

**OFFICE OF THE CITY COUNCIL**

**RESEARCH DIVISION**

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**COUNCIL MEMBERS DIAMOND AND SALEM NOTICED MEETING MINUTES**

**JEA PERFORMANCE UNIT PLAN**

**City Council Conference Room A, Suite 425, City Hall**

**December 16, 2019**

**1:00 p.m.**

**Location:** Lynwood Roberts Room, 1st floor, City Hall – St. James Building

**In attendance:** Council Members Rory Diamond, Ron Salem, Randy DeFoor, Danny Becton, LeAnna Cumber, Al Ferraro, Terrance Freeman, Reggie Gaffney, Joyce Morgan, Scott Wilson, Sam Newby, Garrett Dennis, Michael Boylan, Matt Carlucci, Randy White, Aaron Bowman, Tommy Hazouri

**Also**: Jason Gabriel, Lawsikia Hodges, Jon Phillips, Sean Granat, Lynn Rhode and Paige Johnston – Office of General Counsel; Kyle Billy, Kim Taylor, Jeff Rodda and Heather Reber – Council Auditor’s Office; Jeff Clements – Council Research Division; Carol Owens, Steve Cassada and Melanie Wilkes – Council Staff Services; Cheryl Brown – Council Secretary/Director; Aaron Zahn, Ryan Wannemacher, Herschel Vinyard, Jon Kendrick, Kerry Stewart - JEA

**Meeting Convened**: 1:00 p.m.

The meeting was called to order and the attendees introduced themselves for the record. Chairman Diamond described the purpose of the meeting today and laid out the order of events and the rules of procedure. Council Member Salem said he understood that the JEA board planned to cancel the Performance Unit Plan (PUP) at its meeting tomorrow but felt that it was important for this process to take place so the Council and the public could completely understand what happened with the plan and why.

Aaron Zahn, CEO of JEA, acknowledged making a mistake in pursuing the PUP while a potential recapitalization process was taking place. It should have been delayed until a decision on recapitalization was made. The plan was intended to incentivize JEA’s employees to do their best to keep JEA viable and fiscally sound since salaries had not been keeping up with market rates. He believed that a plan to tie employee incentives to JEA’s financial performance was a sensible way to proceed. Mr. Zahn said that the JEA board and leadership have always sought to comply with all relevant state and local laws and ethics regulations and apologized for the recent upset in the community related to the PUP.

Start of the Performance Unit Plan

Chairman Diamond reviewed several documents from JEA’s Employment and Compensation Committee meetings. Mr. Zahn discussed JEA’s Total Market Compensation Policy which was set before he joined the utility. Jon Kendrick, VP and Chief Human Resources Officer, said that JEA strives to pay its employees in the 50th percentile for the Jacksonville market for like employees in the manufacturing and production sectors. Mr. Zahn explained that the utility’s total market compensation policy was adopted before his arrival and that after his arrival JEA’s adopted its new strategic framework with several new measures of value and a guiding principles document. Adoption of a new set of performance metrics offered the opportunity to reconsider compensation practices and incentive possibilities. In response to a question from Council Member Diamond about why the compensation policy was amended to strike out the provision that the CEO would not cause or allow jeopardy to the financial integrity or public image of the JEA, Mr. Zahn said his recollection was that the language was repetitive from other places in JEA policy and therefore not needed. He said JEA hired the Willis, Towers, Watson compensation consulting firm to generate ideas for how JEA could ensure reaching the 50th percentile of market compensation goal. The company produced several options for designing long-term incentive plans, after which JEA requested more specific examples of how the various options could work. In response to a question from Chairman Diamond about when was the first mention of a PUP, Mr. Zahn said he didn’t know when exactly it was first raised, but it was in the Willis, Towers and Watson follow-up report. JEA had no long-term incentives at all and he wanted to have examples to present to the JEA board for their consideration. He found in his meeting with JEA’s employees that they had little to no understanding of how their jobs and performance related to JEA’s overall financial performance and believed that the entire workforce needed to be much more aware of that and understand their role in the utility’s future success. Mr. Diamond said that June 2019 appears to be the first time the JEA board heard about the concept of a performance unit plan from management. Mr. Zahn said JEA management discussed a wide variety of incentive options and ultimately arrived at the concept of the PUP as the way to tie employee incentives to corporate financial performance. He said that the JEA board’s Compensation Committee, the CEO, the CFO, and others were involved in the discussions leading up to the final decision. CFO Wannemacher did not recall if the PUP valuation formula had been created as of the June 2019 presentation, but the $3.4 million potential cost cited was an estimate of a general level of the incentive that could be achieved.

Council Member Salem asked who put the PUP on the July JEA board agenda; Mr. Zahn said that all of the management team review the agenda and that board members can suggest agenda items. He said that the board members had been individually apprised about important items on the agenda. Mr. Salem said he understood from several JEA board members that the agenda packet for that meeting had been received on the Friday afternoon before the Tuesday morning meeting and that they had not been briefed on the PUP plan in advance of the meeting. Mr. Wannemacher said that he did not recall having done any financial calculations on the Willis, Towers, Watson PUP proposal. In response to a question, Mr. Zahn disagreed with Council Member Salem’s characterization of the JEA board’s action at the July meeting to adopt the plan and grant the CEO unlimited authority to implement the plan and make changes at his discretion. He characterized the board’s action as approving a draft plan. Mr. Zahn repeated his remarks from the beginning of the meeting taking responsibility for letting the PUP discussion proceed when it should have been pulled back until after a recapitalization decision was made. Mr. Salem said it was his understanding that the PUP was the last item on the July board meeting agenda and that there was less than 10 minutes of debate on the issue. The board members to whom he has spoken said they understood the total potential cost to be $3.4 million, and that the plan had been approved by the General Counsel’s Office. Mr. Wannemacher said that he had done some calculations on the PUP plan that was presented to the board in July and presented them to the Council Auditor, but was unsure of the timing, whether before or after the July board meeting. Mr. Zahn said he recalled having discussed several scenarios at the board meeting; review of the tape of the meeting could confirm whether that did or did not occur. Mr. Salem said that he was most bothered by the design of the plan with a $10 per unit charge because that favors higher paid employees, not the rank and file. Mr. Zahn said that the original Willis, Towers, Watson proposal recommended a plan that benefitted only top management and he insisted that it be crafted to allow every employee to participate at the affordable cost of $10 per unit. Mr. Salem said his practical experience in business is that mid-level and lower employees are extremely reluctant to invest into such incentive programs, so the practical effect would have been that the majority of the benefit would have gone to top management.

Council Member Diamond posed questions about how many units were intended to be issued, how any unsold units would be reallocated and purchased if not sold at the outset, what would happen to units of employees where were discharged, etc. Mr. Zahn said that those details were not worked out because the plan still had to go the General Counsel’s Office for review. Mr. Salem said that the board members to whom he has spoken said they voted for the plan with the understanding that the Office of General Counsel had signed off on it. Kelly Flanagan, a JEA board member, said she thought at the time of the vote that the cost of the plan was $3.4 million based on the Willis, Towers, Watson proposal and that she did not recall being briefed by Mr. Zahn the week before at her regular pre-board meeting conversation. She believed that the Office of General Counsel had signed off on the plan’s legality under JEA’s charter. Lynn Rhode, an Office of General Counsel attorney assigned to the JEA, said that it was not unusual for items voted on by the board to require further follow-up and implementation by management based on the board’s instructions. Kevin Hyde, an attorney with the Foley and Lardner law firm representing JEA, said that when the motion to explore recapitalization options was approved at the same meeting, that necessitated coming up with additional scenarios to extend the PUP terms to cover a recapitalization event.

**The committee was in recess from 2:33 to 2:43 p.m.**

In response to a question from Council Member Salem about whether it is common for a board member to be delegated the power to administer a personnel plan, including the power to make changes, decisions and interpretations to the plan, Mr. Zahn said that it is not uncommon for the board to delegate to one of its members the power to act on behalf of the board. Mr. Salem quoted from an email from a law firm to Mr. Wannemacher asking for clarification about the PUP formula because the values their calculations were producing were unexpectedly large. Mr. Wannemacher said that he responded and helped the law firm correct an error they were making in the calculation. Mr. Salem said that no document to that effect was in the JEA’s response. Chairman Diamond said he was compiling a list of apparently missing documents for the JEA to research and provide a response. In response to a question from the Chair, Ms. Rhode said the decision to approve a PUP was a collaborative decision of multiple parties and that the first time she heard about a PUP was in June of 2019. She was asked to look into performance incentive plans longer than the existing current-year plan, possibly in the 1- to 3-year range. Ms. Rhode described her position as an employee of the Office of General Counsel assigned to and housed in the JEA offices and how she related to the remainder of the OGC on different issues. In response to a question she acknowledged that the PUP plan eligibility language applied to the two attorneys assigned by the OGC to the JEA. In response to a question from Chairman Diamond, Ms. Rhode said that she was not involved in any way in the drafting of that portion of the document and had referred it to General Counsel Jason Gabriel. In response to a question from Mr. Salem, Mr. Zahn and JEA Chief Operating Officer Herschel Vinyard stated that the only non-JEA employees contemplated to be covered by the PUP were the two attorneys assigned full-time by the General Counsel to JEA.

In response to questions about the application of the PUP to a recapitalization event, Mr. Wannemacher said that Foley and Lardner’s calculations were obviously faulty because of the results that were produced and an email exchange ensued over why that was happening. He said that JEA contemplated that 30,000 units would be initially issued, not the full 100,000 that might be authorized. Mr. Diamond questioned whether Mr. Wannemacher had ever run the calculations on the potential PUP result of a recapitalization event. Mr. Wannemacher responded that the amount would be 10% of the amount of the recapitalization proceeds exceeding the challenge target of $3.4 billion, so the math on that scenario would be a very simple calculation. Mr. Salem said that nothing in writing precluded the issuance of all 100,000 units; Mr. Zahn responded that nothing required the issuance of 30,000 either. In response to a question to Ms. Rhode about the wording in an email saying that the plan had been “fully reviewed” by the Office of General Counsel, Ms. Rhode said that all of the questions of which she was aware had been answered by JEA’s outside legal counsel and no impediments to the plan had been identified. Council Member Diamond posed questions to General Counsel Jason Gabriel about the OGC’s review of the proposed PUP. Mr. Gabriel gave the timeline of his involvement in exploring the PUP issue, which was JEA-generated. His office explored how employee incentive programs could be structured for public sector employees and they examined whether OGC employees could be eligible to participate in such a plan. He confirmed that Ms. Rhode was not involved at all in the discussion of the eligibility of OGC employees to participate in the plan and stated that non-JEA employees are not eligible to participate and that he would not permit an OGC employee to participate even if it were permissible. Mr. Gabriel described a meeting held among JEA, the Office of General Counsel, and JEA’s law firms to explore a variety of outstanding issues related to the PUP. He told the participants at that meeting that City Council would need to approve the plan and that non-JEA employees could not be eligible to participate. He said that he created his November 12th memo to his files to encapsulate the OGC’s guidance on the issue despite the JEA’s announcement that the issue was going to be “postponed indefinitely” in the event that the issue ever came up again. His office engaged in a thorough due-diligence process with JEA and its attorneys to determine the legality of the proposal. Kevin Hyde of the Foley and Lardner law firm agreed that the firms engaged in a very thorough exploration process of a proposal that was acknowledged to be novel and unusual in a public sector setting.

In response to a question from Chairman Diamond about her expectation that the PUP could be implemented by December 2019, Ms. Rhode said that there were numerous outstanding steps that were not completed and additional research was being done, so the implementation timing wasn’t certain. She confirmed that the plan was not amended at any point to remove a recapitalization scenario. In response to a question from the Chair about a list of 22 questions about the PUP posed to him by the Council Auditor’s Office, Mr. Wannemacher said that he telephoned Jeff Rodda of the Auditor’s Office and sent him the plan documents in answer to his questions. The same questions were posed again by the Council Auditor’s Office and he and Herschel Vinyard met with Mr. Rodda to discuss the questions. Several additional questions developed out of that conversation that were answered by email, and Mr. Wannemacher said that his office is still working on responses to the original 22 questions, although with the decision to indefinitely postpone the plan there was less need for those questions to be answered. He said that they have a good collaborative relationship with the Auditor’s Office. Mr. Diamond questioned why the JEA never responded to the Auditor’s Office’s questions in writing. Council Member Salem questioned how the PUP could be characterized as a “draft” after it had been adopted by the JEA board. Mr. Wannemacher said that legal work on the plan was still being pursued, so he did not consider it completed. Aaron Zahn said that he issued a memo “indefinitely postponing” the PUP because that is the extent of his authority; only the board can cancel a plan that it has previously adopted. He recognized the challenges that the plan faced and felt it was clear that it should not move forward until the board had another opportunity to address the issue. He had spoken to board members about making the motion to cancel the plan. Council Member Salem said that the JEA should have announced its intention to cancel the plan as soon as it became obvious that there were serious problems and issues, not weeks later after appearing to keep to the implementation process going.

In response to a question from the Chair, Mr. Kendrick said that JEA explored plan administration options with Mass Mutual in hopes of getting the program up and running by the end of 2019 if the legal issues could be overcome. He was not aware of the value of PUPs should they have been created.

In response to a question to Mr. Zahn about an email from Gina Kyle saying that JEA did not see any conflicts with the manner in which the plan was developed, Mr. Zahn said it appeared to be a draft email that may not have been sent. It was released pursuant to the public records request. In response to another question, Mr. Zahn said that the plan was canceled because of a combination of the legal issues that appeared and the potential fiscal impact. Mr. Salem asked for evidence from JEA that there was any documentation of discussion of capping the PUP or of removing reference to the plan’s operation under a recapitalization of the utility prior to the last few weeks. Mr. Salem said that the plan was going to be extremely lucrative for employees under normal circumstances if the JEA met modest performance goals, and would be even more lucrative should a recapitalization event take place. Council Auditor Kyle Billy confirmed for Mr. Salem that the value of a PUP unit purchased for $10 would be $167.78 based on the budget projections through 2022, excluding any recapitalization event, according to JEA’s calculations.

Mr. Diamond described two possible scenarios for how the PUP came to be conceptualized, explored, adopted, and subsequently canceled – one based on JEA’s explanation of how the process unfolded, and another based on the assumption that a recapitalization event was already a given and that fact drove the decision by top management. He believes that the absence of any documentation of discussion of caps on the PUP value and the failure to answer the Council Auditor’s questions when posed argues for the second interpretation. He said he doesn’t see evidence of law-breaking, but rather of terrible judgement on the part of the CEO and CFO in pursuing a plan that, even if legal, is terribly wrong. He called for the Council President to appoint an investigatory committee to delve further into management’s actions. Council Member Salem said the bulk of the fault lay with JEA’s top management, but he also urged the JEA board to assert more control and oversight over management’s actions.

**The meeting was in recess from 4:15 to 4:21 p.m.**

Council Member questions and answers

In response to a question from Council Member Boylan about the allocation of the PUP units and the education process for JEA employees, Mr. Kendrick said that he was not part of any allocation decision on the PUP units and that his office was working with Mass Mutual on information pieces to help employees understand the plan and their options.

In response to a question from Council Member Ferraro, Mr. Zahn again took responsibility for the controversy the PUP has generated and expressed regret if any of his board members felt that they were not sufficiently informed before their vote. He intended to do the best for JEA and is dedicated to leading discussion of JEA’s future and answering questions that have been long ignored at the utility. His future at JEA is up to the discretion of the board.

Council Member Cumber expressed disbelief that no one flagged the huge potential liability the PUP could have generated and said the board needs to exercise better oversight of management. She decried the non-disclosure agreements included in the PUP that prohibit program participants from disclosing any information about any aspect of the program to anyone but their legal and financial advisors without the permission of JEA’s CFO. Ms. Rhode said that the confidentiality requirement is specifically qualified by the requirements of the Public Records law and applies to proprietary information, trade secrets, etc. that are standard in the financial services industry. Ms. Cumber asked why the Frequently Asked Questions document emphasizes secrecy and instructs employees not to disclose any information about any aspect of the plan to anyone except their legal or financial advisor. Ms. Cumber is distressed by the proliferation of non-disclosure agreements with regard to JEA activities.

Council Member Becton asked about the requirement in the Invitation to Negotiate for potential purchasers to provide all JEA customers with $300 credits when the utility is owned by the City and is not a co-op owned by the members. Mr. Zahn said it seemed only fair that rate payers should benefit directly from the sale of the utility should that come to pass since they pay the bills.

Council Member DeFoor applauded council members Diamond and Salem for organizing today’s event and being so well prepared. She said that JEA’s process seems to have been almost entirely about marketing and not all about the good of the community. In response to a question from Ms. DeFoor about an email from Kerri Stewart, JEA’s VP and Chief Customer Officer, stating that the PUP planning process was being put on hold until the strategic planning process is complete, Ms. Stewart said that was her understanding of what was to happen. Mr. Zahn said that there may have been a misunderstanding about postponement versus cancellation because his only authority as CEO is to postpone – it would be up to the board to cancel the program.

In response to a question from Council Member Dennis about when Angie Hires, former Chief Human Resources Officer, departed from JEA, Mr. Kendrick said it was in March or early April of 2019. In response to a follow-up about whether Ms. Hires had signed a non-disclosure agreement upon her departure, Mr. Zahn said that he was not aware that any such agreement had been signed. Council Member Dennis asked why Mr. Wannemacher conveyed information by telephone rather than email and asked if he utilized WhatsApp, Viber, LINE or other alternative electronic messaging systems. Mr. Wannemacher , Mr. Zahn and Mr. Kendrick said that they did not use such messaging systems. Mr. Dennis asked Mr. Kendrick about a “fact or myth” document answering questions about the PUP and certain handwritten notes he had made on the document; Mr. Kendrick indicated that he was unfamiliar with the document being discussed. In response to another question from Mr. Dennis about how often he meets with his senior leadership, Mr. Zahn described his weekly and monthly meetings with various levels of leadership. He did not recall exactly the day he informed his leadership team about the decision to postpone the PUP and ask the board to cancel it.

In response to a question from Council Member Salem about whether it is possible that JEA’s PUP calculations were done on legal pads or whiteboards in offices in a manner that would have avoided creating a public record, Mr. Wannemacher said they were not.

**Meeting adjourned:** 4:53 p.m.

Minutes: Jeff Clements, Council Research Division

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12.17.19 Posted 3:30 p.m.