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July 6, 2018

REPORT TO THE RULES COMMITTEE

ANALYSIS OF PROPOSED BALLOT MEASURE PRESENTED BY CALIFORNIA LOCAL ENERGY ADVANCING RENEWABLES

INTRODUCTION

On July 11, 2018, the San Diego City Council's Rules Committee will consider a ballot measure proposal by California Local Energy Advancing Renewables (CLEAR). This measure would amend the San Diego Charter (Charter) to mandate local renewable energy requirements in any franchise granted by the City of San Diego (City) for electrical service, or in the alternative, the formation of a municipal electric utility if a prospective franchisee will not or cannot meet those requirements. The measure also proposes amending the Charter to require that City-acquired or generated renewable electricity be provided to City resident customers of San Diego Gas & Electric Company (SDG&E) over SDG&E's distribution system as a condition of any future franchise, and that the franchise be limited to ten years. The CLEAR ballot proposal is included as Exhibit 1 to this memorandum, including its attachment, a Durham, North Carolina electric franchise agreement. (Durham Franchise).

This Report analyzes legal issues raised by the proposed ballot measure. This analysis is limited because significant facts surrounding this proposal are undetermined or not fully explained.

SYNOPSIS

The proposed ballot measure presents numerous legal and practical problems. Even if these challenges could be overcome, there is insufficient information for our Office to draft ballot language based on the complex proposal. Below is a summary of legal and practical concerns:

- The measure contains mandates that would be subject to the jurisdiction of the California Public Utilities Commission (CPUC). The CPUC might not approve the local renewable generation requirement even if SDG&E agreed to it.

- If the local renewable energy goal is not met through the franchise (because SDG&E or the CPUC do not approve it), then the proposed measure would automatically require the City to buy the SDG&E distribution system and municipalize electric service in the City. The proposed measure does not identify

the costs of buying and operating the SDG&E system or of the City being responsible for generation procurement and serving all customers. If triggered, these requirements could have a significant impact on City finances and operations and the potential costs have not been analyzed.

- State law could preempt the subject of the renewable resource content of SDG&E's generation portfolio, especially if the proposed local program is not optional. This could cause the CPUC to disapprove the proposed program.

- The proposal does not identify the local generation resources that would meet the mandate, how they would be interconnected, or what they would cost. These issues would be significant factors in the CPUC's review.

- The proposal does not explain how SDG&E customers outside the City would be indifferent to the costs of the City of San Diego electric generation portfolio requirements. Non-participating customers should not have costs shifted onto them as a result of the City program. This factor would be significant to the CPUC's review, and to be viable the proposed measure's local program would likely have to bear cost responsibility for the local renewable resources as well as for resources already procured by SDG&E on behalf of customers within the City. The economics of this proposal has not been studied.

- The Durham franchise terms cited as an example are different from the terms of the proposed measure, and therefore not instructive.

- The requirement for the local renewable electricity in the franchise could be viewed as a tax requiring a public vote under Propositions 218 and 26 if the program is mandatory for customers in the City and if the costs exceed the value of the franchise.

- The proposed measure may cover more than a single subject because it addresses both franchised and municipal utility service.

BACKGROUND

Although the proposed ballot measure has an objective of increasing the supply of "local"[1] renewable fueled electricity in the City to 50 percent by 2035, it discusses three different means to that end (franchised, municipal, and hybrid service models of electric service). It cites the City's authority to be a municipal utility; however, it seeks to impose the 50 percent local renewable requirements through the franchise where SDG&E owns distribution facilities and the City provides some or all[2] renewable electricity commodity services.

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[1] The proposal defines "local" as meaning [renewable fueled generating resources] located within the City of San Diego. The proposal does not state what resources would qualify as "renewable."

[2] The proposal does not state what portion of local renewable energy would be provided by the City or what portion would be procured by SDG&E from other local sources.

The proposal assumes that the City's right to be a municipal utility under Charter section 1 means the City can municipalize solely the commodity service, not the distribution service, and either compel SDG&E through a franchise requirement to buy City-generated or acquired electricity and provide it only to City residents, or to have that electricity delivered directly to retail customers in the City over the franchised distribution system of a public utility. Under the former interpretation, the jurisdiction of the CPUC over utility procurement is an issue. For the latter interpretation, current California law limits distribution access to Community Choice Aggregation (CCA), which is controlled by statute and entails procedures and obligations not discussed in the proposal. Cal. Pub. Util. Code §§ 331.1, 366.2.

Utilities, CCAs, and municipal utilities are "load serving entities" (LSEs) subject to integrated resource regulation and resource adequacy obligations.[3] The ballot measure's franchise proposal appears to intend a bundled service analog of CCA without the City actually being an LSE, i.e., without being a CCA under Section 366.2 or a municipal utility under section 224.3 of the California Public Utilities Code. The measure aims to use the franchise as a vehicle to put the City in some material degree of control over the resource portfolio that SDG&E provides to customers in the City.[4]

The 50 percent local renewable electricity requirement goes beyond the statewide renewable energy mandates for LSEs in Cal. Sen. Bill 350 (SB 350) (Clean Energy and Pollution Reduction Act of 2015). An issue of state preemption could be presented if the part of the proposition relating to municipal franchise conditions is found to conflict with legislation on a matter of statewide concern, like the Renewable Portfolio Standard (RPS) program under SB 350. The measure mentions CCA, but does not present it as a subject to be voted upon. The proposed measure does not mention any existing state laws that the measure may implicate or contradict.

The measure as drafted speaks alternately about franchised service and municipal service. It provides that the City shall become a municipal electric utility if the 50 percent local renewable terms cannot be achieved through the franchise. These are significantly different alternatives. Moreover, the ballot measure provides no information about what the estimated price of establishing municipal electric service in San Diego would be, or what the source and terms of the funding would be for the required purchase and operation of the SDG&E system.

ANALYSIS

A. The Measure Contains Mandates That Are Subject To The Jurisdiction And Approval Of The California Public Utilities Commission

SDG&E is an "electrical corporation" as defined by California Public Utilities Code section 218(a), and is therefore a "public utility" subject to the jurisdiction of the CPUC. Cal.

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[3] Cal. Pub. Util. Code §§ 454.52, 380, 380.5.

[4] The measure cites City of Durham as an example, but the Durham franchise does not appear to provide for material municipal control over the utility's resource portfolio.

Pub. Util. Code§ 216. Generators or wholesale electricity sellers that are not CCAs are generally[5] prevented by law from transmitting or distributing electricity to retail customers (end users) from one property or to another non-adjacent property or across public streets using the transmission and distribution system of an electrical corporation. Cal. Pub. Util. Code §§ 216, 218, 701, 1001. Public utility electrical corporations are subject to the jurisdiction of the CPUC. Where CPUC jurisdiction attaches, it is "extensive, and the Commission is obligated to exercise it. (Cal. Pub. Util. Code § 2101). It includes jurisdiction over rates (Cal. Pub. Util. Code § 728), services (Cal. Pub. Util. Code § 761), construction of plants and extensions thereof (Cal. Pub. Util. Code § 1001), issuance of securities (Cal. Pub. Util. Code § 816), and the disposing or encumbering of operative property." *Richfield Oil Corp. v. Public Utilities Commission*, 54 Cal. 2d 419, 431 (1960).

The proposal is not clear as to whether it intends retail sales by the City. The Durham franchise example for the proposal suggests that the primary intention is that the franchise must require that SDG&E to buy electricity from the City and then be required to deliver it over the SDG&E system to residents in the City. A mandatory purchase obligation presents legal issues and does not fully recognize the CPUC's authority. As explained in Part D, the Durham franchise terms are also subject to North Carolina laws, which would entail approval by that state's utilities commission.

The CPUC has control over SDG&E's resource portfolio, which is subject to past and pending decisions and proceedings. The measure does not state that the proposed "50 percent local renewable by 2035" municipal franchise requirement would require approval by the CPUC, or discuss how that approval would be gained, or what would happen if the CPUC did not approve it other than requiring the City to municipalize electric service. The CPUC would likely be concerned about understanding whether the proposal is consistent with state law. The CPUC might also be concerned with operative dynamics and any impacts of the proposed City requirement on SDG&E customers outside the City, and with costs and customer choice within the City.

B. SDG&E's Resource Portfolio Is Overseen And Approved By The CPUC

The provision of a commodity is a "service" under California Public Utilities Code section 761. Therefore, the CPUC has sole jurisdiction and control over SDG&E's resource portfolio, which the ballot measure would purport to be entirely or partially controlled by the City for City customers through electric franchise conditions. The proposed ballot measure would seek to put a mandate in the Charter to cause a result to occur from the granting of the franchise, but the desired result would be subject to the approval of the CPUC. There is no

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[5] A very limited number of commercial customers can take commodity service from Electric Service Providers (ESPs) under California's Direct Access statute. Cal. Pub. Util. Code § 365(b). The statute restricts the amount of load that can be served by ESPs so direct access is not available to the distribution system on the scale of this proposal. The available direct access limit has already been allocated by a CPUC-supervised lottery and beyond that limited amount of load *"[t]he right of retail end-use customers . . . to acquire service from other providers [e.g., ESPs but not CCAs] is suspended until the Legislature, by statute, lifts the suspension or otherwise authorizes direct transactions."* Cal. Pub. Util. Code § 365.1(a) (emphasis added).

precedent of any similar geographic "local" proposal ever being presented to the CPUC, so it is uncertain how it would be received.

The proposal does not mention the CPUC's ongoing regulation of utility resource portfolios and procurement plans or how the local program would fit into statewide and regional coordination plans already in process. The CPUC has broad jurisdiction over public utility and other LSE (including CCA) resource planning and procurement. *See* CPUC Rulemaking R.16-02-007, *Order Instituting Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements* (IRP Proceeding) (filed February 11, 2016). The IRP Rulemaking is the mechanism by which the CPUC is implementing statewide requirements under SB 350. The resource plan that the proposed measure puts forward, to the extent explained, has not been considered by SDG&E or the CPUC for purposes of the IRP Rulemaking. Decision D.18-02-018 dated February 8, 2018 set rules for SDG&E's filing of its IRP plan. The plan proposed by the ballot measure contains features that are not in SB 350, i.e., the "local" renewable program, and therefore it may be at odds with the CPUC's IRP Proceeding. If the CPUC finds this to be the case, then approval of the program is unlikely.

C. The Proposed Measure Could Present Issues Of Preemption By State Law

The proposed ballot measure does not state whether customers would be able to opt out of the local renewable program. If the intention is that they must remain in the local program, then issues of state preemption could arise. Currently the utilities and the CPUC are developing procurement plans through the IRP Proceeding to meet the requirements of SB 350 (adopted 2015) which contain no municipal-local renewable requirements. The principal requirement of SB 350 is that 50 percent of an LSE's resource portfolio consist of renewable energy by 2030. Cal. Pub. Util. Code § 399.11. SB 350 followed earlier renewable electricity mandates in California Senate Bills 1078 (2002) (SB 1078) and 107 (2006) (SB 107), which created a statewide RPS mandate. The RPS program applies to all LSEs whether they are investor owned utilities, municipal utilities, CCAs, or electric service providers. Currently the RPS requirements of SB 350 are being implemented not only through the IRP Proceeding but also through CPUC Rulemaking R.15-02-020 dated December 14, 2017, *Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development of California Renewable Standard Program* (RPS Rulemaking).

SB 350 and these CPUC proceedings reflect a statewide interest in the RPS content of utility portfolios. The legislation does not reflect a legislative intent to require LSEs, including utilities, to procure resources from within certain municipal boundaries. Instead the legislation applies to the total RPS content of LSEs and presumes that the RPS energy is distributed to customers throughout the LSE's customer base along with other resources. A physical reality of electric transmission and distribution is that electrons are fungible regardless of generation technology. Once electric power reaches the transmission and distribution system, all generation becomes mixed and gets conveyed to load according to the California Independent System Operator's system balancing requirements. There is no assurance that an electron generated "locally" within the City will be used in the City. The electricity cannot be distinguished

physically, and generating resources are only distinguished legally, with renewable resources being eligible for Renewable Energy Credits that count toward the RPS obligations of LSEs.[6]

The ballot proposal may posit that the provision of "locally" produced renewable electricity to customers within the City pursuant to a franchise with an electrical corporation is a "municipal affair" under article XI, section 5 of the California Constitution. However, it is questionable whether this "municipal affair" argument is legally sound where there is evidence that the state has occupied the subject of LSE portfolio RPS content with legislation. In those cases where a matter implicates a municipal affair and poses a genuine conflict with state law, the question of statewide concern is the bedrock inquiry through which conflict between state and local interests is adjusted; if the subject of a statute fails to qualify as one of statewide concern, then a conflicting charter city measure is a municipal affair and beyond reach of legislative enactment. In contrast, if a court is persuaded that the subject of a state statute is one of statewide concern and the statute is reasonably related to its resolution, then a conflicting charter city measure ceases to be a "municipal affair" and the legislature is not prohibited from addressing the statewide dimension by its own tailored enactments. *California Federal Saving & Loan Association v. City of Los Angeles,* 54 Cal. 3d 1, 17 (1991).

In the current situation, SB 350 and CPUC rulemakings suggest that the RPS content of public utility electrical corporation portfolios is a matter of statewide concern. If the ballot measure were challenged and a court agreed with that interpretation, then the measure could be invalidated to the extent it is preempted by state law.

D. The Durham Franchise Used As An Example Is Different Than The Ballot Proposal

The proposal cites the Durham franchise as an example of its intention. The Durham franchise appears to confirm that North Carolina has similar limits to distribution access that exist in California. Section 5 of the Durham franchise relates to pole attachments and allows the city to use Duke's facilities to attach items like traffic control signs, fire and police alarms, signage, antennae, cables or other devices for television, data or radio signals, etc. However, section 6 of the Durham franchise specifically provides: "[t]he City's use of Duke's facilities shall not include the transmission and distribution of electricity and shall not involve the sale of services to third parties unless otherwise authorized by law." Beyond this explicit restriction, section 7 is entitled "Electric Industry Restructuring" and looks forward to possible future changed circumstances in the event that the North Carolina electric industry is later deregulated. Section 7 allows both Durham and Duke the right to terminate the franchise in the event that North Carolina might pass laws allowing retail direct access in the future. The Durham franchise does not allow the city to use the distribution system to convey electricity.

Section 3 of the Addendum to the Durham franchise does contain a provision that requires Duke to buy electricity generated by the city itself subject to the laws, rules and regulations in North Carolina. Duke is subject to the jurisdiction of the North Carolina Public Utilities Commission, just as SDG&E's electric procurement is subject to CPUC approval. If an equivalent condition were put in the SDG&E franchise, it would not necessarily mean that

[6] California Public Utilities Code section 399.16 provides for Product Content Categories for renewable resources.

SDG&E would have to buy all electricity produced by the City, because every contract would have to fit within the CPUC's application of statutes, rules, and decisions.

Moreover, the CLEAR proposal would extend the expected utility purchase obligation to not only electricity the City generates but also to electricity it acquires. The Durham franchise has no provision relating to Durham-acquired energy, only city-generated energy, and even that obligation is qualified. The City of San Diego already has power purchase arrangements with SDG&E, or availed net metering, feed-in, and bill credit tariffs for the sale or disposition of excess renewable energy generated by City projects. The common basis in these sales or credits has been some CPUC-approved program. The City, however, is generally not in the electric power production business except at certain sites where City distributed generation (including solar) has been built to serve adjacent City facilities or to remove waste gasses.

The proposed ballot measure also implies that the City will develop or contract with resources that will generate renewable energy specifically for wholesale export to SDG&E until the local renewable goal is attained. In contrast, Addendum section 3 in the Durham franchise does not suggest that the city will be developing plants for the primary purpose of wholesale sales to Duke to supply a special localized retail portfolio program. The Durham franchise does not mention a local portfolio program or what Duke is to do with any energy it bought from Durham. Rather, the Addendum section 4 to the Durham franchise merely looks forward to the possibility of deregulation in the future, where such portfolio control might be accomplished by the city at a later time through aggregation if distribution access were to open up. Thus, the CLEAR proposal may overstate the significance of the provision in the Durham franchise requiring Duke to buy electricity generated by the city.

E. The Measure Mandates That The City Become A Municipal Utility If SDG&E Will Not Agree To The Local Renewable Generation Condition Of A Franchise, But Provides No Analysis Or Means To That End

The measure states that the City shall become a municipal utility if SDG&E will not agree to the conditions relating to local renewable electricity content and/or to buying generation from the City. The definition of municipal utility includes the means of supply, which involves municipal ownership of the distribution system. Cal. Pub. Util. Code §§ 224.3, 10001. The measure provides no indication of how this would be achieved, including what it may cost the City to buy the SDG&E system or what the source and terms of the finance would be. A Charter provision compelling the City to municipalize electric service could have far reaching effects on City finances and operations.

F. If The Measure Intends That San Diegans Could Not Opt Out Of The Local Program And If The Program Adds Costs Not Faced By SDG&E Customers Outside The Program, Then Program Costs Could Be Determined To Be A Tax Under Propositions 218 And 26

The ballot measure proposes that the local renewable requirement be affected through the franchise. The franchise, however, is a property interest in the rental of the streets for the placement of the franchisee's facilities. The City does not have the right to exact franchise consideration in excess of the fair market value of that rental. *See Jacks v. City of Santa Barbara*

(*Jacks*), 3 Cal. 5th 248, 260-66 (2017). To the extent that the local program intended by the proposition would be compulsory upon City residents and they would not be permitted to opt out for standard utility portfolio service, then any costs of the program that exceed the costs of the standard portfolio may be an invalid tax under Propositions 218 and 26, unless a specific vote were held to approve the amount of those costs. *Id.* at 267-68.

The *Jacks* case observed that the CPUC:

> [E]stablished a procedure by which utilities may obtain approval to impose disproportionate charges on ratepayers within the jurisdiction that imposed the charges. (Citation omitted). When a local government imposes taxes or fees 'which in the aggregate significantly exceed the average aggregate of taxes or fees imposed by the other local governmental entities within the public utility's service territory,' a utility may file an advice letter seeking approval to charge 'local government fee surcharges.' (Citation omitted.) Such surcharges 'shall be included as a separate item or items to bills rendered to applicable customers. Each surcharge shall be identified as being derived from the local governmental entity responsible for it.'

Jacks, 3 Cal. 5th at 265, citing CPUC procedures.

However, even if the CPUC approves surcharges for a local program, some or all those charges may still constitute a tax under Propositions 218 and 26 to the extent they exceed (together with other consideration paid for the franchise rights) the fair market value of the franchise. The City is currently defending litigation based on the holding in *Jacks,* which argues that the value of an undergrounding surcharge that was adopted pursuant to the SDG&E franchise in 2002 is invalid under Propositions 218 and 26. Thus, the City is already facing a lawsuit contending that the City has obtained more than the value of the franchise from SDG&E, and alleges that the excess falls on City of San Diego utility ratepayers as a tax. *Mahon, et al. v. City of San Diego,* San Diego Superior Court Case No. 37-2015-00014540-CU-MC-CTL, filed April 30, 2015. Even if the CPUC were to approve such a proposal for local renewable electricity, the program could draw similar challenges if the customers must pay the costs of a localized municipal electricity program.

G. Distribution Access To The SDG&E System Is Not Available Under The Proposed Franchise Model

The electricity industry in California was restructured by Cal. Assembly Bill 1890 (AB 1890) in 1996 to allow customers to obtain "direct access" commodity services from Electricity Service Providers (ESPs). However, the state's experiment with deregulation failed and ended with the energy crisis of 2000-2001. Since that time, the California Public Utilities Code was amended to generally end the availability of direct access except for a very limited amount of load. The ability of ESPs to access the distribution system to sell energy to retail customers was generally suspended. Cal. Pub. Util. Code § 365.1. The Durham franchise reflects the same status of direct access being currently unavailable in North Carolina. In California, the only reasonably available means for the City to act as a participant in wholesale markets and to sell renewable electricity it generates or acquires directly to retail customers is through a CCA pursuant to Cal. Assembly Bill 117 (AB 117). Cal. Pub. Util. Code § 366.2. The proposal puts CCA aside,

however, in its third paragraph, and instead either intends that City-provided renewable energy be purchased by SDG&E (on unstated terms) or provided directly to retail customers on the franchised SDG&E system. Distribution access to the SDG&E system is not legally available under the proposed franchise model, if that is what the proposal intends.

H. The Proposed Measure May Not Satisfy The Single Subject Rule

The measure in one part aims at adding provisions to the Charter relating to the granting of electrical franchises, which, if adopted, would require the franchisee to provide 50 percent "local" renewable fueled electrical generation, with some or all of it supplied by the City, into the retail commodity supply provided to electric customers who take their service from SDG&E in the City of San Diego. At the same time, it proposes to add further provisions to the Charter that would require the City to municipalize electric service if no prospective franchisee agreed to meet the local renewable requirements. These are two alternative legal constructs, so it is not clear that the proposed measure aims at a single subject.

City ballot measures submitted to voters are subject to the separate vote (single subject) rule, which requires that a single ballot measure may not present more than one subject. As explained in City Attorney Report to the Committee on Rules, Finance and Intergovernmental Relations, 2007 City Att'y Report 302 (2007-17; Nov. 2, 2007), the single subject rule is based in article XVIII, section 1 of the California Constitution and in the Charter section 223. The Report cites primarily *Californians for an Open Primary v. McPherson* (*McPherson*) 38 Cal. 4th 735 (2006) to explain the history and purpose of the single subject rule, and advises that *McPherson* established a "reasonably germane" test to assess whether separate provisions of a given ballot measure are sufficiently within the single subject rule. *Id.* at 763. Based on the topics addressed in the proposed ballot measure, it is unclear whether that test could be met.

CONCLUSION

The proposed CLEAR ballot measure presents a number of legal issues and raises questions of unexplained facts and intentions. Even assuming the legal issues could be overcome, this Office cannot draft ballot language for the complex proposal based on the information provided to date by CLEAR.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/Frederick M. Ortlieb
Frederick M. Ortlieb
Senior Deputy City Attorney

FMO:cw
RC-2018-3
Doc. No. 1788038
Attachment: CLEAR Ballot Proposal
cc: Kevin L. Faulconer, Honorable Mayor
Andrea Tevlin, Independent Budget Analyst

ATTACHMENT

California Local Energy - Advancing Renewables
4821 Lomitas Drive, San Diego, CA 92116
c/o: Bill Powers, bpowers@powersengineering.com, tel: 619-917-2941

Tuesday, January 2, 2018

Rules Committee, City of San Diego
c/o: Ms. Elizabeth Maland, San Diego City Clerk, by e-mail: cityclerk@sandiego.gov, MBerumen@sandiego.gov
202 C Street, Second Floor
San Diego, California 92101

RE: Submission of Ballot Proposals for the Next Ballot – Formation of Public Electric Utility

Dear Honorable Rules Committee Members, City Council and Mayor:

California Local Energy - Advancing Renewables (CLEAR), a 501(c)3 non-profit corporation, submits this ballot proposal ("measure") for the November 2018 ballot. This measure, in summary, enables the City to acquire and generate electric power for City residents, with the objective of providing more economical, sustainable, and local electricity to San Diegans. The measure provides for an alternative to the private monopoly franchise model currently relied upon by the City to provide bundled electricity service to City residents. San Diegans currently pay among the highest electricity rates in the California.

Adoption of this measure would provide City residents with access to competitively-priced electricity, prioritizing the use of local green energy to meet the City's mandatory target of 100 percent green electricity by 2035. The target established in this measure is 50 percent of the electricity used to meet City resident's electricity needs in 2035 shall be provided by local renewable energy, with local defined as within the city limits of the City of San Diego. This measure will direct the City to prioritize local renewable power, to stimulate the local economy and avoid the environmental impacts caused by regional renewable energy mega-projects.

The current electricity provider is San Diego Gas & Electric (SDG&E), a private monopoly holding a 50-year franchise agreement with the City to provide electricity to City residents. The franchise agreement expires in December 2020. The City has the authority to renew the franchise agreement, award the franchise to a new provider, or take over the function of electricity acquisition, generation, and delivery. The City is considering becoming a Community Choice Aggregator (CCA), responsible for acquiring and generating electric power for City residents, with SDG&E continuing to provide transmission and distribution service. However, SDG&E's parent company, Sempra Energy, has formed a separate entity known as Sempra Services to actively oppose the City becoming a CCA. Also, the California Public Utilities Commission is currently evaluating whether to delay the formation of new CCAs in the state, which would undercut the City's ability to become a CCA in 2018.

With the passage of this measure, the City would be required to enshrine the authorities to acquire and generate electricity for City residents in a renewal of the City-SDG&E franchise agreement. These authorities have precedent in electric power franchise agreements. For example, the electric power franchise agreement between Durham, North Carolina and investor-owned utility Duke Energy already grant city government the right to generate electricity, which the franchisee must purchase, if the city chooses to be a producer. The City of Durham is also empowered to purchase wholesale electricity for resale within its jurisdiction, which the franchisee must deliver to customers over its distribution system. These same authorities shall be enshrined in a renewal of the City-SDG&E franchise agreement, if the City determines a renewal of the franchise agreement is in its interest. The City of Durham franchise agreement has a term of 15 years (until 2020). Any renewal of the City's franchise agreement with SDG&E shall have term of 10 years, until 2030, to allow the City sufficient time to make necessary adjustments if the City is not on track to meet its mandatory target of 100 percent clean electricity by 2035.

If SDG&E fails to agree to these terms as part of a renewal of the current franchise agreement, the City shall not renew the current franchise agreement with SDG&E and will become a municipal electric utility providing bundled electric service to City residents, including both 1) acquisition and generation of electricity and 2) distribution of electricity to City residents. The City will compensate SDG&E for its electric distribution system assets within City limits at fair market value if the franchise agreement is not renewed and the City becomes a municipal utility providing bundled electric service.

The San Diego City Charter currently provides that the City "... may own and operate public utility systems, including the joint or sole operation and ownership of utilities for the purchase, development, and supply of water and electrical power for the use of the City and its inhabitants and others; and generally shall have all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever now or hereafter authorized to be granted to municipal corporations by the Constitution and laws of the State of California." **[ARTICLE I CORPORATE POWERS Section 1: Incorporation and Corporate Powers]**. Further, the City Charter provides that public services are required: "It shall be the obligation and responsibility of The City of San Diego to provide public works services, water services, building inspection services, public health services, park and recreation services, library services, and such other services and programs as may be desired, under such terms and conditions as may be authorized by the Council by ordinance." **[ARTICLE V, EXECUTIVE AND ADMINISTRATIVE SERVICE, Section 26.1]**.

The City Council has recently adopted a specific, measurable, and enforceable Climate Action Plan. The Climate Action Plan will require changes to the way the City does business, issues permits, and enters into franchise agreements. The City has begun conversion of public buildings and facilities to sustainable and renewable electricity sources. This ballot proposal builds on these initiatives to include City residents and others. This ballot proposal directs the Mayor and Council to take affirmative actions, through municipal code changes and Charter amendments, if necessary, to: 1) implement a public benefit electric utility to acquire and generate electricity for City residents, and 2) own and operate the existing electricity distribution grid within the City's jurisdiction if current franchisee SDG&E opposes inclusion of language in the renewal of the franchise agreement that recognizes the City's authority to acquire and generate electricity supply for City residents.

CLEAR requests the opportunity to be noticed and heard concerning this ballot proposal. Thank you for providing this opportunity.

Respectfully,

California Local Energy - Advancing Renewables
Bill Powers, President and Ballot Proposal Chair

City of San Diego - City Charter: http://docs.sandiego.gov/citycharter/Article%20V.pdf

ARTICLE V EXECUTIVE AND ADMINISTRATIVE SERVICE
Section 26.1: Public Services Required

It shall be the obligation and responsibility of The City of San Diego to provide public works services, water services, building inspection services, public health services, park and recreation services, library services, and such other services and programs as may be desired, under such terms and conditions as may be authorized by the Council by ordinance.

AN ORDINANCE GRANTING A FRANCHISE TO DUKE ENERGY CORPORATION

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DURHAM, as follows:

1. DEFINITIONS

As used in this Ordinance and in an Operating Agreement which may accompany this Franchise, the following terms, words and phrases shall have the meanings respectively ascribed to them in this section, unless otherwise indicated:

"Duke" or "Company" shall mean Duke Power; a division of Duke Energy Corporation, a corporation organized under the laws of the State of North Carolina and authorized to do business in the State of North Carolina and any assignee of or successor in interest to Duke Energy Corporation under this franchise Ordinance.

"City" or "City of Durham" shall mean the City of Durham, a municipal corporation located in Durham County, North Carolina; the area within the territorial city limits of the City of Durham and within the extraterritorial area surrounding the City as may be lawfully included as presently or hereafter fixed by law or ordinance; or the City Council or any officer or agent duly authorized to act on behalf of the City as a municipal corporation, as indicated by the context by which the term is used;

"City Council" shall mean the governing body of the City of Durham;

"City Charter" or "Durham Charter" shall mean the Charter of the City of Durham passed by the General Assembly.

"City Code" or "Durham Code" shall mean the adopted regulations and ordinances of the City of Durham, as they exist at the time of adoption of this ordinance and as they may be amended from time to time.

"City Policies" shall mean the administrative policies and procedures established by the City, but not included in the Code or Charter of the City of Durham as those policies may be amended from time to time.

"City Requirements" shall mean the City Charter, City Code, and City Policies as defined above.

"Franchise" or "this Franchise" shall mean this document, together with the Addendum, as further interpreted by any Operating Agreement hereafter described that may exist.

"NCUC" shall mean the North Carolina Utilities Commission.

"Operating Agreement" shall mean the document titled the same, which may accompany this Franchise, and is subject to more frequent review and amendment, as hereafter set forth.

2. FRANCHISE GRANTED

Duke is hereby granted the right to construct, operate and maintain an electrical utilities system within the City and within the extraterritorial area surrounding the City (to the extent the City has designated such area and may lawfully do so) for the distribution and sale of electricity to consumers and users within the City and to the City and any and all agencies and departments thereof. The system may include such communications infrastructure as is necessary for the distribution and sale of electricity authorized by this Franchise, unless prohibited by this Franchise, and may include telecommunications equipment owned and operated by Duke and used solely for internal Duke communications and/or the distribution by Duke of electricity. This grant is nonexclusive and the City may grant others similar rights. Duke is also given permission to do all additional acts specifically authorized hereafter for the purposes enumerated herein; and assent and permission is hereby given and granted to Duke, its successors and assigns, to exercise, if allowed under this Franchise, all powers, rights and privileges which Duke under and by the terms of its charter, or otherwise is authorized, empowered or permitted to conduct, carry on, exercise, do or transact including, without limitation, the power, right and privilege to use, lease, sell, convey and distribute power by electricity for manufacturing, lighting, heating, motive power or other purpose or purposes and the doing of an electrical business generally.

This grant of authority shall be exercised in compliance with this Franchise. This Franchise is subject to such further conditions as may be established now or in the future by the North Carolina Utilities Commission, by federal and state law and regulation, and by the City of Durham through generally applicable terms and conditions established in City Charter, City Code, and City Policies.

3A. LOCATION

Duke is hereby granted the right, authority, and privilege to construct and install, operate, maintain, renew, replace and repair electrical distribution lines, poles, conduits, transformers, connections and services thereto, and telecommunications infrastructure owned and operated by Duke and used solely for its electrical distribution system, in, through, across, along and under streets, avenues, roads, public alleys, lanes, and other public ways in the City, for the distribution and sale of electricity, its own internal communications purposes, and for any and all other purposes hereafter set forth, subject to the terms and conditions set forth in this Franchise. Such conditions include but are not limited to obtaining all necessary City permits for the location of facilities and conduct of such work.

3B. RELOCATION

If the City determines that it is necessary to alter or improve a road or other public way, the City may require Duke to relocate its facilities and Duke shall do so in accordance with this Section and the further provisions of the Operating Agreement. If the City requests such relocation, and if Duke does not have the right to use additional adjacent land for such relocation pursuant to existing easements, then, upon timely notification by Duke consistent with the Operating Agreement, the City will make reasonable efforts to provide right of way for Duke's facilities, as provided in the Operating Agreement. If Duke has legally sufficient property rights for the location in which its facilities are located, including prescriptive easements, a valid unacquired property interest in a location that predates the existing right of way, or property outside of the public right of way that can no longer be used for its facilities, the City shall pay for the cost of relocation of Duke's facilities. If Duke does not have legally sufficient property rights, however, the Company shall bear the expense of relocating its facilities. These provisions may be varied for particular projects if Duke and the City Manager, or his designee, mutually agree to cost-sharing arrangements as a means of avoiding dispute or extensive legal documentation. Street or other public improvement projects that are entirely administered and funded by the State of North Carolina may be subject to the State's policies regarding relocation, at the option of either Duke or the City.

4. WORK IN PUBLIC RIGHT OF WAY

Except as limited by the further provisions of this paragraph, whenever Duke or its contractors or subcontractors shall cause any work to be done in any public right of way or any public place within the City, Duke shall be responsible for any damages caused, and, in addition, for the restoration of the area disturbed to the same condition in which it found the area. If Duke shall fail to restore the area to its approximate former condition within thirty working days after notification by the City, or within such longer period of time as may be reasonably granted by the City, the City may restore such area as nearly as practicable to its original condition and the City shall submit a statement of the costs for this restoration to Duke. Duke agrees to pay the City for these costs within thirty days. Damages to facilities that are owned by the City or third parties may be immediately repaired by the owners at the option of such owners at Duke's expense. Reimbursement shall include all direct costs plus fifteen per cent of such costs.

Financial responsibility for damage to underground facilities shall be governed by the provisions of NCGS 87-102, 107, and 108.

The installation of street lighting shall be governed by the separate provisions of Duke's approved rate schedules, NCUC service requirements, tariffs and the Operating Agreement, and not this paragraph.

5: CONDITIONS ON USE OF PUBLIC RIGHT OF WAY

All work by Duke or its contractors or subcontractors in the public rights-of-way or other public place shall be done with due care, non-negligently, and in a good workmanlike manner and shall be completed in a timely and expeditious manner so as to minimize inconvenience to the public and individuals. All work shall be conducted in accordance with City Requirements and other legally applicable requirements. Duke shall ensure the provision of traffic control and associated signage, barricades, signals, cones, and other equipment necessary to ensure the public safety.

Duke shall require its contractors and subcontractors to hold the necessary contracting and privilege licenses required by law and to comply with all City Requirements and other applicable legal requirements.

Duke shall maintain its facilities in safe repair and condition.

6. USE OF DUKE FACILITIES BY THE CITY

The City shall be permitted for public purposes to make all reasonable use of all overhead distribution facilities constructed by Duke within the City, provided such use does not unreasonably interfere with the use of such facilities for the distribution of electricity or create an unreasonable hazard and provided further, there is space available on such facilities. The City shall execute the Company's standard pole attachment agreement for municipalities and shall not be required to pay any annual attachment fees. The City shall be responsible for any costs incurred by Duke or any pre-existing attaching entity for modifications to the Company's facilities made necessary solely by the City's attachment. The City shall notify Duke prior to making any attachment that may create pole-loading issues including, but not limited to, traffic signals, banners and major signage, and prior to attaching to any non-wood pole or structure. All attachments made by the City must comply with all applicable codes and regulations including, but not limited to, the National Electric Safety Code. The City's use of Duke's facilities shall not include the transmission or distribution of electricity and shall not involve the sale of services to third parties unless otherwise allowed by law. The term "sale of services" does not include recovery of fees by the City for the City's costs of operating a service for public purposes, however. Use by the City under this provision may include, by way of explanation but not by way of limitation, the attachment of traffic control signs, fire alarm or police signal systems, public signage, or the attachments of cables or other devices for transmitting television, electronic data, radio or similar signals, or for any other municipal use. With regard to light fixtures, the City may use those light fixtures ordered by the City and paid for through NCUC approved rates for any City approved purpose, with notification to and approval by Duke and compliance with the technical provisions of this paragraph.

7. ELECTRIC INDUSTRY RESTRUCTURING

In the event that the electric industry in North Carolina is deregulated or restructured by state or federal legislation or regulation, or state or federal judicial action which affects retail distribution, to the extent that the inhabitants of the Municipality may choose their electric supplier then upon the date when such legislative, regulatory or judicial action has the force and effect of law, this Agreement may be at any time thereafter terminated by either party upon ninety days written notification to the other.

8. SALE OR TRANSFER OF SYSTEM

Duke is hereby granted the right during the existence of this Franchise to mortgage or hypothecate this Franchise, together with all rights and privileges thereunder and any right or interest therein, as security for indebtedness, subject to acceptance by any legal successor in interest of the obligations, duties, liabilities, limitations and prohibitions set out in this Franchise and subject to approval by the North Carolina Utilities Commission or other government agency whose approval is required by law. Duke may not assign or transfer its rights under this franchise agreement without the express consent of the Durham City Council and such consent shall not be unreasonably withheld, provided, however, that this provision shall not require Duke to obtain permission from the Durham City Council prior to assigning its rights hereunder to any new entity created in any corporate reorganization or merger in which Duke is a party.

9. CITY HELD HARMLESS

Duke, its successors and assigns, shall hold the City and its agents (including but not limited to the City's officers, officials, employees, and contractors) free and harmless and indemnify the City and its agents from all damages or claims for damages arising by reason of the construction, maintenance, placement, or operation of Duke's facilities within the City or Duke's noncompliance with this Franchise and shall fully reimburse the City and its agents for any and all amounts they may be required to expend by reason hereof. Indemnification shall include but not be limited to the cost of claims processing, defense, attorney's fees and other claim-related costs. Notwithstanding the provisions of this paragraph, Duke shall not be required to indemnify the City for damages or claims resulting solely from the City's negligence and not in whole or in part from Duke's negligence.

10. AMENDMENTS; SEVERABILITY

The Council, with the consent of Duke, may amend the provisions of this Franchise, provided no material and substantial amendment of this Franchise shall be made except upon a public hearing thereon. The parties agree that the Operating Agreement that may accompany this Franchise shall be reviewed and may be amended, as agreed to by both parties, every five (5) years during the term of this Franchise. Should any part, term, or provision of this Franchise be declared by a court to be illegal or unauthorized or in conflict with any law of the United States or the State of North Carolina, or to be in conflict with any valid rule or regulation duly promulgated by any agency or regulatory

body of the United States or the State of North Carolina, the remaining portions or provisions shall not be affected thereby.

11. REVOCATION OF FRANCHISE.

This Franchise may be revoked by the City in the event of substantial noncompliance with its provisions. The City shall give at least 60 days notice of its intent to revoke and Duke shall have a reasonable opportunity to cure prior to revocation. In the event that Duke does not address the issues identified by the City, the City may proceed with revocation.

12. TERMS OF ACCEPTANCE OF FRANCHISE

This Franchise is granted for a term of fifteen (15) years beginning October 6, 2005, and ending at midnight October 5, 2020. This Franchise shall take effect from the day of its passage, but only after it has been accepted in all its terms and revisions by Duke, in writing, within sixty days after its passage. Otherwise, the same shall be null and void and of no effect.

13. CLAIMS

Duke shall maintain a process and procedure for claims by citizens, businesses, and other individuals who allege damage from the Company's activities or those of the Company's contractors. This process shall be accessible through a local or toll-free telephone number. Duke shall ensure that claims are resolved fairly and expeditiously and shall keep written records of all claims, not identifying the source of the claim, which shall be made available upon City request for review. If a resident of the City consents to disclosure of information to the City, the Company shall provide to the City all documents and materials regarding investigation, processing, and resolution of such resident's claim.

14. ACCESS TO BOOKS, RECORDS, MAPS

Upon the City's request and reasonable notice, relevant information found in the books and records of the Company will be shared with the City at Duke's main office serving the City at an agreed upon time and under the following circumstances: a) for the purpose of conducting a random audit of customer accounts to review the calculation of the electric utility franchise tax paid by the Company to the State of North Carolina for the benefit of the City; b) for the purpose of reviewing maps to ensure proper infrastructure installation within the public right of way; c) for the purpose of other matters when agreed upon by the City and Duke, or d) as otherwise allowed by law.

APPROVED BY
CITY COUNCIL

OCT 3 2005

CITY CLERK

ADDENDUM

The Addendum describes areas that, in whole or in part, may be regulated by other governing/regulatory bodies.

1: COMPLIANCE WITH NORTH CAROLINA UTILITIES COMMISSION RULES AND REGULATIONS - The electricity which the Company distributes shall conform with the standards promulgated by the North Carolina Utilities Commission and with the tariff provisions of the Company setting standards, as the same may be amended from time to time. Upon request by the City, the Company will provide reasonable documentation regarding compliance with such standards.

2: COMPLIANCE WITH AIR AND WATER POLLUTION LAWS - The Company shall use its best efforts to take actions which will result in its facilities meeting the standards required by applicable federal and state air and water pollution laws. Upon request by the City, the Company will provide reasonable documentation regarding the compliance with such measures.

3: CITY AS INDEPENDENT POWER PRODUCER - The City expressly reserves the right to engage in the production of electricity. If requested by the City, the Company agrees to purchase City-generated power in accordance with applicable federal and state laws, rules, regulations, and tariffs at that time.

4: DISTRIBUTION OF CITY PURCHASED POWER – If and when restructuring of the electric utility industry occurs in North Carolina, the City expressly reserves the right to engage in the wholesale purchase of electricity for resale to some or all service locations within the City and the Company agrees to distribute the electricity through its facilities, all in accordance with applicable Federal and State laws, rules, regulations, and tariffs at that time.

5: OBLIGATION TO SERVE – The Company has an obligation to provide electric service as outlined in NCUC rules and regulations. If and when restructuring of the electric utility industry occurs in North Carolina resulting in the need for the removal of Company owned electrical facilities at that time, the removal of such facilities will be in accordance with applicable federal and state laws, regulations, and tariffs, and with City Requirements not preempted by such federal and state enactments.

6: UNDERGROUND UTILITIES – The Company agrees to install new facilities underground and convert overhead facilities to underground facilities, where both situations are deemed appropriate, in accordance with the NCUC approved Duke Underground Distribution Installation Plan or any successor plan, and other NCUC requirements.

7: STREET LIGHTING SERVICE – When street lighting service is requested by the City, such service shall be provided pursuant to the applicable rate schedule and service regulations approved by the North Carolina Utilities Commission.

8: EQUAL OPPORTUNITY COMPLIANCE – The Company shall maintain policies for employees, contractors, and subcontractors that comply with all applicable federal and state laws regulating equal employment and nondiscrimination.

ACCEPTANCE BY DUKE ENERGY CORPORATION OF
FRANCHISE WITH CITY OF DURHAM

The undersigned, by authority duly given and as the act of the corporation, hereby agrees to the franchise agreement between Duke Power Company, a division of Duke Energy Corporation, and the City of Durham as granted by the Durham City Council in Ordinance # _____.

ATTEST:

_____
_____Secretary

DUKE POWER, a division of DUKE ENERGY CORPORATION

BY:_____
_____President, _____

(S E A L)

State of _____

County of _____

ACKNOWLEDGMENT BY CORPORATION

I, a notary public in and for the aforesaid county and state, certify that _____ personally appeared before me this day and stated that he or she is _____ Secretary of _____, a corporation, and that by authority duly given and as the act of the corporation, the foregoing grant of franchise with the City of Durham was signed in its name by its _____ President, whose name is _____, sealed with its corporate seal, and attested by him/herself as its said Secretary or Assistant Secretary. This the _____ day of _____, 20_____.

My commission expires:
_____

_____
Notary Public