



REPORT TO CITY COUNCIL

DATE: OCTOBER 25, 2017

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: GREG RAMIREZ, CITY MANAGER 

BY: LOUIS CELAYA, DEPUTY CITY MANAGER 

SUBJECT: DISCUSSION ON THE JOINT POWERS AGREEMENT WITH THE LOS ANGELES COMMUNITY CHOICE ENERGY AUTHORITY (LACCEA); AND THE IMPLEMENTATION OF THE COMMUNITY CHOICE AGGREGATION PROGRAM

In 2002, the State Legislature adopted AB 117, which allowed local governments to create Community Choice Aggregation (CCA) programs. The County of Los Angeles has led an effort to create such a CCA, and is now offering inclusion to interested cities within the County through the creation of a Joint Powers Authority (JPA). In August 2017, representatives of the County of Los Angeles Office of Sustainability met with the Public Works Subcommittee to discuss the County of Los Angeles' Community Choice Energy Program, and the subcommittee, subsequently, requested a presentation be made to the full City Council. At the September 25, 2017, City Council meeting, the City Council received a presentation from Gary Gero, Chief Sustainability Officer for the County of Los Angeles, concerning the Los Angeles Community Choice Energy Program, detailing the parameters of CCA), and the Los Angeles Community Choice Energy Authority (LACCEA), currently being implemented by the County of Los Angeles. At the conclusion of the presentation, direction was given that this item be brought back to the full City Council for consideration.

CCA allows local governments to purchase and sell electricity in their jurisdictions as an alternative to traditional investor owned utility (IOU) power procurement. CCA's allows cities to aggregate the buying power of individual customers within a defined jurisdiction in order to secure alternative energy supply contracts on a community-wide basis, and allowing consumers not wishing to participate to opt out. Since the formation of the LACCEA, there are currently four municipal agency members composing the LACCEA: Calabasas, Rolling Hills Estates, South Pasadena, and West Hollywood.

The LACCE program potentially provides lower rates and greater energy choices for residents and businesses, promotes electrical rate price stability, addresses climate change by reducing energy-related greenhouse gas emissions, creates jobs, and encourages development of local green energy projects. The LACCE is a method for governments to buy and/or generate electricity for residents and businesses and provides a partnership between the City and existing utility providers like Southern California Edison (SCE), giving local governments the option to purchase up to 100% renewable electricity, such as solar, wind, bioenergy, geothermal, and hydroelectric at competitive

rates. If the City elects to become a member of the LACCEA, the City of Agoura Hills could join other municipalities who could purchase from cleaner sources, while using existing utilities to deliver electrical energy to residents.

With the LACCE program, residents can choose to buy power through the LACCE or “opt out” and continue with SCE. In either case, SCE will continue to handle transmission, process the billing, and be responsible for addressing issues, such as outages and other operational functions. Additionally, greater specific detail regarding the LACCE is provided in the attached Feasibility Study/Business Plan, and the LACCE Presentation for City Councils and Managers.

Participation in the LACCE requires a municipal agency to approve the Joint Powers Agreement (JPA) with the Los Angeles Community Choice Energy Authority (LACC EA), and authorize the Implementation of the CCA Program. During the presentation, the City Council inquired as to the status of neighboring jurisdictions and the planned action on this issue. The following is the status of neighboring and like cities and their position with respect to participating in the LACCE:

City	Status	Notes
Calabasas	Yes	
Hidden Hills	No planned action at this time.	Waiting to see what transpires with other agencies
Malibu	Currently under review by City's consultant	Possible planned action by end of calendar year
Westlake Village	Study Session on October 11. Direction given to staff to wait until the LACCEA has further evolved.	Concern with potential start up challenges as it relates to residential customers
La Canada Flintridge*	No planned action at this time.	
Monrovia	No planned action at this time.	
* Selected as similar contract City with similar demographics		

Additionally, recent communication regarding LACCE activities identified the potential for four new member agencies: Alhambra, Carson, Manhattan Beach and Sierra Madre, to potential become members of the LACCEA. At the time of this report, final action has not been determined.

During the September 25th presentation, the City Council inquired as to the estimated “opt-out” percentage that could occur once agencies joined a CCA. Discussions with representatives from Lancaster Choice Energy, identified that during its initial start up the Lancaster Choice Energy yielded a six percent (6%) opt out rate after six months of the CCA's existence. Additionally, Marin Choice Energy (MCE) identified a 6% - 7% opt out percentage. In both CCA's this percentage has not increased and has stayed at the current level.

There are various considerations for electing or delaying participation in the LACCEA, as summarized below:

Reasons for Electing to Participate in the LACCEA:

- Currently, there are no costs associated with opting to participate in the LACCEA at this time. After the December 27, 2017, cost may be incurred (those costs cannot be determined at this time);

- Active engagement in the early LACCEA's operational, developmental, policy-making and funding decisions as an active Board Member;
- Potential for Agoura Hills residents and businesses to see lower energy cost in Late-2018; and,
- Under the LACCEA, renewable resources are projected to hit targets (i.e., 50% renewable energy), sooner than the current public utility
- There been recent attempts by the Legislature to limit cities participation in, or creation of, CCAs (legislation failed). Potential for similar legislation to return.

Reasons for electing to delay participation in the LACCEA:

- Allows for City to realize actual costs for participating in the LACCEA as the authority develops and grows;
- Allows for initial transitional operational issues and challenges (i.e., potential billing accuracy issues, customer call center issues, etc.) to be vetted and not experienced by Agoura Hills customers;
- Allows City to realize actual staff resource time and JPA Board Member Representative time that will be attributed to participation in the LACCEA;
- Management of the JPA – As the City is far removed from activities of the JPA staff, could present a challenge to know all that is transpiring with related work;
- Pension Liability – Questions re: potential for the JPA to join an employee pension plan in the future and the financial viability of the JPA to do so and any potential impact on member agencies; and,
- Allows City to see what will transpire from utilities (Southern California Edison) with respect to renewable energy source development as long-term legacy power contracts begin to expire.

The existence of CCAs is not a new endeavor. Currently many models are in existence and have provided information and lessons learned for communities or agencies looking to establish and implement their own CCA. Northern California counties and communities have been very proactive in this endeavor. Should the City Council elect to participate in the LACCEA, it would require the passing of the enabling ordinance approving the JPA, authorizing the implementation of the CCA, and selecting a "Director" and "Alternate Director" to participate in future proceedings of the LACCEA.

RECOMMENDATION

City staff is seeking direction from the City Council on the following:

- 1) Take no action at this time; or
- 2) Direct staff to monitor the issue and defer to a later time; or
- 3) Direct staff to return with introduction of the ordinance

Attachments: Los Angeles Community Choice Energy Authority JPA (Exhibit A)
J. Bingham August 10, 2017 Email Communication Re: Liability Risk Analysis to Member of Los Angeles Community Choice Energy Authority

Exhibit A

Los Angeles Community Choice Energy Authority Joint Powers Agreement

LOS ANGELES COMMUNITY CHOICE ENERGY AUTHORITY

JOINT POWERS AGREEMENT

This Joint Powers Agreement (the "Agreement"), effective as of _____, is made and entered into pursuant to the provisions of Title 1, Division 7, Chapter 5, Article 1 (Section 6500 et seq.) of the California Government Code relating to the joint exercise of powers among the public agencies set forth in Exhibit A.

RECITALS

1. The Parties are public agencies sharing various powers under California laws, including but not limited to the power to purchase supply, and aggregate electricity for themselves and their inhabitants.
2. In 2006, the State Legislature adopted AB 32, the Global Warming Solutions Act, which mandates a reduction in greenhouse gas emissions in 2020 to 1990 levels. The California Air Resources Board is promulgating regulations to implement AB 32 which will require local government to develop programs to reduce greenhouse emissions.
3. The purposes for the Initial Participants (as such term is defined in Section 2.3 below) entering into this Agreement include addressing climate change by reducing energy related greenhouse gas emissions and securing energy supply and price stability; energy efficiencies and local economic benefits, such as jobs creation, community energy programs; and local power development. It is the intent of this Agreement to promote the development and use of a wide range of renewable energy sources and energy efficiency programs, including but not limited to solar and wind energy production.
4. The Parties desire to establish a separate public agency, known as the Los Angeles Community Choice Energy Authority ("Authority"), under the provisions of the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.) ("Act") in order to collectively study, promote, develop, conduct, operate, and manage energy programs.
5. The Initial Participants have each adopted an ordinance electing to implement through the Authority a Community Choice Aggregation program pursuant to California Public Utilities Code Section 366.2 ("CCA Program"). The first priority of the Authority will be the consideration of those actions necessary to implement the CCA Program.
6. By establishing the Authority, the Parties seek to:
 - (a) Develop an electric supply portfolio with overall lower greenhouse gas intensity and lower greenhouse gas (GHG) emissions than Southern California Edison ("SCE"), and one that supports the achievement of the parties' greenhouse gas reduction goals and the comparable goals of all participating jurisdictions;

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(b) Establish an energy portfolio that encourages the use and development of cost-effective local renewable and distributed energy resources and that discourages the use unbundled renewable energy credits;

(c) Promote an energy portfolio that incorporates energy efficiency and demand response programs and pursues ambitious energy consumption reduction goals;

(d) Provide electricity rates that are lower or at worst competitive with those offered by SCE for similar products;

(e) Offer differentiated energy options (e.g. 33% or 50% qualified renewable) for default service, and a 100% renewable content option in which customers may "opt-up" and voluntarily participate;

(f) Achieve quantifiable economic benefits to the region;

(g) Recognize the value of current workers in existing jobs that support the energy infrastructure of Los Angeles County and Southern California (e.g. union and prevailing wage jobs, local workforce development, apprenticeship programs, and local hire). The Authority, as a leader in the shift to clean energy, commits to ensuring it will take steps to minimize any adverse impacts to these workers to ensure a "just transition" to the new clean energy economy;

(h) Support a stable, skilled workforce through such mechanisms as project labor agreements, collective bargaining agreements, or community benefit agreements, or other workforce programs that are designed to avoid work stoppages, ensure quality, and benefit local residents by delivering cost-effective clean energy programs and projects (e.g. new energy programs and increased local energy investments);

(i) Promote supplier and workforce diversity, including returning veterans and those from disadvantaged and under-represented communities, to better reflect the diversity of the region;

(j) Promote personal and community ownership of renewable resources, spurring equitable economic development and increased resilience, especially in low income communities;

(k) Provide and manage its energy portfolio and products in a manner that provides cost savings to customers and promotes public health in areas impacted by energy production;

(l) Ensure that low-income households and communities are provided with affordable and flexible energy options, including the provision of energy discounted rates to eligible low-income households;

(m) Recognize and address the importance of healthy communities, including those disproportionately affected by air pollution and climate change;

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- (n) Use program revenues to provide energy-related programs and services; and
- (o) Create an administering Authority that is financially sustainable, responsive to regional priorities, well-managed, and a leader in fair and equitable treatment of employees.

1. DEFINITIONS

- 1.1 "AB 117" means Assembly Bill 117 (Stat. 2002, Ch. 838, codified at Public Utilities Code Section 366.2), which created Community Choice Aggregation.
- 1.2 "Act" means the Joint Exercise of Powers Act of the State of California (Chapter 5, Division 7, Title 1 of the Government Code commencing with Section 6500).
- 1.3 "Agreement" means this Joint Powers Agreement.
- 1.4 "Authority" means Los Angeles Community Choice Energy Authority.
- 1.5 "Authority Document(s)" means document(s) duly adopted by the Board by resolution or motion implementing the powers, functions and activities of the Authority, including but not limited to the Operating Policies and Procedures, the annual budget, and plans and policies.
- 1.6 "Board" means the Board of Directors of the Authority.
- 1.7 "Community Choice Aggregation" or "CCA" means an electric service option available to cities, counties, and other public agencies pursuant to Public Utilities Code Section 366.2.
- 1.8 "CCA Program" means the Authority's program relating to CCA that is principally described in Section 2.4 (Purpose) of this Agreement.
- 1.9 "Days" shall mean calendar days unless otherwise specified by this Agreement.
- 1.10 "Director" means a member of the Board representing a Party, including up to two alternate Directors appointed in accordance with Sections 4.1 (Board of Directors) and 4.2 (Appointment and Removal of Directors) of this Agreement.
- 1.11 "Effective Date" means the date on which the Agreement shall become effective and the Authority shall exist as a separate public agency, as further described in Section 2.1 (Effective Date and Term) of this Agreement.
- 1.12 "Initial Costs" means all costs incurred by the Authority relating to the establishment and initial operation of the Authority, such as the hiring of the executive, technical, and any administrative staff, any required accounting, administrative, technical and legal services in support of the Authority's initial formation activities or in support of the negotiation, preparation and approval of

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power purchase agreements. The Board shall determine the termination date for the Initial Costs.

- 1.13 "Initial Participants" means, for purpose of this Agreement, the County of Los Angeles, and the cities of _____, and any other Parties joining in accordance with Section 2.3 (Initial Participants) of this Agreement.
- 1.14 "Operating Policies and Procedures" means the rules, regulations, policies, bylaws and procedures governing the operation of the Authority.
- 1.15 "Parties" means, collectively, the signatories to this Agreement that have satisfied the conditions in Sections 2.3 (Initial Participants) or 2.5 (Addition of Parties) of this Agreement, such that they are considered members of the Authority.
- 1.16 "Party" means, singularly, a signatory to this Agreement that has satisfied the conditions in Sections 2.3 (Initial Participants) or 2.5 (Addition of Parties) of this Agreement, such that it is considered a member of the Authority.
- 1.17 "Public Agency" as defined in the Act includes, but is not limited to, the federal government or any federal department or agency, this state, another state or any state department or agency, a county, a county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of this state or another state, a federally recognized Indian tribe, or any joint powers authority formed pursuant to the Act.

2. FORMATION OF LOS ANGELES COMMUNITY CHOICE ENERGY AUTHORITY

- 2.1 **Effective Date and Term.** This Agreement shall become effective and the Authority shall exist as a separate public agency on the date this Agreement is executed by the County of Los Angeles and at least one other public agency after the adoption of the ordinances required by Public Utilities Code Section 366.2(c)(12). The Authority shall provide notice to the Parties of the Effective Date. The Authority shall continue to exist, and this Agreement shall be effective, until the Agreement is terminated in accordance with Section 8.3 (Mutual Termination) of this Agreement, subject to the rights of the Parties to withdraw from the Authority.
- 2.2 **Formation of the Authority.** Under the Act, the Parties hereby create a separate joint exercise of power agency which is named Los Angeles Community Choice Energy Authority. Pursuant to Sections 6506 and 6507 of the Act, the Authority is a public agency separate from the Parties. The debts, liabilities or obligations of the Authority shall not be debts, liabilities or obligations of the individual Parties unless the governing body of a Party agrees in writing to assume any of the debts, liabilities or obligations of the Authority. The jurisdiction of the Authority shall be all territory within the geographic boundaries of the Parties; however the Authority may, as authorized under applicable law, undertake any

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action outside such geographic boundaries as is necessary and incidental to the accomplishment of its purpose.

- 2.3 **Initial Participants.** In addition to Parties executing this Agreement on or prior to the Effective Date, any incorporated municipality, county, or other eligible public agency may become a Party and recognized as an Initial Participant provided during the first 180 days after the Effective Date it executes this Agreement and delivers an executed copy of this Agreement and a copy of the adopted ordinance required by Public Utilities Code Section 366.2(c)(12) to the Authority. All Initial Participants to this Agreement shall be required to commence electric service as soon as practicable, as determined by the Board.
- 2.4 **Purpose.** The purpose and objectives of this Agreement are to establish the Authority, to provide for its governance and administration, and to define the rights and obligations of the Parties. This Agreement authorizes the Authority to provide a means by which the Parties can more effectively develop and implement sustainable energy initiatives that reduce energy demand, increase energy efficiency, and advance the use of clean, efficient, and renewable resources in the region for the benefit of the Parties and their constituents, including, but not limited to, establishing and operating a Community Choice Aggregation program.
- 2.5 **Addition of Parties.** After 180 days from the Effective Date any incorporated municipality, county, or other public agency may become a Party to this Agreement if all of the following conditions are met:
- 2.5.1 The adoption of a resolution of the Board admitting the public agency to the Authority;
 - 2.5.2 The adoption by an affirmative vote of the Board satisfying the requirements described in Section 4.10 (Board Voting) of this Agreement, of a resolution authorizing membership into the Authority and establishing its pro rata share of organizational, planning and other pre-existing expenditures, and describing additional conditions, if any, associated with membership;
 - 2.5.3 The adoption by the public agency of an ordinance required by Public Utilities Code Section 366.2(c)(12) and approval and execution of this Agreement and other necessary program agreements by the public agency;
 - 2.5.4 Payment of the membership payment, if any; and
 - 2.5.5 Satisfaction of any reasonable conditions established by the Board.

Pursuant to this Section 2.5 (Addition of Parties), all parties shall be required to commence electric service as soon as is practicable, as determined by the Board, as a condition to becoming a Party to this Agreement.

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2.6 **Continuing Participation.** The Parties acknowledge that membership in the Authority may change by the addition, withdrawal and/or termination of Parties. The Parties agree to participate with such other Parties as may later be added, as described in Section 2.5 (Addition of Parties) of this Agreement. The Parties also agree that the withdrawal or termination of a Party shall not affect this Agreement or the remaining Parties' continuing obligations under this Agreement.

3. POWERS

3.1 **General Powers.** The Authority shall have the powers common to the Parties and which are necessary or convenient to the accomplishment of the purposes of this Agreement, subject to the restrictions set forth in Section 3.4 (Limitation on Powers) of this Agreement. As provided in the Act, the Authority shall be a public agency separate and apart from the Parties.

3.2 **Specific Powers.** The Authority shall have all powers common to the Parties and such additional powers accorded to it by law. The Authority is authorized, in its own name, to exercise all powers and do all acts necessary and proper to carry out the provisions of this Agreement and fulfill its purposes, including, but not limited to, each of the following:

3.2.1 make and enter into contracts;

3.2.2 employ agents and employees, including but not limited to an Executive Director;

3.2.3 acquire, contract, manage, maintain, and operate any buildings, works or improvements;

3.2.4 acquire property by eminent domain, or otherwise, except as limited under Section 6508 of the Act, and to hold or dispose of any property;

3.2.5 lease any property;

3.2.6 sue and be sued in its own name;

3.2.7 incur debts, liabilities, and obligations, including but not limited to loans from private lending sources pursuant to its temporary borrowing powers authorized by law pursuant to Government Code Section 53850 et seq. and authority under the Act;

3.2.8 issue revenue bonds and other forms of indebtedness;

3.2.9 apply for, accept, and receive all licenses, permits, grants, loans or other aids from any federal, state or local public agency;

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- 3.2.10 form independent corporations or entities, if necessary to carry out energy supply and energy conservation programs at the lowest possible cost or to take advantage of legislative or regulatory changes;
 - 3.2.11 submit documentation and notices, register, and comply with orders, tariffs and agreements for the establishment and implementation of the CCA Program and other energy programs;
 - 3.2.12 adopt rules, regulations, policies, bylaws and procedures governing the operation of the Authority ("Operating Policies and Procedures"); and
 - 3.2.13 make and enter into service agreements relating to the provision of services necessary to plan, implement, operate and administer the CCA Program and other energy programs, including the acquisition of electric power supply and the provision of retail and regulatory support services.
- 3.3 **Additional Powers to be Exercised.** In addition to those powers common to each of the Parties, the Authority shall have those powers that may be conferred upon it as a matter of law and by subsequently enacted legislation.
- 3.4 **Limitation on Powers.** As required by Section 6509 of the Act, the powers of the Authority are subject to the restrictions upon the manner of exercising power possessed by the County of Los Angeles.
- 3.5 **Obligations of the Authority.** The debts, liabilities, and obligations of the Authority shall not be the debts, liabilities, and obligations of the Parties unless the governing body of a Party agrees in writing to assume any of the debts, liabilities, and obligations of the Authority. In addition, pursuant to the Act, no Director shall be personally liable on the bonds or subject to any personal liability or accountability by reason of the issuance of bonds.
- 3.6 **Compliance with the Political Reform Act and Government Code Section 1090.** The Authority and its officers and employees shall comply with the Political Reform Act (Government Code Section 81000 et seq.) and Government Code Section 1090 et seq. The Board shall adopt a Conflict of Interest Code pursuant to Government Code Section 87300. The Board may adopt additional conflict of interest regulations in the Operating Policies and Procedures.

4. GOVERNANCE

- 4.1 **Board of Directors.** The governing body of the Authority shall be a Board of Directors ("Board") consisting of one director for each Party appointed in accordance with Section 4.2 (Appointment and Removal of Directors) of this Agreement. The Board, in consultation with the Executive Director, may determine at any time to consider options to reduce the size of the Board if it determines that the efficient functioning and operation of the Board would be improved by having a smaller number of Directors. Any such change to the size

of the Board would require amendment of this Joint Powers Agreement in accordance with Section 4.11 (Special Voting).

4.2 Appointment and Removal of Directors. The Directors shall be appointed and may be removed as follows:

4.2.1 The governing body of each Party shall appoint and designate in writing one regular Director who shall be authorized to act for and on behalf of the Party on matters within the powers of the Authority. The governing body of each Party shall appoint and designate in writing up to two alternate Directors who may vote on matters when the regular Director is absent from a Board meeting. The person appointed and designated as the regular Director shall be an elected or appointed member of the governing body of the Party. The persons appointed and designated as the alternate Directors may be an elected or appointed member of the governing body of the Party, an appointed member of an advisory body of the Party, a staff member of the Party or a member of the public who meets the criteria below. All Directors and alternates shall be subject to the Board's adopted Conflict of Interest Code.

(a) Any alternate Director that is a member of the public must have demonstrated knowledge in energy-related matters through significant experience in either: 1) an electric utility or company, agency, or nonprofit providing services to a utility, 2) a regulatory agency or local government body overseeing an electric utility or a company, agency, or nonprofit providing services to such an agency, 3) an academic or nonprofit organization engaged in research and/or advocacy related to the electric sector.

4.2.2 The Operating Policies and Procedures, to be developed and approved by the Board in accordance with Section 3.2.12 (Specific Powers), shall specify the reasons for and process associated with the removal of an individual Director for cause. Notwithstanding the foregoing, no Party shall be deprived of its right to seat a Director on the Board and any such Party for which its Director and/or alternate Directors have been removed may appoint a replacement.

4.3 Terms of Office. Each regular and alternate Director shall serve at the pleasure of the governing body of the Party that the Director represents, and may be removed as Director by such governing body at any time. If at any time a vacancy occurs on the Board, the affected Party shall appoint to fill the position of the previous Director within 90 days of the date that such position becomes vacant.

4.4 Purpose of Board. The general purpose of the Board is to:

4.4.1 Provide structure for administrative and fiscal oversight;

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- 4.4.2 Retain an Executive Director to oversee day-to-day operations;
 - 4.4.3 Retain legal counsel;
 - 4.4.4 Identify and pursue funding sources;
 - 4.4.5 Set policy;
 - 4.4.6 Maximize the utilization of available resources; and
 - 4.4.7 Oversee all Committee activities.
- 4.5 **Specific Responsibilities of the Board.** The specific responsibilities of the Board shall be as follows:
- 4.5.1 Identify Party needs and requirements;
 - 4.5.2 Formulate and adopt the budget prior to the commencement of the fiscal year;
 - 4.5.3 Develop and implement a financing and/or funding plan for ongoing Authority operations;
 - 4.5.4 Retain necessary and sufficient staff and adopt personnel and compensation policies, rules and regulations;
 - 4.5.5 Adopt rules for procuring supplies, equipment, and services;
 - 4.5.6 Adopt rules for the disposal of surplus property;
 - 4.5.7 Establish standing and ad hoc committees as necessary to ensure that the interests and concerns of each Party are represented and to ensure operational, technical, and financial issues are thoroughly researched and analyzed;
 - 4.5.8 The setting of retail rates for power sold by the Authority and the setting of charges for any other category of retail service provided by the Authority;
 - 4.5.9 Termination of the CCA Program;
 - 4.5.10 Address any concerns of consumers and customers;
 - 4.5.11 Conduct and oversee Authority audits at intervals not to exceed three years;
 - 4.5.12 Arrange for an annual independent fiscal audit;

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- 4.5.13 Adopt such bylaws, rules and regulations as are necessary or desirable for the purposes hereof; provided that nothing in the bylaws, rules and regulations shall be inconsistent with this Agreement;
- 4.5.14 Exercise the Specific Powers identified in Sections 3.2 and 4.6 except as the Board may elect to delegate to the Executive Director; and
- 4.5.15 Discharge other duties as appropriate or required by statute.
- 4.6 **Startup Responsibilities.** The Authority shall have the duty to do the following within one year of the Effective Date of the Agreement:
 - 4.6.1 To adopt an implementation plan prepared by the County of Los Angeles, pursuant to Public Utilities Code Section 366.2(c)(3), for electrical load aggregation;
 - 4.6.2 To prepare a statement of intent, pursuant to Public Utilities Code Section 366.2(c)(4), for electrical load aggregation;
 - 4.6.3 To encourage other qualified public agencies to participate in the Authority;
 - 4.6.4 To obtain financing and/or funding as is necessary or desirable;
 - 4.6.5 To evaluate the need for, acquire, and maintain insurance.
- 4.7 **Meetings and Special Meetings of the Board.** The Board shall hold at least one regular meetings per year but the Board may provide for the holding of regular meetings at more frequent intervals. The date, hour and place of each regular meeting shall be fixed by resolution or ordinance of the Board. Regular meetings may be adjourned to another meeting time. Special meetings of the Board may be called in accordance with the provisions of Government Code Section 54956. Directors may participate in meetings telephonically, with full voting rights, only to the extent permitted by law.
- 4.8 **Brown Act Applicable.** All meetings of the Board shall be conducted in accordance with the provisions of the Ralph M. Brown Act (Government Code Section 54950, et seq.).
- 4.9 **Quorum; Approvals.** A majority of the Directors shall constitute a quorum, except that less than a quorum may adjourn from time to time in accordance with law. The affirmative votes of a majority of the Directors who are present at the subject meeting shall be required to take any action by the Board.
- 4.10 **Board Voting.**
 - 4.10.1 **Percentage Vote.** Each Director shall have one vote. Action of the Board on all matters shall require an affirmative vote of a majority of all

Directors who are present at the subject meeting, except when a supermajority vote is expressly required by this Agreement. When a supermajority vote is required under Section 4.11 (Special Voting), action of the Board shall require an affirmative vote of the specified supermajority of all Directors who are present at the subject meeting. All votes taken pursuant to this Section 4.10.1 shall be referred to as a percentage vote. Notwithstanding the foregoing, in the event of a tie in a percentage vote, the Board can break the tie and act upon an affirmative voting shares vote as described in section 4.10.2 (Voting Shares Vote).

4.10.2 Voting Shares Vote. In addition to and immediately after an affirmative percentage vote three or more Directors may request that a vote of the voting shares shall be held. In such event, the corresponding voting shares, as described in section 4.10.3, of all Directors voting in order to take an action shall exceed 50%, or such other higher voting shares percentage expressly required by this Agreement or the Operating Policies and Procedures of all Directors who are present at the subject meeting. All votes taken pursuant to this Section 4.10.2 shall be referred to as a 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. When a voting shares vote is held, action by the Board requires both an affirmative percentage vote and an affirmative voting shares vote.

4.10.3 Voting Shares Formula. When a voting shares vote is requested by three or more Directors, voting shares of the Directors shall be determined by the following formula:

(Annual Energy Use/Total Annual Energy) multiplied by 100, where (a) "Annual Energy Use" means (i) with respect to the first two years following the Effective Date, the annual electricity usage, expressed in kilowatt hours ("kWh"), within the Party's respective jurisdiction and (ii) with respect to the period after the second anniversary of the Effective Date, the annual electricity usage, expressed in kWh, of accounts within a Party's respective jurisdiction that are served by the Authority and (b) "Total Annual Energy" means the sum of all Parties' Annual Energy Use.

4.11 Special Voting.

4.11.1 Except as provided below, matters that require Special Voting as described in this Section shall require 72 hours prior notice to any Brown Act meeting or special meeting. Two-thirds vote (or such greater vote as required by state law) of the appointed Directors shall be required to take any action on the following:

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- (a) Change the designation of Treasurer or Auditor of the Authority;
- (b) Issue bonds or other forms of debt;
- (c) Exercise the power of eminent domain, subject to prior approval by the passage of an authorizing ordinance or other legally sufficient action by the affected Party; and
- (d) Amend this Agreement or adopt or amend the bylaws of the Authority. At least 30 days advance notice shall be provided for such actions. The Authority shall also provide prompt written notice to all Parties of the action taken and enclose the adopted or modified documents.

5. INTERNAL ORGANIZATION

- 5.1 **Chair and Vice Chair.** For each fiscal year, the Board shall elect a Chair and Vice Chair from among the Directors. The term of office of the Chair and Vice Chair shall continue for one year, but there shall be no limit on the number of terms held by either the Chair or Vice Chair. The Chair shall be the presiding officer of all Board meetings, and the Vice Chair shall serve in the absence of the Chair. The Chair shall sign all contracts on behalf of the Authority, and shall perform such other duties as may be imposed by the Board. In the absence of the Chair, the Vice-Chair shall sign contracts and perform all of the Chair's duties. The office of the Chair or Vice Chair shall be declared vacant and a new selection shall be made if: (a) the person serving dies, resigns, or the Party that the person represents removes the person as its representative on the Board, or (b) the Party that he or she represents withdraws from the Authority pursuant to the provisions of this Agreement. Upon a vacancy, the position shall be filled at the next regular meeting of the Board held after such vacancy occurs or as soon as practicable thereafter. Succeeding officers shall perform the duties normal to said offices.
- 5.2 **Secretary.** The Board shall appoint a Secretary, who need not be a member of the Board, who shall be responsible for keeping the minutes of all meetings of the Board and all other office records of the Authority.
- 5.3 **Treasurer.** The Board shall appoint a qualified person to act as the Treasurer, who need not be a member of the Board. Unless otherwise exempted from such requirement, the Authority shall cause an independent audit to be made by a certified public accountant, or public accountant, in compliance with Section 6506 of the Act. The Treasurer shall act as the depository of the Authority and have custody of all the money of the Authority, from whatever source, and as such, shall have all of the duties and responsibilities specified in Section 6505.5 of the Act. The Board may require the Treasurer to file with the Authority an official bond in an amount to be fixed by the Board, and if so requested the Authority shall pay the cost of premiums associated with the bond. The Treasurer shall

report directly to the Board and shall comply with the requirements of treasurers of incorporated municipalities. The Board may transfer the responsibilities of Treasurer to any person or entity as the law may provide at the time.

- 5.4 **Auditor.** The Board shall appoint a qualified person to act as the Auditor, who shall not be a member of the Board. The Board may require the Auditor to file with the Authority an official bond in an amount to be fixed by the Board, and if so requested the Authority shall pay the cost of premiums associated with the bond.
- 5.5 **Executive Director.** The Board shall appoint an Executive Director for the Authority, who shall be responsible for the day-to-day operation and management of the Authority and the CCA Program. The Executive Director may exercise all powers of the Authority, except those powers specifically reserved to the Board including but not limited to those set forth in Section 4.5 (Specific Responsibilities of the Board) of this Agreement or the Operating Policies and Procedures, or those powers which by law must be exercised by the Board. The Executive Director may enter into and execute any Energy Contract, in accordance with criteria and policies established by the Board.
- 5.6 **Bonding of Persons Having Access to Property.** Pursuant to the Act, the Board shall designate the public officer or officers or person or persons who have charge of, handle, or have access to any property of the Authority exceeding a value as established by the Board, and shall require such public officer or officers or person or persons to file an official bond in an amount to be fixed by the Board.
- 5.7 **Other Employees/Agents.** The Board shall have the power by resolution to hire employees or appoint or retain such other agents, including officers, loan-out employees, or independent contractors, as may be necessary or desirable to carry-out the purpose of this Agreement.
- 5.8 **Privileges and Immunities from Liability.** All of the privileges and immunities from liability, exemption from laws, ordinances and rules, all pension, relief, disability, workers' compensation and other benefits which apply to the activities of officers, agents or employees of a public agency when performing their respective functions shall apply to the officers, agents or employees of the Authority to the same degree and extent while engaged in the performance of any of the functions and other duties of such officers, agents or employees under this Agreement. None of the officers, agents or employees directly employed by the Board shall be deemed, by reason of their employment by the Authority to be employed by the Parties or by reason of their employment by the Authority, to be subject to any of the requirements of the Parties.
- 5.9 **Commissions, Boards and Committees.** The Board may establish any advisory commissions, boards and committees as the Board deems appropriate to assist the Board in carrying out its functions and implementing the CCA Program, other energy programs and the provisions of this Agreement. The Board may establish

rules, regulations, policies, bylaws or procedures to govern any such commissions, boards, or committees and shall determine whether members shall be compensated or entitled to reimbursement for expenses.

5.9.1 The Board shall establish the following Advisory Committees:

- (a) **Executive Committee.** The Board shall establish an executive committee consisting of a smaller number of Directors. The Board may delegate to the Executive Committee's such authority as the Board might otherwise exercise, except that the Board may not delegate authority regarding certain essential functions, including but not limited to, approving the fiscal year budget or hiring or firing the Executive Director, and other functions as provided in the Operating Policies and Procedures. The Board may not delegate to the Executive Committee or any other committee its authority under Section 3.2.12 to adopt and amend the Operating Policies and Procedures.
- (b) **Finance Committee.** The Board shall establish a finance committee consisting of a smaller number of Directors. The primary purpose of the Finance Committee is to review and recommend to the Board:
 - (1) A funding plan;
 - (2) A fiscal year budget;
 - (3) Financial policies and procedures to ensure equitable contributions by Parties;
 - (4) Such other responsibilities as provided in the Operating Policies and Procedures, including but not limited to policies, rules and regulations governing investment of surplus funds, and selection and designation of financial institutions for deposit of Authority funds.
- (c) **Community Advisory Committee.** The Board shall establish a community advisory committee comprised of members of the public representing key stakeholder communities. The primary purpose of the Community Advisory Committee shall be to provide a venue for ongoing citizen support and engagement in the operations of the Authority.
- (d) **Meetings of the Advisory Committees.** All meetings of the Advisory Committees shall be held in accordance with the Ralph M. Brown Act. For the purposes of convening meetings and conducting business, unless otherwise provided in the bylaws, a majority of the members of the Advisory Committee shall

constitute a quorum for the transaction of business, except that less than a quorum or the secretary of each Advisory Committee may adjourn meetings from time-to-time. As soon as practicable, but no later than the time of posting, the Secretary of the Advisory Committee shall provide notice and the agenda to each Party, Director and Alternate Directors.

- (e) **Officers of Advisory Committees.** Unless otherwise determined by the Board, each Advisory Committee shall choose its officers, comprised of a Chairperson, a Vice-Chairperson and a Secretary.

6. IMPLEMENTATION ACTION AND AUTHORITY DOCUMENTS

6.1 Preliminary Implementation of the CCA Program.

6.1.1 **Enabling Ordinance.** In addition to the execution of this Agreement, each Party shall adopt an ordinance in accordance with Public Utilities Code Section 366.2(c)(12) for the purpose of specifying that the Party intends to implement a CCA Program by and through its participation in the Authority.

6.1.2 **Implementation Plan.** The Authority shall cause to be prepared and secure Board approval of an Implementation Plan meeting the requirements of Public Utilities Code Section 366.2 and any applicable Public Utilities Commission regulations as soon after the Effective Date as reasonably practicable. .

6.1.3 **Termination of CCA Program.** Nothing contained in this Section 6 or this Agreement shall be construed to limit the discretion of the Authority to terminate the implementation or operation of the CCA Program at any time in accordance with any applicable requirements of state law.

6.2 **Authority Documents.** The Parties acknowledge and agree that the affairs of the Authority will be implemented through various documents duly adopted by the Board through Board resolution or minute action, including but not necessarily limited to the Operating Policies and Procedures, the annual budget, and specified plans and policies defined as the Authority Documents by this Agreement. The Parties agree to abide by and comply with the terms and conditions of all such Authority Documents that may be adopted by the Board, subject to the Parties' right to withdraw from the Authority as described in Section 8 (Withdrawal and Termination) of this Agreement.

7. FINANCIAL PROVISIONS

7.1 **Fiscal Year.** The Authority's fiscal year shall be 12 months commencing July 1 and ending June 30. The fiscal year may be changed by Board resolution.

7.2 **Depository.**

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- 7.2.1 All funds of the Authority shall be held in separate accounts in the name of the Authority and not commingled with funds of any Party or any other person or entity.
- 7.2.2 All funds of the Authority shall be strictly and separately accounted for, and regular reports shall be rendered of all receipts and disbursements, at least quarterly during the fiscal year. The books and records of the Authority shall be open to inspection and duplication by the Parties at all reasonable times. The Board shall contract with a certified public accountant or public accountant to make an annual audit of the accounts and records of the Authority, which shall be conducted in accordance with the requirements of Section 6506 of the Act.
- 7.2.3 All expenditures shall be made in accordance with the approved budget and upon the approval of any officer so authorized by the Board in accordance with its Operating Policies and Procedures. The Treasurer shall draw checks or warrants or make payments by other means for claims or disbursements not within an applicable budget only upon the prior approval of the Board.

7.3 **Budget and Recovery Costs.**

- 7.3.1 **Budget.** The initial budget shall be approved by the Board. The Board may revise the budget from time to time as may be reasonably necessary to address contingencies and unexpected expenses. All subsequent budgets of the Authority shall be prepared and approved by the Board in accordance with the Operating Policies and Procedures.
- 7.3.2 **Funding of Initial Costs.** Subject to the approval of the Board of Supervisors, the County of Los Angeles has agreed to provide up to \$10 million for funding Initial Costs in establishing the Authority and implementing the CCA Program. In the event that the CCA Program becomes operational, the County of Los Angeles shall be reimbursed for the Initial Costs. The County and the Authority will execute an agreement specifying the terms and conditions of the Initial Costs provided by the County, including but not limited to: (a) Repayment of this amount, which shall be first priority in relation to all other indebtedness of the Authority; and (b) authorization for the County Auditor-Controller to conduct an audit of the Authority's books and records (including personnel records, as necessary) and/or investigation, following reasonable advance notice from the County, to ensure compliance with the terms and conditions of the agreement. The Authority may establish a reasonable time period over which such costs are recovered. In the event that the CCA Program does not become operational, the County shall not be entitled to any reimbursement of the Initial Costs they have paid from the Authority or any other Party.

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7.3.3 **Program Costs.** The Parties desire that, to the extent reasonably practicable, all costs incurred by the Authority that are directly or indirectly attributable to the provision of electric services under the CCA Program, including the establishment and maintenance of various reserve and performance funds, shall be recovered through charges to CCA customers receiving such electric services.

7.3.4 **General Costs.** Costs that are not directly or indirectly attributable to the provision of electric services under the CCA Program, as determined by the Board, shall be defined as general costs. General costs shall be shared among the Parties on such bases as the Board shall determine pursuant to the Authority documents.

7.4 **Contributions.** Parties are not required under this Agreement to make any financial contributions. Consumers may subscribe as customers of the Authority pursuant to the Act and outside of this Agreement and through their on-bill selections.

7.4.1 A Party may, in the appropriate circumstance, and when agreed-to:

- (a) Make contributions from its treasury for the purposes set forth in this Agreement;
- (b) Make payments of public funds to defray the cost of the purposes of the Agreement and Authority;
- (c) Make advances of public funds for such purposes, such advances to be repaid as provided by written agreement; or
- (d) Use its personnel, equipment or property in lieu of other contributions or advances.
- (e) No Party shall be required to adopt any tax, assessment, fee or charge under any circumstances.

7.5 **Accounts and Reports.** The Treasurer shall establish and maintain such funds and accounts as may be required by good accounting practice or by any provision of any trust agreement entered into with respect to the proceeds of any bonds issued by the Authority. The books and records of the Authority in the hands of the Treasurer shall be open to inspection and duplication at all reasonable times by duly appointed representatives of the Parties. The Treasurer, within 180 days after the close of each fiscal year, shall give a complete written report of all financial activities for such fiscal year to the Parties.

7.6 **Funds.** The Treasurer shall receive, have custody of and/or disburse Authority funds in accordance with the laws applicable to public agencies and generally accepted accounting practices, and shall make the disbursements required by this Agreement in order to carry out any of the purposes of this Agreement.

8. WITHDRAWAL AND TERMINATION

8.1 Withdrawal

8.1.1 Withdrawal by Parties. Any Party may withdraw its membership in the Authority, effective as of the beginning of the Authority's fiscal year, by giving no less than 180 days advance written notice of its election to do so, which notice shall be given to the Authority and each Party. Withdrawal of a Party shall require an affirmative vote of the Party's governing board.

8.1.2 Amendment. Notwithstanding Section 8.1.1 (Withdrawal by Parties) of this Agreement, a Party may withdraw its membership in the Authority upon approval and execution of an amendment to this Agreement provided that the requirements of this Section 8.1.2 are strictly followed. A Party shall be deemed to have withdrawn its membership in the Authority effective 180 days after the Board approves an amendment to this Agreement if the Director representing such Party has provided notice to the other Directors immediately preceding the Board's vote of the Party's intention to withdraw its membership in the Authority should the amendment be approved by the Board.

8.1.3 Continuing Liability; Further Assurances. A Party that withdraws its membership in the Authority may be subject to certain continuing liabilities, as described in Section 8.4 (Continuing Liability; Refund) of this Agreement, including, but not limited to, Power Purchase Agreements. The withdrawing Party and the Authority shall execute and deliver all further instruments and documents, and take any further action that may be reasonably necessary, as determined by the Board, to effectuate the orderly withdrawal of such Party from membership in the Authority. The Operating Policies and Procedures shall prescribe the rights if any of a withdrawn Party to continue to participate in those Board discussions and decisions affecting customers of the CCA Program that reside or do business within the jurisdiction of the Party.

8.2 Involuntary Termination. This Agreement may be terminated with respect to a Party for material non-compliance with provisions of this Agreement or the Authority Documents upon an affirmative vote of the Board in which the minimum percentage vote and percentage voting shares, as described in Section 4.10 (Board Voting) of this Agreement, shall be no less than 67% excluding the vote and voting shares of the Party subject to possible termination. Prior to any vote to terminate this Agreement with respect to a Party, written notice of the proposed termination and the reason(s) for such termination shall be delivered to the Party whose termination is proposed at least 30 days prior to the regular Board meeting at which such matter shall first be discussed as an agenda item. The written notice of proposed termination shall specify the particular provisions of this Agreement or the Authority Documents that the Party has

allegedly violated. The Party subject to possible termination shall have the opportunity at the next regular Board meeting to respond to any reasons and allegations that may be cited as a basis for termination prior to a vote regarding termination. A Party that has had its membership in the Authority terminated may be subject to certain continuing liabilities, as described in Section 8.4 (Continuing Liability; Refund) of this Agreement. In the event that the Authority decides to not implement the CCA Program, the minimum percentage vote of 67% shall be conducted in accordance with Section 4.10 (Board Voting) of this Agreement.

- 8.3 **Mutual Termination.** This Agreement may be terminated by mutual agreement of all the Parties; provided, however, the foregoing shall not be construed as limiting the rights of a Party to withdraw its membership in the Authority, and thus terminate this Agreement with respect to such withdrawing Party, as described in Section 8.1 (Withdrawal) of this Agreement.
- 8.4 **Continuing Liability; Refund.** Upon a withdrawal or involuntary termination of a Party, the Party shall remain responsible for any claims, demands, damages, or liabilities arising from the Party's membership in the Authority through the date of its withdrawal or involuntary termination, it being agreed that the Party shall not be responsible for any claims, demands, damages, or liabilities arising after the date of the Party's withdrawal or involuntary termination. In addition, such Party also shall be responsible for any costs or obligations associated with the Party's participation in any program in accordance with the provisions of any agreements relating to such program provided such costs or obligations were incurred prior to the withdrawal of the Party. The Authority may withhold funds otherwise owing to the Party or may require the Party to deposit sufficient funds with the Authority, as reasonably determined by the Authority, to cover the Party's liability for the costs described above. Any amount of the Party's funds held on deposit with the Authority above that which is required to pay any liabilities or obligations shall be returned to the Party.
- 8.5 **Disposition of Authority Assets.** Upon termination of this Agreement and dissolution of the Authority by all Parties, and after payment of all obligations of the Authority, the Board:
- 8.5.1 May sell or liquidate Authority property; and
 - 8.5.2 Shall distribute assets to Parties in proportion to the contributions made by the existing Parties.

Any assets provided by a Party to the Authority shall remain the asset of that Party and shall not be subject to distribution under this section.

9. MISCELLANEOUS PROVISIONS

- 9.1 **Dispute Resolution.** The Parties and the Authority shall make reasonable efforts to settle all disputes arising out of or in connection with this Agreement. Before exercising any remedy provided by law, a Party or the Parties and the Authority

shall engage in nonbinding mediation or arbitration in the manner agreed upon by the Party or Parties and the Authority. The Parties agree that each Party may specifically enforce this section 9.1 (Dispute Resolution). In the event that nonbinding mediation or arbitration is not initiated or does not result in the settlement of a dispute within 60 days after the demand for mediation or arbitration is made, any Party and the Authority may pursue any remedies provided by law.

9.2 **Liability of Directors, Officers, and Employees.** The Directors, officers, and employees of the Authority shall use ordinary care and reasonable diligence in the exercise of their powers and in the performance of their duties pursuant to this Agreement. No current or former Director, officer, or employee will be responsible for any act or omission by another Director, officer, or employee. The Authority shall defend, indemnify and hold harmless the individual current and former Directors, officers, and employees for any acts or omissions in the scope of their employment or duties in the manner provided by Government Code Section 995 et seq. Nothing in this section shall be construed to limit the defenses available under the law, to the Parties, the Authority, or its Directors, officers, or employees.

9.3 **Indemnification of Parties.** The Authority shall acquire such insurance coverage as is necessary to protect the interests of the Authority, the Parties and the public. The Authority shall defend, indemnify and hold harmless the Parties and each of their respective governing board members, officers, agents and employees, from any and all claims, losses, damages, costs, injuries and liabilities of every kind arising directly or indirectly from the conduct, activities, operations, acts and omissions of the Authority under this Agreement.

9.4 **Notices.** Any notice required or permitted to be made hereunder shall be in writing and shall be delivered in the manner prescribed herein at the principal place of business of each Party. The Parties may give notice by (1) personal delivery; (2) e-mail; (3) U.S. Mail, first class postage prepaid, or a faster delivery method; or (3) by any other method deemed appropriate by the Board.

Upon providing written notice to all Parties, any Party may change the designated address or e-mail for receiving notice.

All written notices or correspondence sent in the described manner will be deemed given to a party on whichever date occurs earliest: (1) the date of personal delivery; (2) the third business day following deposit in the U.S. mail, when sent by “first class” mail; or (3) the date of transmission, when sent by e-mail or facsimile.

9.5 **Successors.** This Agreement shall be binding upon and shall inure to the benefit of the successors of each Party.

LOS ANGELES COMMUNITY CHOICE ENERGY – JOINT POWERS AGREEMENT

- 9.6 **Assignment.** Except as otherwise expressly provided in this Agreement, the rights and duties of the Parties may not be assigned or delegated without the advance written consent of all of the other Parties, and any attempt to assign or delegate such rights or duties in contravention of this Section 9.6 shall be null and void. This Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the Parties. This Section 9.6 does not prohibit a Party from entering into an independent agreement with another agency, person, or entity regarding the financing of that Party's contributions to the Authority, or the disposition of the proceeds which that Party receives under this Agreement, so long as such independent agreement does not affect, or purport to affect, the rights and duties of the Authority or the Parties under this Agreement.
- 9.7 **Severability.** If any one or more of the terms, provisions, promises, covenants, or conditions of this Agreement were adjudged invalid or void by a court of competent jurisdiction, each and all of the remaining terms, provisions, promises, covenants, and conditions of this Agreement shall not be affected thereby and shall remain in full force and effect to the maximum extent permitted by law.
- 9.8 **Governing Law.** This Agreement is made and to be performed in the State of California, and as such California substantive and procedural law shall apply.
- 9.9 **Headings.** The section headings herein are for convenience only and are not to be construed as modifying or governing the language of this Agreement.
- 9.10 **Counterparts.** This Agreement may be executed in any number of counterparts, and upon execution by all Parties, each executed counterpart shall have the same force and effect as an original instrument and as if all Parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon, and may be attached to another counterpart of this Agreement identical in form hereto but having attached to it one or more signature pages.

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LOS ANGELES COMMUNITY CHOICE ENERGY – JOINT POWERS AGREEMENT

CITY OF _____

By: _____
Mayor

ATTEST:

By: _____
City Clerk

Attachment

Liability Analysis by Scott H. Howard of Counsel
Colantuono, Highsmith & Whatley, PC

Louis Celaya

From: John Bingham <jbingham@cityofcalabasas.com>
Sent: Thursday, August 10, 2017 1:49 PM
To: Gary Gero
Subject: FW: liability risk analysis to member of LACCE

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Gary, here is the analysis from City Attorney Scott Howard:

John Bingham, IPMA-SCP
Administrative Services Manager
City of Calabasas
100 Civic Center Way
Calabasas, CA 91302
(818) 224-1663

From: Scott H. Howard [mailto:showard@chwlaw.us]
Sent: Thursday, August 10, 2017 1:43 PM
To: John Bingham
Subject: liability risk analysis to member of LACCE

Honorable Mayor & Council:

On August 4 an organization titled California Alliance for Community Energy (hereafter "Alliance") distributed a letter raising concerns about the Los Angeles County Community Choice Energy (LACCE) implementation plan, budget, and risk to member municipalities, among other things. They contend that the Joint Powers Authority (JPA) structure does not shield the city from liability as a result of misfeasance or malfeasance committed by the JPA, its individual board members, or JPA staff. The Alliance requested that LACCE retain independent counsel to assess the risks for member municipalities.

The focus of the Alliance's concerns seems to be that mismanagement by staff or the JPA could result in an unlawful rate structure or other risks which could be the basis for liability against the JPA (ostensibly for refunds or prospective relief), and that the JPA cannot shield its individual municipal members from resulting liability for any loss, costs, or damages. As will be seen from the following, the liability risk to the member municipalities, from a legal perspective, is no greater than it would be with any JPA of which a city is a member.

ANALYSIS

Generally, individual members of a JPA may be jointly and severally liable for the tortious acts or omissions of a JPA of which they are members (Government Code 895.2). However, the JPA may include provisions for contribution or indemnity by any or all public entities to the agreement in any proportion they choose (Government Code sec. 895.4). These twin provisions have been interpreted to apply to claims under tort liability.

Further, even if a city were to be subject to liability for a tortious act or omission, cities do not lose any of their governmental immunities by joining together to form or become a member of a JPA (Gov't Code sec. 6513).

In the case of the LACCE, the JPA language is clear (although the Alliance appears to have possibly conflated the JPA language with a recently adopted MOU). Section 9.3 "Indemnification of Parties" provides "The Authority shall acquire

such insurance coverage as is necessary to protect the interests of the Authority, the parties and the public. The Authority shall defend, indemnify and hold harmless the Parties and each of their respective governing board members, officers, agents and employees, from any and all claims, losses, damages, costs, injuries and liabilities of every kind arising directly or indirectly from the conduct, activities, operations, acts and omissions of the Authority under this Agreement". This provision effectively shifts all tort risk initially to the JPA, the cities only being potentially responsible for any judgment to the extent the JPA or its insurer(s) cannot pay all or a portion of a judgment. As it pertains to tort liability covered by liability or E & O insurance, absent woefully inadequate limits of insurance, an unlikely scenario. Finally, as seen from the following paragraphs, tort liability risk is further limited.

The recently approved MOU between the County and LACCE (August 4, 2017) does not increase risk for city members of the JPA. The MOU is necessary to memorialize the initial interest free \$10M loan from the County to the JPA (an agreement is required by the JPA; see sec. 7.3.2) and the temporary use of County staff to provide services for the JPA (see Section 3, Funding). Section 7.3.2 of the JPA expressly provides that should the CCA program not become operational, the County will not be entitled to any reimbursement of the initial costs. If the program becomes operational, the initial costs are to be repaid through any loan the JPA obtains from the financial market (expected by end of FY 2018; MOU-sec. 3b).

The JPA wisely also addresses debts, liabilities and obligations of the JPA, which unless otherwise stated become debts, etc. of the parties to the JPA (see Gov't Code sec. 6508.1).

Section 3.5 of the JPA "**Obligations of the Authority**" specifically provides that the debts, liabilities, and obligations of the Authority shall not be the debts, liabilities and obligations of the Parties unless the governing body of a Part agrees in writing to assume any of the debts, etc.

The Alliance cites *Tucker Land Company v. State* (2001) 94 Cal. App.4th 1191 seemingly in agreement that exculpatory language in a JPA CAN (emphasis added) provide protections for parties to a JPA. *Tucker* involved a rather convoluted foreclosure/ property acquisition action and dispute between the MRCA and a holder of a preexisting note and the continuing validity thereof. The note holder sought payment on the note from MRCA and the parties to the Joint Powers Agreement creating and administering the MRCA, the latter claims based on an alter ego theory.. The court affirmed dismissal of the action finding that parties to a JPA can be insulated from liability for actions of the JPA IF the JPA has language similar to section 3.5 of the LACCE JPA. There is some dicta in *Tucker* which intimates that an alter ego theory may be viable if a fraud were perpetrated by the MRCA and its members. However, this issue was not squarely addressed and continues to be an open question.

To further support their position that there may be some liability risk, the Alliance notes that one cannot avoid or shift liability for willful misconduct, fraud or a violation of law, whether negligent or intentional (Civil Code secs. 1668 and 3513). However, the risk shifting limits outlined in section 1668 have been narrowly construed to apply to adhesion contracts (*Tunkl v. Board of Regents* (63)-60 Cal.2d 92 -requiring emergency room patients to waive future negligence (malpractice) is unconscionable and against public policy due to the unequal bargaining position of the patient), and to violations of a statute which was enacted to protect the public interest.

In addition, public agencies (JPA and cities) enjoy many immunities from liability, including for example, absolute immunity for negligent or intentional misrepresentation (Gov't Code sec. 818.8 – see *Nuveen Municipal High Income Opportunity Fund v. City of Alameda* (2013) 730 F.2d 1111 (9th Cir.) – investors sue city for alleged common law securities violations involving issuing bonds for cable system; held, city is immune from liability under Gov't Code 818.8. However cf. *Bernard Osher Trust DTD v. City of Alameda* (2009) unpublished Dist. Ct, N.D. Ca. – where securities law expressly imposes liability on a person or government agency, the Government Code immunities may not be applicable). This particular immunity, although one of many, is of some importance in the context of the risk contentions raised by the Alliance in that contextually it would apply to a number of their asserted basis for liability. The immunity afforded by section 818.8 has been broadly construed and applies to miscalculations (*Jopson v. Feather River Air Quality Mgmt Dist* (2003) 108 Cal. App.4th 492 ; common law fraud (*Burden v. County of Santa Clara* (81 Cal. App.4th 244); and suppression of facts (*Harshbarger v. City of Colton* (88) 197 Cal. App. 3rd 1335. *Harshbarger* further notes that a public entity is wholly immune for actual fraud, corruption or the actual malice of an employee (although an employee may not likewise

enjoy such complete immunity, *Harshbarger* @pg. 1345). Further, Civil Code section 1668 which is applicable to more than just public agencies, additionally runs headlong into the presumption that official duties are regularly performed (Evidence Code sec. 664). This presumption applies to claims of willful misconduct by public officials (see *Ellis Landing & Dock Co. v. City of Richmond et al* (1925) 70 Cal. App. 720- it is presumed that city council will not attempt to willfully violate the law).

Examples provided by the Alliance of possible liability for inaccurate information contained in the implementation plan, budget forecasts, financial strategies, and timing and magnitude of customer phase in, are the types of action which would fall squarely into the protection afforded by section 818.8 (and other possibly other immunities), and the presumption that official duties are regularly performed.

To be sure, membership in ANY JPA carries a degree of risk. For example, while many immunities exist to shield agency liability, statutes which impose a mandatory duty may escape some immunities and leave open the narrow possibility that legal action can in the first instance overcome a demurrer or motion to dismiss. However, on balance, most risk is attenuated and effectively minimized through insurance for tort liability (both through third party contractors and the insurance to be procured by the JPA) and the JPA's declaration that its contractual debts are not the debts or obligations of the parties. While willful misconduct cannot usually be insured against nor can the JPA fully insulate a party to the JPA for the JPA's willful misconduct, immunities and presumptions go a long way to creating a high bar for anyone seeking to "pierce" the JPA and seek compensation from the parties to the JPA.

Lastly, one must also assess risk in the context of the mission of the JPA. The following may be simplistic, but boiled down to its essentials, the LACCE will be an energy provider. At least under its current plan, the JPA will not own infrastructure or generating facilities (although if a generating facility is acquired or constructed, risk can be addressed through an assessment of the adequacy of insurance limits including whether excess liability coverage should be increased or added). Its mission is to acquire mixes of electrical energy from various sources and provide the electricity at various rates to the public. Its risks then appear to spring from the JPA establishing rates (are the rates lawfully and properly established), possibly power outages (causation and damage), and contractual disputes.

CONCLUSION

Based on the foregoing, in the final analysis, risks to the parties to this JPA are minimal and attenuated by the language in the JPA, and immunities and presumptions available to public agencies.

Scott H. Howard

Of Counsel

Colantuono, Highsmith & Whatley, PC

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(The full document is available for review in the Office of the City Clerk, 30001 Ladyface Court, Agoura Hills, CA, and on the City's website at www.ci.agoura-hills.ca.us under the October 25, 2017, City Council Meeting)

Attachment

County of Los Angeles Community Choice Energy
Business Plan – June 30, 2016

County of Los Angeles

County of Los Angeles Community Choice Energy

Business Plan

June 30, 2016

Prepared by:

EES Consulting, Inc.

A registered professional engineering and
management consulting firm

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June 30, 2016

Mr. Howard Choy
County of Los Angeles
Energy Management Division
1100 N. Eastern Avenue
Los Angeles, CA 90063

SUBJECT: County of Los Angeles Community Choice Energy (LACCE) Business Plan

Dear Mr. Choy:

Please find attached EES Consulting, Inc.'s (EES) Community Choice Energy Business Plan (Plan) for the County of Los Angeles (County). This Plan represents the work product of EES and Bki in evaluating the prudence of implementing a Community Choice Energy organization for the County.

We want to thank you and your staff for your assistance in preparing this Plan. It has been a pleasure working with you on this project.

Please contact me directly if there are questions or if we may be of any further assistance.

Very truly yours,

A handwritten signature in cursive script that reads "Gary S. Saleba".

Gary Saleba
President

570 Kirkland Way, Suite 100
Kirkland, Washington 98033

Telephone: 425 889-2700 Facsimile: 425 889-2725
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A registered professional engineering and management services corporation

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Los Angeles Community Choice Energy (LACCE)

GARY GERO, CHIEF SUSTAINABILITY OFFICER
COUNTY OF LOS ANGELES

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Los Angeles Community Choice Energy Overview

- 1. What is a CCA?**
- 2. CCA Benefits:**
 - Customer Choice and Local Control
 - Rates
 - Greenhouse Gas Emissions
 - Economic Impacts
- 3. LACCE Business Plan and JPA Formation**
 - County and Cities together
 - LA County Board of Supervisors Adoption
- 4. JPA – Governance**
- 5. Risks and Risk Management**
- 5. Schedule for CCA in L.A. County**
- 6. Next Steps for Cities**

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Los Angeles Community Choice Energy

CCA Benefits: Customer Choice and Local Control

Customer Choice

- CCAs offer customers new options (CCA rate offerings), without removing old options (SCE)
- Having both CCA and SCE products gives customers choice
- Customers may opt out of the CCA at any time and return to SCE

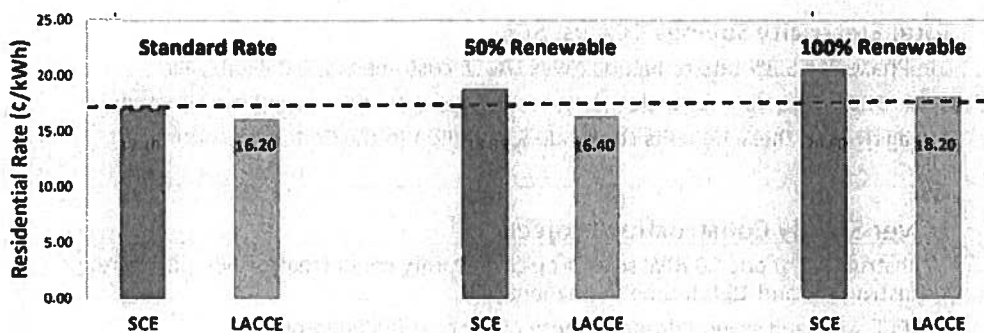
Local Control

- CCAs enable communities to invest locally; instead of sending money to SCE, CCA revenues can be reinvested in the local community
- CCAs have total local control over their power supply, rates, and customer programs (e.g., energy efficiency, solar incentives, EV incentives, etc.)

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Los Angeles Community Choice Energy

LACCE Benefits: Rate Savings



- Rates are taken from the LACCE Business Plan
- LACCE rates include considerable financial reserve

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LA County Board of Supervisors

LACCE Business Plan

- **LA County Board of Supervisors approved a motion in March 2015 asking staff to conduct a CCA feasibility study for LA County**
- **Report completed in June 2016**
- **LACCE Feasibility Study/Business Plan**
 - Includes all eligible cities in LA County
 - Financially viable
 - Cheaper and greener power than SCE
 - Considerable environmental and economic benefits

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LA County Board of Supervisors

Board Direction: Cities and County Together

- **September 27, 2016 Board of Supervisors Motion:**
 - Following Feasibility Study, Board said like the idea but wanted to work together with cities to craft a regional program.
 - Directed that staff negotiate a JPA with interested cities to create a joint cities-county program
 - Ensure equitable representation for all cities
 - Model after existing, successful CCAs in northern California (Marin, Sonoma, San Mateo)
- **JPA Process: December 2016 – March 2017**
 - Bi-weekly meetings with interested cities
 - Two public workshops to get input from the community and stakeholders
 - Public review and comment on draft final JPA
 - Negotiations completed at the end of March
 - BOS approval on April 18, 2017

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Los Angeles Community Choice Energy Joint Powers Agreement

• LACCE Standing Committees

- Executive Committee
- Finance Committee
- Community Advisory Committee

• Directors and Alternates

- Primary Directors must be an elected official of that city
- City's may appoint two Alternate Directors, who may be:
 - Another elected official
 - An appointed official (Commissioners)
 - A city staff person
 - Member of the public with industry expertise

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Los Angeles Community Choice Energy Risks and Risk Management

• The primary risk in forming LACCE is that it will be unable to stay competitive with SoCal Edison, which could be caused by:

- Sudden and unfavorable changes to the energy market
- High customer opt-out rate
- Unreasonable costs imposed by SCE
- New California State laws or regulations

• Risk Management

- Diverse power portfolio with varied power sources
- Sound fiscal policies and rate stabilization plan to remain competitive
- Engagement with the State agencies and State elected officials

• The LACCE Business Plan concludes that there are no reasonable set of risk-related circumstances that would harm the ability of LACCE to be competitive with SCE

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Los Angeles Community Choice Energy

Next Steps for Cities

1. Adopt enabling ordinance and JPA agreement
2. Designate Board Director and alternate(s)
3. Evaluate your constituents' priorities for services and programs
4. Assist with public outreach and noticing

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Los Angeles Community Choice Energy

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More information/documents can be found at:
lacounty.gov/sustainability

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