AC TRANSIT DISTRICT
Board of Directors
Executive Summary

Committees:
Executive Committee [ ]
External Affairs Committee [ ]
Operations Committee [ X ]
Planning Committee [ ]
Board of Directors [ ]

GM Memo No. 02-041
Meeting Date: February 21, 2002

Subject: Final Report – Analysis and Recommendation for Institutional and Governance Structures – TransLink® Universal Fare Card System

RECOMMENDED ACTION: [ X ] Information Only [ ] Recommended Motion

Fiscal Impact: To be determined through shadow JPA process.

Background/Discussion: The Metropolitan Transportation Commission (MTC) is the lead procuring agency on behalf of the following (collectively, the Phase I Operators) and other potential users of the TransLink® smart card universal fare payment and collection system:

San Francisco Municipal Railway (Muni)
Bay Area Rapid Transit District (BART)
Alameda-Contra Costa Transit District (AC Transit)
Peninsula Corridor Joint Powers Board (Caltrain)
Golden Gate Bridge Highway and Transportation District (Golden Gate Transit)
Santa Clara Valley Transportation Authority (VTA)

BOARD ACTION: Approved as Recommended [ ]
Approved with Modification(s) [ ]
Other [ ]

The above order was passed and adopted on ____________________, 2002.

Rose Martinez, District Secretary

By _______________________________
MTC engaged a consulting team: pbConsult; Nossaman, Guthner, Knox & Elliott LLP; Karen Antion Consulting LLC to advise them on Institutional and Governance options for administration of the TransLink® System. Working with MTC and the Operators, the team recommended a Governance structure for the administration of TransLink®.

MTC held a meeting of Operator General Managers and other representatives on November 26, 2001. At that time Governance and Institutional options were explored and certain preliminary conclusions reached. The attached report reflects those deliberations, discussions and conclusions as well as the observations of the team.

Three alternatives were considered: a) the formation of a Statutory Entity or b) Joint Exercise of Powers Authority (JPA) or c) entering into an Inter-agency or Cooperative Agreement. While the option to enter into an Inter-agency or Cooperative Agreement is still under consideration, the option with the most support among Operators is the formation of a JPA. The JPA, for purposes of the attached report is designated as the TransLink® Joint Powers Authority, to assume the Design, Build, Operate and Maintain (DBOM) Contract and to own, manage and operate the TransLink® System.

The TransLink® Joint Powers Authority would initially consist of Phase I Operators [excluding Caltrain, but including the San Mateo County Transit District (Samtrans)] and other Operators choosing to join the JPA as founding members. MTC would be a non-voting, ex-officio member of the JPA and its Governing Board. The power of the Authority would be as broad as legally permissible under the Act. However, the Authority would be expressly prohibited from exercising any power that would set or otherwise determine fares of any Operator.

The Governing Board, or Managing Board, of the Authority might consist of one permanent representative from each Phase I Operator (excluding Caltrain; including Samtrans) plus three additional rotating members from the remaining Operators. Each seat would be filled by the member’s General Manager, Chief Financial Officer or Chief Operating Officer. Significant issues and policy matters would be presented to each Operator’s Board for their consideration and action prior to a vote of the JPA Managing Board.

Additionally, an Operations Board consisting of delegates appointed by the General Managers of the Operators would be responsible for overseeing the day-to-day operations of the Authority as well as any matter not expressly delegated to the Managing Board. The Operations Board Governance structure could mirror that of the Managing Board, or take some modified form such as one seat for each participating Operator.
GM Memo No. 02-041
Subject: Final Report – Analysis and Recommendation for Institutional and Governance Structures – TransLink® Universal Fare Card System
Date: February 21, 2002
Page 3 of 3

On routine matters, the Managing Board would act by approval of a majority of the Board members. Certain matters, including financial, cost and revenue allocations; and amendments, termination or other significant matters related to the DBOM contract would require the affirmative vote of two thirds of the members of the Managing Board. Actions of the Operations Board would be subject to approval by a majority of such board. It is anticipated that the Managing Board would not need to meet monthly; it could probably operate effectively based on quarterly meetings. The Operations Board, because of its “hands on” duties, would probably need to meet more frequently, possibly as frequently as monthly.

Due to the need to resolve complex issues related to cost and revenue allocations, and related to the assignment of the DBOM contract to the JPA prior to its commencement of operations, it is recommended that a “Shadow JPA” (SJPA) be organized by the Operators at this time. It is suggested that the SJPA mirror the proposed structure of the JPA, but be an informal organization, reflected, if necessary, through a Memorandum of Understanding among the parties. The SJPA would be charged with working through the DBOM contract: cost and revenue allocation models, and coming to a final resolution to be adopted by the JPA or other final Institutional and Governance structure that is selected. Neither participation in the SJPA or the JPA contractually commit AC Transit to Phase II of the TransLink® System implementation.

Prior Relevant Board Actions/Policies: The District has agreed, via a Memorandum of Understanding, to participate in the Metropolitan Transportation Commission’s Phase One TransLink® Demonstration project.

Attachments: Final Report
Analysis and Recommendation for Institutional and Governance Structures
The Metropolitan Transportation Commission TransLink® Universal Fare Card System
January 2002

Approved by: Rick Fernandez, General Manager
Prepared by: Joe Kinchen, Chief Technology Officer
John Rudniski, Operations Technology Administrator

Date Prepared: February 4, 2002
FINAL REPORT

ANALYSIS AND RECOMMENDATION FOR INSTITUTIONAL AND GOVERNANCE STRUCTURES

THE METROPOLITAN TRANSPORTATION COMMISSION
TRANSLINK® UNIVERSAL FARE CARD SYSTEM

January 2002

Stanley S. Taylor, Esq.
Nossaman, Guthner, Knox & Elliott, LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Phone: (415) 438-7224
E-mail: staylor@nossaman.com

Scott C. Abrams, Esq.
Nossaman, Guthner, Knox & Elliott, LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Phone: (415) 438-7217
E-mail: sabrams@nossaman.com

Mortimer L. Downey III
pbConsult
1301 “K” Street NW, East Tower, Suite 375
Washington, D.C. 20005
Phone: (202) 789-0711
E-mail: downey@pbworld.com

Karen Antion
Karen Antion Consulting, LLC
61 Seaview Avenue, Suite 58
Stamford, CT 06902
Phone: (203) 961-0079
E-mail: kantion@earthlink.net
# Table of Contents

I. Introduction 1

II. Project Goals and Objectives 2
   A. The Problem 2
   B. Stakeholders 2
   C. Goals and Objectives of the Project 3

III. Northeast Regional Experience 3
    A. Background 3
    B. Governance 4
    C. The New Jersey Consortium 5
    D. Lessons Learned 6

IV. Goals and Objectives of the Governance Project 7
    A. Field of Membership 9
    B. Admission and Withdrawal of Participants 9
    C. Assignment and Assumption of the DBOM Contract 10
    D. Administration of the DBOM Contract 10
    E. Plans for Future Applications 10
    F. Technology Changes and Upgrades 11
    G. Ratification and Approval Operating Policies and Procedures 11
    H. Allocation of System Costs and Revenues 11
    I. Dispute Resolution 12
    J. Privacy Issues 12
    K. Technology Transfers and Interoperability Issues 12
    L. Customer Interface, User Friendliness and Responsiveness 12

V. Legal and Institutional Issues of the Governance Project 13
   A. Jurisdictional Limitations 13
      1. Territorial 13
      2. Governmental Power 13
   B. Funding Limitations 14
      1. Lock In 14
      2. Financial Controls 14
   C. Project Financing 14
   D. Procurement Limitations 14
Options Analysis and Recommendation
TransLink® Governance Project

E. Human Resource Limitations 14
F. Interagency Coordination 15

VI. Ownership, Operations and Maintenance 15
A. Regional Deployment 15
B. Ownership 15
   1. Intellectual Property 15
   2. Capital Assets 15
C. Operational Responsibilities 16
   1. Policies and Procedures 16
   2. Maintenance 16
   3. Replacements 16
   4. Dispute Resolution Among Operators 16
D. Liability 16
E. Privacy 16

VII. Governance Alternatives 17

VIII. Institutional Alternatives 18
A. A Statutory Entity 19
   1. Creation 19
   2. Powers 19
   3. Limitations 20
   4. Advantages 20
   5. Disadvantages 21
   6. Legislation Expressly Enabling MTC Operational Authority Over the System 22
B. Joint Exercise of Powers 22
   1. Formation 22
   2. Advantages 25
   3. Limitations 26
   4. Disadvantages 26
C. Cooperative or Other Interagency Agreement 26
   1. Formation 27
   2. Powers 27
   3. Limitations 27
   4. Advantages 27
   5. Disadvantages 28

IX. Conclusion and Recommendation 28
A. Recommendation for Permanent Institutional and Governance Structure 28
Options Analysis and Recommendation
TransLink® Governance Project

B. Interim Institutional Arrangement
Options Analysis and Recommendation
TransLink® Governance Project

I. Introduction

The Metropolitan Transportation Commission ("MTC") serves as the lead procuring agency on behalf of San Francisco Municipal Railway ("Muni"), Bay Area Rapid Transit District ("BART"), Alameda-Contra Costa Transit District ("AC Transit"), Peninsula Corridor Joint Powers Board ("Caltrain"), Golden Gate Bridge Highway and Transportation District ("Golden Gate Transit"), and Santa Clara Valley Transportation Authority ("VTA") (collectively, the "Phase I Operators") and other potential users (collectively, including MTC, the "Participants") of the TransLink® smart card universal fare payment and collection system (the "Project," or the "System"). MTC has requested advice regarding institutional and governance options for administration of the System (the "Governance Project"). This paper reviews history, goals and objectives of the Project, the need for a new institutional governance structure, some of the issues that the new structure must address, and an analysis of the features, advantages and disadvantages of several alternative structures.

Senate Bill 1474 ("SB 1474")\(^1\) authorized MTC, in consultation with the Partnership Transit Coordination Committee ("PTCC"), an advisory body consisting of representatives of the Phase I Operators and 15 other Bay Area transit operators (collectively, the "Operators"), to recommend actions to implement the consolidation and coordination of transit services and functions in the nine county San Francisco Bay Area Region in order to improve service and achieve operating efficiencies in the regional transit system. SB 1474 contemplates that certain "functions be consolidated and performed through inter-operator agreements or as services contracted to a single entity."\(^2\)

In 1997, MTC adopted an Implementation Plan which includes a proposal for the design, development and deployment of a payment and collection system utilizing smart card technologies under the caption "TransLink®". Since 1997, MTC has negotiated and entered into a design build operate maintain contract ("DBOM Contract") with Motorola, Inc. ("Contractor") for the design, development and implementation of the hardware and software comprising the System.

Under the terms of the DBOM Contract, the Contractor has designed and constructed a demonstration System for fourth quarter 2001 roll out (the "Phase I Program"). The Phase I Program will provide an opportunity to test assumptions regarding System functionality and consumer acceptance. The Phase I Program objectives are to:

- Confirm the feasibility of multi-modal, multi-operator automated fare collection systems.
- Validate functional, operational and technical requirements of the System.
- Ensure the System technology meets the needs of the Operators.

\(^1\) Statutes 1996, Chapter 256; adding Government Code Section 66516.5.
\(^2\) Gov. Code § 66516.5.
Options Analysis and Recommendation
TransLink® Governance Project

- Assess equipment functionality, reliability and serviceability.
- Assess cost effectiveness.
- Assess customer response and acceptance levels.
- Provide a mechanism for learning from mistakes and problems encountered in the implementation of the TransLink® technology.

All of the Phase I Operators have agreed to devote sufficient resources to enable a total of 4,000 transit riders to test the System during the Phase I Program. The Phase I Program may also highlight institutional and governance issues that may require resolution before full implementation of the System is feasible. The Participants anticipate that a governance structure will need to be selected and at least partially implemented prior to final deployment of the System.

MTC held a meeting of Operator general managers and other representatives on November 26, 2001, at which governance and institutional options were explored and certain preliminary conclusions reached. This paper reflects those deliberations, discussions and conclusions as well as the observations of the consultant team.

II. Project Goals and Objectives

A. The Problem

Bay Area transit riders have long expressed desire for a fare payment medium, likely in the form of a single transit card, to smoothe their transfers from one system to another and to eliminate the need to carry exact change or multiple tickets. The Project’s goal is for the System to be available on all Bay Area transit systems and to make the Bay Area the first region in the United States to have a smart card universal fare payment and collection system that can be used interchangeably on all forms of public transit: buses, trains and ferries. The System will make transit easier for Bay Area riders to use, and consequently increase the utilization of existing transit resources around the Bay Area. The System would also be available for use as the basic fare collection mechanism for any agency that opted to use it in that manner.

B. Stakeholders

The stakeholders include the Operators, MTC, Bay Area transit riders, and other Bay Area transportation agencies.
Options Analysis and Recommendation
TransLink® Governance Project

C. Goals and Objectives of the Project

The central goal and objective of the Project is to create a transit payment and fare collection system that will benefit both transit riders and the Operators. As adopted by the PTCC, the goals for the TransLink® Program are to:

1. Improve convenience for passengers making inter-Operator trips.
2. Allow Operators to improve convenience for passengers making intra-system trips.
3. Improve efficiency and security of the fare collection system.
4. Take advantage of revenue enhancing or cost saving business deals (expected primarily from the private sector)
5. Consolidate and coordinate service as required by SB 1474.

The achievement of these goals should be of substantial benefit to both riders and Operators, and warrant the substantial investment of time and money that has been devoted to the project. Riders will find the use of the system simpler and more convenient, purchase options will be widened, employer provision of transit benefits will be enhanced, and TransLink® cards may eventually be accepted for additional uses. Transit operators will have the opportunity for more efficiency and flexibility in their fare collection systems.

III. Northeast Regional Experience

A. Background

To support the development of alternatives for a governance structure for TransLink®, the consultant team researched the Northeast Region’s experience to understand the lessons learned about the structure governing their E-Z Pass Program. E-Z Pass is a multi-state regional electronic toll collection system that enables customers to open a toll account with any member agency and travel on any regional E-Z Pass facility using one transponder or “tag” and receive one consolidated account statement.

The E-Z Pass InterAgency Group (“IAG”), currently comprised of eighteen (18) toll agencies spanning seven states, was originally formed in 1990 to implement a regionally

---

The current IAG Members include: The Delaware Department of Transportation, The Delaware River and Bay Authority, the Delaware River Port Authority; the Maryland Transportation Authority, Massachusetts Port Authority, Massachusetts Turnpike, MTA Bridges and Tunnels, the New Jersey Highway Authority, the New Jersey Turnpike Authority, the New York State Bridge Authority, the New York State Thruway Authority, the Peace Bridge, Pennsylvania Turnpike Commission, The Port Authority of New York and New Jersey, the South Jersey Transportation Authority, and the West Virginia Turnpike Authority.
compatible electronic toll collection system (ETC). Today, eleven of the eighteen toll agencies have implemented electronic toll collection under the E-Z Pass service mark. Jointly, these toll agencies represent nearly 50% of all U.S. toll transactions and over 70% of all U.S. toll revenues, totaling approximately $3.4 billion in annual toll revenues.

The success of the E-Z Pass system has far exceeded all market penetration forecasts. Market penetration has reached an overall level of 65% and rises to a level of 82% during peak periods. There are currently 3.8 million account holders using 6.6 million transponders or “tags”. The E-Z Pass customer service centers are currently processing approximately 66 million transactions per month.

B. Governance

The E-Z Pass IAG is a consortium or “cooperative agreement” form of governance. The structure consists of a series of contracts executed by all members. The contractual agreements include a Consortium Memorandum of Understanding, an Interagency Agreement, and a Reciprocity Agreement. The original nine (9) IAG members created the fee structure and rules for admission of additional members.

There are currently two classes of membership: voting and non-noting members. Voting members pay an initial membership fee of $175,000 plus an annual fee. Non-voting members pay an initial membership fee of $87,500 plus an annual fee. The annual fee is based on the total value of the Agency’s toll revenues. The current IAG membership includes both voting and non-voting members.

An Executive Committee governs the IAG and is comprised of each Agency’s CEO and Operating Officers, or their designees. Each IAG voting member has one representative and one vote on all matters brought before the Executive Committee. A majority vote is required to authorize any action of the committee. In the event that an action would impose a cost, either direct or indirect, in excess of $10,000 on any or all members, a unanimous vote is required. Abstentions are not counted as negative votes in determining unanimity. A two-thirds membership of the committee constitutes a quorum. The Executive Committee of the IAG has the responsibility for the successful operation of the E-Z Pass System. Additional responsibilities articulated in the Interagency Agreement include:

- Protect and preserve the financial interests, reputation and other tangible and intangible assets of the member agencies.
- Develop an annual estimate of expenses to be incurred for the collective benefit of the member agencies and establish a formula and procedure for the sharing of such expenses.
- Administer and review contracts entered into collectively or in parallel by member agencies for common purposes related to E-Z Pass.
- Assure similar operating parameters and procedures are established to provide for consistent, safe E-Z Pass operation throughout the region.
Options Analysis and Recommendation
TransLink® Governance Project

- Coordinate legal, legislative and regulatory activities.
- Coordinate marketing activities and public/press relations for the regional E-Z Pass system.
- Assure that the E-Z Pass service mark is maintained.
- Effect resolution of all disputes that arise from the Policy Committee.

The Executive Committee has the authority to establish a subcommittee structure. The current governance structure includes a Policy Committee reporting directly to the Executive Committee. At the direction of the Executive Committee, the Policy Committee has the responsibility of conducting the research, analysis and “legwork” necessary to develop recommendations on policy matters. The Policy Committee Chairman then presents policy committee recommendations along with supporting facts and unresolved issues to the Executive Committee for action.

The Policy Committee is comprised of one representative from each IAG voting member. Each IAG voting member has one vote on all matters brought before the Policy Committee. A majority vote is required to authorize any action of the Policy Committee. There is a committee structure reporting into the Policy Committee. These committees include: the Operations Committee, the Technical Committee, the Finance Committee, the Procurement Committee, the Public Relations and Marketing Committee, and the Legal Committee. Committees are chaired and staffed by member agencies.

The IAG has five full-time employees including: the Program Director, the Treasurer, the Manager of Technology, the Manager of Business and Finance and an executive secretary. The Treasurer reports to the Chair of the Executive Committee. The Program Director, Manager of Technology, Manager of Business and Finance and the executive secretary report to the Chair of the Policy Committee.

C. The New Jersey Consortium

A second governance structure was put in place to support the implementation of the E-Z Pass program. The New Jersey Consortium was established by a Memorandum of Understanding among five members (the New Jersey Turnpike Authority, the New Jersey Highway Authority, the South Jersey Transportation Authority, the Port Authority of New York and New Jersey, and the Delaware Department of Transportation) to ensure a coordinated implementation of the E-Z Pass Program in New Jersey. This consortium designated a lead agency, the New Jersey Turnpike Authority, to coordinate the efforts of the consortium including the procurement of contractors, consulting services and equipment necessary to operate and maintain a customer service center and the ETC system on behalf of the participating Agencies. The New Jersey Consortium Memorandum of Understanding calls specifically for the member Agencies to participate in interstate groups (all consortium members are also members of the IAG) to work toward a universal ETC system in the region.
Options Analysis and Recommendation
TransLink® Governance Project

While both the IAG and the New Jersey Consortium operate under a “cooperative agreement,” there are a number of differences in the nature and voting structure of the two consortiums that have relevance for the TransLink® Governance Project.

- The New Jersey Consortium is governed by an Executive Council. The Executive Council consists of a Commissioner and the Executive Director from each participating Agency and the Commissioner of the New Jersey Department of Transportation.

- Unanimous Consent is required for decisions brought to the Executive Council. Each Participating Agency has one vote and the Commissioner of the Department of Transportation has one vote.

- A Dispute Resolution Committee, consisting of the Commissioner of the New Jersey Department of Transportation and the Chairperson of each participating Agency, resolves any disputes among and between participating Agencies relating to their rights, obligations and responsibilities as members of the consortium. Major disputes (defined in the Agreement as those involving revenue distribution, allocation of expenditures, award of contracts or agreements, amendment of contracts in excess of 10% of contract amount, authorization of new projects and admittance of new members) require the unanimous vote of all members of the dispute resolution committee. Routine disputes are resolved by majority vote of the dispute resolution committee. Final resolutions are final and binding on each of the participating Agencies.

D. Lessons Learned

While these governance structures have served the IAG well over the last decade, their experience has yielded a number of “lessons learned” that may prove helpful to the Operators as they consider governance alternatives.

- “Charter Membership” is critical to success. There are inevitably those agencies that have the greatest interest and investment in the overall success of a regional program. These members will ultimately control the program’s agenda. Operating Agencies agree that it is best to join early, and secure a seat as a charter member.

- Keep the size of the governing board and working committees manageable. Consider a structure in which non-charter members elect representatives.

- The requirement of a unanimous vote for decision-making is problematic. Alternative voting structures such as a “representative democracy” structured as a one agency-one vote with majority rule, or a weighted voting structure should be explored.
Options Analysis and Recommendation
TransLink® Governance Project

- A dispute resolution process should be an element of the governance structure.
- The organization should hire a small, full time staff.

A lesson that the Northeast Region has learned about the business of a regional electronic payment system is also worth sharing with the TransLink® program participating agencies. That lesson - “Do not underestimate the revenue potential of this type of a program” - is one that the Northeast Region is currently grappling with. When developing the original cost and revenue allocation formulas for the program, the focus was on the cost side of the equation. Today, faced with substantial revenue opportunities associated with E-Z Pass name recognition and market penetration, proposals for revenue generation as well as new cost and revenue sharing formulas are being considered.

IV. Goals and Objectives of the Governance Project

Recognizing that the long term success of the TransLink® System will require a stable means of governance that takes into account the interests of all Operators, MTC engaged a consultant team to review the current state of the Project, determine the interests expressed by Operators participants and work with MTC and the Operators towards acceptance of a mutually beneficial governance structure as the System moves forward.

The goals and objectives of the Governance Project are to evaluate, select, design and implement the optimal institutional structure for the final deployment and ongoing operations of the System. This process will benefit from the work of the consultants, but ultimately its success rests with MTC and Operators. The selection of the optimal institutional structure must be targeted to achieve the System goals. The institutional structure and governance processes selected should reflect the Operators’ preference for creating an institutional structure that is durable, flexible, and operationally efficient, and that treats the interests of each Participant fairly and equitably.

Aside from SB 1474’s direction that such “functions be consolidated and performed through inter-operator agreements or as services contracted to a single entity,“ there is no specific structure, statutory or otherwise, addressing governance of the ongoing operations of the System and there is no existing comprehensive framework of agreements or an interagency entity with the authority to implement and operate the System upon full deployment.

MTC, as the procuring agency, has entered into the DBOM Contract, which is a detailed blueprint addressing implementation and operational issues between the Contractor and the procuring agency. MTC is also responsible under the DBOM Contract for operating and managing the System (“the System Manager”). While the future management and operation of

4/ Gov. Code § 66516.5.
Options Analysis and Recommendation
TransLink® Governance Project

the System by MTC is one of the options being considered, other options that shift management and other decision-making to a more collaborative body may be preferable to MTC and to the Operators.

The PTCC was created to serve as a sounding board and information interchange platform among the Participants on issues of mutual interest, but it has no specific authority or direction with respect to implementation of the System or for addressing ongoing operational issues that will impact the Operators nor does it have a dedicated funding source for the specific purpose of funding System operations and management. Various state and federal funds have been programmed by MTC to meet system costs. Looking forward, it may be more advantageous to organize a new agency, board or commission under the joint exercise of powers laws. The new agency, board or commission would be explicitly created to operate and manage the System (the "System Manager") within the parameters of the selected institutional structure ("the Structure").

Certain issues have already begun to surface that suggest the need for a new institutional structure with the authority and mechanisms to address issues of critical importance to MTC and the Operators. While there is a general understanding that a regional fare collection system is an attractive option for customers, some more than others, there are a variety of interests that must be addressed effectively if the System is to move forward. Individual Operators are at different stages of development and have different needs in terms of their own fare collection systems. The financial condition and budget constraints differ among these Operators, as does their degree of technological sophistication and experience and their perceived need for fare collection improvement.

Recognizing the public investment made and the public interest in the outcome, there is a general consensus that the System ought to move forward, and that a form of governance that accommodates the differing interests of the Operators is necessary for the System's success. Resolution of future governance issues is the goal of this Project as the technological and administrative matters associated with the introduction of the System move forward on a parallel track. Among the key issues that are moving forward in parallel are the evaluation of the Phase I Program and the determination of when and how to proceed with Phase II. Resolution of these matters is not the purpose of this Project, which is focused on an ongoing governance Structure. Definition of that future Structure will be an important element in that resolution, and this Project is focused on the agreements that must be reached for a new Structure to be implemented, as well as those which may become the initial agenda items for the new Structure, including the following:

- Field of Membership.
- Admission and Withdrawal of Participating Agencies.
- Assignment and Assumption of the DBOM Contract.
- Administration of the DBOM Contract.
- Plans for Future Uses.
Options Analysis and Recommendation
TransLink® Governance Project

- Ratification and Approval of Operating Policies and Procedures.
- Allocation of Costs and Revenues Generated by Operation of the System.
- Dispute Resolution.
- Privacy Issues.
- Technology Transfers and Interoperability Issues.
- Customer Interface, User Friendliness and Responsiveness.

A. Field of Membership

A preliminary consideration is establishing the appropriate field of membership in the new institution. Certainly, each of the Operators who are participating in the Project should be given the opportunity to participate in the new Structure. Conversely, it is probably not appropriate to provide membership status to Operators who choose not to participate in full System implementation. In addition, due consideration should be given to the ability of the institution to include, now or in the future, Participants that are not currently principally engaged in Bay Area transit service operations. The consequences of this decision may impact the availability of funding from such Participants, and in particular the availability of the proceeds of County sales tax measures to help fund ongoing operations, or the acquisition of new System equipment for deployment on new or replacement transit equipment and facilities. Furthermore, the question of future participation, through membership or otherwise by private transit operators, or public transit agencies outside of the nine county Bay Area – for example, Santa Cruz, San Joaquin, Yolo and Sacramento County transit agencies, should be addressed. These considerations may impact the selection of the Structure because of the territorial and jurisdictional limitations of the powers of the System Manager.

B. Admission and Withdrawal of Participants

The Structure must address the admission of new members, the withdrawal or termination of members, and the effect of mergers or consolidation of services among Operators. Assuming that all agencies might not choose to be "charter members," a key benefit to their participation and cooperation in the formation of an institutional structure is the ability to approve the terms and conditions under which new Operators would become participants including the funding requirements that may be established as a condition of participation. The methods by which entities can elect participation as well as withdrawal need to be formulated. It may be more advantageous for some Participants not to become members of the JPA and to participate by contract with the JPA. The Structure should also address the ability of Participants to withdraw from the Project or governance scheme, whether such termination or withdrawal is permitted, or permitted upon the occurrence of specified events.
Options Analysis and Recommendation
TransLink® Governance Project

C. Assignment and Assumption of the DBOM Contract

MTC, as the procuring agency and current System Manager, has entered into the DBOM Contract. If MTC is replaced as System Manager for the long-term operation and management of the System, MTC may wish to assign and the new System Manager may wish to assume the Contract. Achieving this end would require that the Contractor both agree to the assignment and to a release of MTC from its current responsibilities under the DBOM Contract. If such assignment takes place, the new System Manager will be responsible for the long-term operation and management of the System and the contracting and procurement functions.

D. Administration of the DBOM Contract

Moving forward to achieve an efficient management system, a governance structure will need to be created in which the authority and responsibility for the System’s operation can be vested in a single, accountable System Manager. Consistent with the provisions of the DBOM Contract as it may be amended or modified by the parties, the System Manager should be responsible for the oversight, review, and monitoring of the Contractor’s performance and take responsibility for any budgeting decisions that would affect the operations and expenses of the Operators and other Participants. Depending on timing, this may also be the way to accomplish changes identified as necessary in the evaluation of the Phase I demonstration. The System Manager should also be responsible for DBOM Contract administration including renewal, termination, periodic auditing and budgeting functions subject to internal governance processes included in the Structure.

E. Plans for Future Applications

As discussion goes forward about broader use of the smart card (other transportation applications, as well as other uses and transactions), it can be anticipated that the System Manager would be responsible for development, strategic planning and the approval of specific initiatives and business terms. A key consideration with respect to selection of the optimal structure will be the powers of the System Manager to engage in the expanded or future uses of the smart card such as parking meter, taxicab fare and bridge toll collections. Expansion of the System to include these transportation-related financial transactions, envisioned under the DBOM contract, is an important consideration. At the same time, it is recognized that successful implementation for the primary TransLink® services is essential to subsequent expansions. Most of the Operators are organized as special transit districts or other limited purpose agencies, and as such, their powers to engage in any commercial or other governmental functions not primarily related to transit services are limited. So long as the System is used primarily for public transit related transactions, there would not appear to be any legal impediment to the expansion of the System. Other uses that are transportation related and revenue generating such

---

Section 17.6 of the DBOM Contract contains a prohibition on assignment and therefore the Contractor’s consent to assignment of the DBOM Contract must be obtained.
Options Analysis and Recommendation  
TransLink® Governance Project

as parking meter, taxicab fare and bridge toll collection may be permissible, but the organic legislation for these transit districts need to be reviewed.

F. Technology Changes and Upgrades

Over the life of the Project it is likely that opportunities will arise for improvements in the System based on newly emerging technologies. In the development of an institutional structure, this process should be considered so that all participants have an appropriate voice in the adoption of technological changes in light of the way they may impact transit system operations.

G. Ratification and Approval Operating Policies and Procedures

Phase I of the project is being conducted according to the agreed-upon TransLink® Demonstration Operating Rules. It is expected that prior to Phase II, these Operating Rules will be revised substantially. A new System Manager would, where necessary, undertake the revisions of the existing Operating Rules. The System Manager should not be involved in the development of specific rules concerning day-to-day operations and maintenance. These functions should be managed by the staff of the System Manager and the Participants. The Structure's governance process should provide the Participants a mechanism for establishing and modifying operational policies and procedures within the framework of broad policies that support successful implementation, such as retention of operator pricing flexibility, user friendliness and fiscal integrity.

H. Allocation of System Costs and Revenues.

A definitive agreement on the allocation of costs of operation and maintenance of the System in Phase 2 and thereafter will need to be achieved prior to the commencement of Phase 2. Although the DBOM Contract contains cost and fee provisions as between the Contractor and MTC based on certain fixed and variable costs generally attributable to the number of transactions that occur, the Operators, as among themselves, can agree upon an alternative allocation of these costs, which could be based on the value of transactions, the number of transactions, the size of the areas served by the Operators, the number of transit customers served or any combination of such factors or other factors that the Operators select. Whatever allocation mechanism is agreed upon, it is essential that total payments match exactly to the amounts due the DBOM contractor under the provisions of the DBOM contract.

To the extent that the System generates revenues, the Operators will also need to reach agreement on the allocation of such revenues among them. Certain revenues will be generated immediately by the System, such as income generated on funds held for the Operators resulting from prepayments by TransLink® customers for transit services. The parties may agree that to the extent that such “float” revenues do not exceed operation and maintenance costs of the System, such revenues should be applied to reduce the amounts due by the Operators or distributed to each participating Operator on a monthly basis. Other possible revenue sources that might be considered include advertising revenues from opportunities to include corporate and other logos and brands on TransLink® cards and other equipment, branding and co-branding opportunities, bill “stuffers” and new payment applications for the TransLink® card, including
use of the card to pay for parking. At some point in the future, it is anticipated that total revenues could exceed System operation and maintenance costs, at which point it may be possible to make distributions of net income to the Operators.

I. Dispute Resolution.

It is inevitable that disputes among the Participants will arise. A quick and efficient dispute resolution process is critical to the ongoing success of the Program and should be agreed upon prior to implementation of the selected institutional and governance structure and commencement of the Phase 2 Project.

J. Privacy Issues.

The System will generate data regarding transit customers and their travel patterns and transit usage that will implicate privacy issues. The System Manager may wish to review the existing TransLink® Privacy Policy to ensure it meets the reasonable expectations of transit customers regarding personal information generated by the System.

K. Technology Transfers and Interoperability Issues.

One of the critical functions that the selected institutional and governance option selected must perform is the monitoring of technology developments of the System and the potential exploitation of that technology for other purposes. A related issue that will need to be dealt with by the new institutional and governance structure is to ensure that technology changes at the System level are coordinated with technology changes that may occur at the Operator level. The selected governance structure will need to be vigilant in assuring that such changes do not affect interoperability of the System and Operator components of the Project.

L. Customer Interface, User Friendliness and Responsiveness.

An important component of the responsibilities assumed by the new institutional structure relates to customer interface and assuring that the System is user friendly and responsive to customer needs, given the importance of customer satisfaction to the success of any transit operation. Complaints about the complexity and variability of the current fare structures and payment media within the Region are frequent. One of the primary goals of the Project is to address at least one of those issues directly, that being the creation of a uniform fare payment medium throughout the Region. The second issue, that is, creating a more uniform fare structure, may be more difficult to address, given the view of the Operators that the new institutional structure should not have any role in setting fare policy.

A related but equally important consideration is that of consumer responsiveness, that is, the "who you gonna call" when the System does not meet customer expectations, question. Phase I results should be evaluated and brought into the decision making process for Phase II. Attention will need to be paid to provisions of the DBOM Contract and the requirements and capabilities of the Call Center, which has been established by the DBOM Contractor under the DBOM Contract in relation to existing customer service programs maintained by the Operators. Questions of "ownership" of the hardware components of the
System will also need to be reviewed and considered by the Operators so that a clear understanding and allocation of the responsibilities of the Operators and the DBOM Contractor with respect to responses to System component breakdowns is reached.

Another customer interface issue that will need to be resolved prior to the Phase 2 rollout is the question of cost allocations between customers and Operators. A critical component of this analysis has to do with whether Operators will require customers to purchase the smart card, or whether the cost, or some portion thereof, of smart cards will be absorbed as a Program cost to be spread across the participating Operators. Finally, processes and policies related to training of Operator staffs in the operation and maintenance of System components for which Operator staffs have responsibility, and the actual training of staffs in connection with such matters, should be addressed prior to Phase II implementation.

V. Legal and Institutional Issues of the Governance Project

We have identified a number of legal and institutional issues that we believe should illuminate the selection of the appropriate Structure and choice of the System Manager. These issues should be considered in the light of the Project goals and objectives as well as the particularized circumstances of each of the Operators with respect to the Project. These considerations are summarized below.

A. Jurisdictional Limitations

MTC and each of the Operators are governmental agencies and are subject to geographical and legal limitations on their powers and on the exercise of such powers.

1. Territorial

MTC and the Operators exist by virtue of special organic legislation that defines the territory in which they are authorized to operate. These limitations need to be considered in the context of the ability of the parties to operate the System outside of the territorial restrictions of the individual Operators, or expand the System beyond the nine county Bay Area.

2. Governmental Power

The same organic legislation that defines the territory in which the Operators are authorized to operate also provides such agencies with general governmental powers, and such powers must generally be exercised exclusively for the purposes for which the agency was organized – e.g. public transit. These limitations need to be considered in connection with addressing the issue of the ability of the parties to expand the uses of the System beyond fare payment and collection services and into other transportation, governmental and commercial uses and transactions.
Options Analysis and Recommendation
TransLink® Governance Project

B. Funding Limitations

There are a number of issues related to fiscal matters that may impact the selection of the preferred Structure as well as the internal procedures and controls that might be implemented by the System Manager. These issues are not legal in nature, but they may be critical in the selection of the Structure.

1. Lock In

The Participants should consider the impact of obtaining or foregoing long-term commitments from the Operators to participate in the Project, and whether financial or other contributions will be required as a condition to membership in the Structure. The Participants should also consider the network effects upon full deployment of the System to the extent that late adopters may be subject to higher entrance costs than the Participants or early adopters.

2. Financial Controls

Responsibility and authority will have to be allocated to the System Manager to establish all required financial controls to ensure the ongoing fiscal health and fundability of the Project. This includes budgeting and auditing controls.

C. Project Financing

The Participants should also consider the flexibility of the selected structure with respect to project financing activities and the incurring of bonded indebtedness. Ultimately the System components will require upgrades and replacements and the chosen Structure should anticipate the need to engage in financing activities.

D. Procurement Limitations

The flexibility of the System Manager's procurement policies should also be considered. The selected Structure should not be so complex as to discourage the participation of small, disadvantaged, disabled and minority businesses or limit the qualified suppliers or contractors to large enterprises. The Participants may also wish to consider the availability of innovative procurement methodologies, such as design build and design build operate and maintain, for future replacements or enhancements to the System.

E. Human Resource Limitations

The Participants should also consider the impact of the selected Structure upon the labor-management relations of the Operators. To the extent that certain operational functions and jobs may be transferred or outsourced by the Operators to the System Manager or to private operators, these actions must be evaluated to ensure they do not violate applicable labor agreements, create unnecessary labor-management conflict or infringe upon the employee claims of the right to work with respect to operation and maintenance of System components.
F. Interagency Coordination

An overriding issue with regard to the regional deployment of the System and its ongoing operation is the coordination of interagency activities. To the extent the Operators will delegate authority to the System Manager the parties will need to formulate the scope of that delegation of authority, the mechanisms for exercise of that authority across jurisdictional lines and the method of resolving any interagency disputes or ambiguities that arise. We would anticipate these relations would be formulated through the Structure's governance process and as a part of operations and maintenance policies and procedures. A corollary of this is adequately defining and documenting in the organic documents each Operators' autonomy.

VI. Ownership, Operations and Maintenance

A. Regional Deployment

Another key issue with respect to the System Manager is establishing or delegating sufficient power to effectively manage the deployment of the System over twenty-one (21) operations in nine counties. Although several of the Phase I Operators have drafted deployment integration plans, management of System deployment will be a computer and time intensive project whose ultimate success will be constrained by the pace and effectiveness of implementation at the field level.

B. Ownership

Ownership of the System components will need to be addressed.

1. Intellectual Property

Under the terms of the DBOM Contract, the Contractor has retained ownership of most of the intellectual property rights related to System elements and operation, but has granted MTC the right to use that intellectual property. The extension of existing licenses for the current System platform and future software upgrades or derivative works to a new System Manager and potentially to the Operators needs to be addressed as well as the right to modify the System in connection with the integration of other hardware and software with the System.

2. Capital Assets

The DBOM Contract provides that title to all hardware components shall vest in MTC. The Structure will need to address whether the existing hardware components will continue to be owned by MTC, transferred to a new System Manager, or transferred to the Operator in whose territory such components are installed. In addition, the Operators will need to consider the ownership of new or replacement hardware not provided by the Contractor and the impact of labor relations agreements that may provide pre-emptive rights to operate and maintain the components.
C. Operational Responsibilities

Another issue the selected Structure must address is the formulation, establishment and execution of key operational functions.

1. Policies and Procedures

A new System Manager will inherit the current TransLink® Operating Rules and any revisions that may be made to them. Thereafter, revisions should be formulated by key technical personnel and presented to the governing body of the new System Manager for review and approval.

2. Maintenance

Maintenance responsibility for the System components will need to be addressed as between the Contractor, System Manager, and the Operators. Currently, the DBOM Contract requires the Contractor to maintain the System to specified service levels. Coordination of these maintenance services must be established and maintenance responsibilities may require reallocation upon termination of the DBOM Contract.

3. Replacements

The replacement of broken, worn and obsolete System components must be addressed.

4. Dispute Resolution Among Operators

The selected institutional Structure might also include internal mediation or dispute resolution procedures in the event of significant policy or operational disputes among the Participants. These procedures may be binding or non-binding and may vary depending upon the nature or magnitude of the dispute.

D. Liability

Liability issues related to the operation of the system suggest that certain institutional structures may be preferred by the Operators. The alternatives would allow for limited liability if a separate statutory entity were established, or joint and several liability in the event of an interagency or joint exercise of powers agreement. In any event, the Operators will likely desire to allocate by contract certain risks to the System Manager and obtain appropriate indemnifications.

E. Privacy

The structure should also consider the respective obligations, rights, and duties of the Participants with respect to access, sharing, use, and dissemination, both internally and externally, of the personal information of transit riders. The System Manager should be responsible for establishing privacy policies. The Operators’ rights with respect to personally
Options Analysis and Recommendation
TransLink® Governance Project

identified information acquired during the Phase I Project are set forth in the TransLink® License Agreement executed by each cardholder.

VII. Governance Alternatives

Governance, as opposed to institutional structures, addresses internal management issues, such as participation, representation, voting rights and quorum requirements, within the selected institutional structure. For the purposes of this paper, institutional and governance issues are sometimes short captioned as “governance” issues. Since governance issues, in the narrow, technical sense, may drive or determine institutional structures, a brief discussion of governance alternatives is provided. There are certain basic alternatives that need to be addressed in deciding how the governing body of the legal structure that is selected should operate. The basic options include:

- A full representational body, with every Operator sitting on the governing body.
- A partially representational body, with selected representatives constituting the board such as representation by County (similar to MTC’s structure) or by other relevant criteria, or a structure pursuant to which some Operators have direct representation and others have indirect and shared representation.
- A fully or partially representational board with policy making authority and an operating committee with representation of the Operators with the greatest interest, which operating committee has broad authority over the day to day operation of the System.

A key determinant in the selection of any representational structure is the number of constituents entitled to vote or otherwise participate. For the purpose of this discussion it is assumed that Phase II of the Project will include participation by a significant percentage of the Operators and by most or all of the larger Operators. The inclusion of each Operator on the governing board might impair the ability of the board to effectively conduct the business of the System Manager. This suggests options: limiting the number of governing board seats to the “major players” with a broader “advisory board” with representation from all the Operators; establishing a governing board with representation from all Operators (either direct or proportional representation) and the establishment of an “executive committee” consisting of representation of the major players, which executive committee would have broad policymaking and/or operational oversight powers.

A subordinate but essential consideration is the voting system’s quorum and approval requirements. Again, a range of possibilities exists, constrained in some fashion by what is permissible under the applicable laws (the analysis which follows will address the feasibility of these options within framework of the governance structures that are proposed). A key issue is how to create a system with which people will be comfortable, therefore one that can protect the interests of each Participant without compromising the general interest.
Options Analysis and Recommendation
TransLink® Governance Project

Some basic concepts follow:

- **“Consensus”** - every agency represented, and nothing happens unless consensus is reached.

- **“Representative Democracy”** - every agency on the governing body, structured as a one agency-one vote, with majority rule.

- **“Security Council”** - all agencies represented (or some subset) with larger entities holding a veto over all actions, or over actions that are clearly inimical to their declared interests. Potentially, this veto might be extendable to all parties, recognizing that subject to any contractual provisions they would have the right to walk out.

- **“Kyoto Agreement”** - a style of membership and voting rights that gives weighted voting powers based on the degree of interest, thus retaining a voice for all members within a structure that assures that all decisions will require a balance of support among small and large agencies.

- **“Rotational Representation”** - not everyone on the governing body all the time, but a process in which you have to recognize that someone else’s term will come.

- **“Supermajority Requirement”** - routine matters can be approved by the affirmative vote of a majority of the board (or a majority of a quorum of the board), but “significant” matters (e.g., financial matters, contract approval and amendment, annual budgets, cost and revenue allocations) would require the affirmative vote of two thirds or some other amount in excess of a simple majority. It should be noted that this requirement, coupled with the final makeup of the board, will have important implications for the various Operators.

**VIII. Institutional Alternatives**

The foregoing review of the status of the System, issues indicating the need for a new institutional structure and some basic governance principles that need to be addressed suggests several possible legal structures.

These alternatives should be measured against the “no-build” alternative with MTC continuing to serve as lead procuring agency and System manager and with the continued utilization of the PTCC as a sounding board and input mechanism for the Operators with respect to System functionality and consumer acceptance.
The advantages to the "no-build" option are that no new governance structures would have to be created. No additional start up costs would be incurred. Existing systems are in place, as are staff with experience in the System technology. There would be no delay attendant to creating a new governance structure.

Ultimate achievement of all the goals of the System will be driven first by its effectiveness and acceptance as a fare-collection medium. The significant and overriding disadvantage to the no build alternative, in the collective opinion of the Operators is that it does not vest responsibility or accountability with the Operators where the operational success or failure of the System will be determined.

Thus other possible institutional structural options should be examined, as described below:

A. A Statutory Entity

The Participants may choose to create an administering agency by seeking the enactment of legislation by the California State Legislature ("Legislature") to establish such an entity.

1. Creation

Creation of a statutory agency would require drafting of a bill, the identification and enlistment of a member or members of the State Legislature as "author" or "authors", its introduction in the Legislature, and its passage by the two houses of the Legislature and signing into law by the Governor. Examples abound. MTC is itself an agency created by State statute to serve as a regional transportation planning and programming agency. MTC has nineteen (19) representative members from each of the nine (9) Bay Area Counties, the United States Department of Transportation, and the United States Department of Housing and Urban Development.6/ Other statutory regional public agencies include the San Francisco Bay Conservation and Development Commission ("BCDC") 7/ and BART.8/

2. Powers

The powers of a statutory agency are determined by its organic legislation and can be extremely broad. Statutory agencies customarily can employ staff, enter into contracts and other agreements with other public agencies and with private entities, sue and be sued, and generally exercise any other powers of public agencies in furtherance of their purpose.9/ The ability to raise funds through imposition of taxes or fees to fund its operations is
also an option available to a statutory agency, although the ability to raise revenues through the imposition of taxes and fees can be politically controversial and practically impossible due to Constitutional restrictions. Governance structures can include directly elected (either at large or by wards within the territory of the statutory agency) or appointed governing boards, and with respect to the basic "representational" options outlined above, each of such options would be permissible for a special purpose local agency subject to certain constitutional limitations. Similarly, and subject to the comment in the footnote immediately above, we believe that each of the voting/quorum alternative structures outlined above would be permitted for a statutory local agency.

3. Limitations

Limitations would mainly be self imposed. There are certain constitutional requirements, e.g., the necessity for a vote on the imposition of a tax or certain other revenue raising initiatives, but as a general matter, the drafters would have broad discretion in fixing the terms, conditions, rights and obligations of the statutory agency.

4. Advantages

One important advantage of choosing this alternative is that the Participants, especially at the initial stage, would have significant discretion to tailor the agency’s powers according to their needs and objectives. For example, unlike the other governance options discussed below, the Participants would have broad authority to grant new powers to the agency beyond what they have in common or provide for different financing powers. Another advantage of this approach would be the prospect of obtaining express legislative authorization to engage in activities or future uses of the System that currently may exceed the statutory powers of some of the Operators.

A strategic advantage may be that certain critical terms and provisions can be locked into statutory language. While the statute need not and generally would not fix all the

 Authorities organized under the provisions of Public Utilities Code Sections 180000 et seq. Under the latter structure, the organic statute permits local jurisdictions, by vote of their governing bodies, to create local transportation planning and programming agencies within limited boundaries (in the case of LTAs, within the jurisdictional boundaries of a county). Such local agencies may, under the provisions of the organic statute, impose sales taxes for transportation projects and programs, subject to voter approval. The governing bodies of such local entities are, in accordance with their organic statute, comprised of local elected public officials appointed by the participating jurisdictions to the board of the LTA. An example of an LTA is the Contra Costa Transportation Authority. Similar agencies formed under other provisions of the Public Utilities Code with similar powers and governance structures include the Alameda County Transportation Authority and the San Francisco County Transportation Authority. Our preliminary investigation does not reveal generic/special purpose legislation currently in existence that would be an appropriate vehicle for the governance structure being proposed, and we believe that if this option is selected it would be necessary and advisable to obtain specific statutory authorization for a special purpose regional agency.

The Equal Protection Clause principle of “one person, one vote” has been found not applicable to members of an appointive board. Therefore, if membership is not determined directly or indirectly through an election the “one person, one vote” requirement does not apply. See Sailors v. Board of Education, 387 U.S. 105 (1967) and 73 Op. Atty. Gen. Cal. 147 (May 10, 1990).
Options Analysis and Recommendation
TransLink® Governance Project

terms and conditions under which the agency would operate, critical terms, such as the representative and voting/quorum features of the agency, could be fixed by the statute. As such, amending or otherwise changing these provisions would require further legislative action, which, as a general observation, would require a much higher level of effort, with a less predictable outcome, than processes for amending organic documents under one of the options discussed below.\(^1\)

5. Disadvantages

First, it is uncertain whether the legislation will pass the Legislature and become law. While legislation can be drafted and an author obtained, there is no assurance that the bill can be successfully navigated through the Legislature and obtain the signature of the Governor, nor is it certain that, if successfully negotiated through the legislative process, the final product is in the form of the original draft or anything resembling it. While MTC and the Participants have legislative representation and a certain amount of clout with the Legislature, the process is essentially beyond their control and transportation related bills are often contentious.\(^2\) While nothing discussed to date suggests that a statute authorizing the creation of a regional agency that would administer the TransLink® System would be particularly controversial, certain potential elements, e.g., taxing authority, could be controversial and could derail or cause significant modification of the original form of the bill.

Second, a significant amount of time is likely to elapse before enactment of legislation and organization of the entity. Under the present circumstances, the best that could be expected is that a bill would be drafted and introduced at the start of the 2002 session of the Legislature. Unless the bill has an urgency clause, the bill would work its way through both houses and ultimately to the Governor for signature.\(^3\) Upon signing, the bill would be enacted and become law, effective the first day of the next calendar year, or January 1, 2003. Once the bill was signed into law and was given an effective date, it would still be necessary to organize the entity, a process that could take several months. While certain actions can be taken in anticipation of an effective date (assuming the bill has no urgency clause), it could be several months after enactment of the legislation before the work of the agency could begin. Therefore, it seems very unlikely that a new statutory agency could be established or organized prior to the Phase II regional deployment and implementation planned for mid-2002.

\(^1\) To some extent the same result can potentially be achieved through other governance structures by imposing unanimity or supermajority vote requirements, veto powers and related mechanisms on changes to the critical terms of the governance documents/structure.

\(^2\) For example, efforts to secure legislative authorization and appropriations for rebuilding the Transbay Terminal in San Francisco are being opposed by some Southern California legislators and by Caltrans.

\(^3\) An urgency clause requires a two thirds vote of both houses of the Legislature for approval of the bill. If the bill contains an urgency clause and is successfully negotiated through the Legislature and is signed by the Governor, it becomes effective immediately. However, negotiating an urgency bill through the Legislature is extremely difficult and is generally reserved for bills of high visibility and perceived importance.
6. Legislation Expressly Enabling MTC Operational Authority Over the System

This alternative to the creation of a new statutory agency is a subset of the option discussed above and implicates many of the same considerations as discussed for a new agency; however, the purpose of the legislation would not be the creation of a new entity but rather to statutorily expand the existing powers of MTC in manner designed to expressly authorize fare collection and permit the long term management and operation of the System by MTC. The consolidation of these functions within MTC presents the advantage of streamlining the deployment of Phase II of the Project and utilization of MTC’s existing representational structure for governance functions.

A committee or subcommittee governance structure could be designed under the direction and oversight of MTC to provide each of the Operators representation in the policy, operational and technical decision related to the Project, or alternatively, the existing PTCC structure could be modified and employed to serve the same purposes. The legislation could also expressly direct and authorize MTC to explore future uses of the smart card beyond transit fare payment and collection. This alternative would be subject to the same risks as outlined above in obtaining final passage, and if one or more of the Operators objected to the consolidation of these functions within MTC, they might be able to block passage of the proposed amendments to MTC’s organic legislation.

B. Joint Exercise of Powers

A somewhat more flexible but more scope-limited alternative would be the formation of a joint exercise of powers authority (JPA) through a joint exercise of powers agreement under the provisions of California Government Code Sections 6500 et seq.

1. Formation

The Joint Exercise of Powers Act (the “Act”)\textsuperscript{14} authorizes two or more public agencies to enter into agreements to jointly exercise any powers common to them (“Joint Powers Agreement” or the “Agreement”).\textsuperscript{15} For purposes of the Act, the term “public agency” includes, among others, a city, a public corporation, a public district, or regional transportation commission in California or another state.\textsuperscript{16} Each of the Operators would be an eligible member of a JPA.

The Act does not grant new powers but merely authorizes a new procedure for agencies to jointly exercise existing powers shared in common by the participating agencies. It is not necessary that any power common to the contracting agencies be exercisable by each contracting party with respect to the geographical area in which the power is to be jointly exercised. For example, two or more public agencies, each of which has the power to administer

\textsuperscript{14} Gov. Code §§ 6500 et seq.
\textsuperscript{15} Gov. Code § 6502.
\textsuperscript{16} Gov. Code § 6500.
Options Analysis and Recommendation
TransLink® Governance Project

a fare payment system within its respective jurisdictions, may create a JPA constituted pursuant to the Act to serve all the affected jurisdictions.\textsuperscript{17}

An agreement entered into under the Act offers certain advantages over other types of interagency agreements.\textsuperscript{18} While the powers of a JPA are limited to those held in common by the participating agencies, the manner of exercise of such powers is not so limited. For instance, while the power to procure goods and services must be commonly held by all the participants in a JPA in order for the JPA to exercise the power, the manner in which such goods and services may be procured is limited only by the abilities of any one of the participants. Accordingly, if one agency has less stringent procurement policies, or permits work to be performed by agency staff, the policies of that agency may be adopted by the JPA.\textsuperscript{19}

The agency-delegated authority under the Act to administer the agreement may be one of the following: (1) one or more of the parties to the agreement; (2) a commission or board constituted pursuant to the agreement; or (3) a person, firm, or corporation, including a nonprofit corporation, designated in the agreement.\textsuperscript{20} One party to the agreement may provide for all or a portion of the services to the rest of the participating agencies. In addition, the agreement may provide for mutual exchange of services without payment.

An independent board or commission has powers as determined by the agreement and by the Act. Similar to a statutory agency, it generally has the power to enter into contracts with other public entities and private parties, to sue and be sued and to manage its affairs. The governing body is subject to appointment and with voting/quorum and other rights determined by the agreement and the Act. The administering board or commission must file a notice of the agreement with the Office of the Secretary of State within thirty (30) days after the effective date of the agreement.\textsuperscript{21} If the notice is not filed within the statutory period, the agency is prohibited from issuing any bonds or incurring indebtedness of any kind until such filings are completed.

In the case of a JPA which has not established a separate board or commission, the agreement would be generally in the nature of a contract among the parties, and the rights and obligations and powers and duties of the parties would be subject to the terms thereof and the Act. Under this alternative, one of the parties\textsuperscript{22} would be designated “managing

\textsuperscript{17/} MTC has sufficient authority to carry out its current function as procuring and contracting agency for the Phase I project and such authority is sufficiently broad such that its participation in the JPA would not result in any limitation in the JPA’s powers.

\textsuperscript{18/} A Joint Powers Agreement (therefore one entered into pursuant to Government Code Section 6500 et. seq.) is but one of many methods for public agencies to contract, including by resolution, contract and ordinance. Ross v. Campbell Union School Dist., 70 Cal. App. 113 (May 1977). See also In Re City and County of San Francisco, 191 Cal. 172 (May 1923).


\textsuperscript{20/} Gov. Code § 6506.

\textsuperscript{21/} Gov. Code § 6503.5.

\textsuperscript{22/} It is also possible for the parties to designate a third party, or even a private entity, as the managing agency of the JPA. (Gov. Code § 6505.)
agency" of the JPA with the responsibility to manage the day to day affairs of the JPA. Generally, a managing agency JPA would contract through the managing agency rather than in the name of the JPA and the managing agency JPA could enter into contracts on its own and could sue or be sued in its own name.

Although a managing agency JPA has no separate board or commission, it would be possible and it is not uncommon to establish advisory, policy and technical boards, committees, or other governance structures to create a representational decision-making process. These committees or boards could make the management decisions that would otherwise be delegated to the governing body of a separate board or commission, subject to any limitations contained in the Act or the agreement.

Under either model, it is likely that the institutional/governance alternatives could be achieved, limited by any limitations on the powers of the JPA established by the agreement or the Act. A full review of the powers of each of the potential participating agencies has not been conducted and should be undertaken before this alternative is selected. Similarly, we believe that the voting/quorum alternatives described above would be available, subject, similarly, to any limitations on the powers of the JPA established by the agreement or the Act.

All of the privileges and immunities from liability, exemptions from laws, ordinances and rules, all pension, relief, disability, workers’ compensation, and other benefits that apply to the activity of officers, agents, or employees of any public agency subject to a JPA when performing their respective functions within their respective territorial limits, apply to them to the same degree and extent while engaged in the performance of any of their functions and duties extraterritorially under the agreement.23/

A joint powers agency has very flexible financing powers and it may issue revenue bonds in its own name pursuant to Article 2 of the Act, including for the purpose of acquiring or constructing a project for mass transit facilities or vehicles.24/ The bonds do not constitute a debt, liability, or obligation of any of the public agencies that are members of the JPA.25/

Moreover, a joint powers agency can also obtain funds for a short period of time to meet operational expenses, until expected revenues are available (1) from advances of funds from the parties of the Agreement26/, or (2) from private lending sources pursuant to the temporary borrowing powers granted to local agencies.27/

24/ Gov. Code § 6546(j).  
26/ Gov. Code § 6504.  
27/ Gov. Code §§ 53850 et seq.
Options Analysis and Recommendation
TransLink® Governance Project

Each of the participating public agencies can also authorize the joint powers agency to exercise additional powers. For example, participating public agencies can authorize the agency to make and enter contracts; to employ agents and employees; to acquire, construct, manage, maintain, or operate any building, works, or improvements; to acquire, hold, or dispose of property; or, to incur debts, liabilities, or obligations.

The JPA may be continued for a definite term or until rescinded or terminated. The parties may provide for the method by which the agreement may be rescinded or terminated and for parties to join the JPA or withdraw from participation. In negotiating for the termination provision, the Participants should take into account such issues as the maturity dates of any bonds issued by the agency, payment dates of other forms of indebtedness incurred, the disposition of other claims, and the distribution of assets of the joint powers agency upon the termination of the agreement.

2. Advantages

As noted above the JPA can be a more flexible structure than a statutory agency. Provisions such as board membership and voting rights can be established in the agreement, subject to modification by action of the membership. Another advantage of creating a joint powers agency under a JPA is that the participating public agencies have the flexibility to specify in the agreement the types of common powers allocated to the agency, and the method of exercising such powers. To the extent that modifications or amendments to the agreement are needed or desired, the process does not require legislative or voter action. Generally, since the agreement is a contract, material changes would require the unanimous consent of the parties; however, agreements frequently contain provisions, which permit amendment and modification to certain terms of the agreement by less than unanimous consent.

There are no requirements for legislative or local vote approval for the creation of a JPA and the structure can be put in place as quickly as the parties can agree on the terms and conditions to be included in the agreement. In the present context it may be possible to have the governance structure in place in advance of the termination of the Phase I project, permitting a smooth transition into Phase II under the new structure.

The Act also authorizes “super-powers” for transit equipment acquisition. The Act permits a joint powers authority to exceed its ordinary powers to finance or refinance the acquisition of transit equipment in a manner customarily used by a private transit operators, and to transfer the tax benefits derived. This super-power could provide the agency with increased flexibility with respect to future procurements and financing.

---

30/ Gov. Code § 6510.
31/ Gov. Code § 6511.
33/ Gov. Code § 6518.
3. **Limitations**

The Act limits the exercise of powers to those that are shared in common by all members of the JPA. Therefore, the powers of the JPA will be limited to those held by the “weakest link” member. Accordingly, the powers of each of the respective participants in the JPA must be examined to ensure that the powers of the weakest link will be broad enough to achieve the Project goals and objectives. Although the powers of the JPA will be limited by the powers of the weakest link, the agreement may specify the manner in which those powers that are to be exercised by the JPA will be exercised by designating that one of the participant’s internal procedures shall be employed by the JPA.\(^{34/}\) For example, the group may wish to stipulate that the JPA’s manner of procurement would be that of the agency with the most streamlined procurement policies.

The Act is silent on the issue of member withdrawal. In negotiating for the withdrawal provision in the agreement, the Participants should bear in mind any adverse effects a member’s withdrawal may have upon any outstanding bonds, obligations, liabilities or other forms of indebtedness issued by the agency.

Creating an agency does not necessarily shield the participating agencies from liability. The parties to the JPA are jointly and severally liable to the injured party for any torts that may occur in the performance of the agreement for which any one of the agencies, or an agency created by the agreement, is otherwise made liable by law.\(^{35/}\) The parties to the agreement may provide in the agreement for contribution or indemnification by any or all of the entities that are parties to the agreement on any liability arising out of its performance.\(^{36/}\) The Tort Claims Act also provides for contribution in the absence of such provision in the agreement.\(^{37/}\)

4. **Disadvantages**

The agreement generally defines the powers and limitations of the particular JPA, such as the agency’s funding arrangements. As a consequence, as noted above, a review of the powers held by each of the participating public agencies will need to be conducted in advance of the establishment of a JPA as the preferred governance structure, and the parties will have to carefully negotiate the details of the agency’s governance. Finally, negotiating an agreement among the Operators may prove time consuming and potentially difficult.

**C. Cooperative or Other Interagency Agreement**

A third alternative would be for the Operators to enter into a cooperative or other similar form of agreement for MTC, or one or more of the Operators to provide others with TransLink\(^{®}\) service at agreed upon terms and conditions. The implications of this arrangement

---

\(^{34/}\) Gov. Code § 6502.

\(^{35/}\) Gov. Code § 895.2.

\(^{36/}\) Gov. Code § 895.4.

Options Analysis and Recommendation  
TransLink® Governance Project  

are similar joint exercise of powers discussed above under the separate administering agency model insofar as the powers exercisable under the contract would be limited to those held by or necessarily implicit in the powers retained by the parties to the agreement. There is statutory authorization for public agencies in California to contract with other public agencies for the purpose of performing public functions, including the provision of service or the exercise of a power by one public agency on behalf of the other contracting agencies. Transit districts are authorized to enter into contracts to provide services for other public entities.  

1. Formation  

A cooperative or interagency agreement is simply a contract among the participating agencies establishing the terms and conditions for governance of the TransLink® Service and would be subject to the general rules of contract formation. This contract would not be subject to the provisions of the Act discussed, but would be subject to certain statutory and judicially imposed limitations. The formation of a contract would not result in the creation of a separate entity, or governing body, but the delegation of functions to one or more of the contracting parties. The contract could provide for the creation of committees, boards or other governance mechanisms for the purpose of implementing the purposes of the contract.  

2. Powers  

The contract would determine the respective powers of the parties under the agreement subject to the organizational limitations of each agency.  

3. Limitations  

Public agencies in California can contract with other public agencies for the purpose of performing public functions, including the provision of service or the exercise of a power by one public agency on behalf of the other contracting agencies. Such activities or services would have to be limited to a public purpose of the participating agencies, however.  

4. Advantages  

Subject to the limitations outlined above, there are effectively few restrictions on the terms and conditions that the parties can agree to. Since there are no governmental review or approval requirements other than the internal processes of the Operators, the Structure can be put in place as soon as the parties can come to agreement.  

38/ Pub. Utilities Code § 99288.  
39/ Article XVI, Section 16 of the California Constitution prohibits a governmental agency from expending public funds other than for a public purpose, express or implied, of the granting agency. Accordingly, any arrangement by contract among the System Participants whereby the Participants agreed to fund any feature or function of System operations or maintenance would have to be reviewed in light of and for consistency with the “public purpose” of the granting agency.
Options Analysis and Recommendation
TransLink® Governance Project

Because the “lowest common denominator” or “weakest link” rule applicable to JPA agreements is inapplicable, the parties may have slightly broader authority to craft an agreement to meet the needs of the System, consistent with constitutional limitations including the limitation on the expenditure of public funds for a public purpose of the Operators.

5. Disadvantages

Because there is no separate entity there is no governing body, however, there is no reason the parties could not agree to establish committees with substantially the same functions, duties, responsibilities and powers. Since there is no separate entity, contracts would have to be entered into with one or more of the Operators, presenting the potential for some complexity in the allocation of risks and indemnification.

IX. Conclusion and Recommendation

A. Recommendation for Permanent Institutional and Governance Structure

The issues outlined above together with feedback collected from MTC and the Operators suggests that while there is no single preferred Structure, a contractually based organization (i.e., cooperative agreement or JPA) would provide the Operators with the most control over the System and System Manager. This degree of control addresses the Operators’ view that vesting responsibility and accountability with them is essential to the operational success of the System.

The sentiment against pursuing new legislation, whether to form a new statutory agency or expand MTC’s powers, was nearly unanimous. Many of the Operators responded that legislative action could potentially result in a complete loss of control over the Project because the final legislation would be subject to influence by interests that had no actual stake in the operation of the System or the Bay Area. The possibility of continuing under the current structure with MTC supervising the Contractor and service being provided to each Operator on a contract basis was similarly disfavored because it would not provide the Operators with a direct responsibility for the decision-making process, or for ongoing operations and maintenance.

While the option to enter into an inter-agency or cooperative agreement is still being considered, the option with the most support among Operators appears to be the formation of a JPA – which for purposes of this report will be designated the “TransLink® Joint Powers Authority,” to assume the DBOM Contract and to own, manage and operate the System (for political and other reasons it may be advisable to select a name for the JPA which does not directly reflect its legal authorization). Based on these findings, the Structure outlined below is recommended.

The TransLink® Joint Powers Authority (“Authority” or “JPA”) would be organized pursuant to the Act, and would initially consist of the Phase I Operators (excluding Caltrain, but including the San Mateo County Transit District (“Samtrans”)) and such other Operators as chose to join the JPA as its founding members. MTC would be a nonvoting, ex-
Options Analysis and Recommendation
TransLink® Governance Project

officio member of the JPA and of its governing board. The powers of the Authority would be as broad as legally permissible under the Act; however, the Authority would be expressly prohibited from exercising the authority to set or otherwise determine fares of any Operator.

The governing board, or Managing Board, of the Authority might consist of one permanent representative from each Phase I Operator (excluding Caltrain and including Samtrans) plus three additional rotating members from the remaining Operators. Each seat would be filled by the member’s General Manager, chief financial officer or chief operating officer. The Managing Board would be charged with policy decision-making authority over the following topics:

* Approval of Annual Operating Budget
* Approval of Reserve Requirements
* Financial Auditing
* Bonded Indebtedness
* Capital Expenditures
* Admission or Expulsion of Members of the Authority
* Amendment, Renewal or Termination of the DBOM Contract
* Allocation and adjustments to Cost and Revenue Generated by Operation of the System
* Future enhancements and uses of the System
* Achievement of SB 1474 goals and objectives

In addition, an Operations Board consisting of delegates appointed by the general managers of the Operators would be responsible for overseeing the day-to-day operations of the Authority, and any other matters not expressly delegated to the Managing Board. The Operations Board governance structure could mirror that of the Managing Board, or take some modified form such as one seat for each participating Operator.

On routine matters, the Managing Board would act by approval of a majority of the board members. Certain matters, including financial matters, cost and revenue allocations, and amendments, termination or other significant matters related to the DBOM Contract would require the affirmative vote of two thirds of the members of the Managing Board. Actions of the Operations Board would be subject to approval by a majority of such board. It is anticipated that the Managing Board would not need to meet monthly and could probably operate effectively based on quarterly meetings. The Operations Board, because of its “hands on” duties, would probably need to meet more frequently, possibly as frequently as monthly.
Options Analysis and Recommendation
TransLink® Governance Project

In accordance with the option available under the JPA law, the Authority would be organized as a separate agency with its own small staff including an Executive Director, senior officials for Information Technology, Operations, Finance, and other staff as may be required. The initial funding for the Authority would be contributed by the Participants as part of the agreed upon service cost assessments or by special allocation, with a goal of the Authority becoming self-sustaining within a specified period of time. Means by which to take advantage of the technical and other TransLink® System expertise of current MTC and Operator staff must be addressed as a part of the organizing process.

The agreement creating the Authority would provide for criteria and procedures for the admission of new members and for the withdrawal or expulsion of existing members. This would permit a structure in which all Operators (other than the Participants) will become members of the Authority. Some Operators may elect to contract with the Authority for participation in TransLink® Service. This hybrid structure, a joint powers authority comprised of members from the major stakeholders with the provision of TransLink® Service to other Operators through interagency cooperative agreements, could help facilitate the implementation of Phase II of the Project by permitting the operational inclusion of Operators who chose not to be a part of the governance structure. Concurrent with the organization of the JPA would be an agreement among all the Operators participating in the System, on detailed provisions setting forth cost and revenue allocations among the participating Operators. It may not be advisable to include these provisions in the final institutional Structure selected in order to retain the maximum flexibility. Additionally in connection with the formation of the JPA, negotiation of assignment of the DBOM Contract from MTC to the JPA will be necessary, subject to the conditions noted above.

B. Interim Institutional Arrangement

Because of the need to resolve complex issues related to cost and revenue allocations and related to the assignment of the DBOM Contract to the JPA prior to its commencement of operations, it is recommended that a “Shadow JPA” (the “SJPA”) be organized by the Operators. It is suggested that the SJPA mirror the proposed structure of the JPA, but be an informal organization, reflected, if necessary, through a memorandum of understanding among the parties. The SJPA would be charged with working through the DBOM Contract and cost and revenue allocation models and coming to a final resolution to be adopted by the JPA or other final institutional and governance structure that is selected.

We propose that the SJPA establish two working committees, a “Finance Committee” charged with the responsibility to address financial issues including cost and revenue allocations among the participating Operators, and a “Legal Issues Committee” charged with the responsibility to review and analyze legal issues, including the terms and conditions of the DBOM Contract, and possible amendments thereof, and the assignment of the DBOM Contract to the JPA. The Legal Affairs Committee would also be charged with finalizing institutional and governance issues for the new structure to be adopted for the ownership, management and control of the System.

The SJPA would also provide a vehicle for Operator input on a coordinated basis in the review and analysis of the Phase I demonstration results, as well as a forum for
participation in the determination regarding Phase II and the Structure needed to make that determination viable.

We recommend that certain matters should be left to be resolved by the JPA or other selected institutional structure. These include but would not be limited to issues related to revenue generating opportunities, customer interface issues, use of the database and review of consumer privacy issues.