Forfeit: If the Grantee fails to comply with any instructions of the Board with respect to the location, installation, or the repair of any damage to highways or County Right of Way, done by Grantee in the construction or maintenance thereof within ten (10) days after the service of written notice upon the Grantee, requiring compliance therewith, then the Board may immediately declare the right of way privilege forfeited.

Section 21. Noncompliance Penalties: The Board may levy a monetary penalty on Grantee as an alternative to, or in addition to, forfeiting the right of way privilege for Grantee's failure to abide by the terms and conditions of this Ordinance or the granting ordinance. The amount of penalty shall be assessed and determined by the Board per the schedule as follows:

- a. Up to \$5,000 for the first offense;
- b. Up to \$10,000 for the second offense;
- c. Up to a maximum of \$25,000 for third and all subsequent offenses.

Section 22. Assignment: The right of way privilege shall not be assignable in whole or in part without the written consent of the Board being first obtained.

Notwithstanding the foregoing, Grantee may hypothecate the right of way privilege without such consent and, in the event of foreclosure, the creditor may be assigned the right of way privilege provided that: (a) the facilities are properly maintained; (b) all terms and conditions of the right of way privilege and other County requirements are being adhered to; (c) the creditor agrees in writing to be bound by the terms of the right of way privilege and not to assign or transfer the right of way privilege without the approval of the Board; and (d) the creditor pays to the County the required administrative fee to process the assignment.

In the event of transfer or assignment for any cause, the Board shall have the right to substitute for the security a new security conditioned upon the assignee or transferee well and truly observing, fulfilling and performing and terms and conditions of the right of way privilege, and upon the filing of said security with and the approval thereof by said Board, to exonerate and excuse further liability upon the original security.

Section 23. Removal or Abandonment Of Facilities – Procedures:

A. At the expiration, revocation or termination of this right of way privilege or of the permanent discontinuance of the use of all or a portion of its facilities, Grantee shall, within thirty (30) days thereafter, make written application to the County Roads Department for authority either:

1. To abandon all or a portion of such facilities in place; or
2. To remove all or a portion of such facilities.

Such application shall describe the facilities desired to be abandoned, their location with reference to county highways, and shall describe with reasonable accuracy the physical condition of such facilities. The County Roads Department shall determine whether any abandonment or removal which is thereby proposed may be effected without detriment to the public interest and under what conditions such proposed abandonment or removal may be effected. The County Roads Department shall then notify the Grantee of the determinations.

B. Within thirty (30) days after receipt of such notice, Grantee shall apply for a permit from the County Roads Department to abandon or remove the facility.

C. The Grantee shall, within sixty (60) days after obtaining such permit, commence and diligently prosecute to completion the work authorized by the permit.

Section 24. Removal or Abandonment Compliance:

A. If any facilities to be abandoned "in place" subject to prescribed conditions shall not be abandoned in accordance with all such conditions, the County Roads Department may make additional appropriate orders, including an order that Grantee shall remove any or all such facilities. Grantee shall comply with such additional orders.

B. In the event that the Grantee shall fail to comply with the terms and conditions of abandonment or removal as may be required by Section 23 and within such time as may be prescribed by the County Roads Department, then the County may remove or cause to be removed such facilities at the Grantee's expense. The Grantee shall pay to the County the cost of such work plus the current rate of overhead being charged by the County for reimbursable work.

C. If, at the expiration, revocation or termination of this right of way privilege, or of the permanent discontinuance of the use of all or a portion of its facilities, the Grantee shall, within thirty (30) days thereafter, fail or refuse to make written application for the above mentioned authority, the County Roads Department shall make the determination as to whether the facilities shall be abandoned in place or removed. The County Roads Department shall then notify the Grantee of his determinations. The Grantee shall thereafter comply with the provisions of subsection B above.

Section 25. County Maintenance Waiver: No provision of this right of way privilege shall be so construed as to impose upon the County any duty or obligation to construct, repair or maintain any highway, including those areas in which right of way privilege property is located, to any particular standard.

Section 26. Road Modifications:

A. The State and any municipal corporation, political subdivision or governmental agency or instrumentality of the State acting in a governmental capacity may improve any public road or portion thereof in which right of way privilege properties have been installed and may install, and maintain in any such public road or remove any public improvement.

B. If notice in writing is given to the Grantee ten (10) days in advance that work is to be done pursuant to any right reserved in subdivision "A" of this section, specifically the general nature of the work and the area in which the same is to be performed, then the Grantee shall do all things necessary to protect its right of way privilege property during the progress of such work. If ordered by the Board, County Roads Department or by the governmental agency performing such work, the Grantee shall disconnect, remove or relocate its facility within the public road to such extent, in such manner, for such period as shall be necessary to permit the performance of such work in an economical manner, and in accordance with the generally recognized engineering and construction methods, to permit the maintenance, operation and use of such public improvement or of the highway as so improved. All of such things shall be done and such work be performed by the Grantee at the sole cost and expense of the Grantee.

C. Notwithstanding any provision in this section to the contrary, the provisions of subsections "A" and "B" hereof shall have no application to, nor shall said provisions be enforceable against, any Grantee which is a public utility within the meaning of sections 3, 5, and 8 of article XII of the California Constitution and section 216 of the Public Utilities Code of the State of California and which has, or may hereafter be granted a right of way privilege and is using said right of way privilege for the purpose of providing utility services to its consumers within the meaning of said sections 3, 5 and 8 of article XII and said section 216 of the Public Utilities Code.

D. The right is reserved in the County, through the County Roads Department to: (1) change the grade, alignment, or width of any public road over which a right of way privilege is granted; (2) extend, place, lay or construct an installation of any kind of nature including the construction of any subway or viaduct, whether or not it is within the facilities granted by right of way privilege, over, in upon or under any public road. In the event County Roads Department desires to exercise any of the foregoing powers, ten (10) days written notice shall be given by the Board of its intention to do so and the Grantee at its own cost and expense, within said time shall begin, and within a reasonable time shall complete, a change of location of all installations made by it in its operations under right of way privilege so as to permit and conform to such change or installation desired to be made by the County.

Section 27. Road Crossings: If facilities cover pipeline and it is necessary to lay pipe across or under any portion of the pavement, it shall be done by a tunnel or bore unless the County Roads Department directs otherwise. The County Roads Department retains the power to refuse permission for the laying of pipe across or under any paved highway if it believes that the work cannot be done without permanent damage to the highway.

Section 28. Bridge: In the event that the County Roads Department or any governmental agency or instrumentality mentioned hereinabove shall construct, install, reconstruct or repair any bridge or artificial support in or underlying any highway in which the right of way privilege property is located or which is prescribed as the location for any right of way privilege property, and the cost thereof be increased in order to provide for the installation, maintenance or operation of the right of way privilege property in or on the highway area covered or underlain by

said bridge or other artificial support, then the Grantee shall pay to the County or such governmental agency or instrumentality doing such work the full amount of such increase of cost, upon completion of such construction, installation or repair.

Section 29. No right of way privilege is exclusive to the Grantee.

Section 30. Any provision, clause or section of this Ordinance, or the application thereof, which is, or becomes inconsistent or in conflict with any of the laws of the United States of American or State of California shall be deemed to be preempted and superseded.

Section 31. Any provision, clause or section of this Ordinance, or the application thereof, which is preempted or superseded shall not preempt, supersede or in any other way invalidate the other provisions, clauses or sections of this Ordinance which can be given a reasonable effect without the preempted or superseded provision, clause, or section, and to this end, the provisions, clauses, and sections of this Ordinance are hereby declared to be severable.

COPIES FURNISHED:
<i>Property Management</i>
<i>Co Counsel</i>
<i>3/24/2011</i> <i>HLW</i>