



Staff Report Item 17

TO: East Bay Community Energy Board of Directors

FROM: Nick Chaset, CEO
Inder Khalsa, General Counsel

SUBJECT: Discussion of In-Person and Teleconference Board Meetings Options After the End of the State of California COVID-19 State of Emergency, and Adopt Post-COVID Emergency Attendance Policy for East Bay Community Energy Board and Brown Act Committees (Action Item)

DATE: February 15, 2023

Recommendation

Provide direction to staff and adopt a Resolution approving a POST-COVID Emergency Attendance Policy (Policy) for the Board and East Bay Community Energy Brown Act committees to provide a policy with respect to conducting public meetings after the end of the State of California's COVID-19 State of Emergency, which is expected to occur on February 28, 2023. This policy will provide direction to staff regarding Board preferences for conducting meetings going forward.

Background

On October 17, 2022, Governor Newsom announced that the State of California's COVID-19 State of Emergency will end on February 28, 2023. On January 31, 2023, the Governor announced a confirmation of the State's intent to end this State of Emergency at the end of February. With the end of the State of Emergency, the Board of Directors (as well as its Brown Act committees, including the Community Advisory Committee) will no longer be able to rely on Senate Bill 361 to conduct fully remote public meetings.

The Ralph M. Brown Act requires that all meetings of a local agency legislative body be open and public and that members of the public be permitted to attend and participate. The Brown Act has long allowed for meetings to occur via teleconferencing, subject to certain requirements: the agenda must identify the teleconference location of each legislative body member that will be participating in the meeting; each teleconference location must be

accessible to the public; members of the public must be allowed to address the legislative body at each teleconference location; the meeting agenda must be posted at each teleconference location; and at least a quorum of the legislative body must participate from locations within the boundaries of the agency's jurisdiction. For the purposes of this staff report and policy, we refer to these rules as the "Traditional Brown Act" teleconferencing regulations.

With COVID-19 stay at home mandates and social distancing recommendations, it was not feasible to comply with the Brown Act's teleconferencing requirements, especially the posting of each remote location on the agenda and the requirement that remote locations be open and accessible to the public. In March 2020, Governor Newsom issued Executive Order No. N-29-20 which suspended certain Brown Act requirements, including these, during 2020. AB 361, adopted as urgency legislation in 2021 and effective until January 1, 2024, superseded the Governor's Executive Order and amended the Brown Act to relax teleconferencing requirements during Governor-proclaimed emergencies.

Under AB 361, the relaxed teleconferencing requirements apply when the state has declared a "state of emergency" and either of the following: (1) state or local officials have imposed or recommended measures to promote social distancing; or (2) the local agency legislative body determines that as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees. Under AB 361's relaxed teleconferencing provisions, a legislative body may meet via teleconference without a quorum of members physically present, without having to post agendas at all teleconference locations, without identifying each teleconference location, and without making each teleconference location accessible to the public. To utilize these provisions, a legislative body is required to make periodic findings every 30 days. EBCE has relied on AB 361 to conduct meetings remotely since the legislation was adopted.

Analysis & Discussion

Assuming the Governor acts on his stated intention to end the State of Emergency related to COVID-19 on February 28, 2023, agencies will no longer be able to meet remotely pursuant to AB 361, because this statute is only operative during a Governor-proclaimed emergency. Although agencies like EBCE have found that remote public meetings can be held conveniently, transparently, and with robust public participation via online platforms like Zoom, it is important to note that, absent a Governor-proclaimed emergency or future changes legislative changes, the law does not allow legislative body members to participate remotely in public meetings from home solely for convenience and without substantial additional noticing and transparency requirements. The end of the COVID-19 State of Emergency will substantially change the landscape of remote public meetings in California. This change will impact **all Brown Act bodies**, not only the Boards of agencies. In EBCE's case, that includes the Community Advisory Committee, the Executive Committee, the Marketing, Regulatory, and Legislative Subcommittee, and the Financial, Administrative, and Procurement Subcommittee.

Therefore, staff is looking for direction from the Board on how they would like to proceed with EBCE Board meetings and Brown Act committee meetings in the coming year. Staff has drafted a proposed policy for Board meetings and Brown Act committee meetings. As stated in the proposed policy, for Brown Act committees (including the Community Advisory Committee), the Board may wish to allow such committees to establish their own protocols for attendance at their meetings, provided they are in compliance with the Brown Act.

Options for Brown Act Meetings After February 28, 2023

1. In Person

Hopefully it goes without saying that one option for the Board would be for the EBCE Board to meet entirely in person in one location, as most bodies did prior to the COVID-19 emergency. The location of meetings could be the same for every regular meeting or it could rotate from one location to another if feasible. Regular times and locations are generally set by a resolution of the Board. This option is straightforward, but given EBCE's large geographical jurisdiction, would require legislative body members to drive to meetings to attend in person, and inevitably some members may have to drive long distances. It would also preclude members from participating remotely when they are feeling unwell, have recently been exposed to an illness, or are caring for a family member. For this reason, the Board may determine that it would be desirable for legislative body members to have some ability to participate in meetings remotely.

2. Traditional Brown Act Teleconferencing Rules

Another option would be to rely on what we refer to here as the "traditional" Brown Act teleconferencing requirements. As noted above, the Brown Act has long allowed legislative bodies to meet remotely, whether online through a platform like Zoom or Microsoft Teams or by teleconference, as long as each remote location is identified on the agenda, noticed and made open to the public to participate, and a quorum of the legislative body participates from within the agency's geographical jurisdiction (note that a quorum is *not* required to be in one physical location under the traditional Brown Act rules). Before COVID-19, a number of agencies with large jurisdictions regularly held meetings by teleconference, with legislative body members participating by phone from multiple different locations in the entity's jurisdiction, following these rules. This option remains available to EBCE, and would allow legislative body members to participate from a number of publicly accessible and noticed locations throughout EBCE's geographical jurisdiction. This option would not require that a quorum of the Board participate from one location as long as a quorum was somewhere in EBCE's geographical location. However, it does require the posting of notice at the remote locations, publication of each remote location on the agenda (posted 72 in advance of the meeting), and the public would have to be allowed to participate from the remote location(s).

Under the traditional Brown Act rules, the Board could establish multiple meeting locations throughout its jurisdiction, perhaps at County or City offices, which can easily be posted and made available to the public. This approach would shorten driving times for members of the

Board, but it would *not* be a good solution for members who would like to participate in meetings from home, perhaps because they are unwell. The need to list remote locations on the public agenda 72 hours in advance of the meeting, post notices at those locations, and make them accessible to the public makes private residences inconvenient/infeasible for use as remote locations under these rules.

3. AB 2449

Finally, the California Legislature adopted Assembly Bill 2449 in 2022 to provide local agency legislative bodies with an alternative teleconferencing option starting January 1, 2023. This new legislation does not supersede the traditional Brown Act teleconferencing rules (or even AB 361) but provides an additional option which does allow legislative body members to participate in meetings from home in limited circumstances. But while AB 2449 shares some similarities with AB 361, important differences mean that an agency relying on AB 2449 will be required to have a singular physical meeting space where at least a quorum of the body attends in person. It also strictly limits the circumstances and frequency of remote participation.

Like AB 361, AB 2449 exempts local agencies from certain traditional Brown Act teleconferencing requirements like posting agendas at all teleconference locations, identifying all teleconference locations in the meeting agendas, or making each teleconference location open to the public. Also like AB 361, local agencies relying on teleconferencing under AB 2449 must follow certain requirements for noticing and conducting remote meetings. Meeting notices and agendas must identify the means by which members of the public may access the meeting and offer public comment. Meeting agendas must identify and include an opportunity for all persons to attend and address the legislative body directly via a call-in option, via an internet-based service option, and at the in-person location of the meeting. In the event of a disruption that prevents the legislative body from broadcasting the meeting to members of the public using the call-in option or internet-based service option, or in the event of a disruption within the agency's control that prevents members of the public from offering public comments using the call-in option or internet-based service option, the legislative body may take no further action on items appearing on the meeting agenda until public access to the meeting via the call-in option or internet-based service option is restored. The legislative body may not require public comments to be submitted in advance of the meeting and must provide an opportunity for the public to address the legislative body and offer comment in real time.

Unlike teleconferencing under the traditional Brown Act requirements or AB 361, AB 2449 requires ***at least a quorum of the legislative body to participate in person from a singular physical location*** clearly identified on the agenda, open to the public, and situated within the boundaries of the territory over which the agency exercises jurisdiction. This location would presumably be the body's regular meeting location (which, again, could be the same each meeting or rotate according to a Board adopted resolution). Further, Members of the legislative body participating remotely pursuant to AB 2449 must publicly disclose at the meeting before any action is taken whether any other individuals 18 years of age or older are present in the room at the remote location with the member, and the general nature of the member's

relationship with any such individuals. Members must also participate through both audio and visual technology so that the public can remotely hear and visually observe them. To do this, AB 2449 requires either a two-way audiovisual platform or a two-way telephonic service with a live webcasting of the meeting.

Further, AB 2449 limits how frequently and under what circumstances remote participation is allowed. AB 2449 only allows for remote participation by legislative body members in two specified circumstances: (1) “just cause” or (2) “emergency circumstances.”

- **Just Cause:** “Just cause” means any of the following: (A) a childcare or caregiving need of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner that requires them to participate remotely; (B) a contagious illness that prevents a member from attending in person; (C) a need related to a physical or mental disability not otherwise accommodated by the agency’s procedures for receiving and swiftly resolving requests for reasonable accommodation for individuals with disabilities, consistent with the Americans with Disabilities Act; or (D) travel while on official business of the legislative body or another state or local agency. To participate remotely for just cause, a member must notify the legislative body “at the earliest opportunity possible, including at the start of a regular meeting, of their need to participate remotely for just cause.” This notification must include a general description of the circumstances relating to their need to appear remotely at the given meeting.
- **Emergency Circumstances:** “Emergency circumstances” means a physical or family medical emergency that prevents a member from attending a meeting in person. To participate remotely due to emergency circumstances, the member must request the legislative body to allow them to participate in the meeting remotely due to emergency circumstances and the legislative body must take action to approve the request. If the legislative body does not approve the request, the member may not participate via teleconference under AB 2449 at that meeting. The legislative body must request a general description of the circumstances relating to the member’s need to appear remotely at the given meeting. A general description need not exceed 20 words and does not require the member to disclose any medical diagnosis or disability, or any personal medical information that is already exempt under existing law.

A legislative body member is required request to participate remotely at a meeting due to emergency circumstances as soon as possible, and a separate request is required for each meeting in which they seek to participate remotely. The legislative body may approve such a request by a majority vote. If the request is received at least 72 hours before a regular meeting, the legislative body’s action on the request should be included on the agenda. If the request does not allow sufficient time to place proposed action on such a request on the posted agenda for the meeting, the legislative body may take action at the beginning of the meeting.

Finally, for “just cause,” legislative members are ***only allowed up participate remotely up to two meetings per calendar year***. Otherwise, even in emergency circumstances, legislative members may not participate solely by teleconference from a remote location for a period of more than three consecutive months or 20 percent of the regular meetings for the legislative body within a calendar year (for a body that meets once a month, this would be 2 meetings a year).

In sum, AB 2449 does provide an option for members of a legislative body to participate in public meetings from home, but only infrequently and after complying with numerous procedural requirements.

Recommendation for Board and Brown Act Committee Meetings

With the end of the State of Emergency, the Board and Brown Act committees will no longer be able to rely on AB 361 to conduct fully remote public meetings. For Board meetings, staff recommends that the Board utilize traditional Brown Act teleconferencing rules if the Board would like to use multiple locations throughout its jurisdiction. This approach would allow Board members to utilize their City or County offices to attend meetings remotely, eliminating the requirement that a quorum be present in a singular physical location in order to comply with the Brown Act. Under the traditional Brown Act rules, a quorum needs to be in the agency’s jurisdiction but does not need to be in one physical location. Finally, staff anticipates that confirming compliance with the law will be simpler under the traditional Brown Act rules, which is important to ensure the validity of Board actions.

For EBCE’s Brown Act committees, such as the Community Advisory Committee, Executive Committee, and Board subcommittees, staff is recommending that these bodies be allowed to adopt their own policies with respect to Brown Act compliance. Under traditional Brown Act rules, a Brown Act committee could participate from multiple meeting locations throughout its jurisdiction, perhaps in the city hall or other public facility of the member city in which the committee member resides, as long as the remote locations are listed on the agenda, open to the public, and noticed appropriately. With respect to the Community Advisory Committee, staff recommends that if a CAC member would like to participate from a public meeting space in their city of residence, the Board member representative from that city may be a point of contact with their city staff to arrange for publicly accessible meeting space.

Alternately, a Brown Act committee may opt to utilize AB 2449. In that case, at least a quorum of the committee must participate in person from a singular physical location. If a committee member is unable to attend a meeting in person due to a reason that constitutes “just cause” or an “emergency circumstance,” they may participate remotely provided they comply with the requirements of AB 2449, discussed above. If a Committee is willing to meet in person for most meetings and limit remote appearances to an as-needed basis, staff would be willing to support this option for the Brown Act committees, which are primarily advisory in nature and usually considerably smaller than the Board.

Staff recommends that the Board direct each Brown Act committee to adopt their own meeting attendance policy in compliance with the Brown Act, to establish clear expectations for their members.

Fiscal Impact

None foreseeable at this time. Depending on the direction of the Board, minor fiscal impacts could be associated with reservation of in-person facilities and staff administrative costs.

Attachments

- A. Resolution of the Board of Directors to Adopt a POST-COVID Emergency Attendance Policy for the East Bay Community Energy Board and Brown Act Committees
- B. POST-COVID Emergency Attendance Policy for the East Bay Community Energy Board and Brown Act Committees

RESOLUTION NO. ____

**A RESOLUTION OF THE BOARD OF DIRECTORS
OF EAST BAY COMMUNITY ENERGY AUTHORITY (EBCE) TO ADOPT A POST-COVID
EMERGENCY POLICY FOR THE BOARD AND EBCE BROWN ACT COMMITTEES**

WHEREAS, The East Bay Community Energy Authority (“EBCE”) was formed as a community choice aggregation agency (“CCA”) on December 1, 2016, Under the Joint Exercise of Power Act, California Government Code sections 6500 *et seq.*, among the County of Alameda, and the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Piedmont, Oakland, San Leandro, and Union City to study, promote, develop, conduct, operate, and manage energy-related climate change programs in all of the member jurisdictions. The cities of Newark and Pleasanton, located in Alameda County, along with the City of Tracy, located in San Joaquin County, were added as members of EBCE and parties to the JPA in March of 2020; and

WHEREAS, The Joint Powers Agreement (JPA) permits the Board of Directors to establish governing rules, regulations, policies, bylaws or procedures as the Board deems appropriate to assist in carrying out its functions and implementing the CCA Program, other energy programs, and the JPA; and

WHEREAS, The JPA also allows the Board to promulgate rules regarding Directors; and

WHEREAS, The Board recognizes that Governor Newsom has announced that the State of California’s COVID-19 State of Emergency will end on February 28, 2023; and

WHEREAS, The Board recognizes that with the end of the State of Emergency, the Board as well as its Brown Act committees, will no longer be able to rely on Senate Bill 361 to conduct fully remote public meetings; and

WHEREAS, The Board would like to adopt a policy regarding the conduct of EBCE Board and Brown Act committee meetings following the termination of the COVID-19 State of Emergency; and

NOW, THEREFORE, THE BOARD OF DIRECTORS OF THE EAST BAY COMMUNITY ENERGY AUTHORITY DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. The Board of Directors hereby adopts the POST-COVID Emergency Attendance Policy for the EBCE Board and Brown Act committees, attached hereto as Exhibit A.

ADOPTED AND APPROVED this 15th day of February, 2023.

Jen Cavanaugh, Acting Chair

ATTEST:

Adrian Bankhead, Clerk of the Board

POST-COVID EMERGENCY ATTENDANCE POLICY FOR THE EAST BAY
COMMUNITY ENERGY BOARD AND BROWN ACT COMMITTEES

Policy Number: 1

February 15, 2023

Agenda Item 17

Approved by Resolution:

I. PURPOSE

This document establishes a policy for attendance at meetings of the East Bay Community Energy (EBCE) Board and Brown Act Committees following the termination of the COVID-19 State of Emergency.

II. POLICY

1. For East Bay Community Energy (EBCE) Board meetings following the termination of the COVID-19 State of Emergency, the Board shall return to in-person meetings or in the alternative, utilize traditional Brown Act rules to the extent Board Members would like to participate from remote, publicly accessible locations throughout its jurisdiction.
2. EBCE Brown Act committees, including but not limited to the Executive Committee and the Community Advisory Committee, shall operate in compliance with the Brown Act. In compliance with the Brown Act, each committee may adopt their own policies for meeting attendance. Committees may meet under the traditional Brown Act rules (either entirely in person or by teleconference/remote) or allow for participation in compliance with AB 2449 on a limited as-needed basis when the members of the committee are willing to meet in a singular physical location.