



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Jon Cicirelli

SUBJECT: SEE BELOW

DATE: April 9, 2018

Approved

Date

4-18-18

**SUBJECT: APPROVAL OF THE RULE 20A AND RULE 20B (IN-LIEU FEE)
UNDERGROUND UTILITY PROGRAM AND 2017/18- 2022/23 WORKPLAN
AND APPROVAL OF THE FISCAL YEAR 2016-2017 RULE 20B (IN LIEU FEE)
UNDERGROUNDING MASTER PLAN**

RECOMMENDATION

Approve the proposed Fiscal Year 2017/18- 2022/23 Workplan for the Rule 20A and Rule 20B (In-Lieu Fee) Underground Utility Program and of the Fiscal Year 2016-2017 Rule 20B (In-Lieu Fee) Undergrounding Master Plan.

OUTCOME

Approval of the proposed Fiscal Year 2017/18- 2022/23 Workplan for the Rule 20A and Rule 20B (In-Lieu Fee) Underground Utility Program and of the Fiscal Year 2016-2017 Rule 20B (In-Lieu Fee) Undergrounding Master Plan will guide Public Works staff and utility companies to program funds, assign project priorities, and establish, design and construct the proposed overhead-to-underground utility conversion projects.

EXECUTIVE SUMMARY

The Rule 20A and 20B (In-Lieu Fee) Underground Utility Program report provides information on the City's utility undergrounding program and projects. In addition, the proposed workplan will instruct Public Works staff and utility companies to program funds, assign project priorities, and establish, design and construct overhead-to-underground utility conversion projects. The proposed workplan reflects Council policy and focuses on timely delivery of projects allowing more aggressive draw-down of the City of San José's current \$29 million Rule 20A allocation balance. Staff continues to meet on a quarterly basis with all utilities to monitor schedules and address issues and concerns as they arise.

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 2

BACKGROUND

Three programs are used to fulfill the General Plan goal of converting overhead utilities to underground systems. These programs are described as follows;

RULE 20A PROGRAM – In 1968, the California Public Utilities Commission (CPUC) and utility companies established a program to underground utilities across the State. Under Rule 20A, Pacific Gas and Electric Company (“PG&E”) allocates funds, on a calendar year basis, to convert existing overhead electrical facilities to underground electrical facilities within the communities it serves. PG&E considers Rule 20A allocations as a tool to allow cities and counties to evaluate and prioritize undergrounding projects within their respective jurisdictions. These allocations accumulate until they are expended for undergrounding projects. PG&E uses its own funds to design and construct Rule 20A projects, and once the projects are completed, the cost is recovered through incremental utility rate increases.

Other CPUC rules, tariffs and legislation require AT&T to convert its facilities in a similar manner to the Rule 20A Program. Comcast also budgets its own funds for the conversion of its facilities within the districts legislated for Rule 20A funding.

The 2017 calendar year allocation of PG&E funds for the City of San José is \$2.3 million, which is lower than the average annual allocation of \$4.2 million prior to 2010. Initially, the reduction was requested by PG&E due to over allocation by PG&E during previous years. The annual allocation amount for San Jose was expected to remain at \$2.2 million until calendar year 2015. However, PG&E has continued to request an extension of the lower annual allocation amount until calendar year 2019. The reason for the extension request is to prevent agencies from building up too large an allocation balance and to allow PG&E to reduce the backlog of projects.

Although the funds for this program are never actually transferred to the City for use by the City, City staff programs the money toward conversions on arterial and major collector streets as specified in the Rule 20A tariff. These allocations accumulate until they are expended for undergrounding projects. The current accumulated allocation totals approximately \$29 million.

RULE 20B (IN-LIEU FEE) PROGRAM – Undergrounding may be accomplished through the City's In-Lieu Fee Program which allows the City to accumulate funds from developers to underground large aggregated projects rather than requiring developers to perform the undergrounding themselves on a project-by-project basis. This results in the more efficient use of engineering staff, construction crews, and utility company resources, thus lowering unit costs for design and construction. Rule 20B funds are leveraged against 20A allocations as opportunities arise to construct larger projects which provide a greater economy of scale.

Chapter 15.26 of the San José Municipal Code (Undergrounding Utility Fee Ordinance), requires that developers either: 1) pay a fee, per foot of frontage, in-lieu of performing the overhead-to-underground conversions along the street frontage where their development is occurring; or 2) as a condition of development, underground the overhead utility facilities on the street or streets adjacent to the project. For the latter option, the Undergrounding Utility Fee Ordinance allows the use of previous fee

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 3

payments collected within the limits of undergrounding to partially offset developer construction costs for completing underground utility projects. Only those projects that develop adjacent to designated streets as defined in the Undergrounding Utility Fee Ordinance are subject to the undergrounding in-lieu fee conditions.

In 2009, the City Council approved an amendment to the Undergrounding Utility Fee Ordinance that allows: 1) automatic annual adjustment of the Undergrounding Utility Fee based on Engineering News Record (ENR) 20-City Average Construction Cost Index or its equivalent; 2) reimbursement to developers for completion of underground utility projects; and 3) other technical changes. Based on latest ENR data, effective January 31, 2018, the Underground Utility Fee was adjusted from \$469 to \$485 per linear foot frontage. Fees are collected from developments on both sides of the street regardless of the side which has the actual overhead facility. This fee was based on an average City cost of \$970 per linear foot to complete larger undergrounding conversion projects. The total fees collected for Fiscal Year 2016-2017 was \$2.25 million with earned interest of \$72,000.

In-Lieu fees are programmed to be expended in areas per the In-Lieu Fee Undergrounding Master Plan. As long as these fees are committed to projects in the approved Master Plan, the fees are considered programmed and not subject to refund. The In-Lieu Fee Undergrounding Master Plan was last included with the Annual Development In-Lieu Fee Report that is expected to be reviewed by the City Council on May 15, 2018. The Annual Development In-Lieu Fee Report provides an annual report on in-lieu fee program activity as required by the Mitigation Fee Act (Government Code Section 66000 *et seq.*)

RULE 20C PROGRAM – In some instances, developers, neighborhood and business associations, or other agencies may pursue completing underground conversions themselves. These conversions do not meet the criteria for Rule 20A or 20B, are typically less than 600 feet long, and are coordinated directly between the utility companies and the interested party.

Underground Utility Program Activity

Since 1968, the City has legislated 140 Underground Utility Districts (UUD), of which:

- 133 projects have been completed
- 3 projects are in construction (Delmas/Park, Aborn Road, and Tully Road UUD)
- 2 projects are in design (White Road and Monterey Road)
- 2 projects are in planning (Lincoln Avenue and Kirk Park)

The Rule 20A and 20B Underground Utility Programs are currently administered in accordance with the Rule 20A 2016/17 – 2021/22 Workplan approved by Council on May 11, 2017. The current status of the Rule 20A and Rule 20B programs and the implementation of the current Workplan are presented in **Attachment A**.

Other attachments to this memorandum related to the Rules 20A and 20B Programs include:

- 2016/17 -2021/22 Workplan Status (**Attachment A**)
- 2017/18- 2022/23 Workplan (**Attachment B**)

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 4

- Summary of Changes since the Last Report (**Attachment C**)
- Proposed Future Rule 20A Underground Utility Projects (**Attachment D**)
- Criteria for Evaluating Rule 20A & 20B (In-Lieu Fee) Underground Utility Projects (**Attachment E**).
- In-Lieu Fee Master Plan (**Attachment F**)

The Workplan provides guidance to Public Works staff regarding the establishment, design, and construction of the proposed overhead-to-underground utility conversion projects.

CALIFORNIA PUBLIC UTILITY ADVICE LETTERS AND TARIFF AGREEMENTS

In April 2010, PG&E presented the City with three CPUC approved agreements that were intended to “clarify” the responsibilities of the City and PG&E in construction of Rule 20A projects. Initially, PG&E stated they would not construct any Rule 20A projects until the agreements were signed by the City. The three agreements were for different phases of Rule 20A projects:

1. Street Light Agreement included the conversion of street lights from overhead services, relocation of street lights currently on utility poles to be removed by the Rule 20A project and payment for such relocation and conversions.
2. Electrical Panel Conversion Agreement is meant to allow PG&E to perform the conversion of private property electrical panel conversions required by the Rule 20A project. PG&E would use these agreements to perform the conversion of the panels for the property owners in order to avoid delays caused by property owners not performing the work in a timely manner.
3. General Conditions Agreement defines what PG&E work would be performed and managed on a Rule 20A project. The agreement also defines what the City would be required to pay and manage in preparation and construction of the Rule 20A project.

The City staff reviewed the agreements and advised PG&E in writing that the Street Light agreement was not necessary and that portions of the other two agreements violated certain provisions of the San José Municipal Code (SJMC):

1. Own and manage all contaminated solids and cultural resources findings.
2. Provide a construction yard.
3. Waive work hour restrictions.
4. Obtain the Rights of Entry on behalf of PG&E.
5. Provide a liaison for residents and property owners to contact with questions.
6. Waive permit and inspections fees.

The City began to negotiate with PG&E for more reasonable terms that avoided violation of the SJMC. PG&E’s first step in working with the City was to continue construction of Rule 20A projects that were legislated prior to April 2010.

Other governmental agencies (City of Cupertino, Hayward, Oakland, Campbell and the counties of Tehama and Alameda) that had similar issues with PG&E’s agreements joined the negotiations, although some were still forced to sign the agreements in order to proceed with construction of their

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 5

projects. Many of the minor issues with the agreements were revised or removed from the agreements. As the City and our partners worked to resolve the remaining major issues of the agreements the League of California Cities (LOCC) and California State Association of Counties (CSAC) joined the negotiations in March of 2015.

CSAC eventually supported the revised General Conditions Agreement (Tariff) believing that the Tariff was the best agreement they could obtain for the agencies they represented. PG&E then submitted the revised Tariff to the CPUC believing that all governmental agencies were in agreement. The City protested to the CPUC the submittal stating our previous objections to the CPUC instead of directly to PG&E. PG&E withdrew their revised Tariff on December 12, 2016, from the CPUC to reevaluate the situation.

During these negotiations the City of Hayward had initiated a complaint against PG&E regarding their accounting practices for Rule 20A projects. The CPUC instigated an audit of the program based on the City of Hayward's complaint and an internal investigation into Rule 20A funding. The CPUC has decided that a full evaluation of the Rule 20 program was in order and instituted a proceeding for Rulemaking that would completely reevaluate the program and its objectives. The initial scope of the Rulemaking evaluates many of the issues the City was contending with PG&E's agreements. The City has joined the Rulemaking process as a party to the proceeding. Staff has already attended a CPUC public hearing conference and public workshop providing some detail to the issues the City has with the Rule 20 program.

PG&E resubmitted their revised Tariff to the CPUC on October 24, 2017, which the City protested again. The CPUC suspended the submittal of the revised Tariff due to the current Rulemaking proceeding that evaluates the same issues. At this time the CPUC is attempting to clarify the scope of the Rulemaking. As progress occurs on the Rulemaking, staff will provide updates to the Council.

Although, PG&E has continued to construct projects legislated prior to April 2010, the City has been unable to legislate any new Rule 20A districts because PG&E will not proceed with the creation of new districts while Tariff negotiations are ongoing. Currently, there are UUD projects in construction totaling approximately \$7.7M, and 2 projects in design with an estimated construction value of \$7.5 million.

ANALYSIS

WORKPLAN

In the previous decade, there was a backlog of Rule 20A projects due to lack of utility company funding and utility resource issues. Staff continuously worked with PG&E, held several workshops, and developed guidelines to implement the program in a more timely fashion. As a result, in 2007, PG&E and the other utility companies agreed to implement a more aggressive work plan.

Only five legislated Rule 20A projects remain on the workplan. PG&E has committed resources to construct two of the legislated Rule 20A projects. The Monterey Road and White Road Rule 20A

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 6

projects are expected to start construction in spring 2018 and winter 2019, respectively, for a value of \$7.5 million of work credits. The Coleman Avenue Rule 20A legislated project has been delayed waiting for funding of the Coleman Avenue Road widening. The remaining two legislated projects, Lincoln Avenue and Kirk Park, (\$4.1 million of work credits) were legislated after the Tariff was approved by the CPUC, therefore PG&E is unwilling to construct the projects without a signed Tariff. Three 20A projects are still in construction, Delmas/Park (in construction since October 2013), Aborn Road (in construction since August 2014), and Tully Road (in construction since November 2014) all of which require AT&T to complete their work. The Delmas/Park Rule 20A project cannot be completed until the Delmas/Park 20B has been completed which is expected to start construction summer 2018.

When the City and PG&E can agree to terms or the CPUC makes a determination in the Rulemaking, staff will work with PG&E to construct the two remaining legislated district Rule 20A projects and begin to legislate new districts. As indicated in the proposed 2017/18- 2022/23 Workplan, depending on the outcome of the Tariff, it is anticipated that the City will be drawing down an average of approximately \$8 million per year from PG&E's Rule 20A allocation.

The proposed Workplan, shown in **Attachment B**, reflects scheduling changes resulting from reprioritization of projects to address utility company resource challenges, other jurisdictions requests and coordination with City's roadway paving projects. The proposed Workplan is presented on a fiscal year basis and summarizes program expenditures, preliminary project cost estimates, Rule 20A allocations, and Rule 20B (In-Lieu Fee) Fund balances. The proposed projects are listed in sequence of the target start dates for proposed, legislation and construction of the underground utility districts. Overall, the projects in this program are reprioritized in accordance with the Council approved criteria, available resources and focus on completing the Workplan. A summary of the changes that have occurred since the last report is presented in **Attachment C**.

The Workplan identifies the City's Utility Undergrounding projects for 5 years; as those projects are completed, potential projects are added to the 5 year workplan. A listing of potential Rule 20A project areas are identified in **Attachment D**, and a summary of the Criteria for Evaluating Underground Utility Projects is presented in **Attachment E**. These criteria provide a process for the selection of projects presented in the proposed Workplan.

There is a current beginning balance of nearly \$29 million in accumulated Rule 20A allocations for the City. Approximately \$1.5 million is allocated to be spent in FY 2017-2018 and \$6 million in FY 2018-2019. Historically, the City had experienced challenges in implementing the approved workplan due to a shortfall in utility company staff resources and funding. Compounding these difficulties, the CPUC mandates that PG&E's top priority be the maintenance of system reliability without compromising safety. The CPUC has taken the position that Rule 20A utility undergrounding services for existing customers is secondary to storm and heat related repairs, general system maintenance, electrical connections for new customers and system upgrades to improve capacity. In addition, unforeseen circumstances such as weather-related emergencies and the resources necessary to address deficiencies in the high pressure gas transmission program may divert utility company resources and delay Rule 20A projects.

HONORABLE MAYOR AND CITY COUNCIL

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 7

To monitor schedule and ensure timely delivery of projects, staff continues to meet with utility companies regularly to address issues and concerns as they arise. To date, utility companies are collaborating with the City and with each other to maintain the agreed upon schedules with the resources available. One of the challenges has been coordinating all three major utility companies' internal approval processes and timelines. Each utility company has various stages of internal review, design approval, construction and funding allocation. To streamline and simplify the process, staff worked closely with these companies and developed a Best Practices guideline.

Aside from the challenges presented above, the proposed workplan is designed to draw down the accumulated and future Rule 20A allocations in an effort to maximize the number of undergrounding projects that can be delivered.

FISCAL YEAR 2016-2017 RULE 20B (IN-LIEU FEE) MASTER PLAN

The following information is included in **Attachment F**, FY 16-17 Rule 20B (In-Lieu Fee) Undergrounding Master Plan:

- The fee estimate and fees collected to date for each of the underground utility projects;
- An identification of each underground utility projects on which fees were expended and the amount of the expenditures on each project (including the total percentage of the cost of the project that was funded with in-lieu fees).

The Mitigation Fee Act (Government Code Section 66000 *et seq.*) requires public agencies to account for and make findings regarding fees collected by an agency as a condition of development approval. The law also requires that the agency annually review and make available to the public a report accounting for the development fees held by the agency.

In-lieu fees are programmed to be expended in these areas as shown in **Attachment F** FY 16-17 Rule 20B (In-Lieu Fee) Undergrounding Master Plan as required by the Mitigation Fee Act. As long as these fees are committed to projects in the approved Master Plan, they are considered non-refundable. This program is reported annually and was submitted to the City Council for review on May 15, 2018 as part of the Fiscal Year 2016-2017 Annual Development in Lieu Fee Report.

EVALUATION AND FOLLOW-UP

Staff will report on the outcome of the PG&E revision of the General Conditions Tariff and next steps.

PUBLIC OUTREACH

This memorandum will be posted on the City's website for the May 1, 2018, City Council agenda.

HONORABLE MAYOR AND CITY COUNCIL

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 8

COORDINATION

This report has been coordinated with the Departments of Transportation and Planning, Building and Code Enforcement, the City Attorney's Office and the City Manager's Budget Office. The Workplan has been coordinated with PG&E, AT&T and Comcast.

COMMISSION RECOMMENDATION/INPUT

No Commission recommendation or input is associated with this action.

COST SUMMARY/IMPLICATIONS

RULE 20A PROGRAM - The cost of the overhead-to-underground conversion of PG&E facilities in the public right-of-way within underground utility districts is funded through the PG&E Rule 20A allocation to the City. It includes up to \$1,500 per service entrance for private service panel conversions. The total cost for conversion work varies project by project. Other utility companies underground their facilities at their own cost.

The administrative costs of the Rule 20A program have been funded by In-Lieu fees since FY 2003-2004 and staff recommends the continued use of In-Lieu Fee Funds, approximately \$300,000 in FY 2017-2018 with a slight increase in future years, to support the administration of the Rule 20A program.

Additionally, the City is responsible for the conversion of its facilities within the Rule 20A underground utility districts, including streetlights, traffic signals, and other City facilities in the public right of way. Funding for the conversion of City facilities is budgeted in the 5-year Traffic CIP Program at \$200,000 for the current fiscal year, \$100,000 for Fiscal Year 2018-19 and \$200,000 annually for the remaining 3 years.

RULE 20B (IN-LIEU FEE) PROGRAM – The cost for the undergrounding of utilities is funded through the In-Lieu Underground Utility Fund. In addition, staff estimates a funding need of approximately \$20,000 for private service conversions, or \$1,500 per service entrance from funds typically used for Public Works non-personal/equipment

April 9, 2018

Subject: Rule 20A and 20B Underground Utility Program and 2017/18- 2022/23 Workplan and Approval of the Fiscal Year 2016-2017 Rule 20B Undergrounding Master Plan

Page 9

BUDGET REFERENCE

| Fund # | Appn. # | Appropriation Name | Total Appn. | 2017-2021 Adopted Budget (Page) | Last Budget Action (Date, Ord. No.) |
|--------|---------|--|--------------|---------------------------------|-------------------------------------|
| 001 | 0572 | Public Works Non-Personal/Equipment | \$12,305,152 | Operating, 828 | 3/13/18, 30070 |
| 416 | 4654 | Underground Utility Program | \$1,944,000 | Capital,144 | 10/17/17, 30014 |
| 416 | 5147 | Underground Utility Admin. (20B) | \$84,000 | Capital,153 | 6/20/17, 29962 |
| 416 | 4786 | Underground Utility Admin. (20A) | \$300,000 | Capital,152 | 6/20/17, 29962 |
| 416 | 7883 | PG&E/Private Electrical Service Panel Conversion Reimbursement | \$20,000 | Capital,147 | 6/20/17, 29962 |
| 429 | 5063 | Underground Utilities – City Conversions | \$331,000 | Capital,1022 | 10/17/17, 30014 |

CEQA

Not a Project, File No. PP17-008, General Procedure & Policy Making resulting in no changes to the physical environment.

/s/

JON CICIRELLI

Acting Director of Public Works

For questions please contact Michael O’Connell, Acting Assistant Director, at (408) 535-8300.

Attachment A: Status of the 2016/17 - 2021/22 Rule 20a & Rule 20b (In-Lieu Fee) Workplan

Attachment B: Rule 20a & Rule 20b (In-Lieu Fee) Underground Utility Program 2017/18 - 2022/2023 Workplan

Attachment C: Rule 20a & 20b (In-Lieu Fee) Underground Utility Program Summary of Changes Since Last Report

Attachment D: Areas Identified for Consideration as Future Rule 20a Underground Utility Projects

Attachment E: Summary of Criteria for Evaluating Underground Utility Projects

Attachment F: FY 16-17 Rule 20b (In-Lieu Fee) Undergrounding Master Plan Proposed Project Areas that Meet General Criteria