MUNICIPAL JOINT ACTION AGENCIES

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Joint action, the cooperation by contract or other legal structure of individual municipal corporations or other local governmental entities in the provision of governmental facilities or services, has for many years been a means for local governments to achieve greater efficiency and breadth in the provision of their traditional municipal services. From the provision of wholesale electric power generation capacity or wholesale gas supplies to the ownership, financing and management of metropolitan mass transportation services, joint action allows local government to leverage its basic cost of service into the most sophisticated and efficient deployment of capital to acquire assets and supplies, diversify assets and sources to minimize risk and centralize expertise to lower costs.

Traditional Municipal Services. Municipal services historically provided by local government include police and fire service, water and sewerage service, solid waste collection, management and disposal service (including, more recently, recycling), recreational facilities and programs and natural gas and electric power distribution service. While police, fire, water and sewerage and solid waste services are traditionally provided on a municipal level, electric power and natural gas distribution services, and more recently, cable, internet and telephone services, have often been provided by municipal governments in smaller cities or locations that were underserved by private industry either because of low population or low concentration of individual municipal

corporations, or, in some cases, dissatisfaction of citizens and ratepayers with the level of service provided by private enterprise in those areas.

Of course, just as some services usually provided by private enterprise can be taken over by local government, there are a growing number of exceptions to the public provision of traditional governmental services now as resources become scarce, making pooling economic, or as public-private cooperation increases, often at the instance of private providers or developers. Municipal solid waste collection and disposal has long been a ripe (!) area for private enterprise and contracting with government, and has even achieved the status of a valuable commodity subject to interstate commerce requirements, as expensive Subtitle D-compliant landfill owners, whether private or public, struggle through flow control ordinances or contracts to control access to waste streams to generate tipping fees to cover debt service on their landfill costs.

Additionally, many individual residential developments and communities have privatized water systems, and some municipal systems have contracted with private managers. Digressing briefly to highlight the special and desirable nature of municipal joint action as opposed investor-owned corporate consolidation in certain key municipal services, consider Azurix, Enron's water resource subsidiary. Enron developed and then spun off Azurix, fitting the provision and trading of water as a commodity into its energy trading and capacity arbitrage model. Azurix failed only a year before Enron's own debacle, but for interestingly different reasons, some related to the core values supporting municipal joint action. While in regions where water is scarce, such as the western United States, there would be a theoretical advantage to the trading and capacity management of water, there are physical and even emotional barriers to joint

management, particularly by private enterprise.[2] Physical barriers include weight: water weighs about eight pounds a gallon and is therefore slow to move where gravity won't take it. Unlike the power grid or the system of interstate and intrastate natural gas pipelines, the system of pipes and canals to move the resource through the West is incomplete, and there is no federal regulatory system in place as there is for natural gas pipelines and power grids requiring owners of those transmission or transportation resources to make unused capacity available to others.[3] Also, unlike electricity, water from different sources, such as snow melt versus lowland rivers, has to be treated for different impurities.[4] Most importantly, however, water is considered by the citizens and ratepayers to be a core governmental, rather than proprietary, function of government, of such basic and critical human need that its availability and management must be overseen and regulated locally by representative of it users for the protection and well-being of the citizenry. Both laws and political sentiment impeded the sale to or management by private enterprise of local governments' raw water resources, treatment and distribution systems for those reasons.

It's said in the West that "whiskey's for drinking, and water's for fighting over," expressing the high emotion surrounding water as a governmental service, a passion that increases as communities and recreational facilities are developed in areas that do not have access to their own water resources.[5] It is this very emotion, as well as the real need for a regulatory overlay to control transportation among regions to allow for joint management and resource sharing, that leaves water, to my mind, as the next ripe area for governmental joint action. Through joint management of water resources, local governments could gain the efficiencies and resource and risk sharing attainable with

joint action while retaining critical local governmental supervision, regulation, and resource and rate control.

What is Joint Action? Joint action is the cooperation of governments through contract or other legal structure in the provision of governmental services or enterprise. Joint action typically addresses the needs of government service or enterprise where benefits can be realized through economies of scale and joint use of assets or resources, both human and natural, and through the efficient deployment of capital at the lowest all-in cost to participating governments.

Public Power Joint Action. Municipal joint action in the United States arose first in areas of public power and then public gas as wholesale prices rose due to increases in demand. Greater demand made necessary the planning and construction of new generation resources, particularly as hydroelectric resources in the western United States were unable to keep up with population growth and nuclear units were planned.[6] The only way for municipally owned local distribution companies to participate in the ownership and operation, and to have a representative voice in the management, of these very expensive long-term construction projects for generation assets was by working together to pool requirements, distribution system revenues and resources.

The South Carolina Public Service Authority ("Santee Cooper Power"), one of the oldest public power entities in the United States, was formed by the South Carolina General Assembly in 1934.[7] Washington Public Power Supply System (renamed Energy Northwest in 1998 to eliminate the unfortunately historical "WPPSS" acronym) was created in 1957 by the Washington State Legislature as a municipal corporation that allowed publicly owned utilities to combine resources and build power generation

facilities.[8] The Massachusetts Municipal Wholesale Electric Company ("MMWEC") was created by an act of the Massachusetts legislature in 1976 as a nonprofit public corporation and political subdivision of the Commonwealth of Massachusetts with the power to issue tax-exempt revenue bonds to finance electric generating facilities and other projects.[9] The Municipal Electric Authority of Georgia ("MEAG Power") was formed by the Georgia Legislature in 1976 to provide an adequate, dependable, and economical supply of electric power and energy and related services to its municipal participants.[10] Florida Municipal Power Agency ("FMPA") was formed in 1978 under the State of Florida's Interlocal Cooperation Act.[11] Long Island Power Authority ("LIPA") is a corporate municipal instrumentality of the State of New York created by the New York State Legislature in 1986 to resolve the controversy over the Shoreham Nuclear Power Plant and to seek lower utility rates on Long Island.[12] Other public power joint action agencies include American Public Energy Agency, the Municipal Energy Agency of Nebraska, the Southern California Public Power Authority and Alabama Municipal Electric Authority.

In the case of public power, the efficiencies and economies of scale were achieved in part because of the enormous cost and complexity of operation of the primary generation resources. Joint ownership of transmission assets, allowing energy to flow among municipally owned local distribution companies ("LDCs"), further increased economies by eliminating the need for redundancy in transmission lines. Expertise that individual LDCs could never afford in the way of staffing in finance, operations, fuel supply, hedging, public education and other areas could be centralized in the joint action agency for the better leverage of each rate payer's utility bill, as well as each LDC's

purchase of wholesale power for those ratepayers. Joint action gave the LDCs a voice in the operation of generation and transmission assets that were often owned by the joint action agency with investor-owned power companies and operated through joint operating agreements with those companies. With the LDCs speaking together through their agency, their negotiating leverage, operational control and consent rights or options to participate in plant changes or future development were increased tremendously, giving them an almost equal (or at least recognizable) place at the bargaining table with the investor owned power companies. Further, most of their investment in generation and transmission assets could be financed from the proceeds of the agency's tax-exempt bonds, as opposed to having the individual LDCs pay wholesale electric rates that embodied the financing of investor-owned generation assets on a taxable basis.

Additionally, the concerns and needs of public enterprise are different from those of private enterprise. Joint action allowed the LDCs both to discern their special regulatory and other legal needs and issues, at the federal and state level, and lobby effectively with one voice.

Public Gas Joint Action. Natural gas joint action agencies also arose from market change and opportunity, together with regulatory change. Federal Energy Regulatory Commission ("FERC") Order 436, promulgated in 1985, and Order 636, promulgated in 1992, required the "unbundling" of the gas transportation pipelines' services, mandating that they provide transportation only, rather than commodity, services. The pipelines had previously served in an almost parental role to the municipally owned gas distribution systems, keeping their natural gas flowing even in times of storms in the gulf or other weather or service-related interruptions that caused

other wholesale customers to be cut off. While the cities had to be expert in the operation of their distribution systems, particularly in the areas of service and safety, they did not have to independently negotiate supply and capacity management, and there was not a developed or transparent market available to them for natural gas purchase or trading. The elimination of the commodity component of pipeline service encouraged the cities to work together to find their own sources of natural gas to assure firm, wholesale, secure supply at an economical price.

The Municipal Gas Authority of Georgia was formed by the Georgia Legislature in 1987, largely on the model of MEAG Power, in response to this need.[13] The Tennessee Energy Acquisition Corporation (formerly The Tennessee Natural Gas Acquisition Corporation), Tennergy and the Municipal Energy Acquisition Corporation were formed under the State of Tennessee's Energy Acquisition Corporations law in the 1990s.[14] The Southeast Alabama Gas District, a retail municipal LDC owning distribution assets in 16 counties in Southeast Alabama, was formed in 1952 under the Alabama Gas Districts Law.[15] The Municipal Gas Authority of Mississippi was formed by the Mississippi Legislature, Patriots Energy Group was formed by the South Carolina legislature, and Public Energy Authority of Kentucky Trust ("PEAK") and Florida Gas Utility were formed under their respective states' Interlocal Cooperation Acts.[16]

These entities undertook, on behalf of their respective members, transportation, supply, capacity and load management. The efficiencies that they experienced were great as they replaced the role that the pipelines had previously played through their own joint action, leveraging their individual budgets allocable to human resources to employ at the joint action agency level seasoned gas industry executives experienced in the acquisition,

operation, transportation, hedging and management of natural gas supply, capacity, storage and transportation. Economies realized through savings on supply, capacity and personnel through joint action were returned to the members and used to enhance their distribution systems or build public projects. As one natural gas joint action agency's telephone public information recording says (played to callers while on hold), "we return profits to Main Street, not Wall Street."

The Development of the Super-regional Joint Action Agency. Here's a short digression to demonstrate the efficiencies and economies of scale achieved by public gas through joint action: in their acquisition of supply, some joint action agencies initially acquired overriding royalty interests in producing gas wells in Texas, Louisiana and Arkansas, secured by real property interests and financed from the proceeds of tax-exempt bonds. Further development of the concept lead to the prepayment for the future delivery of natural gas supplies in specified quantities at specified delivery points for a specified term, secured by real property interests or financial surety bonds and financed from the proceeds of tax-exempt bonds. The latter structure assured that the members of the joint action agency had not purchased gas or rights to gas in excess of estimated loads and presented a tidy and easily understood credit package to Wall Street. Further, the prepayment obligation of the supplier could be satisfied from natural gas reserves available to the supplier, gas purchased on the open market, or in the case of isolated instances of nondelivery, cash compensation at market value. As the supplier's delivery obligation was secured by a surety or properties, the members, through their joint action agency, were at little risk for the nonproduction of any particular well or natural disaster

or transportation bottleneck in any particular region, as there was a secured obligation to deliver, but not from a mineral in place.

A number of factors, however, lead to the interest of many natural gas joint action agencies in the purchase of actual natural gas reserves, including the unavailability of surety bonds after Enron's collapse and the bankruptcy concerns regarding real property security. In 2004, seven of those natural gas joint action agencies combined to form Public Gas Partners, Inc., a Georgia nonprofit corporation and super-regional joint action agency comprising members in five states. Additional natural gas and electric joint action agencies are currently considering membership. The advantages of joint action on a larger scale include all of the advantages for the intrastate or interlocal joint action agencies, but also include the aggregation of load sufficient to support the acquisition of an extremely diversified portfolio of natural gas reserves in different production areas, and with different drilling technology, production characteristics and depletion rates, as well as different transportation pathways. A single municipally owned LDC, or single joint action agency, does not risk its whole supply capital on a single well or production area that may not perform as expected or daily as is required, but instead gains access to a diversified portfolio of supply. Additionally, as the electric joint action agencies use natural gas for generation, and, in that, primarily for peaking loads during summer months, their load profile complements the needs of the natural gas joint action agencies, whose heavier load is in the winter months.

Other super-regional joint action agencies include The Energy Authority ("TEA"), founded by MEAG Power, Jacksonville Electric Authority and Santee Cooper and joined more recently by additional members. TEA was formed to trade excess power

generated by its members in the open market and acquire supplemental power in the open market needed for the members' native loads. Colectric Partners, formed to assist the members generally in acquiring and sharing spare parts and acquiring fuel for generation, is a sister organization to TEA.

Formation of a Joint Action Agency. Joint action agencies take a variety of forms. In some cases, they have been created by a single organic act of the relevant state legislature creating a statewide agency or authority and containing all the powers necessary to the joint action in the act. MEAG Power, LIPA, Energy Northwest and Alabama Municipal Electric Authority, among others, were created in this way.[17] Joint action entities can also be created through the relevant state's interlocal cooperation act or similar intergovernmental contract structure, as Florida Municipal Power Agency, Florida Gas Utility, Municipal Energy Agency of Nebraska and The Southern California Public Power Authority were created.[18] Minnesota, Michigan, Kentucky and many other states have similar laws. Entities have also been created in Georgia and Montana, among other states, under the relevant state's nonprofit corporation laws.

Whether a joint action agency is created by an act of its state legislature, through intergovernmental contract or as a nonprofit corporation, the heart of the joint action is in the rights and obligations of the local governmental members and is expressed in their individual contracts with the joint action agency. Mutuality of purpose and conformity of each member's undertaking are critical. A tenet of joint action is that all the entities should, at the very least, do a little better together than any one would have done individually, but no member should do worse. There are times, even with the fairest, substantially identical member contracts, that larger members increase the economies and

efficiencies of the group through their stronger credit and larger and more diverse service areas at a greater "velocity" than smaller members, but those larger members still do marginally better than they would have done independently, and their public enterprise is improved through the joint participation.

Joint action efforts typically arise from opportunity for municipal provision of a service, participation in an enterprise, scarcity of a resource, complexity of an operation or developed expertise by a single or several local governments in a service area, such as recreational programs. Often a core group of local governments has organized informally for information sharing or lobbying through their state's municipal association, such as the Electric Cities section of the Georgia Municipal Association, or through an industry association, such as the American Public Gas Association. Still other groups have organized because they have a common vendor or even natural gas pipeline, such as the Municipal Defense Group, a loose affiliation of municipally owned gas LDCs on the Texas Eastern Pipeline, that share the costs of legal representation in their common issues before the FERC.

In any of those examples, the group provides the context for the consideration of the joint action and the leadership in determining its scope and means. One of the group's first considerations should be whether, because of the complexity of the industry or level of borrowing required for the joint undertaking (such as capacity in electric generation assets or extensive natural gas reserves), the detail, additional power and specificity of a statewide agency or authority created by a separate act of the state legislature will ease later financing requirements. In many cases, a group may determine to use its state's interlocal cooperation or similar act when the undertaking requires only

the joint exercise of powers that each participating city already has. A group of interested local governments spearheading a joint undertaking requiring a legislative effort would have to be prepared to write comprehensive and detailed legislation and engage in years, in some cases, of lobbying efforts to effect their plan.

Any undertaking with as many real economic, political and security benefits as joint action in governmental enterprise is not easy. There are many layers of complexity in the formation of a joint action agency, from the specific details of the operational side of the enterprise to the means and timing of billing, the means of calculating each participant's obligation to support the enterprise, the nature of that support obligation and whether each participant's support obligation may be increased to include a share of a defaulting participant's support obligation. Further, the position each participant's support obligation takes in its own enterprise's revenue stream (i.e., whether a participant's share of the support obligation is paid as an operating expense of its enterprise before its own enterprise debt service, on a parity with such debt service or subordinate to such debt service) is critical to every other participant and even more critical to the creditors and bondholders of the joint action agency. In a super-regional joint action, there is an additional layer added, as each participant in the joint action is itself a joint action agency, having contracts with its own wholesale members that mirror its obligations in the super-regional joint action undertaking. In the case of a super-regional joint action agency, there are at least two levels of examination of debt service obligations and the priority of payment of support obligations in the relevant entity's revenue stream.

Joint action requires a common purpose, joint powers, mutual agreement, foresight in anticipating the evolution in the operation or financing of an industry and a great deal of leadership. Some of the joint action agencies that now own and manage generation assets or natural gas resources took many years just to create and more to finance, while smaller or simpler undertakings can be accomplished in less time and with less effort. The benefits of joint action, however, in efficiency, economy and leverage of public dollars make the effort in creating an undertaking worthwhile.

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[1] A Partner at Alston & Bird LLP.
[2] "Rebecca Mark's Exit Leaves Azurix Treading Deep Water," *The Wall Street Journal*, August 28, 2000.
[3] *Id.*
[4] *Id.*
[5] "Whiskey's For Drinking And Water's For Fighting Over," *Midcurrent Fly Fishing News*, December 17, 2004.
[6] HistoryLink.org, The Online Encyclopedia of Washington State History, "Washington Pubic Power Supply System (WPPSS), http://www.historylink.org/essays/output.cfm?file_id=5482.
[7] SC Code Ann. Section 58-31-10, *et seq.*
[8] Wa. Code Ann. Section 43.52.360.
[9] M.G.L.A. 164 App. Section 1-1, *et seq.*
[10] O.C.G.A. Sections 46-3-110 through 46-3-155.
[11] Fl. Code Ann. Section 163.01.
[12] NY Pub. Auth. Section 1020.
[13] O.C.G.A. Sections 46-4-80 through 46-4-125.
[14] TN Code Ann. Chapter 7-39.
[15] Al. Code Ann. Sections 11-50-390 through 11-50-417.
[16] Miss. Code Ann. Sections 77-6-1 through 77-6-77; SC Code Ann. Section 6-24-10 through 6-24-300; KRS Sections 65.210 through 65.300; Fl. Code Ann. Section 163.01.
[17] O.C.G.A. Sections 46-3-110 through 46-3-155; NY Pub. Auth. Section 1020; Wa. Code Ann. Section 43.52.360; Al. Code Ann. Section 11-50A-1, *et seq.*
[18] Fl. Code Ann. Section 163.01; Ne. Code Ann. Sections 70-1401 through 70-1423; Cal. Gov. Code Ann. Sections 6500 through 6513.