

September 20, 2022

Via Email and Overnight Courier

Honorable Erick L. Larsh
Presiding Judge
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

**Re: Orange County Power Authority Response to
Grand Jury Report, “Orange County Power
Authority: Come Clean”**

Dear Presiding Judge Larsh:

In accordance with California Penal Code section 933, please find enclosed herein the official response of the Orange County Power Authority Board of Directors regarding the subject Orange County Grand Jury report, approved on September 6, 2022. Also included is a copy of the OCPA staff report.

If you have any questions, please contact OCPA’s General Counsel, Ryan Baron at (949) 263-6568, or at ryan.baron@bbklaw.com.

Sincerely,



Brian S. Probolsky
Chief Executive Officer
Orange County Power Authority



ORANGE COUNTY POWER AUTHORITY
Staff Report – Item 9.4

To: Orange County Power Authority Board of Directors

From: Brian Probolsky, Chief Executive Officer

Subject: Proposed Response to FY 2021-22 Grand Jury Report

Date: September 6, 2022

RECOMMENDED ACTION

1. Approve proposed response to Fiscal Year 2021-22 Grand Jury Report
2. Direct the Chief Executive Office to forward the staff report with attachments to the Presiding Judge of the Superior Court and the Fiscal Year 2021-22 Grand Jury no later than September 23, 2022.

BACKGROUND

On June 24, 2022 the Orange County Grand Jury (OCGJ) released a report regarding OCPA. California Penal Code Section 933 requires the governing body of any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the governing body. Such comment shall be made no later than 90 days after the Grand Jury publishes its report. The report contains six (6) findings and made four (4) recommendations. Attachment B is OCPA's proposed response to the Grand Jury.

FISCAL IMPACT

There is no fiscal impact.

ATTACHMENT

1. Orange County Grand Jury Report
2. Proposed Response to FY 2021-22 Grand Jury Report

**Responses to Findings and Recommendations
2021-22 Grand Jury Report
“Orange County Power Authority: Come Clean”**

On June 24, 2022, the Orange County Grand Jury released a report entitled “Orange County Power Authority: Come Clean.” This report directed responses to findings and recommendations to the OCPA Board of Directors. The responses are below:

FINDINGS

F1: OCPA has not properly implemented bylaws and other procedures to promote and ensure transparency.

Response: OCPA disagrees wholly with Finding #1.

Bylaws are typically procedural requirements or limitations on an entity’s governance. Although OCPA’s Joint Powers Agreement authorizes the Board to adopt bylaws, neither the Joint Powers Agreement, the Joint Exercise of Powers Act, nor the provisions of the Public Utilities Code relating to CCAs require the adoption of bylaws. They are only required in corporate governance. Further, bylaws are often duplicative of the provisions of a joint powers agreement or applicable law, although in some cases they may be used to establish additional agency procedures. Ultimately, the need for bylaws and the substance thereof is at the discretion of the governing body if it chooses to adopt specific governance procedures not already included in its governing agreement or charter. The absence of any particular provision or policy, too, would be governed by state law where applicable.

Many older joint powers authorities have basic JPA agreements that are more general in nature and only address the required elements of the Joint Exercise of Powers Act, such as the purposes of the agency and powers of the Board of Directors. The OCPA JPA agreement, and many community choice aggregator joint powers agreements, are drafted in a more modern drafting style by including procedures that might be broken out in bylaws or an agency’s policies. These include, but are not limited to, officer terms of office, committees, and board member appointments and vacancies requirements. In fact, many CCAs do not have bylaws as the larger and more established ones may have operating procedures to address larger organizational bureaucracy. Further, the Grand Jury report does not reference or mention the fact that OCPA has adopted numerous policies related to general governance subjects, and therefore, this issue does not appear to have been well-researched. Simply because these policies have been adopted as policies, and not within a document called “bylaws” does not mean that OCPA has not established basic governance policies and procedures. For example, OCPA has adopted policies on procurement of goods and services, delegated contract authority, creation of Board agendas, energy risk management, record retention, Board compensation and expense reimbursement, etc., all of which are publicly available here under “Policies”:

<https://www.ocpower.org/resources/key-documents/> to promote and ensure transparency. The format and depth of documents follows best management practices created by CalCCA in coordination with the CPUC. The finding by the Grand Jury report that OCPA has not properly adopted “bylaws” appears to place form over substance and ignores the existence of these previously adopted policies and how other CCAs, JPAs and public agencies implement governance mechanisms.

F2: OCPA unreasonably delayed the formation of the CAC, has failed to properly utilize CAC member expertise, and has stifled the CAC from functioning as an advisory committee as intended.

Response: OCPA disagrees wholly with Finding #2.

The formation of the Community Advisory Committee (“CAC”) was not delayed or even unreasonably delayed. The OCPA Board of Directors considered formation of a citizen’s advisory committee at its April 13, 2021 meeting where there was significant discussion and criteria presented to the Board. OCPA staff conducted research on the various CAC models that have been established by other CCAs, joint powers authorities, and other public agencies. While the Grand Jury notes that the item was a “receive and file,” the recommended action was, in fact, to “discuss and provide direction.”

The Grand Jury draws a comparison to San Diego Community Power where it was asserted that the agency formed in September 2019 and held its first CAC meeting in May 2020 some eight months after formation. In reviewing this comparison, OCPA notes that its first CAC meeting was held within 7 months of formation, which is sooner than SDCP. Therefore, we see no evidence that the timeline set forth by the Grand Jury can be deemed to be unreasonable.

Further, the OCPA CAC had its first meeting on July 8, 2021. This was 267 days prior to commercial launch and 450 days prior to when residential service is scheduled to begin. As the Table below demonstrates, formation of the OCPA CAC compared to service launch occurred prior to many other CCAs.

CCA	First CAC Meeting	Date Service Began	Days Prior to Launch
OCPA (Residential)	7/8/2021	10/1/2022	450
SDCP	5/22/2020	7/1/2021	406
SJCE (Res/Com)	2/26/2018	2/1/2019	340
RCEA (Approved Committee Charter)	6/20/2016	5/1/2017	315
Easy Bay Community Energy	8/1/2017	6/1/2018	304
VCE	8/22/2017	6/1/2018	283
OCPA (Commercial)	7/8/2021	4/1/2022	267
Desert Community Energy	7/11/2019	4/1/2020	265
SJCE (Muni)	2/26/2018	9/1/2018	187
Clean Energy Alliance	12/3/2020	5/1/2021	149
Clean Power Alliance (Commercial)	2/14/2019	5/1/2019	76
Clean Power Alliance (Residential)	2/14/2019	2/1/2019	-13
Central Coast Community Energy	7/10/2018	3/1/2018	-131
Peninsula Clean Energy	5/25/2017	10/1/2016	-236
SVCE	1/17/2018	3/1/2016	-687
Pioneer Community Energy	11/10/2021	2/1/2018	-1378

Since the first CAC meeting, 11 additional meetings have been held where the Committee has been given ample opportunities to provide feedback and share their expertise, with OCPA staff and consultants in attendance. An additional three meetings were scheduled but cancelled due to there

being an insufficient quorum of committee members. CAC meetings are conducted in accordance with the Brown Act whereby all meeting agendas are posted within the statutory timelines prescribed by law and meetings are open to the public who may comment on agenda items. Furthermore, CAC committee reports have been provided to the Board on a regular basis consistent with the practice of other CCAs, which is done on a quarterly basis.

The Grand Jury commented that a key example of underutilization occurred in November 2021 when the Board established an ad hoc committee marketing and outreach committee and did not appoint a CAC member. The Grand Jury further noted that no CAC members serve on other ad hoc committees. Under the Ralph M. Brown Act, however, temporary ad hoc advisory committees of a legislative body may not include individuals other than members of the legislative body. Specifically, Government Code section 54952(b) provides, in part, that “advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies” Accordingly, although the OCPA Board’s ad hoc committee could confer with one or more CAC members, the Board could not directly appoint one or more CAC members to the ad hoc while maintaining its status as an ad hoc committee composed solely of less than a quorum of the Board. The Grand Jury, therefore, does not understand the legal limitations of its comments.

The Grand Jury draws further comparison between OCPA and SDCP regarding underutilization of committee members and stifling the functionality of committee members by citing the scope of work guidelines that apply to SDCP’s CAC work. OCPA notes that these same guidelines were used as a model and ultimately adopted by the OCPA CAC on March 30, 2022. Therefore, OCPA fails to see how this example supports the Grand Jury’s finding.

F3: OCPA hiring practices and procedures for both employees and contractors have failed to follow best practices, potentially damaging the credibility of the agency and raising questions of cronyism.

Response: OCPA disagrees wholly with Finding #3.

OCPA follows industry best practices for the hiring of both employees and consultants. OCPA retained a CEO and COO in the same manner as other start-up CCAs have done through direct appointment of executive staff. To date OCPA has hired six additional employees and three of them had eight years of combined experience in the CCA industry. Each new hire followed an open competitive process including public posting of the job opening, screening of applicants, interview, and selection panels. OCPA has a procurement policy that is followed when hiring consultants that has been utilized to hire through competitive processes a portfolio manager, scheduling coordinator and data manager, which functions are the backbone and are 90% of a CCA’s work. OCPA’s procurement policy can be found at [OCPower.org/key-documents](https://ocpower.org/key-documents).

F4: OCPA has failed to hire a Director of Power Purchases or other experienced senior staff as appropriate for a CCE, resulting in a lack of oversight of contractors and fewer checks and balances in its operation.

Response: OCPA disagrees partially with Finding #4.

OCPA agrees that it has not hired a Director of Power Purchases but disagrees that it has not hired other experienced senior staff. In October 2021, OCPA hired Tiffany Law as its CFO. Tiffany Law has approximately four years of experience working as the Chief Financial & Technology Officer at Central

Coast Community Energy (3CE), a successful CCA serves more than 430,000 customers throughout Central Coast, including residential, commercial, and agricultural customers in communities located within Monterey, San Benito, San Luis Obispo, Santa Barbara, and Santa Cruz counties. At 3CE, Tiffany oversaw critical functional areas, demonstrating leadership over accounting, auditing, finance, budgeting, treasury, credit rating, payroll, ratemaking, tax, data analytics management, and information technology. During her tenure, Tiffany was responsible for managing the data manager contracts which function was the backbone of the CCA billing operations. Notably, 3CE was the first CCA to achieve an “A” credit rating by S&P Global.

In addition, OCPA has had an active recruitment for Power Resources Director since September 28, 2021. OCPA has interviewed six candidates and made offers to two of those candidates. However, none of the candidates that had the experience for the position accepted the position. OCPA is still currently searching for an experienced Power Resources Director.

F5: OCPA lacks experienced in-house staff to develop and implement a long-term strategic plan as well as short-term plans to mitigate economic risks.

Response: OCPA disagrees wholly with Finding #5.

OCPA hired Tiffany Law as its CFO, who brings a wealth of financial and technology experience to the growing CCA sector with over 22 years serving in the private and public sectors. During her tenure at 3CE, a well-established CCA located in central coast, they were able to take immediate short-term action of providing a significant COVID-19 financial relieve assistance of \$22.4 million to all customers with the goal of boosting local economy while avoiding any disparate impacts on various customer classes. For a long-term strategic plan, Tiffany managed the development and implementation of the new cost-of-service rate design process for 3CE (first in CCA) to provide customers consistent and transparent rates, enhancing local control on rate-setting, reducing cross-subsidization among rate classes, and ensuring customer classes remain competitive with IOUs rates.

In addition, OCPA hired Owen Lee as its Controller, who also comes from 3CE, brings 12 years of experience working in financial forecasting, budgeting, financial modeling, and accounting. Owen’s experience in handling energy business fundamentals including cost of energy, load forecast, and utility rate schedules. Together, Tiffany and Owen made a high-performing finance team to develop and implement strategic plans for economic risks mitigation.

F6: OCPA Board meeting agendas and staff reports are distributed at the last minute and Board meeting minutes are not always accurate, complete, or posted in a timely manner.

Response: OCPA disagrees wholly with Finding #6.

All agendas and staff reports are distributed in accordance with the Brown Act. Accordingly, there is no such thing as “last minute” for distribution of the agenda. The Brown Act sets a 72-hour deadline for documents to be posted which is followed by OCPA. All minutes are approved by the OCPA Board and are posted as soon as possible after being approved. All minutes conform to industry standards.

RECOMMENDATIONS

Based on its investigation described herein, the Grand Jury makes the following recommendations:

R1: Implement OCPA and Community Advisory Committee by-laws consistent with those of other CCEs within California. (F1) Timeline: October 1, 2022.

Response: Recommendation will not be implemented because it is not warranted or is not reasonable.

OCPA is governed by a duly adopted Joint Powers Agreement as are most other CCAs within California. There is no legal requirement for the adoption of a separate agreement titled "By-laws". For comparison we note the entire Charter governing the County of Orange is only six pages long and the County has no by-laws.

[4492.pdf \(ocgov.com\)](#)

OCPA has adopted ten (10) Polices which cover the same material that would be included in by-laws and overtime will continue to further define governance definitions as the Board determines it is needed. As an advisory committee reporting to the board, with no legal or statutory authority the CAC has drafted and adopted its own set of operating procedures which has been sufficient.

R2: Include the Community Advisory Committee as a standing item on the OCPA Board minutes and recognize the Community Advisory Committee as an advisory committee, and not simply a mouthpiece. (F2) Timeline: October 1, 2022.

Response: The recommendation has been implemented.

OCPA believes the Grand Jury meant OCPA "agenda" not Board "minutes." The recommendation has been implemented. The Community Advisory Committee has been given the opportunity to provide updates at any and all Board Meetings. OCPA has always recognized the Community Advisory Committee as an advisory committee to the Board, which is evidenced by its formal creation as a Brown Act committee and its charter documents.

R3: Hire a Director of Power Purchases or other qualified staff positions to properly oversee Pacific Energy Advisors and CalPine contractors utilizing best practices. (F3, F4, F5) Timeline: December 1, 2022.

Response: The recommendation has been implemented.

CFO, Tiffany Law oversees the CalPine (data manager) and co-oversees the Pacific Energy Advisors (power portfolio) contractors. Tiffany has approximately four years of CCA experience managing the data manager contracts for 3CE in dual IOUs service territories (PG&E and SCE). In addition, Tiffany served as a Risk Management Committee member at 3CE working closely with the in-house power supply team over front, middle, and back offices functions. Also, the recommendation has been implemented by virtue of the fact that OCPA has had an active recruitment for Power Resources Director since September 28, 2021 well before the Grand Jury's investigation and report and has interviewed candidates for the position. Furthermore, OCPA has contacted specialized recruitment firms for assistance with fulfilling the position and will work with one of these firms if current recruitment efforts are unsuccessful. OCPA encourages qualified applicants to submit an application and view details at <https://www.ocpower.org/position/power-resources-director/>

R4: Utilize a member agency clerk or assign a qualified OCPA staff member to handle the agendas and minutes for the OCPA Board and OCPA Community Advisory Committee to ensure that they are prepared properly and posted in a timely manner. (F6) Timeline: October 1, 2022.

Response: This recommendation has been implemented.

Under the OCPA JPA Agreement, the CEO is designated as the Secretary. OCPA has retained and assigned these duties to at least two consultants to perform the Clerk function, both of which are former City Clerks (and one a former City Clerk and City Manager), well-trained with significant experience in open meetings laws and procedures. OCPA has properly prepared and posted agendas in a timely manner consistent with the timeframes in the Brown Act. Per the recommendation, OCPA has contacted its member agencies requesting the use of their Clerk for OCPA meetings. The member agencies either did not find this feasible or did not respond to OCPA's request. Furthermore, OCPA is currently in the process of recruiting an in-house Clerk. While OCPA is in the process of hiring a Clerk, OCPA utilizes both in-house staff and experienced contract employees to ensure that agendas and minutes are prepared and posted in a timely manner.