

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

To: Matthew J. Fertal
Dept.: City Manager
Subject: AGREEMENT WITH THE CITY OF NEWPORT BEACH TO TRANSFER GARDEN GROVE'S UNUSED SOUTHERN CALIFORNIA EDISON RULE 20A CREDITS TO THE CITY OF NEWPORT BEACH

From: William E. Murray
Dept.: Public Works
Date: September 11, 2012

OBJECTIVE

Authorize the City Manager to enter into an agreement with the City of Newport Beach to transfer the City's unused Rule 20A allocation of \$1,847,982 within the Southern California Edison (SCE) Service Area to the City of Newport Beach in exchange for compensation in the amount of \$831,591.90

BACKGROUND

The California Public Utilities Commission (CPUC) Rule 20A establishes program funding for the undergrounding of overhead utilities by municipalities. The CPUC uses a formula to determine annual funding allocations to individual cities that may be used for Rule 20A eligible projects. These funds can only be used to underground electric facilities that meet the strict criteria established by Rule 20A. Currently, SCE is completing the design phase for the Brookhurst Street Undergrounding Project from Westminster Avenue to Garden Grove Boulevard. This project will cost approximately \$4.5M; and as such, the City of Garden Grove will have an unallocated Rule 20A fund balance within the SCE service area in the amount of \$1,847,982.

DISCUSSION

The Rule 20A program allows cities that have unallocated Rule 20A funds to reallocate these unused funds to other cities that have Rule 20A eligible projects. Staff's research of recent transactions indicates that typically the city transferring the allocation is compensated by the receiving city within the range of a low of 40 cents on the dollar to a high of 50 cents on the dollar. Staff contacted numerous cities to determine if there was a need for Garden Grove's unused allocation. The City of Newport Beach expressed an interest in acquiring the rights to utilize the allocations.

Staff was able to negotiate compensation in the amount of 45 cents on the dollar for Newport Beach to acquire Garden Grove's unused allocation. Upon approval of the

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attached agreement (subject to the approval of the City Council of the City of Newport Beach) Garden Grove will be compensated in the amount of \$831,591.90 by the City of Newport Beach in exchange for reallocating Garden Grove's \$1,847,982 SCE Rule 20A allocation.

FINANCIAL IMPACT

The City will receive \$831,591.90 in General Fund revenues. This amount has been allocated in the Fiscal Year 2012-13 budget.

RECOMMENDATION

It is recommended that the City Council:

- Approve the attached agreement with the City of Newport Beach for the transfer of Garden Grove's Rule 20A credits to the City of Newport Beach, for compensation in the amount of \$831,591.90; and
- Authorize the City Manager to execute the Agreement , and make minor modifications as appropriate thereto, on behalf of the City.


WILLIAM E. MURRAY, P.E.
Public Works Director/City Engineer

By: 
Ana Neal
Administrative Analyst

Attachment: Agreement

Recommended for Approval


Matthew Feral
City Manager

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (MOU) is entered into as of _____, 2012 (Effective Date), by and between the **City of Newport Beach**, a California municipal corporation with its principal place of business at 3300 Newport Boulevard, Newport Beach, California 92663 (Newport Beach), and the **City of Garden Grove**, a California municipal corporation with its principal place of business at 11222 Acacia Parkway, Garden Grove, California 92840 (Garden Grove). Newport Beach and Garden Grove are sometimes individually referred to herein as "Party" and collectively as "Parties".

RECITALS

A. Electric Utilities collect and annually allocate funds to communities to convert overhead electric facilities to underground electric facilities (Rule 20A Funds).

B. Newport Beach is actively planning one or more projects to underground overhead electric facilities that qualify for the application of California Public Utilities Commission (CPUC) Rule 20A Funds (Projects). Newport Beach desires to obtain additional Rule 20A Funds allocation to finance such Projects.

C. Southern California Edison (SCE) currently has designated and dedicated a balance of \$1,847,982 in Rule 20A Funds for the benefit of Garden Grove (Garden Grove Allocation), and Garden Grove currently has no active projects which can make use of the Garden Grove Allocation.

D. Newport Beach desires to acquire, for consideration, the Garden Grove Allocation to use in connection with the Projects, and Garden Grove desires to transfer the Garden Grove Allocation to Newport Beach to enable the Rule 20A Funds, which have been allocated to Garden Grove, to be used for their intended purpose of undergrounding electric facilities and to derive economic benefit from the Garden Grove Allocation.

AGREEMENT

NOW, THEREFORE, the Parties hereto agree as follows:

1. Garden Grove agrees to assign, for use by Newport Beach, its rights and interests in the Garden Grove Allocation to Newport Beach, and Newport Beach agrees to acquire, for consideration, the Garden Grove Allocation in accordance with the terms of this MOU. This MOU shall be subject to the approval of each the City Council of Newport Beach and the City Council of Garden Grove and shall become effective on the date when both such approvals have been obtained (Effective Date). Notwithstanding the foregoing, if this MOU has not become effective as of December 31, 2012, then either Party may terminate this MOU on five (5)

business days' written notice to the other Party without incurring any liability, costs or further obligations to the other party or any third party.

2. Reserved.

3. Within fifteen (15) business days of the Effective Date, Newport Beach shall make a payment to Garden Grove in the amount of Eight Hundred Thirty One Thousand Five Hundred Ninety One and Ninety Cents (\$831,591.90) (Acquisition Price). The Acquisition Price shall be made in immediately available funds via check or wire transfer to an account designated by Garden Grove. The Acquisition Price shall constitute full consideration for the transfer and assignment of the Garden Grove Allocation.

4. Garden Grove agrees to sell the Garden Grove Allocation to Newport Beach at a purchase rate Forty-Five Cents (\$0.45) for every One Dollar (\$1.00) of Rule 20A Funds. Within ten (10) business days of Garden Grove's receipt of the Acquisition Price funds, Garden Grove shall deliver a written request to SCE, with a copy to Newport Beach, making a formal request to transfer and assign the entire balance of the Rule 20A Funds contained in the Garden Grove Allocation to and for the benefit of Newport Beach. Garden Grove shall cooperate in good faith with Newport Beach to provide any additional documentation or information that is reasonably requested by SCE to complete the transfer. In the event that SCE is unable to complete the transfer, or only complete a partial transfer, Garden Grove shall return the unused Acquisition Price funds to Newport Beach within ten (10) business days of Newport Beach's notification to Garden Grove.

5. Newport Beach acknowledges and agrees that it has conducted its own investigation as to the applicability and transferability of the Garden Grove Allocation for use in the Projects and that Garden Grove has not made any representation or warranty to Newport Beach with respect to same. The actual use of the Garden Grove Allocation by Newport Beach shall be subject to the rules and procedures adopted by SCE, CPUC, and such other conditions or requirements as are set forth in the Public Utilities Code.

6. Newport Beach shall indemnify, defend, and hold harmless Garden Grove, its elected officials, officers, employees, and agents, from any claim, damage or liability arising in connection with the use of Rule 20A Funds from the Garden Grove Allocation in connection with the construction of the Projects, including legal challenges of all types or natures, including but not limited to administrative, judicial, or legislative actions.

7. In the event that either Party is in breach of its obligations as set forth in this MOU, then the non-defaulting Party shall have the right to terminate this Agreement on ten (10) business days' written notice to the defaulting Party unless the default is cured, or cure has commenced, within the notice period. Upon termination for breach, the non-defaulting Party may exercise any right or remedy which it may have under applicable law. Within ten (10) business days of termination pursuant to this Section 7, Garden Grove shall return to Newport Beach that portion of the Acquisition Price funds applicable to that portion of the Garden Grove Allocation not yet transferred by SCE to Newport Beach.

8. All notices to be given pursuant to this MOU shall be delivered in person or by commercial overnight delivery to the address of the Party set forth above, and addressed to the City Manager of such Party and shall be effective upon receipt.

9. This MOU shall be governed and construed in accordance with the laws of the State of California, and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange.

10. Each Party shall at its own cost and expense comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted.

11. A waiver by either Party of any breach, of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.

12. Reserved.

13. The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either Party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.

14. If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

15. In the event of any dispute or legal action arising under this Agreement, the prevailing Party shall not be entitled to attorney's fees.

16. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

17. Each Party signing this Agreement explicitly affirms and provides they have the power and authority to bind their respective Party.

IN WITNESS WHEREOF, the Parties hereto have executed this MOU as of the dates indicated below.

CITY OF GARDEN GROVE,
A California municipal corporation

CITY OF NEWPORT BEACH,
A California municipal corporation

Date: _____

Date: _____

Matthew J. Fertal
City Manager

Dave Kiff
City Manager

ATTEST:
Date: _____

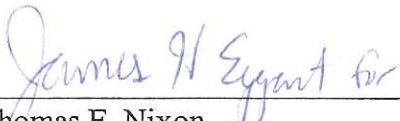
Date: _____

Kathy Bailor
City Clerk

Leilani I. Brown
City Clerk

APPROVED AS TO FORM:
Date: _____

Date: _____



Thomas F. Nixon
City Attorney

Aaron C. Harp
City Attorney