STATE OF CALIFORNIA — Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: May 23, 2011

To: The Commission
(Meeting of May 26, 2011)

From: Edward Randolph, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **AB 976 (Hall) – Public contracts: consulting services: community choice aggregators.**
As amended: April 25, 2011.

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: OPPOSE

SUMMARY OF BILL:

As amended, AB 976 adds Section 1090.2 to the Government Code and would prohibit any person or firm that has been awarded a contract for consulting services to advise a public entity on the feasibility of creating a community choice aggregator from bidding for or being awarded a contract for any work which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.

SUMMARY OF SUGGESTED AMENDMENTS:

None.

DIVISION ANALYSIS:

AB 976 would limit the ability of a potential Community Choice Aggregator (CCA) to contract for services from qualified companies that can provide accurate information to the potential CCA on the feasibility and cost and benefits of creating a CCA that could also provide future services to the CCA once it is created. There are a limited number of qualified individuals and companies that can provide the consulting services and then the procurement services needed to create and operate a CCA. The outright prohibition on providing both consulting and procurement servers in this bill would have the impact of stymieing the development of CCAs by limiting the ability of potential CCAs to seek expert advice and/or operational support.

The bill states that it is declaratory of existing law. However, the only law that we have been able to find that contains such a provision is Public Contract Code section 10365.5, which applies only to *state* agencies. Section 10365.5 appears in Article 4, of Chapter 2, of Part 2 of Division 2 of the Public Contract Code. Article 4 begins with Section 10335. Subdivision (a) of that section states: "This article shall apply to all contracts, including amendments, entered into by any *state* agency for services . . ." (emphasis added).

Accordingly, it seems that this bill, which applies only to *local* agencies wishing to create a CCA, is *not* declarative of existing law. If it is declarative of existing law, it is unclear why this section is needed. If it is not declarative of existing law, as we believe, then it appears that this bill is intended to impose a more stringent standard on CCAs than is currently imposed by Government Code section 1090 which prohibit local government officials from having a financial interest in an contract made by them in their official capacity.. The Attorney General has opined that section 1090 does apply to independent contractors who perform a public function, even on a temporary basis, (see 46 Ops. Cal. Atty. Gen. 74 (1965)) and thus should apply to consultants who advise a public entity on the feasibility of creating a community choice aggregator. There may be no need to impose a more stringent standard on CCAs.

PROGRAM BACKGROUND:

None.

LEGISLATIVE HISTORY:

None.

FISCAL IMPACT:

None.

STATUS:

AB 976 (Hall) is currently pending a vote on the Assembly floor.

SUPPORT/OPPOSITION:

None on file.

STAFF CONTACTS:

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BILL LANGUAGE:

BILL NUMBER: AB 976 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY APRIL 25, 2011

INTRODUCED BY Assembly Member Hall

FEBRUARY 18, 2011

~~An act to amend Section 366.2 of the Public Utilities Code, relating to electricity.~~ *An act to add Section 1090.2 to the Government Code, relating to public contracts.*

LEGISLATIVE COUNSEL'S DIGEST

AB 976, as amended, Hall. ~~Electricity: community choice aggregation.~~ *Public contracts: consulting services: community choice aggregators.*

Existing law prohibits a person, firm, or subsidiary thereof, which has been awarded a consulting services contract from submitting a bid for, or being awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract, except as specified.

This bill would also prohibit a person, firm, or subsidiary thereof, which has been awarded a consulting services contract for advising a public entity on the feasibility of creating a community choice aggregator, as defined, from submitting a bid for, or being awarded a contract for any work including the procurement of electric supply and renewable energy credits, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.

The bill would also specify that this provision is declaratory of existing law.

By imposing new restrictions on local government entities with respect to their contract procedures, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

~~Under existing law, the Public Utilities Commission has regulatory authority over public utilities, including electrical corporations, as defined. Existing law authorizes a community choice aggregator to aggregate the electrical load of interested electricity consumers within its boundaries and requires a community choice aggregator to~~

~~file an implementation plan with the commission. Existing law establishes various steps to be undertaken before a community choice aggregator may begin to provide electric service, including notifying the electrical corporation that it will commence providing community choice electric service within 30 days.~~

~~This bill would prohibit a community choice aggregator from procuring electricity or energy services from any entity that provided any analysis, advice, consultation or other services to the community choice aggregator prior to it providing notice to the electrical corporation that it will commence providing community choice electric service within 30 days.~~

~~Under existing law, every person who violates any provision of the Public Utilities Act is guilty of a crime.~~

~~Because the prohibitions of this bill are in the act, a violation of these provisions would impose a state-mandated local program by creating a new crime.~~

~~The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.~~

~~This bill would provide that no reimbursement is required by this act for a specified reason.~~

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1090.2 is added to the Government Code , to read:

1090.2. No person, firm, or subsidiary thereof that has been awarded a consulting services contract to advise a public entity on the feasibility of creating a community choice aggregator, as defined in Sections 331.1 and 366.2 of the Public Utilities Code, may submit a bid for, or be awarded a contract for, any work including the procurement of electric supply and renewable energy credits, or any other related action which is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract.

SEC. 2. Section 1 of this act is declaratory of existing law.

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

~~SECTION 1. Section 366.2 of the Public Utilities Code is amended to read:~~

~~366.2. (a) (1) Customers shall be entitled to aggregate their electric loads as members of their local community with community choice aggregators.~~

~~(2) Customers may aggregate their loads through a public process with community choice aggregators, if each customer is given an opportunity to opt out of their community's aggregation program.~~

~~(3) If a customer opts out of a community choice aggregator's program, or has no community choice program available, that customer~~

~~shall have the right to continue to be served by the existing electrical corporation or its successor in interest.~~

~~(b) If a public agency seeks to serve as a community choice aggregator, it shall offer the opportunity to purchase electricity to all residential customers within its jurisdiction.~~

~~(c) (1) Notwithstanding Section 366, a community choice aggregator is hereby authorized to aggregate the electrical load of interested electricity consumers within its boundaries to reduce transaction costs to consumers, provide consumer protections, and leverage the negotiation of contracts. However, the community choice aggregator may not aggregate electrical load if that load is served by a local publicly owned electric utility. A community choice aggregator may group retail electricity customers to solicit bids, broker, and contract for electricity and energy services for those customers. The community choice aggregator may enter into agreements for services to facilitate the sale and purchase of electricity and other related services. Those service agreements may be entered into by a single city or county, a city and county, or by a group of cities, cities and counties, or counties.~~

~~(2) Under community choice aggregation, customer participation may not require a positive written declaration, but all customers shall be informed of their right to opt out of the community choice aggregation program. If no negative declaration is made by a customer, that customer shall be served through the community choice aggregation program.~~

~~(3) A community choice aggregator establishing electrical load aggregation pursuant to this section shall develop an implementation plan detailing the process and consequences of aggregation. The implementation plan, and any subsequent changes to it, shall be considered and adopted at a duly noticed public hearing. The implementation plan shall contain all of the following:~~

~~(A) An organizational structure of the program, its operations, and its funding.~~

~~(B) Ratesetting and other costs to participants.~~

~~(C) Provisions for disclosure and due process in setting rates and allocating costs among participants.~~

~~(D) The methods for entering and terminating agreements with other entities.~~

~~(E) The rights and responsibilities of program participants, including, but not limited to, consumer protection procedures, credit issues, and shutoff procedures.~~

~~(F) Termination of the program.~~

~~(G) A description of the third parties that will be supplying electricity under the program, including, but not limited to, information about financial, technical, and operational capabilities.~~

~~(4) A community choice aggregator establishing electrical load aggregation shall prepare a statement of intent with the implementation plan. Any community choice load aggregation established pursuant to this section shall provide for the following:~~

~~(A) Universal access.~~

~~(B) Reliability.~~

~~(C) Equitable treatment of all classes of customers.~~

~~(D) Any requirements established by state law or by the commission concerning aggregated service.~~

~~(5) In order to determine the cost-recovery mechanism to be imposed on the community choice aggregator pursuant to subdivisions (d), (e), and (f) that shall be paid by the customers of the community choice aggregator to prevent shifting of costs, the community choice aggregator shall file the implementation plan with the commission, and any other information requested by the commission that the commission determines is necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f).~~

~~(6) The commission shall notify any electrical corporation serving the customers proposed for aggregation that an implementation plan initiating community choice aggregation has been filed, within 10 days of the filing.~~

~~(7) Within 90 days after the community choice aggregator establishing load aggregation files its implementation plan, the commission shall certify that it has received the implementation plan, including any additional information necessary to determine a cost-recovery mechanism. After certification of receipt of the implementation plan and any additional information requested, the commission shall then provide the community choice aggregator with its findings regarding any cost recovery that must be paid by customers of the community choice aggregator to prevent a shifting of costs as provided for in subdivisions (d), (e), and (f).~~

~~(8) An entity proposing community choice aggregation shall not act to furnish electricity to electricity consumers within its boundaries until the commission determines the cost-recovery that must be paid by the customers of that proposed community choice aggregation program, as provided for in subdivisions (d), (e), and (f). The commission shall designate the earliest possible effective date for implementation of a community choice aggregation program, taking into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the commission.~~

~~(9) All electrical corporations shall cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs. Cooperation shall include providing the entities with appropriate billing and electrical load data, including, but not limited to, data detailing electricity needs and patterns of usage, as determined by the commission, and in accordance with procedures established by the commission. Electrical corporations shall continue to provide all metering, billing, collection, and customer service to retail customers that participate in community choice aggregation programs. Bills sent by the electrical corporation to retail customers shall identify the community choice aggregator as providing the electrical energy component of the bill. The commission shall determine the terms and conditions under which the electrical corporation provides services to community choice aggregators and retail customers.~~

~~(10) (A) A city, county, or city and county that elects to implement a community choice aggregation program within its jurisdiction pursuant to this chapter shall do so by ordinance.~~

~~(B) Two or more cities, counties, or cities and counties may participate as a group in a community choice aggregation pursuant to this chapter, through a joint powers agency established pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, if each entity adopts an ordinance pursuant to subparagraph (A).~~

~~(11) Following adoption of aggregation through the ordinance described in paragraph (10), the program shall allow any retail customer to opt out and to continue to be served as a bundled service customer by the existing electrical corporation, or its successor in interest. Delivery services shall be provided at the same rates, terms, and conditions, as approved by the commission, for community choice aggregation customers and customers that have entered into a direct transaction where applicable, as determined by the commission. Once enrolled in the aggregated entity, any ratepayer that chooses to opt out within 60 days or two billing cycles of the date of enrollment may do so without penalty and shall be entitled to receive default service pursuant to paragraph (3) of subdivision (a). Customers that return to the electrical corporation for procurement services shall be subject to the same terms and conditions as are applicable to other returning direct access customers from the same class, as determined by the commission, as authorized by the commission pursuant to this code or any other provision of law. Any reentry fees to be imposed after the opt-out period specified in this paragraph, shall be approved by the commission and shall reflect the cost of reentry. The commission shall exclude any amounts previously determined and paid pursuant to subdivisions (d), (e), and (f) from the cost of reentry.~~

~~(12) This section shall not be construed as authorizing any city or any community choice retail load aggregator to restrict the ability of retail electricity customers to obtain or receive service from any authorized electric service provider in a manner consistent with law.~~

~~(13) (A) The community choice aggregator shall fully inform participating customers at least twice within two calendar months, or 60 days, in advance of the date of commencing automatic enrollment. Notifications may occur concurrently with billing cycles. Following enrollment, the aggregated entity shall fully inform participating customers for not less than two consecutive billing cycles. Notification may include, but is not limited to, direct mailings to customers, or inserts in water, sewer, or other utility bills. Any notification shall inform customers of both of the following:~~

~~(i) That they are to be automatically enrolled and that the customer has the right to opt out of the community choice aggregator without penalty.~~

~~(ii) The terms and conditions of the services offered.~~

~~(B) The community choice aggregator may request the commission to approve and order the electrical corporation to provide the notification required in subparagraph (A). If the commission orders the electrical corporation to send one or more of the notifications required pursuant to subparagraph (A) in the electrical corporation's normally scheduled monthly billing process, the electrical corporation shall be entitled to recover from the community choice aggregator all reasonable incremental costs it incurs related to the notification or notifications. The electrical corporation shall fully cooperate with the community choice aggregator in determining the feasibility and costs associated with using the electrical corporation's normally scheduled monthly billing process to provide one or more of the notifications required pursuant to subparagraph (A).~~

~~(C) Each notification shall also include a mechanism by which a ratepayer may opt out of community choice aggregated service. The opt~~

~~out may take the form of a self-addressed return postcard indicating the customer's election to remain with, or return to, electrical energy service provided by the electrical corporation, or another straightforward means by which the customer may elect to derive electrical energy service through the electrical corporation providing service in the area.~~

~~(14) The community choice aggregator shall register with the commission, which may require additional information to ensure compliance with basic consumer protection rules and other procedural matters.~~

~~(15) (A) Once the community choice aggregator's contract is signed, the community choice aggregator shall notify the applicable electrical corporation that community choice service will commence within 30 days.~~

~~(B) A community choice aggregator shall not procure electricity or energy services from any entity that provided any analysis, advice, consultation, or other services to the community choice aggregator prior to it providing notice to the electrical corporation pursuant to subparagraph (A).~~

~~(16) Once notified of a community choice aggregator program, the electrical corporation shall transfer all applicable accounts to the new supplier within a 30-day period from the date of the close of their normally scheduled monthly metering and billing process.~~

~~(17) An electrical corporation shall recover from the community choice aggregator any costs reasonably attributable to the community choice aggregator, as determined by the commission, of implementing this section, including, but not limited to, all business and information system changes, except for transaction-based costs as described in this paragraph. Any costs not reasonably attributable to a community choice aggregator shall be recovered from ratepayers, as determined by the commission. All reasonable transaction-based costs of notices, billing, metering, collections, and customer communications or other services provided to an aggregator or its customers shall be recovered from the aggregator or its customers on terms and at rates to be approved by the commission.~~

~~(18) At the request and expense of any community choice aggregator, electrical corporations shall install, maintain and calibrate metering devices at mutually agreeable locations within or adjacent to the community aggregator's political boundaries. The electrical corporation shall read the metering devices and provide the data collected to the community aggregator at the aggregator's expense. To the extent that the community aggregator requests a metering location that would require alteration or modification of a circuit, the electrical corporation shall only be required to alter or modify a circuit if the alteration or modification does not compromise the safety, reliability or operational flexibility of the electrical corporation's facilities. All costs incurred to modify circuits pursuant to this paragraph, shall be borne by the community aggregator.~~

~~(d) (1) It is the intent of the Legislature that each retail end-use customer that has purchased power from an electrical corporation on or after February 1, 2001, should bear a fair share of the Department of Water Resources' electricity purchase costs, as well as electricity purchase contract obligations incurred as of the effective date of the act adding this section, that are recoverable from electrical corporation customers in commission-approved rates.~~

~~It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers.~~

~~(2) The Legislature finds and declares that this subdivision is consistent with the requirements of Division 27 (commencing with Section 80000) of the Water Code and Section 360.5, and is therefore declaratory of existing law.~~

~~(e) A retail end-use customer that purchases electricity from a community choice aggregator pursuant to this section shall pay both of the following:~~

~~(1) A charge equivalent to the charges that would otherwise be imposed on the customer by the commission to recover bond related costs pursuant to any agreement between the commission and the Department of Water Resources pursuant to Section 80110 of the Water Code, which charge shall be payable until any obligations of the Department of Water Resources pursuant to Division 27 (commencing with Section 80000) of the Water Code are fully paid or otherwise discharged.~~

~~(2) Any additional costs of the Department of Water Resources, equal to the customer's proportionate share of the Department of Water Resources' estimated net unavoidable electricity purchase contract costs as determined by the commission, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the Department of Water Resources.~~

~~(f) A retail end-use customer purchasing electricity from a community choice aggregator pursuant to this section shall reimburse the electrical corporation that previously served the customer for all of the following:~~

~~(1) The electrical corporation's unrecovered past undercollections for electricity purchases, including any financing costs, attributable to that customer, that the commission lawfully determines may be recovered in rates.~~

~~(2) Any additional costs of the electrical corporation recoverable in commission-approved rates, equal to the share of the electrical corporation's estimated net unavoidable electricity purchase contract costs attributable to the customer, as determined by the commission, for the period commencing with the customer's purchases of electricity from the community choice aggregator, through the expiration of all then existing electricity purchase contracts entered into by the electrical corporation.~~

~~(g) (1) Any charges imposed pursuant to subdivision (e) shall be the property of the Department of Water Resources. Any charges imposed pursuant to subdivision (f) shall be the property of the electrical corporation. The commission shall establish mechanisms, including agreements with, or orders with respect to, electrical corporations necessary to ensure that charges payable pursuant to this section shall be promptly remitted to the party entitled to payment.~~

~~(2) Charges imposed pursuant to subdivisions (d), (e), and (f) shall be nonbypassable.~~

~~(h) Notwithstanding Section 80110 of the Water Code, the commission shall authorize community choice aggregation only if the commission imposes a cost-recovery mechanism pursuant to subdivisions (d), (e), (f), and (g). Except as provided by this subdivision, this section shall not alter the suspension by the commission of direct~~

~~purchases of electricity from alternate providers other than by community choice aggregators, pursuant to Section 80110 of the Water Code.~~

~~(i) (1) The commission shall not authorize community choice aggregation until it implements a cost-recovery mechanism, consistent with subdivisions (d), (e), and (f), that is applicable to customers that elected to purchase electricity from an alternate provider between February 1, 2001, and January 1, 2003.~~

~~(2) The commission shall not authorize community choice aggregation until it has adopted rules for implementing community choice aggregation.~~

~~(j) The commission shall prepare and submit to the Legislature, on or before January 1, 2006, a report regarding the number of community choices aggregations, the number of customers served by community choice aggregations, third party suppliers to community choice aggregations, compliance with this section, and the overall effectiveness of community choice aggregation programs.~~

~~SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.~~