



Board Agenda Item 13

DATE: October 22, 2024

TO: Board of Supervisors

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

SUBJECT: Public Protest Hearing and First Reading of Proposed Ordinance Granting a Franchise to Toro Energy of California AA, LLC

RECOMMENDED ACTION(S):

1. **Conduct public protest hearing, as required by Public Utilities Code section 6234, for the Board of Supervisors (“Board”) to receive, hear, and pass upon any timely written protests, including any timely written objections, made by any interested person against the Board granting 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. **After conducting and closing the public protest hearing, do the following, as determined by the Board:**
 - a. **Determine that no timely written protests, including timely written objections, have been made against the Board granting of the non-exclusive franchise to Toro Energy, and the Board may proceed to act on recommended action 3; or**
 - b. **Determine that one or more timely written protests, including timely written objections, have been made against the Board granting of the non-exclusive franchise to Toro Energy, and have been heard by the Board, and pass upon such protest(s), including such objection(s), as applicable:**
 - i. **The protest(s), including objection(s), are insufficient;**
 - ii. **The protest(s), including objection(s), are overruled or denied; or**
 - iii. **The protest(s), including objection(s), are sufficient.**
 - c. **If the Board determines that all such protests, including all such objections, are insufficient or overruled or denied, the Board may proceed to recommended action 3.**
 - d. **If the Board determines that only some of such protests, including some of such objections, are insufficient or overruled or denied, the Board will determine, under recommended action 2.e., if the remaining protests, including remaining objections, are**

sufficient.

- e. **If the Board determines that any such protests, including objections, are sufficient, then the Board may grant such protests, and sustain such objections, and abandon these proceedings.**

- 3. Conduct first hearing, including first reading of an ordinance granting the non-exclusive franchise, as described above, to Toro Energy. Waive reading of the ordinance in its entirety and set the second hearing of the ordinance for December 3, 2024.**
- 4. Designate County Counsel to prepare a fair and adequate summary of the proposed ordinance.**
- 5. Direct the Clerk of the Board to post and publish the required summary in accordance with Government Code section 25124(b)(1).**

These proceedings are a result of your Board's adoption of a resolution of intention, on September 25, 2024, to set the public protest hearing today to initiate the process discussed in this item.

The recommended actions will enable your Board to proceed with considering granting a non-exclusive franchise, up to 25 years, to Toro Energy 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 LFGTE Project at the 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 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 will enable your Board to conduct public protest hearing to receive, hear, and pass upon any timely written protests, including any timely written objections, made by any interested person against your Board granting the non-exclusive franchise, by ordinance, to Toro Energy. Protests must be in writing and signed by the person making the protest. Persons submitting protests need not be affected property owners.

After you Board conducts and closes the public protest hearing, the second recommended action will enable your Board to make determinations concerning written protests, if any, against your Board granting of the non-exclusive franchise. There is no minimum number of (or area affected by) timely written protests, including timely written objections, that must be received by the Clerk of the Board in order for your Board to decide to grant the protests and abandon the proceedings.

Depending on the public protest hearing, your Board might:

1. Determine that no timely written protests, including timely written objections, have been made; or
2. Determine that one or more timely written protests, including timely written objections, have been made, and have been heard by your Board, and pass upon such protest(s), including such objection(s), as applicable.

Depending on your Board's determinations of any written protests, including any written objections, presented to the Clerk of the Board, this item may or may not proceed to the third recommended action.

If your Board determines that no timely written protests, including timely written objections, have been made against the Board granting of the non-exclusive franchise to Toro Energy, or that all timely written protests, including all timely written objections, are insufficient or overruled, or denied, then your Board may proceed to the third recommended action. The third recommended action will enable your Board to conduct the first hearing, including first reading, of the proposed ordinance, as recommended by the Department of Public Works and Planning (“Department”), for granting the non-exclusive franchise, as described above, to Toro Energy, waive reading of the proposed ordinance in its entirety, and set the second hearing of the proposed ordinance for December 3, 2024.

The fourth and fifth recommended actions direct the Clerk of the Board and County Counsel to take actions necessary to facilitate your Board’s further consideration, and possible adoption, of the proposed ordinance. This item pertains to a location in District 1.

ALTERNATIVE ACTION(S):

Your Board may proceed with the public protest hearing, and decline to proceed with the first reading of the proposed ordinance, or decline to take all the recommended actions; in either such case, that would result in your Board abandoning the proceedings, and the Department would refund any unused portion of monies deposited by Toro Energy, as provided by a reimbursement agreement discussed in the Fiscal Impact, section, below.

If the recommended actions do not result in your Board conducting the first hearing, including first reading, of the proposed ordinance granting the non-exclusive franchise to Toro Energy, and setting the second hearing of the proposed ordinance for December 3, 2024, as discussed above, Toro Energy will not be able to transmit gas through pipes within the County right-of-way. Toro Energy could elect instead to truck the gas from the County’s AADS to the transfer point, and that would eliminate 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 (see “Discussion” section below), pay a franchise fee of two percent (2%) of its gross annual receipts (defined below in this “Fiscal Impact” section) 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 a 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 LFTGE 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:

1. Background.

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 section 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 the recommended non-exclusive franchise as described in this item.

2. Toro Energy's application for the non-exclusive franchise.

Toro Energy of California AA, LLC 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 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.

As noted above, the term of the recommended 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.

3. Prior Board actions implementing the process in this item.

To enable your Board to consider granting the non-exclusive franchise to Toro Energy of California AA, LLC, your Board, on September 25, 2024, passed a Resolution of Intention ("ROI") to grant the non-exclusive franchise, by ordinance, to Toro Energy of California AA, LLC, 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.

Today's public protest hearing was set, and notice of it was timely published, in the Business Journal on Wednesday, October 2, 2024, in compliance with Public Utilities Code section 6232.

At the public protest hearing, your Board is to proceed, under Public Utilities Code section 6234, to hear and pass upon all timely written protest, including written objections, so made and its decision shall be final and conclusive, subject to the right of referendum of the people. Such timely written protests, including any timely written objections, may be made by any interested person against your Board granting the non-exclusive franchise, by ordinance, to Toro Energy. Protests must be in writing and signed by the person making the protest. Persons submitting protests need not be affected property owners.

If no protests, including objections, in writing are delivered to the Clerk up to the hour set for hearing, or if such protests, including objections, as are timely filed have been heard and determined by your Board to be insufficient, or have been overruled or denied, your Board may proceed to 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.

But if your Board determines that any such timely filed written protests, including objections, are sufficient, then your Board may grant such protests, and sustain such objections, and abandon these proceedings. There is no minimum number of (or area affected by) timely written protests, including timely written objections, that must be received by the Clerk of the Board in order for your Board to decide to grant the protests and abandon the proceedings.

4. The proposed ordinance.

The Department recommends the proposed ordinance, discussed below.

If your Board approves the third, fourth and fifth recommended items, and if your Board thereafter 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 second reading of the ordinance would, with your Board's approval, be scheduled for December 3, 2024.

As stated above, 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 (see "Discussion" section below), pay a franchise fee of two percent (2%) of its gross annual receipts 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.

Under the proposed ordinance, Toro Energy 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. This bond is

separate from the bond for construction, discussed above.

The proposed ordinance provides that if Toro Energy does not comply with any of the conditions of the franchise for more than thirty (30) days after written demand by County for compliance, then County, by your Board, in addition to all rights and remedies allowed by law, may terminate the franchise. Under the proposed ordinance, if Toro Energy breaches any condition of the franchise, the bond is recoverable by the County.

If adopted, the ordinance will become effective thirty (30) days after its final passage, pending written acceptance of the non-exclusive franchise by Toro Energy of California AA, LLC. The franchise, if granted, does not become effective until Toro Energy files written acceptance of it with the Clerk of the Board and a copy thereof is filed with the Director.

A copy of the proposed ordinance is on file with the Clerk of the Board. It is the same as the draft ordinance that was on file with the Clerk of the Board when your Board adopted the ROI on September 25, 2024 except for one minor clarification in section 14, Audits, at page 13, line 31, which has been made, as follows:

Delete the following text: "This Section 14 survives the termination of this Agreement"

Add the following text: "This Section 14 survives the termination of this ordinance."

A copy of the proposed ordinance, as clarified above, has been provided to Toro Energy.

5. Other information.

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 LFGTE Project.

California Environmental Quality Act:

The recommended actions 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 actions were 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 actions comply with the California Environmental Quality Act because they are part of a project which has already undergone environmental review.

REFERENCE MATERIAL:

BAI# 42, September 24, 2024
BAI #65, October 10, 2023
BAI #8, April 19, 2022

ATTACHMENTS INCLUDED AND/OR ON FILE:

Ordinance
On file with Clerk - Ordinance Summary
Attachment 1 - Location Map
Attachment A - Future LFGTE Project 25-year Estimated Cash Flow

CAO ANALYST:

Salvador Espino