

Memorandum

To: Honorable Mayor Shetter and members of the Burleson City Council

From: Aaron Russell, P.E., Public Works Director

Date: March 16, 2009

Subject: Minute Order MO-09-057, Consideration of a directive to relocate utilities associated with the expansion of Hurst Road (Renfro Street to Wyche Court) at the utility companies' expense

Council Action Requested:

Direct the Public Works Director to require relocation of utilities, at the utility companies' expense, that are within the existing right-of-way of Hurst Road between Renfro Street and 400 feet north of Wyche Court that are in conflict with the Hurst Road project.

Background Information:

The City and the BISD are proceeding with design and construction of Hurst Road between Renfro Street and Wyche Court in accordance with an interlocal agreement approved by the City Council on January 20, 2009. As a part of the construction of Hurst Road, utility relocations must occur so that there are no conflicts between the proposed road facilities and the existing utility facilities in the area. Staff has begun the utility relocation coordination process. The utilities that need to be relocated are owned by Oncor Electric, United Cooperative Services, Atmos Gas, AT&T, and Charter Cable.

Atmos Gas and Oncor Electric have stated that they will charge for their relocations because this is not a City funded project. The Texas Utilities Code states that each of these utilities is required to relocate their facilities within the right-of-way for street construction projects at their expense; it does not specify the funding source or who provides the project administration. This project is partially funded by the City and will be managed by the BISD. To comply strictly with State law, the City Attorney has recommended that the City Council direct staff to require the relocation of the utilities since the law states that the notices shall be from the "governing body." The attached memo from the City Attorney more fully explains the requirements of the law.

Board/Citizen Input: N/A

Financial Considerations:

There is no expenditure of municipal funds associated with this item.

Attachments:

Memo from City Attorney.

Staff Contact:

Mandy Clark, Deputy City Engineer
817-447-5400 ext. 292
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MEMORANDUM

DATE: February 27, 2009
TO: Mandy Clark
Deputy City Engineer
FROM: Wade Adkins
TOASE
RE: Relocation of Utility Facilities
For Hurst Road Project

In my opinion, the City of Burleson should take the position that the public utility companies are required to relocate their facilities in the road at no cost to the City. The Director of Public Works should send them a letter directing them to do so. It might be wise to have the City Council instruct the Director to do so since some of the provisions in the Utility Code state that notice shall be sent by the "governing body."

Here is a list of the provisions establishing Burleson's authority to require each of the specific types of companies to pay to relocate its facilities:

a. Oncor Electric and United Coop (if it is an electric coop)

Section 37.101, Texas Utilities Code. This section says that the governing body of a municipality may require an electric utility to relocate the utility's facilities at the utility's expense to permit the widening or straightening of a street by: (a) giving the electric utility 30 days' notice; and (2) specifying the new location for the facility along the right-of-way of the street.

Burleson franchise ordinance. I still would like to see the current Oncor/TXU franchise ordinance because it probably contains specific provisions concerning relocation of facilities.

b. Atmos Gas

Section 104.112 of the Texas Utilities Code. This section applies to a gas utility's costs of relocating a facility to accommodate "construction or improvement of a highway, road, street, public way, or other public work by or on behalf of the United States, the state, a political subdivision of the state, or another utility having the power of eminent domain" It provides that the gas utility may recover its relocation costs from its customers through a surcharge on gas sold in the service area.

Burleson franchise ordinance: Ordinance No.C-424, adopted by the Burleson City Council on November 21, 1991, granted a twenty year franchise to Lone Star Gas, the

predecessor of Atmos. Section 5 of the Ordinance contains provisions requiring the Company to relocate its facilities. It states: "Company shall at its own cost and expense, without claim for reimbursement or damages against the City, when requested by the City, lower, relocate, or relay existing gas mains or street service lines located in City right-of-way where necessary due to any street construction or reconstruction by or on behalf of the City or due to the construction or relocation of an City utility lines." There are some additional provisions concerning reimbursement of the gas company if their relocation costs can be made part of a state or federal grant request.

c. Southwestern Bell Telephone

Section 54.203 of the Texas Utilities Code. This Section says that the governing body of a municipality may require a certificated telecommunications utility to relocate the utility's facilities at the utility's expense to permit the widening or straightening of a street by giving the utility 30 days' notice and specifying the new location for the facility along the right-of-way of the street.

Section 283.056 of the Texas Local Government Code. Chapter 283 did away with municipal franchises for telephone companies. Chapter 283.056 (b) and (c) says that a municipality may require the issuance of a construction permit without cost to a certificated telecommunications provider locating facilities in or on public right-of-way within the municipality. These provisions state that a municipality may exercise police power regulations in the management of a public right of way that apply to all persons within the municipality. A municipality may exercise police power based regulations in the management of the activities of certificated telecommunications providers within a public right-of-way only to the extent they are reasonably necessary to protect the health, safety and welfare of the public. In addition, any police power regulation must be competitively neutral and may not be unreasonable or discriminatory. (See e. below concerning the Burleson Right-of-Way Management Ordinance).

Section 283.066 of the Local Government Code didn't repeal Section 54.203 of the Utilities Code remains in effect.

d. Charter Cable

Chapter 66 of the Texas Utilities Code. This chapter regulates cable television companies and provides for a state issued franchise. It did away with municipal cable franchises. Chapter 66 gives state franchised cable companies the right to locate their facilities in city streets. Section 66.011 provides that a municipality may enforce "police power-based regulations in the management of a public right-of-way that apply to the holder of a state-issued certificate of franchise authority within the municipality. A municipality may enforce police-power based regulations in the management of the activities of the holder of a state-issued certificate of franchise authority to the extent that they are reasonably necessary to protect the health, safety and welfare of the public." The regulations must be competitively neutral and may not be unreasonable or discriminatory." The section contains a laundry list of requirements which a municipality may not impose – none of them are relevant to the relocation issue. (See e. below concerning the Burleson Right-of-Way Management Ordinance).

e. The Burleson Right of Way Management Ordinance.

Chapter 15 of the Burleson Code of Ordinances. The Burleson City Council adopted Ordinance No. B-715 in 2004. It enacted Article II of Chapter 15 of the Burleson Code of Ordinances and established comprehensive and competitively neutral regulations for utility and telecommunications providers, and others, desiring to place facilities in public rights-of-way in the City of Burleson. This ordinance was adopted partly in response to Chapter 283 of the Local Government Code and perhaps in anticipation of Chapter 66 of the Texas Utilities Code. Section 15-30 (a) of the City Code provides that whenever the Director of Public Works “deems it necessary to remove, alter, change, relocate, or adapt the underground or overhead facilities of a public service provider in the public right-of-way due to the City’s reconstruction, widening, or straightening of streets, placement or replacement of water, wastewater, or storm water facilities, installation of traffic signals, traffic signs, and streetlights or construction of any other City public improvement project, the public service provider that owns the facilities shall conform its facilities to the City’s project. Section 15-30 (b) provides that the public service provider shall conform the facilities at its expense within 120 days after the Director issues notice to do so, unless a different schedule is approved or the provider’s franchise agreement with the City provides for different relocation requirements.”

Under this provision, I would argue that the reconstruction of Hurst Road is due to the “City’s reconstruction, widening, or straightening” of the street because the City has required reconstruction of the street as part of BISD’s project.

Please contact me if you have any questions or need additional information.

Wade Adkins