

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
MARA W. ELLIOTT
CITY ATTORNEY

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MEMORANDUM OF LAW

DATE: November 4, 2020
TO: Barbara Bry, Council President Pro Tem
FROM: City Attorney
SUBJECT: Gas and Electric Service Issues in Light of Expiring Franchises

INTRODUCTION

You asked our Office several questions about the City's electric and gas franchises with San Diego Gas and Electric Company (SDG&E) that expire on January 17, 2021, and the Invitations to Bid that the Mayor's Office issued on September 23, 2020 to solicit new franchises. The answers to your questions are below.

QUESTIONS PRESENTED

1. If the City were a local publicly owned electric utility, could it purchase energy from San Diego Community Power?
2. Does SDG&E have an absolute obligation to continue serving customers if the existing franchises expire without extension or grant of new franchises?
3. If the current franchises expire without extension and without new franchises becoming effective, could the incumbent utility refuse and/or suspend franchise fee payments to the City?
4. If the franchises expire, would the failure to pay any or all of the currently applicable franchise fees possibly constitute an illegal trespass?

SHORT ANSWERS

1. Yes. Although the City could not be a member of San Diego Community Power (SDCP) for purposes of selling electricity to retail customers within City boundaries, the City as a local publicly owned electric utility could purchase wholesale electricity from SDCP.

2. No. SDG&E has a duty to continue serving customers if the existing franchises expire. However, the duty is not absolute because it is subject to orders of the California Public Utilities Commission (CPUC).

3. Yes. Franchise fees and undergrounding revenue that is subject to surcharges authorized for the current franchises could be at risk.

4. Yes. Although the outcome of any court proceeding cannot be predicted, the City could allege that failure to pay consideration for use of the streets is a trespass and a nuisance.

ANALYSIS

I. IF THE CITY WERE A LOCAL PUBLICLY OWNED ELECTRIC UTILITY, IT COULD PURCHASE WHOLESALE ELECTRICITY FROM SAN DIEGO COMMUNITY POWER, BUT COULD NOT BE A MEMBER OF THAT COMMUNITY CHOICE AGGREGATION AGENCY FOR PURPOSES OF SERVING RETAIL CUSTOMERS

As you know, the City is currently a member of SDCP, a community choice aggregation joint powers agency formed to sell electricity to retail customers in the City of San Diego and other member cities. However, if the City provided electric distribution service to retail customers as a local publicly owned electric utility (often referred to as a “municipal utility”), its relationship with SDCP would fundamentally change. As a municipal utility, the City can no longer be an SDCP member for the purpose of *selling* electricity to retail customers within City boundaries. Rather, it can contract with SDCP to *buy* electricity for the customers it serves, but it would have to do so at the wholesale level. This concept is explained in California Public Utilities Code section 366.2(c)(1), which provides:

Notwithstanding Section 366, a community choice aggregator is hereby authorized to aggregate the electrical load of interested electricity consumers within its boundaries to reduce transaction costs to consumers, provide consumer protections, and leverage the negotiation of contracts. *However, the community choice aggregator may not aggregate electrical load if that load is served by a local publicly owned electric utility.* A community choice aggregator may group retail electricity customers to solicit bids, broker, and contract for electricity and energy services for those customers. The community choice aggregator may enter into agreements for services to facilitate the sale and purchase of electricity and other related services. Those service agreements may be entered into by an entity authorized to be a community choice aggregator, as defined in Section 331.1. (Emphasis added.)

Therefore, if the City were a local publicly owned electric utility, it could purchase wholesale electricity from SDCP.¹

II. IF THE EXISTING FRANCHISES EXPIRE WITHOUT EXTENSION OR GRANT OF NEW FRANCHISES, THE INCUMBENT UTILITY WOULD HAVE A DUTY TO CONTINUE SERVING CUSTOMERS, SUBJECT TO ORDERS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION

If the current gas and electric franchises expire without extension, amendment, or new franchises in place, the incumbent gas and electric corporation has a duty to continue service, unless the CPUC authorizes it to discontinue those operations. California Public Utilities Code section 451 provides, in relevant part:

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

SDG&E is both a “gas corporation” and an “electrical corporation” under California Public Utility Code sections 222 and 218, respectively. As such, it is a “public utility” as defined in California Public Utilities Code section 216, subject to regulation by the CPUC, which has broad authority to regulate utilities, including the application of California Public Utilities Code section 451. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Util. Code § 701.

In 1972, in exchange for a Certificate of Public Convenience and Necessity to operate the current franchises under California Public Utilities Code section 1003, SDG&E accepted the duty to serve. Decision 80833, 72 Cal. P.U.C. 452 (1972). A public utility cannot cease to be such by merely discontinuing operations; CPUC approval is required. *Lakewood Civic Group, Inc. v. Homestead Land & Water Co., Inc.*, 56 Cal. P.U.C. 31 (1957). SDG&E’s current Rule 11, a CPUC order, limits the circumstances SDG&E can discontinue service to a customer. *See* SDG&E Rule 11, “Discontinuance of Service.” Moreover, the public utility could be exposed to liability to customers if it were to abandon service without authorization from the CPUC. *See* Cal. Pub. Util. Code § 2106.

Ultimately, the City would be required to determine whether to grant another franchise or acquire the distribution system facilities through the power of eminent domain and become a municipal utility.² *See* San Diego Charter (Charter) § 1.

¹ This conclusion is consistent with previous statements from this Office and the JVJ Pacific Consulting Report dated June 22, 2020, at page 7.

² As a matter of history, the gas and electric franchises between the City and SDG&E in place prior to the existing franchises were granted in 1920 and expired before the current franchises were awarded in December 1970. *See* CPUC Decision 80234, 73 Cal. P.U.C. 623, 625 (1972). The City reoffered the franchises by subsequent bidding after the 1920 franchises expired. There was no discontinuation in services.

III. IF THE CURRENT FRANCHISES EXPIRE WITHOUT EXTENSIONS OR NEW FRANCHISES IN PLACE, IT IS POSSIBLE THAT THE INCUMBENT UTILITY COULD SUSPEND OR END FRANCHISE FEE PAYMENTS TO THE CITY

If the franchises expire without extensions or new franchises in place by January 17, 2021,³ it is possible the incumbent utility may cease to pay all or a substantial part of current franchise fees and undergrounding fees. Currently, the CPUC has approved municipal surcharges that are tied to the existing franchises. The surcharges are only assessed on customers within the City. These surcharges equate to 5.78% of SDG&E's gross receipts on the electric franchise and 1.03% of its gross receipts on the gas franchise. *See* CPUC Resolution E-3788 (2002) and Decision 80234, 73 Cal. P.U.C. 623, 625 (1972). Since the surcharge authorizations are tied directly to the expiring franchises, it is possible that the incumbent utility or the CPUC could request, and the CPUC could order, the cessation of the collection of these surcharges. Without franchises in place, there is a risk that the incumbent utility could stop paying the amounts covered by the surcharges or stop paying franchise fees altogether. This Office cannot predict the outcome should the City contest any failure to pay franchise fees.

When this possibility was discussed in the attached City Attorney memorandum dated August 25, 2020 and titled "Option for Extension of Gas & Electric Franchise Agreements," we noted that SDG&E may 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. City Att'y MS 2020-23 (Aug. 25, 2020).

IV. IF THE FRANCHISES EXPIRE AND THE INCUMBENT UTILITY STOPS PAYING SUFFICIENT CONSIDERATION FOR ITS USE OF THE STREETS, THE CITY POTENTIALLY COULD BRING AN ACTION FOR TRESPASS OR NUISANCE

The City has the right to charge consideration for the right to use its streets for public utility purposes. Charter §§ 103, 103.1; *Sunset Telephone & Telegraph Co. et al. v. City of Pasadena et al.*, 161 Cal. 265, 284-85 (1911) (distinguished on other grounds in *Pacific Telephone and Telegraph Co. v. City and County of San Francisco*, 51 Cal. 2d 766 (1959)). If the incumbent utility continued using City streets for gas and electric poles, pipes, and other facilities after its franchise rights ended, the City potentially could bring an action in court alleging trespass and nuisance. In *City of San Diego v. Southern Cal. Telephone Corp.*, 141 Cal. 2d 110 (1954), the trial court issued an injunction against a telephone utility with an expired franchise based on a nuisance claim. Before the injunction became effective, the court allowed the company time to apply for a new franchise. The issue decided on appeal was the amount of consideration the company had to pay for use of the streets in the period between the expired franchise and the new franchise.

³ A new or extended franchise must be passed by an ordinance requiring two City Council hearings twelve calendar days apart and would become effective thirty days after the date of final passage. Charter §§ 103, 275, and 295.

Therefore, if the incumbent utility were to “hold over” after the expiration of the current franchises without removing its facilities or paying for its use of City streets, the City potentially could bring an action in Superior Court for trespass and nuisance. The City would likely seek an injunction and unpaid franchise fees and undergrounding payments. The outcome of such litigation would be dependent on the facts and cannot be predicted.

CONCLUSION

Numerous legal implications will occur if the current SDG&E franchises expire on January 17, 2021 without extensions, amendments, or new franchises in place. Although SDG&E would have a duty to continue providing gas and electric service to customers under state law, the CPUC could relieve it of that obligation. Additionally, it is possible that SDG&E would discontinue payment of franchise fees and undergrounding revenue, leading to litigation initiated by the City. Also, if the City elects to municipalize its services, it can no longer be a member of SDCP for purposes of selling electricity to *retail* customers within City boundaries, but it could *contract* with SDCP for the supply of *wholesale* electricity and/or other services.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Frederick M. Ortlieb

Frederick M. Ortlieb

Senior Deputy City Attorney

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Doc. No. 2511586_3

cc: Councilmembers

Honorable Mayor, Kevin L. Faulconer

Chief Operating Officer, Aimee Faucett

Independent Budget Analyst, Andrea Tevlin

Deputy Chief Operating Officer, Erik Caldwell

Strategic Energy Initiatives Manager, Lee Friedman

Attachment: MS-2020-23 dated Aug. 25, 2020

**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

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.

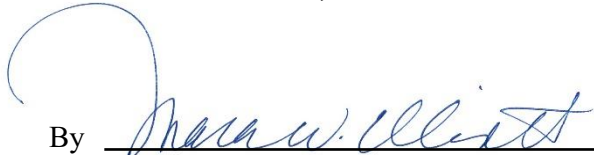
There are several factors you may wish to consider in determining whether to extend the current franchise agreements:

- 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



Mara W. Elliott
City Attorney

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MS-2020-23

Doc. No.: 2461942

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