



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: October 18, 2016

TO: Mayor and City Council

FROM: Michael A. Guina, City Attorney
Nancy Humphrey, Environmental Programs Supervisor

SUBJECT: Informational Report On East Bay Community Energy Authority Joint Powers Agreement

RECOMMENDATION

Staff recommends the City Council receive the written and oral report and provide feedback on a proposed Joint Powers Agreement among Alameda County and cities within Alameda County for the formation of a joint powers authority to implement a Community Choice Aggregation program.

BACKGROUND

Alameda County and the cities within the County are exploring the possibility of establishing a county-wide Community Choice Aggregation (“CCA”) program¹ pursuant to California Utilities Code Section 366.2. CCA allows public agencies to procure electric power on behalf of customers. Unlike a municipal utility, a CCA entity does not own the transmission and delivery systems, but is responsible for purchasing electricity used by residents and businesses. With CCA, energy transmission, distribution, repair, customer service, and billing would continue to be administered by PG&E. Customers have a choice to continue to purchase power directly from PG&E by opting out of the CCA. Customers who receive electricity from a CCA are still entitled to PG&E’s special pricing, efficiency programs, and rebates. The advantages of joining a CCA program include potentially providing Emeryville residents with energy that comes from sources that generate fewer greenhouse gas emissions (GHGs), as well as increased energy efficiency and renewable incentive programs for residents and businesses. Joining a CCA would also provide Emeryville residents with more electricity options and encourage local renewable energy projects.

The Alameda County Community Development Agency established a Steering Committee, comprised of public officials, labor, and environmental representatives, and conducted a Technical Study to investigate the feasibility of a CCA program. Mayor

¹ Also known as Community Choice Energy (“CCE”) program

Martinez and Nancy Humphrey, Environmental Programs Supervisor, represented Emeryville on the Steering Committee. The Steering Committee also worked to draft the JPA Agreement, which was concurrently reviewed by each city's City Attorney and County Counsel.

In order to implement a CCA program, the County and participating cities would form a Joint Powers Authority pursuant to the Government Code². The participating jurisdictions would enter into a Joint Powers Agreement ("JPA Agreement") which will form a Joint Powers Authority, and which Agreement dictates the powers, duties, and obligations of the member agencies in the Authority. Representatives from the County and Alameda County cities have been meeting to discuss the framework for a JPA Agreement. Concurrent with the development of the JPA Agreement, the County commissioned a technical study to analyze the feasibility of an Alameda County CCA program involving the participating entities. The technical study analyzed several models to compare how energy delivery via CCA Program versus energy provided by PG&E.

The City Council considered the CCA program and JPA Agreement on May 3, 2016, and again at a study session on June 21, 2016. The Council supported the CCA program and directed staff to continue negotiations with the County and cities.

The purpose of this report is to update the City Council on development of the JPA Agreement, to provide an update on the technical study, and to obtain further feedback from the Council. This report also provides a timeline for actions to enter into the CCA program and JPA Agreement if the Council so desires.

ANALYSIS

The JPA Agreement would create a new legal entity, the East Bay Community Choice Energy Authority (the "Authority") to implement the CCA program. The Authority's powers would include: entering into contracts to procure, operate, and manage energy programs; employing agents and employees including an Executive Director; acquiring and managing buildings, works or improvements; incurring debts and liabilities; issuing bonds; applying for and accepting grants, permits, loans or other assistance or permits or licenses from other regulatory agencies; and entering into any other agreements necessary to plan, implement, operate, or administer a CCA program.

The JPA Agreement presented to the Alameda County Board of Supervisors at their October 2, 2016 meeting is attached as Exhibit A. That version includes proposed last-minute additions from labor and environmental advocates.

The Authority will be subject to the Brown Act, Political Reform Act and Government Code 1090.

² Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.)

- Board of Directors

The Authority would be governed by a Board of Directors. Each participating agency would appoint one regular member and one alternate to the Board. The regular member and alternate member would be a member of the governing body of the agency: i.e., the regular and alternate members would be members of the City Council.

The Board of Directors' authority would include but not be limited to: issuing bonds or other financing; hiring an Executive Director and General Counsel; appointing and removing officers; adopting an annual budget; initiating claims and litigation, including intervening in claims before the California Public Utilities Commission or other administrative agencies; adopting rules and regulations; setting rates for power sold by the Authority; and terminating the CCA Program. The Board Officers shall include a Chair and Vice Chair, who shall each serve for a two-year term.

The Board may establish an Executive Committee of its members and may delegate some of its authority to the Executive Committee pursuant to rules and regulations established by the Board. Certain Essential Functions, such as the issuance of bonds or other financing, the hiring or removal of officers, adoption of the annual budget, or initiation of litigation, may not be delegated to the Executive Committee. The Board may also establish advisory commissions or committees to assist in carrying out the Board's functions and duties.

- Community Advisory Committee

The current draft of the JPA Agreement specifically provides for the creation of a Community Advisory Committee consisting of nine members comprised of community members appointed by the Board for a staggered four-year term. None of the Board members could serve on the Community Advisory Committee. The purpose of the Community Advisory Committee is to advise the Board of Directors on subjects related to the operation of the CCA Program with the exception of personnel and litigation matters.

One issue presented to the City Council at the June 2016 study session was whether an ex officio non-voting member should sit on the Board of Directors. The current draft of the JPA Agreement provides that the Chair of the Community Advisory Committee shall serve as the Ex Officio Board Member, with the Vice Chair of the Community Advisory Committee serving as the alternate Ex Officio Board Member.

- Voting – Percentage Vote and Voting Shares Vote

- ❖ Percentage Vote

Board votes would be comprised of two types of voting: a Percentage Vote and a Voting Shares Vote. A Percentage Vote involves a vote of a majority of all Directors on the entire Board. A supermajority may be required, either by the JPA Agreement (e.g., to amend the JPA Agreement) or by the rules and regulations established by the Board. In the event of a tie, the Board may break the tie and act upon an affirmative Voting Shares vote if three or more Directors immediately request the Voting Shares vote.

❖ Voting Shares Vote

A Voting Shares Vote is based on voting shares held by each agency represented on the Board. The current JPA Agreement draft provides that in addition to and immediately after an affirmative Percentage Vote, three or more Directors may request a Voting Shares Vote be held. In that event an affirmative vote must exceed 50% of the voting shares cast, unless a higher percentage is established by the rules and regulations established by the Board. When a Voting Shares Vote is held, action by the Board requires both an affirmative Percentage Vote as well as an affirmative Voting Shares Vote. In the event that any one Director has a voting share that equals or exceeds that which is necessary to disapprove the matter being voted on by the Board, at least one other Director shall be required to vote in the negative in order to disapprove such matter.

The voting share of each agency is determined by the following formula:

(Annual Energy Use/Total Annual Energy) multiplied by 100, where:

a. *“Annual Energy Use” means:*

- i. *In the first two years after the Effective Date, the annual electricity usage within the agency’s jurisdiction; and*
- ii. *After the first two years of the Effective date, the annual electricity usage of accounts served by the Authority within the agency’s jurisdiction*

b. *“Total Annual Energy” means the sum of all parties’ Annual Energy Use*

Thus the greater the amount of Annual Energy used by an agency, the higher the voting shares of that jurisdiction. As part of the study into the CCA Program, the County has developed a Technical Study which shows that in 2014 Emeryville’s bundled load (which includes residential, commercial, industrial, and public uses) was approximately 203,591 Megawatt hours. Of the 14 agencies in the Technical Study, Emeryville’s bundled load was the third lowest, above Piedmont and Albany³, although Emeryville load is disproportionately higher than its geographic size and disproportionately higher on the Commercial load.

³ Technical Study Figure 2 (p. 25) and Appendix A, “Loads and Forecast”

The initial Voting Shares will be designated in the JPA Agreement based on the Technical Study. Thereafter the Voting Shares will be adjusted annually subject to approval of the Board. Note this two-tier voting structure is similar to other Joint Powers Authorities operating a CCA program in the state.

There has been vigorous discussion about the number of Directors needed to trigger a Voting Shares vote. The four largest cities (Oakland, Berkeley, Hayward, and Fremont) advocate for a two-Director standard. The remaining small-to-medium cities propose a four-Director standard. The County has proposed a compromise of three Directors to trigger a Voting Shares vote. The Steering Committee voted for the three-Director standard.

Staff requests the City Council to provide feedback on the proposed voting structure of the JPA Agreement, including the three-Director standard necessary to trigger a Voting Shares vote.

- Business Plan

The JPA Agreement draft calls for the Authority to prepare a Business Plan for the development and procurement of renewable energy sources for the first five years of the Authority's operation. Of note, the current draft calls for the Business Plan to include a description of how the CCA Program will contribute to "fostering local economic benefits, such as job creation." The current proposed language also calls for the Business Plan to include language detailing employment and labor standards. These provisions were part of the late additions proposed by labor groups.

- Labor Neutrality

The Steering Committee also considered proposed language from labor groups which would have the Authority be neutral toward attempts at unionization.

- Withdrawal and Termination

- ❖ General Right to Withdraw

A participating agency may withdraw from the Authority upon an affirmative vote of the agency's governing body and by giving at least 180 days' advance notice. The withdrawing agency may be subject to certain continuing liabilities, including any damages or losses incurred by the Authority resulting from the agency's withdrawal, such as losses from resale of power contracted by the Authority to serve the withdrawing agency's load. An agency may also be responsible for costs or obligations associated with any agreements entered into prior to the agency's withdrawal.

❖ Right to Withdraw Prior to Program Launch

After receiving bids from power supplies, the Authority must provide to participating agencies a report from a utility consultant retained by the Agency which compares the Authority's total estimated electrical rates, the estimated greenhouse gas emissions rate, and the amount of estimated renewable energy to be used with that of PG&E. Within 30 days after receiving the report, an agency may immediately withdraw from the Authority if the report determinates that any one of the following conditions exist:

1. the Authority is unable to provide total electrical rates equal to or lower than the existing utility (i.e., PG&E);
2. the Authority is unable to provide electricity in a manner that a lower greenhouse gas emissions rate than the existing utility; or
3. the Authority will use less renewable energy than the existing utility.

A party who withdraws pursuant to this section shall not incur any liabilities or obligations of the Authority after the date of withdrawal, including liabilities arising from power purchase agreements entered into by the Authority.

❖ Continuing Liability After Withdrawal

A party that withdraws from the Authority will be responsible for paying its fair share of costs incurred resulting from the party's withdrawal. Those costs may include costs from the resale of power contracts to serve the party's load.

- Miscellaneous Provisions

The JPA Agreement requires the Authority to acquire insurance which names the Authority, the participating agencies, and their respective boards and councilmembers.

The JPA Agreement may be amended by supermajority of the Board, except that any change to the voting rights and structure, discussed above, requires a unanimous vote of the Board.

- Next Steps

Following this informational report, the following calendar outlines next steps:

- ❖ October 4, 2016: Consideration of JPA Agreement and CCA Ordinance by Alameda County Board of Supervisors
- ❖ Fall 2016: Participant Cities approve JPA Agreement and designate Board representatives

- ❖ December 1, 2016: JPA Agreement becomes effective and the Authority comes into existence, provided that a minimum of three cities execute the JPA Agreement and adopt an ordinance to enter into the CCA Program by this date.
- ❖ December 31, 2016: Deadline for all remaining cities to execute JPA Agreement and adopt an ordinance to enter into the CCA Program.
- ❖ January 2017: First meeting of JPA Board
- ❖ Summer 2017: Launch CCA operations
- ❖ Late 2017 – Early 2018: Transition energy procurement from PG&E to CCA

- Next Steps for Emeryville

If Emeryville is to join the CCA Program, staff proposes the following City Council actions:

- ❖ October 18, 2016: Receive information report
- ❖ November 1, 2016: Adopt first reading of ordinance expressing the City Council's intent to enter into the CCA Program, as required by the state Public Utilities Code.
- ❖ November 15, 2016: Adopt the second reading of the above Ordinance. Adopt a resolution authorizing the City Manager to execute the JPA Agreement on behalf of Emeryville
- ❖ December 31, 2016: Deadline for Emeryville to submit the ordinance and resolution to the JPA Authority.

- Action by Alameda County Board of Supervisors

The Alameda County Board of Supervisors met on October 4, 2016, to consider the JPA Agreement and ordinance expressing intent to enter into a CCA program. The version presented to the Board of Supervisors included the late additions from labor and environmental advocates as well as the three-Director standard to trigger a Voting Shares vote. The Board voted to adopt the JPA Agreement in its proposed form, as well as the first reading of the ordinance.

FISCAL IMPACT

It is difficult to quantify the fiscal impact from entering into the JPA Agreement at this time. There is no immediate impact from continuing to negotiate the JPA Agreement with the other agencies. The Agreement calls for Alameda County to fund the Initial Costs⁴ of the program. In the event the program becomes operational the Initial Costs will be reimbursed to the County through customer charges for electric services.

As noted above, if the City enters into the JPA Agreement, it will have an immediate right to withdraw prior to program launch and will not incur any liabilities from the Authority at that time. However after program launch, the City may have ongoing liabilities resulting from withdrawal from the Authority as discussed above.

Note that the JPA Agreement is designed such that the liabilities and obligations of the Authority are separate from those of the City. Thus any obligations of the JPA would not be passed onto the City and the City's General Fund is insulated from liabilities of the JPA. As noted above, the JPA Agreement also calls for the Authority to carry insurance which names the City and its Councilmembers as additional insureds.

CONCLUSION

The City Council is asked to provide direction on the following issues relating to the JPA Agreement:

1. Does the City Council wish the City Attorney to continue negotiating a JPA Agreement with the participating agencies to form a joint powers authority?
2. Voting Rules: Does the City Council agree with the voting rules structure, including the three-Director requirement to trigger a Voting Shares vote?
3. Does the City Council wish to comment on other terms of the JPA Agreement or wish to add other terms not discussed?
4. Does the City Council wish to comment on the proposed schedule?

⁴ Costs incurred by the Authority relating to the establishment and initial operation of the Authority, such as the hiring of the Executive Director and staff and any required accounting, administrative, and legal services in support of the Authority's initial formation activities or in support of the negotiation of power purchase agreements.

PREPARED BY: Michael A. Guina, City Attorney

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Michael A. Guina, City Attorney

Attachments:

1. Exhibit A: JPA Agreement presented to Alameda County Board of Supervisor
10/2/16