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City of San Diego Pure Water Project

June 7, 2018

Dear Vic Bienes, City of San Diego Public Utilities Director

San Diego Gas & Electric Company ("SDG&E") reviewed the plans submitted by the City of San Diego ("City") for the Pure Water system ("Project") and determined that the cost of the utility relocations required for the Project should be paid by the City. As you know, the Project is a multi-phase water infrastructure project designed to increase San Diego's current water supply by producing clean drinking water. We understand that Phase 1 of the construction for the Project is expected to begin in early 2019 and conclude in late 2021.

Prior to our full analysis of the current proposal for the Project, on February 6, 2018, SDG&E sent a letter to Ms. Christine Leone, Deputy City Attorney, stating that SDG&E is not responsible for the utility relocation costs related to the Morena Pump Station and Conveyance System ("MPS") (which is part of the Project). This determination was made because the MPS is not a public street project and therefore, not covered by the relocation provisions of the franchise agreement between SDG&E and the City ("Franchise"). Now that we have analyzed the current proposed Project, SDG&E finds that it is not responsible for any utility relocation costs in the Franchise area for the reasons described below.

First, the Project benefits select residents of the City of San Diego. The high costs of this project should not be spread among SDG&E's entire territory, which includes other cities and counties. The funding of this Project, which ultimately will be recouped from City of San Diego residents, should include utility relocation costs.

Second, in California, the common law rule is that in the case of development of a "water system, even within [a city's] own limits, a city does not act in its governmental capacity, but in a proprietary" capacity. (*South Pasadena v. Pasadena Land and Water Company* (1908) 152 Cal. 579); see also *Hansen v. City of Buenaventura* (1986) 42 Cal. 3d 1172). When a municipality is acting in a "proprietary" capacity, as distinct from a "governmental use", the municipality should bear the costs to relocate, remove, or abandon its facilities. (*Postal Telegraph -Cable Co.*

v. City and County of San Francisco (1921) 53 Cal.App. 188). The common law rule has been embodied in California case law for nearly a century and, importantly, has never been overruled by the California Supreme Court.

Third, SDG&E's Franchise with the City authorizes SDG&E to install utility facilities in the public streets. It also requires that the City and SDG&E prepare a manual of administrative practices "which shall govern the installation and removal of Grantee's facilities in the streets." (Franchise at Section 7). Such manual "shall govern the practices of [SDG&E] in its installation and removal of [SDG&E's] facilities in the streets of the City." (Franchise at Section 7). The City Manual of Administrative Practices for Utility Installation, dated February 24, 1986, ("Manual") reaffirms the City's commitment to the common law governmental-proprietary distinction in determining who should bear the costs of utility relocations. The Manual, which was jointly entered into by the City's utilities (including the City's Water Department) and private utility companies (including SDG&E), expressly acknowledges that where facilities or improvements are proprietary in nature, as opposed to governmental, the City should bear the cost for such relocations. Section VII(2) provides that utility relocations are to be borne by the utility only when "City facilities and improvements are financed by the City..., and where such facilities or improvements are governmental in nature as opposed to proprietary in nature." (Manual, Section VII (2)).

Additionally, our regulators may not permit SDG&E to socialize the costs to relocate our facilities for a project that only benefits select City of San Diego's residents among the 28 other municipalities we serve.

SDG&E will cooperate with the City in a timely manner to effectuate any desired utility relocations. However, the City is responsible for the costs of the relocations required by the Project.

We would like to set up a meeting with you to discuss this further so that a project agreement can be put in place that will provide the terms for the construction work and related payments. Please let us know when you are available. This is time sensitive as the SDG&E relocation designs are on hold pending payment.

Thank you for your time and attention.

Sincerely,



Andy Renger

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CITY ATTORNEY

June 20, 2018

Via email to: bsyz@semprautilities.com

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Subject: Pure Water Project and SDG&E Utility Conflicts

Dear Ms. Syz:

It was a pleasure meeting you at the MCLE presentation at our Office last week. The regulatory framework SDG&E must navigate is more complex than many of us expected. Thank you for the presentation.

In anticipation of our meeting tomorrow, I want to briefly address some of the issues raised in a letter dated June 7, 2018 from Andy Renger, SDG&E Project Manager to Vic Bienes, the Public Utilities Director for the City. Mr. Renger says that the City is responsible for SDG&E's costs of relocating its facilities to accommodate the City's Pure Water project. He relies on a common law rule that a municipality acting in a "proprietary capacity" must pay to relocate conflicting utilities, and that SDG&E ratepayers should not bear the cost of a project that only benefits "select residents" of the City.

The terms of both the electric and natural gas franchises require SDG&E to start relocating its facilities within 90 days at its own expense when necessary to accommodate the City's use of its streets:

City reserves the right for itself to lay, construct, erect, install, use, operate, repair, replace, remove, relocate, regrade or maintain below surface or above surface improvements of any type or description in, upon, along, across, under or over the streets of the City. City further reserves the right to relocate, remove, vacate or replace the streets themselves. If the necessary exercise of the aforementioned reserve rights conflicts with any poles, wires, conduits, and appurtenances of Grantee constructed, maintained and used pursuant to the provisions of the franchise granted hereby, whether previously constructed, maintained and used or not. Grantee shall, without cost or expense to City within ninety (90) days after

written notice from the City Manager, or his designated representative, and request so to do, begin the physical field construction of changing the location of all facilities or equipment so conflicting. Grantee shall proceed promptly to complete such required work.

San Diego Ordinance No. O-10466, Section 8(a) (Dec. 17, 1970); *See also* San Diego Ordinance No. O-10465, Section 8(a) (Dec. 17, 1970) [natural gas franchise relocation requirement applying to “pipes” instead of “poles, wires, conduits.”]

Municipalities providing water and sewer service are acting in their governmental capacities. The *South Pasadena* and *Hansen* cases cited by Mr. Renger do not apply to this situation. *South Pasadena* addressed a city’s acquisition of a water utility franchise operating in a neighboring city over 100 years ago. The controlling law is stated in *Southern California Gas Company v. City of Los Angeles*, 50 Cal. 2d 713, 717 (1958) [“The laying of sewers is a governmental as distinct from a proprietary function under the foregoing rule.”] The *Hansen* case, which allowed municipal utilities to charge rates that realize a reasonable return on investments, has been superseded by Proposition 218. *Green Valley Landowners Association v. City of Vallejo*, 241 Cal. App. 4th 425, 439 (2015).

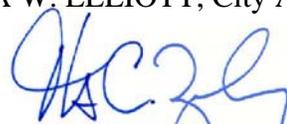
Also, the Pure Water project is a regional project with two primary purposes. The first is to offload wastewater from the Point Loma Wastewater Treatment Plant to help ensure the City will receive future permits without expensive upgrades to the plant. Recognizing this benefit, the following local agencies are directly contributing to the cost of the Pure Water project: the cities of Chula Vista, Coronado, Del Mar, El Cajon, Imperial Beach, Poway, and National City, the Lemon Grove Sanitation District, the Padre Dam Municipal Water District, the Otay Water District, and the San Diego County Sanitation District. The second purpose is to provide a local, drought-resistant source of potable water. The Pure Water project has been incorporated into the San Diego County Water Authority’s long-range water resource plans, postponing other expensive capital projects to the benefit of the Authority’s 24 member agencies. Combined, the local agencies benefitting from the Pure Water project represent almost all of SDG&E’s service area, not just the City of San Diego.

Hopefully providing this information in advance will help with our discussion tomorrow. We look forward to seeing you then.

Sincerely,

MARA W. ELLIOTT, City Attorney

By



Thomas C. Zeleny
Chief Deputy City Attorney