

ORDINANCE NO. F-605

ORDINANCE NO. F-3 (Fourth Revision)

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

The following Ordinance, consisting of three (3) parts, 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 28th day of April, 2015, by the following vote, to wit:

AYES: Gleason, Scrivner, Couch, Perez

NOES: None

ABSENT: Maggard

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 29th day of May, 2015 and shall be published once in the Bakersfield Californian, a newspaper of general circulation published in the County of Kern ("County"), State of California ("State"), together with the names of the members of the Board of Supervisors voting for and against the same.

Section 2. Ordinance F-3 (Third Revision) (effective March 22, 2011) is hereby; renamed Ordinance F-3 (Fourth Revision) and amended to read as follows:

Ordinance No. F-605

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 III 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 — DEFINITIONS

Section 1. "Grantee" means the applicant, its successor and/or assignee, or "successful bidder" for a right of way privilege process.

Section 2. "Board" means the Board of Supervisors of the County of Kern.

Section 3. "Term" means the period for which the granting Ordinance is effective, beginning on the date the granting of the right of way privilege becomes effective.

Section 4. "Base Fee" means the basic annual fee defined in the granting ordinance before a Consumer Price Index adjustment.

Section 5. "Public Road(s)" 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" means utilities owned by public entities and/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 placement of the means of transmission or operation of the Facility.

Section 9. "Transmission Line System" means the three phase power method of distributing electricity which includes one bundling of three cables/phases of electricity, one ground line and one communication line.

PART III – TERMS AND CONDITIONS OF RIGHT OF WAY PRIVILEGE

Section 1. Permitting: No Facility Installation, repair, or maintenance, which disturbs the surface of any Public Road or obstructs its public use, shall be started without first obtaining the necessary permits from the Board or the officer designated by the Board. All Installations under this 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 Public Roads for purposes of travel. Any excavations in the Public Roads 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 required to, perform repairs of any Public Roads or any portion of any Public Roads in which Grantee may have excavated for the purpose of making Installations. Workmanship and costs thereof shall be consistent with the industry standards and rates, and to the reasonable satisfaction of the County. 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 2. 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 that time, the granted Ordinance may be declared forfeited. The 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 3. 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 the Board, or its designee, a map showing in detail the length and specifications of such Installation and the location of the same with its beginning and terminus in the Public Road both with reference to the surface and with reference to the property lines along the Public Roads.

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

Section 4. Surety Bond: Within thirty (30) days after the Ordinance is awarded, the Grantee shall file with the Board a bond running to the County in a penal sum set by the 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 the Grantee shall well and truly observe, fulfill and perform each and every term and condition of the ordinance and in case of any breach of condition of the 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 the bond is not so filed, the award of the 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 length of the Facility within right of way: 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 the bond or certificate of deposit that this action shall be in addition to those remedies outlined in the granting Ordinance.

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 Department of the General Services Division of the County.

At the discretion of the Board, or its designee, the requirements and obligations under this Section 4 may be modified if the Board, or its designee, determines that a Grantee is determined to be low risk, and can demonstrate that securing and maintaining the required amount of the Surety Bond would cause financial hardship.

Section 5. Public Utility and Publicly-Regulated Utility Fees: The Grantee shall during the Term of the granting 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 5, 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.

It shall be the duty of the Grantee to file with the Board, or its designee, on or before April 1st of each year, a statement verified by the oath of the presiding officer of the Grantee showing in detail the gross receipts and gross earnings collected or received by the 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 the right of way privilege is granted; and within ten (10) days

after the time for filing the statement it shall be the duty of the Grantee, its successors or assigns, to pay to the County the aggregate sum of the 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, or its designee; the Board, or its designee, may order the payment of an additional sum which shall be added to the corrected amount due and if not paid, the same may be collected by suit.

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 6. Non-Public Utility Fees:

a. 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: During the Term of the granting Ordinance, the annual fee shall be paid by Grantee to County for the right of way area occupied by each pipeline of the Grantee under this Ordinance, using the actual external diameter including the casing, at an annual rate equivalent to one dollar and fifty-five cents (\$1.55) per cubic foot, of each pipeline, adjusted annually throughout the Term pursuant to Section 9 below. All applicable fees shall be due and payable annually on or before April 15th.

b. If the application is for a right of way privilege for a stand-alone, redundant, non-public utility pole line or underground line for fiber optics, or insertion of fiber optics cable or any other cable into a pipeline for the purpose of transmitting, electricity, telecommunications, broad band communications, or data, Grantee shall pay to County during the Term of the granting Ordinance one dollar and fifty cents (\$1.50) per linear foot of each transmission line of Grantee under this Ordinance, adjusted annually throughout the Term pursuant to Section 9 below. All applicable fees shall be due and payable annually on or before April 15th.

Section 7. 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, during the Term of the granting Ordinance, shall pay to County an annual fee equivalent to fifteen cents (\$.15) per linear foot of each pipeline of the Grantee under this Ordinance, regardless of the diameter, adjusted annually throughout the Term pursuant to Section 9 below. All applicable fees shall be due and payable annually on or before April 15th.

Section 8. 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 Term of the granting Ordinance, an annual fee equivalent to three dollars (\$3.00) per linear foot of each separate Transmission Line System of the Grantee under this Ordinance, adjusted annually throughout the Term pursuant to Section 9 below. All applicable fees shall be due and payable annually on or before April 15th.

b. If the application is for a right of way privilege for a stand-alone non-public utility pole line or underground 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 Term of the granting Ordinance, an annual fee equivalent to one dollar fifty cents (\$1.50) per linear foot of each transmission line of Grantee under this Ordinance, adjusted annually throughout the Term pursuant to Section 9 below. All applicable fees shall be due and payable annually on or before April 15th.

Section 9. CPI Adjustments: The procedure for adjustment shall be as follows: The Consumer Price Index - All Urban Consumers - Los Angeles-Riverside-Orange County (“Index”) as published by the United States Department of Labor’s Bureau of Labor Statistics (“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 annual 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 annual 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 10. Fees and CPI Adjustments After 20 Years: In consideration of County granting a right of way privilege with a Term greater than the standard 20-year term provided for in this Ordinance, Grantee, its successors and/or assigns, agree to pay a one-time, 30%, step increase effective on the 21st anniversary of the Effective Date of said ordinance. The procedure for applying the one-time step increase shall be to multiply the then-current Base Fee, including all applicable CPI adjustments to date, by 130% (“New Base Fee”). In no event shall the total annual franchise fee, for each transmission line, be less than the previous year’s fee. From then on, Grantee, its successors and/or assigns, shall pay to the County an annual franchise fee equal to the New Base Fee per linear foot of each Transmission Line System plus an annual Consumer Price Index adjustment as detailed below.

The procedure for annual CPI adjustments for the remainder of the Term of said Ordinance shall be as follows: The Index will be the basis for the annual franchise fee adjustments. March 2032 shall be used as the “New Base Month Index” for the remaining Term. County shall review the Index annually and compare it with the New Base Month Index. If there has been an increase in the Index, the annual fee for the succeeding year shall be increased by an amount equal to the New Base Fee multiplied by the percentage of the increase over the New Base Month Index. In no event shall the annual franchise fee be adjusted downward to an amount less than the previous year’s annual franchise 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 11. 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 15th) 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 12. Publication Fees: The Grantee shall pay the cost of publication of both the Notice of Public Hearing and Summary of Proposed Ordinance, and Summary of Enacted Ordinance in the newspapers necessary to comply with California Public Utilities Code 6232 and Government Code Section 25124(b)(1).

Section 13. Grounds for Forfeit: If the Grantee fails to comply with any instructions of the Board, or its designee, with respect to payment, the location, the Installation, the removal, or the repair of any damage to Public Roads or County right of way caused as a result of the actions of the Grantee, within ten (10) days after the written notice is provided to the Grantee, requiring compliance therewith, then the Board may immediately declare the right of way privilege forfeited.

Section 14. 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 15. Assignment: Prior to any assignment, the Grantee shall provide written notice to the County of the transfer of interest, or sale of Facilities, under this right of way privilege so County may consider the requested action. The rights, interest, duties, obligations, and responsibilities under this Ordinance or the granting ordinance shall not be considered assigned in whole, or in part, without the written consent of the Board being first obtained. Until the Board consents to the assignment, the Grantee shall be held liable for all duties, obligations, and responsibilities under this Ordinance or the granting ordinance.

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, as described in Section 4, 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 16. Tie-In: Prior to issuance of any encroachment, grading, or building permit to any current or future project ("Project") wishing to share, or tie-in to, Grantee's Facilities ("Tie-In"), Grantee agrees to pay a one-time Tie-In fee in an amount equivalent to 25% of the estimated cumulative franchise fee, calculated as if the additional Project is a stand-alone franchise. Grantee shall pay this fee for each additional Project that requires a Tie-In. The Tie-In fee must be paid in full before any Projects are permitted to Tie-In to the Grantee's Facilities.

Grantee shall be allowed to utilize the Grantee's Facilities under the terms of this Ordinance and the granting ordinance for benefit of any additional Projects, subject to payment of the Tie-In fee. The shared use of the Grantee's Facilities will not affect any of the approved infrastructures under this Ordinance or the granting ordinance. Additional Projects shall not be considered to be grantees under this Franchise or the granting ordinance and shall have no independent rights or obligations under this Franchise or the granting ordinance.

Section 17. Recordation: Grantee and its successors and/or assigns shall have the right to record this Franchise, the granting franchise, or a Memorandum in the official records of the County. Upon the expiration or termination of the Franchise, Grantee, its successors and/or assigns shall duly execute, acknowledge, deliver, and record a quitclaim deed, in a form mutually agreed upon between Grantee and the County, quitclaiming to the County all of Grantee's right, title, and interest in the Franchise.

Section 18. 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 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.

The application shall describe the Facilities desired to be abandoned, their location with reference to Public Roads, 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 the 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 the permit, commence and diligently prosecute to completion the work authorized by the permit.

Section 19. 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 fails to comply with the terms and conditions of abandonment or removal as may be required by Section 18 and within such time as may be prescribed by the County Roads Department, then the County may remove or cause to be removed, to the reasonable satisfaction of the County, such Facilities at the Grantee's sole cost. 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, within thirty (30) days, fails or refuses 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 its determinations. The Grantee shall comply with the provisions of subsection "b" above.

Section 20. 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 Public Road, including those areas in which right of way privilege property is located, to any particular standard.

Section 21. 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 Facilities have been installed or may install, and maintain any such Public Road or remove any public improvement.

b. If written notice is given to the Grantee ten (10) days in advance of the commencement of work to be done pursuant to any right reserved in subdivision "a" of this section, specifying the general nature of the work and the area in which the work is to be performed, then the Grantee shall do all things necessary, at its sole cost, to protect its right of way privilege and Facilities during the progress of such work. If ordered by the Board, County Roads Department or by the governmental agency performing the work, the Grantee shall, at Grantee's sole cost and expense, and to the satisfaction of the County, 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 the 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 Public Road as so improved.

c. Notwithstanding any provision in this section to the contrary, the provisions of subsections "a" and "b" 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, or its designee, of its intention to do so and the Grantee, at its sole cost and to the satisfaction of the County, 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 22. Road Crossings: If Facilities include pipelines and it is necessary to install the Facilities 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 Installation of Facilities across or under any paved highway if it believes that the work cannot be done without permanent damage to the Public Roads.

Section 23. Bridge: In the event that the County Roads Department or any governmental agency or instrumentality of the State, shall construct, install, reconstruct or repair any bridge or artificial support in or under any Public Road in which the right of way privilege area is located or which is prescribed as the location for any right of way privilege area, and the cost thereof is increased in order to provide for Grantee's Installation, maintenance or operation of its Facilities in the right of way privilege area, then the Grantee shall pay, upon receipt of an invoice, to the County or such governmental agency or instrumentality of the State doing such work the full amount of such increase of cost, upon completion of such construction, installation or repair.

Section 24. No right of way privilege is exclusive to the Grantee.

Section 25. 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 America or State of California shall be deemed to be preempted and superseded.

Section 26. 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:
PropMgmt;
CoCoun
4/30/2015
du

clauses, and sections of this Ordinance are hereby declared to be severable.