

OFFICE OF THE COUNCIL AUDITOR
Suite 200, St. James Building



MEMORANDUM

Date:	November 18, 2019
To:	All Council Members
From:	Kyle S. Billy, Council Auditor
Subject:	JEA Performance Unit Plan

This memorandum is about the JEA “Long-term Performance Unit Plan” (Plan) approved by the JEA Board on July 23, 2019. The Plan concerns me due to its significant potential cost to JEA and the potential reduction of proceeds to the City from a Recapitalization Event.

Members of my staff and I met with JEA officials on October 31, 2019, to discuss the proposed Plan. This discussion was based on the resolution approved by the JEA Board on July 23, 2019, and other documents (drafts of the JEA Long-Term Performance Unit Plan and the Long-Term Performance Unit Agreement) received on August 14, 2019, and on questions submitted by my office on August 9, 2019. During the meeting on October 31, 2019, JEA officials indicated that there had been some changes to the documents based on our initial set of questions. They also indicated that there could be additional changes made in the future based on our discussions at that meeting. Later that day, we sent JEA a summary of outstanding and additional questions. Included in the list were questions asking for a legal opinion on whether the Plan requires City Council approval and whether it is required to be collectively bargained. While waiting for responses to our questions, I prepared to issue a memo notifying City Council of my concerns due to the timing of the rollout of the Plan (JEA planned to distribute the Plan agreements to employees in December and sell the first Performance Units in January of 2020.) However, on November 13, 2019, I received a copy of a letter from JEA’s Managing Director and CEO to the City’s General Counsel (see Attachment A) stating that implementation of the Plan has been postponed indefinitely. While the postponement alleviates my immediate concerns, the Plan has not been formally rescinded by the JEA Board. That is why I am still issuing this memo. Below is information about the Plan and support for why the Plan should be formally rescinded or amended by the JEA Board.

PURPOSE OF THE PLAN

The stated purpose of the Performance Unit Plan is to “provide a means by which employees of JEA may be given incentives to (i) remain with JEA, (ii) drive value for customers, (iii) drive value for the community of North East Florida, (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville.” The purpose further states “JEA hereby seeks to retain the services of Employees and to provide incentives for such Employees to exert maximum efforts for the success of JEA and for the benefit of JEA’s customers and the community it serves and the City of Jacksonville.”

HOW DOES THE PLAN WORK?

Employees may purchase Performance Units for \$10 each through payroll deduction and then, after the three-year Performance Period, JEA will pay each Participant of the plan the Redemption Price per Performance Unit. The JEA Board has authorized a pool of 100,000 Performance Units.

As seen on Schedule A to JEA's Long-Term Performance Unit Plan (See Attachment B), the Redemption Price shall increase by \$100.00 per Performance Unit for each Value Change Percentage increase of 1.00% in excess of the Challenge Value Target (10% increase over the Base Year Value for the performance period) and shall decrease by \$0.50 per Performance Unit for each Value Change Percentage decrease of 1.00% below the Base Year Value for the performance period. The scenarios below show JEA's minimum cost, maximum cost, cost based on recent financial performance, cost based on JEA projections, and cost based on various Recapitalization Event scenarios.

Minimum Cost: Zero. The minimum cost is zero because the Redemption Price may be equal to or less than the Purchase Price.

Maximum Cost: Unlimited. The maximum cost is unlimited because there is no cap on the value of a Performance Unit.

Cost Based on Recent Financial Performance: \$101,350,000. Based on the Fiscal Year 2018 audited financial statements (Current Year Value) compared to the Fiscal Year 2015 audited financial statements (Base Year Value), the Redemption Price of a Performance Unit would be \$1,023.50. If 100,000 Performance Units had been issued for this period, the net cost to JEA would be \$101,350,000 (\$102,350,000 payout by JEA less \$1,000,000 paid in by employees).

Cost Based on JEA Projections: \$15,778,000. Based on Fiscal Year 2019 unaudited financial statements and Fiscal Year 2022 forecasted amounts provided by JEA's Chief Financial Officer, the Redemption Price of a Performance Unit would be \$167.78. If 100,000 Performance Units are issued for this period, the net cost to JEA would be \$15,778,000 (\$16,778,000 payout by JEA less \$1,000,000 paid in by employees).

Cost Based on Various Recapitalization Event Scenarios: We ran additional calculations to demonstrate the possible costs of the Plan if a Recapitalization Event occurs.

(A)	(B)	(C)	(D)	(E)	(F)
Net Proceeds to City Before Payment of Performance Units	Purchase Price Per Performance Unit	Increase in Value Per Performance Unit	Redemption Price (B + C)	Total Payout on 100,000 Performance Units (D * 100,000 Units)	Net Proceeds to City After Payment of Performance Units (A – E)
\$3 billion	\$10	\$0	\$10	\$1.0 million	\$3.0 billion
\$4 billion	\$10	\$3,140	\$3,150	\$315.0 million	\$3.7 billion
\$5 billion	\$10	\$6,356	\$6,366	\$636.6 million	\$4.4 billion

OVERALL WEAKNESSES AND CONCERNS

In addition to estimating the potential cost of the Plan, we also reviewed the Plan for weaknesses and concerns and have compiled the following list:

1. The Performance Unit Plan has not been vetted and approved by City Council.
2. There is no cap to the value of a Performance Unit.
3. The Challenge Value Target is too easy to achieve. (Looking at JEA's audited financial statements for the past ten years (2019 is based on unaudited financial statements), we determined that JEA has hit this target in 9 out of the past 10 three-year periods. See Attachment C).
4. The value of a Performance Unit is affected by changes in rates.
5. The value of a Performance Unit is affected by newly adopted Governmental Accounting Standards and changes in accounting policies which are not tied to the actual performance of JEA. Changes like these can cause significant fluctuations. Examples include:
 - a. Accounting Standards Change: The Fiscal Year 2014 financial statements were restated for comparison purposes for Fiscal Year 2015 to show the unfunded pension liability. The change resulted in a decrease in the Net Position of \$352,105,000 for Fiscal Year 2014.
 - b. Accounting Policy Change: The Fiscal Year 2015 financial statements included a change in accounting policy which had a net positive change of \$151,490,000 in Net Position for Fiscal Year 2015.
6. The value of a Performance Unit would be affected by the sale of JEA assets such as real estate or JEA's fiber network. (Real estate is recorded in the financial statements at historical cost. Therefore, the sale of the SJRPP site or any other JEA real estate not held for investment purposes would increase the value of the Performance Units.)
7. The value of a Performance Unit would increase due to developer contributions or even contributions from the City. (For example, when developers complete a subdivision, they may deed over the utility infrastructure to JEA. This would increase the value of the Performance Units. If the City donated assets to JEA, it would increase the value of the Performance Units.)
8. The value of a Performance Unit would be affected by in-kind contributions from JEA to the City (e.g. nitrogen credits).
9. The Plan is not limited strictly to JEA employees. The Plan specifically includes "each actively employed eligible attorney from the Office of General Counsel of the City of Jacksonville who is dedicated exclusively to JEA." In addition, the CEO can recommend and the Plan Administrator (Chair of JEA Compensation Committee) can approve participants that are not JEA employees.
10. The Plan Administrator has the ability to delegate any or all responsibilities to any member of JEA's senior executive management. (This could create a conflict of interest and should be reviewed by the City Ethics Officer.)
11. JEA's CFO, who is eligible to participate in the Plan, is responsible for calculating the Redemption Price.
12. If any payments under the plan are subject to any excise tax, interest or penalties under the IRS Code, JEA will have to pay to such employee an amount equal to the full amount of the penalties. (This could further increase the cost of the plan.)

WEAKNESSES AND CONCERNS THAT APPLY TO A RECAPITALIZATION EVENT

1. The value of a Performance Unit can increase significantly due to a Recapitalization Event. (If 100,000 Performance Units were sold as authorized, over \$300 million would be distributed to the holders of Performance Units for every billion dollars in proceeds over \$3 billion that the City receives.)
2. There is no prohibition in the Plan to offering Performance Units to employees after an ITN award has been made and the value of a Performance Unit is known, should a Recapitalization Event occur.

OVERALL CONCLUSION

The Plan is potentially a very costly use of JEA resources that would be magnified by a Recapitalization Event. Regarding a Recapitalization Event, the City Council should keep in mind that plans have already been approved by the JEA Board to help retain and protect employees, including guaranteeing to the employees three years of substantially comparable compensation and benefits in effect at the Closing Date, providing an additional year's pay spread over two years, and providing a pension for years of service not worked by employees who are not eligible for retirement at the time of a Recapitalization Event. Although JEA leadership has decided to postpone indefinitely the implementation of the Plan, the JEA Board has not taken action to formally rescind the Plan or modify it to correct its weaknesses.

RECOMMENDATION

I recommend that you request that the JEA Board take action to formally rescind the Performance Unit Plan or make the following changes to the Plan.

1. If the Plan is not rescinded, the City Council should request a legal opinion as to whether the Plan requires City Council approval.
2. Put a cap on the maximum redemption value of a Performance Unit and a cap on the overall payout of the Plan.
3. Increase the Challenge Value Target.
4. Exclude the following from impacting the value of a Performance Unit.
 - a. Recapitalization Event
 - b. Change in rates charged by JEA
 - c. Newly adopted accounting standards and changes in accounting policy
 - d. Sales of JEA assets
 - e. City contributions to JEA
 - f. Developer contributions to JEA
 - g. In-kind contributions from JEA to the City (e.g. nitrogen credits)
5. Prohibit the delegation of Plan responsibilities to those eligible to participate in the Plan.
6. Limit Plan participation to JEA employees.
7. Require JEA's external auditor to calculate or certify the Redemption Price for Performance Units.
8. Eliminate the provisions whereby if any payments under the Plan are subject to any excise tax, interest or penalties under the IRS Code, JEA will have to pay to such employee an amount equal to the excise tax, interest, or penalties.

Attachments:

Attachment A - Letter from Aaron Zahn to Jason Gabriel

Attachment B - Schedule A to JEA Long-Term Performance Unit Plan

Attachment C - Graph Depicting the Value Change Percentage Compared to the Challenge Value Target Percentage

CC: JEA Board of Directors

Aaron Zahn, Managing Director and Chief Executive Officer, JEA

Ryan Wannemacher, Chief Financial Officer, JEA

Herschel Vinyard, Chief Administrative Officer, JEA

Sherry Hall, Chief Government Affairs Officer, JEA

Attachment A

21 West Church Street
Jacksonville, Florida 32202-3139

November 12, 2019

Mr. Jason Gabriel
City of Jacksonville General Counsel
117 W Duval St, Suite 400
Jacksonville, FL 32202



Re: JEA Long Term Performance Unit Plan (the "Plan")

Mr. Gabriel:

This letter pertains to the Plan approved by the JEA Board of Directors ("Board") by Resolution 2019-10 on July 23, 2019. The stated purpose of the Plan is to provide a means by which employees of JEA may be incentivized to: (i) remain at JEA, (ii) drive value for customers, (iii) drive value for the community of Northeast Florida, (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville. The Board developed the Plan out of a desire to develop a long-term incentive program, in line with market standards, that furthered the Board's total compensation policy approved in January 2019. The Board reviewed the Plan framework as recommended by a third party compensation consultant, Willis Towers Watson, in June 2019. Finally, the Board adopted the Plan in July 2019 and instructed JEA executive leadership to work with the Chair of the Compensation Committees ("Plan Administrator") to implement the Plan.

This letter is to inform you that JEA leadership, in consultation with the Chair of the Board ("Chair"), the Plan Administrator and OGC, has decided to postpone indefinitely the implementation of the Plan.

As you are aware, JEA executive leadership has been diligently working to implement the Plan with the Office of General Counsel ("OGC"), Pillsbury Winthrop Shaw Pittman, LLP, Foley Lardner LLP, and relevant state and local bodies. Given the long-term nature of the Plan and the Plan obligations, JEA leadership wanted to ensure all employment, corporate, ethics, tax, and other related matters associated with the Plan were in accordance with applicable statutes and regulations. To that end, JEA greatly appreciates the deliberate, methodical and meticulous work of OGC and all of its advisors.

The decision to not implement the Plan is based in the incongruity of the Plan's long-term nature and the very real potential short-term implications of the JEA's strategic planning process. As such, the Chair, Plan Administrator and JEA leadership believe the Plan would be best implemented, if ever, post decision on the strategic direction of JEA as determined by the Board.

E L E C T R I C

W A T E R

S E W E R

Accordingly, the Board is expected to recommend one of the following five options as a strategic direction for JEA:

- 1) Scenario #1: Status Quo Plan;
- 2) Scenario #2: Traditional Utility Response Plan;
- 3) Scenario #3: Community Ownership Plan;
- 4) Scenario #4: Initial Public Offering (IPO) Plan; or,
- 5) Scenario #5: Strategic Alternative from ITN 127-19.

Should the Board choose Scenarios 3, 4, or 5 the Plan would be moot from a long-term incentive basis. Should the Board choose Scenario 1 or 2, the Plan has a more appropriate role in driving employee behavior to increase customer, community, environmental and ultimately financial value of JEA.

Please accept this letter as a final decision on this matter until further notice. As always, JEA, and specifically the Plan Administrator, welcomes OGC input and advice on how to appropriately administer the Plan absent a full implementation with its employees.

Sincerely:



Aaron F. Zahn
Managing Director & Chief Executive Officer

Cc:
JEA Board of Directors

Attachment B

SCHEDULE A [YEAR] REDEMPTION PRICE SCHEDULE

The Redemption Price shall increase by \$100.00 per Performance Unit for each Value Change Percentage increase of 1.00% in excess of the Challenge Value Target and shall decrease by \$0.50 per Performance Unit for each Value Change Percentage decrease of 1.00% below the Threshold Value Target, but in no event shall the Redemption Price per Performance Unit be less than \$0.00.

For purposes of this Schedule A, the following defined terms shall mean:

- (a) “Base Year Value” means \$[AMOUNT].¹
- (b) “Challenge Value Target” means [PERCENT].²
- (c) “Current Year Value” means, with respect to each Performance Period, the sum of (i) JEA’s Net Position, as shown on JEA’s audited financial statements for such Performance Period, (ii) the aggregate consideration paid, distributed, credited or otherwise provided to the City of Jacksonville whether in cash or in-kind (excluding any public service taxes or franchise fees) during the twelve (12)-month period prior to the end of the Performance Period, and (iii) the aggregate consideration (including refunds, rebates and distributions) paid, distributed, credited or otherwise provided to the customers of the JEA Group during the twelve (12)-month period prior to the end of the Performance Period. For the avoidance of doubt, for purposes of calculating the amounts in clauses (i), (ii) and (iii), any consideration and change in Net Position, as applicable, in connection with the Recapitalization Event shall be taken into account.
- (d) “Value Change Percentage” means a percentage equal to the Current Year Value divided by the Base Year Value.
- (e) “Threshold Value Target” means [PERCENT].³

Any amounts paid, distributed, credited or otherwise provided in a form other than cash shall be valued at the value ascribed to them in the documents governing, or if none, then at their fair market value as determined by the Administrator in its sole discretion.

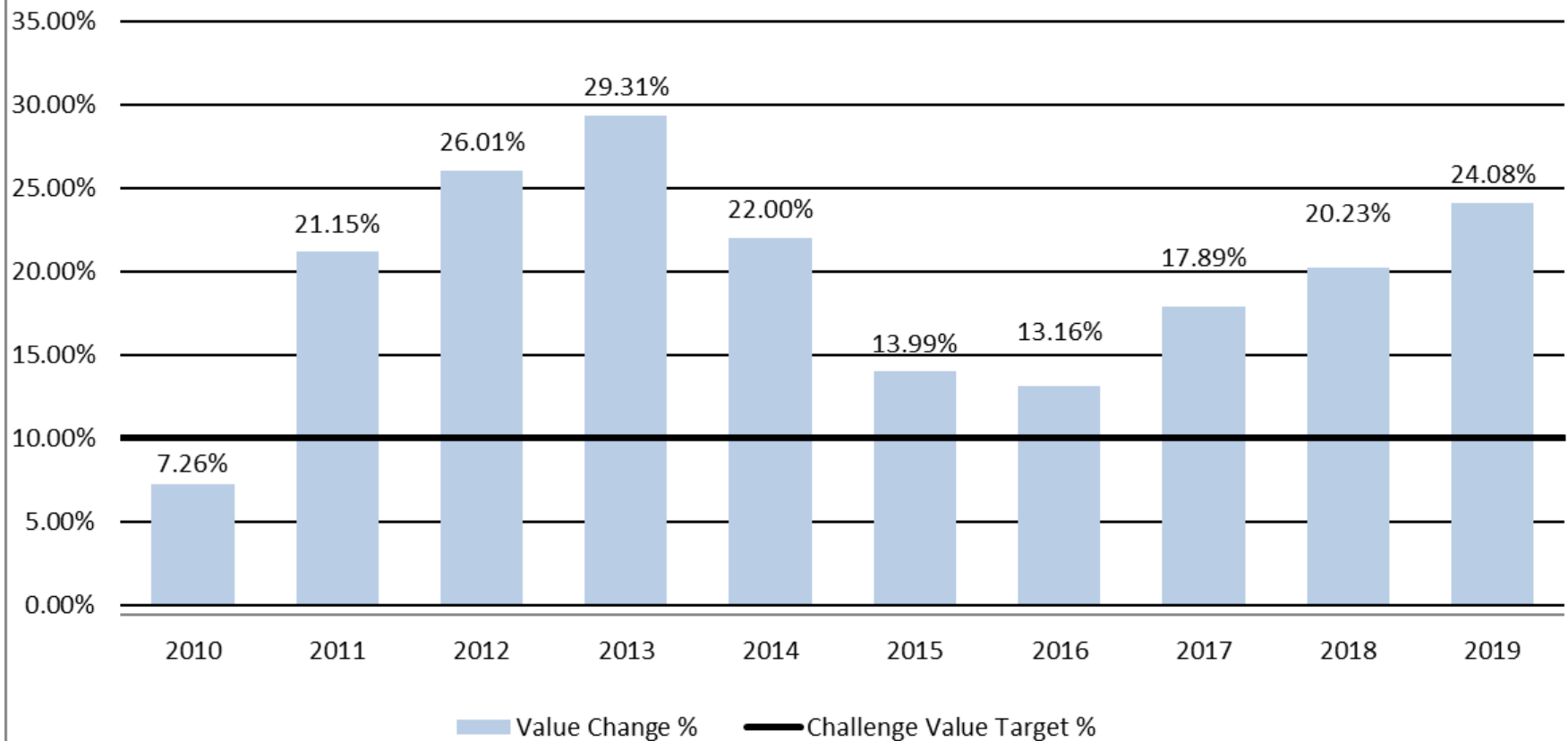
¹ For the first performance period, this amount will be equal to the Current Year Value for fiscal year 2019 as reflected on the audited financial statements when available.

² For the first performance period, insert 110%.

³ For the first performance period, insert 100%.

Attachment C

Value Change Percentage Compared to the Challenge Value Target Percentage



All value change percentages are based on originally issued audited financial statements except for FY 2019, which is based on preliminary financial statements. The formula is $\text{Current Year Value} \div \text{Base Year Value} = \text{Value Change Percentage}$.