

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: June 3, 2020

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Unpaid Utility Undergrounding Program Invoices and Documentation
Dispute with SDG&E

INTRODUCTION

As the City Council (Council) prepares to adopt the Fiscal Year 2021 (FY 2021) budget, our Office presents this memorandum to ensure that the Council is informed of an ongoing dispute with San Diego Gas & Electric (SDG&E) relating to Utility Undergrounding Program (UUP) expenditures and the potential depletion of UUP funds due to an acceleration of undergrounding projects from the end of 2018 through February 2020. The Council has not received a Council Policy (CP) 600-08 status report on the “status of all allocated underground conversion projects, as well as the status of expenditures and underground conversion account status” since January 25, 2019.¹ Under CP 600-08, City of San Diego (City) staff must present reports on the UUP to the Council by January 31 and June 30 of each year.

It is our belief that the dispute between the City and SDG&E involves at least \$22.1 million in invoices the City has not yet paid because SDG&E has failed to properly document and substantiate its project costs. Our Office recommends that City staff present a detailed CP 600-08 status report to the Council before budget decisions are finalized so that it may request that the Independent Budget Analyst analyze the effects of the dispute on the UUP and recommend appropriate funding for FY 2021 projects.

¹ The last status report is available at <https://www.sandiego.gov/undergrounding/documents/conversion>.

I. THE UNDERGROUNDING SURCHARGE FUND WILL LIKELY BE DEPLETED AT SDG&E'S CURRENT RATE OF EXPENDITURE.

Our Office understands that, near the end of 2018, City management and SDG&E agreed to accelerate the pace of UUP projects over the short term to address ongoing concerns. While this agreement was not memorialized in writing, information indicates that this acceleration of UUP projects, coupled with an unexplained rise in SDG&E's invoiced costs, resulted in the City's inability to pay SDG&E invoices for UUP projects, and jeopardizes the Surcharge Fund for FY 2021.²

A. SDG&E Invoices for Costs Related to UUP Projects Rose Significantly and Unexpectedly During the Acceleration.

As UUP projects accelerated in 2019, SDG&E began to submit invoices with significantly increased and unsubstantiated costs. Around the same time, the rate of cost, or cost-per-mile, of SDG&E projects also significantly increased compared to prior SDG&E-led undergrounding projects and compared to current City-led undergrounding projects. SDG&E-led projects in the past historically averaged around \$4.5 million per mile of undergrounding conversion³ and City-led projects currently average about \$5 million to \$6 million per mile of undergrounding conversion. By comparison, we have learned some SDG&E projects are currently at or exceeding \$10 million per mile with some projects potentially approaching \$20 million per mile, without sufficient documentation to justify such increases. SDG&E has refused to provide City staff with detailed undergrounding cost documentation, which violates Section 12 of the 2002 Memorandum of Understanding between the City and SDG&E.

At a meeting in March 2019, SDG&E provided forecasts for future expenditures to City staff. When City staff compared these forecasts with monthly reports, their calculations revealed that the Surcharge Fund balance would be depleted by December 2020. City staff have continued to meet with SDG&E regarding these concerns and have demanded substantiation of invoices without success.

B. SDG&E's Increased Costs on UUP Invoices Exhausted the FY 2020 Annual Allocation as of January 2020.

The Fiscal Year 2020 (FY 2020) annual allocation of funds for UUP Surcharge Fund projects was exhausted by January 2020 due to the accelerated pace of expenditures.⁴ It is our understanding that the City stopped paying SDG&E invoices for undergrounding projects

²The Surcharge Fund consists of increased franchise fees authorized by the California Public Utilities Commission in Resolution E-3788 and collected by SDG&E via customer utility bills then transmitted to the City to finance the UUP.

³ These are estimated figures that should be confirmed with City staff.

⁴ The annual allocation for FY 2020 was roughly \$102 million; it is unclear how much was allocated for SDG&E costs on UUP Projects, but based on the current budget's inclusion of such costs under "Other Expenses," it appears that roughly \$40 million was allocated to SDG&E-led projects. City staff would be able to confirm the exact details of how much of the FY 2020 budget was expended through SDG&E invoices.

sometime in early January, that no payment has occurred since, and that there are \$22.1 million in unpaid invoices from FY 2020 on UUP projects for December 2019 through February 2020. If the City paid these UUP invoices, total expenditures would exceed the amount the Council allocated for FY 2020. This figure does not account for any additional invoices since February.

In January 2020, our Office advised City staff to send a letter to SDG&E putting it on notice that City staff cannot pay its invoices under the Surcharge Fund's FY 2020 budget allocation and explaining SDG&E's obligations to substantiate its invoices. We are informed that City management sent that letter last week.

C. A CP 600-08 Status Report Would Provide Valuable Information for the Council to Consider When Making Budget Decisions.

As the Council prepares to adopt the FY 2021 budget, the current FY 2021 allocation for the UUP is \$107 million, which is roughly a \$5 million increase over FY 2020. Per City staff, this includes only \$35 million for SDG&E-led projects - a request that is significantly lower than the estimated needs that have been communicated to the program.⁵ It is unclear whether that allocation is intended to cover new project costs or will be used to pay FY 2020 invoices that have not been paid. Before Council votes to approve this allocation, it should be informed of these ongoing issues with the UUP, including the unpaid project invoices of at least \$22.1 million and the ongoing dispute with SDG&E about proper documentation to verify project costs. We therefore recommend that City staff prepare a detailed CP 600-08 status report for Council that addresses all outstanding invoices from SDG&E for UUP projects.

II. SDG&E REFUSES TO PROVIDE SUFFICIENT DOCUMENTATION TO VERIFY PROJECT COSTS ON UUP INVOICES.

The current problem of unpaid invoices for costs that exceeded the FY 2020 allocation of UUP funds is exacerbated by SDG&E's unwillingness to substantiate UUP costs despite its duty to do so under Section 12 of the 2002 Memorandum of Understanding between SDG&E and the City, which states:

SDG&E will make all business records directly relevant to the undergrounding program available to the City upon request, including records the City deems necessary to perform value engineering studies for planning and implementation of future projects and not for retroactive reviews. At least quarterly, at the written request of the City, SDG&E will provide a detailed analysis of expenditures and participate in any City Council meeting to report on the status of the undergrounding projects. SDG&E will maintain all business records that are necessary to

⁵ The FY 2021 Proposed Budget for the UUP Surcharge Fund is as follows: Salaries & Wages - \$1,741,183; Fringe Benefits - \$1,020,938; Supplies - \$22,200; Contracts - \$69,647,189 (These contracts include \$51.3 million for City-managed projects); Information Technology - \$266,386; Energy & Utilities - \$9,000; Other - \$35,017,853 ("Other Expenses" includes \$35 million for SDG&E-managed projects). Total Budget: \$107,724,749.

determine the costs for the undergrounding program. The City shall have the right at any reasonable time to examine and audit such business records to verify the costs of the undergrounding program.

SDG&E failed to adequately respond to a letter from City staff, dated December 3, 2019, or to requests made since by City staff, requesting cost estimates on specific projects prior to initiating work and verification of overhead charges.⁶

CONCLUSION

Because this dispute could result in a large and unanticipated budget impact to the UUP, we recommend that staff issue an updated CP 600-08 status report as soon as possible. This Office will advise on next steps as soon as we are made aware of all pertinent information, including the likely need for an in-depth audit of invoices.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Ryan P. Gerrity
Ryan P. Gerrity
Deputy City Attorney

RPG:cw:cm

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cc: Aimee Faucett, Chief of Staff, Office of the Mayor
Kris Michell, Chief Operating Officer, Office of the Chief Operating Officer
Alia Khouri, Deputy Chief Operating Officer, Office of the Mayor
Andrea Tevlin, Independent Budget Analyst, Office of the Independent Budget Analyst

⁶ SDG&E overhead costs and invoicing practices have been flagged by the City many times in the past decade. Our Office previously advised City staff that the City was not required to pay UUP invoices that were not verified by sufficient documentation. It is our understanding that SDG&E provided limited access to accounting records on May 22, 2020, for just one project.