



Board Agenda Item 41

DATE: September 24, 2024

TO: Board of Supervisors

SUBMITTED BY: Steven E. White, Director
Department of Public Works and Planning

SUBJECT: Resolution of Intention to Grant a Franchise to Toro Energy of California AA, LLC;
Setting dates for Public Protest Hearing and further actions

RECOMMENDED ACTION(S):

- 1. Pass and authorize the Chairman to execute a Resolution of Intention to grant a franchise, up to 25 years, on a non-exclusive basis (the “non-exclusive franchise”), by Ordinance, to Toro Energy of California AA, LLC, (also referred to as Toro Energy), upon annual payment of a franchise fee to the County, to construct, maintain and use pipes and appurtenances for transmitting derived gas from Toro Energy’s landfill-gas-to-energy project (“LFGTE project”) at the County’s American Avenue Disposal Site (“AADS”) for any and all purposes, as allowed by a County-approved conditional use permit and/or road permit condition, from the LFGTE project at the AADS at 18950 W. American Avenue, Kerman, in, along, across, upon, and under the following public streets and highways within the unincorporated area of Fresno County: from the County’s AADS, eastward on W. American Avenue for approximately 4 miles, and then southward on S. Madera Avenue for approximately 4 miles, to a PG&E connection location approximately a half of a mile north of W. Manning Avenue, just east of S. Madera Avenue/SR 145, Kerman.**
- 2. Set October 22, 2024, at 9:30 a.m. or as soon thereafter as may be heard for the public protest hearing, as required by Public Utilities Code Section 6232, for the Board to hear and pass upon on any protest, including any objections, made against granting of the non-exclusive franchise, and, for the Board’s first reading of the Proposed Ordinance that would grant the non-exclusive franchise, with the Board’s second reading of the Proposed Ordinance expected to follow on December 3, 2024, at 9:30 am or as soon thereafter as may be heard; and further reading of the Proposed Ordinance expected to be waived at the time of its introduction and passage.**
- 3. Direct the Clerk of the Board to publish notice of the public protest hearing in a newspaper of general circulation within the County, at least once within fifteen (15) days after the passage of the Resolution.**

The recommended actions will initiate the process to enable your Board to consider granting of non-exclusive franchise, up to 25 years, to Toro Energy of California AA, LLC that would allow Toro Energy, upon annual payment of a franchise fee of two percent (2%) of its gross annual receipts to the County, to construct, maintain and use pipes and appurtenances for transmitting derived gas from Toro Energy’s landfill-gas-to-energy project (“LFGTE project”) at the County’s American Avenue Disposal Site (“County’s AADS”) for any and all purposes, as allowed by a County-approved conditional use permit and/or road permit condition, from the LFGTE project at the County’s AADS, in, along, across, upon, and under the foregoing public streets and highways, under Division 3, Chapter 2 of the California Public Utilities Code. A location map is attached hereto as Attachment 1. The recommended actions comprise a component of a larger project, namely the County’s future sale of landfill gas (also referred to as derived

gas) to Toro Energy generated by the LFGTE project at the County's AADS. The proposed pipeline system is eight miles in length, only half of which is within public streets and highways within the County.

The first recommended action requests your Board to pass a recommended resolution declaring your Board's intention to grant the non-exclusive franchise. Your Board's passage of the resolution would initiate these proceedings. This recommended action does not grant the non-exclusive franchise.

The second recommended action requests your Board to set a public protest hearing for all persons having any objection to the granting of the non-exclusive franchise to appear before your Board and be heard on that matter at such date and time. If no protest in writing is delivered to the Clerk of the Board up to the hour set for the protest hearing, or such protests as are filed have been heard and determined by your Board to be insufficient, or have been overruled or denied, then your Board may grant the non-exclusive franchise by proceeding with the ordinance adoption process. That process involves your Board conducting the first and second ordinance readings and passage and waiving further reading of the proposed ordinance at the time of its introduction and passage.

The third recommended action directs the Clerk of the Board to provide publication notice of the public protest hearing. This item pertains to a location in District 1.

ALTERNATIVE ACTION(S):

Your Board may decline to pass the recommended Resolution, which will result in your Board not considering (i.e. not holding the public hearing to consider) granting the non-exclusive franchise to Toro Energy; in that case the Department of Public Works and Planning (Department) will refund any unused portion of monies deposited by Toro Energy, as provided by a reimbursement agreement discussed below.

In determining whether to pass the recommended Resolution, your Board may take into account the two percent (2%) annual franchise fee rate (discussed below in the Fiscal Impact section), which was proposed by Toro Energy in its application for the requested non-exclusive franchise. That franchise fee rate is one of the lawful options that an applicant may propose when requesting a non-exclusive franchise for a nonpublic utility pipeline for industrial gas, which is the type of pipeline here (Pub. Util. Code, § 6231). The other lawful options for an annual franchise fee that the applicant may propose are that the applicant will pay to the County during the life of the franchise:

1. A specified percentage agreed to by the applicant and the County of the gross annual receipts of the applicant arising from the use, operation, or possession of the franchise;
2. An annual franchise fee in an amount agreed to by the applicant and the County; or
3. An annual franchise fee computed by multiplying the sum of one-half cent (\$0.005) times the nominal internal diameter of the pipe, expressed in inches (here, 6" - 8"), times the number of lineal feet of the pipe (here, 20,225) within the public streets, ways, alleys, or other public places within the County; but this calculation would only result in a flat annual fee of \$600 - \$800, depending on the final diameter.

(Pub. Util. Code, § 6231)

If your Board believes that the two percent (2%) annual franchise fee rate is unacceptable, and declines to adopt the recommended Resolution, this item will not proceed, but your Board may direct the Department to return to Toro Energy to ask Toro Energy if it is willing to resubmit a new application for the franchise based one of the foregoing options for franchise fee rates desired by your Board.

However, Toro Energy could decline to resubmit a new application for the franchise based on one of the foregoing options for franchise fee rates, and elect instead to truck the gas from the County's AADS to the

transfer point, which would eliminate the need for Toro Energy to request your Board to grant the non-exclusive franchise for the proposed pipeline system, as well as the County's ability to charge a franchise fee for the transmission of the gas.

FISCAL IMPACT:

There will be no net County cost associated with the recommended actions. Toro Energy entered into a reimbursement agreement with the County to reimburse the County for all staff time and any other costs associated with preparing the recommended resolution and the potential ordinance that would grant the non-exclusive franchise, including all required publication costs.

The recommended non-exclusive franchise requires that Toro Energy of California AA, LLC shall annually, commencing on the first date when Toro Energy receives derived gas pursuant to Section 1.26 of the Revenue Agreement, pay a franchise fee of two percent (2%) of its gross annual receipts (defined below) to the County, arising from the use, operation or possession of the franchise, plus any surcharges, if applicable to Toro Energy, under the Public Utilities Code, sec. 6350, et seq., successor legislation, or other legislation applicable to franchisee or derived gas enacted by the State of California. In the event such payment is not made, the non-exclusive franchise will be forfeited. The non-exclusive franchise will be for a term not to exceed twenty-five (25) years, as discussed further below.

"Gross annual receipts" means all income received by Toro Energy under the Revenue Agreement without any deductions, offsets or credits described in section 1.25 of the Revenue Agreement, and separate from other payments, reimbursements, or franchise fees payable or paid to the County. "Revenue Agreement" means the Revenue Agreement between the County and Toro Energy, dated April 22, 2022, as it may be amended from time to time, for the County's future sale to Toro Energy of landfill gas as renewable energy at the County's American Avenue Disposal Site, also known as the County's "AADS."

The County currently deposits funds from grants of franchises into the General fund as allowed by Government Code, section 26001.5, and the funds from the recommended non-exclusive franchise, if granted, will be deposited into the General Fund, unless otherwise directed by your Board.

An estimate of the gross annual receipts from the County's future sale of landfill gas was included in an attachment to the Agenda Item for the Revenue Agreement presented to and approved by your Board on April 22, 2022. That attachment is again included in this item as Attachment A, with the addition of the calculation of the proposed two percent (2%) franchise fee. Gross annual receipts are estimated to start at \$9 million in the first year of the project and increase to \$22 million by the 25th year. Two percent (2%) of these amounts means that annual County General Fund revenues would initially be approximately \$185,000 and eventually reach \$440,000.

Separate and apart from the foregoing franchise fee, Toro Energy, has agreed under the Revenue Agreement approved by your Board on April 19, 2022, to share 51% of its net receipts from the future LFGTE project (starting at the fifth year), discussed below, with the County. These net receipts to be paid to the County will be deposited into the American Avenue Landfill Enterprise fund. These net receipts, which are estimated to start at approximately \$200,000 annually (starting at the fifth year) and increase to approximately \$8 million in Year 25, are uneven due to Toro Energy's development costs paid over the first few years of the project.

DISCUSSION:

On April 19, 2022, your Board conducted a public hearing, made certain determinations of public benefits, adopt an uncodified ordinance to allow for the County's future sale of landfill gas generated by the County's AADS ("LFGTE project"), under a then-proposed Revenue Agreement with Toro Energy of California AA, LLC, as provided under Government Code § 25515 et seq. The determinations made by your Board are prescribed by statute, and in no way did the determinations involved any sale of the County's AADS. The

Revenue Agreement, as approved by your Board on April 19, 2022, contemplates a possible future discretionary Project, if realized, which is now the LFGTE project, but your Board was not being asked to approve, and did not approve, the future LFGTE project in that item.

The recommended actions in this item comprise a component of a larger project, namely the County's future sale of landfill gas to Toro Energy of California AA, LLC generated by the LFGTE project at the County's AADS. A Conditional Use Permit was approved by the Planning Commission on April 25, 2024 as one of the actions necessary for the larger project. Other approvals will be necessary including your Board approving a non-exclusive franchise as described above.

Toro Energy of California AA, LLC, has submitted a written application requesting a franchise to construct, maintain and use pipes and appurtenances for transmitting derived gas for any and all purposes, as allowed by a County-approved conditional use permit and/or road permit condition, in, along, across, upon, and under public streets and highways within the unincorporated area of Fresno County. However, the recommended actions limit the franchise, on a non-exclusive basis, to transmitting derived gas from Toro Energy's landfill-gas-to-energy project (LFGTE project) at the County's AADS at 18950 W. American Avenue, Kerman, in, along, across, upon, and under the following public streets and highways within the unincorporated area of Fresno County: from the County's AADS, eastward on W. American Avenue for approximately 4 miles, and then southward on S. Madera Avenue for approximately 4 miles, to a PG&E connection location approximately a half of a mile north of W. Manning Avenue, just east of S. Madera Avenue/SR 145, Kerman.

If approved by your Board, the ordinance granting the requested franchise (discussed below) will become effective thirty days after passage. As noted above, the term of the proposed franchise is from and after the date that, after Toro Energy has provided the bond, referenced above, to the County and accepted by the Director, the County has issued a permit for Toro Energy to commence construction within the franchise area. The franchise, if granted, would be on a non-exclusive basis.

To enable your Board to consider granting the non-exclusive franchise to Toro Energy of California AA, LLC Public Utilities Code section 6232 requires that your Board pass a Resolution of Intention to grant a non-exclusive franchise, by ordinance, to Toro Energy of California AA, LLC including provisions for publishing a Notice of Protest Hearing relating to your Board's intention to the grant of the non-exclusive franchise, by ordinance, setting a date, time, and place where all persons objecting to the granting of the non-exclusive franchise may appear and be heard by your Board. That notice is to be published in a newspaper of general circulation once within 15 days after the passage of the recommended Resolution of Intention. The public protest hearing may not be sooner than 20 days or later than 60 days after the passage of the recommended Resolution of Intention.

Under the recommended Resolution of Intention, Toro Energy of California AA, LLC shall, if granted the non-exclusive franchise, be required to file a bond running to the County of Fresno in the penal sum of \$100,000 at least thirty (30) days before any permit is granted by the County for Toro Energy to commence construction within the franchise area.

The recommended Resolution of Intention sets the date and place of the public protest hearing for October 22, 2024. At the public protest hearing, your Board is to proceed to hear and pass upon all protests so made and its decision shall be final and conclusive, subject to the right of referendum of the people. If no protest in writing is delivered to the Clerk up to the hour set for hearing, or such protests as are filed have been heard and determined by your Board to be insufficient, or have been overruled or denied, your Board may grant the non-exclusive franchise by ordinance adopted in the manner prescribed by law for the enactment of ordinances by the Board. The ordinance process involves your Board conducting the first and second ordinance readings and passage and waiving further reading of the proposed ordinance at the time of its introduction and passage, as allowed under Government Code, sections 25120 - 25131.

If your Board desires to proceed with the ordinance adoption process, your Board may hold the first

reading of the proposed ordinance immediately following the conclusion of the protest hearing. The Department recommends that your Board set the first reading of the proposed ordinance on October 22, 2024, and that your Board set a second reading of the proposed ordinance for December 3, 2024. If adopted, the ordinance will become effective thirty days after its final passage, pending written acceptance of the non-exclusive franchise by Toro Energy of California AA, LLC.

A copy of the draft of the proposed ordinance is on file with the Clerk of the Board solely for informational purposes relating to this item.

A copy of the recommended Resolution of Intention, the proposed Publication Notice, and draft proposed Ordinance have been provided to Toro Energy in advance of when this item was submitted to your Board.

On February 21, 2012, the Board of Supervisors authorized the County's engaged the law firm of Lozano Smith, LLP of Fresno (Lozano Smith), as special counsel, under a specialized legal services agreement to assist the Department connection with the LFGTE project. Lozano Smith, in association with County Counsel's Office assisted the Department concerning this item, which is related to the proposed LFGTE project.

California Environmental Quality Act:

The recommended action comprise a component of a larger project, namely the LFGTE project at the County's AADS. The County conducted Initial Study (IS) No. 8380, and the Planning Commission adopted the resultant Mitigated Negative Declaration (MND) (SCH No. 2024030055) along with approval of Conditional Use Permit No. 3762 on April 25, 2024. The recommended action was contemplated within the scope of the project description and are consistent with any mitigation measures imposed on this project by the MND. Accordingly, the recommended action comply with the California Environmental Quality Act because they are part of a project which has already undergone environmental review.

REFERENCE MATERIAL:

BAI #65, October 10, 2023

BAI #8, April 19, 2022

ATTACHMENTS INCLUDED AND/OR ON FILE:

On file with Clerk - Resolution of Intention, including Publication Notice

On file with Clerk - Draft Proposed Ordinance

Attachment 1 - Location Map

Attachment A - Future LFGTE Project 25-year Estimated Cash Flow

CAO ANALYST:

Salvador Espino