



GOVERNANCE STRUCTURE RECOMMENDATIONS FOR A COMMUNITY CHOICE PROGRAM IN THE CITY OF SAN DIEGO

June 2019

Overview and Intent

On February 25, 2019, the San Diego City Council approved pursuing the development of a Community Choice Aggregation (CCA) program. CCAs serve as an alternate method of energy procurement for municipal agencies, where a public agency assumes a more active role in energy procurement policy by replacing the local utility as energy purchaser. With the vote, the City began the process of establishing a Joint Powers Authority (JPA) with the intent of inviting other County jurisdictions into the program.

To guide the efforts of the City of San Diego in the formation of a Joint Powers Agreement, SDCTA has developed a set of recommendations that: (1) reduce legal exposure to taxpayers, (2) minimize the number of agencies created, (3) provide both flexibility and robustness for jurisdictions to join and depart the agreement, and (4) promote the local choice and control of member agencies.

Background

On February 25, 2019, the San Diego City Council approved pursuing the development of a Community Choice Aggregation (CCA) program. These programs serve as an alternate method of energy procurement for municipal agencies, where a public agency assumes a more active role in energy procurement policy by replacing the local utility as energy purchaser. With the vote, the City began the process of establishing a Joint Powers Authority (JPA) with the intent of inviting other County jurisdictions into the program.

In 2018, the San Diego County Taxpayers Association evaluated the benefits and costs of notable CCA programs across California to estimate the potential local impact of the implementation of a CCA in the City of San Diego. As part of that analysis, SDCTA recommended the formation of a JPA governance structure to mitigate some of the risks associated with a CCA because, overall, JPAs are a more fiscally responsible choice for the establishment of a CCA.

Joint Powers Authorities are legally created entities that allow two or more public agencies to jointly exercise common powers and to provide more cost-efficient services. With a Joint Powers Agreement, a member agency agrees to be responsible for delivering a service on behalf of the other member agencies. Each Joint Powers Agreement is unique, as there is no set formula for how governments should use their joint powers.

The Joint Exercise of Powers Act, as codified in California Government Code section 6500, governs JPAs. The Act authorizes two kinds of JPA arrangements. The first allows two or more public agencies to jointly exercise common powers. The second allows two or more public



agencies to form a separate legal entity. This new entity has independent legal rights, including the ability to enter into contracts, hold property, and sue or be sued.

Forming a separate entity can be beneficial because the debts, liabilities and obligations of the JPA belong to the entity, not the contracting parties. This approach enables economies of scale, resulting in a potential financial benefit to the taxpayers. Ultimately, by sharing resources and combining services, the member agencies and their taxpayers may save time and money.

To become a JPA member, the public agencies must enter into an agreement. This agreement, often called a Joint Powers Agreement, must state both the powers of the JPA and the manner in which it will be exercised. The member agencies that created the Joint Powers Authority fund the operation of the organization. Their Joint Powers Agreement usually spells out how much each member agency contributes, based on such factors as its projected use of services.

Policy Recommendations

The formation of a JPA begins when public officials negotiate a formal agreement that spells out the member agencies' intentions, the powers they will share, and other mutually acceptable conditions that define the intergovernmental arrangement. Each member agency's governing body then approves the Joint Powers Agreement.

In drafting the Joint Powers Agreement, the overall goal should be to ensure that the newly created entity is given the level of authority required to accomplish its purposes. The Agreement should also establish a strong set of operating rules to enhance the agency's stability despite the probability of competing interests among its members, its accountability, and its fiscal responsibility. With these considerations in mind, SDCTA has provided the following recommendations for the pertinent sections of the Agreement:

Launch

- 1. The Agreement should state that, until half of the county is represented, the JPA should not form.**

The California Government Code requires that at least two agencies must pass an ordinance before the effective date of the formation of a Joint Powers Authority. However, SDCTA observes that the large size of the proposed Community Choice Aggregation program in the City of San Diego poses additional financial risks and uncertainty. Expanding the number of agencies needed to create the JPA may enable the entity to better reflect the long-term interests of the region. In turn, this could create a new government agency that proportionally pools the risk among all members of the authority and prevents a member agency from acting on behalf of all members.

- 2. A jurisdiction must be able to join the JPA after it has been established under the same requirements and fees set forth in the Agreement, accounting for inflation.**



It may make more financial sense for a jurisdiction to join a CCA at a different point in time. Therefore, a jurisdiction must be able to join a CCA after the date of establishment for the exact fees and timeline associated with those jurisdictions that joined at the time of its enactment, accounting for inflation.

Financial Liabilities and Accountability

JPAs formed to manage CCA programs often arrange the structure capital financing needed to purchase energy contracts and build the appropriate infrastructure that will ultimately create and deliver the utility. Several taxpayer protections must be included in the Agreement.

3. The JPA must notify member agencies six (6) months prior to entering in long-term contracts.

To protect the interests of its taxpayers, the agreement must provide that each member agency will be given notice six (6) months prior to the entity incurring an obligation over a specified amount of time. The notice should specify the parameters of the loan or loans, including principal, interest, and years. The Joint Powers Agreement should also outline the pertinent steps to follow should a member city decide to withdraw from the Authority before the obligation is incurred.

4. Each member agency should only be liable for the power costs procured on its behalf.

The debts, liabilities or obligations of the JPA should not belong to the individual members unless the governing board of the member agency agrees in writing to assume any of the debts, liabilities or obligations of the Authority.

5. To streamline costs and protect taxpayers, any bond should have a clear schedule of payments and projects, and an oversight body that includes at least one member of a bona fide taxpayers association, similar to what the education code requires.

JPAs should not abuse the public trust. Given that JPAs are not approved by voters, the agreement should specify true disclosure and transparency of its organization and financial information to taxpayers. The Agreement must also specify the inclusion of steering committees under its governing board that include community stakeholders such as a bonafide taxpayer association. This should better represent the interests of taxpayers.

6. An external firm must annually audit the JPA, unless its income is anticipated to be too small to justify the cost of an audit.

To address concerns of cloaking funds, the JPA must be annually audited. The Agreement must also specify the mechanism by which it reports all financial information to the State Controller and by which it makes that information easily accessible to ratepayers.



- 7. The Agreement must specify that the JPA is not entitled to any financial protection from member agencies in the event of a bankruptcy. This will protect the General Funds of member agencies.**

The Agreement should protect the financial integrity of member agencies by barring them from providing financial protections to the entity. In turn, this may encourage jurisdictions to join the JPA.

Distribution of Assets and Investment of Money

- 8. The Agreement must specify that all of the JPA investments will be restricted to the pertinent infrastructure and renewable energy procurement.**

The Agreement must ensure that all proceeds from the program will be reinvested back into the community it serves through investments restricted to the pertinent infrastructure and renewable energy procurement.

- 9. The Agreement must provide that any surplus money retained after the completion of the entity's purpose shall be returned to taxpayers in member agencies in proportion to the contributions made.**

- 10. The Agreement must specify that JPA members shall have no claims on any of the reserves in the organization.**

The reserves must always be retained in the entity. JPA members should have no claims on any of the reserves in the organization.

Voting and Representation

- 11. The Agreement must specify that a passing vote needs the majority of the member agencies and the majority vote of the electrical load.**

For a matter to be approved, it must receive both a majority vote of the members and a majority vote of the electrical load. Exceptions may be provided for a limited number of matters requiring a two-thirds vote such as amending the Joint Powers Agreement or terminating a member for materially violating the provisions of the Joint Powers Agreement.

- 12. To increase local control, member agencies should be able direct the JPA on procurement.**

It is important in drafting the Joint Powers Authority agreement to think carefully about the extent of authority each of the members intends to delegate, if any, the electrical load that each member agency brings to the program, and the size of the economy of each member agency. A set up in which member agencies determine the electrical load and demand reflects true local choice and control.



Withdrawal of a Member Agency and Termination

Due to the competing interests of member agencies, JPAs can be hard to sustain. Changes in local public support, new political leaders or financial pressures may cause a member agency to reconsider participating in the JPA. While unlikely, a departure of a member agency may harm the JPA's long-term bonds or purchasing programs. To protect taxpayers from such an event, SDCTA recommends the following:

13. A member agency must formally express its intent to leave the JPA six (6) months prior to the authorization of its exit.

To avoid the financial problems that can result if member agencies pull out of JPAs, some Joint Powers Agreements include specific protocols that make it difficult to dissolve the agreements. Ultimately, multi-member Joint Powers Authorities must outline the process by which a member agency may leave the JPA. These provisions should guard against encouraging withdrawal and jeopardizing the survivability of the entity upon withdrawal of an agency.

14. To mitigate the exposure to economic loss resulting from a customer departing the program, the Agreement must establish a departure charge that proportionally covers the cost of excess electricity supplies and long-term contract liability.

Similar to the exit-fee imposed by the California Public Utilities Commission on CCAs to compensate utilities for the loss in ratepayers, a regional CCA should specify in the JPA Agreement a fee to offset the cost of customer departure. This would prevent the remaining customers in the CCA from bearing the costs of energy purchased on the behalf of the departing ratepayers.

15. To prevent remaining customers from bearing the cost of departing cities, the Agreement should outline the terms of the dissolution in the case that the CCA program needs to terminate and return customers to the local utility.

If too many members terminate their affiliation to a JPA or if too many residents opt-out, the CCA may need to mutually terminate and return customers to SDG&E. Moreover, fluctuations in market prices and future regulatory decisions could result in cost increases for CCA programs. Therefore, the agreement should also outline an exit plan if costs become too high to sustain or if a reliable system whereby customers can truly pick their energy mix (and not depend on either the utility or a CCA to do so) develops.