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October 21, 2013

**VIA EMAIL**

Council Member Lori Zapf, Chair  
and Council Members of the  
Committee on Land Use and Housing  
of the City Council, City of San Diego  
202 "C" Street  
San Diego, CA 92101

**Re: Item - 7: Proposal for the Formation of a Utility Undergrounding Advisory Group**  
**Meeting Date: October 23, 2013**

Dear Council Member Chair Zapf and Members  
of the Committee on Land Use and Housing:

This firm represents members of the Kensington/Talmadge communities in seeking to create a Utility Undergrounding Advisory Committee. In addition, the Community Planners Committee by a unanimous vote, requests that the Advisory Committee be formed. This proposal for a Utility Undergrounding Advisory Committee has also now received the support of the utility companies who have agreed to participate on the committee.

**The Proposed Utility Advisory Committee and the Importance of Its Formation**

City of San Diego neighborhoods scheduled for undergrounding of utilities have raised concerns regarding the place and manner in which this is to be accomplished. Currently, there is no forum to address these issues, particularly in regard to the placement of utility boxes. Creation of the proposed Utility Undergrounding Advisory Committee would allow all stakeholders – the utilities, the City and the communities – to work together to study ways to potentially mitigate these concerns and consider options.

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### **The City of San Diego has Authority over how Utility Companies may Install their Equipment**

Prior to the last Land Use and Housing Committee meeting on this matter on June 13, 2012, the City Attorney prepared a May 11, 2012 letter report to the Mayor and City Council regarding the placement of utility equipment in the public right-of-way during the course of the City's undergrounding projects. Its conclusion that the City does not have authority to impose a requirement that public utilities be placed underground within the public right-of-way was too narrowly construed, and the following case law over the ensuing year has confirmed that the City does have the right to exercise reasonable control as to the time, place and manner of the undergrounding of utilities and related equipment.

A. *City of Huntington Beach v. Public Utilities Commission* Decided March 14, 2013

Subsequent to the May 11, 2012 City Attorney's letter, the Court of Appeal published its March 14, 2013 decision in *City of Huntington Beach v. Public Utilities Commission* (2013) 214 Cal.App.4<sup>th</sup> 566. The appellate court overturned the Public Commission's issuance of a permit to a telecommunication provider for undergrounding its communication equipment and specifically held that the Commission erred by purporting to preempt the City's undergrounding ordinance. The court confirmed that the City has the right to exercise reasonable control as to the time, place, and manner of undergrounding utilities in roads and highways, and further pointed out that California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of wireless telecommunication facilities.

B. *Southern California Edison v. City of Victorville* Dated June 17, 2013

Shortly after the *City of Huntington Beach* case was decided, the Court of Appeal published its decision in *Southern California Edison v. City of Victorville* (2013) 217 Cal.App.4<sup>th</sup> 218. In determining who has jurisdiction over the location of streetlights, the appellate court held that the Public Utilities Commission does not have exclusive jurisdiction. The court specifically held that cities are expressly authorized not to surrender the power to supervise and regulate the relationship between the public utilities and the general public in matters effecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of poles, wires, mains, or conduits of any public utility, on, under, or above public streets.

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C. The League of California Cities' Amicus Curie Brief in *Pacific Bell Telephone Co. dba AT&T California v. City of Livermore* filed on May 7, 2013

On May 7, 2013, the League of California Cities (along with other parties) filed its Amicus Curie Brief in support of the City of Livermore in the pending Court of Appeal case, *Pacific Bell Telephone Co. dba AT&T California v. City of Livermore*, Court of Appeal Case No. A136714. The City of San Diego is a member of the League of California Cities, and the Amicus Curie Brief was filed by the City Attorney of Pasadena. The trial court in this matter upheld the City's enforcement of its ordinance requiring underground placement of all new utility infrastructure in the public right-of-way, and that the ordinance was supported by appropriate findings that address both aesthetic and other public health and safety issues that are legitimate subjects of local regulation.

The California League of Cities alleged the importance of its input in this case as many cities and counties in California have ordinances requiring electric, telephone, and cable companies to underground their facilities. Specifically in this case, the California League of Cities argued that the court should confirm that local governments have the authority to regulate the location and appearance of telephone lines, including by adopting and enforcing an ordinance establishing a preference for undergrounding.

### Conclusion

Based upon the apparent agreement among the stakeholders to form a Utility Underground Advisory Committee, and the authority of the City to consider recommendations from the Committee, it is requested that the Committee on Land Use and Housing support this proposal.

Thank you for your attention to this important matter.

Very truly yours,



SANDRA J. BROWER

of

HIGGS FLETCHER & MACK LLP

SJB/lm

cc: Mary Jo Lanzafame, Assistant City Attorney  
Ryan P. Kohut, Deputy City Attorney