

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

*Order Instituting Rulemaking to Consider
Revisions to Electric Rule 20 and Related
Matters*

Rulemaking 17-05-010
(Filed May 11, 2017)

**LEAGUE OF CALIFORNIA CITIES COMMENTS ON STAFF PROPOSAL
FOR IMPROVING THE ELECTRIC TARIFF RULE 20
UNDERGROUNDING PROGRAM**

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**COMMENTS OF THE LEAGUE OF CALIFORNIA CITIES ON THE
ENERGY DIVISION STAFF PROPOSAL FOR IMPROVING THE
ELECTRIC TARIFF RULE 20 UNDERGROUNDING PROGRAM**

Pursuant to Rule 6.2 of the California Public Utilities Commission (“CPUC”) Rules of Practice and Procedure, and Administrative Law Judge Stephanie Wang’s March 25, 2020 email ruling granting an extension to all parties to file and serve opening comments by April 21, 2020, the League of California Cities (“League”) submits the following comments concerning the CPUC Staff Proposal for Improving the Electric Tariff Rule 20 Undergrounding Program, issued and entered into the record on February 13, 2020 by ruling of Administrative Law Judge Eric Wildgrube (“Staff Proposal”).

I. Introduction

The League is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance quality of life for all Californians. Because Rule 20 is a statewide program that impacts each city within California by providing important

funding to cities for the undergrounding of overhead electric infrastructure, the League has a vested interest in the outcome of Rulemaking 17-05-010. The League joins in the CPUC's goal to enhance the fair, efficient allocation of ratepayer funds to communities for the undergrounding of electric infrastructure in specified locations and circumstances.

The League appreciates the Energy Division Staff's thorough and thoughtful Staff Proposal, and the opportunity to provide comments on the issues identified in the Staff Proposal. The League supports many of the recommendations included in the Staff Proposal. However, while well-intentioned, the League believes that certain aspects of the Staff Proposal would harm cities that rely on Rule 20A funding for undergrounding projects in their communities. The League provides the following comments to address these concerns.

II. General Comments.

A. The League agrees there are existing obstacles to the effective and efficient administration of Rule 20A that should be addressed by the CPUC.

The League supports the current structure of the Rule 20A program, but agrees there are existing obstacles to its effective and efficient administration, as outlined in Section 3.2 of the Staff Proposal. As explained in the Staff Proposal, there is a substantial balance of unused or uncommitted work credits. In order to address this issue, it is necessary to identify why work credits remain unused or uncommitted.

Reductions in funding, the exponentially increasing costs of undergrounding, a lack of transparency of the costs related to undergrounding, a lack of transparency in how Rule 20A projects are prioritized, insufficient staffing by Investor Owned Utilities

("IOUs") for Rule 20A projects, and stringent criteria for determining which projects are eligible for Rule 20A funding have all contributed to inefficiencies in the delivery of Rule 20A projects. If these underlying issues are addressed in this rulemaking, Rule 20A can continue to provide great benefits to California cities, and their constituents, statewide.

B. The League urges the CPUC not to sunset the Rule 20A program.

Rule 20A allocations are an important source of funds for undergrounding projects. Indeed, without Rule 20A allocations, many cities would be unable to underground existing utilities at all. The projects funded through Rule 20A provide significant benefits to residents and commercial property owners in cities.

Undergrounding improves community aesthetics by removing unsightly poles and wires, and benefits adjacent tree canopies. These aesthetic benefits improve residential and commercial property values. Further, undergrounding improves public safety by reducing the number of car-pole accidents, the potential for live-wire contact injuries, and the number of fires caused by downed-wire incidents. Removing poles from the public right-of-way also has benefits for pedestrian traffic, particularly for those pedestrians with sight or mobility concerns. Moreover, undergrounding generally results in improved system reliability.

Although Rule 20A is implemented for the benefit of the public, IOUs also benefit significantly by installing new, updated, and often more efficient systems to deliver their services. For IOUs, undergrounding provides benefits through reduced operation and maintenance costs, reduced tree trimming costs, less storm damage, and reduced losses of electricity sales caused by power outages. Significantly, to the extent undergrounding

reduces the risk of wildfires being sparked by utility lines, IOUs also receive the benefit of reduced exposure to liability.¹ These benefits facilitate the delivery of safe, reliable electricity service to IOU customers statewide.

Rule 20A has been used successfully by cities to the benefit of the public. For example, between 2009 and 2011, the City of Santa Barbara completed construction of the Cliff Drive Underground Utility Project, which placed all existing overhead wires and facilities that supply electric, communication, and similar services, underground. This project is an excellent example of how planning and cooperation among the various utility and right-of-way stakeholders benefited the community as a whole, as it improved the visual appearance of the neighborhood and resulted in upgraded, more reliable utilities.

As detailed above, Rule 20A advances the public interest generally. As such, ratepayers, generally, bear the cost to perform Rule 20A projects. In light of the many public benefits provided by Rule 20A, the League strongly urges the CPUC not to sunset the program. Certainly, some changes need to be made to maximize the effectiveness and efficiency of the program. However, sunseting the program without a viable alternative will harm California cities and their constituents.

¹ The Staff Proposal notes, at Page 24, that there are several open wildfire-related dockets that may have a greater impact on wildfire mitigation than the Rule 20A program. The League understands and agrees that Rule 20A is not a panacea for wildfire mitigation. However, it is important to note that IOUs receive a valuable and substantial benefit in reduced liability for wildfires when utility lines are undergrounded.

1. The League cautions that the CPUC should consider very carefully whether the San Diego model of “self-taxation” can be used as a statewide model.

The Staff Proposal, on page 33, contemplates that cities can implement “self-taxation” programs to fund undergrounding projects. The League understands the Staff Proposal’s use of the phrase “self-taxation” to refer to an increase in franchise fees, with the increase directed to undergrounding projects, such as that established between San Diego Gas & Electric (“SDG&E”) and the City of San Diego.

Any such increase requires evaluation under recent case law. In 2017, the California Supreme Court held in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, that, to the extent a franchise fee exceeds the reasonable value of the franchise, the excessive portion of the fee is a tax under Proposition 218, subject to voter approval. (See Cal. Const. Art. 13C, § 2 [requiring approval by a majority vote for the imposition, extension, or increase of a general local tax, and a 2/3 vote for the imposition, extension, or increase of a special local tax].) As a result of this holding, franchise fees must be analyzed on a case-by-case basis. The SDG&E franchise fee is the subject of active litigation. (*Mahon v. City of San Diego*, D074877, app. pending.)

Moreover, this model can only apply to charter cities, not general law cities. Franchise fees payable by electric utilities to general law cities are established by statute. (Pub. Util. Code § 6001.5 [preempting general law city authority to establish the terms of franchise agreements]; Pub Util. Code § 6231(c) [establishing franchise fees to be paid to general law cities].) The statutory limits do not apply to charter cities. (Pub. Util. Code §

6205.) Of California's 482 cities, only about 120 cities are charter cities; as such, this model is maladaptive for the majority of California cities.

2. The League cautions against relying too heavily on Rule 20B and 20C as replacements for Rule 20A.

Under Rule 20B, the utility is responsible for a certain percentage of undergrounding project costs (using rate payer revenues), and property owners are responsible for the remainder of the costs. Under Rule 20C, projects are paid for by property owners, with no ratepayer funds used, though the IOU is still involved in the installation of the underground wiring. The Staff Proposal relies heavily on the continued use of Rule 20B and Rule 20C funding mechanisms and, in fact, proposes even greater reliance on these funding streams by its proposed sunset of Rule 20A projects. This approach requires the exercise of caution and may be overly optimistic. The assessment districts and special tax districts that have historically been used to fund Rule 20B and Rule 20C projects are subject to significant Constitutional restrictions and require property owner approval.

The Municipal Improvement Act of 1913 ("1913 Act"), Str. & H. Code § 10000 *et seq.*, has been used by many cities throughout the state to create an assessment district to fund the non-utility portion of the costs of undergrounding within that district. A special assessment is a charge on real property imposed by a city to finance all or a portion of the cost of providing public improvements or services. The 1913 Act also authorizes the sale of bonds under the Improvement Bond Act of 1915, Str. & H. Code § 8500 *et seq.*, to allow repayment by property owners over an extended period of time (typically 25 years).

Proposition 218 (Article XIII D, section 4 of the California Constitution) sets forth procedural and substantive requirements with which the formation of an assessment district must comply, including:

- The proposed assessment must be supported by a detailed engineer’s report that identifies all parcels which receive a special benefit from the utility undergrounding;
- A rigorous analysis of special vs. general benefit must be completed that reveals the proportionate special benefit derived from the utility undergrounding by each identified parcel (“special benefit” must be separated from “general benefit” because general benefit cannot be assessed);
- Property owners have the right to vote in favor of or against the assessment in an “assessment ballot proceeding” (establishing the assessment requires the affirmative vote of 50% weighted by proportional financial obligation proposed assessment; and
- Public property (e.g. State-owned property) generally must be included in the district. An agency can exempt public property only if it can demonstrate by clear and convincing evidence that the property receives no special benefit. If the agency cannot make this showing, a funding source must be identified to pay the assessment attributable to the property.

The requirement to assess only the “special benefit” is particularly challenging. In *Town of Tiburon v. Bonander* (2009) 180 Cal.App.4th 1057, an appellate court determined that although properties in an assessment district formed for the purpose of financing the undergrounding of utilities would receive special benefits from the project, the proposed assessments were invalid because: (1) they were allocated among three zones based on cost considerations rather than on proportional special benefits; and (2) the properties in the district were required to pay for special benefits conferred upon parcels excluded from the district.

The Mello-Roos Community Facilities Act, Gov. Code § 53311 *et seq.*, allows for the formation of one or more special tax districts (“CFD”) to issue special tax bonds to finance the

cost of utility undergrounding improvements. Debt service on the special tax bonds are paid from special taxes imposed on parcels within each special tax district. A CFD is typically initiated by one or more property owners by petition accompanied by funds for preliminary, non-contingent costs associated with the undergrounding district formation process. These costs include design engineering, construction cost estimates, the cost of administering the district and election costs. Seventy-five percent of the registered voters and property owners within the district must sign the petition to form the CFD. At required public hearings, if 50% or more of the registered voters residing in the CFD or the owners of 50% or more of the land in the CFD, file written protests against the establishment of the CFD, then proceedings must stop for one year. If no majority protest is received, a voter election is required. Special taxes must be approved by two-thirds majority of the qualified electors in order to move forward with the special tax levy and bond issuance process.

In light of these difficult processes, the CPUC should be aware that reliance on Rule 20B or 20C to take the place of Rule 20A allocations will likely result in fewer undergrounding projects being completed.

3. To the extent the Staff Proposal contemplates the use of other local tax and fee authority to fund undergrounding, the League urges the CPUC to consider that the California Constitution restricts city authority to generate the revenue that would be needed to fund undergrounding projects absent Rule 20A allocations.

If the Staff Proposal intends “self-taxation” to refer to other local tax and fee authority, the League urges CPUC staff to consider the long history of increasingly

stringent regulation on local revenue-raising, which imposes substantial constraints on how California cities impose taxes and fees, before sunseting Rule 20A.²

Proposition 13 was intended to provide financial relief to California property owners and taxpayers through a package consisting of real property tax rate limitations (Cal. Const., art. XIII A, § 1), a real property assessment limitation (Cal. Const., art. XIII C, § 2), a restriction on state taxes (Cal. Const. art. XIII C, § 3), and a restriction on local taxes (Cal. Const., art. XIII A, § 4). Significantly, Proposition 13 restricted the ability of local governments to adopt “special taxes” without first obtaining two-thirds voter approval. (Cal. Const., art. XIII A, § 4.) Proposition 62 amended the California Government Code to provide that all new local taxes be approved by a vote of the local electorate, and provided specific procedures and requirements applicable to the holding of an election on taxes.³ Proposition 218 created new procedural and substantive requirements that a city must comply with prior to increasing, extending, or adopting a new property related fee, charge, or benefit assessment. (Cal. Const., art. XIII D, §§ 4-6.) Proposition 26 added article XIII C, section 1(e) to the Constitution to define every fee or charge of any kind as a tax, unless explicitly (or implicitly) exempt.

Together, these measures have made it increasingly difficult for cities to generate the revenue cities would need to self-fund undergrounding projects if Rule 20A

² For a thorough discussion of Proposition 13 in 1978, Proposition 62 in 1986, Proposition 218 in 1996, and most recently, Proposition 26 in 2010 and how they restrict the ability of cities raise revenue, see League of California Cities, Proposition 26 and 218 Implementation Guide (2019), available at <https://www.cacities.org/Resources/Documents/Member-Engagement/Professional-Departments/City-Attorneys/Proposition-26/LCC-218-26-Guide-2017-FINAL.aspx>.

³ Although Proposition 62 has largely been superseded by Proposition 218, it contains procedural requirements that remain in effect as to charter cities.

allocations were to disappear. Depending on how a city structures a fee or tax, the City would be required to comply with the substantive and procedural hurdles these measures impose. Therefore, the League urges the CPUC not to rely on local tax and fee authority alone to accomplish undergrounding, as such an approach will likely undermine the accomplishment of undergrounding statewide.

4. The League urges the CPUC not to replace Rule 20A allocations with a grant program.

The Staff Proposal, on page 36, suggests that in lieu of an allocation-based program for distributing work credits to cities, the CPUC should consider requiring cities to apply for grant funding to complete undergrounding projects. Shifting away from a formulaic allocation of work credits to a grant based system poses significant challenges, without clear benefits.

The Staff Proposal suggests that a grant program designed with a centralized mechanism for awarding projects would “yield the highest societal benefits.” However, such a program would not make a closer connection between the ratepayers benefitting from the undergrounding and the utilities being undergrounded, which the Staff Proposal suggests is important. Moreover, it is unclear how a process which delegates decision-making authority over project funding to a single, state entity would result in more societal benefits than a process by which funding decisions are made through locally-conducted public hearings that are informed by ratepayers themselves and IOUs.

The Staff Proposal also suggests that a grant program “would create a more level playing field for cities and counties.” However, this assertion is not supported by the on-

the-ground experience of cities. Often, when the state provides grants to local governments, the benefits of those grants only accrue to a small number of beneficiaries. While the Staff Proposal suggests that a grant program could be designed in a way that benefits small cities or disadvantaged communities, the League contends that many small cities and disadvantaged communities simply do not have the staff resources necessary to apply for grant funding. Therefore, shifting to a grant based system could result in negative unintended consequences for the very communities the Staff Proposal is trying to help.

A. The League urges the CPUC to restore full funding to the Rule 20A program within PG&E's territory.

In 2011, PG&E's Rule 20A allocations were reduced by approximately one half. (Decision No. 11-05-018. See also Decision No. 14-08-032 and Decision No. 17-05-03 [extending reduction in 2014 GRC and 2017 GRC, respectively].) This resulted in a significant loss to local agencies within PG&E's territory, many of which are now unable to accumulate sufficient credits to perform Rule 20A projects for many years. The League urges the CPUC to restore those allocations to pre-2011 levels, so that jurisdictions within PG&E's territory will have the opportunity to accumulate sufficient credits to perform Rule 20A projects.

III. Questions for Parties.

The League provides the following comments, organized by page and section of the staff proposal, in response to the CPUC's specific inquiries. These comments represent overarching policy concerns of the League and its members. The League has

actively encouraged its members to submit individual comments addressing the technical questions presented in the Staff Proposal, which require on-the-ground knowledge of Rule 20 projects and the answers to which vary jurisdiction-to-jurisdiction.

A. Question 4.1.i. (Page 28) – If the CPUC ultimately decides to sunset the Rule 20A program, should any of the modified criteria be adopted for the sunset period?

As explained above, the League urges the CPUC not to sunset the Rule 20A program. However, the League is supportive of adopting the modified criteria for Rule 20A projects outlined in the Staff Proposal on pages 22 through 28.

The League is particularly supportive of the Staff Proposal’s recommendation to include wildfire mitigation as an eligible criteria for Rule 20A work credits. With California experiencing record-breaking catastrophic wildfires in recent years, cities are looking for every tool to both prepare for, and mitigate against, wildfires. To this point, in February of 2020, the League’s Board of Directors adopted a new policy that states, “The League supports the inclusion of wildfire mitigation as an eligible project to receive the California Public Utilities’ Rule 20 funds and efforts to expand funding for Rule 20.” Expanding project criteria to include wildfire mitigation would allow those cities that are particularly susceptible to wildfires to leverage every resource available to them to reduce wildfire risk in their communities. The League urges the CPUC to make clear that the use of Rule 20A funds for undergrounding projects designed to mitigate wildfire risks does not relieve IOUs of the responsibility to dedicate funding to wildfire mitigation efforts outlined in IOU wildfire mitigation plans or other wildfire mitigation efforts.

Moreover, the League believes the public interest criteria should be modified to give cities as much flexibility as possible to undertake Rule 20A projects that further the goals specific to their communities. Elected officials in city government, representing the city, following public notice and hearings, must approve a utility undergrounding district to initiate the use of Rule 20A funds. This process affords numerous opportunities for the public to be heard and is informed by data provided by IOUs. The League believes this robust democratic process is best suited for ensuring Rule 20A undergrounding occurs in a manner that benefits the public-at-large. Therefore, the League suggests that cities—rather than IOUs—should have the authority to interpret the criteria and determine if a proposed project meets the criteria.

B. Question 4.3.i. (Page 38) – Is 10 years a reasonable and sufficient amount of time to phase out the Rule 20A program in its current form?

As explained above, the League urges the CPUC not to phase out the Rule 20A program. Many cities have undergrounding projects in the pipeline. Other cities have identified areas where they would like to underground utilities, but are waiting to accumulate sufficient money to fund the project. Many of the cities that have not yet initiated undergrounding projects are small, and therefore, their annual Rule 20A allocations also tend to be small. For this reason, these cities may have to wait many years to accumulate sufficient funds to offset the very high costs of an undergrounding project.

These cities, which have accumulated credits over time or have identified projects for which they intend to save sufficient credits, are extremely concerned that the changes

to Rule 20A detailed in the Staff Proposal will jeopardize years of planning and saving. The League respectfully asks CPUC staff to provide clarity on the Staff Proposal so cities can gain a better understanding of what will happen to accumulated work credits and projects that have been in the planning process for several years. Without further clarity on what will happen to unused credits or the announcement of a replacement program that provides funds and benefits that are equal to or better than the current Rule 20A, cities will not support the sunseting of Rule 20A on any timeline, as it has been a critical resource to cities for many years.

C. Question 4.4.i. (Page 42) – Is 90 calendar days enough time for cities and counties to form a workable underground utility district? Would 90 business days be more appropriate?

In some instances, forming an underground utility district merely requires the adoption of an ordinance. For many cities, the adoption process requires 2 readings before the city council at least 5 days apart. The city council typically would adopt the ordinance after the second reading, and the ordinance would take effect thirty days thereafter. However, if the city were required to comply with the Constitutional requirements for imposing a tax or fee in conjunction with the adoption of an ordinance establishing an underground utility district or if a city were to work with the IOUs to adopt the boundaries of an underground utility district, as highlighted in the comments submitted in response to the Staff Proposal by the City of Laguna Beach, the process may take 6-12 months. Therefore, depending on the circumstances, the League does not believe that 90 calendar days is enough time for cities to form a workable underground utility district.

D. Question 4.4.ii. (Page 42) – Should the definitions for active and inactive communities be based on different criteria than project statuses or an active utility undergrounding district, such as having a current 5-year plan, 10-year plan, or sending the utility and the CPUC a letter of intent?

The criteria for determining whether a city is “active” should be based on the city’s stated intent. The mere fact that a city does not have an active undergrounding project, or has not adopted a utility undergrounding district ordinance, is not indicative of the city’s future intent. Therefore, the League urges that the criteria for active and inactive communities should include that a city sent the IOU and CPUC a letter of intent.

E. Question 4.4.iv. (Page 42) – Should the CPUC continue to allow work credit trading among the communities?

The CPUC should continue to allow work credit trading among communities, as cities have benefitted significantly from work credit trading.

Recently, the City of Dublin successfully completed the \$11.7 million Dublin Boulevard Improvements project, which established a Utility Underground District by ordinance, undergrounded overhead electrical and telecommunication lines, widened the City’s busiest thoroughfare, and installed associated streetscape improvements. The multi-phased project included the \$3.4 million undergrounding of PG&E, Comcast, AT&T, and Sprint overhead wires and the removal of wooden poles along both sides of Dublin Boulevard.

The undergrounding phase included approximately \$1.7 million in existing and borrowed Rule 20A program funds, approximately \$1.0 million of Comcast and AT&T reimbursable expenses, and \$700,000 of unused Rule 20A credits that Dublin purchased at a discount from the City of Vallejo. Both Dublin and Vallejo directly benefitted from

the Rule 20A program provision that allows work credit trading. Without the Rule 20A fund and the ability for communities to trade unused Rule 20A credits, this project would not have been economical and the project's benefit to the community would have been greatly reduced. Rule 20A funds allowed the City of Dublin to implement its Master Plan, revitalize the right-of-way, and significantly improve multi-modal transportation in the City's core.

The League is supportive, in concept, of the creation of a work credit trading marketplace. Such a marketplace would ensure that transactions are fair, promote accountability and transparency, and encourage efficiencies within the Rule 20A program. The League will comment further on this issue once more details are provided on how the marketplace will function.

F. Question 6.1. (Page 58) – Are there other policies that the CPUC can implement to incentivize more efficient and less expensive project completion?

The League believes that requiring IOUs to provide cities with detailed accountings of cost estimates before Rule 20A projects are approved will incentivize more efficient and less expensive project completion. As described in Section 3.2 of the Staff Proposal, the costs for undergrounding have skyrocketed, and in many instances these costs are higher for California's IOUs than nation-wide averages for similar projects. Cities have reported that Rule 20A project estimates from IOUs are consistently higher than city engineer estimates for the same project. Increasing cost transparency could help cities evaluate the best use of Rule 20A credits and be good stewards of Rule 20A funds.

IV. Conclusion

The League appreciates the CPUC's efforts to explore ways to enhance utility undergrounding throughout the California. The League stands ready and willing to work with the CPUC on improving Rule 20, as we have done in the past. League staff are available as a resource to connect the CPUC with city officials and employees, and to ensure that any changes to Rule 20 are made in light of robust public comment.

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Respectfully submitted,

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