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August 1, 2011

**By Electronic Mail and First Class Mail**

Ryan P. Kohut, Esq.  
Office of the City Attorney of San Diego  
Civic Center Plaza  
1200 Third Avenue, Suite 1620  
San Diego, CA 92101

**Re: The City of San Diego Undergrounding Program**

Dear Mr. Kohut:

On behalf of the California Cable Telecommunications Association ("CCTA") and its members Cox Communications, Inc. ("Cox") and Time Warner Cable ("TWC") (collectively, the "Cable Operators"), we address the City of San Diego's (the "City's") authority to create new undergrounding guidelines. We understand that consideration is being given by the City to requiring the undergrounding of additional utility facilities and permitting neighborhood organizations to participate actively in the undergrounding design process.

As discussed below, new undergrounding guidelines would breach the agreements between the City and the Cable Operators related to the City's Accelerated Undergrounding Program ("Undergrounding Program"), and/or trigger the City's obligations under those agreements to shoulder the significant extra costs of complying with any new undergrounding guidelines.

**The Cable Operators Participate in the City's Undergrounding Program Pursuant to Agreements with the City.**

As you are aware, the City's Undergrounding Program was implemented in 2002 to provide for undergrounding in residential areas that do not meet the California Public Utility Commission's ("CPUC's") Rule 20-A Program's criteria for undergrounding. Because the City's Undergrounding Program is inconsistent with the CPUC's rules on undergrounding, the City and San Diego Gas & Electric ("SDG&E") submitted an advice letter to the CPUC seeking approval for the program. In late 2002, the CPUC approved a deviation from its rules and tariffs for SDG&E and AT&T to permit the implementation of the Undergrounding Program.<sup>1/</sup>

<sup>1/</sup> CPUC Resolution E-3788, Ordering ¶ 2 (2002).

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Also in 2002, the City agreed to terms with Cox and TWC to secure their participation in the Undergrounding Program. The City and the Cable Operators agreed to add Section 16(e) to their franchise agreements, providing that the City "will assume responsibility for that portion of the joint trench costs related to *extra depth trenching and installation of conduit and substructures*" that are required to accommodate cable facilities. In return, the Cable Operators agreed to bear other costs of undergrounding without any pass-through of those costs to the Cable Operators' subscribers.<sup>2/</sup> In addition, the Cable Operators also agreed not to protest the advice letter submitted to CPUC by the City and SDG&E and committed "that all work will be done pursuant to City Council Policy 600-8, *Underground Conversion of Utility Lines by Utility Company* [the "Policy"], and San Diego Municipal Code, Chapter 6, Article 1, Division 5, *Underground Utilities Procedural Ordinance* [the "Undergrounding Ordinance"]."<sup>3/</sup>

TWC continues to operate under its amended franchise with the City. After its local franchise with the City transitioned to a state-issued certificate, Cox and the City entered into a separate agreement that continues in effect the wording from Section 16(e) of the prior franchise (the "Cox Agreement").<sup>4/</sup>

**The City Would Be Obligated to Shoulder the Extra Expense of Complying with Additional Undergrounding Requirements.**

Under its agreements with Cox and TWC, the City is responsible for any "extra depth trenching and the installation of conduit and substructures" required to accommodate the Cable Operators' facilities.<sup>5/</sup> Were the City to require the Cable Operators to place additional facilities, such as pedestals, underground, the City would be required to bear that cost pursuant to this provision. Those costs would include not only the cost of placing the facilities underground, but would also include the capital and maintenance costs of more expensive equipment. Because the Cable Operators' conventional electronic equipment is not designed to be placed in subsurface structures or subjected to water submersion, undergrounding much or all of their facilities would require additional electronic equipment, result in higher maintenance costs, and lead to shorter equipment life. In some cases, large or specialized vaults would be necessary to accommodate these facilities, which are substantially more costly than surface-installed pedestals. Moreover, undergrounding the Cable Operators' equipment may be wholly impracticable in some areas due to water table issues or migration of irrigation from residential landscaping.

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<sup>2/</sup> See Ord. No. 19059 (May 14, 2002) (amending TWC Cable Franchise Ord. No. 15213); Ord. No. 19058 (May 14, 2002) (amending Cox Cable Franchise Ord. No. 12543); Report No. 02-053, Manager's Report to the City Council at 2 (Mar. 13, 2002) ("2002 Manager's Report").

<sup>3/</sup> See 2002 Manager's Report at 2-3.

<sup>4/</sup> *Agreement Between the City of San Diego and Cox Communications, Inc. Concerning the City's Accelerated Undergrounding Program*, Doc. No. C-15482 (Apr. 4, 2011).

<sup>5/</sup> See Ord. No. 19059 (adding Section 16(e) to the TWC Cable Franchise); Cox Agreement (continuing in effect the wording from Section 16(e) of Cox's prior franchise with the City).

**Imposing Additional Undergrounding Requirements Would Breach the City's Agreements with the Cable Operators.**

The agreements between the City and the Cable Operators do not contemplate a role for property owners or their neighborhood groups in the design process. When Cox and TWC agreed to participate in the City's Undergrounding Program, they expressly committed to perform all work pursuant to the Policy and the Undergrounding Ordinance. Yet neither the Policy or the Undergrounding Ordinance authorize the City to impose specific design requirements. Allowing third parties a role in the design process would significantly increase the cost of undergrounding and would unnecessarily delay the process.

The only role for property owners under the Policy is accepting the utility's offer of conversion or paying for their own conversion.<sup>6/</sup> Indeed, property owners who insist on particular accommodations that exceed the scope of the Undergrounding Program are responsible for the costs of that undergrounding.<sup>7/</sup> Similarly, the Undergrounding Ordinance does not contemplate any role for property owners in the design process or impose any design-specific requirements on utility companies. It merely authorizes the City Manager to set a deadline by which "the electric *Utility Company* must provide a final design for joint trenches to all affected *Utility Companies*."<sup>8/</sup>

The City therefore would materially breach its agreements with the Cable Operators if it attempted to impose additional undergrounding requirements or carved out a new role for property owners to participate in the design process. These additional obligations would impose extra costs and obligations on Cox and TWC that were not contemplated at the time they agreed to participate in the City's Undergrounding Program. If the City were to breach its agreements with the Cable Operators, they would no longer be obligated to underground their facilities, and the costs of going forward with undergrounding would be the sole responsibility of the City.

**CPUC Approval is Required For Any Changes to the Undergrounding Program.**

In addition to the limitations created by the binding agreements between the Cable Operators and the City, the City's authority to operate its Undergrounding Program derives from the CPUC's decision to grant a deviation from its own rules and SDG&E's and AT&T's tariffs.<sup>9/</sup> Thus, any ordinance imposing additional undergrounding requirements would require CPUC approval. Even then, the City would still need to

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<sup>6/</sup> *Id.* § E(3) (requiring utility companies to offer property owners the complete conversion of the facilities on their property, and noting that property owners who decline offers for conversion are required to pay for the cost of conversion at their sole expense).

<sup>7/</sup> *Id.* § G (stating that property owners who "desire an underground conversion in situations other than those meeting one of the criteria for conversion at company expense" are required to pay the cost of undergrounding at their sole expense).

<sup>8/</sup> Undergrounding Ordinance § 61.0509(d)(1).

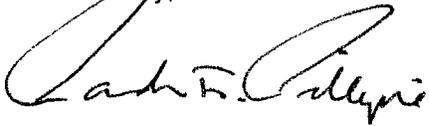
<sup>9/</sup> As part of its comprehensive statewide undergrounding program, the CPUC ordered regulated utilities to adopt statewide undergrounding tariffs setting forth and circumscribing the utilities' undergrounding responsibilities. The tariffs adopted by the regulated utilities have the force of law and "preempt[] the conversion field." See *City of Santa Rosa v. PT&T*, Dec. No. 87278, 81 CPUC 593, 602 (1977).

obtain the consent of the Cable Operators to ensure their participation in the revised program.

**Conclusion.**

The Cable Operators have complied with the commitments they made to the City in 2002: they did not protest the advice letter; they have not passed through any additional expenses to their subscribers; and they have performed their work consistent with the Policy and the Undergrounding Ordinance. Thus, TWC's franchise and the Cox Agreement continue to govern their participation in the Undergrounding Program. The City may not require the undergrounding of additional facilities without bearing all of the attendant additional expenses. And the City may not impose larger roles for neighborhood groups or property owners without breaching the agreements and usurping the role of the CPUC. Accordingly, the Cable Operators urge the City not to go forward with any of the suggested modifications of the Undergrounding Policy.

Sincerely,



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GFG/gs

cc: Lesla Lehtonen  
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