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February 21, 2019

REPORT TO CITY COUNCILMEMBERS

LEGAL ANALYSIS OF PROPOSED CONDITIONS FOR A COMMUNITY CHOICE AGGREGATION PROGRAM

INTRODUCTION

On February 25, 2019, the City Council (Council) will consider a resolution that expresses the City's desire to pursue a Community Choice Aggregation (CCA) program through a regionally-formed Joint Powers Authority (JPA) to provide electric commodity service. The Environment Committee (Committee) previously considered this matter on January 28, 2019. At the Committee hearing, a group named San Diego Community Choice Alliance (Alliance) presented a letter listing 15 points that it urged the City to include as conditions for adopting a CCA program (Attachment A). The Committee voted to refer the item to the full Council without a recommendation, and requested that staff separately analyze the Alliance's 15 points and report on those recommendations when the item is heard by the full Council.

This Report addresses Point No. 10, concerning a Project Labor Agreement (PLA) requirement, and Point No. 13, concerning a prevailing wage requirement. Mayoral staff will address the other thirteen points.

QUESTION PRESENTED

What are the Council's options with respect to incorporating a PLA or prevailing wage requirement in the resolution being considered on February 25, 2019?

SHORT ANSWER

Because the resolution before the Council merely expresses guiding principles for the formation of a JPA, and does not concern any particular agreement or construction project, it is premature to include PLA and prevailing wage requirements. In order to survive legal challenge, PLA and prevailing wage requirements may only be applied to a project after a fact-specific analysis is performed to ensure that the requirements will have a project benefit. This analysis cannot be performed until the specifics of a project are known. However, nothing prevents the Council from including language in the resolution that encourages or promotes the use of PLAs and prevailing wages on CCA-related projects.

BACKGROUND

California Assembly Bill 117, adopted in 2002, allows local governments to administer CCA programs to sell electricity to retail customers in their jurisdictions. The goal of CCA is to offer customers a choice of a non-utility electricity supplier, and at the same time allow for procurement of renewable energy at a reasonable cost, to meet state and local objectives. Local governments may provide CCA service either alone or by joining with other jurisdictions under the Joint Powers Authority Act. Cal. Gov't Code §§ 6500, *et seq.*

In July 2017, the City commissioned a study to analyze the feasibility of implementing a CCA program in San Diego. Following the study, the City retained MRW & Associates to draft a CCA Business Plan, which it issued on October 22, 2018 (CCA Business Plan).

The action currently before the Council is a resolution of intent, which: (1) accepts and adopts the CCA Business Plan, (2) expresses the City's desire to pursue a CCA program through a JPA, and (3) provides direction to the Mayor for negotiating terms of the JPA agreement. The resolution does not formally adopt a CCA program or approve a JPA agreement. In order to form a CCA Program or approve a JPA agreement, the Council would later need to adopt two ordinances (or one ordinance with two essential parts): (1) establishing CCA service in the City pursuant to Public Utilities Code section 366.2, and (2) authorizing the City to become a member of a JPA on terms agreed to by all JPA members. The advertising and award of any construction projects related to CCA would not occur until after these steps have been taken.

While the proposed resolution directs the Mayor to advocate for the inclusion of the preferred points in the terms of a JPA agreement, the terms of the JPA can only be negotiated with other jurisdictions, and not imposed on other jurisdictions. Ultimately, the Council will approve the proposed JPA agreement. If certain points are not included or are substantially modified in a proposed JPA agreement, the Council will have options available to it, which include: (1) joining the JPA as negotiated, (2) instead electing to pursue CCA on its own, or (3) foregoing the CCA entirely.

ANALYSIS

I. WHILE PROJECT LABOR AGREEMENTS CANNOT BE MANDATED AT THIS STAGE, THE COUNCIL CAN RESOLVE TO ENCOURAGE THEIR USE ON FUTURE CCA-RELATED PROJECTS TO THE EXTENT LEGALLY PERMISSIBLE

Alliance Point No. 10 suggests that the City include the following provision in any action supporting the development of a CCA:

Requires that any CCA in the City of San Diego shall, for any electric generating projects that it will own, sign multi-craft Project Labor Agreements and Community Benefits Agreements (CBA) that include local investments and local hiring,¹ prioritizing communities of concern.

As discussed above, the action before the Council is the proposed adoption of a resolution of intent, which would allow the Mayor to pursue CCA through a regionally-formed JPA. The actual establishment of CCA service and joining of a regional JPA would require a separate Council action in the future. Although it is premature to mandate the program delivery terms of a proposed JPA, the Council could include language in the resolution of intent encouraging or promoting the use of PLAs and CBAs to the extent legally permissible.²

If a JPA is ultimately formed, several legal principles regarding PLAs must be kept in mind. For example, some potential JPA members may have their own municipal restrictions on the use of PLAs, and a JPA may only exercise powers that all its members have in common. Cal. Gov't Code § 6508.

Additionally, the JPA could not require PLAs in blanket fashion without knowing what construction projects, if any, the JPA might procure or when they may be procured. Public entities eligible to be members of a proposed San Diego CCA JPA are subject to competitive bidding requirements for public works construction contracts. *See* San Diego Charter § 94; Cal. Pub. Con. Code §§ 20100-20929. Where competitive bidding laws apply, PLAs can only be used if substantial evidence exists for an agency to find that the purposes of competitive bidding laws

¹ This Office has previously opined that local hire requirements are legally permissible under certain circumstances, but must be defined in manner that does not violate article IV, section 2, clause 1 of the U.S. Constitution (Privileges and Immunities Clause). *See* Report to Rules Committee entitled, "Local Hire Program: Legal Issues and Draft Ordinance," City Att'y Report 2010-15 (Apr. 22, 2010) (RC-2010-15); and Report to Council entitled, "Local Hire Program: Follow-Up Legal Analysis," City Att'y Report 2010-27 (July 7, 2010) (RC-2010-27).

² For example, the founding members of the Clean Power Alliance (formerly Los Angeles County Community Energy), which today consists of 31 agencies from Los Angeles and Ventura Counties, encouraged their CCA board to consider PLAs, CBAs, and prevailing wage requirements by including the following non-binding language in their Joint Powers Agreement:

By establishing the Authority, the Parties seek to:

(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 and trained 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).

are served by having a PLA on an identified project. *See Associated Builders and Contractors, Inc. Golden Gate Chapter v. San Francisco Airports Commission*, 24 Cal. 4th 352 (1999) (*ABC*). In the *ABC* case, the California Supreme Court held that “challenges to the imposition of project labor agreements as bid requirements will be reviewed, *on a case-by-case basis*, for consistency with the competitive bidding laws under the principles articulated in this opinion.” *Id.* at 376 (italics added). Under the principles articulated in the *ABC* decision, facts must exist to support a determination that a PLA requirement for the project is consistent with and serves the goals of the competitive bidding laws, which are to “secure the best work or supplies at the lowest price practicable . . . for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders.” *Id.* at 375 (citing *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 173 (1994)).

Therefore, to include PLA requirements in project contracts, the JPA board must evaluate each proposed CCA-owned electric generating project separately on its own facts, or find that interrelated projects present the same factual basis, to support a finding that a PLA requirement for the contract would serve a project benefit consistent with the purposes of competitive bidding laws and the principles of the *ABC* case.³

II. WHILE PREVAILING WAGES CANNOT BE MANDATED AT THIS STAGE, THE COUNCIL CAN RESOLVE TO ENCOURAGE THEIR APPLICATION TO FUTURE CCA-RELATED PROJECTS TO THE EXTENT LEGALLY PERMISSIBLE

Alliance Point No. 13 suggests that the City include the following provision in any action supporting the development of a CCA:

Requires that any developer that enters into a power purchase agreement with a CCA in the City of San Diego shall pay prevailing wage.

At this stage, it is premature to mandate the content of a proposed JPA when the participating parties have not been identified, no power purchase agreement (PPA) is being considered, and there is no construction project in front of the Council at this time. In addition, some PPAs may not require construction at all. There may be some generating plants that have already been built and prevailing wages cannot be imposed retroactively.⁴ At this point, however, the Council could include language in the proposed resolution of intent encouraging or promoting the payment of prevailing wages to the extent legally permissible.

³ See Memorandum of Law entitled, “Proposal to Apply State Prevailing Wage Laws to City Public Works Projects,” City Att’y MOL No. 2013-10 (Jun. 17, 2013).

⁴ At its inception, the CCA will need to demonstrate to the Public Utilities Commission that it has “Resource Adequacy” (as defined in Public Utilities Code section 380) to serve its customers. This will occur before the CCA is operational. Thus, all of the resources in its portfolio will need to be contracted from developed projects.

Depending on the facts, a developer that enters a PPA with a CCA in the City of San Diego may be legally required to pay prevailing wages. Existing law requires payment of prevailing wages for public work, as that term is defined. *See* Cal. Lab. Code §§ 1720-1861. For example, prevailing wages must be paid when a JPA enters a PPA with a public entity for construction work, and the work is “paid for all or in part with public funds.” Cal. Lab. Code §§ 1720, 1771.

Prevailing wages are also required for private generating plant projects under certain factual criteria. *See* Cal. Lab. Code § 1720.6 (requiring prevailing wages when a public entity has a PPA for more than 50% of a private renewable project’s capacity). This Office cannot evaluate whether prevailing wages would be required without specific facts, such as whether the PPA involves any construction work, whether the counterparty is a public or private entity, whether the generating plant for the PPA is located on public or private property, whether any part of the property is owned or leased by the CCA, and what percentage of the capacity of the generating facility is subject to the PPA.

Where prevailing wages are not required by law for private projects not yet built, a JPA could require payment of equivalent wages by contract. However, whether to require payment of prevailing wages not otherwise required by law should be evaluated on a case-by-case basis. Various factors should be considered, including whether evidence exists that the payment of prevailing wages by a private contractor for private work would serve a project benefit in accordance with the *ABC* case.⁵

CONCLUSION

In order to survive legal challenge, PLA and prevailing wage requirements must undergo a fact-specific analysis, which cannot be done at this stage because the Council is not considering a specific construction project. However, nothing prohibits the Council from including language in a resolution that encourages or promotes the use of PLAs and prevailing wages on CCA-related projects to the extent legally permissible.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Frederick M. Ortlieb
Frederick M. Ortlieb
Deputy City Attorney

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Attachment
RC-2019-2
Doc. No. 1936059.docx

⁵ Another issue to be considered is the resources required to enforce prevailing wage requirements. *See* Miscellaneous Memorandum entitled, “Prevailing Wage Compliance on Affordable Housing Projects,” City Att’y MS 2019-4 (Feb. 5, 2019).



Environment Committee Chair Dr. Jennifer Campbell & Committee Members
 City of San Diego
 202 C Street
 San Diego, CA 92101
 January 23, 2019

Dear Chair Dr. Campbell and Committee Members,

On behalf of the undersigned environmental, community, labor, business, and climate and environmental justice organizations representing thousands of residents and businesses throughout the San Diego region, we write to support the City of San Diego in moving forward with a Community Choice Aggregation (CCA) program under a Joint Powers Authority (JPA) that includes the following provisions and request that the Environment Committee moves to incorporate them, in no order of priority, in any City Resolution, Ordinance, policy documents, or other actions supporting the development of a CCA:

1. Accepts the feasibility conclusions of the CCA Business Plan report by MRW and Associates dated October 22, 2018, on file at the City Clerk as Document No. _____;
2. Adopts the JPA pathway as the City's preferred approach to be further pursued;
3. Requires the Mayor or his designee to provide regular reports and updates to the Environment Committee and full City Council regarding JPA discussions and all other CCA matters;
4. Authorizes the Mayor or his designee to commence discussions and negotiations with local governments in the San Diego region for the purpose of exploring the interest and viability of creating a San Diego Regional CCA JPA with the intent to submit the necessary formation documents to the California Public Utilities Commission by December 31, 2019;
5. In order to protect ratepayers and ensure fiscal responsibility any CCA program in the City of San Diego shall ensure rates that are competitive with the incumbent utility.
6. Require opportunities for public participation and input as a JPA is developed.
7. By the end of the first year of the CCA's formation, the JPA shall develop a Strategic Plan for the development, procurement and integration of renewable energy resources that will foster meaningful and equitable environmental and economic benefits in the San Diego region.

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8. Ensures that any CCA program shall not procure energy from Category 2 or 3 energy resources as defined under the RPS and exclude coal and nuclear energy;
9. Pursues purposeful and focused investment in communities of concern, prioritization of local renewable power and workforce development, and policies and programs centered on economic, environmental and social equity;
10. Requires that any CCA in the City of San Diego shall, for any electric generating projects that it will own, sign multi-craft Project Labor Agreements and Community Benefits Agreements (CBA) that include local investments and local hiring, prioritizing communities of concern.
11. Requires that any CCA in the City of San Diego shall send at least three (3) written notices to potential customers, and each notice will include a description of the percentage of the power mix that comes from California solar, wind, geothermal, small hydro-electric or other state certified eligible renewable energy resources.
12. Requires that any CCA in the City of San Diego shall agree in writing to neutrality in the event employees or contractor employees wish to unionize.
13. Requires that any developer that enters into a power purchase agreement with a CCA in the City of San Diego shall pay prevailing wage.
14. Requires that any city or county that joins the CCA JPA shall adhere to the above provisions and these provisions will be included in any Resolutions adopted by the City Council;
15. Requires the Mayor or his designee to represent and advocate for the principles outlined above in discussions with other cities related to creating a JPA.

The City is at a key decision-making moment in ensuring that any CCA program in San Diego reflects the values of the residents and businesses it serves, and it is therefore imperative to establish a policy framework as the basis for JPA negotiations. The above provisions are critical to ensuring a transparent public process that provides opportunities for public participation and input to deliver a CCA program that prioritizes and fosters equity, creates and protects good, middle-class careers for working families, delivers cleaner energy at competitive rates, and addresses our climate crisis.

Thank you,

Signed--

San Diego Community Choice Alliance

Alliance San Diego

Business for Good San Diego

California Nurses Association

Center on Policy Initiatives

Climate Action Campaign

Environmental Health Coalition

Greenpower

GRID Alternatives San Diego

Protect Our Communities

San Diego 350

San Diego Energy District

Sullivan Solar Power

The AFT Guild Local 1931

United Domestic Workers Local 3930

International Brotherhood of Electrical Workers Local 569

Sierra Club

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