



MEMORANDUM

TO: Mayor Laurel Lunt Prussing and Members of the City Council
FROM: Gale L. Jamison, Assistant City Engineer
William R. Gray, Public Works Director
DATE: April 20, 2011
RE: Windstream KDL, Inc., Agreement for use of Right-of-Way

INTRODUCTION

Windstream KDL, Inc. of Overland Park, Kansas proposes to install fiber optic cables both above ground on Ameren power poles and below ground in conduits within the rights-of-way of the City. In accordance with City policy a license agreement with the City is required for that installation and is attached for Council consideration. The proposed routing of the fiber optic cable is depicted in Exhibits A, B and C to the proposed agreement.

FISCAL IMPACT

The proposed installation will be at no cost to the City. As provided for in agreement in the event that Windstream KDL, Inc. becomes a retailer of telecommunications services within the City by the transmitting, supplying or furnishing of telecommunications, including without limitation internet services, data services, local telephone services or long distance services, as contemplated under the Illinois Simplified Municipal Telecommunications Tax Act, as amended from time to time, then Windstream KDL, Inc. will provide written notice thereof to the City, and will as soon as practicable thereafter commence collection of the taxes provided for under that Act, and any other taxes that they may be required by law to collect.

RECOMMENDATION

It is recommended that the City Council approve the attached ordinance entitled “**AN ORDINANCE APPROVING AN AGREEMENT FOR USE OF RIGHT-OF-WAY (Windstream KDL, Inc.: High Cross Road, Windsor Road, Lincoln Avenue, Clark Street, Sassafrass Alley, Orchard Street, and Broadway Avenue)**”

ORDINANCE NO. 2011-04-031

AN ORDINANCE APPROVING AN AGREEMENT FOR USE OF RIGHT-OF-WAY
(Windstream KDL, Inc.: High Cross Road, Windsor Road, Lincoln Avenue,
Clark Street, Sassafrass Alley, Orchard Street, and Broadway Avenue)

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City
of Urbana, Champaign County, Illinois, as follows:

Section 1.

An Agreement for use of right-of way (High Cross Road, Windsor
Road, Lincoln Avenue, Clark Street, Sassafrass Alley, Orchard
Street, and Broadway Avenue) between the City of Urbana and
Windstream KDL, Inc., in substantially the form of the copy of
said Agreement attached hereto and hereby incorporated by
reference, be and the same is hereby authorized and approved.

Section 2.

The Mayor of the City of Urbana, Illinois, be and the same is
hereby authorized to execute and deliver and the City Clerk of
the City of Urbana, Illinois, be and the same is hereby
authorized to attest to said execution of said Agreement as so
authorized and approved for and on behalf of the City of Urbana,
Illinois.

PASSED BY THE CITY COUNCIL this ____ day of _____, _____.

AYES:

NAYS:

ABSENT:

ABSTAINED:

Phyllis D. Clark, City Clerk

APPROVED BY THE MAYOR this ____ day of _____, _____.

Laurel Lunt Prussing, Mayor

After recording return to:

City of Urbana Legal Division
400 S. Vine Street
Urbana, IL 61801

AGREEMENT FOR USE OF RIGHT-OF-WAY

(Windstream KDL, Inc.)

THIS AGREEMENT is made and entered into this _____ day of _____, 2011, by and between the CITY OF URBANA, a municipal corporation of the State of Illinois (hereinafter “City”), and Windstream KDL, Inc. (hereinafter “Company”).

WITNESSETH:

FOR AND IN CONSIDERATION of the mutual covenants and agreements herein contained, the City and the Company do mutually covenant and agree as follows:

A. High Cross Road, Windsor Road, Lincoln Avenue, Clark Street, Sassafrass Alley, Orchard Street, and Broadway Avenue are roadways of at least sixty feet of dedicated right-of-way (r-o-w).

B. The City hereby grants the Company a limited right to install two 2¼ inch conduits as provided in Paragraph D of this Agreement. One conduit is to be immediately filled with 48-count fiber and the other to be filled as needed within the term of this Agreement. This limited right is wholly dependent upon the Company and its successors and assigns fully and faithfully performing and complying with all the terms, conditions, and covenants contained within this Agreement. The Company expressly acknowledges and agrees that such limited right is immediately revocable at the option of the City in the event that the Company or its successors or assigns fails to perform or comply with any term, condition or covenant set forth within this Agreement provided that Company shall have a period to cure any such failure as otherwise set forth herein. This Agreement may be terminated at any time without notice upon the express written consent of both Parties. Either Party may terminate this Agreement for cause by giving written notice to the other Party at least forty-five (45) days prior to the proposed termination. For the purposes of this section, “for cause” means the breach of any material provision of this Agreement, which remains uncured for a period of thirty (30) days after serving the written notice thereof. A notice of termination shall specify the “cause” upon which such termination is based. Further, it is expressly understood that regardless of the existence or not of any breach, the use by the Company of the hereinabove described r-o-w shall at all times be subordinate to the City’s use of said r-o-w.

C. The construction and installation of said facility or any change thereof including extension, reduction or removal of the telecommunications facility shall be subject to the issuance of a permit therefore by the City's Director of Public Works (hereinafter referred to as "Director"). No telecommunications facility shall be laid or installed in or under any streets, alleys or other public way until a permit therefore is issued by the Director. Said permit shall indicate the time, manner and place of laying or installing each telecommunications facility. Permit approval shall be granted if the proposed improvements are consistent with the use of the public way granted by this Agreement. Each application for a permit shall be accompanied by prints, plans and maps showing the proposed location of each telecommunications facility to be laid or installed, the location of each conduit to be entered, and the number and placement of manholes or other openings to gain access to said conduit, along with the appropriate surety bond, insurance certificate, and permit fees required by the Urbana City Code. In the event of an emergency which the Company believes poses a threat of immediate harm to the public or to any of the Company's facilities, the Company shall be permitted access to the public way to mitigate the threatened harm without the benefit of a permit, provided however the Company shall advise the Municipality of the emergency at its earliest reasonable opportunity and seek a proper permit within a reasonable period of time thereafter.

D. The purpose of the herein permitted right to construct upon such r-o-w shall be limited solely to the installation, operation, and maintenance of the telecommunications facility in said r-o-w, which is shown on Exhibits A, B, and C, which are attached to and incorporated into this Agreement, and use thereof, and for incidental uses directly related thereto. Upon cessation of such use as determined by the Director, this Agreement shall immediately lapse and terminate. If the City believes that any facilities of the Company are no longer in use by the Company or are otherwise abandoned by the Company, the City may notify the Company in writing that the City is asserting its right to declare this Agreement lapsed and terminated. Such notice must give the Company at least thirty (30) days to respond. If the Company demonstrates that the facilities are still in use by the Company and are not otherwise abandoned by the Company, this Agreement shall remain in force and effect according to its terms. If the Company does not demonstrate within thirty (30) days of the notice that the facilities are in use by the Company and are not otherwise abandoned by the Company, this Agreement shall be deemed lapsed and terminated. Any additional use other than that specifically named, without the further express written consent of the City, shall be construed as a violation of this Agreement.

E. The Company, after doing any work shall, at its sole cost and expense, promptly repair and restore the site including all sidewalks, parkways or pavements disturbed by the Company to the condition in which they existed prior to the performance of the work, or nearly as practicable as determined by the City in the exercise of its reasonable discretion. In the event that any such sidewalk, parkway or pavement shall become uneven, unsettled, or otherwise requires repairing, because of such disturbance by the Company, then the Company, as soon as climatic conditions will reasonably permit shall promptly, and no more than fifteen (15) days from receipt of notice from the City to do so, cause such sidewalk, parkway or pavement to be repaired or restored to the condition in which it existed before said sidewalk, parkway or pavement was disturbed by the Company. Such restoration shall be completed within ten (10)

days after the date of commencement of such restoration work. In the event that the Company fails to commence and complete the restoration work in the manner and within the time periods prescribed herein, the City may, but shall have no obligation to, perform such work and recover from the Company any costs and expenses the City incurs. In the event that such public way or improvement cannot be so repaired, replaced or restored, the Company shall justly compensate the City. All excavations in lawns or grassy parkways shall be immediately backfilled, tamped and then restored within a reasonable time thereafter to the original condition with sod or hydroseed in accordance with the applicable provisions of this Agreement. The Company shall keep all structures which it shall construct by virtue of this Agreement, in a reasonably safe condition at all times, and shall maintain such traffic control and protection during the construction, repair or renewal work performed hereunder as will reasonably avoid danger to life, limb and property. Any damage caused by the Company to any other utility including storm and sanitary sewers and their services, street lighting, traffic signals, field tiles or any facilities from any other utility company shall, at its sole cost and expense, promptly repair and restore said damaged facility.

F. In the event of an emergency, defined as imminent peril to person or property, or when the Company has inadequately complied with an order of the Director pursuant to Paragraph (B) above, or at any other time the Director or other responsible City official in good faith deems the procedures of Paragraph (B) impracticable under the circumstances present, the Company consents and agrees that the City or its duly authorized agent may remove the telecommunications facility, or any portion thereof, and charge all costs and expenses incurred in such removal, disposal, and restoration to the Company. Should the Company fail in any way to make timely payment to the City for such costs and expenses, the Company agrees to pay, in addition to any amount so owed, reasonable attorneys' fees and court costs incurred in the collection of such amount.

G. The Company agrees to defend the City from and against any claims, suits, or actions for death or injury to persons or damage to property or breach of the contract brought against the City arising from any alleged claims, acts, or omissions in connection with this Agreement, whether or not suit is filed unless such claim, suit, or cause of action was based solely upon the negligence of the City, its employees, agents, or contractors. Additionally, the Company shall indemnify the City for any sums the City becomes obligated to pay as damages arising out of such circumstances except to the extent such damages are due to the negligence of the City, its employees, agents, or contractors.

H. The Company acknowledges that it shall be fully responsible and bear all costs associated with any and all maintenance or repair of the telecommunications facility.

I. The Company shall provide as built plans to the City, upon completion of the installation of the telecommunications facility, in an electronic format compatible with the City's Geographic Information System.

J. In the event that Company becomes a retailer of telecommunications services in the City by transmitting, supplying or furnishing of telecommunications, including without limitation internet services, data services, local telephone services or long distance services, as contemplated under the Illinois Simplified Municipal Telecommunications Tax Act, as amended

from time to time, then Company shall provide written notice thereof to the City, and as soon as practicable thereafter commence collection of the taxes provided for under that Act, and any other taxes that it may be required by law to collect.

K. The license granted under this Agreement may not be transferred without the express written consent of the City, provided that such consent shall not be unreasonably withheld.

L. The license granted under this Agreement does not confer any exclusive right or privilege to occupy any r-o-w for any purpose.

M. The license granted under this Agreement does not convey any right, title, or interest in any r-o-w but is deemed a license only to use and occupy the r-o-w for the limited purposes and term stated herein. The license will not be construed as any warranty of title.

N. This Agreement is expressly binding upon both parties, their successors and assigns.

O. All notices required under this Agreement must be in writing. Notices must be personally hand delivered or mailed by certified U.S. mail, return receipt requested, addressed to the respective Party as shown below, or to any changed address either Party may have fixed by notice. Notice will be deemed effective upon actual receipt of the notice, or, if certified mail delivery is not accomplished, notice will be deemed given on the date of the mailing.

To the City: Director of Public Works
City of Urbana
706 S. Glover Avenue
Urbana, Illinois 61802

To the Company: Windstream KDL, Inc.
Attention: Manager
8825 Bond Street
Overland Park, Kansas 66214

Either party may designate by written notice a different address to which notices must be sent.

P. The Company shall not be excused from complying with any of the terms and conditions of this Agreement by any failure of the City upon any one or more occasions to insist upon or to seek compliance with any such terms or conditions.

Q. This Agreement and the License granted to the Company hereunder shall commence as of the date of this Agreement and shall continue until June 30, 2016, unless sooner terminated in accordance with this Agreement.

R. The Company shall comply with all ordinances of the City, including but not limited to all generally-applicable provisions regarding rights-of-way, as such ordinances are now or hereafter amended, except to the extent that such ordinances directly and irreconcilably

conflict with an express provision of this Agreement. The Company shall comply with all conditions of permits issued to it.

S. In the event any one or more of the provisions contained in this Agreement is determined to be invalid, illegal, or unenforceable in any respect by a Court of competent jurisdiction, such provision will be deemed severed from this Agreement, and the validity, legality, or enforceability of the remaining provisions of this Agreement or any other application thereof will not be affected or impaired thereby, and will, therefore, remain in full force and effect.

T. This Agreement will be recorded in the Office of the Champaign County Recorder of Deeds at the expense of the City.

U. This Agreement and any written exhibits or addenda to it constitute the entire Agreement between the Parties, and may be changed, modified or amended only by mutual written agreement executed by them.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed effective as of the day and year first above written.

CITY OF URBANA, ILLINOIS

By: _____
Laurel Lunt Prussing, Mayor

ATTEST:

Phyllis Clark, City Clerk

Windstream KDL, Inc.

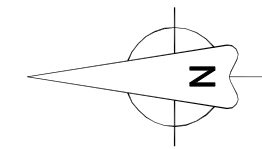
By: _____
(Signature)

(Print Name & Title)

ATTEST:

Secretary *(Signature)*

(Print Name)



KDI
KENTUCKY DATA LINK, INC.
 3701 COMMUNICATIONS WAY
 EVANSVILLE, IN 47715 (800) 709-5690

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REV	DATE	DESCRIPTION	ENG	DRAFTER

EXHIBIT B
ROUTE: 487
PROJECT: VZW SITE 1
LOCATION: CHAMPAIGN, CHAMPAIGN CO., IL

DESIGNED BY: R. DICKERSON	
DRAWN BY: LBD	
SCALE: NTS	
DATE DRAWN: 09/15/10	
FILE NAME: CONSTRUCTION DRAWINGS	
PROJECT NUMBER: 487	
SHEET: E01	TOTAL SHT: 1

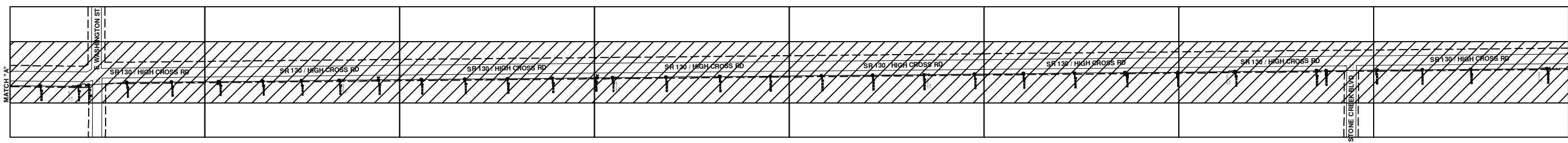
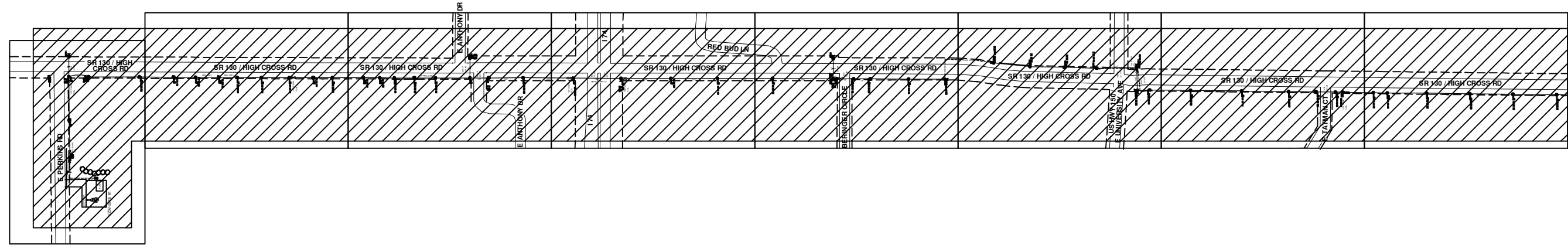
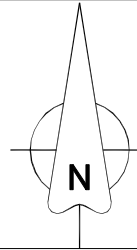


EXHIBIT B LEGEND

— — — — — EXISTING RIGHT OF WAY LINE

PROPOSED CONSTRUCTION BOUNDARY



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REV	DATE	DESCRIPTION	ENG	DRAFTER

EXHIBIT C
 ROUTE: 487
 PROJECT: VZW SITE 5
 LOCATION: CHAMPAIGN, CHAMPAIGN CO., IL

DESIGNED BY: R. DICKERSON	
DRAWN BY: LBD	
SCALE: NTS	
DATE DRAWN: 09/15/10	
FILE NAME: CONSTRUCTION DRAWINGS	
PROJECT NUMBER: 487	
SHEET: E01	TOTAL SHT: 1

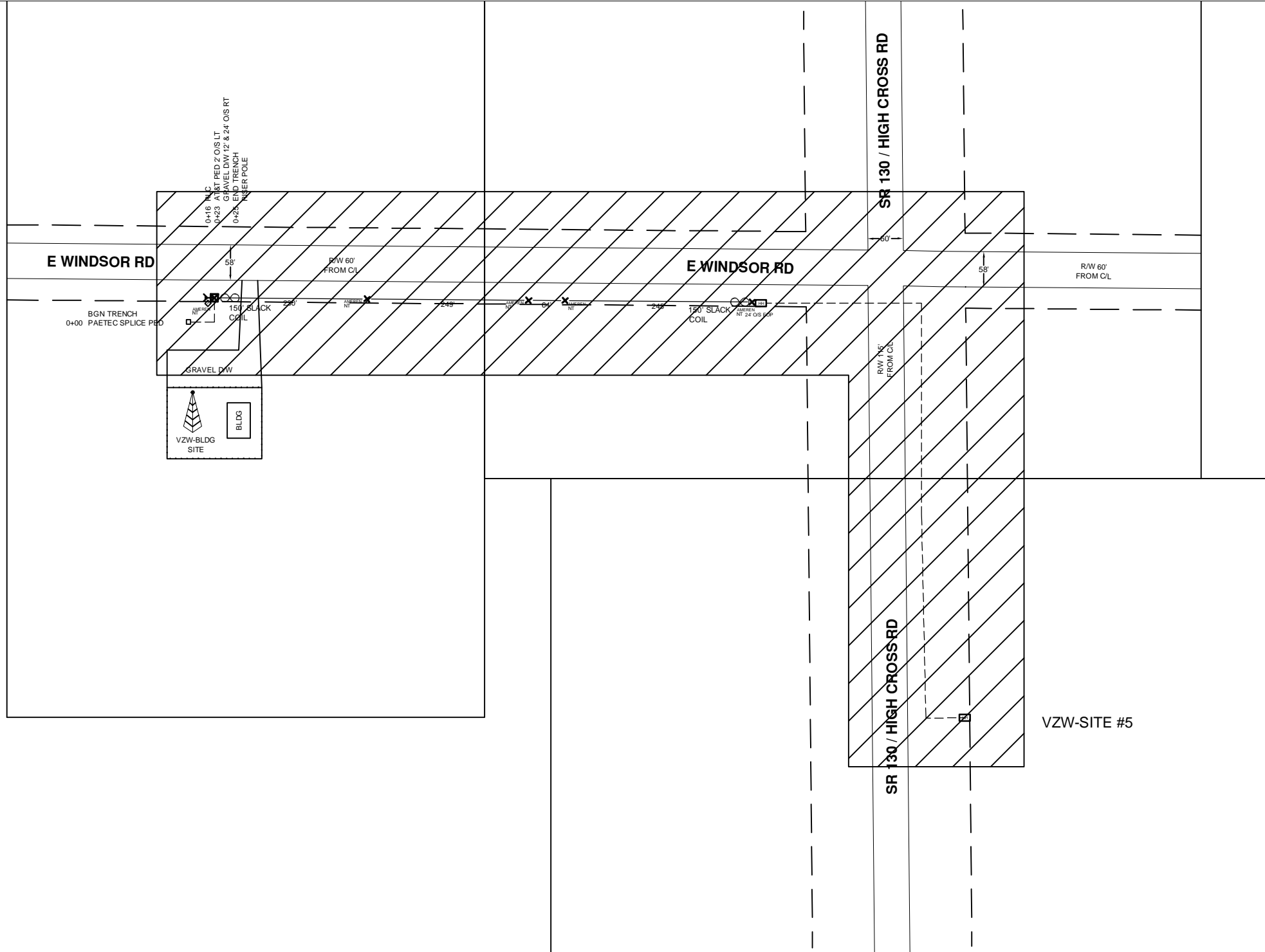
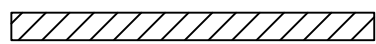


EXHIBIT C LEGEND

— — — — — EXISTING RIGHT OF WAY LINE

 PROPOSED CONSTRUCTION BOUNDARY