

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** August 25, 2020

**TO:** Honorable Mayor and Members of the City Council

**FROM:** City Attorney Mara W. Elliott

**SUBJECT:** Option for Extension of Gas & Electric Franchise Agreements

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The City of San Diego's (City) 50-year franchise agreements with San Diego Gas & Electric (SDG&E) for gas and electric service are set to expire on January 17, 2021. As the City's procurement process for the new franchise agreements is occurring less than five months before the current franchise agreements expire, we wish to remind the Mayor and City Council (Council) that the City has the option of extending the current franchise agreements beyond January 2021 subject to SDG&E's concurrence.

As our Office has explained in prior memoranda, San Diego Charter (Charter) section 103 governs the granting of franchises. It provides, in relevant part, as follows:

The Council shall have power to grant to any person, firm or corporation, franchises, and all renewals, *extensions* and amendments thereof, for the use of any public property under the jurisdiction of the City. Such grants shall be made by ordinance adopted by vote of two thirds (2/3) of the members of the Council and only after recommendations thereon have been made by the Manager and an opportunity for free and open competition and for public hearings have been given.

(Emphasis added.)

Importantly, the Charter gives the Council the power to approve, after the Mayor has made a recommendation, an extension of the existing franchise agreements by a two-thirds vote. By its plain language, the Charter conditions this power on the "opportunity" for free and open competition and public hearings; however, the Charter does not require the free and open competition to have reached completion and resulted in the selection of a winner prior to Council approving an extension. Indeed, the word "extension" implies the opposite; it suggests that a new agreement has not been agreed to or executed, necessitating the extension of an existing agreement.

We interpret Charter section 103 to mean that if the Mayor has provided an opportunity for free and open competition by issuing one or more invitations to bid and continues to move forward with the procurement, the Council can – after sufficient public notice and hearings – extend the current franchise agreements for a reasonable period of time to allow the competitive process to conclude without risking a potential interruption in service. We expect that SDG&E would be willing to work with the City to accommodate a reasonable extension on the current franchise terms, including continued payment of franchise fees and undergrounding surcharge revenue, based on our 100-year partnership and our shared goal of providing certainty and continuity for SDG&E employees and contractors during the pandemic.

There are several factors you may wish to consider in determining whether to extend the current franchise agreements:

- If a bidder brings a valid protest in response to the outcome of the competitive process, or if litigation ensues, the City will likely be unable to meet the January 17, 2021 expiration date.
- If SDG&E either does not submit a bid or submits a bid and is not selected, a transition plan would be required because SDG&E owns the facilities needed to operate the franchises.
- The COVID-19 pandemic has created challenges for the City that have impacted the City's workforce and response time. With such a tight timeline, COVID-19 related delays could be detrimental to a successful process.
- The process likely will not have concluded before a new Mayor and five newly-elected council members assume their seats on December 10, 2020, which means that five newly-elected officials will be asked to vote on a substantive matter in which they've had no input.

It has been 50 years since the City has entered gas and electric franchise agreements. The impact on our region will be tremendous, and the City must take the time needed to handle this transaction properly. We are available to assist you if you wish to further explore an extension of the existing franchise agreements.

MARA W. ELLIOTT, CITY ATTORNEY

By           /s/ Mara W. Elliott          

Mara W. Elliott

City Attorney

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cc: Chief Operating Officer Kris Michell  
Independent Budget Analyst Andrea Tevlin