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May 11, 2012

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

AESTHETIC CONCERNS RELATED TO THE PLACEMENT OF UTILITY EQUIPMENT IN THE PUBLIC RIGHT-OF-WAY DURING THE COURSE OF CITY UNDERGROUNDING PROJECTS

INTRODUCTION

The City of San Diego has had a program to underground utility lines since 1970, and currently spends approximately $50 million per year to do so. When overhead lines are removed, the utilities replace electrical transformers and other equipment found on utility poles with above ground cabinets within the public right of way. Within some areas, these above ground facilities are within residential front yards and other places where they create aesthetic impacts on the adjacent properties. These impacts have created concerns within the community and an interest in requiring that utility equipment be placed underground.

Councilmember Gloria has requested that this office report on whether the City may implement legislation regulating the installation of utility equipment within the public right of way with the intent to reduce the aesthetic impacts of these above ground utility facilities. This memorandum responds to these questions.

QUESTIONS PRESENTED

1. Does the City have authority to impose a requirement that public utility equipment be placed underground within the public right-of-way?

2. Would such a requirement breach any of the various agreements between the City and the public utility companies?

SHORT ANSWERS

1. No, unless any such requirement receives the approval of the California Public Utilities Commission. While the City has authority within its police powers to impose regulations upon how the public right-of-way is utilized, such authority is preempted by the express powers given to the CPUC by the Public Utilities Code. The Public Utilities Code has granted the California Public Utilities Commission broad authority to regulate the operations of utility companies statewide. In doing so, the CPUC has long regulated the statewide Rule 20A/Rule 32 Program and has authorized the City's unique Surcharge Program. Any change to

how the Rule 20A/Rule 32 Program or Surcharge Program is administered is subject to CPUC approval.

2. Not Likely. The City's franchise agreement with SDG&E requires SDG&E to comply with all local laws subject to the authority of the CPUC. The City's Undergrounding Agreement with AT&T allows AT&T to provide a design for their undergrounding projects but does not exempt them from compliance with laws enacted by the City. The Time Warner franchise agreement does not contain any exception to compliance with local laws, but the California Digital Infrastructure and Video Competition Act (DIVCA) does allow Time Warner to unilaterally terminate their franchise with the City and move to a state franchise. Cox Communications operates under a State franchise and participates in the Surcharge Program under an agreement with the City to continue undergrounding as in the prior City franchise. This agreement is terminable with 120 days notice of either party.

BACKGROUND

There are two different types of utilities undergrounding programs in the City, the Rule 20A/Rule 32 Program and the Surcharge Program. In 1968 the California Public Utilities Commission (CPUC) established a program to underground utility facilities statewide. Under CPUC Rule 20A, San Diego Gas & Electric (SDG&E) allocates funds to convert existing overhead electrical facilities to underground service. Telecommunications providers, including AT&T, operate under a similar program authorized by CPUC Rule 32. The Rule 20A/Rule 32 programs are intended to underground utilities in areas that meet "general public benefit" criteria. Areas that meet these criteria are typically streets with heavy vehicular and pedestrian traffic. Thus many residential areas are not eligible for utilities undergrounding under the Rule 20A/Rule 32 Program.

The City, desiring to extend the benefits of utilities undergrounding citywide, including areas that were not eligible under the Rule 20A/Rule 32 program, approached SDG&E with a proposal to seek a surcharge onto the electricity bills of City residents (Surcharge Program). This surcharge would be collected by SDG&E and remitted to the City along with the quarterly franchise fees to fund utilities undergrounding projects in all areas of the City. A Memorandum of Understanding between the City and SDG&E (Surcharge MOU),[1] Undergrounding Ordinance,[2] and Council Policy 600-08[3] were submitted, along with the support of SDG&E, to the CPUC for approval. The CPUC approved the Surcharge on January 1, 2002.[4] No other city or local agency in the State of California has a utilities undergrounding program comparable to the City's Surcharge Program.

Upon approval of the Surcharge Program, the City and AT&T reached a CPUC mediated agreement on AT&T's participation in the Surcharge Program (AT&T Undergrounding

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[1] Memorandum of Understanding Between San Diego Gas & Electric Company and the City of San Diego Regarding Implementation of Franchise Underground Obligation, dated December 11, 2001. The execution of this agreement was authorized by City Council Resolution R-295892, adopted on December 11, 2001.
[2] City Council Ordinance O-19032 N.S. adopted 1-14-2002.
[3] Council Policy 600-8 describes the criteria under which utilities undergrounding districts would be prioritized and the types of activities that surcharge funds would be expended.
[4] CPUC Resolution E-3788 adopted 12-19-2002.

Agreement).[5] This agreement was approved by the City Council in December 2004[6] and approved by the CPUC on December 14, 2006.[7] The AT&T Undergrounding Agreement and CPUC decision authorized AT&T to recover their undergrounding costs by placing a surcharge on customers within the City, and thus not impacting customers outside of the City.

Other utility companies that maintained overhead facilities within the City such as Time Warner and Cox recognized the need to comply with the City's Undergrounding Ordinance and the benefits of being able to take advantage of the Surcharge Program to subsidize the recapitalization of their networks.[8] These other companies therefore amended their City franchise agreements to participate in the Surcharge Program.[9] Cox Communications has since terminated their franchise agreement with the City and moved to a statewide franchise as allowed under the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).[10] Due to the unique nature of the City's Surcharge Program, DIVCA does not directly address utilities undergrounding beyond that required under CPUC Rule 20A/Rule 32. Cox Communications has entered into stand alone agreement with the City to continue participating the in the Surcharge Program under the same terms as the prior City franchise.[11]

ANALYSIS

I. AUTHORITY OF THE CITY TO IMPOSE AESTHETICS REQUIREMENT

The California Public Utilities Code provides:

> The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

Cal. Pub. Util. Code § 701.

This provision expressly provides the CPUC with broad authority over how public utilities may conduct business within the State. However, the municipalities have retained some authority over how utility companies may install their equipment in the public right-of-way.

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[5] Undergrounding Agreement between the City and SBC, now AT&T, dated February 1, 2005.
[6] City Council Resolution R-299901, adopted 11-29-2004.
[7] CPUC Decision 06-12-039 adopted December 14, 2006.
[8] Participation in the Surcharge Program allows Cox and Time Warner to replace older cabling and equipment with new facilities at a fraction of the cost of what a similar capital project would outside of the program.
[9] City Council Ordinance O-19058, adopted 5-14-2002. This ordinance modified the existing franchise agreements with both Time Warner and Cox Communications. Among the changes was an agreement that should the CPUC approve the Surcharge Program, that the City would cover all costs related to trenching and installing conduit and that Cox and Time Warner would place their facilities within these conduit at their own cost. This City franchise agreement shall expire on January 31, 2019.
[10] Digital Infrastructure and Video Competition Act of 2006 (DIVCA), enacted 9-29-2006. DIVCA amended the Public Utilities Code to allow cable and video service providers to unilaterally terminate local franchise agreements and enter into a statewide franchise.
[11] Agreement Between the City of San Diego and Cox Communications, Inc. Concerning the City's Accelerated Undergrounding Program. Executed January, 2011. Section 4 provides for the agreement to terminate on January 31, 2019 or upon 120 days notice of either party.

> The grantee of a franchise under this chapter shall construct, install, and maintain all pipes, conduits, poles, wires, and appurtenances in accordance and in conformity with all of the ordinances and rules adopted by the legislative body of the municipality in the exercise of its police powers and not in conflict with the paramount authority of the State, and, as to state highways, subject to the laws relating to the location and maintenance of such facilities therein.

Cal. Pub. Util. Code § 6294.

This reservation of power to the municipality is an extension of the general grant of authority by the State as provided within the California Constitution.

> A county or city may make and enforce within its limits all local, police, sanitary, and other ordinance and regulations not in conflict with general laws.

Cal. Const. art. 11, § 7.

A regulation intended to improve the aesthetics of a community, is a proper use of a City's police powers.[12] Therefore, a requirement that public utilities place their equipment within the public right-of-way underground, with the intent to improve the aesthetics of the community after the completion of a City utilities undergrounding project would be a valid use of the City's police powers if such a requirement were not in conflict with the general laws, including the Public Utilities Code and the decisions of the CPUC.

The CPUC in their capacity to supervise and regulate the public utilities of the State has expressly approved both the statewide Rule 20A/Rule 32 Program and the City's Surcharge Program. The CPUC supervision of the Rule 20A/Rule 32 Programs is extensive and includes how tariff funds are spent, projects are selected, and how facilities are constructed. At the time the Surcharge Program was approved, the CPUC was provided with the Surcharge MOU, Undergrounding Ordinance, and Council Policy 600-08. These documents described the scope of the program, how the Surcharge Program would be administered, and how ratepayer funds would be expended. The level of detail under which the CPUC scrutinizes both the Rule 20A/Rule 32 Program and the Surcharge Program indicates the CPUC's intent to supervise and regulate all aspects of these programs and thus occupy the field of utilities undergrounding. Any change imposed by the City impacting either undergrounding program will require approval from the CPUC.

The Public Utilities Code provides additional guidance specifically with regard to telephone, cable, and video services providers in that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." Cal. Pub. Util. Code § 7901.1(a).[13] This statute reiterates the City's police powers and would allow a City undergrounding requirement to stand if it were found reasonable. The telecommunications utilities may argue that undergrounding their equipment is

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[12] See Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848 at 865.

[13] DIVCA reserves the same time-place-manner authority for local entities and directly references California Public Utilities Code § 7901.1. Under either statute it would be within the CPUC's authority to decide was is reasonable.

more expensive to maintain and thus, not reasonable. The City would present evidence that equipment similar to theirs can be placed underground and thus is reasonable. The reasonableness of any City undergrounding requirement would be determined by the CPUC.

Should a City requirement that above ground equipment be undergrounded be allowed by the CPUC, any belowground equipment would need to comply with CPUC Rules for Construction of Underground Electric Supply and Communication Systems[14] (GO 128). These rules specify the requirements for installation of equipment in manholes, building vaults, rooms, or other enclosures and self-contained surface-mounted equipment." *CPUC General Order 128, Section 34.* Transformers and other equipment placed into below ground enclosures are required to be large enough to provide working space sufficient to allow for the safe operation, maintenance, and replacement of the equipment. *See CPUC General Order 128, Sections 34.2 and 34.2(C).* Transformers operating at more than 600 volts, which would include most within residential areas of the City, are required to be ventilated. *Id.* at *34.2(C).* These technical requirements are within the sole authority of the CPUC.

II. CONTRACTUAL COMMITMENTS

The City has contracts related to utilities undergrounding with SDG&E, AT&T, Cox, and Time Warner. These contracts are unique and warrant individual analysis.

A. SAN DIEGO GAS & ELECTRIC (SDG&E)

San Diego Gas & Electric has obtained the rights to operate a franchise to distribute electricity in the City via the Franchise Agreement.[15] This agreement requires that SDG&E comply with all laws, including those which the City may enact subsequent to the execution of the franchise.

"All facilities or equipment of Grantee [SDG&E] that Grantee shall construct, maintain and use or remove, pursuant to the provisions of this franchise granted herein shall be accomplished in accordance with the ordinances, rules and regulations of City now or as hereafter adopted or prescribed, and such rules or regulations as are promulgated under State law, or orders of the Public Utilities Commission or other governmental authority having jurisdiction in the premises." City-SDG&E Franchise Agreement, Section 6.

If the City were not otherwise preempted by State law, the terms of the Franchise Agreement would not prohibit the City from enacting a requirement that certain equipment be undergrounded as part of a utilities undergrounding project.

The Surcharge MOU describes how the electric surcharge would be collected and requires that all revenues "fund expenses directly and exclusively related to replacing existing

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[14] CPUC General Order 128 Rules for Construction of Underground Electric Supply and Communication Systems. Dated January 2006. Also known as GO 128.

[15] The original City-SDG&E Franchise Agreement was executed on December 17, 1970 and approved by the City Council by Ordinance O-10466. This agreement was amended on January 28, 2002 and was approved by the City Council on January 28, 2002 by Ordinance O-19030. The amended Franchise Agreement did anticipate that the City and SDG&E would seek approval of the Surcharge Program from the CPUC, however it did not otherwise amend Section 6 of the 1970 Franchise Agreement or limit the City's authority to make SDG&E subject to additional City requirements. The term of the Franchise Agreement will expire on January 17, 2020.

infrastructure related to electric undergrounding projects including, but not limited to, design engineering, construction, City and SDG&E construction management, repaving streets, lateral connections to ratepayers and street lights". Surcharge MOU, Section 8. Additional expenses required to underground transformers or other utility equipment as part of a utilities undergrounding project are directly related to undergrounding projects and would seem to fall within the description of appropriate expenditures contemplated within the Surcharge MOU. Therefore, if the City were to enact a requirement that transformers and other utility equipment be placed underground and that requirement was approved by the CPUC, Surcharge Program funds could likely be used to cover any necessary additional costs.

B. American Telephone and Telegraph (AT&T)

The AT&T Undergrounding Agreement describes the terms of AT&T's participation in the Surcharge Program. This agreement requires for AT&T to provide a design for each undergrounding project[16], and that the City shall install the undergrounded facility in accordance with that design.[17] While the agreement does allow AT&T to provide a design for their facilities, it does not prohibit or otherwise address the possibility that the City might utilize its police powers to impose subsequent right-of-way requirements. Therefore, it is unlikely that this agreement could be interpreted to likely restrict the City from imposing a requirement that AT&T underground their access pedestals as a part of a City utilities undergrounding project.

C. Cox Communications and Time Warner

Time Warner currently operates under a City franchise, while Cox operates under a state franchise. The Time Warner-City franchise agreement has no provisions limiting the City from exercising its police powers to enact a requirement that Time Warner underground access pedestals. However, should the City enact such a requirement, Time Warner would have the unilateral option of terminating their City franchise agreement and entering a state franchise. The state franchise would require that any time-place-manner requirements being placed by the City upon either Cox or Time Warner be reasonable.[18]

CONCLUSION

The City has broad authority to exercise its police powers over the use of the public right-of-way; however that authority is subservient to the State. Thus any expression of the City's police powers must not conflict with or interfere with the exercise of the State's authority. In this case, the State has expressly granted the CPUC via the California Public Utilities Code the authority to supervise and regulate the operations of public utilities. Within that authority, the CPUC has supervised and regulated utilities undergrounding statewide under the Rule 20A/Rule 32 Program. The CPUC has also reviewed and approved the Surcharge Program. A requirement that public utilities underground equipment that is currently placed on above ground will require the approval of the CPUC.

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[16] AT&T Undergrounding Agreement, Section 2.2 Conduit Design.

[17] AT&T Undergrounding Agreement, Section 3.2.2.2 (b)(i) Overhead Line Conversion.

[18] The determination of what time-place-manner requirements are reasonable is governed under Cal. Pub. Util. Code § 7901.1(a) and subject to the authority of the CPUC.

While the City does have bilateral agreements with SDG&E, AT&T, and Time Warner, these agreements do not expressly describe how they must underground their equipment as a part of a utilities undergrounding project. Nor do these agreements expressly limit the City from utilizing their proper police powers.

By _____
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RC-2012-11