

Office of General Counsel Disclosure Report

The Office of General Counsel (OGC) provides the following disclosure of identified and known memos, official legal guidance and legislation that was requested by City Council, the Mayor's Office and JEA that pertain to the previous *privatization of JEA* discussions. When relevant and known we have also included important meeting dates associated with memos or legislation.

- September 13, 2007 – Council Member request for JEA value & Council Auditor Special Report on JEA's Net Assets & Cash Flows

In response to a letter of inquiry dated July 25, 2007 by the Council President at the time, the Council Auditor analyzed the value of JEA's net assets and cash flows. LINK 1

- October 10, 2012 – Council Member request for JEA value & Council Auditor Special Report on JEA's Net Assets & Cash Flows

In response to a letter of inquiry by a Council Member, the Council Auditor analyzed the value of JEA's net assets and cash flows. LINK 2

- October – November 2012 – Special Committee to Review the Status of JEA

In 2012 a City Council Special Committee to Review the Status of JEA was charged to discuss and explore the benefits or consequences of selling JEA. The Special Committee was Chaired by Matt Schellenberg, along with Dr. Johnny Gaffney and Bill Gulliford. It appears that the Special Committee met twice, on October 23, 2012 and on November 13, 2012. This is a link to the archived meetings on the City of Jacksonville website:

<https://www.coj.net/city-council/standing-committees/special-committee-to-review-the-status-of-jea>

- December 11, 2012 – Resolution 2012-625-W

This resolution, which was introduced on October 9, 2012, set forth that the Council encourages the Mayor to direct the City's Procurement Division to issue a Request for Proposal for the sale of JEA in whole or in part. The resolution was withdrawn on December 11, 2012. LINK 3

- January 15, 2016 – Unsolicited Bid Process

The administration requested and met with members of OGC to generally discuss the legal process involved in the event that an outside private entity were interested in making an unsolicited bid for a City asset. A brief high-level process outline was prepared in anticipation of this meeting. No further OGC analysis took place with respect to this unsolicited bid process. LINK 4

- November 28, 2017 – JEA Board Meeting

Former JEA Board Chair Mr. Tom Petway posed questions to the JEA Board which included whether the services and financial benefits derived from the privatization of JEA would better serve the City and area at large. JEA Board Chair at the time, Alan Howard, requested JEA management to engage a qualified firm "to appraise the value of JEA's constituent utilities: electric, water/wastewater, and district cooling." Public Financial Management (PFM) was engaged by JEA to prepare such a report.

- February 13, 2018 – OGC Memo regarding the process for evaluating a potential JEA Privatization

City Council President Anna Lopez Brosche requested a briefing from OGC on the process for consideration of a potential privatization of JEA. Other Council Members at the time also had similar inquiries. Accordingly, OGC prepared a memo generally outlining such a process. LINK 5

- February 14, 2018 – Special Meeting of Council

This was a special meeting that was called by the Mayor pursuant to the City Council rules and presided over by Council President Anna Lopez Brosche. The understood purpose of the meeting was to provide an overview of a report produced by Public Financial Management dated February 14, 2018 which provided information under the title: The Future of JEA: Opportunities and Considerations. The General Counsel was asked by a Council Member at this meeting whether, hypothetically, JEA could undergo an RFP process by itself and whether the City Council could interfere in such a process. Summarized, the answer was that while JEA could commence an RFP process to sell all or a portion of its assets, such a process would eventually have to be reviewed and approved by Council. Accordingly, OGC advised that JEA undertake a process that was collaborative, coordinated, open and transparent with City Council and the community. LINK 6

- February 20, 2018 – Special Committee on the Future of JEA

City Council President Anna Lopez Brosche created the Special Committee on the Potential Sale of JEA with an initial five members (that later was expanded to the entire 19 member Council) chaired by Council Member John Crescimbeni. The Committee's initial charge of four tasks were eventually modified to two items: (1) Understand JEA's role in the consolidated government, contributions to the City of Jacksonville, governance practices, and future in the context of both changing technology and regulatory environment, and (2) Conduct necessary meetings and hearings to gather the relevant facts the entire City Council should consider in its responsibility to represent citizens and taxpayers of the City of Jacksonville. The Committee met several times up and until late July 2018, issuing its final report on July 25, 2018. LINK 7

Here is the link to the Special Committee information:

<https://www.coj.net/city-council/standing-committees/special-committee-on-the-future-of-jea>

- February 20, 2018 – OGC Memo regarding the Transfer of More than 10% of the Total of the Utility

At the request of the Chair, John Crescimbeni, OGC prepared a memo that addressed questions regarding the definition of "more than 10%" in the context of any potential transfer of any function or operation of the JEA utility system, as set forth in the City Charter for JEA. LINK 8

- March 12, 2018 – OGC Memo regarding Potential Plan for Underground Utility Lines

At the request of the Chair, John Crescimbeni, OGC prepared a memo that addressed whether City Council could bind JEA to develop (and implement) a long-term plan for undergrounding remaining overhead utility lines. LINK 9

- March 14, 2018 – OGC Memo regarding Council Authority to Administer Oaths and Subpoena Power

At the request of the Chair, John Crescimbeni, OGC prepared a memo that addressed the authority, process, enforcement and limits of issuing subpoenas and administering oaths. LINK 10

- March 15, 2018 – Special Committee on the Future of JEA Meeting

At the request of the Chair, John Crescimbeni, the General Counsel made a presentation to the Committee with respect to the general process on evaluating JEA and what a potential privatization may entail. This presentation covered local law and authority, including the fact that it is an executive branch prerogative to be able to explore the operations and assets of the City and propose ideas, philosophies or negotiated transactions which seek to promote a certain community vision in the public interest. In that context, the authority could be exercised by the mayor's office, JEA leadership or both. And it is in the legislative capacity of Council to review those proposals, analyze them, inquire and approve or disapprove those proposals.

Also covered in this presentation was an overview of other matters that would have to be addressed in any exploration of privatization, including a review of all interlocal and franchise agreements, a review of all real estate assets, a variety of regulatory approvals, and a public interest determination that would have to eventually be made by Council. The process, oversimplified, would consist of: (1) Exploration and Engagement; (2) Market Test; (3) Final Proposals; (4) Council Approval; (5) Regulatory Approval (FERC, PSC, etc.). Liabilities would also have to be considered. Note: After this meeting another aspect to any potential privatization was made part of the law via the Charter by Council, namely, the requirement for a voter referendum on any such sale.

- June 26, 2018 – OGC Memo regarding City Council Process for Approving Potential JEA Sale

At the request of the Chair, John Crescimbeni, OGC prepared a memo that addressed questions regarding the particularities of how the assets of JEA could be approved for sale by Council and the voting requirements for same. [LINK 11](#)

- June 26, 2018 – OGC Memo regarding JEA Retention Incentive Agreements

At the request of the Chair, John Crescimbeni, OGC prepared a memo that addressed a question regarding whether the executive director of JEA or Board Chair of JEA had the authority to enter into retention incentive agreements. The brief answer was no, only the JEA Board could approve such agreements, pursuant to limitations as provided in State Law, including but not limited to Florida Statute 215.425. [LINK 12](#)

- September 19, 2018 – Nixon Peabody invoice for counsel provided to JEA regarding JEA Board and City Council consideration of privatization. [LINK 13](#)

- January 2019 – Request by JEA for legal guidance with respect to incentive pay

At some point in January 2019, OGC was asked by JEA to provide general legal guidance with respect to incentive pay for JEA employees. OGC's Tort and Employment Department conducted research regarding compliance with Chapter 215, Florida Statutes.

- May 20, 2019 – Nixon Peabody memo regarding employee incentive programs emailed from Nixon Peabody to Herschel Vinyard, JEA CAO and Ryan Wannemacher, JEA CFO. This memo was first seen by current OGC employees on March 9, 2020. [LINK 14](#)

- June 17, 2019 – OGC Memo regarding Compensation Plans

At the request of JEA, OGC prepared a memo that addressed the general authority and requirements related to the establishment of long-term employee incentive programs to pay bonuses or additional amounts to JEA employees over a period of years. No plan specifics were provided by JEA.

This memo generally set forth that JEA is authorized to adopt bonuses or incentive programs so long as the program complies with the requirements of § 215.425, Florida Statutes. The program must (1) be based on work performance; (2) have pre-determined performance standards and evaluation processes; (3) provide notice of the program to all JEA employees prior its commencement; and (4) be available to all JEA employees. In addition to the requirements of § 215.425, Florida Statutes, any bonus or incentive program JEA adopts should provide for objective metrics measured by impartial analysts and not potential program award recipients. Also, the program would have to comply with the specific constraints itemized within the memo, which include ethics laws, Civil Service Rules, and collective bargaining. LINK 15

- June 25, 2019 JEA Board Meeting

Herschel Vinyard called for a meeting with OGC at some point after the June 25, 2019 JEA Board Meeting. He informed OGC of the development of what JEA called “non-traditional” strategic plans after a JEA Board Meeting where JEA officials gave a presentation on trends in utilities and traditional versus non-traditional utility responses. Mr. Vinyard expressed that at that Board Meeting there was a consensus to explore “non-traditional utility responses” and that the Board directed JEA staff to come back with a plan to implement a status quo option, and in addition, an exploration of the removal of constraints on opportunities to innovate the business.

- July 10, 2019 – Memo regarding Invitation to Negotiate: Public Records Considerations

At the request of Herschel Vinyard, Lynne Rhode, JEA VP & Chief Legal Officer prepared a memo that addressed the CAO’s question of whether and to what extent documents related to a JEA ITN process are protected from disclosure under Florida’s Public Records Law. LINK 16

- July 15, 2019 (week of) – Lynne Rhode provided a set of preliminary draft documents to OGC that were, at JEA leadership’s direction, drafted and prepared by outside special legal counsel to JEA (Pillsbury Winthrop Shaw Pittman LLP (Pillsbury) and Foley & Lardner LLP (Foley)) which were intended to be presented to the JEA Board on July 23, 2019. The documents were voluminous and were still being developed and revised by outside special legal counsel. Included in these documents was the first disclosure of a draft version of the PUP to OGC (excluding Lynne Rhode). OGC informed JEA officials that with less than one week until the JEA Board meeting on July 23, 2019, coupled with the complexity, magnitude and variety of matters intended to be presented to the JEA Board, there was insufficient time for OGC to provide its own appropriate review of the extensive and varied documents that JEA and outside special counsel had developed and drafted. OGC was told by JEA leadership that outside special legal counsel was drafting and approving the various documents in anticipation of the Board meeting. In the case of the PUP, because potential implementation would not take place until January 2020, OGC was assured by JEA leadership that the Board would approve a general summary of the plan and that OGC would have the ensuing months from the time of the Board meeting on July 23, 2019 to further review the plan, review outside special legal counsel’s findings as to the legality of the plan, and to independently research and provide any comments to the plan. Also, with regard to the PUP, OGC was told that both Pillsbury and Foley were developing it in compliance with all applicable laws, including but

not limited to Florida Statute 215.425. Furthermore, a condition precedent to the implementation of the PUP, as set forth in the applicable JEA Board Resolution, was that it would meet the requirements of Florida Statute 215.425. Accordingly, OGC included this understanding in its July 22, 2019 memo; specifically that OGC was only opining on the JEA Board's authority to pursue one of the strategic options before them, subject to applicable laws, and not as to the legality of the underlying documents.

- July 22, 2019 – JEA request for Board Authority Memo

At the request of Herschel Vinyard and Lynne Rhode, carrying out a request by Aaron Zahn – and based on an initial draft prepared by Lynne Rhode – OGC was asked to produce a memo that addressed the JEA Board's general authority regarding proposed action at the next meeting. This was requested the day before JEA's July 23, 2019 Board Meeting. The first draft sent to OGC was oriented towards each resolution. OGC objected to this draft because the resolutions and their underlying documents were not prepared by or approved for legality by OGC. The underlying documents were drafted, prepared and reviewed for legality by Pillsbury and Foley. Accordingly, OGC limited the scope of the memorandum to the JEA Board's general authority to take action with respect to pursuing a strategic planning option subject to applicable laws, and not to the legality of the underlying documents. [LINK 17](#)

- July 23, 2019 JEA Board Meeting

This is the JEA Board Meeting where several resolutions are considered for paths forward on the future of JEA, as well as employment and incentive related plans for the benefit of JEA employees.

- September 13, 2019 – OGC initial Review of PUP Matters

(At some point in early September OGC is informed for the first time by Lynne Rhode/Kevin Hyde that the PUP being developed by JEA is actually not going to be drafted in accordance with Section 215.425, Florida Statutes (which was a condition precedent of the Resolution that was passed by the JEA Board). They also informed OGC that they would be seeking input and an opinion from the Florida Attorney General's Office, as well as the Florida Commission on Ethics with respect to the matter. Accordingly, OGC requested the PUP documents from JEA to be reviewed independently in detail. OGC wanted to undertake its own due diligence on the matter, while also asking Pillsbury and Foley to review OGC's questions and provide answers to OGC regarding its concerns with the plan.

A meeting was held on this date with Kevin Hyde, Herschel Vinyard, Lynne Rhode, Lawsikia Hodges and Jason Gabriel in which OGC raised its initial concerns, questions and comments related to the legality of the PUP. OGC's concerns included JEA's Charter authority, the characterization of the PUP as an employee benefit "deferred compensation" plan, the inclusion of 2 OGC employees in the plan, IRS tax implications, securities laws, and collective bargaining requirements. Kevin Hyde committed to answering OGC's questions in a written memorandum. Lynne Rhode also confirmed at this meeting that Pillsbury was preparing a legal memo concerning tax and securities issues.

- August 27, 2019 – OGC Memo regarding Ex Parte/Cone of Silence Guidelines to Council

In response to several Council Member questions regarding the procurement process cone of silence / ex parte requirements under the ITN, OGC prepared a memo to Council. [LINK 18](#) On the same topic, also see the August 21, 2019 Memo from Foley to JEA. [LINK 19](#)

- September 23, 2019 – OGC Memo regarding Legislative Counsel & Specialized Legal Counsel to Council LINK 20

- September 24, 2019 – OGC Memo regarding Ex Parte/Cone of Silence Guidelines

Although the OGC memo dated August 27, 2019 had already been issued on this topic, the GC issued a similar memo in response to a Council Member's request. LINK 21

- September 25, 2019 – Foley's First PUP-Related Memo

Kevin Hyde provided OGC with his firm's initial attempt to address OGC's concerns that were raised at the September 13, 2019 meeting, with respect to the PUP. LINK 22

- October 1, 2019 – Internal OGC Meeting re various JEA matters including the PUP

Based on a review of Foley's First PUP-Related Memo dated September 25, 2019, OGC internally discussed further concerns and matters that it would bring to JEA and Foley's attention. OGC also discussed other concerns related to the JEA ITN process that it would bring to their attention.

- October 1, 2019 – Letter requesting an Opinion from Florida's Attorney General

A letter requesting an opinion from Florida's Attorney General, which was developed, drafted and coordinated by Foley and signed by Lynne Rhode was delivered to the Attorney General by Foley on this date. LINK 23 An email enclosing a copy of the AG request letter which confirms its delivery and Foley's agreement with the analysis and content of the letter was sent on October 3, 2019 from Kevin Hyde to Lynne Rhode. LINK 24 Certain changes and questions requested and asked by the General Counsel to the letter – fundamental to the legal basis of the request – were not incorporated into the letter that was submitted to the AG.

- October 2, 2019 – JEA / OGC Meeting re various JEA matters including the PUP

Lynne Rhode and Herschel Vinyard were told by OGC that the PUP appeared not to be legal because of several issues. Because of these concerns, additional explanation needed to be forthcoming from outside counsel. OGC requested further analysis and explanation to address those concerns. This meeting also addressed other OGC concerns related to the JEA ITN process.

- October 7, 2019 – OGC Memo regarding Council Authority regarding JEA ITN

At the request of a Council Member, OGC prepared this memo. LINK 25

- October 21, 2019 – Foley's Second PUP-Related Memo

Kevin Hyde provided OGC with his firm's second attempt to purportedly address OGC's concerns that were raised at the September 13, 2019 and October 2, 2019 meetings, with respect to the PUP. LINK 26

- November 4, 2019 – Pillsbury PUP-Related Memo

Pillsbury provided OGC with their firm's attempt to address OGC's concerns that were raised previously, particularly with respect to tax and SEC related matters with respect to the PUP. LINK 27

- November 5, 2019 – OGC Meeting with JEA and Foley

After OGC had received both Foley memos dated September 25 and October 21 regarding PUP-related concerns it had raised as well as a memo from Pillsbury regarding tax issues, and after OGC had performed its own internal diligence and analysis, it was imperative that OGC relay its official concerns and counsel to JEA. OGC's concerns included not only legal issues but also concerns about the uncapped nature of potentially gigantic payouts for the senior leadership team. These concerns were brought up to JEA officials and outside special counsel throughout the several weeks leading up to November 5. However the culmination of the concerns resulted in OGC officially stating its position on November 5 that the PUP in its current form was not legal. It would require substantial modification and other approvals if an employee incentive plan were to be implemented. Accordingly, a meeting was coordinated at Foley's office.

Beyond the legal issues raised at this meeting, and prior to knowledge of the Council Auditors work on the potential pay-outs that could result from the PUP – which would be revealed a few weeks later – the General Counsel asked a question as to whether any financial projections were made to understand the potential pay-outs that could result under the proposed plan. No one at the meeting responded, other than Aaron Zahn. Mr. Zahn stated that the payouts would not be substantial, but rather nominal. Also, he and Herschel Vinyard asked at the meeting if any of OGC's legal concerns changed if JEA were to modify the plan to nix the 3 year long-term aspect of it and relegate the plan to being solely contingent upon the potential sale of JEA. The General Counsel stated that such a modification would in fact make the plan worse and would not change OGC's legal concerns with the plan.

*See OGC Memo dated November 12, 2019 (below) for a summary of the legal issues raised at the meeting that took place on November 5, 2019. LINK 30

- November 12, 2019 – Letter from A. Zahn to J. Gabriel regarding PUP “indefinite postponement.” LINK 28
- November 12, 2019 – Letter from J. Gabriel to A. Zahn regarding PUP. LINK 29
- November 12, 2019 – OGC Memo to File by J. Gabriel memorializing legal advice and meeting, for the record. LINK 30
- November 13, 2019 – Memo regarding Ethics Inquiries on behalf of JEA Negotiation Team Members

At the request of Melissa Dykes, JEA COO, Herschel Vinyard, Jordan Pope, JEA Director and Camille Lee-Johnson, JEA Board Member, Lynne Rhode (in consultation with the City's Ethics Office, the State's Ethics Office and OGC) prepared a memo/letter request that reviewed conflicts of interest questions surrounding the proposed JEA negotiating team. This memo/letter request was delivered for review to the State Commission on Ethics. Eventually this request was withdrawn as the JEA negotiation team was subsequently reconstituted with City employees. LINK 31

- November 21 or 22, 2019 – Herschel Vinyard and Steve Amdur came to the GC's Office to revisit the GC's previous refusal to permit a “success fee” to Pillsbury in the event of a successful recapitalization of JEA. The GC once more notified them that the answer was no.
- November 25, 2019 – OGC Memo regarding Termination of ITN by JEA

At the request of a Council Member, OGC prepared a memo that addressed the question of whether JEA could suspend or terminate the ITN (which was answered in the affirmative) and the process for same. LINK 32

- November 25, 2019 – OGC Memo regarding Non-Confidential/Exempt Memos by Special Counsel to JEA

At the request of a Council Member, OGC prepared a memo that addressed the question of whether City Council could obtain non-exempt and non-confidential legal memos provided by special counsel to JEA (which was answered in the affirmative). LINK 33

- December 5, 2019 – OGC Memo regarding ITN Notice Requirements

At the request of a Council Member, OGC prepared a memo on the topic of ITN notice requirements. LINK 34

City Legislation regarding JEA

- Resolution 2012-625-W

This resolution set forth that the Council encourages the Mayor to direct the City's Procurement Division to issue a Request for Proposal for the sale of JEA in whole or in part. The resolution was withdrawn on December 11, 2012.

- Ordinance 2018-76-W

Charter amendment to require JEA to provide and maintain water and sewer lines in certain pre-consolidated urban areas.

- Resolution 2018-101-W

A resolution that any proceeds of sale of JEA shall be deposited into a restricted reserve account.

- Ordinance 2018-127-W

Ordinance setting straw ballot referendum regarding whether to privatize JEA.

- Ordinance 2018-141-E: Public Straw Ballot relating to the Sale of JEA – April 10, 2018

At the request of the Chair, John Crescimbeni and Council Member Garrett Dennis, the Office of General Counsel prepared an ordinance which set a public straw ballot voter referendum as to whether Council should call a binding referendum approving the terms and conditions of any Council action that sells more than 10% of JEA. This Ordinance was introduced on February 27, 2018 and enacted on April 10, 2018. The straw ballot referendum was held on the ballot of the 2018 Gubernatorial General Election "to afford Jacksonville's citizenry the opportunity to speak out on the issue of selling JEA and privatizing the electric, water, and sewer components of the City of Jacksonville. This referendum passed.

- Ordinance 2018-142-E: Charter Amendment related to Council's Power to Sell JEA – November 27, 2018

At the request of the Chair, John Crescimbeni and Council Member Garrett Dennis (as co-sponsored by other Council Members) the Office of General Counsel advised, counseled and prepared an ordinance which amended Section 21.04 of the City Charter to add the requirement that any Council approval of the terms and conditions of any transfer of more than 10% of the total utilities system of JEA be approved by voter referendum. This Ordinance was introduced on February 27, 2018 and enacted on November 27, 2018.

- Resolution 2018-242-W

A resolution recognizing the unique quality of owning JEA and encouraging the Mayor and JEA to thoughtfully and deliberately review the sale of JEA in whole or in part and should it determine that there is a benefit for the community to sell all or a part of JEA the Council encourages JEA and the Mayor to present such a proposal to Council for consideration.

- Resolution 2018-248-W

A resolution expressing City Council's opposition to the sale of JEA at the time.

- Ordinance 2018-256-W

An ordinance seeking to amend the Charter so that 4 of the 7 JEA Board Members be appointed by the Council and also subject to removal by Council.

- Resolution 2018-327-D

Resolution urging Aaron Zahn, Interim CEO of JEA, to abstain from applying for Permanent Position.

- Resolution 2018-429-W

Resolution expressing City Council's opposition to the Sale of JEA at this time.

- Resolution 2018-489-W

Resolution seeking to adopt Final Report of Special Committee on Future of JEA dated June 27, 2018.

- Resolution 2018-593-W

Resolution expressing City Council's opposition to the Sale of JEA at this time.

- Ordinance 2018-747-E: Approving Amended Contribution Agreement City/JEA – February 12, 2019

This Ordinance amended the Charter and approved an amended interagency agreement between JEA and the City which dealing with the contribution agreement between the parties.

- Ordinance 2019-566-E; JEA Pension and Defined Contribution Legislation

This legislation was prepared by Foley & Lardner / JEA and filed to propose amendments to Chapter 120, Ordinance Code to address potential recapitalization event changes and how that would effect employees and pensioners under the City's General Employee Retirement Plan. There was an associated collective bargaining shade meeting between Council, JEA and counsel to JEA in August 2019.

- Ordinance 2019-693-W

Ordinance to amend Charter to provide for sharing of dividends to JEA customers based on JEA's change in net position.

- Ordinance 2019-694-E

Ordinance appropriating \$1,850,000.00 for Special Legislative Counsel for City Council on the issue of JEA Recapitalization Event.

- Ordinance 2019-725-W

Ordinance to provide for payment of JEA's unfunded actuarial accrued liability upon JEA recapitalization event.

- Resolution 2019-863-A

Resolution encouraging JEA Board to take formal action to rescind the JEA PUP at the next JEA Board Meeting.

- Resolution 2019-894-A

Resolution encouraging JEA Board to take formal action to rescind the Invitation to Negotiate at the next JEA Board Meeting.

- Ordinance 2019-898-E

Ordinance approving engagement agreement with Smith Hulsey & Busey as special private counsel to Council on matters relating to the Future of JEA.

- Ordinance 2020-39-E

Ordinance requiring boards and commissions to respond to Council Auditor requests for information within 48 hours of receipt.

- Ordinance 2020-40-E

Ordinance amending City Charter, requiring responses by JEA to Council Auditor requests for information within 48 hours of receipt.

- Resolution 2020-42-A

Resolution encouraging JEA Board to take or initiate all actions necessary to renegotiate, rescind, cancel and/or terminate all executed non-CEO employment agreements between JEA and senior leadership team employees approved by JEA Board.

- Ordinance 2020-100-E

Ordinance setting a public referendum to amend the JEA Charter to require 4 of the JEA Board Members to be appointed by City Council.

- Resolution 2020-125-W

Resolution requesting Mayor to consider City Council suggested JEA Board Members.

- Ordinance 2020-126-E

Ordinance approving \$5,000 budget for City Council Professional Services to pay for travel and lodging for subject matter expert regarding Future of JEA Council meetings.

- Ordinance 2020-185-E

Ordinance prohibiting certain unlawful compensation contractual provisions.

- Resolution 2020-193-A

Resolution urging independent agencies (JAA, JEA, JPA & JTA) to limit executive contracts to the Chief Executive Officer.

- Ordinance 2020-245-W

Ordinance setting a public referendum with respect to bonus or incentive program limitations and requirements for JEA employees.

- Ordinance 2020-419

Ordinance related to JEA and Article 21, Charter amending various parts of JEA Charter with respect to contracts, composition, compensation, procurement, privatization and public engagement. This is the product of the Future of JEA workshops led by Council Member Michael Boylan.

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



September 13, 2007

Special Report #637

Council President Daniel Davis
Jacksonville City Council District 12
117 W. Duval Street
City Hall, Suite 425
Jacksonville, FL 32202

Dear Council President Davis,

In response to your letter dated July 25, 2007, my office has quantified the value of JEA's net assets and JEA's cash flows. We are providing this special written report in accordance with Ordinance Code Section 102.102. This report does not represent an audit or attestation conducted pursuant to Government Auditing Standards. As seen below, the value of JEA's net assets at July 31, 2007 was \$1,518,871,000 per JEA's monthly financial statements.

	Electric System	Water/Sewer System	District Energy System	Total JEA
<u>Value of JEA's Net Assets</u>				
Current Assets	\$ 373,289,000	\$ 110,868,000	\$ 1,121,000	\$ 485,278,000
Restricted Assets	453,425,000	100,515,000	2,451,000	556,391,000
Other Non-current Assets	260,763,000	22,184,000	302,000	283,249,000
Capital Assets (net of depreciation)	3,494,298,000	2,679,780,000	49,128,000	6,223,206,000
Total Assets	<u>\$4,581,775,000</u>	<u>\$2,913,347,000</u>	<u>\$ 53,002,000</u>	<u>\$7,548,124,000</u>
Current Liabilities	\$ 155,803,000	\$ 9,742,000	\$ 15,000	\$ 165,560,000
Liabilities Payable from Restricted Assets	262,950,000	51,866,000	212,000	315,028,000
Other Non-current Liabilities	112,940,000	8,109,000	-	121,049,000
Long-term Debt	3,636,795,000	1,737,571,000	53,250,000	5,427,616,000
Total Liabilities	<u>\$4,168,488,000</u>	<u>\$1,807,288,000</u>	<u>\$ 53,477,000</u>	<u>\$6,029,253,000</u>
Net Assets as of July 31, 2007 (per JEA unaudited financial statements)	<u><u>\$ 413,287,000</u></u>	<u><u>\$1,106,059,000</u></u>	<u><u>\$ (475,000)</u></u>	<u><u>\$1,518,871,000</u></u>

Regarding the value of JEA's cash flows, we calculated the value from two different perspectives. First, what is the value of JEA's cash flows to the City of Jacksonville? Second, what would the value of JEA's cash flows be to an Investor Owned Utility (IOU)? These are two entirely different numbers. We calculated the net present value of JEA's projected contributions to the City general fund for the next 30 years. We also calculated the net present value of JEA's projected cash flows to an IOU (assuming an IOU purchased JEA) for the next 30 years.

Each of these projections is based on various assumptions which we list below. While we believe that our assumptions are reasonable, assumptions are educated guesses about the future which may differ from actual experience. We wish to emphasize that we are not experts in utility valuation and we did not engage or consult any independent experts in utility valuation to assist in calculating our estimates. This was a limited exercise which we believe provides useful estimates and information for discussion purposes.

Value of JEA's Cash Flows to the City

We estimate the value of JEA's cash flows to the City to be worth \$2,001,136,744 based on the following assumptions:

1. The appropriate interest rate for discounting the projected cash flows is 6.35% consisting of a risk free rate of 4.85% and a risk premium of 1.5%. The risk free rate of return is the rate of return on an investment having no risk of default, equal to the real rate of return plus expected inflation. The risk premium is the difference between the required rate of return on an investment with risk and the rate of return on a risk-free investment, such as U.S. Treasury bills.
2. The electric contribution to the City general fund will grow at 2.50% per year for the next 30 years, the same rate that JEA electric sales have grown (measured on a quantity sold basis) on average for the past five years.
3. The water/sewer contribution to the City general fund will grow at 7.94% per year for the next 30 years, the same rate that JEA water/sewer sales have grown (measured on a volume sold basis) on average for the past five years.

Value of JEA to an Investor Owned Utility

We estimate the value of JEA's cash flows to an IOU to be \$3,145,943,326 based on the following assumptions:

1. The appropriate interest rate for discounting the projected cash flows is 11.75%, which is the likely return on equity allowed by the Florida Public Service Commission.
2. Electric sales will grow at 2.50% per year for the next 30 years, the same rate that JEA electric sales have grown (measured on a quantity sold basis) on average for the past five years.
3. Water/sewer sales will grow at 7.94% per year for the next 30 years, the same rate that JEA water/sewer sales have grown (measured on a volume sold basis) on average for the past five years.
4. The IOU would raise rates as soon as possible. Electric rates would be raised to \$112.18 per megawatt hour, which represents a blended rate that is equivalent to that being charged by Florida Power & Light (vs. a JEA blended rate of \$80.65 per megawatt hour). Water/Sewer rates would be raised 28%, the rate differential between JEA and United Water at the time JEA purchased United Water's Florida operations in December 2001.

5. The IOU would be required to refund all of JEA's tax-exempt debt with taxable debt as part of the purchase transaction. The IOU's average interest rate on outstanding debt would be two percent higher than JEA's average interest rate.
6. The IOU would save \$31,955,382 per year by laying off 369 JEA employees. The savings represent the salaries and benefits for all JEA support personnel who are not directly involved in operations. The savings are allocated 72% to electric and 28% to water/sewer.
7. The IOU would not pay a contribution to the City general fund, but would pay ad valorem taxes.
8. The IOU would pay state corporate income taxes at a rate of 5.5% and federal corporate income taxes at an effective rate of 24%.
9. Electric fuel revenues equal fuel expense.
10. District Energy System revenue and expense are immaterial to this calculation.

Additional JEA Contributions

In any meaningful discussion of JEA value to the City, there are additional factors that must be considered. These "additional factors" are contributions that JEA makes or has made to the City and the citizens of Jacksonville above and beyond the annual monetary contribution to the City general fund. We have compiled a list of what we consider to be the top five additional contributions made by JEA during the past ten years.

1. JEA's low electric rates have saved the citizens of Jacksonville over two billion dollars during the past ten years, compared to what the citizens would likely have paid if JEA had been an investor owned utility.
2. JEA spent approximately \$53 million on electric, water, and sewer infrastructure at Cecil Field to assist the City and JAA in creating Cecil Commerce Center.
3. JEA spent approximately \$26 million to purchase over 5,000 acres of preservation land to complement the City's Preservation Project.
4. Rather than the City and JEA each constructing their own radio systems, JEA coordinated the design and construction of a radio system that the City and JEA can both use. The First Coast Radio System is a City-wide 800MHz trunked radio system used by JEA and the City including the Sheriff's Office and the Fire & Rescue Department. JEA financed the \$20,795,159 cost of the system and bills the using agencies for their monthly operating charges as well as a capital recovery charge.
5. JEA constructed chilled water plants to serve the City sports complex, the proposed new courthouse, the Main Library, and Shands Jacksonville.

Benefits of Privatization

The City and the School Board could be expected to benefit from the sale of JEA to an IOU as discussed below. As with any sale transaction, the value of JEA to an IOU assumes that a buyer exists that is willing and able to purchase JEA.

1. The City would receive an infusion of cash from the sale that could be invested to provide a permanent revenue stream for the City general fund. For example, \$3 billion would generate \$140,400,000 per year assuming the proceeds were invested and earned 4.68% (current 20-year treasury bond yield) or \$268,800,000 per year assuming the

proceeds earned 8.96% (the average rate earned by the General Employees pension plan during the past ten years). To determine the net financial benefit to the City general fund, this additional investment income must be netted with the additional ad valorem taxes which the City would receive from the IOU (approximately \$52 million for 2007 at the currently proposed millage rate), the loss of the JEA contribution to the City general fund (\$94,187,538 for FY 07/08), and an increase in the City's utility bills of approximately \$7.5 million per year.

2. The Duval County School Board would receive ad valorem taxes from the IOU. Taxes paid to the School Board for 2007 would be approximately \$48 million using the currently proposed school board millage rate. To determine the net benefit to the School Board, the ad valorem taxes received must be netted against an approximate \$7.6 million increase in the School Board's utility bills.
3. The City would be removed from involvement or responsibility for public utilities.

Conclusion

We estimate the value of JEA to the City to be a minimum of \$2.0 billion not taking into consideration "Additional JEA Contributions" such as those listed above. We estimate that the value of JEA could be as high as \$3.1 billion to an investor owned utility or utilities assuming that a willing and able buyer exists. The difference between the two values is largely due to the assumption that an IOU would raise rates in order to cover its costs and generate its required return on equity, which is a higher rate of return than that generated by JEA which only attempts to cover its costs, with the contribution to the City general fund essentially being the City's return on equity.

Sincerely,

Kirk A. Sherman, CPA
Council Auditor

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



October 10, 2012

Special Report #722

Council Member Matt Schellenberg
Jacksonville City Council District 6
117 W. Duval Street
City Hall, Suite 425
Jacksonville, FL 32202

Dear Councilman Schellenberg,

In response to your request, my office has quantified the value of JEA's net assets and JEA's cash flows. We are providing this special written report in accordance with Ordinance Code Section 102.102. This report does not represent an audit or attestation conducted pursuant to Government Auditing Standards. As seen below, the value of JEA's net assets at September 30, 2011 was \$1,808,559,000 per JEA's audited financial statements.

<u>Value of JEA's Net Assets</u>	<u>Electric System</u>	<u>Water/Sewer System</u>	<u>District Energy System</u>	<u>Total JEA</u>
Current Assets	\$ 602,018,000	\$ 141,161,000	\$ 5,756,000	\$ 748,935,000
Restricted Assets	776,123,000	309,037,000	3,956,000	1,089,116,000
Other Noncurrent Assets	85,393,000	18,531,000	256,000	104,180,000
Capital Assets (net of depreciation)	3,873,913,000	2,759,664,000	42,092,000	6,675,669,000
Deferred Outflows	153,340,000	23,418,000	-	176,758,000
Total Assets	\$ 5,490,787,000	\$ 3,251,811,000	\$ 52,060,000	\$ 8,794,658,000
Current Liabilities	\$ 170,058,000	\$ 22,476,000	\$ 53,000	\$ 192,587,000
Liabilities Payable from Restricted Assets	469,344,000	105,714,000	4,894,000	579,952,000
Other Noncurrent Liabilities	107,751,000	7,072,000	20,000	114,843,000
Long-term Debt	4,040,594,000	2,012,983,000	45,140,000	6,098,717,000
Total Liabilities	\$ 4,787,747,000	\$ 2,148,245,000	\$ 50,107,000	\$ 6,986,099,000
Net Assets as of September 30, 2011	\$ 703,040,000	\$ 1,103,566,000	\$ 1,953,000	\$ 1,808,559,000
(per JEA audited financial statements)				

Regarding the value of JEA's cash flows, we calculated the value from two different perspectives. First, what is the value of JEA's cash flows to the City of Jacksonville? Second, what would the value of JEA's cash flows be to an Investor Owned Utility (IOU)? These are two entirely different numbers. We calculated the net present value of JEA's projected contributions to the City general fund for the next 30 years. We also calculated the net present value of JEA's projected cash flows to an IOU for the next 30 years (assuming an IOU purchased JEA Electric and Water/Sewer Systems).

Each of these projections is based on various assumptions which we list below. While we believe that our assumptions are reasonable, they are educated guesses about the future which will likely differ from actual experience. We wish to emphasize that we are not experts in utility valuation and we did not engage or consult any independent experts in utility valuation to assist in calculating our estimates. In this process we consulted with the City of Jacksonville's Treasury Division, JEA's Treasury Services Department, and JEA's Financial Planning Budgets and Rates Department. This was a limited exercise which we believe provides useful estimates and information for discussion purposes.

Value of JEA's Cash Flows to the City

We estimate the net present value of JEA's cash flows over a 30 year period to the City to be within a range of \$2,044,586,904 and \$2,488,320,814 based on the following assumptions:

1. The appropriate interest rate for discounting the projected cash flows is 4.03% consisting of a risk free rate of 1.93% and a risk premium of 2.10%. The risk-free rate of return is the rate of return on an investment having no risk of default, equal to the real rate of return plus expected inflation. The risk premium is the difference between the required rate of return on an investment with risk and the rate of return on a risk-free investment, such as U.S. Treasury bonds.
2. The total JEA combined contribution for fiscal year 2010/11 was \$101,687,538. The total JEA combined contribution (Electric & Water/Sewer) to the City will increase, at a minimum, \$2.5 million each year through fiscal year 2015/16 in accordance with Ordinance 2007-838-E. After fiscal year 2015/16 we estimate the electric contribution and the water/sewer contribution to the City general fund will grow between 0.50% and 2.50% per year for the following 26 years.
3. The JEA District Energy System (DES-also known as Chilled Water Service) does not make a contribution to the City and DES revenue and expense are immaterial to this calculation.

Value of JEA to an Investor Owned Utility

We estimate the net present value of JEA's cash flows over a 30 year period to an IOU to be within a range of \$1,039,870,216 and \$1,215,011,384 based on the following assumptions:

1. The appropriate interest rate for discounting the projected cash flows from the Electric System is 10.50%, which is the current approved average return on equity (ROE) allowed by the Florida Public Service Commission (PSC) for the major investor owned electric utilities in Florida. The appropriate interest rate for discounting the projected cash flows from the Water/Sewer System is 9.75%, which is the current ROE for the largest investor owned water/sewer utility in Florida. The PSC sets rates at a level that is intended to allow each utility the opportunity to collect revenues equal to that utility's cost of providing service, including a reasonable rate of return on invested capital.
2. Electric (MWh) and Water/Sewer (CCF) sales will grow between 0.50% and 2.50% per year for the next 30 years. JEA Electric System average growth in sales for the past 10

years was 0.84%. Water/Sewer average growth in sales for the past 10 years was 3.56% although that growth was augmented through the JEA purchase of 36,612 United Water customers in 2001 and 7,000 Florida Water customers in 2004.

3. An IOU purchasing the Electric System and/or the Water/Sewer System would apply to the PSC for permission to increase rates as soon as possible in order to reach its desired ROE.
4. An IOU purchasing JEA would be required, as part of the purchase transaction, to pay the City for JEA's share of the General Employees' Pension Plan (GEPP) Unfunded Actuarial Accrued Liability (UAAL). We estimate JEA's share of the GEPP UAAL to be \$272,941,713 based on JEA's percentage share of pensionable payrolls for the past three years (Fiscal Year 2008/09 – 2010/11). This amount of the sale proceeds would be paid into the GEPP trust fund and would not be available for other uses.
5. An IOU would be required to refund all \$4,040,594,000 of JEA's tax-exempt electric system long term debt with taxable debt as part of the purchase transaction. Based on audited financials we estimate the IOU's average interest rate on outstanding electric debt would be 1.113% higher than JEA's average interest rate on outstanding electric debt. Additionally, the IOU would be required to refund all \$45,140,000 of the DES outstanding Long Term Debt which is considered part of the Electric System for this analysis.
6. An IOU would be required to refund all \$2,012,983,000 of JEA's tax-exempt Water/Sewer debt with taxable debt as part of a purchase transaction. Based on audited financials we estimate the IOU's average interest rate on outstanding debt for water/sewer would be 1.270% higher than JEA's average interest rate on outstanding debt for water/sewer.
7. The IOUs would save a combined total of \$72,345,480 per year by laying off an estimated 747 JEA employees whose positions duplicate existing IOU employee positions. The savings represent the salaries and benefits for JEA upper management and support personnel who are not directly involved in operations, allocated 72% to electric and 28% to water/sewer.
8. The IOU would not pay a contribution to the City general fund, but would pay ad valorem taxes. Using the current millage rate and JEA's capital assets net of depreciation, we estimate that the IOU would pay as much as \$62,138,141 per year to the City in ad valorem taxes. However, from discussions with Property Appraiser personnel, we understand that utility assessments are difficult to estimate and the amount of taxes received could be considerably less.
9. The electric IOU would pay corporate income taxes at an effective rate of 38% for combined state and federal income tax. The water/sewer IOU would pay corporate income taxes at an effective rate of 32.9% for combined state and federal income tax.
10. Electric fuel revenues equal fuel expense.
11. District Energy System revenue and expense are immaterial to this calculation. However, it is assumed that DES Capital Assets (net of depreciation) and Long Term Debt are part of the Electric System in the cash flows to an IOU.
12. The City's electric expense would increase approximately \$2.8 million per year as the City's JEA customer discount would likely not be offered by an IOU.

Additional Considerations

As with any sale transaction, the value of JEA to an IOU assumes that a buyer exists that is willing and able to purchase the Electric System and/or the Water/Sewer System of JEA. Any discussion of selling all or part of JEA should consider the following:

1. The City would receive an infusion of cash from the sale that could be invested to provide a permanent revenue stream for the City general fund. For example, \$1 billion would generate \$24,200,000 per year assuming the proceeds were invested and earned 2.42% (current 20-year treasury bond yield) or \$50,300,000 per year assuming the proceeds earned 5.03% (the average rate earned by the General Employees' Pension Plan during the past ten years). To determine the net annual financial benefit to the City general fund, this additional investment income must be netted with the additional ad valorem taxes which the City would receive as a result of the sale to the IOU (approximately \$62 million for 2011 at the current millage rate), the loss of the JEA contribution to the City general fund (\$101,687,538 for FY 10/11), and an increase in the City's electric expense of approximately \$2.8 million per year as the City's JEA customer discount would likely not be offered by an IOU.
2. The City's current contribution from JEA has a guaranteed floor or minimum, whereas returns on the sale proceeds from JEA would be dependent on the market. The possibility also exists that a major market decline, such as the 2008 great recession, would result in the loss of principal, negating any positive outcome anticipated from the sale of the utilities.
3. The City would be removed from involvement or responsibility for public utilities if both the electric and water/sewer systems were sold.
4. JEA has assisted the City in numerous instances in the past. Examples include JEA's construction of significant utility infrastructure (approximately \$53 million) at Cecil Commerce Center, the purchase of approximately \$26 million of preservation land to complement the City's Preservation Project and the expense of approximately \$28 million to construct Chilled Water plants serving Better Jacksonville Plan buildings; Courthouse Complex, Main Library, Arena and Ballpark. It is doubtful that an IOU based outside of Jacksonville would partner as closely with the City as JEA.
5. The sale of JEA to an IOU would result in the City losing over 700 jobs with salaries and benefits totaling more than \$70 million annually.
6. The Duval County School Board would receive annual ad valorem taxes as a result of the sale to an IOU. Using the current millage rate and JEA's capital assets net of depreciation, we estimate that the IOU would pay as much as \$46,767,848 per year to the School Board in ad valorem taxes. However, from discussions with Property Appraiser personnel, we understand that utility assessments are difficult to estimate and the amount of taxes received could be considerably less. To determine the net benefit to the School Board, the ad valorem taxes received must be netted against an increase in the School Board's electric expense of approximately \$2 million per year as the School Board's JEA customer discount would likely not be offered by an IOU.

Conclusion

We estimate the value of JEA to the City to be a range between \$2.0 and \$2.5 billion taking into consideration the assumptions listed above. We estimate that the range in value of JEA could be \$1.0 billion at a minimum and as high as \$1.2 billion to an investor owned utility or utilities assuming that a willing and able buyer exists.

Sincerely,

Kirk A. Sherman, CPA
Council Auditor

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Introduced by Council Member Schellenberg:

RESOLUTION 2012-625-W

A RESOLUTION REGARDING THE JEA; RECOGNIZING
THE UNIQUE QUALITY OF OWNING AN ELECTRIC AND
WATER AUTHORITY; ENCOURAGING THE MAYOR TO
DIRECT THE PROCUREMENT DIVISION TO ISSUE A
REQUEST FOR PROPOSAL FOR THE SALE OF JEA;
PROVIDING AN EFFECTIVE DATE.

WHEREAS, JEA is the seventh largest community electric company
in the United States and the largest in Florida; and

WHEREAS, as of 2009, JEA serves more than 417,000 electric
customers, 305,000 water customers and 230,000 sewer customers; and

WHEREAS, in 1997, Jacksonville's Department of Utilities,
Water and Sewer operations merged with JEA; and

WHEREAS, JEA is a publically owned utility owned by the City
of Jacksonville; and

WHEREAS, JEA makes an annual contribution to the City of
Jacksonville currently in the amount of \$94 million dollars
annually pursuant to an agreement between the City and the JEA; and

WHEREAS the Council of the City of Jacksonville desires to
express its will and intent that the JEA be sold; now therefore

BE IT RESOLVED by the Council of the City of Jacksonville:

Section 1. Council Encouragement. The Council of the
City of Jacksonville hereby encourages the Mayor to direct the
Procurement Division to issue an Request for Proposal("RFP") for
the sale of JEA in whole or in part.

Section 2. Effective Date. This Resolution shall become
effective upon signature by the Mayor or upon becoming effective

without the Mayor's signature.

Form Approved:

/s/ Margaret M. Sidman

Office of General Counsel

Legislation Prepared By: Margaret M. Sidman

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Summary Outline of Privatization Process Steps

(via Preliminary Proposal)

- Step 1:** Direct entity to submit a Preliminary Proposal in the form attached as **Exhibit A**.
- Step 2:** Develop solicitation procedures/Retain consultants (utilizing procurement code methods)
- Step 3:** Solicit, evaluate and negotiate privatization contract
- Step 4:** Prepare and file legislation with final negotiated privatization proposal. The legislation will include:
- Any necessary Charter Amendments;
 - Negotiated contract with entity to purchase and provide the services to be privatized; and
 - All applicable statutory and local ordinance requirements.

Exhibit A

Contents of Preliminary Proposal to Privatize

An entity's preliminary proposal ("Preliminary Proposal") to privatize a City department, division or essential public function may include the following minimum information, which is based in part on the requirements of Chapter 21 (Executive Branch, Generally), Part 3 (Privatization), Section 21.03 (Contents of Plan) of the Ordinance Code:

- Entity name, background and experience in the proposed privatization;
- The proposed City department, division or essential public function to be privatized;
- An estimated time range for the privatization;
- A preliminary financial analysis, based on information obtained by the entity through public records; and
- The advantages and disadvantages associated with the privatization plan.

Note that all information provided in a Preliminary Proposal is subject to Florida's Public Records Law. The information contained in a Preliminary Proposal is based on available information in the public records and is non-binding on the entity. The entity shall be responsible for all costs associated with preparing a Preliminary Proposal.

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**OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 630-1700**



MEMORANDUM

TO: Honorable Mayor Lenny Curry
Honorable Members of the Jacksonville City Council
JEA Board of Directors

CC: Chief Administrative Officer, Sam Mousa
Chief of Staff, Brian Hughes
Chief Financial Officer, Mike Weinstein

FROM: Jason Gabriel, General Counsel
Jody Brooks, Chief Legal Officer, JEA
Gayle Petrie, Chief Financial Officer for OGC

RE: Process for the evaluation of a potential JEA privatization

DATE: February 13, 2018

I. Background and Purpose

In November 2017, former JEA Board Chair Mr. Tom Petway posed questions to the JEA Board which included whether the services and financial benefits derived from the privatization of JEA would better serve the customers of the JEA and the citizens of Jacksonville and the region at large.

In an effort to respond to these inquiries, the current JEA Board Chair, Mr. Alan Howard, requested that JEA management engage a qualified firm "to appraise the value of JEA's constituent utilities: electric, water/wastewater, and district cooling." Public Financial Management (PFM) was engaged by JEA to prepare such a report and is working to finalize and deliver the report to the JEA Board, City Council and members of the Administration on or around February 14, 2018. A draft of the PFM report dated February 2, 2018 was provided to City Council members, JEA Board members, and members of the Administration.

The JEA and City Council members have inquired as to the process for exploring and considering the potential privatization of JEA utility operations which include water and

sewer, chilled water, and electric systems. The purpose of this memo is to provide the basic process for such exploration and consideration, including, without limitation to identify local, state and federal regulatory processes that would be necessary to complete.

Please note that this memo provides basic procedural information on a comprehensively large first-of-its-kind transaction and accordingly is subject to further modification, amendment, elaboration and analysis as the evaluation, exploration and consideration process is undertaken.

II. Authority and Responsibilities of JEA

JEA is the largest municipally-owned electric, water and sewer utility in Florida and the 8th largest in the nation. JEA serves Duval County and portions of three adjacent counties including St. Johns County, Nassau County and Clay County. In 1967 upon consolidation, Jacksonville Electric Authority became an independent authority of the City of Jacksonville authorized to own, manage and operate an electric utility system. In 1997, the City amended the Charter to expand this authority to include water, sewer and natural gas, and the City transferred the water and wastewater responsibilities from a City department to Jacksonville Electric Authority and renamed the independent authority to simply JEA.

A. JEA Charter

Article 21 of the City of Jacksonville Charter creates the JEA, defining its responsibilities, authority and power. JEA is authorized to own, manage and operate utility systems within and without the City of Jacksonville and was created for the express purpose of acquiring, constructing, operating, financing and otherwise having plenary authority with respect to electric, water, sewer, natural gas and such other utility systems as may be under its control now or in the future. Such utilities may be owned, operated or managed by JEA separately or in such combined or consolidated manner as JEA may determine. Section 21.01, City Charter.

The JEA's powers are listed in Section 21.04 of the Charter. Specifically, Section 21.04(p), in part, limits JEA's ability to "transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private without approval of the council."

Any transaction that comprises more than ten percent of the total utilities system would require approval of City Council. Upon receipt of the PFM final report, the JEA Board could make a recommendation to City Council on pursuing a potential privatization opportunity and exploring the market to do so, however the JEA ultimately does not have the power to complete such a transaction without City Council approval.

B. JEA Charter Amendment Process

Any transaction that would modify the authority or powers of JEA would require an amendment to or repeal of Article 21. Section 21.11 provides the following legislative authority of City Council:

Notwithstanding any provision of this charter to the contrary, the council may repeal or amend any portion of this article, by two-thirds vote of the membership of the council. A public hearing on the adoption of the ordinance shall be advertised in substantially the same manner as the council is required to advertise its intention pursuant to s. 200.065, Florida Statutes, and held not earlier than 30 days after the introduction of the ordinance into the council. The council shall take final action on the ordinance only after the expiration of 60 days after the advertised public hearing, and no ordinance shall be enacted except by a two-thirds vote of the entire council. If the mayor disapproves the ordinance, the council may enact it notwithstanding such disapproval only by a four-fifths vote of the entire council.

Section 21.11 authorizes the City Council to repeal or amend any portion of the JEA Charter. Because this amendment and repeal section (coupled with the sale/transfer provision set forth in Section 21.04(p)) was specifically authorized by the State Legislature, no referendum would be required to amend or repeal the JEA Charter to affect a privatization transaction. Furthermore, any effort to require such a transaction to be subject to a voter referendum would require an amendment to Article 21 of the City Charter.

C. Interlocal and Franchise Agreements

JEA provides utility services to surrounding communities under certain interlocal or franchise agreements. The electric system provides service to the Town of Orange Park, Town of Baldwin, Atlantic Beach and a portion of St. Johns County. The water/wastewater system provides service to parts of Nassau and St. Johns Counties. Each of these agreements will need to be reviewed for the provision of service to these surrounding communities and the transferability of the agreements.

Those agreements are referenced as provided below:

1. Electric:

a. Ordinance No. 305 (Town of Orange Park) Franchise Fee Agreement effective September 1, 1969, between JEA and Town of Orange Park

- b. Assignment and Assumption of Franchise Agreement (FPL) dated January 1, 2000, between JEA and Town of Baldwin

Franchise Agreement between JEA and Atlantic Beach

- c. Territorial Agreement (FPL) dated December 14, 1998, between JEA and St. Johns County

2. Water/Wastewater:

- a. Nassau County/JEA Water and Wastewater Interlocal Agreement dated December 17, 2001
- b. St. Johns County/JEA Water and Wastewater Interlocal Agreement dated July 1, 1999

A purchaser would also need to negotiate a franchise agreement with the City of Jacksonville.

3. All Applicable Agreements:

Agreements with governments outside of Jacksonville would need approval for a transfer or will need to be renegotiated with the local governmental units. Those agreements include the agreements listed above. The Office of General Counsel is currently examining all known applicable agreements, and is researching JEA files to ensure that all necessary agreements are identified and reviewed. Accordingly other agreements may be added to the list of agreements that necessitate review.

D. Real Estate / Asset Inventory Review

All governmentally owned, leased, managed, operated or controlled property interests and other assets associated with JEA utilities need to be reviewed, along with the instruments and documents which govern them. The purpose of such examination is to assess the rights, obligations, benefits and burdens contained within them which affect the various utility systems. This is an undertaking conducted by the JEA with assistance from the City, Office of General Counsel, and specialized outside legal counsel.

III. Applicable State and Federal Agencies

A. Regulatory Approvals

As a municipal utility, JEA is exempt from certain federal and state regulatory laws that would be applicable to a non-municipal, investor-owned purchaser. Approval by the Federal Energy Regulatory Commission (FERC) (with respect to the entire transaction of the electric system) and the Florida Public Service Commission (PSC) (with respect to

the approval of utility rates and related matters) of a privatization transaction to a private entity would be required as part of a conversion from a municipal-owned utility to an investor-owned utility.

B. Public Interest Determination for Water/Wastewater System

Pursuant to Florida Statutes, no county, municipality, special district or community development district may sell a water, sewer or wastewater reuse utility or enter into a wastewater facility privatization contract for a wastewater facility until the governing body has held a public hearing and made a determination that the sale or wastewater facility privatization contract is in the public interest (§125.3401 - Purchase, sale, or privatization of water, sewer, or wastewater reuse utility by county, §180.301 - Purchase, sale, or privatization of water, sewer, or wastewater reuse utility by municipality, §189.054 - Purchase, sale, or privatization of water, sewer, or wastewater reuse utility by special district, and §190.0125 - Purchase, privatization, or sale of water, sewer, or wastewater reuse utility by district, Florida Statutes). The public interest determination shall consider at a minimum the specific items required by statute.

IV. Exploration and the Transaction Process

Should the valuation conducted by PFM provide justification for further exploration by the Consolidated Government for examining and considering further action toward privatization, the draft PFM report dated February 2, 2018, outlines a six-phased approach for a utility asset sale:

- Phase 1 – Commitment to the Process
- Phase 2 – Documentation and Disclosure
- Phase 3 – Preparing for the Sale
- Phase 4 – Indications of Interest
- Phase 5 – Due Diligence and Final Bids
- Phase 6 – Regulatory Approvals

Because of the complexity of a multi-faceted privatization transaction of this nature and magnitude and the integral involvement of various parts of the Consolidated Government, the City and JEA will have to craft a process in collaboration with an investment advisor which adequately tests the market, seeks suitable investors and forges a path to evaluating the best value proposition of the asset for the City. The City and JEA have the ability and authority to create a fair and effective process for a privatization transaction that mirrors standard merger and acquisition processes that are tailored for achieving the best result for the City.

Incorporating the six phases from the PFM draft report, the following is an outline of process for the benefit of the City Council and JEA:

A. City Council and JEA evaluate the PFM final report and decide whether to support further exploratory consideration and action. This can be accomplished through a Council resolution. A cohesive, collaborative and cooperative approach by the entire Consolidated Government is highly recommended while the market is tested for such a comprehensive transaction in order to achieve the highest and best potential valuation by interested entities on behalf of the taxpayers.

B. Assuming City Council support is obtained for the exploration of a potential transaction or set of transactions, arrangements are made to retain an investment advisor, merger and acquisition counsel and other necessary professional services including assistance with employee and labor matters and real estate / asset inventory review.

C. In close collaboration with the investment advisor and merger and acquisition counsel, marketing and disclosure documentation and minimum transaction parameters are prepared for potential investors, and discussions commence with such entities.

D. Prospective investors are assisted with their due diligence review / information acquisition, and the parties begin negotiating terms and conditions of associated transaction documents, including any necessary provisions regarding future rates and employee matters. The bid process is narrowed to the potential investor or investors that have provided the favored terms of acquisition.

E. Final proposals are obtained from investors, reviewed and evaluated. The parties then negotiate definitive acquisition documents that are packaged and submitted to City Council for consideration and formal action.


F. If a proposal is accepted and approved by City Council, transaction documents are executed, and work is commenced on satisfaction of closing conditions, including the regulatory approval process with governmental agencies.

V. Conclusion

If pursued, this complex transaction will require extended cooperation between JEA and the City to maximize net proceeds and clear regulatory hurdles which as noted above include FERC and PSC review and approval.

Please let us know of any further questions and if we can be of any further assistance.

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The Future of JEA: Opportunities and Considerations

Michael Mace

PUBLIC FINANCIAL MANAGEMENT

FEBRUARY 14, 2018



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Introduction

On November 28, 2017, in his final meeting as a Director of the JEA Board, Mr. Thomas Petway posed the following questions...

Would the customers of JEA and the people of Jacksonville be better served in the private marketplace?

Should JEA and the City of Jacksonville consider the financial benefits that would come from the privatization of JEA?

This topic has been raised and studied in the past. The conclusions of prior studies were that the City and the ratepayers would be better served by having JEA remain in place as a municipally-owned utility. But as Mr. Petway accurately stated at the November meeting, the utility market is vastly different than when JEA was formed in 1967. Further, the utility market is quite different than it was just five years ago when this topic was last studied.

The outlook for the future of the utility industry, and specifically for the electric utility industry, is as uncertain as it has ever been. Continued advances in technology will impact both energy demand and energy supply. Technology has led to tremendous leaps forward in energy efficiency, resulting in reduced energy demand; while potential growth in electric vehicle adoption could replace that demand in the upcoming decade. On the supply side, we have seen coal go out of favor due to environmental concerns, and nuclear due to cost concerns; while natural gas-fired and renewable generation costs have declined dramatically. The continued change could make the utility industry more volatile and riskier than it has been in the past.

The rapidly changing nature of the utility industry supports the need for the City and JEA to reevaluate questions that have been asked and answered in the past. As a result of Mr. Petway's questions and suggestions, JEA's new Board Chair Mr. Alan Howard made the following request of JEA's CEO, Mr. Paul McElroy...

Take up that challenge, evaluate our prospective position in the marketplace, and report back on what the private market value of JEA may be so the citizens of Jacksonville and the mayor and other constituencies — City Council — can evaluate that opportunity.

JEA's management team was given the directive to study this issue, and report back to the Board. One of the steps taken by JEA to respond to this directive by the Board was to commission Public Financial Management ("PFM") to prepare a report that addressed a number of topics that are relevant to a decision that JEA and/or the City might make regarding the City's continued ownership, or possible sale, of JEA. The goal of the PFM Report (or "Report") is not to make a recommendation on whether to retain JEA, sell JEA or seek some other relationship between JEA, the City and JEA's ratepayers. Rather, the goal of the Report is to inform the Board, the City and the Public as to several important considerations that must be evaluated in order to make decisions regarding JEA's future. The Report does contain a range of potential values that the City might derive from a sale of JEA. It also includes a discussion of the key drivers of JEA's potential market value, and it covers the required application of a portion of the sale proceeds that would reduce the gross sale proceeds to a net amount that would be available to the City. There are many other considerations that City leaders will evaluate that go beyond the question of "What is JEA Worth?". The price a buyer might pay for JEA (or that separate buyers might pay

separately for JEA's Electric, Water & Sewer, and District Energy Systems) is but one input to a more complex equation that arrives at the net long-term impact of a JEA asset sale on both the City and on JEA's ratepayer "owners".

The goal of this Report is to raise and address the other inputs to this complex equation, and to assist the reader in understanding both the quantitative and non-quantitative considerations relevant to a decision to retain JEA; or to proceed to the next step in the complex process of deriving the highest possible value from JEA for the City and the ratepayers.

The readers of this Report should consider the qualifications and background of the firm providing the Report. Briefly, PFM is the country's largest, independent, full-service financial and investment advisor to the governmental and not-for-profit sectors. PFM has served as JEA's financial advisor since 2002. PFM is independent in that it is not associated with any investment bank or commercial bank. The firm does not underwrite or trade municipal securities for its own account. PFM is not affiliated with and does not provide financial advisory services to private, for-profit utilities. PFM does not serve as a broker in asset sales and would not serve in this role should JEA sell any or all of its assets. PFM has particular expertise in providing financial advice to large municipal utility systems across the country. In the public power sector, PFM serves as financial advisor to well over half of the 50 largest public power systems in the United States. PFM is also the leading financial advisor to large governmental water and wastewater systems. PFM has assisted several of our clients in the evaluation of large asset sales and acquisitions. In some cases, these analyses have covered the sale of all of a utility's assets. In a limited number of cases, the outcome of the process was a sizable asset sale or privatization arrangement.

Sales of municipal utility systems have historically been quite rare. There are significant economic factors that have long favored municipal ownership. In the past, PFM's role in the analysis of a potential municipal utility system sale has often been to explain and quantify these economic factors. For JEA, its access to low-cost, tax-exempt debt, and its non-profit, cost-of-service business model provided considerable cost savings relative to for-profit utilities that: (1) had higher cost debt, (2) even higher cost equity, and (3) paid taxes on income. The utility industry had long been a very capital intensive business, and JEA's distinct capital cost advantages delivered considerable value for JEA's customers. The evaluation of municipal ownership or sale was often focused on capital cost advantages and their impact on current and projected utility rates. Not surprisingly, the projected rate differentials between municipal versus for-profit ownership led to a clear advantage for continued municipal ownership of large utility assets.

However, in recent years there have been considerable changes in both the capital markets and in the utility industry. These changes justify a new look at the old math that had always favored municipal ownership. In addition, there have been changes in JEA's business outlook and financial structure that have made JEA more appealing to potential purchasers of utility assets. These changes necessitate a very different approach to this exercise than that of simply going through an explanation of capital cost and philosophical differences between public power and Investor Owned Utilities ("IOUs").

This Report will provide an updated range of potential values of JEA to an acquirer. This value range reflects the changes discussed above as well as other market dynamics. The Report will also discuss: (1) information related to JEA's utility systems, (2) a comparison of municipal and for-profit ownership, (3) utility valuation methodologies and approaches, (4) potential sale processes and timeline, (5)

complexities of the privatization process, and (6) the potential risks to, and impacts on the City from an asset sale.

As mentioned, the goal of this Report is not to recommend either selling or retaining JEA. It is to inform the Board and other community decision makers, and assist them in assessing the value of JEA. Throughout the Report, there is discussion of the City selling or retaining JEA. At no point in this Report does PFM assume a preferred outcome for any decision regarding JEA's future. While it may be possible for isolated sections, or selected text of the Report to be read out of context, and be interpreted as expressing a view regarding the potential or preferred outcome of JEA's and the City's evaluation process, PFM is not expressing any opinion or assumptions as to the outcome of the evaluation process on the part of either JEA or the City.

This report is written primarily from the perspective that the City could choose to sell JEA's assets in their entirety – including the Electric System, the Water & Sewer System and the District Energy System. This perspective is for the purpose of simplicity. It is possible that the City could sell only a single system, or any combination of the systems to one or more buyers. The determination of which systems to sell, if any, and whether they be sold jointly or separately, is not within the scope of this Report.

JEA Asset Summary

JEA is a not-for-profit, community-owned utility created by the City of Jacksonville to serve Duval County and surrounding communities. It is located in Jacksonville, Florida, and serves approximately 464,000 electric, 346,000 water and 269,000 sewer customers in Northeast Florida. JEA is an independent agency of the City of Jacksonville. JEA's businesses are divided into three main systems: electric, water/sewer, and district energy. JEA provides reliable utility services to business and residential customers at an affordable cost, while remaining in compliance with environmental regulations.

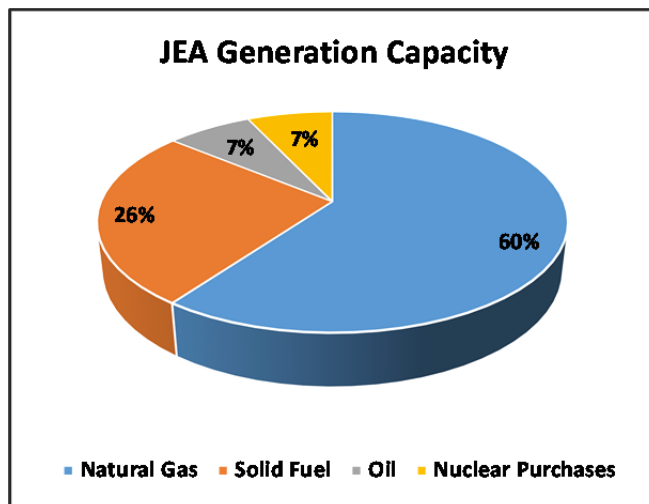
JEA provides excellent customer service as measured by J.D. Power. By focusing on the customer experience, JEA improved its customer ratings over the past six years, and is now ranked in or near the top quartile in both business and residential customer satisfaction in the J.D. Power survey. JEA ranks #2 in business customer satisfaction in the state of Florida.

JEA's Northeast Florida service territory is strong and diverse with little to no significant customer concentrations. Current median household income in the territory is roughly 85-90% of the national average. Real GDP growth for Jacksonville is on par with US real GDP growth. JEA's average monthly bills as a percentage of its ratepayers' household income are below the national average. JEA's rates for both the electric and water/sewer systems are below the medians in the State of Florida. JEA's competitive rate structure supports the region's ability to capture significant new growth opportunities into the future.

Electric System:

The electric department of the City of Jacksonville was made an independent authority of the City in 1968 as a result of City Consolidation. JEA now serves most of Duval County and limited areas in Clay and St. Johns Counties. JEA serves the City of Atlantic Beach, the Town of Baldwin and the Town of Orange Park through electric franchise agreements.

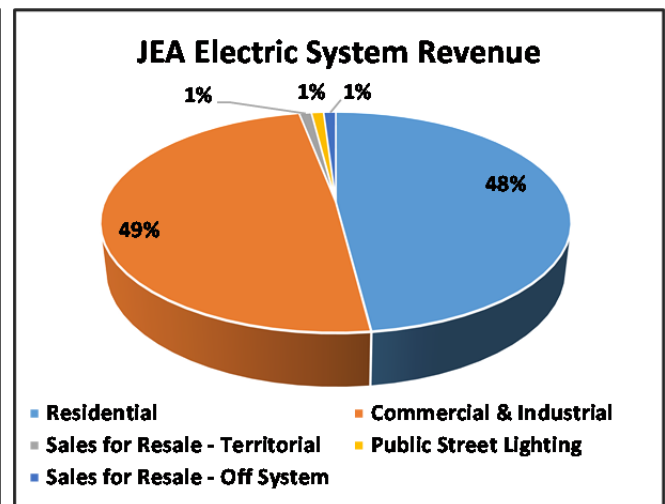
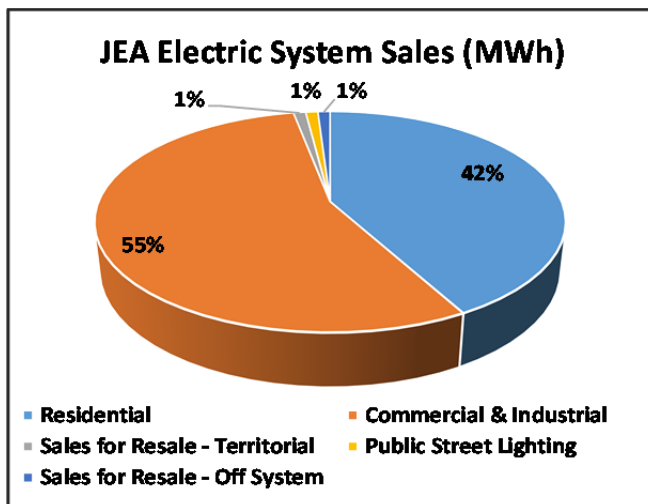
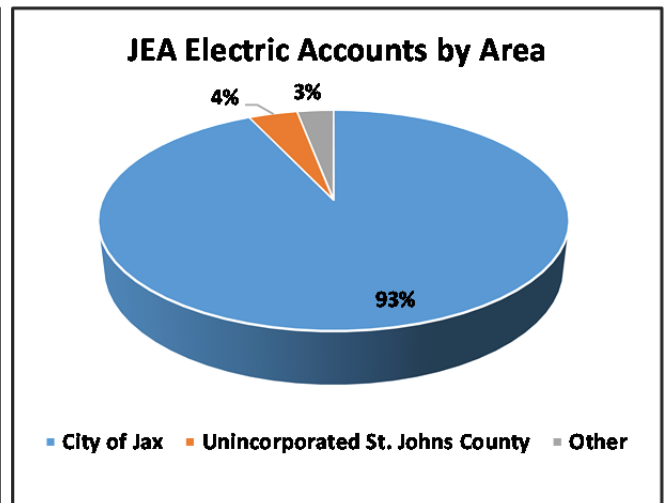
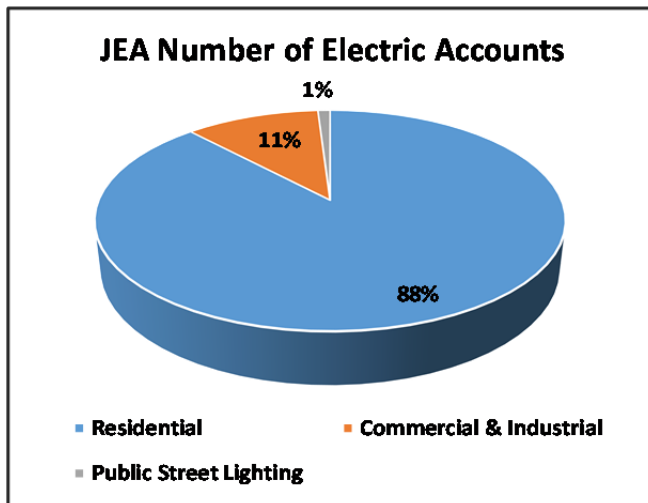
The JEA Electric System consists of generating facilities located on four plant sites within the City of Jacksonville, and an interest in a generating unit in central Georgia. In January 2018, JEA shut down the St Johns River Power Park ("SJRPP") a plant co-owned with Florida Power & Light. JEA also purchases power from several solar installations in Duval County and a landfill facility. JEA has been authorized to purchase up to 300MW of additional solar output from field sites in and around the City of Jacksonville. JEA entered into a 20-year purchase power agreement to receive 206MW of nuclear capacity and energy from Plant Vogtle Units 3 & 4, which is under construction in Southern Georgia.



JEA owns and maintains 745 circuit miles of transmission lines and 6,800 miles of distribution lines. The T&D system consists of over 70 substations and 200 high voltage transformers, 340 distribution feeder circuit lines, over 100,000 lower voltage transformers and over 200,000 electric poles. The T&D system is approximately 44% overhead and 56% underground.

JEA's electric system has been in operation since 1895 with a record of outstanding reliability and performance. JEA is one of only 184 of the nation's more than 2,000 public power utilities to earn the Reliable Public Power Provider (RP3®) designation from the American Public Power Association for providing consumers with the highest degree of reliable and safe electric service.

JEA's 464,000 electric system customers are in an area covering 900 square miles within three counties (Duval, Clay, St Johns) and six municipal tax jurisdictions (Cities of Jacksonville, Baldwin, Atlantic Beach, Orange Park, Unincorporated Clay County, Unincorporated St Johns County).

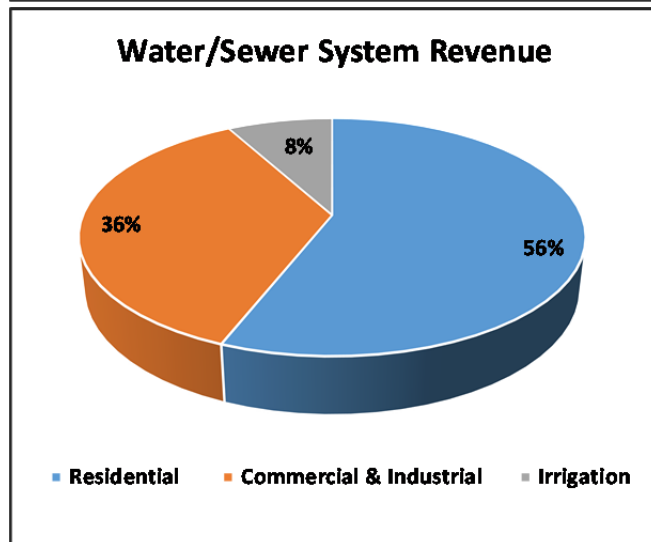
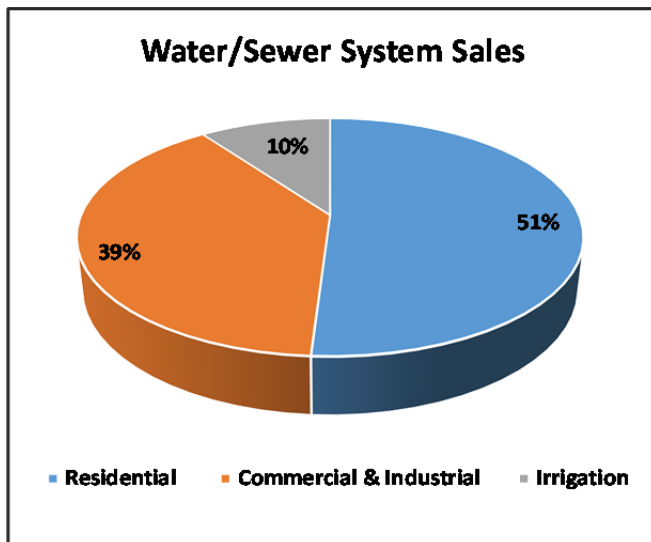
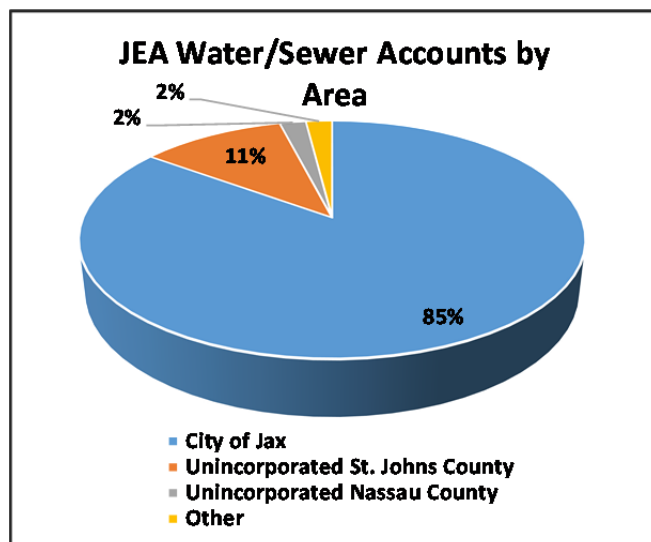
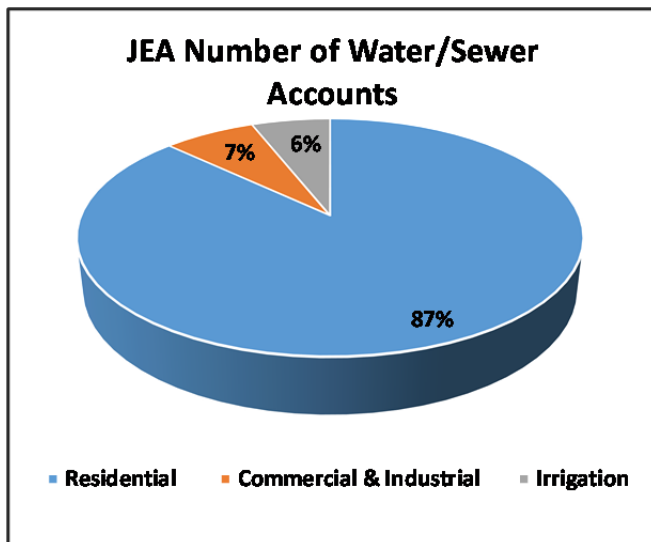


Water and Sewer System:

The water and sewer department of the City was transferred by Ordinance to JEA in 1997. At the time, the utility needed significant system upgrades and the City Council found it difficult to raise rates to the degree needed to cover the cost of the upgrades. There had been an ongoing effort in the City to acquire smaller water and sewer utilities to be able to provide similar service levels and rates as those offered by the City. JEA continued that effort by acquiring most of the remaining larger private utilities within the service districts in the county (Ortega Utilities, United Water, Florida Water). JEA also expanded service into northern St. Johns County with the approval of City Council and the St. Johns County government. Through a series of approvals and acquisitions, JEA purchased JCP Utilities (Julington Creek Plantation), and later acquired the St. Johns and Nassau customers from Florida Water and United Water. JEA also made a similar purchase of existing customers and expanded service territory in Nassau County through its acquisition of United Water. JEA serves minor portions of Clay County in the northern Oakleaf Plantation area. The cities of Atlantic Beach, Baldwin and Jacksonville Beach serve their cities as well as Neptune Beach for water and wastewater service. There are a few remaining private utilities in the City of Jacksonville.

The JEA Water and Sewer System consists of 137 permitted wells, 37 water treatment plants with over 300MGD of system water capacity and 4,700 miles of water pipes. The Sewer system consists of 11 wastewater treatment facilities with a 241MGD peak capacity, 1,300 pump stations and 4,000 miles of pipe. JEA also owns over 300 miles of pipe delivering reclaimed water from ten reclaimed water facilities.

JEA's 346,000 water customers and 269,000 wastewater customers are in a service territory spanning four counties (Duval, Clay, St Johns, Nassau) and include two major wholesale water customers. JEA also supplies reclaimed water to 11,000 customers.



Unlike many water and wastewater utilities, JEA has kept its system up to date by funding an appropriate capital investment program including: pipe replacements, system hardening, and constructing adequate capacity. While the need for large capital investments to update a neglected system is a common driver behind evaluating water and wastewater privatization, this is not the case for JEA.

District Energy System:

The District Energy System was established in 2004 and provides chilled water to customers for air-conditioning. JEA owns four chilled water plants and facilities which generate and distribute chilled water to buildings located within the respective districts served by the plants and certain ancillary equipment. The biggest customers of the district energy system are city owned facilities such as the baseball park, the arena, the Duval County Courthouse, the library and other government buildings. JEA also has contracts with private entities to serve institutional buildings such as UF Health Jacksonville.

Overview of Municipal Ownership vs. For-Profit Ownership

Utility services in the United States are provided by three general types of utility enterprises: (1) for-profit, IOUs, (2) non-profit, governmentally-owned or affiliated utilities, and (3) non-profit, consumer-owned cooperative utilities. In the electric utility sector, most of the country is served by the IOU market, with only about 15% of the population served by public power utilities such as JEA. In the water/sewer sector, municipal utilities serve over 80% of the country's population. From an economic perspective, each of the three utility structures shares the goal of meeting the needs of their "owners". Municipal utilities are owned by governmental entities, and operated to maximize value to the local ratepayer citizens. Municipal utilities operate on a cost of service basis, in that ratepayers are charged only for the costs required to deliver service. There is no requirement to charge ratepayers for profits and shareholder returns, nor must a municipal utility include provisions for federal and state income taxes in their rate structure. IOUs have an obligation to their shareholders to deliver profits and achieve targeted equity returns. IOUs also have to pay income taxes and property taxes.

The IOU structure carries the added cost of delivering equity returns to its shareholders. These higher returns often come with higher risk for the shareholder. In some cases, equity owners absorb costs that would have been passed on to customers in the municipal ownership structure. There are numerous instances where IOU shareholders have absorbed the costs that regulators did not allow to be passed on to ratepayers. Under a municipal utility structure, there is no shareholder "buffer" to absorb losses as an alternative to passing costs on to ratepayers.

Most utilities, IOU and municipal, generally have near monopoly status in their service territories. For municipal utilities, the cost-of-service business model precludes them from charging rates in excess of those required to recover their costs. Municipal utilities are also locally-governed by either an independent Board or an elected governing body; which leaves the utility answerable to local ratepayer interests. For IOUs, ratepayer interests are protected by state regulation that governs the IOU rate setting process in order to ensure that IOUs earn only a "reasonable" return for their shareholders. IOUs are allowed to earn profits, pay shareholders, and recover enough to pay taxes. The regulatory structure is in place to ensure that IOUs are not exercising monopoly pricing power in a way that allows for excessive shareholder returns at the expense of ratepayers.

The following table provides a comparison of the municipal utility and IOU ownership structure along a number of criteria:

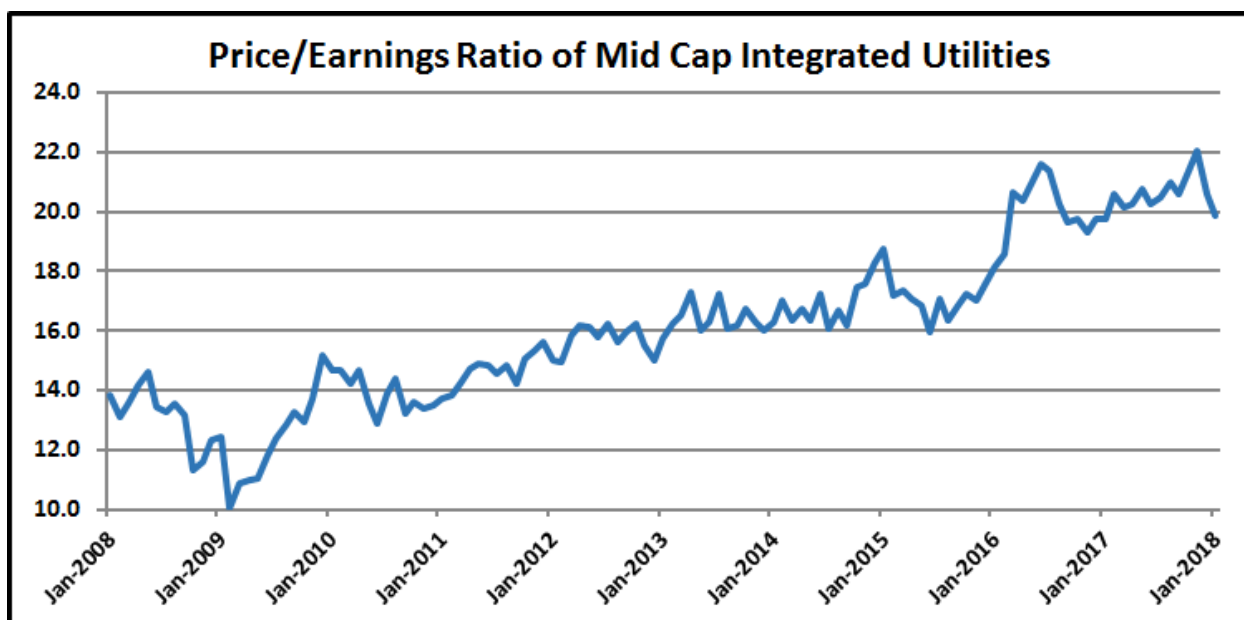
	Municipal Utility	Investor Owned Utility
Ownership	Local government body and customers of the utility, usually limited to the service area	Shareholders or investors, typically external to the service territory
Structure/Management	Not-for-profit public entity managed locally by elected or appointed board members and public employees	Private company. Shareholder elected board appoints management team of private sector employees. Both may be external to the service territory.
Rate Setting & Regulation	Customer rates are set by utility's governing body/board or city council in a public forum. Florida Public Service Commission (FPSC) regulates rate structure. Little or no regulation of wholesale rates.	Customer rates are set and regulated by FPSC through a public process that includes some customer participation. Some regulation of wholesale rates. Customers represented by Florida Office of Public Counsel.
Mission/Goals	Optimize benefits for local customer owners and local communities	Optimize return on investment for shareholders
Financing	Tax-free bond sales, bank borrowing, and retained earnings	Equity sales, bond sales, bank borrowing and retained earnings
Investment in Capital Assets	Own and operate assets or purchase service through contracts. FPSC must certify need for facility investment. Can be jointly owned.	Own and operate assets or purchase service through contracts. Can be jointly owned.
Profit/Net Revenue	Rates are set to recover costs and earn additional return to maintain bond ratings and invest in new facilities. Can provide return to local government owner	Utility rates are set to recover costs and earn a reasonable return as profits for investors in return for the risk they bear for investing in new facilities
Size	Munis differ greatly in size and number of customers served. Local or regional geography and customer mix.	Large in size and number of customers, complex geographic and customer mix.
Taxes and Contribution	Typically pay a payment in lieu of taxes or contribution to local government	Pay state and federal income tax and local property taxes

Introduction to Utility Enterprise Valuation

In recent years, there have been a significant number of large transactions involving the sales and purchases of utility assets. These transactions have primarily involved energy assets and enterprises, such as integrated electric utilities, electric transmission companies, generating assets, natural gas pipelines and natural gas distribution companies. There have been only a limited number of transactions involving large water and wastewater assets.

Given the large number of publicly-traded energy companies, and the material number of mergers and acquisitions of energy assets, there is sufficient public data and history that enables analysts to estimate what JEA's electric system may be worth to the private sector. There is not the same amount of market and price guidance for water/sewer utility assets. We can look to the energy sector for guidance on the value of JEA's water/sewer utility. We can also estimate the water/sewer system value from stock prices and multiples of the publicly-owned water utilities. There are commonalities between the energy and water/sewer asset classes, such that asset prices in the energy sector provide helpful guidance for prices that might be paid for water/sewer assets. The values for the limited water/sewer transactions that have been executed, along with certain "non-electric" energy transactions, indicate that the values for water/sewer assets could be higher in terms of metric multiples than the values for same-sized electric utility assets.

One of the most commonly followed corporate market value metrics is the Price to Earnings ("P/E") ratio. This ratio compares equity value to a company's earnings, and its stock share price to its earnings per share. It is essentially the price owners/investors are willing to pay relative to the annual earnings they expect to receive on their investment. A high P/E ratio indicates that investors are: (1) placing higher value for the same dollar of earnings, and/or (2) expecting that earnings for a company may grow in the future. The following chart provides an historical view of P/E ratios for Mid Cap Integrated Utilities. A Mid Cap utility is one that has market capitalization from \$2 billion to \$10 billion, and would be comparable to a utility of JEA's size.



As the chart clearly demonstrates, there has been a pronounced upward trend in the valuations and prices paid for utility assets in recent years. The fact that multiples have increased means that stockholders and asset purchasers are paying as much as they ever have for utility assets. These high prices are not isolated to the utility market. Buyers of all types of commercial enterprises are willing to pay high multiples of earnings and attach high value to expected future cash flow. The stock prices and asset acquisition prices paid today are a function of both the amount of expected future earnings of a business, and the present value of those earnings to the buyer. The present value is determined by applying a discount rate or capital cost to the future expected earnings. These capital costs, and thus net present value discount rates, are near all-time lows for most potential buyers of utility assets. Most buyers would source their acquisition funding through a combination of debt and equity. Debt funding costs are still very low, in spite of a recent moderate increases in some interest rate indices. The cost of equity funding is also near all-time lows – especially for what are considered relatively low risk utility investments. Stock market indices have been steadily setting new all-time highs for the past several months. The market has sold off somewhat in recent weeks, although values remain quite high.

High stock prices mean low equity costs for companies issuing stock, or using stock as a currency for acquisitions. Interestingly, while the market cost of equity has declined considerably for many large regulated utility companies, their allowable returns on their regulated utility investments have remained relatively stable over time. This means that a regulated utility can fund an acquisition in the market with a combination of debt and equity that has a combined cost that is as low as any time in history. That utility can then earn a regulated return on the portion of that purchase price that is allowed into rate base. This allowable return on equity will be materially higher than the utility's actual cost of equity. The acquiring utility can pay a price that is well in excess of the portion of the asset price that might be allowed in its regulated rate base, and still provide a market-based return to its shareholders.

Low financing costs have been a major contributing factor to the sustained amount of mergers and acquisition activity in the utility industry. Favorable capital markets have also enabled buyers to pay very high prices for utility assets.

Asset prices for utility transactions are generally expressed in terms of their values as multiples of Earnings, Earnings Before Interest, Taxes, Depreciation and Amortization ("EBITDA" or "Cash Flow"), or Net Property, Plant and Equipment ("NPP&E" or "Rate Base") which is a proxy for the utility's rate base and determines the return on capital an IOU would be allowed to earn by regulators.

Following is a summary of selected "headline" asset sales in the energy sector that have occurred in recent years:

Table #1: Recent Energy Sector Mergers and Acquisitions

Buyer	Sempra	Hydro One	Great Plains	Fortis	Dominion	Duke	Emera	Wider Industry Averages
Sold	Oncor	Avista	Westar	ITC	Questar	Piedmont	TECO	
Date	Aug-2017	Jul-2017	Jul-2017	Feb-2016	Feb-2016	Oct-2015	Sep-2015	
Total Value	\$18.7 Bn	\$5.3 Bn	\$11.6 Bn	\$11.3 Bn	\$6.0 Bn	\$6.7 Bn	\$10.4 Bn	
Cash Flow Multiple	10.5 X	11.8 X	11.0 X	13.8 X	9.6 X	14.9 X	9.8 X	~12 X
P/E Ratio	27.9 X	24.2 X	21.5 X	22.0 X	19.4 X	30.5 X	28.4 X	~25 X
Rate Base Multiple	1.7 X	1.7 X	1.8 X	2.0 X	2.2 X	2.5 X	1.7 X	~2 X

In addition to strong financial markets, there are other factors that create healthy demand for utility assets. As discussed later in this Report, there are various categories of potential buyers of utility assets. One category includes existing regulated utilities and energy companies – known as “Strategic Buyers”. These Strategic Buyers have strong economic incentives to acquire additional utility assets. One of the strongest incentives is to satisfy shareholders’ desire for growth in earnings. As is well known throughout the utility industry, technology advances and environmental concerns have led to declines in energy use by most consumer classes. When combined with a generally sluggish economy for the past decade, many utilities have seen sales decline significantly in recent years. This is not appealing to shareholders. For some utilities, the only way to generate material growth is through acquisitions. These Strategic Buyers are: (1) motivated to grow/buy, (2) have record low funding costs, and (3) continue to be able to earn attractive regulated returns for the portion of the acquisition price that is allowed into the rate base. These factors combine to create a motivated buyer base that has been paying high multiples of Earnings, EBITDA and NPP&E.

In addition to being able to pay a higher price than ever for a given cash flow or earnings stream, buyers are also interested in assets for which there is potential to grow cash flow and earnings. Some buyers will look at JEA’s cost structure and asset base, and have expectations of increasing revenues and/or decreasing costs in order to improve the cash flow return on JEA’s assets. The combination of low capital costs and the potential to increase cash flow, should make JEA an attractive acquisition candidate for many potential buyers.

As a cautionary note, for some potential buyers, “increasing revenues” can mean higher utility rates; and “decreasing costs” can mean reducing the labor force and a lower economic profile in the City. Conditions can be imposed upon buyers to limit the adverse impacts on both ratepayers and employees. The extent of these conditions can affect the amount a buyer will be willing to pay for a utility asset. Buyer conditions and stakeholder protections can be used to balance the desire to generate the highest value, while continuing to address the long-term best interests of ratepayers and citizens.

Potential new owners may also place significant value on JEA’s physical assets, as well as their strategic location that is near the geographic center of one of the stronger economic growth regions in the

Country. JEA has: (1) diverse, flexible generating resources, (2) land suitable for future resource development, (3) strategically located transmission lines, and (4) similarly attractive gas transportation assets. It would be reasonable for a buyer to look at these assets and assume they might be deployed more efficiently by an entrepreneurial, for-profit owner.

The combination of near-record stock prices and acquisition multiples, with JEA's perceived potential for significant operational and strategic synergies, make JEA an extremely interesting target for any utility seeking to provide value to its owners. JEA is also attractive to non-utility investors that could borrow and leverage to produce very low funding costs, and invest those dollars to earn a higher regulated return on the portion of their investment that is allowed into rate base; such that the higher allowed return on this portion of the investment translates to a market-based return on the overall acquisition price.

Traditional Valuation Methodologies

One of the fundamental conditions that must be present in order to motivate a for-profit enterprise to purchase or acquire another business is that the transaction must provide the acquirer with the expectation that the transaction will be economically beneficial for its owners/shareholders. The transaction benefit is often described as being "accretive to shareholders" – namely the acquirer's shareholders. In the private sector, which would include most entities that would have an interest in acquiring JEA, there are several methods by which potential buyers examine an acquisition to determine if the purchase would be beneficial to the buyer. These valuation methods generally compare the potential purchase price to measures of future cash flow (or net present value of cash flow), earnings, asset base or other financial metrics. Following are descriptions of several key valuation methods and metrics for utility mergers and acquisition transactions:

Discounted Cash Flow ("DCF") and Discount Rate:

Discounted cash flow analysis is a classic financial analysis used to value an organization. The analysis starts with a projection of free cash flow, to which a Weighted Average Cost of Capital ("WACC") is applied as a discount rate to determine the present value of the future cash flows, and thus the enterprise. DCF analysis is likely to be the most important exercise for prospective buyers. This would involve a thorough analysis that tests a wide variety of assumptions and sensitivities to arrive at a probabilistic estimate of the net impact of an acquisition on the buyer and their key financial metrics.

Purchase Price as a Multiple of Earnings ("P/E Ratio or Multiple"):

A pro-forma earnings projection is used to determine the expected net income if JEA were a private utility. This earnings number is multiplied by a factor determined by industry comparable public equity trading values and recent utility M&A transactions to determine the equity value of an enterprise. This value is then combined with the expected debt balance in the pro-forma capital structure to determine the enterprise value.

Enterprise Value as a Multiple of EBITDA or Cash Flow:

A pro-forma projection is used to determine the expected EBITDA if JEA were a private utility. The EBITDA number is multiplied by a factor determined by industry comparable public equity trading values and recent utility M&A transactions to determine the appropriate enterprise value.

Enterprise Value as a Multiple of Assets in Rate Base:

A pro-forma projection is used to determine the expected Public Service Commission approved rate base assets if JEA were a private utility. JEA's NPP&E serves as a good proxy for an estimate of the assets for which the FPSC would allow capital cost recovery to a private, regulated utility. The amount of rate base is multiplied by a factor determined by industry comparable public equity trading values and recent utility M&A transactions to determine the appropriate enterprise value.

These multiples and ratios of Earnings, EBITDA and Rate Base are typically used to measure and compare various transactions. They often provide a "scorecard" comparison, as opposed to serving as the primary determinate of the price a buyer will pay for an asset.

Potential asset buyers will examine these metrics and compare them to their own business objectives and projections. Some buyers will examine a potential acquisition on a stand-alone basis – looking to see that the expected economic results deliver a sufficient return on funds invested in the new business. Other buyers will expect to incorporate the new business into an existing operation. These buyers will want to see that returns for their investors are higher for the combined business than for their existing business. But the focus will clearly be first and foremost on achieving investment returns and economic success for shareholders/investors.

At various times in the past, the City has analyzed the value of JEA. Since the last time this analysis was completed in 2012, there are several factors that have worked together to improve the overall potential market value of JEA's utility assets. Buyers are willing to pay higher multiples of Earnings, EBITDA, and NPP&E. At the same time, the JEA management team has reduced JEA's overall debt and improved the operation of the utility, including its relationship with its customers, thus substantially improving the value of the enterprise.

Key Value Drivers for Sales Price

As mentioned earlier, simply focusing on obtaining the highest possible up-front price for a utility asset, may lead to outcomes that are not optimal for the long-term customers of the utility if it is sold. New owners are likely to make changes that will impact utility customers and the City. Some of these changes may be necessary to generate earnings required to justify a high purchase price for JEA. In nearly every system sale, the seller or state regulators impose conditions on the sale that are designed to protect ratepayers, employees and the community from excessive change and unintended consequences of a new ownership structure.

Listed below are examples of common asset sale conditions or objectives that are designed to protect ratepayers:

- **Guaranteed employment:** acquisitions commonly provide employment guarantees for existing employees for a period of time to be negotiated among the parties.
- **Utility Rate Guarantees:** Acquirers will often agree to keep rates the same or lower for some period of time following the acquisition. Rate regulation for a buyer of JEA's assets will ultimately transition to the Florida Public Service Commission. The pricing and duration of rate constraints may have a significant impact on acquisition price.
- **Headquarters Location:** The sale process can include certain requirements around maintaining a physical presence in a community, including the location of corporate headquarters.
- **Community Impact:** Requirements for charitable giving, volunteerism support, or other community-related goals can be included in the constraints established up front as part of the sale process.

While these types of conditions, and others, are common in utility asset sales, conditions that are too onerous on the buyer could serve to limit the price paid for a utility asset. Any decisions related to a sale of JEA should include discussion and decisions on these items to ensure that there are not unintended consequences of a sale that adversely impact the community.

Overview of JEA's Balance Sheet

Like JEA's operations, JEA's financial statements are divided according to the three utility systems and their respective funds – the Electric Enterprise Fund, the Water and Sewer Fund, and the District Energy System (DES). The Electric Enterprise Fund is comprised of the JEA Electric System, Bulk Power Supply System (Scherer), and St. Johns River Power Park System (SJRPP). JEA maintains separate accounting records for the Electric System, the Bulk Power Supply System and its ownership interest in SJRPP. For purposes of financial reporting, however, JEA prepares combined financial statements that include the Electric System, the Bulk Power Supply System, JEA's interest in the Power Park, the Water and Sewer System and the District Energy System. The financial statements consist of the related statements of net position, statements of revenues, expenses, and changes in net position, and statements of cash flows covering the fiscal year period October 1 – September 30.

JEA's statement of net position, more commonly referred to as a balance sheet, contains relevant financial metrics that would be important to the analysis of an asset sale. JEA's outstanding debt would have to be retired if its utility assets are sold. Portions of cash and cash equivalents on hand can be used to satisfy portions of the long-term debt obligations. Both assets and liabilities would be factored into the net transaction price. Net capital assets are another indicator of value although these are historical amounts and might not represent current replacement or market values for JEA's invested infrastructure assets.

Table #2: JEA Balance Sheet Metrics

As of 9/30/17 (\$'000)	Cash and Equivalents	Long-Term Debt	Net Capital Assets
Electric System ¹	\$803,000	(\$2,328,000)	\$2,687,000
Water/Sewer	\$448,000	(\$1,625,000)	\$2,616,000
DES	\$7,000	(\$36,000)	\$36,000
TOTALS	\$1,258,000	(\$3,989,000)	\$5,339,000

¹ Excludes SJRPP – shutdown January 2018

JEA's income statement provides data that is also important to potential buyers. Purchasers will examine JEA's income statement and develop estimates of the financial metrics that are key components of the "scorecard" metrics that are commonly used to compare utility asset transactions. While municipal utility financial statements do not translate directly to those of for-profit utilities, it is possible to estimate an approximate "run rate" for items such as Earnings and EBITDA should JEA be converted to a for-profit structure. PFM developed assumptions and ranges for JEA metrics that would be comparable to the for-profit, corporate equivalents of: Earnings, EBITDA (Cash Flow) Cash Flow and NPP&E (Rate Base).

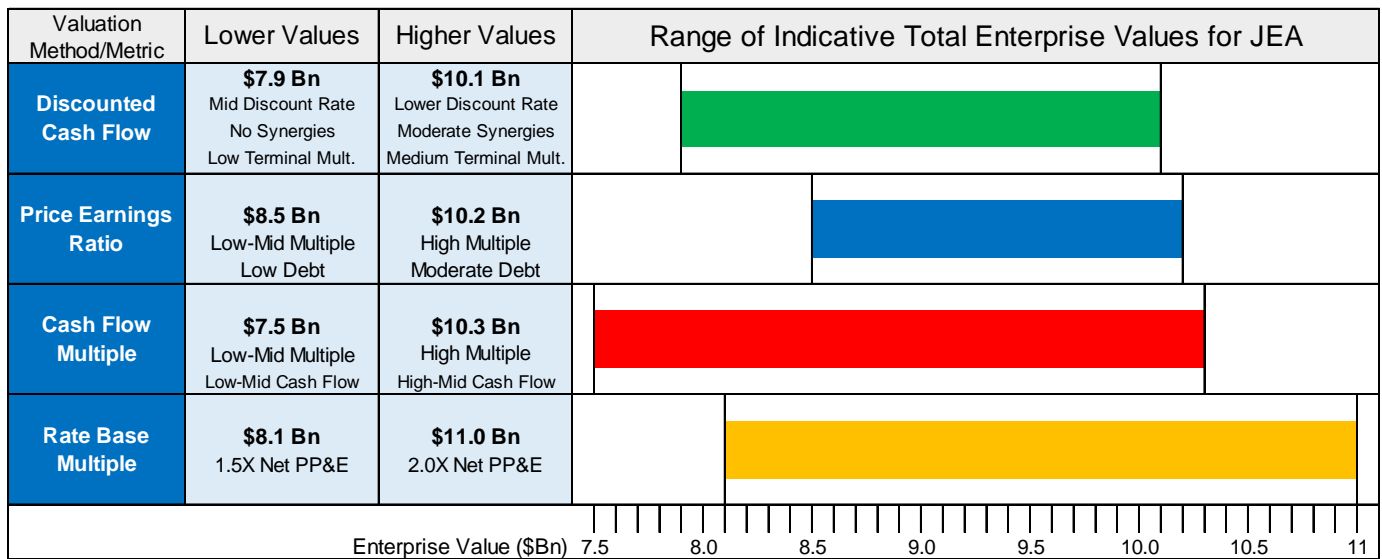
Summary of JEA Potential Value Ranges

Recent utility stock prices and utility mergers and acquisitions provide **indicative** value ranges for JEA's key assets. The comparable transactions listed in Table #1, as well as other utility market data, provide a range for utility transaction metrics and multiples that have been seen in recent years. PFM utilized market data to develop ranges for several metrics associated with the valuation methodologies discussed previously. It is important to note that the market data is derived from transactions among for-profit, non-governmental entities. None of the transactions that provide data are sourced from sales of governmental assets. Data points for asset sales of large governmental utilities comparable to JEA simply do not exist.

Applying a range of potential multiples to assumed financial indicators for JEA provides a range of JEA valuations that can be extrapolated by comparable transactions. However, as mentioned earlier, the Discounted Cash Flow analysis is the primary valuation tool that will be employed by potential buyers. They will use the multiples and metrics to "reality test" the DCF results, and compare them to other transactions. For this reason, PFM utilized a DCF modeling approach to develop a range of potential enterprise values. We use a range of assumptions for factors such as: capital costs, NPV discount factors, the duration of future rate guarantees, capital needs, growth rates, potential synergies and efficiencies, and valuation methodologies to determine enterprise value at the end of the test period, etc.

When we employ a discounted cash flow analysis, and apply the range of multiples observed in the market to reasonable assumptions for JEA's key financial indicators, we arrive at the **indicative** value ranges for JEA's overall enterprise as listed below:

Table #3: Potential JEA Value Ranges



The indicative values provided above are based upon the assumption that the transaction would be completed in late 2019. This simplifying assumption allows us to pick a point in time that coincides with the end of JEA’s fiscal year and key debt retirement dates.

One of the first and most important things we observe from the table above is that the implied value ranges are VERY wide. The lower implied valuation is \$7.5 billion, and the higher implied valuation is \$11.0 billion – a difference of \$3.5 billion. The upper end of the potential value range provides very large valuation numbers. The market and transaction data points that contribute to PFM’s assumed value multiple ranges are sourced from a wide variety of transactions, and market conditions. It would be optimistic to assume that the high end of the price range is the most appropriate starting point for JEA price discussions. JEA, as a large governmental asset, would be a more complex and challenging transaction than the majority of those that make up the data ranges. Later in the Report, we discuss the complications and considerations associated with a JEA asset sale, which may have an impact on potential buyer interest and value.

While there is good reason to manage expectations when approaching the sale of any large asset, it should also be noted that these lower and higher range figures do not represent the lowest possible or highest possible values for JEA. These are the figures supported by reasonable assumptions and historic price comparisons. However, JEA represents a unique, scarce asset, which is strategically located in an attractive regional utility market. Given the competitive nature of the utility industry, and the limited number of acquisition candidates, it is very possible that demand for JEA’s assets could produce a value that exceeds the higher value indicated by traditional valuation methods.

There are a number of factors that could drive JEA’s value toward the higher or lower end of any of the ranges listed above. Some of these factors would be in the control of the City as the seller. To the extent that the City elected to impose conditions on a sale that were economically or structurally unattractive to buyers, the value available to the City could be less than the figures provided above. It is also possible that market conditions could change considerably between now and the time the City

might attempt a sale. Current market conditions are better than they have been throughout most of the time that JEA has been in existence. There is no assurance that these conditions will prevail into the future.

The valuation ranges above are implied values for the **gross transaction value for JEA**. That is the gross or total price that might be paid. If JEA were sold, and received gross proceeds of \$7.5 billion - \$11.0 billion, JEA would then have to apply these proceeds, together with any cash and investments remaining at JEA, to retire its liabilities. In late 2019, JEA is projected to have debt of roughly \$3.6 billion, and cash and investments totaling in excess of \$1 billion on its balance sheet. A portion of the cash and investments may be required for business continuity and thus go to the buyer. The remainder of the cash and investments could stay with JEA and be available to offset remaining JEA liabilities.

The following section of the Report discusses the application of the gross proceeds, along with the deployment of remaining cash and investments to offset JEA liabilities, in order to arrive at the range of potential net proceeds to the City.

Net Transaction Value

The ranges of gross transaction proceeds listed above provide a first step in calculating the potential net impact for the City of a JEA sale. There are several JEA liabilities that will have to be accounted for before any funds can be released to the City. Following is a discussion of these liabilities.

JEA Debt

With the sale of JEA, the City would be removing the revenue source that was expected to service JEA's current balance of almost \$4 billion in debt outstanding. The debt balance in late 2019 is expected to be roughly \$3.6 billion. In order to honor its contract with its bondholders, JEA would be required to retire all of its debt in order to accomplish an asset sale. Some of JEA's debt, primarily its short-term debt, can be retired by simply paying the bondholder the face amount of the bonds they own. Most of the debt, like the majority of municipal bonds, has specific provisions by which the bonds can be retired prior to their final maturity and due date. The typical long-term municipal bond can be paid back (or "called") prior to its final maturity date. Bonds cannot be called or paid off before this call date. However, the issuer is allowed to deposit investments in an escrow account to pay the principal and interest on the bond until the call date. This is known as "defeasing" bonds. The defeased bonds are still owned by the investors, but they are no longer the legal liability of the issuer. JEA will be able to retire its longer debt by allocating a portion of the gross transaction proceeds to the purchase of US Treasury investments that will pay principal and interest on any bonds that cannot immediately be paid off. The earnings rate on the US Treasury escrow investments will be lower than the interest rate on the defeased JEA bonds. This will lead the cost of the escrow investments to exceed the par amount of the defeased bonds. Based on market conditions for escrow investment securities, and the amount of JEA debt that remains outstanding, PFM has calculated an estimated overall JEA debt retirement cost of approximately \$3.9 billion to retire JEA's expected balance of roughly \$3.6 billion of debt as of 10/1/2019.

Table #4: Approximate Debt Retirement Components and Costs as of 10/1/2019

System	Electric and SJRPP	Water/Sewer	District Energy
Debt Outstanding	\$2.16 Billion	\$1.42 Billion	\$33 Million
Total defeasance cost	\$2.31 Billion	\$1.55 Billion	\$35 Million

Other JEA liabilities

Certain other liabilities may also be settled from the gross proceeds of a JEA asset sale. Under an asset sale JEA would likely be required to terminate and settle the interest rate swap contracts. These contracts are in place to hedge a portion of JEA's outstanding variable-rate debt. PFM has estimated that the termination cost of these contracts will be roughly \$100 million in late 2019. The actual figures will vary from these estimates and be dependent upon market conditions at the time.

If JEA remains in place as an asset of the City, JEA expects to utilize the energy purchased under the roughly 20-year Vogtle power purchase contract to provide a substantial amount of carbon free energy to its ratepayers. JEA expects to pass the cost of this energy to its ratepayers pursuant to its fuel billing line item. In the context of an asset sale to a private entity, it may be necessary to remediate a portion of the Vogtle debt in order to achieve tax compliance related to tax-exempt bonds and Build America Bonds issued for the project. The net present value of the estimated debt service included in the Vogtle contract is assumed to range from \$1.1 to \$1.3 billion. The mid-point of this range, of \$1.2 billion, is used as a very rough estimate of the potential net impact of the Vogtle contract on JEA. This range does not take into account possible legal claims or settlements related to the project, nor does it reflect assumptions related to final completion costs or in-service dates. We use this figure as a rough estimate for discussion purposes of what it could require for JEA to offset the cost of the Vogtle contract.

Liability	Description	Estimated Amount
Interest Rate Swaps	Mark to market estimate of certain interest rate hedge agreements	~\$80 million electric ~\$20 million water/sewer
Purchased Power Agreement	Long Term Vogtle Purchase	~\$1.1 - 1.3 Billion NPV of Debt Service

Remaining Cash and Investment

Based on the JEA's projected financial metrics, it is expected that JEA will have well over \$1.0 billion of cash and investments on its balance sheet in 2019. A review of the various accounts and projected balances supports PFM's estimate that roughly \$600 million of cash and investments would be available to supplement the gross sale proceeds, and could be used to retire JEA's liabilities.

Based upon: (1) the indicative JEA value ranges of \$7.5 billion to \$11.0 billion provided in the prior section, (2) a projected 2019 debt retirement cost of roughly \$3.9 billion, (3) an estimate of \$600 million for the cash and investments that could be available to offset debt retirement costs, and (4) roughly \$100 million of interest rate swap termination costs; the sale of JEA could produce roughly \$4.1 billion to \$7.6 billion net proceeds to the City. If JEA and the City elected to use a portion of the proceeds to remediate the Vogtle contract for an assumed cost of \$1.2 billion, then the net proceeds to the City could range from \$2.9 billion to \$6.4 billion. Again, it is important to note that this range of net

proceeds is based upon a number of assumptions related to: market conditions, valuation methodology, transaction timing and potential use of proceeds. The actual results of a sale would depend on a several variables that cannot be determined at this time.

Likely Buyer Profiles

The potential buyers of JEA's assets can be divided into two general categories – Strategic Buyers and Financial Buyers. Strategic Buyers include those that already participate in some way in the utility business. They include regulated utilities, independent energy companies, and investment companies with existing utility assets. For the most part, these would be entities that have experience with many of the components of JEA's business, including: running a retail utility and managing a fleet of utility assets. Many of these Strategic Buyers will also have experience providing service in a territory that is overseen by a state level public utility regulator. Some of these potential buyers may already provide service that is subject to regulation by the FPSC. These Strategic Buyers would look to integrate JEA's assets into their existing asset base, and likely derive cost synergies based on their existing operations. These buyers would view JEA as a very long term investment.

Financial Buyers would be those whose primary focus in acquiring JEA would be as a financial investment, perhaps one that might be sold after some period of time. The Financial Buyers would include: large investment funds, pension funds, private equity firms, infrastructure funds, etc. These buyers would likely keep JEA as a stand-alone entity, seeking to maximize earnings but not necessarily through synergies with their other investments. Minimum holding periods may be negotiated to prevent a buyer from selling the assets prior to the expiration of any conditions or protections negotiated by the City.

Other Considerations and Impacts on the City and Customers

Estimates of JEA's market value, gross sale proceeds and the City's net proceeds provide important input for any decision to pursue a new path for JEA and the City. However, the potential up-front net proceeds available to the City represent only one of many outcomes and impacts from a sale of JEA. There are several other far-reaching impacts in addition to the up-front price and net proceeds.

Customer Impacts – Rates and Service Levels

The discussion of future utility rates under an asset sale scenario is not simply a comparison of JEA's current rates to potential future rates if JEA is sold. In order to assess the customer rate impact of a sale, it is necessary to develop long-term projections of customer rates under both (1) continued City ownership of JEA, and (2) if the assets are sold to a private, for-profit utility. A thorough analysis of the customer impact requires comprehensive rate projections under a sale and a non-sale scenario. The sale scenario requires analysis of (1) potential rate conditions that the City may decide to impose on potential buyers, and (2) on the rate structure once ratemaking governance transitions from the JEA Board to a FPSC regulatory environment. While it is impossible to predict the industry, economic, technological and demographic conditions that will prevail over the long run, an effort should be made to develop the best possible pro forma projections for both a sale scenario and a non-sale scenario. Over the next five to ten years, the cash flow dynamics and capital needs of the electric system would suggest

that the FPSC rate regulatory structure would not allow a new owner much opportunity raise electric rates. In fact, it is possible that electric rates could be lower after a sale of the system. For the water and sewer system, if future capital improvements are required, the FPCS could approve rate increases needed by a new owner to recover their capital improvement. Based on the cash flow and capital needs of the water and sewer system, it is possible that higher rates may be needed in the foreseeable future. The projected incremental rate impact between JEA ownership and new ownership is likely to be the most important non-price consideration in the complex decision regarding JEA's future.

Local Employment and Economic Impacts

In almost every acquisition of a major utility company, there is an expectation that the new combined enterprise will experience synergies and efficiencies that allow for cost reductions. There is no reason to expect that JEA's case would be different. As mentioned, the City could place conditions on the buyer that they not reduce employment levels in and around the City for some period of time. Commitments from acquirers to maintain employment and/or economic presence in a community are common in utility acquisitions.

Operational Efficiencies and Economic Benefits

The City and JEA have partnered on many beneficial initiatives and projects in the past, and the City could continue to partner with a new owner subject to the terms and conditions of the sale. Listed below are select recent examples of the value of the partnership to the Jacksonville community:

- The City and JEA are currently partnering on the latest septic tank phase out program including program funding and JEA providing project management and outreach.
- JEA acquired approximately 5,000 acres of land as buffers or adjacent to JEA facilities in parallel with the City's Preservation Project as part of the Better Jacksonville Plan.
- The City and JEA partnered on the Water and Sewer Expansion Authority creation and dissolution from 2003 to 2011.
- JEA partnered with the City on the transition of Cecil Commerce Center (formerly Cecil Field) including planning for the transition.
- JEA and the City partnered on the LED streetlight conversion program which is an initiative to convert all streetlights City wide to LED fixtures.
- JEA's operational efficiencies and advancements in the wastewater system provide nitrogen reduction credits to the City which are critical to meeting its reduction goals.
- JEA provides multiple services to the City including treatment of the City's leachate, processing and review of the City's wireless facility attachment applications, and chilled water to several City facilities.
- The City and JEA coordinate continually on projects that involve multiple agencies for upgrades, widenings, expansions, maintenance and repairs.

JEA's economic development policy is designed to support the economic growth of northeast Florida through active participation in both local and regional economic development efforts in coordination with various City departments. JEA's policy objectives include commitments to competitive rate offerings, service reliability, and business support resources that meet or exceed the needs of its business customers. Such objectives support community goals to grow existing businesses and attract new business.

Many Florida utilities are supportive of economic development initiatives and partnerships; and offer rates programs that may be designed to encourage growth within certain industries. The extent to which an acquiring utility would participate in future economic development initiatives and partnerships can be among the conditions imposed upon a buyer.

Potential Residual Costs and Liabilities

The ownership and operation of a large utility carries a significant degree of business risk. The environmental risks and liabilities associated with both electric and water/sewer systems have received national attention in recent years. A purchaser would want a detailed environmental assessment and to conduct an environmental audit to fully understand the environmental risks associated with the acquisition. The City will also need to conduct an environmental risk assessment associated with any residual environmental liability that may not be transferred to a new owner.

Renewables and Energy Policy

JEA's clean and renewable energy goals have been developed in response to JEA's solicitation of and reaction to its customers' desire for affordable pursuit of an environmentally responsible energy portfolio. If JEA is sold, these decisions are more likely to be determined by State and Federal legislation.

Eligibility for Federal and State Assistance – FEMA Grants

As a municipal government entity, the City and JEA are eligible for various forms of Federal and State assistance for events such as natural disasters, environmental mishaps and other potentially unexpected and costly occurrences. Governmental assistance of this nature may no longer be available to offset costs related to natural disaster recovery.

Tax and Revenue Impacts

Currently the City of Jacksonville has three primary funding sources from JEA into the General Fund:

- JEA Contribution. JEA's contribution is a payment to the City in lieu of taxes. The current formula for the annual contribution is based on a millage per units sold, including a floor formula of one percent growth from the FY16 contribution. The contribution in FY18 is expected to be roughly \$115 million.
- Franchise Fee. The JEA franchise fee was implemented in 2008 as an additional revenue source for the City. It is unique among municipal utilities but more common where communities are served by investor-owned utilities. The current JEA franchise fee is 3% of certain revenues and is expected to be roughly \$40 million in FY18.
- Public Service Taxes. This tax, provided for under Florida state law, is equal to 10% of a portion of utility purchases (generally, electric and water but excluding most fuel and sewer charges). It is commonly levied in service territories served by both municipal and investor-owned utilities and is expected to be roughly \$90 million in FY18.

Property Taxes vs. City Contribution

As a municipal utility, JEA does not pay property taxes on its land and assets; as an alternative JEA pays an annual contribution in lieu of taxes. Should a private entity take the place of JEA, the taxable assessed value of property in Duval County could increase by approximately 10% (the addition of ~\$5bn net capital assets on the City's ~\$50bn taxable base). Based on current millage rates, this increase in assessed value will equate to approximately \$100 million of additional

property taxes receipts, of which roughly \$60 million would go the City of Jacksonville General Fund. Most of the remainder would go toward funding public schools.

Franchise Fee

JEA's pays a 3% Franchise Fee. Many municipal utilities do not pay a franchise fee. It is more commonly assessed on investor-owned utilities, and in amounts up to 6%. The City could establish the new franchise fee at a level that is designed to preserve revenue to the City, and avoid having the franchise fee serve as a driver of higher rates.

Public Service Taxes

Public Service Taxes are common on both municipal and investor-owned utilities and the calculation of tax revenues to the City would be similar in either case.

Prior to any asset sale, the City would need to conduct a comprehensive analysis of the tax and revenue changes arising from a new ownership structure – both on the City and on neighboring communities. It should be possible to “immunize” local government finance against adverse impacts from selling JEA if the proper conditions are imposed on potential buyers.

Alternative Privatization Structures

“Privatization” can encompass a variety of structures resulting in private sector involvement in the utility's operation. Privatization structures could include:

- A sale of generation assets only. Under this option, JEA would sell its electric system generation assets but retain its transmission, distribution, customer relationships, and entire water & sewer system. This type of privatization is typically coupled with a Power Purchase Agreement, whereby JEA sells its generation to a third party who, in return, agrees to supply all of JEA's power supply needs for a contractual period of time at a contractual price.

Under a generation asset sale, the value received is highly dependent on the terms and conditions of the Power Purchase Agreement. Proceeds of the sale could be applied against JEA's outstanding electric system debt to cushion any financial impact on JEA customers.

Example of generation privatization: North Carolina Eastern Municipal Power Agency (2015)

- Operations and Maintenance contract. Under this option, JEA would continue to exist as a legal entity with a reduced staff primarily responsible for contract management, financial reporting, and long-term strategic decision-making. Utility operations are contracted to a third party who is responsible for the day-to-day operation of the utility.

The value derived from an O&M contract (near-complete outsourcing) could be derived from a difference in contract price versus current, insourced total operating expenses. This value is not clear at this time. Outsourcing can also be accomplished for a subset of utility operations rather than for the entire utility, and these opportunities are periodically analyzed by JEA.

Example of O&M privatization: Long Island Power Authority, NY (2011)

- Enterprise sale. Under this option, any one or combination of the existing JEA enterprises – electric enterprise, water/sewer enterprise, district energy system, or all three – is sold to a third party. After regulatory approvals are received and all outstanding debt obligations of JEA are redeemed, proceeds are transferred to the City of Jacksonville and the ownership and operation of the utility(s) is transferred to the third party acquirer. This can result in an operation that is ultimately folded into an acquirer’s operation, or some independence in operation may result, including retaining a corporate headquarters located in Jacksonville.

This option will be the primary focus for an analysis of JEA.

Examples of utility privatizations: City of Vero Beach, FL Electric System (pending)

- Concession agreement. Under a concession agreement, the City gives a third party the right to operate utility assets for a specified period of time, typically very long term (30-50 years). This commercial structure is more common for water and sewer utilities than for electric utilities. The risks and benefits of a concession are similar to an enterprise sale with a key difference: at the end of the term of the concession agreement, ownership of the utility reverts to the City. Concession agreements can encompass all assets of a system or just a subset of assets.

The value of the concession agreement is established similarly to the value of an enterprise sale.

Example of utility concession: City of Allentown, PA Water & Wastewater (2013)

- Initial Public Offering. The City could choose to convert JEA to a corporation and recapitalize the business through an Initial Public Offering (“IPO”). This would have the effect of maintaining an independent investor-owned utility headquartered in Jacksonville. This structure presents a number of complexities that would need to be solved. Typically, in an IPO the owners would only offer a portion of the stock in the market and retain a significant portion of ownership in the company. While under Florida law the City could not hold the remaining equity after an IPO, it could theoretically make a contribution of JEA stock to the pension funds and lower the required ongoing pension contributions. Alternatively, the City could explore setting up a public trust to hold the stock for the benefit of the community on a perpetual basis. Either option is likely to net less proceeds to the City from the privatization than a sale of the enterprise, although some benefits of local ownership could be preserved.
- Recapitalization of JEA. Rather than a sale, it is possible for JEA to re-leverage its balance sheet, allowing the City to extract substantial value from JEA’s equity position. JEA’s credit rating would likely be downgraded, reflecting the increased debt position. This leverage could be structured to allow for stable rates over the near term but would require future rate increases to repay this borrowing. Although it is unlikely to lead to as large a capital transfer to the City as an outright sale of the enterprise, this recapitalization would allow the City to retain local control over JEA.

The Sale Process

Utility asset sale processes generally proceed through five phases:

Phase 1 – Evaluation and Commitment to the Process: If a sale process is to move forward, it requires the preliminary evaluation contained in this Report in order to develop consensus and commitment for the next steps. That does not mean a commitment to sell; but rather to provide the comfort and guidance to potential buyers that if they undertake considerable due diligence, commit to spend billions of dollars, and achieve the City's economic objectives, that their efforts likely will not be in vain. This commitment is essential to generating the greatest level of interest among buyers, and will be important to maximizing value.

Phase 2 – Preparing for the Sale: Engage advisors, prepare sale process, resolve legal, regulatory, and other issues prior to proceeding. This phase will include a resolution of the issues discussed later in this section. During this phase, the determination will be made around whether it is optimal to proceed with a single sale process for the enterprise as a whole or to engage in separate processes for each utility system. Develop documentation around the utilities' operation, legal issues, financial disclosures, and other materials.

Phase 3 – Indications of Interest: During this phase, the seller receives reactions and indications from the acquirers most likely to participate in the next phase of the process. This includes a comprehensive management presentation to potential buyers, and discussions/meetings to determine the buyer's/bidder's interest, and their financial and execution capabilities. Following this phase, the seller and its advisor will narrow down the acquirers to participate in the second phase of the bid process.

Phase 4 – Due diligence and final bids: The potential acquiring companies undertake a significant due diligence effort and submit final bids. Bids are scored against pre-determined criteria to recommend a successful acquirer(s) and the acquisition contract is negotiated. It is at the end of this stage that the City would deliver the final approval for a sale

Phase 5 – Regulatory approvals: Completion of a process can be lengthy (in excess of a year). Approvals will be required from the Federal Energy Regulatory Commission, North American Electric Reliability Corporation, the FPSC, and other regulatory agencies.

Phases #2 through #4 could take roughly 5-9 months. Phases #1 and #5 are more difficult to predict, and could add more than six months to the front end of the process, and possibly a year for the final approval stage.

Considerations and Challenges to Executing a Transaction

A privatization of JEA and its utility enterprises would likely represent the largest and most complex municipal privatization in the United States. Privatizations are complex undertakings and often take years to complete. Below is a discussion of several of the execution complexities that will likely be encountered under a privatization scenario. No issues have been identified to date which will prevent a privatization altogether, but each of these will have to be carefully considered and mitigated if a privatization moves forward.

Operational

JEA must ensure continuity of operations through a potential change in ownership. This includes managing the workforce through change while maintaining focus on safety, service and reliability to the community.

Employees

Any acquisition, sale or privatization process will be challenging for employees. There will be uncertainty from the time a potential sale is initially made public until the final resolution of the process. This process can take well over a year, and employees will focus on the terms of the transaction (negotiated by the parties) that affect their future job security. Employees may pursue other employment options in search of more security. It may be difficult to fill positions during a sale process.

Regulatory

JEA currently operates under a municipal utility regulatory and rate setting construct. If a privatization were to occur, the transition to the FPSC regulatory structure would have to be carefully managed to ensure compliance both before and after privatization with all applicable regulations, including operational, security, technology, environmental, and financial.

Contracts and legal

There are a number of outstanding contracts and property rights that would be affected by a privatization of JEA. These include power purchase agreements, interlocal agreements, and real estate easements. A privatization would necessitate a complete review of all outstanding agreements. We have identified several specific items that would need to be addressed as indicated below.

Plant Vogtle Power Purchase Agreement

JEA entered into a 20-year power purchase agreement with the Municipal Electric Authority of Georgia ("MEAG"). The contract obligates JEA to pay for all incurred costs associated with JEA's share of the capacity and energy output over the 20-year period. As written, this contract does not contain a provision discussing change in control of either party to the contract. A change in control may require accommodations to allow the sale process to comply with the tax covenants contained in the contract. Possible solutions which have been identified will require substantial legal and economic due diligence.

Interlocal agreements

JEA has active interlocal agreements with Nassau and St. Johns Counties that grant JEA the right to provide water and sewer service to current and future customers in specified areas. Each of these agreements have a change of control provision that gives each County the option to purchase the portion of JEA's water and sewer assets in each County if there is a change of control for JEA.

Property issues

JEA has thousands of property rights contracts, many of which contain complexities around ownership, transfer rights, and division of property rights should a privatization occur.

St. Johns River Power Park Shutdown

JEA is in the process of dismantling and remediating the St Johns River Power Park site under the terms of an Asset Transfer and Contract Termination Agreement ("ATA") between JEA and Florida Power & Light Company. This work will remain ongoing through 2020.

Transaction Execution and Costs

A sale of all or a portion of JEA's assets will represent one of the largest, most complex transactions ever attempted in the municipal utility market. JEA and the City will require experienced financial, legal and technical advisors that specialize in utility assets sales. Obtaining the best advice is essential to maximizing value for the City and for ratepayers. The complex, protracted nature of this assignment will lead to professional fees that are much higher than for typical municipal financing assignments undertaken by JEA or the City. These fees often become the subject of much attention – even though expert advice is essential to the sale process and can generate value to the City that is well in excess of these fees.

The items discussed above, and others, will require resolution prior to the execution of an asset sale. Some of these items are likely to be subject to considerable public debate. It will be important to raise the issues, and resolve them to the extent possible, early in the process.

Summary

It is very likely that the sale of JEA, in whole or in part, can produce substantial up-front net proceeds to the City – even after all of JEA's liabilities have been accounted for. Current market conditions can be expected to provide for a greater net value to the City from the sale of JEA than at any time in the past. The sale of JEA would be an enormously complex undertaking. It would have quantifiable impacts on future taxes and payments received by the City and other governmental jurisdictions. It would have economic impacts on JEA's employees and on the City. Many of these impacts can be managed through conditions that the City can decide to impose on the sale process and on potential buyers. There would also be a number of qualitative differences between having a utility with a local presence and under local control, versus having a utility that is privately held. While local control and presence are appealing, there is also a fundamental question of whether it is prudent for the City to remain in the utility business. It is a business that is changing rapidly due to technology and market forces. Continued change could make the City's ownership of JEA much less appealing in the future than it has been for the past several decades. It may be more prudent to leave this business to larger, more nimble companies that have the ability to absorb risk and uncertainty.

Jacksonville's leaders will have to evaluate and weigh the quantifiable and qualitative impacts to make the best decision for JEA ratepayers and for the City. In the past, it could be expected that the sale of JEA would not produce enough proceeds to satisfy JEA's liabilities and still leave sufficient net proceeds to compensate the City for future economic and qualitative differences under a new ownership structure. Because of recent changes to the utility market and to JEA, those old expectations are no longer valid. A more thorough, updated valuation of JEA, and perhaps an exploratory sale process could lead to a new answer to the old question of whether the City should sell JEA.

7



Special Committee on the Future of JEA

Final Report

July 25, 2018

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1. The Special Committee

The entity that eventually became the Special Committee on the Future of JEA was created in response to activities by JEA Board Members that generated interest and concern in the community about the future of the utility. At his last meeting before leaving the board in November 2017, outgoing Board Member and former Chairman Tom Petway suggested that the time was right for the JEA to consider whether the services and financial benefits derived from a privatization of JEA would better serve its customers and the citizens of Jacksonville. New Board Chairman Alan Howard subsequently requested that JEA management engage a qualified firm to appraise the value of JEA's constituent utilities – electric, water/wastewater, and district energy. Public Financial Management (PFM - already a financial advisor to JEA) was engaged by JEA to prepare such a report, which delivered a draft copy to JEA Board members, City Council members and the Mayor's administration on February 2nd. The final report was delivered by PFM on February 14, 2018 at a Special Council Meeting with some members of the JEA Board also in attendance.

On February 20th, City Council President Anna Lopez Brosche created the Special Committee on the Potential Sale of JEA with five members (Council Members John Crescimbeni (Chair), Danny Becton, Anna Lopez Brosche, Garrett Dennis and Joyce Morgan). The committee was charged with four tasks:

- Understand all aspects and implications (who, what, when, where, and why) of a potential sale of JEA, and the roles that various parties to such a potential sale will play in the process.
- Conduct necessary meetings and hearings to gather the relevant facts the entire City Council should consider in its decision(s) related to a potential sale of JEA.
- Offer monthly (or more frequent, as necessary) updates as to the progress of this work to the City Council at its regular meetings.
- Make recommendations to ensure a transparent and open process for the citizens of Jacksonville as to the consideration of a potential sale of JEA.

The Special Committee did not have a final reporting deadline, but was requested to make a status report at the June 26, 2018 City Council meeting, the last meeting before the end of Council Member Brosche's term as Council President.

In one of its first actions, the Special Committee considered an offer by the Jessie Ball duPont Fund to assist the Council in its study of JEA-related issues by funding the services of a consultant to the Special Committee. A subcommittee of the Special Committee met with the duPont Fund's President and developed a scope of services document and list of preferred

consultant qualifications. The duPont Fund eventually determined that it would contract with the consultant directly and commission their work on behalf of the City rather than provide funding to the City to hire the consultant through its procurement process.

The Special Committee on the Potential Sale of JEA met seven times during March and April of 2018. At the March 27th City Council meeting (revised committee charge memo issued April 19th) the Council President changed the name of the committee to the Special Committee on the Future of JEA and expanded its membership to include all City Council members – Greg Anderson, Danny Becton, Anna Lopez Brosche, Katrina Brown, Reggie Brown, Aaron Bowman, Lori Boyer, Doyle Carter, John Crescimbeni, Garrett Dennis, Al Ferraro, Reggie Gaffney, Bill Gulliford, Tommy Hazouri, Jim Love, Joyce Morgan, Sam Newby, Matt Schellenberg, Scott Wilson - with Council Member Crescimbeni continuing as Chairman. The charge of the committee was changed to two items:

- Understand JEA’s role in the consolidated government, contributions to the City of Jacksonville, governance practices, and future in the context of both changing technology and regulatory environment.
- Conduct necessary meetings and hearings to gather the relevant facts the entire City Council should consider in its responsibility to represent the citizens and taxpayers of the City of Jacksonville.

The revamped Special Committee (which included a change of membership on July 12, 2018 when City Council members Ju’Coby Pittman and Terrance Freeman replaced Katrina Brown and Reggie Brown) met an additional seven times from April through late July and issued its final report on July 25th. A full record of the committee’s meetings (including minutes and verbatim transcripts) and links to all of the presentations, handouts, studies, and other documentation provided to the committee is available on the City Council’s website at <http://www.coj.net/city-council/standing-committees/special-committee-on-the-future-of-jea>.

2. About JEA

The entity now known as JEA had its origins in 1893 when the citizens of Jacksonville approved a referendum to issue bonds to fund the construction of a city electric generating plant. The City of Jacksonville operated an Electric Department for 70 years. During this time the electric operation was managed briefly by a Board of Bond Trustees and then by the City Commission. A substantial portion of the utility’s net revenues were transferred to the City’s general operating fund, constituting a major funding source for the city budget. When city/county consolidation was approved by the voters in 1967 the new City Charter provided for the creation of an independent Jacksonville Electric Authority (JEA) governed by a seven-member board

appointed by the Mayor and confirmed by City Council. In 1997 the City transferred its water and sewer utility operations to JEA to achieve better operational efficiency and to take advantage of economies of scale. JEA has since expanded into an additional business line by constructing three “district energy” plants in downtown Jacksonville in the early 2000s to provide chilled water to serve the air conditioning needs of nearby buildings. One plant downtown serves City Hall, the county courthouse, the main library and its parking garage, City Hall Annex, State Attorney’s Office and the JEA headquarters. A second plant in the Sports Complex serves the Veterans Memorial Arena and Baseball Grounds. The third plant in Springfield serves the UF Health Jacksonville hospital complex, the UF Proton Therapy Institute and UF College of Medicine.

JEA is currently the eighth largest municipal utility in the country, serving 458,000 electric customers, 344,000 water customers, 267,000 sewer customers and 10,000 reclaimed water customers (JEA 2017 Report to Customers). The electric operation covers 900 square miles of territory through 745 miles of transmission lines and 6,800 miles of distribution lines, and sold 13.9 million megawatt hours of power in 2017. The water operation covers 655 square miles of territory with water drawn from 137 wells, treated at 37 water plants, distributed through 4,700 miles of distribution pipes, and delivered over 43 billion gallons to customers in 2017. The sewer operation covers 680 square miles of territory with 4,000 miles of collection mains transporting wastewater to 11 treatment plants, and treated over 30 billion gallons of wastewater in 2017. JEA’s operating revenues and expenses for the fiscal years 2012-13 through 2016-17 are attached. **[See Exhibit 1]**

JEA’s owned electric generating capacity is 3,090 megawatts spread over seven plants. 67% of its generating capacity is fueled by natural gas (Kennedy Generating Station, Northside Unit 3, Brandy Branch, Greenland Energy Center), 25% is solid fueled (Northside Units 1 and 2, Plant Scherer), and 8% other (Northside oil, solar farms, landfill methane gas). The utility has 12 purchase power agreements in force (nine operational for 258.6 megawatts and three under construction for 212 megawatts) and has agreements pending for five additional privately owned solar generating plants (totaling 250 megawatts). JEA’s next generating capacity expansion will take the form of the five private solar plants, the eventual addition of gas-fired capacity at the Greenland Energy Center on the Southside and an additional capacity expansion at the Brandy Branch Generating Station. **[See Exhibits 2, 3 and 4]** JEA and Florida Power and Light recently made a joint decision to decommission and demolish the solid-fueled (coal/petroleum coke) St. Johns River Power Park (SJRPP) on Jacksonville’s Northside (see Section 5 below).

While the JEA’s number of customers has steadily increased over the years, the utility’s volume of sales on both the electric and water sides has leveled off or decreased in recent years. JEA

has experienced actual declines in both electric and water sales from their peaks in 2006 and 2007 (respectively) to 2016 – a 10% decline from peak in electric sales and a 14% decrease in water sales. Electric sales peaked in 2006, declined through 2013, and increased slightly through 2017. The decline and subsequent leveling off of sales is largely attributable to the increased use of energy-efficient appliances and better energy efficiency in building construction, along with the effects of the economic recession in 2008-09. Water sales peaked in 2007, declined steadily through 2014, and have resumed a slight growth trend. The decline in water usage is largely attributable to increased emphasis in recent years on water conservation practices to preserve the potable water supply and on more water-efficient appliances. [See Exhibits 5 and 6]

JEA contributes, in several forms, a substantial portion of the City of Jacksonville's General Fund budget each year. The largest portion comes from the JEA's annual contribution to the City, the amount of which is negotiated between the City and JEA on a typically 5-year basis. For many years the contribution has been set at the *greater of* either a figure arrived at by multiplying a millage rate by JEA's actual electric and water sales amounts, or a contractually agreed upon minimum increase over the previous year's contribution. The electric-based contribution to the City has increased from \$25.7 million in fiscal year 1978-79 to \$92.3 million in FY2016-17; the water-based contribution has increased from \$9.5 million in FY97-98 (the first year after the transfer of water and sewer operations to JEA) to \$23.6 million in FY2016-17. [See Exhibit 7] The JEA annual contribution increased each year from FY2004-05 through FY2015-16 as a result of the minimum guaranteed increase. As a result of a newly negotiated agreement between the City and JEA that reduced the guaranteed minimum annual increase from \$2.5 million to a 1% increase over specific base year amounts set for each of the five years of the contract, the contribution increases in FY16-17 and FY17-18 were once again set by the sales calculation. [See Exhibits 8 and 9]

The City levies a franchise fee on JEA of 3% on electric revenues (up to a maximum of \$2.4 million in sales or \$72,000 in franchise fee per customer per fiscal year) and on all water and sewer revenues. The franchise fee is charged on customer accounts in Duval County only with the exception of customers in Urban Service Districts 2-5 (the Beaches cities and Baldwin), the City of Jacksonville accounts, and JEA accounts. The City also levies a utility service tax of 10% on all purchases of electricity and water (in addition to metered or bottled natural, LP or manufactured gas not related to JEA). Between 2009 and 2017 the franchise fee ranged from a low of \$37.5 million to a high of \$41.7 million annually, while the utility service tax ranged from \$70.7 million to \$87.3 million. Both of these fees would be levied on or collected by a private investor-owned utility should JEA be privatized. [See Exhibit 10]

3. Value of JEA

The Special Committee learned that there is a distinction between a “valuation” study and an “evaluation” study of a utility. A valuation study examines the monetary value of a utility’s assets and attempts to determine what a buyer might be willing to pay for those assets. An evaluation study considers broader strategic issues and community concerns, opportunities and challenges, etc. in addition to simple asset value. The Council Auditor’s Office has previously produced two reports on JEA, at the request of council members. A 2007 report (#637) found that JEA had a net asset value of \$1.5 billion and estimated the value of its cash flow to the City (negotiated annual contribution, franchise fee, utility service tax) over 30 years at \$2 billion. The value of the utility’s cash flow to a private utility purchaser over 30 years was estimated at \$3.15 billion. A 2012 report (#722) found that JEA had a net asset value of \$1.8 billion and estimated the value of its cash flow to the City over 30 years at between \$2.04 and \$2.49 billion (depending on the methodology). The net present value of the cash flow over 30 years to a private utility purchaser was estimated at \$1.04 to \$1.22 billion.

As mentioned earlier, in February 2018, PFM released its evaluation study to the City Council and the JEA Board in a joint meeting. Michael Mace, Managing Director of Public Finance Management Inc., presented four different value ranges calculated using four different methodologies:

- \$7.9 - \$10.1 billion using the discounted cash flow model
- \$8.5 - \$10.2 billion using the price-to-earnings ratio model
- \$7.5 – \$10.3 billion using the cash flow multiple model
- \$8.1 - \$11 billion based on the rate base multiple model

Mr. Mace said that the evaluations were done on a fairly conservative basis using moderate assumptions and represent gross transaction value *before* retirement of debt (currently \$5.3 billion) and settlement of other outstanding long-term contracts and obligations (i.e. the JEA’s contractual obligation on a purchase power agreement for a portion of the output of nuclear plant Vogtle under construction in Georgia). PFM suggested a reasonable expectation for net proceeds from sale of JEA under current market conditions would be \$2.9 - \$6.4 billion.

The Council Auditor’s Office was requested to produce a new study of JEA’s value, which was released as Special Report #807 – The Potential Sale of JEA: Things to Consider. The evaluation portion of the report started from the PFM report’s estimated gross value of \$7.5 to \$11 billion, subtracted out a variety of financial obligations that would have to be paid off using the

proceeds of a sale and arrived at a potential net proceeds value of \$1.7 to \$5.2 billion. JEA's outstanding obligations include: 1) long term debt - \$3.9 billion; 2) Plant Vogtle obligation - \$1.2 billion; 3) accrued pension liabilities - \$541,025,000; 4) interest rate swap termination costs - \$100 million; 5) accrued "other post-employment benefits (OPEB) - \$34,526,000; and 6) environmental liabilities - \$21,654,000. The Auditor's report also included a list of other "things to consider" in determining the value of the JEA as a City-owned asset, including: the value of the JEA's annual contribution to the City as a reliable source of revenue; JEA's various cooperative projects with the City over the years (assistance in funding septic tank phase-out initiatives, providing the City with water quality credits to meet the City's obligations, purchasing land for conservation purposes, development of a shared citywide radio system, etc.); the value of the utility as a large company headquartered in downtown Jacksonville; the value of JEA's corporate sponsorship of local events and activities; the value of JEA's sole focus on Jacksonville rather than a larger utility's responsibilities for a much larger service area; and the value of JEA as a local employer and purchaser of goods and services, particularly in its commitment to using the City's Jacksonville Small and Emerging Business (JSEB) program.

The committee learned that a portion of the value of JEA's assets is located in adjacent counties which have the first right of refusal to purchase them in the event of privatization of JEA. The purchase price of JEA's water and sewer assets in Nassau County is \$44.66 million and in St. Johns County it is \$217.97 million per the terms of the respective Interlocal Agreements as of 2018. The Nassau County assets are a stand-alone system operated by JEA. The St. Johns County assets are interconnected with Jacksonville's system and the cost and process to bifurcate those two systems in the event of a sale of JEA is unknown.

The Council Auditor's Office contacted the Property Appraiser's Office to learn how that office places a value on JEA's real and personal property assets as a non-taxable entity. Keith Hicks, Chief Appraiser at the Property Appraiser's Office, reported that JEA's property is inspected at least once every five years as required by state law using a combination of physical inspections and aerial photography, but acknowledged that the JEA does not undergo the same degree of detailed inspection as a taxable entity would. He said that given the very complex appraisal needed to estimate a value for JEA, the Property Appraiser's Office recommended that an outside agency that specializes in the utilities industry be consulted to develop an accurate estimated market value. The Property Appraiser's 2018 in-progress appraised value for JEA is \$432,416,183 for real property and \$6,324,505,586 for tangible personal property, for a total appraised just value of \$6,756,921,769. [See Exhibit 11]

JEA has several different kinds of value to the City, of which the annual financial contribution to the City is only one. The Special Committee learned that JEA employees contribute thousands of hours annually as both volunteers (using up to eight hours of paid leave to participate in the

activities of approved non-profit organizations and events) and as ambassadors (engaging with JEA customers through speaking engagements, participation in community events and educational programs). The value of employee volunteer hours totaled \$344,379 over the last three fiscal years. The JEA also procures goods and services for its operations in the Northeast Florida economy, spending between \$110 million and \$169 million per year in the five-county Northeast Florida area over the past seven years. A substantial portion of that procurement spending is directed to small businesses through the JEA's participation in the City's JSEB (Jacksonville Small and Emerging Business) program. JEA's spending with JSEB, minority- and female-owned businesses over the past ten years has ranged from a low of \$9.6 million in FY13-14 to a high of \$30.6 million in FY05-06.

In 2013, the Northeast Florida Regional Council released an Economic Impact Analysis for JEA. The study estimated the economic impact and value of JEA to Duval County in 2012. The annual impact of JEA on Gross County Product (GCP) indicated

- JEA contributed between \$860 - \$910 million to GCP
- JEA contribution was 1.4% - 1.5% of Duval County GCP
- JEA directly and indirectly impacted 4,500 - 4,700 jobs
- JEA impacted Earnings/Personal Income \$206 - \$310 million

Only the tangible impacts were quantified in the analysis.

JEA is an economic development partner with the City in several ways. The utility has two "program riders" or incentive programs for large corporate users of electric power - an economic development rider and an economic stimulus rider. Currently, Sysco International Food Group Inc., Dresser Equipment Group Inc., and Hans Mill Corporation are utilizing those riders. Pursuant to an Ordinance Code provision, the City appropriates a portion of the JEA annual contribution (equal to one-quarter mill multiplied by the gross kilowatt-hours delivered by the JEA during the preceding 12 months) to the Jacksonville Port Authority for the purpose of land acquisition and development of any marine terminal capital construction or improvement project, including payment of debt service on bonds issued for capital projects. From FY 1996-97 to FY 2016-17, \$63,584,846 of revenue from JEA was pledged to JPA for debt service. For FY 2017-18, the amount pledged from the JEA assessment is \$3,062,125. In the 1990s JEA also spent approximately \$53,000,000 on electric, water and sewer infrastructure at Cecil Field to assist the City in creating Cecil Commerce Center.

JEA is also a member, sponsor, or partner of dozens of organizations and events throughout its service area. JEA is a dues-paying member of organizations ranging from the chambers of

commerce of Jacksonville, Clay County, St. Johns County and Amelia Island/Fernandina Beach to economic development organizations (JAX USA Partnership, Nassau County Economic Development Board, Clay County Economic Development) to industry associations (First Coast Manufacturers Association, Associated Industries of Florida) to minority business organizations (Asian-American Chamber of Jacksonville, First Coast Hispanic Chamber of Commerce, Jacksonville Black Chamber of Commerce, Indo-US Chamber of Commerce), among others. JEA's paid memberships in these organizations has ranged from a total of \$257,000 to \$563,000 over the past five years. The utility participates financially and through employee participation in scores of community events, ranging from the World of Nations festival to the Martin Luther King, Jr. Breakfast, the United Negro College Fund to Leadership Jacksonville, and the WJCT TEACH event to Earth Day celebrations.

Another aspect of JEA's value is the fact that as a municipal utility, JEA qualifies for reimbursement from the Federal Emergency Management Agency (FEMA) for damages it sustains from significant natural disasters. Private investor-owned utilities are not eligible for FEMA reimbursement for their damages, so they apply to the Florida Public Service Commission for authorization to place storm recovery charges on customer bills to recoup the cost of uninsured damages. JEA suffered reimbursement-eligible damages in the amount of \$14.6 million from Hurricane Matthew in 2016 and \$17.4 million from Hurricane Irma in 2017, of which FEMA and the State of Florida will eventually reimburse 87.5% (\$28 million total for the two storms).

Another aspect of JEA's value is its partnership with the City in various types of community improvement projects. In 1998, JEA started the "Groundworks Program" to dedicate resources to the water and sewer system just transferred to it by the City, which improved water quality so much that the EPA lifted an administrative order previously imposed on the City to clean up its effluent into the river. Over \$3,618,940,436 has been invested by JEA in capital improvements to the water and sewer system to date. JEA performed the project management function for the \$75 million septic tank remediation project that was part of the Better Jacksonville Plan and has spent approximately \$20,000,000 to purchase over 5,000 acres of preservation land to complement the City's Preservation Project. Rather than the City and JEA each constructing their own radio systems, JEA coordinated the design and construction of a radio system that the City and JEA could both use. JEA is also performing and financing the City's LED (Light Emitting Diode) streetlight conversion project at an estimated cost of \$10 million. Pursuant to a 2016 interagency agreement between the City and JEA, JEA contributed \$15,000,000 to be used in conjunction with a \$15,000,000 match from the City for water and sewer infrastructure. It also agreed to transfer 30.34 metric tons of its excess Total Nitrogen Water Quality Credits to the City at no cost (valued at \$2.1 million per year) each year through

December 2023 to help the City meet its water quality improvement obligations to the Florida Department of Environmental Protection.

A question was raised during the course of the special committee's hearings about the potential impact of the privatization of JEA on the Duval County Public Schools. Unlike a privately owned utility, JEA does not pay any property taxes to the city, school district or other taxing entities. The City receives the annual contribution pursuant to its contract with JEA but the School Board does not receive any financial contribution. The Council Auditor was asked to investigate the potential for increased revenue to the School Board from a privatized utility paying the school millage levy. The Council Auditor's Office reported that the Duval County School Board (DCSB) would receive additional ad valorem taxes, although the amount DCSB would receive is limited. The Auditor estimated that DCSB would receive approximately \$8 million per year for capital purposes, pursuant to the Local Capital Improvement Millage for school districts, but explained that the DCSB would probably not receive additional operating revenue from the sale of JEA. Based on the way the Florida Education Finance Program (FEFP) formula works, increases in revenue from the Required Local Effort or the Discretionary Local Effort millage levies would likely be offset by a corresponding decrease in State funds. The Local Capital Improvement Millage however, is not part of the FEFP calculation. This information was confirmed with the Florida Department of Education.

4. Plant Vogtle

One factor that has a substantial, but somewhat unknown, impact on establishing JEA's value is its purchase power agreement for a 206MW share of the power output of Units 3 and 4 of the Plant Vogtle nuclear plant under construction in Waynesboro, Georgia, the first new nuclear reactors to be constructed in the U.S. in the last 30 years. JEA made the decision to commit to purchasing power from the plant in 2008 for several reasons, including: 1) a JEA Board decision to meet 10% of its power needs by 2018 from non-carbon, nuclear generating sources; 2) steadily growing energy demand in Jacksonville; 3) serious discussion by the federal government about severely limiting carbon dioxide emissions, particularly from carbon-burning power plants; and 4) the relatively high cost of natural gas at the time.

The plant was permitted for site work in 2009 and received a construction and operating license (COL) in 2012. Westinghouse Nuclear, the contractor for the project, declared bankruptcy in 2017 and some parties urged the Georgia Public Service Commission to shut down the project. The GPSC gave Georgia Power the approval to complete construction of the plants, but without the contract that made Westinghouse responsible for most cost overruns. The construction cost of the project has grown since the purchase power agreement was first executed, and JEA is required to pay for the contracted capacity on a "take-or-pay" basis (that is, whether or not either additional Vogtle unit is completed or is operating or operable, and whether or not its

output is suspended, reduced or terminated, in whole or in part). JEA's agreement to purchase power from Plant Vogtle does not have a cap on construction costs (although the primary companies involved in the construction do have a cap of another \$1 billion, after which they could pull the plug on the project). The PFM report calculated a potential liability of \$1.2 billion as a share of future construction costs for the plant, which would accrue as a share of debt service even if the plant never produces power. JEA's power purchase obligations to Plant Vogtle end 20 years after power begins being produced, although the expected lifespan of the plant is 40 years.

5. St. Johns River Power Park

As mentioned earlier, JEA and Florida Power and Light, the joint owners of SJRPP, made the decision in 2017 to decommission and demolish the plant before the end the Joint Operating Agreement. JEA determined that its share of the plant represented excess generating capacity that was more expensive to maintain and operate than the cost of purchasing power from other sources in the short term, and that eventually JEA's share of the output of the Plant Vogtle nuclear plant under construction in Georgia would supplant the need for the SJRPP output when that plant comes on line. The shutdown of the coal-fired SJRPP will also reduce JEA's CO² output by 30% by 2020. Melissa Dykes, President and Chief Operating Officer of JEA, estimated that the total savings to JEA's customers over the next 10 years resulting from the closure would be \$450-460 million, representing the difference in purchasing the needed 150 - 200MW of power rather than operating a 1,000MW plant to supply that amount. She distributed a table showing the operating cost of SJRPP (\$122.9 million in FY16, \$140.1 million in FY17) versus purchasing 200MW of power from the natural gas-fired Plant Wansley in Georgia (\$35.2 million in FY18, \$44.1 million in FY19).

6. Legal and regulatory issues and procedures

The Special Committee learned early in its work that, pursuant to the City Charter, JEA has the authority to issue an RFP to privatize the utility without City Council's prior approval. Sale of more than 10% of JEA (defined by the Office of General Counsel as 10% of assets as of the last audit report) does require City Council approval, and sales cannot be done in multiple increments of less than 10% to avoid Council approval. General Counsel Jason Gabriel told the committee that a decision to consider a sale of JEA must take into account at least four components: 1) interlocal and franchise agreements with St. Johns and Nassau Counties; 2) real estate assets and obligations; 3) required regulatory approvals (state and federal); and 4) a water/wastewater "public interest determination" required by state law. In response to a question posed by several council members about a potential role for the voting public in a potential sale of JEA, the Office of General Counsel ruled that voters cannot use the petition and referendum method to amend the City Charter to give themselves a role in a proposed JEA sale.

The PFM February 2018 evaluation study listed as a “Key Value Driver for Sales Price” an item entitled *Utility Rate Guarantees* which read “Acquirers will often agree to keep rates the same or lower for some period of time following the acquisition. Rate regulation for a private buyer of JEA’s assets will ultimately transition to the Florida Public Service Commission (PSC). The pricing and duration of rate constraints may have a significant impact on acquisition price.” In response to a question about the potential for utility rate guarantees during his presentation to the Special Committee in May, Keith Hetrick, the General Counsel of the Florida PSC, said that local governments do not have the power to impose rate freezes, which would probably constitute a “taking.” Utilities have the right to request rate increases of the PSC to recover their operating and capital costs and to generate a reasonable rate of return on invested capital.

7. JEA’s rates compared to other public and private utility rates

The Special Committee heard that rate comparisons among utilities can be tricky because factors aren’t uniform from jurisdiction to jurisdiction (i.e. differing franchise fee and utility service tax rates, presence or absence of storm recovery surcharges by investor owned utilities, etc.). Generally speaking, JEA’s rates have historically been somewhere in the middle of the range of rates for utilities in Florida, both municipally owned and privately owned. From 2010 through 2018, JEA’s residential electric rate (assuming 1,000 kWh of consumption) was in the middle of the four major private utilities, with Florida Power and Light and TECO being less expensive and Progress Energy/Duke Power and Gulf Power being more expensive each year by varying amounts. [See Exhibit 12] In April 2018 JEA’s residential rate was in the bottom half of all Florida utilities, public and private. [See Exhibit 13] Similarly, in April 2018 JEA’s water and sewer rates ranked in the bottom third of 18 water and sewer systems in Florida (based on residential service with 5/8 inch meter and 6,000 gallons of consumption). [See Exhibit 14]

The Florida Public Service Commission regulates the rates charged by private utilities based on reasonable recovery of certain costs of operation (fuel, environmental compliance, conservation programs and nuclear pre-construction costs) and a reasonable rate of return on the utility’s base rate (facility and equipment cost) and debt expense. The rate-setting process is codified in state law and is a litigated process with sworn testimony, witnesses and experts testifying on both sides. Rates for private utilities must be uniform within rate classes across their entire contiguous service areas in Florida. The PSC also allows investor-owned utilities (IOUs) to impose approved surcharges for storm damage restoration following major storms, and these surcharges apply to all of a utility’s customers within the state, regardless of whether a particular area suffered storm damage or not.

8. JEA’s current and projected business model

As mentioned earlier, JEA's number of customers has steadily grown but electric and water consumption has declined for a number of years following the Great Recession and the growth projections for both are basically flat if not slightly declining for the foreseeable future. Overall JEA has experienced actual declines in both electric and water volume sales from their peaks in 2006 and 2007 (respectively) to 2017 – a 10% decline from peak in electric sales and a 14% decrease in water sales. JEA makes several different forecasts of future sales trends for different purposes, including one for JEA's financial planning purposes and another for the Florida Public Service Commission for capacity planning purposes.

On-site solar power generation on business and residential properties is a small but growing trend as the quality of solar panels and battery technology improves. 1,436 residential customers and 59 commercial customers currently have customer-owned solar systems, so self-produced power serves a small proportion of the total demand and is not yet a threat to JEA's centralized generation model, but the trend bears watching. JEA currently needs to have a certain amount of generating capacity available at all times to serve its customers, including those who generate their own solar power, so JEA is acting as the backup power supply for solar users who will need its services when weather or other conditions reduce solar generation capability. The development of affordable, efficient customer-owned on-site storage batteries will be a key to the growth of solar power use and the timing of its impact on JEA's generating capacity needs.

Given the trends in electric and water sales, JEA has given some thought to expanding into other lines of business to produce additional revenues, including pole attachment revenues, wireless colocation leasing revenue, dark fiber leasing, natural gas sales, solar panel leasing, fuel cells and micro-turbines. [See Exhibit 15] Other utilities around the country, facing the same challenges of declining sales, have diversified into energy marketing, liquefied natural gas (LNG) processing and sales, renewable energy development (wind and solar), distributed generation (i.e. combined heat and power generators, fuel cells, batteries), and telecommunications (fiber optics, tower leasing, internet services).

JEA's Interim CEO Aaron Zahn informed the Special Committee that the JEA board will spend the next six months to a year mapping a strategy for its future in consultation with its employees and stakeholders. He said he has instructed the employees and management of JEA to focus on five priorities for the present: 1) focus on core business – serving electric water and sewer customers with excellence; 2) look forward – implement a smooth transition of leadership; 3) listen and align our purpose with shareholder trustees - JEA's board of directors, City Council and the Mayor will establish consensus around a framework upon which to measure a strategic plan for the future of JEA; 4) question the possibilities of greatness and innovate; and 5) be stewards of a united community and lead with integrity. Mr. Zahn plans to

have the JEA board thinking strategically and planning for a changing future. He said that board agendas will include several categories of issues – routine operational issues, deep dives into particular topics, and long range planning discussions. Issues will undergo a 3-step progressive process of “discuss, deliberate and decide”.

9. Independent evaluations of JEA’s value and role in the community still underway

Two independent evaluations of JEA are still ongoing. The Jessie Ball duPont Fund, a national foundation headquartered in Jacksonville, carries on the philanthropic tradition of Mrs. duPont by making grants to organizations that she supported during her lifetime with the aims of “building the capacity of eligible organizations, building the assets of people, families and communities, and promoting civil society.” As a recipient of a gift from Mrs. DuPont, the City is an eligible recipient of the Fund’s grant-making. As mentioned earlier, the Jessie Ball duPont Fund offered to assist the Special Committee’s efforts to study a vital community issue by funding the services of a consultant. The Fund eventually opted to hire a consultant itself rather than make a grant to the City to hire a consultant through its procurement process. The Fund contracted with the Public Utility Research Center at the University of Florida to assist the City. Dr. Ted Kury, the Director of Energy Studies for the Center, explained why the Center is interested in studying the JEA privatization issue. Privatization of municipal utilities is a relatively rare occurrence and the Center is interested in exploring the question of “value” in the context of the overlap of utility owners and users (the citizens of Jacksonville) and how they consider making such a decision. He said that he can find no similar research on this question of value to municipal utility owners/customers, and is excited by the prospect. He is particularly anxious to explore the “quality of service” aspect – what do customers really value about JEA? Dr. Kury anticipates that study should be completed by the end of 2018.

The other study of JEA has been commissioned by the Jacksonville Civic Council. The Civic Council is a nonpartisan, nonprofit organization which brings together chief executives from the nonprofit, business and government sectors of Jacksonville to study important community issues. The Civic Council assembled a team of local business executives, co-chaired by CSX former CEO Michael Ward and Bobby Stein, Managing Director of Chartwell Capital Management, to examine issues related to JEA’s value to the community. At a Special Committee meeting Mr. Ward said that fundamentally the proper question to be asked is not whether to sell JEA or not, it’s how to best maximize the value of the asset to the City and its taxpayers. The group will perform a cash flow analysis that will lead to ideas for enhancing JEA’s value (i.e. sale/leaseback of assets, leveraging JEA’s very strong balance sheet, alternative operating models, etc.) as one part of its analysis. The Civic Council has retained Gerry Hartman, an engineer and certified appraiser from Central Florida, as a utility industry expert to provide in-depth analysis of JEA. Mr. Ward said the nature of the study will depend in part on the ultimate goal – is it to determine how much JEA might be worth to private buyer? Is it to

run JEA better in its current business lines? Is it to determine how to monetize various JEA assets to generate cash? He also said that the study, which will take 9-12 months, will definitely produce some good ideas and suggestions, some of which JEA will likely want to adopt to make itself a better utility.

10. Unanswered questions

One issue that the special committee heard several times in different contexts concerned unfulfilled promises from the city/consolidation era in the late 1960s: do the City and/or JEA have any legal or moral obligation to provide water and sewer service to areas of the pre-consolidation city that do not have those services? Who will pay to extend the mains and hook up the individual properties? Can JEA legally use its operating revenues to pay for extension of service to new customers?

The broader questions that underlie the creation of the Special Committee are:

- What is the true value of the utility to the City government and to the citizen/taxpayers who are its ultimate owners?
- What factors should be considered relevant in determining whether the JEA should be privatized or not?
- How should purely monetary considerations be balanced against the intangible value that JEA provides to the region?
- What process should be used to perform that balancing test and involve the citizens in helping to make a final privatization decision?

11. Conclusions

Based on the hours of testimony provided by invited speakers in Special Committee meetings, the hundreds of facts identified by numerous presenters, and extensive discussion among the committee members, the following conclusions can be reached:

- Regardless of any of the various measures of its monetary worth, JEA is one of Jacksonville's most important civic assets and decisions about its future should be made with the utmost care.
- Having a utility headquartered in and solely focused on serving Jacksonville and the immediately surrounding counties has both tangible and intangible value, in large part because the utility's decisions will be made by board members who are local residents and who will make those decisions based solely on what's best for the customer/owners in the immediate service area.

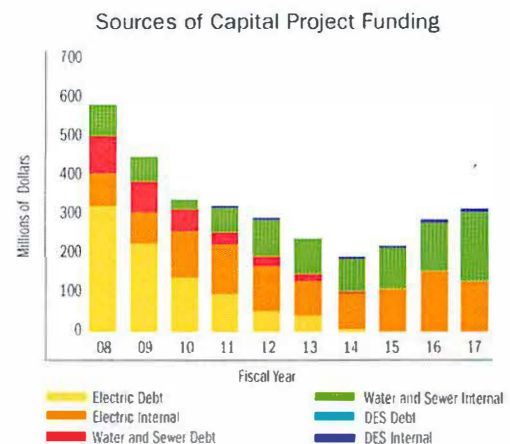
- The ability of JEA, as a municipal utility, to receive FEMA reimbursement for damages caused by natural disasters has value because it shifts part of the cost burden of restoring and rebuilding infrastructure after a storm from the ratepayers to the federal government.
- Because of the success of energy conservation measures in reducing electric and water consumption and sales, JEA needs to consider expanding its operations into other related business lines to diversify its revenue streams and ensure continued financial health.
- JEA's Plant Vogtle obligations have the potential to adversely affect the utility's financial position for several decades to come, depending on how long the construction process takes, how much the plant eventually costs, whether it eventually produces power or not, and what that power costs when finally available in comparison with the cost of power from other sources (i.e. natural gas or solar) at the time, and the then-current state of the regulatory environment.
- As a municipal utility owned by the City of Jacksonville, JEA is more likely to enter into voluntary agreements with the City to tackle community needs and opportunities (i.e. septic tank phase-out, transfer of water quality credits, environmental conservation efforts, cost-sharing on projects of mutual interest, etc.) on financial terms favorable to the City than would an investor owned utility whose primary responsibility is to maximize shareholder value.
- Expansion into new business lines may require an amendment to JEA's Charter to authorize entry into new fields.

Report of the Special Committee on the Future of JEA - Exhibits & Appendices

FINANCIAL SUMMARY

Combined Electric System, Bulk Power Supply System, St Johns River Power Park System, Water and Sewer and District Energy System (in thousands of dollars)

	2017-16	2016-15	2015-14	2014-13	2013-12
Operating revenues:					
Electric	\$1,382,206	\$1,321,713	\$1,324,883	\$1,431,167	\$1,383,696
Water and sewer	448,057	417,404	379,789	383,643	381,677
District energy system	8,185	8,337	8,778	8,682	8,471
Other, net	36,729	34,298	35,930	38,389	38,975
Total operating revenues	1,875,177	1,781,752	1,749,380	1,861,881	1,812,819
Operating expenses:					
Fuel and purchased power	536,250	485,874	517,239	585,021	539,646
Maintenance and other operating expense	392,142	380,219	374,166	364,764	371,041
Depreciation	386,699	382,432	366,486	375,505	378,067
State utility and franchise taxes	69,683	71,244	72,510	72,221	70,237
Recognition of deferred costs and revenues, net	(4,075)	(1,527)	(11,168)	49,271	64,305
Total operating expenses	1,380,699	1,318,242	1,319,233	1,446,782	1,423,296
Operating income	494,478	463,510	430,147	415,099	389,523
Nonoperating revenues (expenses):					
Interest on debt	(182,992)	(184,457)	(198,199)	(223,736)	(235,228)
Investment income (loss)	10,576	14,225	12,904	20,546	(13,240)
Allowance for funds used during construction	11,774	9,407	5,723	3,894	3,986
Other nonoperating income, net	5,918	8,765	11,833	7,280	7,530
Earnings from The Energy Authority	6,335	6,136	1,461	3,567	4,325
Gain (loss) sale of asset	-	-	(199)	-	-
Other interest, net	(451)	(403)	(68)	(38)	(134)
Total nonoperating expenses, net	(148,840)	(146,327)	(166,545)	(188,487)	(232,761)
Income before contributions and special item	345,638	317,183	263,602	226,612	156,762
Contributions (to) from:					
General fund, City of Jacksonville	(115,823)	(129,187)	(111,688)	(109,188)	(106,687)
Capital contributions:					
Developers and other	66,875	53,652	52,709	38,845	29,292
Reduction of plant cost through contributions	(42,069)	(31,632)	(33,105)	-	-
Total contributions	(91,017)	(107,167)	(92,084)	(70,343)	(77,395)
Special item	-	-	151,490	-	-
Change in net position	254,621	210,016	323,008	156,269	79,367
Net position—beginning of year, originally reported	2,376,925	2,166,909	1,843,901	2,039,737	1,991,311
Effect of change in accounting	-	-	-	(352,105)	(30,941)
Net position—beginning of year, as restated	2,376,925	2,166,909	1,843,901	1,687,632	1,960,370
Net position—end of year	\$2,631,546	\$2,376,925	\$2,166,909	\$1,843,901	\$2,039,737



JEA Generating Sources and Capacities

Energy - MWh			
Unit			2018
Kennedy	7		146
Kennedy	8		86
Northside	1		1,627
Northside	2		1,570
Northside	3		2,029
Northside	33		1
Brandy Branch	1		63
Brandy Branch Combined Cycle	2,3 & 4		4,238
Greenland Energy Center	1		68
Greenland Energy Center	2		35
St. Johns River Power Park	1		0
St. Johns River Power Park	2		0
Scherer	4		958
All Purchases			1,776
Total			12,597

Summer Capacity - MW			2018
Kennedy	7		150
Kennedy	8		150
Northside	1		293
Northside	2		293
Northside	3		524
Northside	33		212
Brandy Branch	1		150
Brandy Branch Combined Cycle	2,3 & 4		501
Greenland Energy Center	1		150
Greenland Energy Center	2		150
St. Johns River Power Park	1		
St. Johns River Power Park	2		
Scherer	4		194
Purchase – Wansley	7		200
Purchase – Summer Seasonal	--		25
Purchase – Trail Ridge	--		15
Total			3,007

JEA Power Purchase Agreements

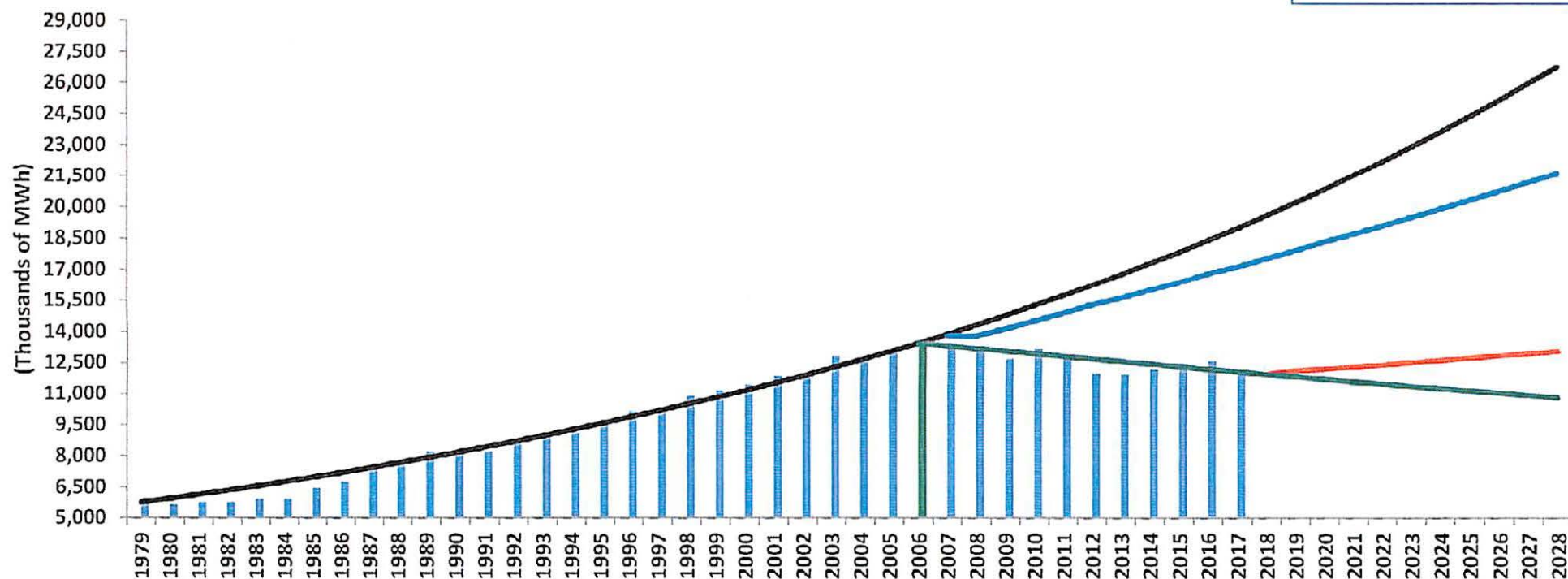
Currently Operational	Megawatts
Trailridge/Sarasota Landfill Gas	15.6
Ainsworth Wind	10
Jax Solar	12
NW Jacksonville Solar	7
Blair Solar	4
Old Plank Road Solar	3
Simmons Road Solar	2
Starrat Solar	5
Wansley Combined Cycle	200
Under Construction	
Old Kings Solar (due 2018)	1
Sunport Solar/Battery (due 2018)	5
Vogtle 3 & 4 Nuclear (due 2021/2022)	206
Pending	
5 x 50 MW Solar (pending award, PPA negotiations)	250

JEA Solar Power Purchase Agreements

Project	Vendor	Location	Size	In-Service Date	PPA Term (yrs)
Jacksonville Solar	PSEG/juwi	2009 Hwy 301 N, Jacksonville, FL 32224	12 MW	09/30/2010	30
NW JAX Solar Partners	EDF Renewables (formerly named groSolar)	2600 Arnold Rd Jacksonville, FL 32218	7 MW	5/30/17	25
Old Plank Rd Solar Farm	COX/PEC Velo	12850 Hance Ln Jacksonville, FL 32220	3 MW	10/13/17	20
SunPort Solar	NationalSolar	3838 Newcomb Rd Jacksonville, FL 32218	5 MW	Q4 2018	20
Blair Rd Solar	Hecate	1908 Blair Road, Jacksonville, FL 32221	4 MW	01/23/18	20
Simmons Rd Solar	InmanSolar	11300 Simmons Rd, Jacksonville, FL 32218	2 MW	01/17/18	20
Starratt Rd Solar	InmanSolar	14120 Webb Rd, Jacksonville, FL 32218	5 MW	12/20/17	20
Old Kings Solar	Mirasol	8321 Old Kings Rd. Jacksonville, FL 32219	1 MW	Q3 2018	20

JEA Electric Sales

Revised to show 10 year projection – May 2018

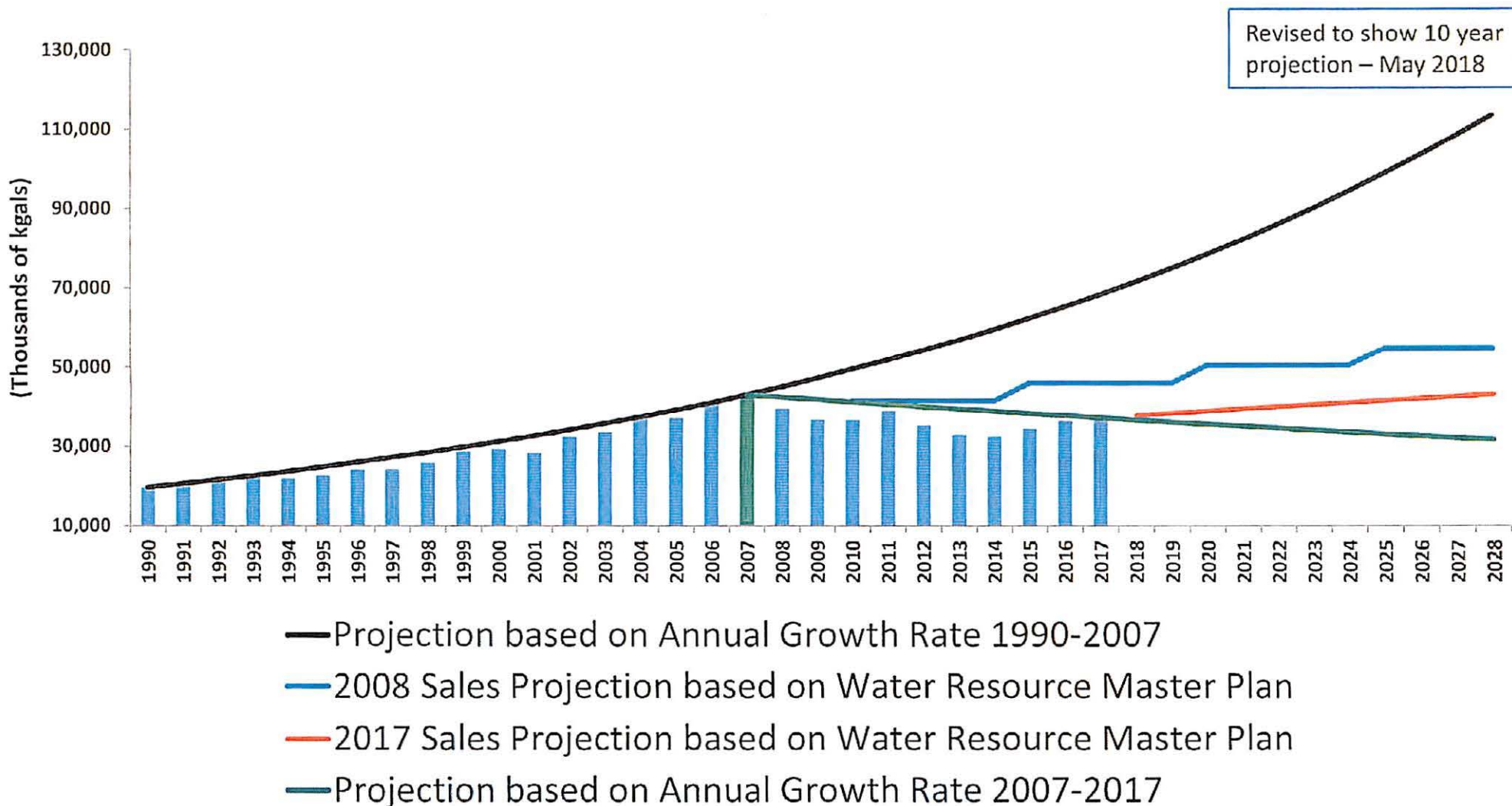


- Projection based on Annual Growth Rate 1979-2006
- 2006 Sales Projection (IRP-Based)
- 2017 Sales Projection (TSP-Based)
- Projection Based on Annual Growth Rate 2006-2017



IRP = Integrated Resource Plan
TSP = Ten Year Site Plan

JEA Water Sales



Report of the Special Committee on the Future of JEA - Exhibits & Appendices

Council Auditor's Office Budgeted JEA Contributions and Millage Rate History

FISCAL YEAR	MILLAGE FOR ELECTRIC (Per Ordinances)	MILLAGE FOR WATER (Per Ordinances)	BUDGETED ELECTRIC CITY CONTRIBUTIONS (Budget Ordinances)	BUDGETED WATER CITY CONTRIBUTIONS (Budget Ordinances)	TOTAL CONTRIBUTIONS	DOLLAR AMOUNT CHANGE
Per JEA's Charter, from FY 1988/89 through FY 1977/78, JEA was required to contribute annually to the City of Jacksonville, a percentage not to exceed 30% of defined gross revenues.						
1978/79 ¹	4.50	N/A	25,731,850		25,731,850	
1979/80	4.50	N/A	26,259,521		26,259,521	527,671
1980/81	4.50	N/A	25,430,587		25,430,587	(828,934)
1981/82	4.50	N/A	25,907,300		25,907,300	476,713
1982/83	4.50	N/A	25,803,338		25,803,338	(103,962)
1983/84 ²	4.76	N/A	27,819,985		27,819,985	2,016,647
1984/85	4.76	N/A	28,884,837		28,884,837	1,064,852
1985/86	4.76	N/A	29,457,186		29,457,186	572,349
1986/87	4.76	N/A	31,124,554		31,124,554	1,667,368
1987/88	4.76	N/A	33,778,052		33,778,052	2,653,498
1988/89 ³	5.00	N/A	37,490,966		37,490,966	3,712,914
1989/90	5.00	N/A	37,759,359		37,759,359	268,393
1990/91	5.00	N/A	40,063,483		40,063,483	2,304,124
1991/92	5.00	N/A	41,529,616		41,529,616	1,466,133
1992/93	5.00	N/A	42,323,106		42,323,106	793,490
1993/94 ⁴	5.25	N/A	43,261,617		43,261,617	938,511
1994/95	5.25	N/A	48,570,887		48,570,887	5,309,270
1995/96	5.25	N/A	48,798,841		48,798,841	227,954
1996/97 ⁵	5.25	1.75	52,800,571	3,035,682	55,836,253	7,037,412
1997/98 ⁶	5.25	1.75	52,039,278	9,528,923	61,568,201	5,731,948
1998/99 ⁶	5.50	1.75	57,056,117	9,437,643	66,493,760	4,925,559
1999/2000	5.50	1.75	60,898,145	10,536,135	71,434,280	4,940,520
2000/2001	5.50	1.75	62,589,668	11,048,610	73,638,278	2,203,998
2001/2002	5.50	1.75	65,489,556	11,116,676	76,606,232	2,967,954
2002/2003	5.50	1.75	67,039,278	11,456,781	78,496,059	1,889,827
2003/2004 ⁷	5.513	2.149	70,039,278	13,148,260	83,187,538	4,691,479
2004/2005	5.513	2.149	68,676,620	17,260,918	85,937,538	2,750,000
2005/2006	5.513	2.149	71,030,754	17,656,784	88,687,538	2,750,000
2006/2007	5.513	2.149	73,100,458	18,337,080	91,437,538	2,750,000
2007/2008	5.513	2.149	73,846,762	20,340,776	94,187,538	2,750,000
2008/2009 ⁸	5.513	2.149	76,094,120	20,593,418	96,687,538	2,500,000
2009/2010	5.513	2.149	79,007,260	20,180,278	99,187,538	2,500,000
2010/2011	5.513	2.149	81,921,684	19,765,854	101,687,538	2,500,000
2011/2012	5.513	2.149	83,037,710	21,149,828	104,187,538	2,500,000
2012/2013	5.513	2.149	83,969,075	22,718,463	106,687,538	2,500,000
2013/2014	5.513	2.149	87,318,021	21,869,517	109,187,538	2,500,000
2014/2015	5.513	2.149	90,108,598	21,578,940	111,687,538	2,500,000
2015/2016	5.513	2.149	91,720,182	22,467,356	114,187,538	2,500,000
2016/2017 ⁹	7.468	389.200	92,270,692	23,552,258	115,822,950	1,635,412
2017/2018	7.468	389.200	91,471,795	25,148,020	116,619,815	796,865
TOTALS			\$ 2,251,520,707	\$ 371,928,200	\$ 2,623,448,907	

Footnotes:

- 1 - Ord 78-351-185 Amended Ch. 128 of the Ord Code and set the JEA calculation rate at 4.50 mills multiplied by the gross kilowatt hours sold by the authority during the 12 month period ending on May 31 of the current fiscal year.
- 2 - Ord 83-591-400 Repealed the 1970 Ordinance Code and included with this legislation was the increase of the JEA contribution from 4.50 mills to 4.76 mills multiplied by the gross kilowatt hours sold by the authority during the 12 month period ending on May 31 of the fiscal year.
- 3 - Ord 88-1081-532 Amended Section 106.202 of the Ordinance Code and increased the contribution calculation rate from 4.76 mills to 5.0 mills multiplied by the gross kilowatt hours sold by the authority during the 12 month period ending on May 31 of the fiscal year.
- 4 - Ord 93-82-1385 Amending, revising, repealing and renumbering Article 21, the JEA Charter. This Ordinance increased the contribution calculation from 5.0 mills to 5.25 mills multiplied by the gross kilowatt hours sold by the authority during the 12 month period ending on May 31 of the fiscal year.
- 5 - Ord 97-12-E and Ord 97-229-E Amended Article 21 (JEA Charter) by authorizing JEA to take over the Water and Sewer and setting the assessment calculation rate of 1.75 mills. The takeover occurred on June 1, 1997 and per the CAFR for the year ending September 30, 1997 the General Fund received the \$3,035,682.
- 6 - Ord 98-253-E Amended Article 21 (JEA Charter) and increased the assessment calculation from 5.25 mills to 5.50 mills multiplied by the gross kilowatt hours delivered or such amount, if necessary, which will reflect an increase on an annual basis of \$3,000,000 per year using the FY 1998 assessment as the base year for such additional amount. Also, as seen in the 1997/1998 FY line, there was a contribution of \$9,528,923 from JEA's assumption of the City's Water and Sewer System on June 1, 1997. This was also noted in the FY 1997/98 Budget Ordinance and the CAFR for the FY Ending September 30, 1998.
- 7 - Ord 2003-1320-E Amended Article 21 (JEA Charter) and increased the assessment calculation from 5.50 mills to 5.513 mills multiplied by gross kilowatt-hours delivered by JEA and also increased the water and sewer assessment from 1.75 mills to 2.149 mills multiplied by the number of cubic feet of potable water and cubic feet of sewer service excluding reclaimed water service provided to customers during the 12 month period ending on April 30th of the current fiscal year (the same with electric). Also, JEA was to pay the city each fiscal year from Fiscal Year 2004-2005 through Fiscal Year 2007-2008 an additional amount necessary to ensure a minimum annual increase of \$2,750,000.
- 8 - Ord 2007-1132-E Amended Article 21 (JEA Charter) by decreasing the minimum annual increase from \$2,750,000 to \$2,500,000
- 9 - Ord 2015-764-E Amended Article 21 (JEA Charter) by setting a new millage formula and a base level contribution that increases 1% each year for five years. The annual contribution is the greater of the millage calculation or the annual increase from the base level amount for the applicable year.

Report of the Special Committee on the Future of JEA - Exhibits & Appendices

CALCULATION OF JEA ELECTRIC CONTRIBUTION FOR FISCAL YEAR 2017-2018

	Total	Less Interchange	Net kWh
Month	kWh Sales (1)	kWh Sales (2)	Sales
May 2016	953,860,830	1,014,000	952,846,830
June	1,187,678,293	27,295,000	1,160,383,293
July	1,289,228,317	4,194,000	1,285,034,317
August	1,322,732,224	16,818,000	1,305,914,224
September	1,312,328,044	56,878,000	1,255,450,044
October	1,087,642,427	45,558,000	1,042,084,427
November	878,412,157	26,434,000	851,978,157
December	887,333,577	7,449,000	879,884,577
January 2017	957,813,362	11,339,000	946,474,362
February	815,852,726	5,813,000	810,039,726
March	863,809,753	5,719,000	858,090,753
April	918,433,823	18,115,000	900,318,823
Totals	12,475,125,533	226,626,000	12,248,499,533
		(3)	0.007468
			<u>\$ 91,471,795</u>

CITY WATER/SEWER CONTRIBUTION FORMULA FOR FISCAL YEAR 2017-2018

	Water Consumption	Sewer Consumption	Adjustments Total	Total Net Consumption
MONTH	kGals (1)	kGals (1)	kGals (2)	kGals
May 2016	3,307,729	2,167,549	(138,060)	5,337,218
June	3,663,119	2,379,591	(148,110)	5,894,600
July	3,696,744	2,371,763	(158,413)	5,910,094
August	3,781,184	2,376,493	(178,795)	5,978,883
September	3,653,920	2,339,033	(171,116)	5,821,838
October	3,131,673	2,095,904	(133,424)	5,094,153
November	3,063,516	2,023,264	(133,927)	4,952,853
December	3,281,733	2,199,082	(159,777)	5,321,038
January 2017	3,059,853	2,155,173	(121,653)	5,093,372
February	2,682,345	1,875,600	(123,646)	4,434,298
March	3,141,915	2,156,949	(143,492)	5,155,371
April	3,510,812	2,297,649	(187,533)	5,620,928
Totals	39,974,542	26,438,050	(1,797,945)	64,614,647
			(3)	<u>0.3892000</u>
				<u>\$ 25,148,020</u>

Notes:

- (1) kWh sales information is based on JEA's CMFTR124 monthly reports.
- (2) Interchange, the sale of electricity to other utilities, is not included in the contribution formula.
- (3) The current City contribution formula is based on multiplying 7.468 mills times total electric kWh sales less interchange sales for the twelve months (12) ending April 30th of each year.

Pursuant to Ordinance § 106.218, one quarter of a mill or \$3,062,125 has been dedicated to the JPA for port expansion.

Notes:

- (1) Consumption information taken from JEA's CMFTR124 monthly reports.
- (2) Total Adjustments include Summer Discount, Water Large (large industrial customer), Sewer LTD (wholesale sewer rate) and Water Reuse Consumption.
- (3) The current City contribution is based on multiplying 389.20 mills times total water/sewer kGal sales less reuse sales for the twelve (12) months ending April 30th of the prior year.

Report of the Special Committee on the Future of JEA - Exhibits & Appendices

JEA Contribution Calculation

A Millage Calculation

Electric	\$	91,471,795	78.44%
Water		25,148,020	21.56%
	\$	116,619,815	

B Floor (per Ordinance plus 1%)

FY 2015/16	\$	114,187,538	Base Year
FY 2016/17	\$	115,329,413	
FY 2017/18	\$	116,482,708	

Conclusion

The millage calculation of \$116,619,815 is greater than the minimum payment of \$116,482,708 therefore, the millage in the amount of \$116,619,815 is the JEA contribution for FY17/18.

Recommended Budget FY 17/18

Electric	\$	91,471,795	78.44%
Water		25,148,020	21.56%
	\$	116,619,815	

Notes:

A Calculated as 7.468 mills times gross kilowatt-hours delivered by JEA to users of electricity in JEA's service area (less interchange sales) plus the amount calculated by multiplying 389.20 mills by the number of kGals (1,000 gallons) of potable water and sewer service (excluding reclaimed water sales) provided to consumers during the twelve (12) month period ending April 30th of the previous year.

B Notwithstanding the contribution cap calculated in Part A above, JEA shall pay the City each fiscal year, from 2016/2017 through 2020/2021, an additional amount if necessary, to ensure a minimum annual increase of 1% using the fiscal year 2015-2016 combined assessment of \$114,187,538 as the base year.

Although the annual transfer of available revenue from JEA to the City is based upon formulas that are applied specifically to the respective utility systems operated by JEA, JEA's Charter allows it to utilize any of its revenues regardless of source to satisfy its total annual obligation to the City.

JEA's Charter does not currently require a contribution from the District Energy System (Chilled Water).

Council Auditor's Office
JEA Payment Information
FY 2009 - 2018

Description	FY 2018 *	FY 2017	FY 2016	FY 2015	FY 2014
Contribution to General Fund from JEA	\$ 116,619,815	\$ 115,822,950	\$ 114,187,538	\$ 111,687,538	\$ 109,187,538
City Franchise Fee collected by JEA	38,765,323	38,244,055	39,202,965	39,599,067	39,018,021
City Utility Service Tax collected by JEA	89,245,441	86,667,471	87,289,621	84,546,762	83,275,603
Total	\$ 244,630,579	\$ 240,734,475	\$ 240,680,123	\$ 235,833,367	\$ 231,481,162

Description	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
Contribution to General Fund from JEA	\$ 106,687,538	\$ 104,187,538	\$ 101,687,540	\$ 99,187,528	\$ 96,687,546
City Franchise Fee collected by JEA	37,603,803	39,320,997	41,743,481	38,490,955	37,541,551
City Utility Service Tax collected by JEA	81,631,385	80,784,137	85,125,451	80,369,088	70,727,230
Total	\$ 225,922,726	\$ 224,292,672	\$ 228,556,472	\$ 218,047,571	\$ 204,956,327

* FY 2018 numbers are projections from the Budget Office's 12/31/17 quarterly summary that are reasonable.

Report of the Special Committee on the Future of JEA - Exhibits & Appendices

JEA REAL & TPP VALUES 2018 as of 4-9-18

2018	Just Values	Taxable Values	2017 Total Mills GS Dist	2017 City Mills GS Dist	Est Tax Total	Est Tax City
Real	\$432,416,183	\$0	0.0182313	0.0114419		
TPP	\$6,324,505,586	\$0				
Total	\$6,756,921,769	\$0			\$123,187,468	\$77,312,023

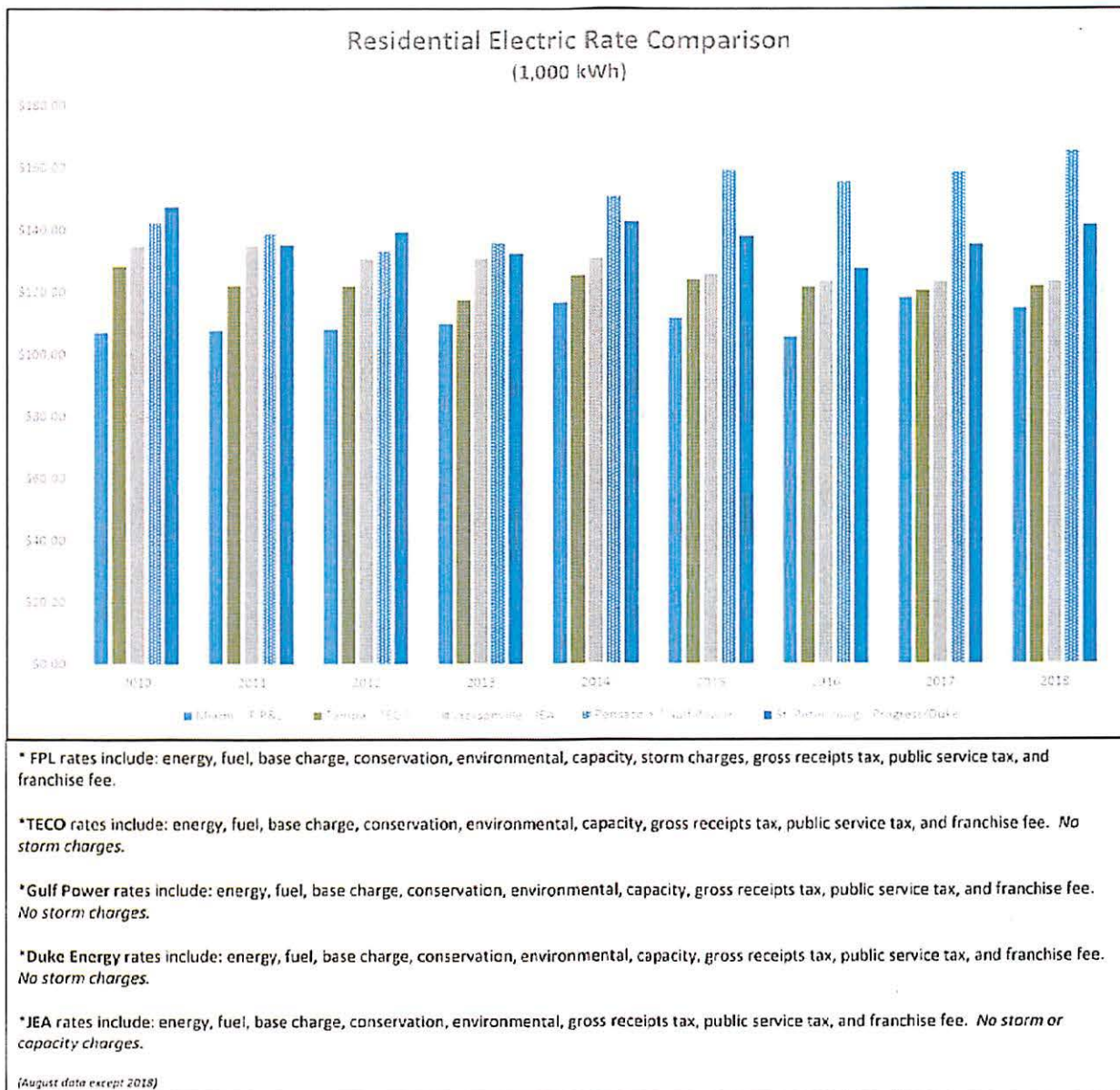
Totals	Just Values	Taxable Values
	\$6,756,921,769	\$0

Est Tax Total	Est Tax City
\$123,187,467.85	\$77,312,023.19

Report of the Special Committee on the Future of JEA - Exhibits & Appendices

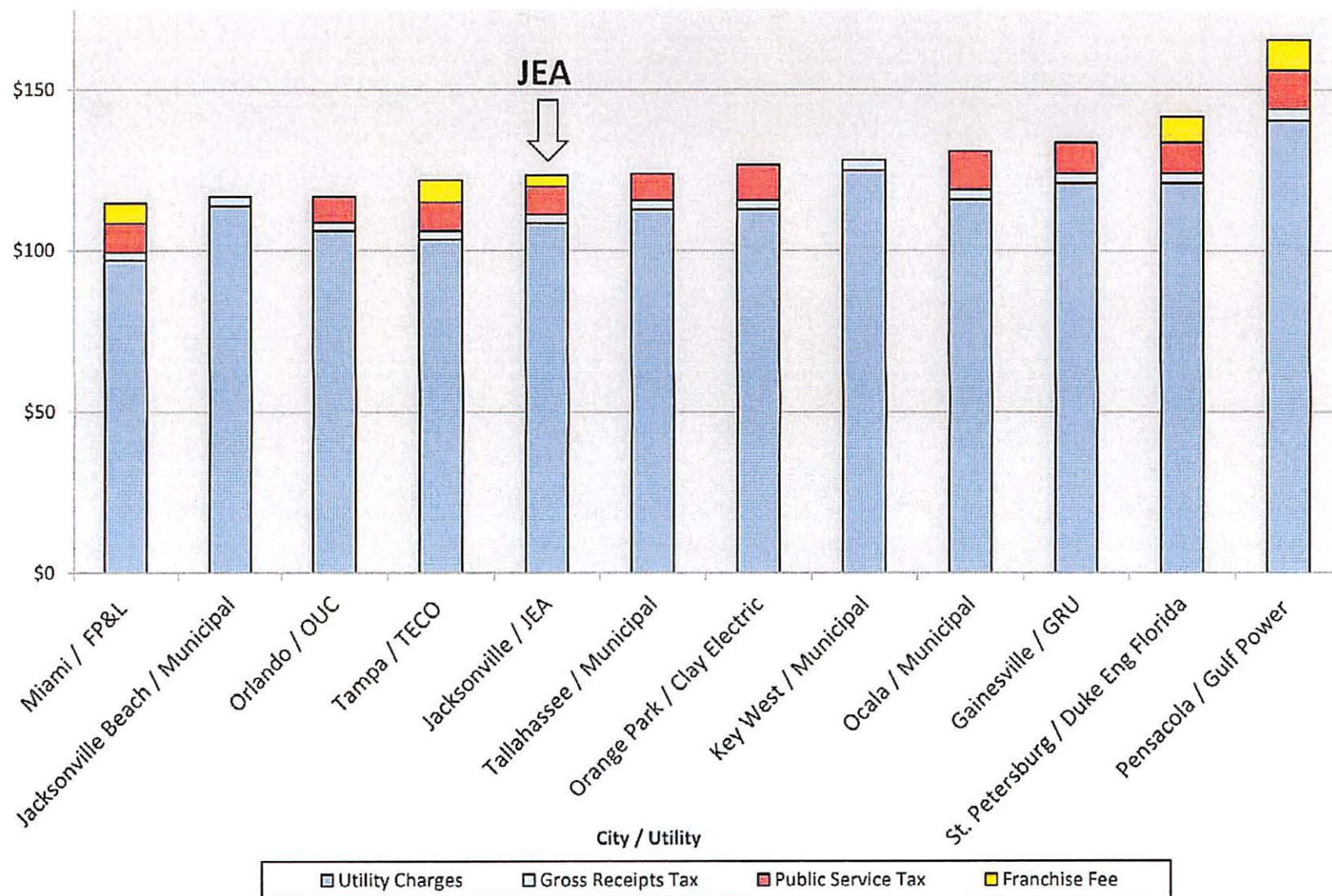
Revised Residential Electric Rate Comparison to reflect 1,000 kWh across all years

	2010	2011	2012	2013	2014	2015	2016	2017	2018	'10 - '18 Variance
Miami / F P&L	\$107.31	\$107.89	\$108.25	\$110.01	\$116.85	\$111.70	\$105.72	\$118.34	\$114.77	7%
Tampa / TECO	\$128.50	\$122.11	\$122.01	\$117.43	\$125.41	\$124.13	\$121.68	\$120.60	\$121.98	-5%
Jacksonville / JEA	\$134.91	\$135.01	\$130.90	\$130.90	\$130.90	\$125.91	\$123.63	\$123.34	\$123.34	-9%
Pensacola / Gulf Power	\$142.56	\$139.08	\$133.44	\$135.95	\$150.93	\$159.30	\$155.65	\$158.56	\$165.37	16%
St. Petersburg / Progress/Duke	\$147.53	\$135.39	\$139.49	\$132.62	\$142.74	\$138.16	\$127.71	\$135.38	\$141.65	-4%



Florida Utilities Monthly Residential Electric Bill Comparison

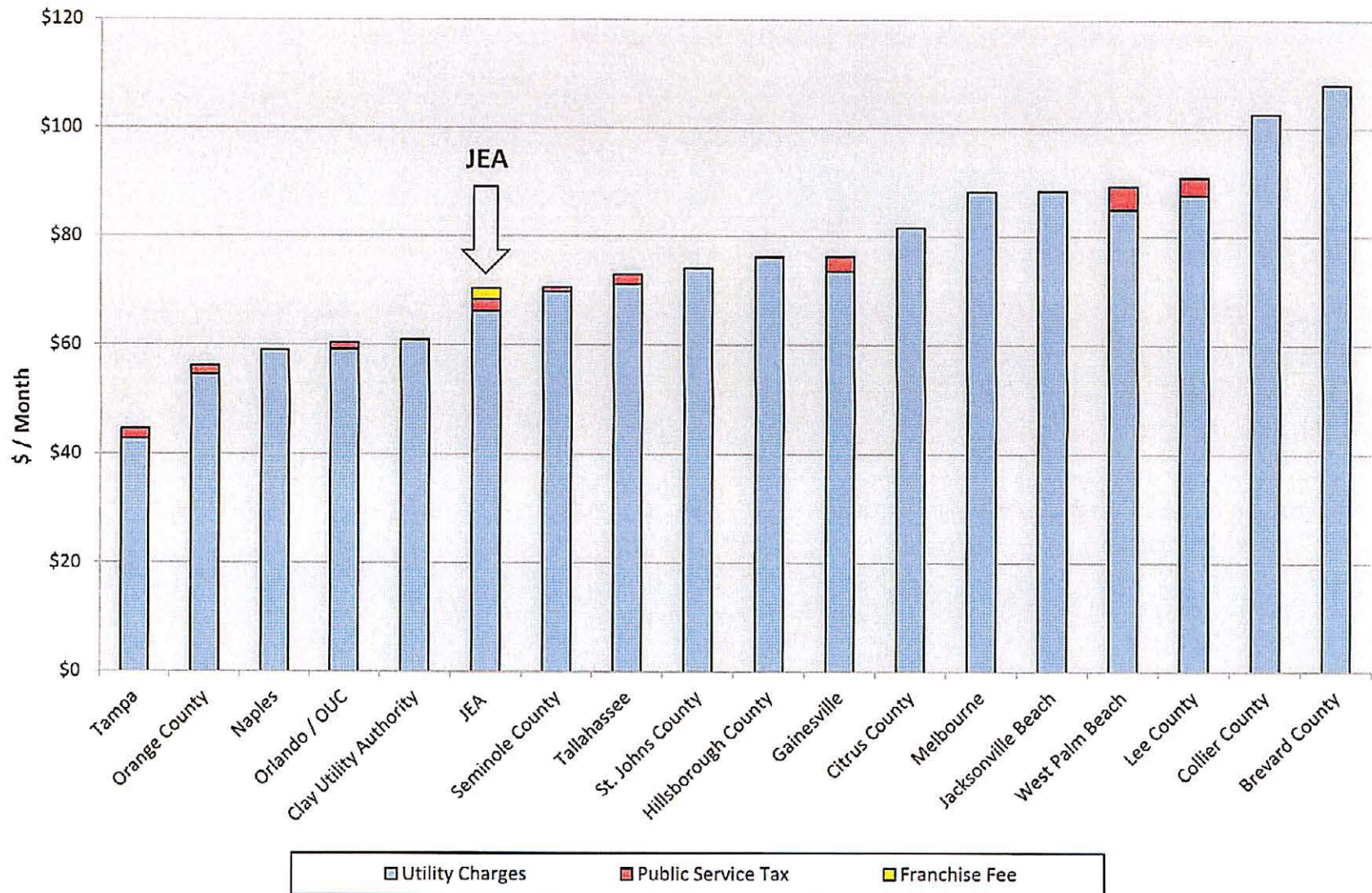
(Consumption @ 1,000 kWh)
Residential Rates as of April 2018



*FPL bill includes \$1.38/MWh storm charge and Duke bill includes a \$2.54/MWh storm charge in this comparison. The other utilities in this comparison do not currently assess storm charge in their bills. (1MWh=1000kWh)

Water & Sewer Rates in Florida

Residential Service with a 5/8" meter and 6 kgals of Consumption
Residential Rates as of April 2018



JEA New Revenue Task Force – Potential Business Plan List 6/02/15

Title	Description	Status
<u>Timber Harvesting</u>	Manage 4000+ acres by cutting plantation pines; use ongoing BMP and reforestation. Timber harvesting in progress.	<u>Business Plan Implemented.</u> High Revenue expected FY15 – FY16.
<u>Transmission Operator (TOP)</u>	JEA has certified operators and complies with NERC. JEA can register/accept NERC Compliance Responsibility for another utility. Six potential customers within Florida.	<u>Business Plan Implemented.</u> High Potential Revenue. No utilities have contracted for this service.
<u>Dark Fiber Leasing</u>	JEA has offered this in the past; formalize process and expand to include wireless and telecommunication companies. Begin leasing available fiber within JEA's easement rights.	<u>Business Plan 100% Complete.</u> Marketing to target four new customers in FY15. Potential High Revenue.
<u>Solar "Garden"</u>	Photovoltaic (PV) utility sized solar generated electricity; offers customers a solar energy option. (implementation expected by December 2016)	<u>Business Plan 100% Complete.</u> Revenue TBD. Selecting Solar Offering Options through Market Research.
<u>Natural Gas Sales - Marketing</u>	JEA is the largest importer/user in NE FL. Become provider of natural gas to commercial and industrial customers through TEC's Natural Gas Choice program.	<u>Business Plan Implemented.</u> High Revenue expected to begin in FY16.
<u>Security Services: Physical, Consulting, Maintenance</u>	Provide consulting services to local clients that need physical security services and security equipment maintenance services.	<u>Business Plan 100% Complete.</u> Low Revenue. Benefit includes lowering JEA's contract unit pricing (cost reduction).
<u>Security Physical Compliance (CIP) Service</u>	JEA Security personnel to provide CIP-014 "Third Party Reviewer" service. Combined with Security Services Business Plan.	<u>Business Plan 100% Complete.</u> Target customers once CIP rule is implemented. Low Revenue.
<u>Transmission & Distribution Services</u>	JEA to provide transmission and distribution (T&D) maintenance services (using JEAs skilled electric staffing) to Florida municipalities to enhance their delivery system to their customers (infrared, substations, inspections, breakers, etc.).	<u>Business Plan 100% Complete.</u> Target NE Florida Utilities. Business has potential to grow from low revenue to high revenue.
<u>Distributed Generation (DG) – Various Project Ideas</u>	Renewables, fuel cells, micro-turbines, "concession" utility services are being considered by DG Council.	Business Cases being developed by DG Council. Mitigates loss of electric sales.

Process: (1) Submit New Idea; (2) Research Idea; (3) Risk & Revenue Rating; (4) Business Case (Scope); (5) Business Plan/Detailed Study; (5) Implementation by assigned project manager.

Low Revenue is typically less than \$100,000 per year; however, a Low Risk ranking may allow project to be considered on a case by case basis.

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MEMORANDUM

TO: The Honorable Council Member John Crescimbeni

CC: Jody Brooks, Chief Legal Officer, JEA

FROM: Jason Gabriel, General Counsel
Gayle Petrie, Chief Financial Officer, OGC

RE: Section 21.04 of the Charter of JEA; Transfer of Any Function or Operation Which Comprises More Than 10% of the Total of the Utility System

DATE: February 20, 2018

In response to the two questions raised in your February 14, 2018 email regarding JEA, I am pleased to provide the following information.

Question 1: What is the definition of more than 10%?

More than 10% refers to the assets of JEA as listed on its financial statements (\$8.70 billion at 9/30/17, less approximately \$500 million of cash and investments, equals approximately \$8.2 billion of assets in the utility system at 9/30/17). As a governmental unit, JEA as an entity could not be sold to a purchaser and, consequently, one must conclude the reference in Section 21.04 is a reference to assets and not net worth. The determination would be performed by the JEA Board based on its financial statement numbers. Accordingly, JEA could currently sell up to approximately \$820 million of assets without City Council approval. Geographic area and/or customer base concepts do not apply in the context of a sale or lease so the concept of a “transfer of any function or operation” would be a sale or lease of utility assets up to the 10% limit.

Question 2: Does anything in the JEA Charter prevent several installment sales of 10% or less over time (e.g. quarterly)?

The JEA Charter provides for a 10% basket on asset sales that does not require City Council approval. Once that basket is utilized (whether through five sales of 2% or two sales of 5%, or any other combination that equals 10% in the aggregate), any further sales would require City Council approval.

GC-#1189833-V1-Crescimbeni_Memo_Re_Charter_Section_21_04_

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MEMORANDUM

TO: The Honorable Council Member John Crescimbeni

CC: Jody Brooks, Chief Legal Officer, JEA

FROM: Jason Gabriel, General Counsel
Gayle Petrie, Chief Financial Officer, OGC

RE: Potential Plan for Underground Utility Lines

DATE: March 12, 2018

In response to the question raised in your February 22, 2018 email regarding JEA, I am pleased to provide the following information.

Question: Could the City Council bind JEA to develop (and implement) a long term plan for undergrounding remaining overhead utility lines?

Answer: Yes. The City Council could bind the JEA to develop a long term plan for undergrounding remaining overhead utility lines. The procedure to create such a binding obligation would be to amend the JEA Article in the Charter. Section 21.04, Powers, or Section 21.07, Fiscal and Budgetary Functions, would appear to be the most appropriate sections to consider for an amendment to include the long term undergrounding plan. Such an obligation would have a financial impact with respect to the bond ratings of JEA, as well as a financial impact on rates charged to JEA Customers, and would require a thorough financial evaluation by both JEA and the City. A JEA charter amendment would be governed by section 21.11 of the JEA charter, which provides for a two-thirds vote by City Council (and a four-fifths vote if a proposed amendment is disapproved by the Mayor).

GC-#1192920

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MEMORANDUM

TO: The Honorable Council Member John Crescimbeni
Chair, Special Committee on the Potential Sale of JEA

FROM: Office of General Counsel

RE: Council Authority regarding Administering Oaths and Subpoena Power

DATE: March 14, 2018

I. Background and Scope

The Council President has established the Special Committee on the Potential Sale of JEA. In the initial meeting questions arose as to the power of the Committee to administer oaths to those appearing at the meeting, or if necessary to subpoena employees. The brief answer is that the Committee has the authority to administer oaths or issue subpoenas, so long as it follows Charter and Ordinance Code procedures for administering such oaths or issuing such subpoenas. This power is not without limits. The inquiry must be: (1) within the Council President's directive (and purpose) to the Committee, and (2) within the scope of inquiry permitted for the legislative branch.

Administering oaths and issuing subpoenas, particularly to employees and officers is a power which the Council has very rarely used in the past for policy related matters. In that vein such a power should be thoughtfully utilized and judiciously exercised. It is intended to be invoked within the legislative body's "investigative" role (much like a Senate Committee at the federal level) with a specified scope that is commensurate with the identified purpose. The power of administering an oath is usually reserved for purposes of obtaining or preserving evidence for potential judicial proceedings. For example, administering an oath to witnesses is routinely used in quasi-judicial hearings such as appeals of orders from the Planning Commission to the City Council, or in zoning matters that are before either body.

The boundary of inquiry is marked by the boundary of the power to legislate. The City Council does not possess the power of making inquiry into the private affairs of the witness; the inquiry ends where the jurisdiction of the body ends.

Since Consolidation (for almost 50 years) employees and officers have attended hundreds of Council or Committee meetings on their own prerogative or at the request of Council Members. Since issuing a subpoena suggests that the only way to compel testimony or provide documents is through force, such power should be reserved as a last resort, used only when requests for information or attendance have been declined or neglected. To do otherwise may create questions in any judicial proceeding instituted to enforce the subpoena.

The Committee need not issue a subpoena in order to administer an oath to any witness and may, as it has done for almost 50 years, rely on the integrity and good faith of its officers and employees. In this context, the administration of an oath very well may be perceived as a strong statement of distrust. While perhaps intended to elicit the free flow of factual evidence, administering an oath may very well have the opposite effect and in fact stymie witness testimony or information because it will almost certainly encourage witnesses to be extremely cautious, or seek legal counsel as to what they may say, fearing that any word or utterance might cost their freedom with the potential penalties of imprisonment and fines hanging in the backdrop.

II. Issue Presented

What are the processes for issuing and enforcing a subpoena?

III. Short Answer

Subpoenas may be issued by the Council or standing or special committee of the Council. Rule 2.208. The Council Rules provide that the issuance of the subpoena be in accordance with the provisions of Chapter 134, *Ordinance Code*. However, neither the Ordinance Code nor the Council Rules allow for one individual Council Member to issue subpoenas.

First, the Committee must vote to issue a subpoena. The Council Secretary then issues the subpoena (drafted by the Office of General Counsel) to be served by the Sheriff on the witness. If the witness refuses to appear, the Committee may request the Council to re-subpoena the witness through order of the Council. If the witness again refuses to appear, the Council may request the State Attorney to impose penalties against the witness.

IV. Discussion

Introduction

Section 5.09, Charter, grants power to the Council and its committees to administer oaths and issue subpoenas. This Section also provides for penalties, authorized by Council but not a committee, for refusal to comply with “lawful order[s].” Council Rules and the Ordinance Code contain provisions that implement Section 5.09. The Charter limits penalties to refusal to comply with “lawful order[s]” of the Council.

Process for Administering the Oath

The Council or its authorized committee may request that a witness take an oath before testifying. When a witness is under oath, the witness is subject to potential penalties of perjury, which is, in this context, a Class D misdemeanor per Section 134.106, *Ordinance Code*. Any answer given must be truthful and as such should be thoughtfully conditioned. If an accurate answer is not readily known right then, the witness should notify the questioner. When in doubt, an “I don’t know” or “I cannot recall” would be appropriate.

Process for Issuing Subpoenas

As a precondition to the exercise of the power, Council Rule 2.208 requires that the issuance of the subpoena and the nature of the inquiry must be within and in furtherance of carrying out the duties assigned to the committee by the Council Rules, the Council or the President. Pursuant to §134.101, *Ordinance Code*, upon majority vote of the City Council or standing or special committee, the Council Secretary shall issue the subpoena to compel attendance before Council or a standing or special committee. The notice requires service of the subpoena seven days in advance of the meeting unless a shorter time is established by majority vote of Council. Accompanying the subpoena shall be a general statement informing the individual of the subject matter of the inquiry. Additionally, notice shall be provided to the individual that he/she has the right to bring the counsel of his/ her choice with him.

Enforcement

Section 134.108, *Ordinance Code*, governs the process of enforcement of a lawful committee order to answer a particular question or refusal to produce documents pursuant to a subpoena *duces tecum*. Given that Section 5.09, Charter, only authorizes punishment for violation of a Council order and given that the Council has not created procedures specific to refusal to comply with a subpoena nor procedures specific to refusal to take an oath, the Council and the committee should follow the same procedures for enforcement of such orders.

If a witness refuses to: (i) comply with a subpoena, (ii) comply with an order to take an oath, or (iii) comply with an order to answer a particular question, the committee chair, upon vote of the committee shall report the refusal to the Council. A resolution attaching a City Council order which provides instruction to the witness shall be introduced to the City Council. Upon enactment of the legislation, the order shall be served upon the witness in accordance with Section 134.103, *Ordinance Code*.

If the witness refuses to comply with the Council’s order, the Council may request that the State Attorney charge the disobedient witness with a misdemeanor under Section 5.09 of the Charter.

The State Attorney has absolute discretion to decide whether or not to prosecute any contempt of Council violations.

Penalties

On the other hand, given that penalties under Section 5.09 of the Charter include fines up to \$1000 and imprisonment of up to 60 days, separation of powers concerns, as well as statutory construction that penal laws be narrowly construed, the Charter should be interpreted no broader than its plain language. Under Section 5.09 of the Charter, penalties are imposed by Council action, not action by committees.

Limits to Subpoena Power.

The United States Supreme Court has recognized the right of legislative bodies to issue subpoenas. In a case concerning the investigative power of the Florida Legislature, the Court held:

[T]his Court's prior holdings demonstrate that there can be no question that the State has power adequately to inform itself—through legislative investigation, if it so desires—in order to act and protect its legitimate and vital interests. As this Court said in considering the propriety of the congressional inquiry challenged in *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273: 'The power * * * to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them.' 354 U.S., at 187, 77 S.Ct., at 1179. And, more recently, it was declared that 'The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.' *Barenblatt v. United States*, 360 U.S. 109, 111, 79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115. It is no less obvious, however, that the legislative power to investigate, broad as it may be, is not without limit.

Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544–45, 83 S. Ct. 889, 893, 9 L. Ed. 2d 929 (1963). The Florida Supreme Court recently upheld the subpoena power of local governments. *D'Agostino v. City of Miami*, 220 So. 3d 410 (Fla. 2017).

While recognizing the power to investigate, the Supreme Court has noted that such power is not unlimited, cautioning more than once that a committee's subpoena power is limited to its charge. In *Watkins v. United States*, Chief Justice Warren cautioned that "[b]roadly drafted and loosely worded . . . resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent house of Congress." *Watkins v. United States*, (354 U.S. 178 (1957)). In *Gojack v. United States*, the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the inquiry and neither had the full committee specified the area of inquiry. *Gojack v. United States*, (384 US 384 U.S. 702 (1966)).

Separation of powers concerns also provide broad limits to legislative inquiry. The Office of Legal Counsel, in the United States Justice Department, has applied separation of powers principals to subpoena power:

The constitutional role of Congress is to adopt general legislation that will be implemented “executed” by the Executive Branch. “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The courts have recognized that this general legislative interest gives Congress broad rein to investigate. Both Houses of Congress have broad power, “through their own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.” *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927). The issuance of subpoenas in aid of this function “has long been held to be a legitimate use by Congress of its power to investigate,” *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), provided that the investigation is “related to, and in furtherance of, a legitimate task of the Congress.” *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See also*, *McGrain v. Daugherty*, 273 U.S. at 177 (inquiry must pertain to a subject “on which legislation could be had”). This sphere of legitimate legislative activity “is as penetrating and far reaching as the potential power to enact and appropriate under the Constitution.” *Barenblatt v. United States*, 360 U.S. 109, 111 (1959). *See also*, *Watkins v. United States*, 354 U.S. at 187. The power of investigation can be delegated by either House of Congress to committees, subcommittees, or even individual legislators, *see*, *Eastland v. United States Servicemen's Fund*, 421 U.S. at 505; *Watkins v. United States*, 354 U.S. at 200-01, as long as “the instructions to an *74 investigating committee spell out that group's jurisdiction and purpose with sufficient particularity.” *Id.* at 201. The scope of judicial inquiry on these matters is narrow, and ““should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.”” *Eastland v. United States Servicemen's Fund*, 421 U.S. at 506, (quoting *Tenny v. Brandhove*, 341 U.S. 367, 378 (1951)).

Nonetheless, the investigative power of Congress is not unlimited. Congress cannot, for example, inquire into matters “which are within the exclusive province of one of the other branches of Government Neither can it supplant the Executive in what exclusively belongs to the Executive.” *Barenblatt v. United States*, 360 U.S. at 111; *see also* *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1881) (Congress cannot exercise judicial authority). Congress must be able to articulate a legitimate legislative purpose for its inquiry; if Congress lacks constitutional authority to legislate on the subject (or to authorize and appropriate funds), arguably Congress has no jurisdiction to inquire into the matter. . . .

Response to Cong. Requests for Info. Regarding Decisions Made Under the Indep. Counsel Act, 10 U.S. Op. Off. Legal Counsel 68, 73–74 (1986)

Consequently, the Council’s subpoena power must be interpreted in light of Article 4 of the Charter. This Article enshrines separation of powers in the Consolidated Government. The

Supreme Court of Nevada has explained the importance of separation of powers as follows: “This court has recognized that separation of powers is probably the most important single principle of government.” *Commission on Ethics v. Hardy*, 125 Nev. 285, 125 Nev. 1027, 212 P.3d 1098 (2009) (internal quotation omitted). A Louisiana appellate court explained the significance of separation of powers with regard to municipal government as follows: “This separation of powers provided for in the city charter is designed to ensure an orderly process in the operations of the city government.” *Plaisance v. Davis*, 868 So. 2d 711 (La.App. 1 Cir.2003), *writ denied*, 867 So.2d 699 (La. 2004). Separation of Powers prohibits the Council from investigations outside its sphere, i.e., adopting ordinances (1) creating public policy and (2) appropriating money. Likewise, Separation of Powers prohibits the Council from engaging in or interfering with the day to day operations of the executive branch.

This memorandum need not reach a conclusion as to the authority of the Council to itself engage in contract negotiations. Little doubt exists, however, that “[n]either the city council, nor its members, can mandate their participation in negotiations conducted by the mayor and employees under the mayor’s supervision.” Mississippi Attorney General Opinion 2012-00013, 2012 WL 679170, at *2 (Miss. A.G. Jan. 27, 2012). And while the Mayor may, or perhaps even should keep Council Members apprised of negotiations (being ever cognizant to avoid a violation of the Sunshine Law), “the mayor has the authority to recommend a contract for approval by the city council without interference, or input, from the city council.” Mississippi Attorney General Opinion 2016-00078, 2016 WL 1566504, at *2 (Miss. A.G. Mar. 18, 2016). In other words, the Mayor has independent authority to negotiate or discuss any contract.

As the Committee proceeds, it should bear in mind these separation of powers issues.

V. Conclusion

The Charter and Ordinance Code allow the Council to investigate any matter over which it has legislative authority. In doing so, the Council may use both subpoenas and oaths. Please let me know if you have any other questions.

GC-#1196417

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LEGAL MEMORANDUM

TO: The Honorable Council Member John Crescimbeni
CC: Jason Gabriel, General Counsel
FROM: Stephen M. Durden, Chief Assistant
RE: City Council Process for Approving Potential JEA Sale
DATE: June 26, 2018

I. Introduction.

In the past few months, the discussion surrounding the idea that JEA might one day be sold, spawned a vast number of questions concerning (1) the process of selling JEA and (2) potential terms of sale.

In your email of April 8, 2018, to the General Counsel you posed a question about the potential sale of JEA, as follows:

Article 21 of the Charter clearly creates and governs JEA.

More specifically, Article 21.04(p) restricts JEA from transferring any function or operation which comprises more than ten percent of the total utilities system by sale, lease or otherwise to any public utility, public or private without approval of the Council.

Furthermore, Article 21.11 requires a two-thirds vote of the Council to amend or repeal any portion of Article 21.

With respect to the above, I am requesting a legal opinion on whether a bundle of proposed ordinances to facilitate the outright and complete sale of JEA could be cleverly packaged to require a majority vote instead of a two-thirds vote? If so, how could the ordinances relating to the sale of JEA (which seems to only require a majority vote pursuant to Article 21.04(p)) not constitute a *de facto* change to the Charter (inasmuch as the sale would eliminate all assets of the JEA and thereby the ability – as well - of JEA to perform the duties detailed throughout Article 21)?

In order to respond to the questions asked, this memorandum will first respond to an unasked question the correct answer to which provides the answer to the questions asked.

II. Questions Presented.

(A) If JEA were to seek to sell 100% of the assets of JEA, must the Council approve by a majority vote or a supermajority vote of two-thirds of the Council?

(B) Whether a bundle of proposed ordinances to facilitate the outright and complete sale of JEA could be “cleverly packaged” to require a majority vote instead of a two-thirds vote.

(C) If so, how could the ordinances relating to the sale of JEA (which seems to only require a majority vote pursuant to Article 21.04(p)) not constitute a *de facto* change to the Charter (inasmuch as the sale would eliminate all assets of JEA and thereby the ability – as well - of JEA to perform the duties detailed throughout Article 21)?

III. Short Answers.

(A) If JEA were to seek to sell 100% of the assets of JEA, the Council would have to approve such a sale by a majority vote and not a supermajority vote of two-thirds of the Council. On the other hand, the terms of a potential sale and remaining responsibilities or duties of JEA after such a transaction could require an amendment to the Charter (and accordingly a two-thirds vote of the Council).

(B) While it might be that a bundle of proposed ordinances to facilitate the outright and complete sale of JEA could be “cleverly packaged,” whether cleverly packaged or not, the Council may approve the sale of 100% of JEA by a majority vote.

(C) The sale of 100% of the assets of JEA is not a *de facto* amendment to the Charter.

IV. Discussion.

As to Question (A), General Counsel Opinion 70-354 has already concluded that the City Council has the power to sell the assets of JEA. In reaching that conclusion the opinion noted that “the Charter of the former City of Jacksonville” contained “the following provision”:

The City shall not sell, lease or otherwise part with the control and management of the Water Works or Electric Light plant, but shall continue perpetually the maintenance, control and operation thereof in the interest of its citizens. (Sec. 5, Ch. 5347, Acts 1903).

The opinion went on to discuss the significance of the absence of such a provision in the Charter for the Consolidated Government:

That provision was not carried forward into the Act creating the Jacksonville Electric Authority. There was no reason to do so because no authority was given Jacksonville Electric Authority to sell or dispose of the public and municipal electric system. On the other hand, there was a reason for such a provision to be in the Charter of the former City, because the former City had general authority in its Charter to sell, lease or otherwise dispose of property of the City.

By the same token the City of Jacksonville also has general power to sell and dispose of property of the City. As set forth in *Section 3.01, Charter*:

The consolidated government:

(b) With respect to Duval County, except as expressly prohibited by the Constitution or general laws of the State of Florida, *may enact or adopt any legislation concerning any subject matter upon which the Legislature of Florida might act*; may enact or adopt any legislation that the council deems necessary and proper for the good government of the county or necessary for the health, safety, and welfare of the people; may exercise all governmental, corporate, and proprietary powers to enable the City of Jacksonville to conduct county and municipal functions, render county and municipal services and exercise all other powers of local self-government; all as authorized by the constitutional provisions mentioned in subsection (a) and by ss. 125.86(2), (7), and (8) and 166.021(1) and (3), Florida Statutes.

The Charter contains no language remotely similar to the language in the pre-Consolidation Jacksonville Charter. Nothing in the Charter appears to even suggest that the City must operate

the electric utility in perpetuity. Given that the prior Charter had such language and given the broad grant of power within *Section 3.01*, the City Council has the power to approve the sale of 100% of the assets of JEA, and such approval is not to be construed as an amendment to *Article 21*.

The City Council acts by majority vote, unless otherwise required by State Law or the Charter.¹ As further pointed out and oversimplified, the Charter (now *Article 21, Charter*) grants to JEA the authority to operate various utilities of the Consolidated Government, each of which was once owned by the Consolidated Government or the predecessor municipal corporation. Neither the Charter, in general, nor *Article 21*, in particular, requires the City to own any particular utility service. Instead, *Article 21*, requires that if the Consolidated Government has the utilities referenced in *Article 21*, then operation shall be by the JEA, without the direct political influence of the voters or elected officials. The Charter grants to the City Council power of the purse, the power to approve the budget of the JEA, not the power to control the day-to-day operations of JEA.

The foregoing discussion also answers Question (B). Clever packaging or not the City Council may approve the sale of all the assets of JEA by majority vote. *Article 21* creates and defines the independence of the agency. It does not in any way purport to limit the powers of the

¹ The various courts of the United States have long recognized the power of the majority of the quorum in legislative bodies. As explained by the United States Supreme Court more than 125 years ago:

The constitution provides that ‘a majority of each [house] shall constitute a quorum to do business.’ In other words, when a majority is present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and when that majority are present the power of the house arises.

United States v. Ballin, 144 U.S. 1, 5–6, 12 S. Ct. 507, 509, 36 L. Ed. 321 (1892). A decade ago, the Texas Attorney General explained the common law rule of legislative enactments:

In order to answer that question [of the validity of a rule requiring a super-majority vote], we must turn to the common law. In 1922, a Texas court stated the common-law rule:

The general rule is that, in the absence of an express provision to the contrary, a proposition is carried in a deliberative body by a majority of the legal votes cast.

Comm’rs Court of Limestone County v. Garrett, 236 S.W. 970, 973 (Tex. 1922) (footnote added). Thus, the general rule in this state is that a governmental body must conduct its business on the basis of a majority of a quorum of members present and voting. As a result, a governmental body may not adopt a rule that requires, in some instances, the vote of a “supermajority.”

Tex. Att’y Gen. Op. GA-0554 (2007). The Jacksonville Charter contains various supermajority requirements. Outside of those requirements, the Charter requires that the Council adopt legislation by majority vote of the quorum.

City Council. In sum, the City Council has the power to approve the sale of 100% of the assets of JEA by majority vote.

As for Question (C), the sale of 100 percent of JEA assets neither constitutes a *de facto* change to the Charter nor prohibits the ability of JEA to perform the duties detailed throughout Article 21. As noted above, “the specific purpose of [Article 21] is to repose in JEA all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, *in the future could be*, or could have been but for this article, exercised by the City of Jacksonville.” *Section 21.01, Charter* (emphasis added). *Section 21.04* expands upon those powers.

Section 21.01 contains at least three ideas significant to the answer of Question (C). First, *Section 21.01* contains permissive language, i.e., a grant of powers, not an imposition of duties. The *Charter* no more *requires* the JEA to operate an electric utility than it *requires* the JEA to operate a natural gas utility. If *Section 21.01* contained such requirements, then it might be argued that the sale of the electric utility assets would be a *de facto* modification of the *Charter*. By the same token, if *Section 21.01* contains a set of utility operation requirements, then JEA has operated in violation of the *Charter* from the day *Section 21.01* was amended to concern itself with operating a natural gas utility. Should JEA electric utility assets be sold, then the JEA will have the power to operate an electric utility, but no assets, a situation indistinguishable from JEA’s current natural gas utility situation, i.e., the power to operate, but no assets. *Cf. Pollock v. Fla. Dep’t of Highway Patrol*, 882 So. 2d 928, 934 (Fla. 2004) wherein the Florida Supreme Court recognized that a statute that “authorizes” an activity “does not establish a legal duty.” Finally, as noted above, the former charter required that the City operate an electric utility in perpetuity. Had the Legislature sought to re-impose such a duty, it could have done so.

Section 21.01 also references *future* activities. Upon sale of all assets of the JEA, the JEA could begin investigating future utility activities. One obvious example would be the creation of a natural gas utility. JEA may investigate returning to one of the sold utilities, but in a different form, such as household solar or wind electricity. The speculation need not continue; the point being that after the sale of JEA assets (assuming that were to occur) *Article 21* provides to JEA continuing authority and responsibility to operate the utilities referenced therein in the event the Council provided the funding to obtain the necessary assets.

Section 21.01 provides one other continuing effect after a sale. The City may not operate any of the utilities identified in that section. Should the City seek to operate a utility activity after the sale of the JEA assets, then the *Charter* requires JEA to operate such a utility.

Selling 100% of the assets, then, is not a *de facto* amendment to the *Charter*. Courts have held that privatization does not violate a charter or constitutional provision merely because of the inherent ramifications of privatization. For example, where a charter requires that employees of department of government be entitled to civil service protections, the charter is not violated when

that department is privatized despite the fact that employees for the private entity necessarily cannot have civil service protection. *See, e.g., Haub v. Montgomery County*, 353 Md. 448, 727 A.2d 369 (1999).

As a final note, the sale of JEA could very well create reasons to amend the Charter. For example, a contract for sale, might include a requirement that JEA hold funds in escrow to cover the costs of Plant Vogtle. The *Charter* does not currently permit JEA to act as a kind of escrow agent, consequently, the *Charter* would need to be amended to grant to JEA such power. The speculation could continue. As referenced above, a sale transaction may include provisions that require amendments to *Article 21* thereby creating the need for complying with the enactment requirements of *Section 21.11*.

V. Conclusion.

I hope this provides the guidance you seek. Please do not hesitate to contact me if you have further questions.

GC-#1212984

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**OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 630-1700**



MEMORANDUM

To: The Honorable Council Member John Crescimbeni
From: Gayle Petrie, Sr. Assistant General Counsel
Cc: Jason R. Gabriel, General Counsel
Re: JEA Retention Incentive Agreements
Date: June 26, 2018

I. Background

As requested, the Office of General Counsel has reviewed two of the JEA Retention Incentive Agreements regarding change of control that were entered into with 67 JEA employees (8 of which Agreements provided two times salary as a special payment for members of the senior leadership team and 59 of which Agreements provided one times salary as a special payment for members of the executive leadership team) to evaluate the provisions of the agreements and the manner in which they were created to determine if the agreements are valid agreements.

II. Question Presented

Does the executive director / CEO of JEA, or JEA Board Chair have the authority to enter into such Agreements?

III. Short Answer

No. First, any incentives agreement of this nature (assuming it contains provisions enforceable under Florida law) would require the approval of the entire JEA Board. Second, these agreements were not properly authorized and are not valid or enforceable against JEA with respect to a change of control event. Limited enforceability, as to a termination of employment event would in any event be limited to 20 weeks of compensation even if properly authorized.

IV. Discussion

With respect to change of control events, the payments provided for in these Agreements do not appear to be bonus or severance payments, as defined in F.S. 215.425, but instead are extra compensation prohibited under F.S. 215.425. In addition, the Agreements purport to provide CEO approved benefits to unclassified employees without proper approval by the JEA Board. Section 21.07(j) of the JEA Charter provides for unclassified employees to serve at the pleasure of JEA, and this means the JEA Board, not the CEO of JEA, would be the appropriate authority to authorize these types of agreements. In addition, Section 21.09(b) of the JEA Charter prohibits JEA employees from being a party to a contract that creates a liability of JEA. In other words, even if the Agreements provided bonuses or severance payments which are allowed by Florida Statutes, they must be approved by the JEA Board.

With respect to termination events that trigger extra compensation that constitutes severance payments, Section 215.425, Florida Statutes, limits such compensation provided for by contract to an amount not to exceed 20 weeks of compensation. Accordingly, even if the JEA Board authorized such contracts, compensation would be limited to 20 weeks.

In the opinion of the Office, these agreements are not valid or enforceable. As a final note, information currently available does not indicate that funding for these proposed agreements were included in the 17/18 JEA budget that was reviewed and approved by City Council.

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FEDERAL I.D. NO. 16-0764720

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JEA
21 West Church Street
14 FL.
Jacksonville, FL 32202

September 19, 2018
Invoice No. 10017773
Account: 059985
Terms: Due Upon Receipt

FOR PROFESSIONAL SERVICES RENDERED through August 31, 2018, including:

MATTER NO.: 000001

GENERAL – PRIVATIZATION MATTERS

For Professional Fees:

<u>Date</u>	<u>Timekeeper</u>	<u>Hours</u>	<u>Description of Services</u>
01/12/18	B. Rothchild	1.80	Discuss with J. Orfano and M. Dykes (JEA) need to review documentation to determine bond documentation requirements relating to possible JEA sale; review official statement and related documentation; discuss documentation requirements with E. Columbo and with M. Dykes.
01/12/18	M. Rapaport	1.00	Conference calls with JEA regarding privatization issues. Review regulations.
01/16/18	E. Columbo	1.20	Review Vogtle PPA for provisions relating to assignment of such contract; conference with M Dykes, J Orfano and B Rothchild to discuss findings and next steps; discuss other elements of privatization analysis.
01/17/18	B. Rothchild	1.80	Discuss with J. Orfano (JEA) need to review provisions in asset transfer agreement regarding representations, covenants and assignment provisions; review and discuss documentation with E. Columbo; discuss conclusions from review with J. Orfano.
01/17/18	E. Columbo	1.00	Review Asset Transfer Agreement for questions raised by J Orfano with respect to the privatization.
01/18/18	M. Rapaport	1.00	Review issues regarding privatization and Vogtle project.
01/19/18	M. Rapaport	0.50	Telephone call with Melissa regarding Vogtle.
01/23/18	M. Rapaport	1.00	Drafted summary of private use exceptions.
02/06/18	E. Columbo	1.50	Review Electric System resolution for defeasance and discharge provisions; review Vogtle PPA and the amendments for provisions as to payments obligations of JEA; conference with B Rothchild re same.

<u>Date</u>	<u>Timekeeper</u>	<u>Hours</u>	<u>Description of Services</u>
02/07/18	B. Rothchild	1.70	Discuss status of study reviewing possible sale of JEA with J. Orfano (JEA) and E. Columbo; review draft report from PFM regarding possible sale of JEA; discuss status of other matters with J. Orfano (JEA).
02/07/18	E. Columbo	2.20	Review ES Resolution; conference with B Rothchild; call with B Rothchild and R Wannemacher to discuss privatization report and schedule and Vogtle PPA provisions.
02/08/18	M. Rapaport	0.50	Telephone call with L. Columbo. E-mails regarding privatization.
02/09/18	B. Rothchild	1.10	Review draft report regarding possible sale of JEA and review related information.
02/10/18	M. Rapaport	1.00	Reviewed PFM report.
02/12/18	B. Rothchild	2.80	Discuss whether to post PFM Report regarding possible sale of JEA to EMMA with D. Deaton and with J. Orfano (JEA); review relevant documentation.
02/12/18	D. Deaton	1.30	Telephone calls with B. Rothchild.
02/13/18	B. Rothchild	1.90	Discuss questions regarding disclosure of PFM report relating to possible sale of JEA with J. Orfano (JEA) and D. Deaton; review documentation and draft narrative to be posted with PFM Report.
02/13/18	D. Deaton	1.30	Telephone calls with B. Rothchild. Work regarding disclosure.
02/13/18	M. Rapaport	0.30	Telephone call with B. Rothchild.
02/14/18	B. Rothchild	5.30	Review, modify, distribute draft of narrative language relating to PFM Report to be posted on EMMA; communicate with D. Deaton and with V. Wong and with J. Orfano (JEA) regarding language; listen to and watch live streaming video of special session regarding discussion of report describing possible sale of JEA; review final report and power point presentation; modify and distribute updated draft of narrative language and discuss with J. Orfano (JEA) and E. Columbo.
02/14/18	C. Yi-Medina	3.50	MSRB EMMA filing of PFM Report
02/14/18	D. Deaton	1.10	Telephone calls with B. Rothchild.
02/14/18	M. Rapaport	3.20	Reviewed privatization materials. Watched city counsel meeting.
02/14/18	P. McGovern	2.50	Prepare and file the Public Financial Management, Inc. Report – The future of JEA on EMMA
02/16/18	E. Columbo	2.50	Review privatization report.
03/07/18	B. Rothchild	0.50	Discuss questions regarding power purchase agreement with E. Columbo and with D. Stevens and W. Vaughan (Holland & Knight).
03/20/18	E. Columbo	1.20	Listen to board meeting; begin review of materials prepared for meeting to assist City Council on potential sale of JEA. Call with B. Rothchild.
03/21/18	E. Columbo	2.50	Review privatization materials; review filings for SJRPP

<u>Date</u>	<u>Timekeeper</u>	<u>Hours</u>	<u>Description of Services</u>
			defeasance; calls with B Rothchild; review notices for water and sewer defeasance.
03/22/18	B. Rothchild	2.00	Listen to privatization workshop and take notes and mark thoughts regarding possible disclosure of information.
03/22/18	E. Columbo	1.50	Review privatization presentation. Calls with B Rothchild. Watch board workshop.
03/23/18	B. Rothchild	0.90	Review additional information regarding privatization materials and make additional notes regarding information.
03/23/18	E. Columbo	1.50	Review privatization materials; call with B Rothchild and J Orfano.
03/25/18	B. Rothchild	1.30	Review materials, discuss privatization materials and approach to voluntary disclosure with D. Deaton and E. Columbo.
03/25/18	D. Deaton	0.90	Privatization: Telephone call with B. Rothchild and E. Columbo.
03/25/18	E. Columbo	3.00	Review privatization reports; complete review of board workshop on privatization; call with D Deaton and B Rothchild regarding privatization matters.
03/26/18	E. Columbo	1.20	Call with J Orfano, L Boynton, C Cicero and B Rothchild to discuss disclosure of recent developments with proposals to sell JEA utility system and board workshop
03/28/18	E. Columbo	1.50	Review privatization materials; call with B Rothchild; review and revise draft of voluntary disclosures for JEA on discharge of SJRPP resolution and privatization of JEA
03/29/18	B. Rothchild	0.60	Review, discuss with E. Columbo and modify and distribute draft voluntary disclosure language regarding possible privatization of JEA..
04/06/18	B. Rothchild	2.50	Discuss resignation of Managing Director and CEO with R. Hahn and J. Orfano (JEA) and with G. Petrie (Office of General Counsel of City of Jacksonville) and with E. Columbo; review information describing resignation; draft voluntary disclosure language regarding the resignation.
04/06/18	E. Columbo	1.50	Review articles on resignation of Paul McElroy; call with B Rothchild and JEA staff. Call with B Rothchild and G Petrie; review additional articles and video clips of meeting
04/09/18	B. Rothchild	2.20	Review documentation and draft updated versions of voluntary disclosure filings and draft resolution regarding signing authority.
04/10/18	B. Rothchild	1.80	Review, modify, distribute updated versions of voluntary filings to be put on EMMA and review related documentation and communicate with E. Columbo and with J. Orfano and M. Dykes (JEA) regarding filings.
04/10/18	E. Columbo	1.20	Review voluntary disclosures; calls with J Orfano. Conferences with B Rothchild and C Yi-Medina re timing of filing and discussion of privatization in ADR
04/11/18	C. Yi-Medina	3.00	Revised, finalized and assisted with posting of Voluntary

<u>Date</u>	<u>Timekeeper</u>	<u>Hours</u>	<u>Description of Services</u>
04/11/18	P. McGovern	2.00	Disclosure Notices on EMMA Prepare, review and post EMMA disclosure filings for "Voluntary Notice Regarding Resignation of JEA's Managing Director and Chief Executive Officer, Voluntary Notice Regarding Satisfaction and Discharge of JEA's SJRPP System Revenue Bond Resolution, Voluntary Notice Regarding Filings on EMMA for Base CUSIP Number 46614A for JEA and Voluntary Notice Regarding Possible Sale of JEA"
04/17/18	E. Columbo	2.00	Watch board meeting regarding appointment of interim CEO and adoption of resolution providing for signing authority. Call with R Hahn and J Orfano.
05/07/18	B. Rothchild	0.40	Discuss change in timing for upcoming JEA Board meeting and other upcoming items with J. Orfano.
05/09/18	B. Rothchild	0.80	Review delegation memo, discuss with E. Columbo and review Charter and communicate determination regarding delegation resolution to J. Brooks (JEA).
05/15/18	B. Rothchild	0.30	Discuss with J. Brooks (JEA) reasoning for possible board resolution for signing authority of interim chief financial officer.

TOTAL HOURS: 79.30

TOTAL FEES: \$41,600.00

TIMEKEEPER SUMMARY

<u>Timekeeper</u>	<u>Rate</u>	<u>Hours</u>	<u>Fees</u>
<u>Partners</u>			
B. Rothchild	500.00	29.70	14,850.00
D. Deaton	625.00	4.60	2,875.00
M. Rapaport	675.00	8.50	5,737.50
E. Columbo	625.00	25.50	15,937.50
Partners Totals		68.30	39,400.00
<u>Paralegals</u>			
C. Yi-Medina	200.00	6.50	1,300.00
P. McGovern	200.00	4.50	900.00
Paralegals Totals		11.00	2,200.00
Total All Timekeepers:		<u>79.30</u>	<u>\$41,600.00</u>

TOTAL FOR MATTER -- GENERAL: \$41,600.00

TOTAL FOR STATEMENT: \$41,600.00

Client:	059985	JEA
		21 West Church Street
		14 FL.
		Jacksonville, FL 32202
Matter:		000001
Invoice Number:		10017773
Date of Invoice:		09/19/18
Terms:		Due Upon Receipt
Invoice Amount:		\$ 41,600.00

Check - mail to: **NIXON PEABODY LLP**
PO BOX 28012
NEW YORK, NY 10087-8012

Electronic Payment: (Wire/ACH)	Bank Name: JPMorgan Chase Bank 1 South Clinton Ave. Rochester, NY 14604
	ABA Routing #: 021000021
	Account Name: Nixon Peabody LLP
	Account #: 938761475
	SWIFT Code: CHASUS33
	Invoice(s) Paid: <i>Please include in electronic payment's addenda information.</i>

Credit Card: www.nixonpeabody.com/payment
Phone: (617) 345-1100

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MEMORANDUM

Date: May 20, 2019
To: JEA
From: Elizabeth Columbo, Barry Rothchild and Daniel Deaton
Subject: Long-Term Employee Incentive Program

ISSUE

You have asked us to analyze whether JEA may create or establish a long-term employee incentive program (the “Program”) to pay a bonus or additional amounts to the employees of JEA over a period of one-to-three years if JEA were to achieve specific and mechanical financial metrics (such as an increase in the net asset value of JEA or an increase in the amount transferred annually to the City of Jacksonville). In addition, you have asked us, if JEA could create the Program, whether JEA could pay such additional amounts to the employees for such program in the form of a JEA bond that JEA would issue directly to the employee.

BRIEF ANSWER

We do not believe that the Program would be able to clear legal hurdles under Florida law. While JEA is authorized to adopt a program to award employees bonuses, and has done so as recently as fiscal year 2018, the specific features of the Program present challenges past JEA bonus programs do not. Our main concern is that JEA would be presented with an unresolvable dilemma between two legal restraints. First, JEA’s authorization to maintain an employee bonus program must be extended to all employees. Second, employees of JEA could influence financial and operating decisions of JEA could not participate in the Program as we read the conflicts of interest provisions of Florida law because they could impact the financial metrics being measured under the Program and would derive a direct financial benefit if the financial metrics were reached—which is the ostensible purpose of the Program. In addition, we have concerns regarding whether JEA would be able to establish a strong legislative record regarding the public purpose of the Program that could allow a court to conclude that the Program is in furtherance of a legitimate public purpose due to the narrowly focused objectives of the Program. While our analysis involved a general review of JEA’s charter, the City’s Charter, local and state laws and other available

sources, the attorneys involved in the preparation of this memorandum are not licensed to practice law in the State of Florida (the “State”) nor do we have or maintain an office in the State and if JEA would like to move forward in developing such a program, we believe it would be prudent for JEA to retain Florida counsel to provide additional analysis or further determinations regarding the issues we have raised in this memorandum.

DISCUSSION AND ANALYSIS

JEA is a municipal utility owned by the City of Jacksonville, Florida (the “City”). JEA was established as a body politic and corporate and was renamed as the current JEA through Article 21¹ of the City’s Charter² (“City’s Charter”). Article 21 of the City’s Charter serves as the charter for JEA (“JEA’s Charter,” together with the City’s Charter, the “Charters”). Although it is the intent of the article “to grant to JEA full power and right to exercise all authority necessary for the effective operation and conduct of JEA,” JEA’s power is nevertheless limited in accordance with City, State, and Federal laws^{3,4}.

JEA’s Authority to Create Incentive Program Plans or Bonus Schemes

JEA’s Charter was created for “the specific purpose . . . to repose in JEA all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in the future could be, or could have been but for this article, exercised by the City of Jacksonville⁵.” Acting as an extension of the City, JEA’s power is limited in the same way that the City’s would be. Accordingly, we must first look to the City’s Charter and ordinance code of the City to determine what powers, if any, the City and therefore JEA has to create an employee incentive program.

While the City’s Charter does not specifically authorize the creation of an employee incentive program, the City’s Municipal Ordinance Code (“Code”) does. The City’s Municipal Ordinance Code Title V, Chapter 116, Part 11, (the “Incentive Program Ordinance”) provides for the creation of “employee incentive programs, solely for the purpose of encouraging excellence in

¹ See Chapter 92-341, Special Acts, Laws of Florida; Establishing the JEA under the City’s charter.

² See Laws of Fla. Ch. 78-538, §1.

³ See City of Jacksonville, Florida, Municipal Code §21.05.

⁴ This memorandum does not address issues of Federal law that are applicable to employee incentive programs.

⁵ See *Id.* at 21.01.

public service⁶.” This section 116.1101, which appears under the Employees and Employee Benefits section of the Code, authorizes the establishment of employee incentive programs in accordance with the following conditions:

- (a) Such programs may include recognition of performance or achievement in the form of cash, plaques, trophies, clothing, food and nonalcoholic beverage, and other forms of tangible personal property.
- (b) Such programs shall be in accordance with applicable pay plan or collective bargaining agreement, or both; and
- (c) Such programs shall be subject to prior approval of (1) the applicable department or agency head and (2) the Mayor or, as to the Council and its staff, the Council President⁷.

Because the City’s power is self-executing under the Florida Constitution, the Incentive Program Ordinance’s authorization of the creation of employee incentive programs is clearly within the power of the City, and by extension, JEA. To satisfy the requirement of section 116.1101(c), an employee incentive program of JEA would be subject to the prior approval of the JEA Managing Director/CEO and the Mayor.⁸

While JEA is authorized under the Code to create employee incentive programs and expressly authorized to create employee suggestion plans⁹, the terms of any such program would be subject to applicable Florida law. Section 215.425, Florida Statutes, addresses the payment of extra compensation and bonuses for public employees. While section 215.425(1) generally prohibits the payment of any extra compensation to public employees after service has been rendered or the contract made, section 215.425(3) (the “Bonus Statute”) provides clear guidelines

⁶ See City of Jacksonville, Florida, Municipal Code §116.1101; regulations granting authority and governing the establishment of an employee incentive program.

⁷ See *Id.*

⁸ In addition to authorizing employee incentive programs, the City’s Municipal Ordinance Code Title V, Chapter 116, Part 10 (the “Employee Suggestion Plan Ordinance”) expressly provides for the creation by the Mayor of “a program of meritorious awards to employees who propose procedures or ideas which are adopted and which will result in eliminating or reducing City expenditures or improving operations or who, by their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in the operations of City government.” The Employee Suggestion Plan Ordinance also specifies that all suggestions meriting an award shall be classified as having tangible or intangible value and that no award shall exceed \$1,000, except that the Council may approve a larger award in exceptional cases. We have not addressed the Employee Suggestion Plan Ordinance because it would not provide a legal basis for the implementation of the Program.

⁹ Section Fla. Stat. §116.1005 contains express authorization for JEA to create an employee suggestion plan for meritorious awards to employees of JEA who (a) propose procedures or ideas which are adopted and which will result in eliminating or reducing JEA's expenditures or improving JEA's operations or (b) by their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in the operations of JEA.

for implementing a “bonus scheme¹⁰” for public agencies. The current version of the Bonus Statute, last amended in 2011, provides that:

- (3) Any policy, ordinance, rule, or resolution designed to implement a bonus scheme must:
 - (a) Base the award of a bonus on work performance;
 - (b) Describe the performance standards and evaluation process by which a bonus will be awarded;
 - (c) Notify all employees of the policy, ordinance, rule, or resolution before the beginning of the evaluation period on which a bonus will be based; and
 - (d) Consider all employees for the bonus¹¹.

As described above, under section 215.425(3), JEA clearly has the authority under Florida law to create an incentive program or bonus scheme for its employees provided that (1) all employees are considered for a bonus, (2) the award of the bonus is based on work performance and (3) the public agency describes the performance standards and evaluation process for which a bonus is awarded. As provided in section 116.1101 of the Code of the City, the award can take the form of “cash, plaques, trophies, clothing, food and nonalcoholic beverage, and other forms of tangible personal property.” Stocks and bonds are considered intangible personal property under Florida law and so JEA would not be able to issue its revenue bonds to the employee as payment of such award.¹²

Analysis of Application of Conflict of Interest Statutes to Program

Section 112.311(5) of the Florida Code of Ethics for Public Officers and Employees (ss. 112.311-112.3261, Florida Statutes) (the “State Ethics Code”) provides as follows:

It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest.

Similarly, the City Charter in providing for the enactment of an ethics code that would apply to officers and employees of the City and its independent agencies, including JEA, reiterated

¹⁰ See Fla. Stat. §215.425(1) and (3); Section 3 was included through amendment in 2011 specifically to allow public agencies to administer bonus schemes for public employees, notwithstanding section 1 of the same.

¹¹ See Fla. Stat. §215.425(3)(2011).

¹² See Fla. Stat. §192.001(11)(b).

that “[t]he proper operation of responsible government requires that public officials and employees be independent, impartial, and responsible to the people; that government decisions and policy be made in the best interests of the people, the community and the government; that public office not be used for personal gain, and that the public have confidence in the integrity of its government”¹³ and the City’s ethics code expressly makes the State Ethics Code applicable to officers and employees of the City and to JEA.¹⁴

To further reduce the likelihood or appearance of conflicts of interest, Section 112.311(3)(a), Florida Statutes, provides that “[n]o county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss” (emphasis added). Similarly, Section 112.311(4), Florida Statutes, provides that “[n]o appointed public officer shall participate in any matter which would inure to the officer’s special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter.”¹⁵

These state law provisions governing conflicts of interest would effectively prohibit any JEA employee from participating¹⁶ in any business transaction from which the JEA employee would personally benefit. To us, this strikes at the heart of the Program. The very nature of the Program is that employees of JEA will be incentivized to make financial and operating decisions that will increase specific financial goals. If implemented, the Program would vest any employee involved in or in a position to influence financial and operating decisions that could increase those financial goals with a concrete financial interest in the outcome of those decisions. This would make it very difficult for such an employee to demonstrate that their actions are in the public interest and not based on their own private interest. Past JEA bonus programs have not operated like this. Instead, the JEA Board retained the authority to award bonuses based on the totality of

¹³ See Charter of the City of Jacksonville, Part A §1.201.

¹⁴ See City of Jacksonville, Florida, Municipal Code §602.1203.

¹⁵ The City’s ethics code may also create some concerns in that it requires employees to perform their responsibilities “regardless of personal considerations.”

¹⁶ The term “participate” is defined in section 112.3143(4)(c), Florida Statutes, to mean “any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer’s direction.”

numerous factors, many of which were not quantitative at all¹⁷. This creates space between the employee's compensation and the financial or operating decision. Under the Program, however, there would be no such space—in fact, that would be the entire purpose of the Program.

Tension between the Program and JEA's Public Purpose

In addition to our concerns above, we are also concerned that a court could call into question whether the narrow focus of the Program on a few financial metrics is in reasonable furtherance of JEA's public purpose. The authority of municipal governments to issue bonds and to make expenditures of public funds are required to be exercised in furtherance of a public purpose and the concept of public purpose is consistently used by courts in Florida and across the country to evaluate whether a particular expenditure is a "legitimate exercise of the people's power surrendered to the state".¹⁸ Most of the case law interpreting what constitutes a public purpose in Florida involves the validation of debt issued by a government entity and an examination of whether the state or local government is lending its credit to a private party in violation of Article VII, section 10 of the Florida state constitution.¹⁹ The courts in Florida have generally held that if a local government issues bonds where a pledge of public credit or taxing power is involved for a project that includes a private component, the bonds are validly issued only if the bond issuance serves a "paramount public purpose" and any benefits to a private party are merely incidental.²⁰ If it is a revenue bond financing and there is no lending of credit the courts have often found that it is enough to show only that an ordinary public purpose is served by the issuance of such bonds²¹, however this rule has not always been followed by the courts.²² The lack of a specific definition of public purpose and inconsistent analysis by the courts creates uncertainty as to whether the

¹⁷ JEA's Pay for Performance Program tracks five key metrics: (1) Customer Satisfaction; (2) Safety; (3) Cost per unit of Electricity delivered (Kwh); (4) Cost per unit of Water delivered (Kgal); and (5) Cost per unit of Wastewater collected (Kgal). See JEA Board Meeting Agenda Item Summary, October 24, 2018.

¹⁸ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 483 (2017)

¹⁹ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 483 (2017)

²⁰ See *Poe v. Hillsborough County*, 695 So. 2d, 672, 675 (Fla. 1997) (holding that "a bond issue does not violate [A]rticle VII, [s]ection 10 so long as the project serves a 'paramount public purpose,' and any benefits to private parties from the project are incidental").

²¹ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 489 (2017).

²² See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the "Public Purpose" Fulcrum, Stetson Law Review, Vol. 46 482, at 490 (2017).

establishment of the Program and the issue of bonds to provide awards under such program would survive a legal challenge. However, the courts are clear that if there are specific findings “by the legislature, the Board of County Commissioners, and the Authority that the project is related to the health, safety, morals, and welfare of the residents” then

What constitutes a public purpose is, in the first instance, a question for the legislature to determine, and its opinion should be given great weight. A legislative declaration of public purpose is presumed to be valid, and should be deemed correct unless so clearly erroneous as to be beyond the power of the legislature[...] and the issuance of the Authority’s revenue bonds is adequately supported by a proper public purpose.²³

In making such a legislative declaration, one commentator itemized the list of elements that a governing body should consider in any legislative record to establish that an action is in furtherance of a “public purpose” so that a subsequent review by a court would make it difficult for the court to overturn the findings of the legislative body:

- A concise statement of the problem;
- How the problem is affecting the public;
- Identification of the factors causing or contributing to the problem;
- Which factors the proposal will influence, including the ones that will not or cannot be affected;
- How the proposal will operate to influence the factors that will be affected; that is, the mechanics of the nexus between action and purpose;
- What the alternatives are; what has been tried that didn’t work or why this proposal is being suggested over alternatives;
- How the success of the proposed project will be measured and when;
- How the public will be protected if the project fails and rewarded if it succeeds; and
- What the city’s risks and upsides are, what the private party’s risks and upside are, and a comparison of the two.²⁴

In connection with any approval of the Program by JEA’s Board, the Board should specifically articulate what problem the Program solves and how the Program is reasonably related to solving that problem. In doing that, if the Board articulates the purposes of the Program solely in terms of the financial goals of JEA, then it could expose JEA to a court that questions whether that purpose is consistent with JEA’s mission. Conversely, if the Board articulates its purpose as

²³ Housing Finance Authority of Polk County, 376 So .2d at 1159. (

²⁴ See Douglas J. Sale, Free Enterprise vs. Economic Incentives: The Evolution of the “Public Purpose” Fulcrum, Stetson Law Review, Vol. 46 482, at 483 (2017).

broad as its traditional mission has been, then a court could question why the Program furthers only a portion of that overall mission.

While we do not suggest that it represents a clear legal prohibition, we do note that the Program would potentially be viewed by a court as in tension with JEA's stated public purpose and role as a municipal utility—particularly since the Program would be unusual for municipal-owned utilities. JEA as a municipal utility is a not-for-profit entity. As JEA's website states, "As your not-for-profit, community-owned utility, JEA is committed to providing you the most reliable service at the lowest possible cost in an environmentally friendly way." This is consistent with how JEA has approached its mission in the past and is consistent with other municipal-owned utilities. Municipal-owned utilities exist for an array of quantitative and qualitative purposes which further the interests of the communities they serve. Low utility rates for low-income members of the community, environmental considerations and securing long-term power sources to support the local economy are as important of purposes as generating net revenues in the short term.

Our observation of the Program is that it furthers a very small set of the overall purposes of JEA while giving at least the perception of being inconsistent with other critical aspects of JEA's stated mission. Since the Program would be unique in nature among municipal-owned utilities (we are not aware of another similar program and particularly in Florida), we believe that the Program's narrow focus on the generation of profits and financial performance to the exclusion of other considerations exposes the Program to a legal challenge that it is not in furtherance of JEA's overall public purpose. As the Supreme Court of Florida stated in *State v. City of Panama City Beach*:

The constitutional prohibition against pledging public credit to private enterprise, article IX, section 10, Florida Constitution (1885) (now contained in article VII, section 10), was designed "to restrict the activities and functions of the State, county and municipality to that of government and forbid their engaging directly or indirectly in commercial enterprises for profit." This prohibition is closely tied to revenue bonds and to what constitutes a proper public purpose.²⁵

We do not consider this to represent a clear legal prohibition but one of those uncertain legal issues that will affect any employee incentive program that awards bonuses solely on the basis of a few narrow financial metrics instead of an after-the-fact assessment by the Board of

²⁵ See *State v. City of Panama City Beach*, 529 So. 2d 250, 253 (Fla. 1988).

whether employees furthered the full public purposes of JEA. It also could be viewed as a possible interpretative framework a court would use in evaluating any legal analysis of the Program.

CONCLUSION

While JEA is authorized to adopt a program to award employees bonuses, and has done so as recently as fiscal year 2018, the specific features of the Program present challenges past bonus programs do not. Under Florida law, JEA would be legally required to make the Program available to all employees – which would include high-level employees who are involved or influence many if not all significant financial and operating decisions. But, under Florida conflict of interest laws, no employee could participate in the making of a financial decision if he or she has a financial interest in that decision without first disclosing the financial interest and concluding that the financial interest is not in substantial conflict with the duties that employee has to act first and foremost in the public interest. In our view, we believe this creates an unresolvable dilemma where JEA would either have to exclude several employees from the Program thereby rendering the Program in violation of Florida law or several employees would be unable to carry out their responsibilities under Florida conflict of interest laws.

In addition, the narrowly focused goals of the Program could present challenges whether the Program is in furtherance of a legitimate “public purpose.” Key to any expenditure or transfer of property by a municipality is whether that expenditure or transfer furthers a “public purpose.” To protect it from a court having the ability to fully re-consider whether the Program were in furtherance of a “public purpose,” JEA’s Board would likely need to have a complete record as to the problem the Program solves and how the Program is reasonably connected to the solution of the problem. To that end, the Program may present challenges if JEA’s Board narrowly articulates JEA’s purposes – as it exists for an array of public purposes and not just narrow financial ones – or broadly articulates JEA’s purposes and cannot explain why the narrow focus of the Program on a few financial goals reasonably furthers those more-broadly articulated goals.

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**MEMORANDUM
*PRIVILEGED AND CONFIDENTIAL***

TO: Lynne Rhode, Vice President & Chief Legal Officer, JEA
FROM: Kort Parde, Assistant General Counsel, OGC
Sean Granat, Deputy General Counsel, OGC
RE: Compensation Plans
DATE: June 17, 2019

ISSUE:

You have asked whether JEA may create or establish a long-term employee incentive program to pay a bonus or additional amounts to the employees of JEA over a period of years.

ANSWER:

Yes, JEA is authorized to adopt bonuses or incentive programs so long as the program complies with the requirements of § 215.425, Florida Statutes. The program must (1) be based on work performance; (2) have pre-determined performance standards and evaluation processes; (3) provide notice of the program to all JEA employees prior its commencement; and (4) be available to all JEA employees. In addition to the requirements of § 215.425, Florida Statutes, any bonus or incentive program JEA adopts should provide for objective metrics measured by impartial analysts and not potential program award recipients. Also, the program would have to comply with the specific constraints itemized in Part III of this memo, which include ethics laws, Civil Service Rules, and collective bargaining.

ANALYSIS:

I. General Authority for Incentive Programs by Independent Agencies

A. Florida Statute

The relevant statutory constraint on the awarding of incentives by a unit of government to its employees is found in § 215.425(3), ¹ Florida Statutes, which states that:

**Any policy, ordinance, rule or resolution
Designed to implement a bonus scheme must:**

**(a) Base the award of a bonus on work
performance;**

**(b) Describe the performance standards and
Evaluation process by which a bonus will be
awarded;**

**(c) Notify all employees of the policy, ordinance,
rule, or resolution before the beginning of the
evaluation period on which a bonus will be
based; and**

(d) Consider all employees for the bonus.

Section 215.425 also contains a prohibition on providing “extra compensation...to any officer, agent, employee, or contractor after the service has been rendered or the contract made.” §215.425(a), Florida Statutes. The term “extra compensation” “ . . . denotes something done or furnished in addition to, or in excess of the requirement of the contract; something not required in the performance of the contract.” *Fla. AGO 91-51* citing *Fla. AGO 81-98*. Therefore, a governmental agency has the authority to provide for bonuses or incentive programs so long as the programs strictly comply with the requirements set out in § 215.425(3), and offer no compensation for any work performed prior to the commencement of the programs.

B. Florida Constitution

Any action of an independent agency, including providing a bonus program for employees, must be analyzed in light of the Article VII, § 10, Florida Constitution, prohibition against the State and its subdivisions from using their taxing power or pledging public credit to aid any private person or entity. The purpose of this constitutional provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the

¹ Section 215.425, Florida Statutes, applies broadly to “units of government” without limitation. Fla. Att’y Gen. Op. 2013-09 (2013). As an independent agency of the Consolidated City of Jacksonville, JEA is a unit of government subject to § 215.425, Florida Statutes. See *City Charter* §§ 18.07 and 21.

public would be at most only incidentally benefited." *Fla AGO 2012-26* citing Bannon v. Port of Palm Beach District, 246 So.2d 737, 741 (Fla. 1971). "If the expenditure primarily or substantially serves a public purpose, however, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, § 10. *Id.* citing *State v. Housing Finance Authority of Polk County*, 376 So.2d 1158, 1160 (Fla. 1979). The Legislature "has recognized that lump sum bonus payments for county and municipal employees serve the public interest and represent a progressive innovation in personnel management." *Id.* In the past, Florida Statutes expressly authorized counties and municipalities "to adopt extra compensation programs to reward outstanding employees. See §§ 125.01 and 166.021, Florida Statutes (2010). These statutes allowed for lump-sum bonus payments, but required that the bonuses not be included in an employee's regular base rate of pay and not to be carried forward in subsequent years. *Id.* In 2011, the Florida Legislature revised § 215.425, Florida Statutes, and deleted the express authorization to pay bonuses in §§ 125.01 and 166.021, Florida Statutes. The restriction that a bonus payment not be included in an employee's regular base rate of pay and not be carried forward in subsequent years was also deleted. Instead the Legislature created § 215.425(3), Florida Statutes, which permits any unit of government to establish a bonus or incentive program as long the program strictly complies with § 215.425(3)(a)-(d), described in section 1(a) above.

II. General Authority for Incentive Programs by JEA

Article 21 of the Consolidated City of Jacksonville's Charter² "created and established a body politic and corporate to be known as JEA." *City Charter*, §21.01. Under § 21.01 the City delegated to JEA "all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, in the future could be, or could have been but for this article, exercised by the City of Jacksonville". *Id.* Section 21.04 explicitly prescribes the powers of JEA to include the right to contract, and the more broad authority "to do all acts and deeds necessary, convenient or desirable, incidental to the exercise and performance of the power and duties granted to JEA in this article." *City Charter*, §§21.04(e) and (t).

² See *Jacksonville, Fla., City Charter*, §3.01(a), providing that the Consolidated City of Jacksonville:

Shall have and may exercise any and all powers which counties and municipalities are or may hereafter be authorized or required to exercise under the Constitution and the general laws of the State of Florida, including, but not limited to, all powers of local self-government and home rule not inconsistent with general law conferred upon counties operating under county charters by s. 1(g) of Article VIII of the State Constitution; conferred upon municipalities by s. 2(b) of Article VIII of the State Constitution; conferred upon consolidated governments of counties and municipalities by section 3 of Article VIII of the State Constitution; conferred upon counties by ss. 125.85 and 125.86, Florida Statutes; and conferred upon municipalities by ss. 166.021, 166.031, and 166.042, Florida Statutes; all as fully and completely as though the powers were specifically enumerated herein.

Most relevant to the issue of whether JEA has the authority to create a bonus or incentive program is § 21.08 of the Charter, which prescribes JEA's powers with respect to its employees. Under § 21.08 the City delegated to JEA the following authority:

JEA shall have full and independent authority to hire, transfer, promote, discipline, terminate and evaluate employees engaged to provide any and all of the utilities services for which it is responsible and accordingly, consistent with the provisions of article 17, JEA may establish employment policies relating to hiring, promotion, discipline and termination, and other terms and conditions of employment, and enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment and take such other employment related action as needed to assure effective and efficient administration and operation of the utilities system. In order to effectively implement the foregoing, JEA shall perform all functions with regard to its own employees that are performed by the City department or division which oversees city employees in regard to personnel matters.

Id. at §21.08. Section 21.08 provides JEA the express authority to not only establish employment policies, but the implied authority to establish bonus or incentive programs under the authority to establish 'other term and conditions of employment, and enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment'. *Id.*

III. Specific Constraints on the Contemplated Incentive Program

JEA may establish a bonus program, subject to several constraints. First, as explained above, a bonus or incentive program policy must be strictly implemented under the requirements of §215.425(3), Florida Statutes, in that it must base the award of the bonus on work performance, provide for performance standards and an evaluation process, notify all employees of the policy before the beginning of the evaluation period, and consider all employees for the bonus. Further, the program must comply with state and local ethics laws. Lastly, bonus plans must comply with the City's Civil Service Personnel Rules and Regulations and collective bargaining requirements.

A. Constraints Under State and Local Ethics Law

Under state and local ethics laws, an otherwise proper JEA long-term incentive program benefiting both management and non-management employees is permissible within the following key parameters designed to prevent the misuse of public funds:

Article II, § 8 of the Florida Constitution (Ethics in Government) requires financial disclosure by public officials and generally prohibits public officials from acting in a manner in breach of the public trust. This general prescription has been codified by Florida Statute, namely

Chapter 112 Part III (Code of Ethics for Public Officers and Employees), and further enumerated for Jacksonville officials and employees within the Jacksonville Ethics Code (Chapter 602 of the Jacksonville Ordinance Code).

Within the state ethics code, which generally applies to all public officials and employees within the state, § 112.313, Florida Statutes, is the primary provision that should be considered when analyzing an incentive program adopted by an independent agency of the City. Section 112.313 (Standards of conduct) subsection (6) (Misuse of public position) states, in relevant part and with emphasis added, that “no public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. ...”. Pursuant to subsection (6), an independent agency employee may not corruptly use his position or perform his official duties in order to secure for himself or other individuals a unique benefit.

Similar to § 112.313(6), Florida Statutes, the city ethics code (which expressly at §602.401(a), Ordinance Code, applies to officers and employees of independent agencies) at §602.401 (Misuse of position, information, resources etc.) subsection (a) prohibits an employee of an independent agency from intentionally using his position or otherwise acting in a manner inconsistent with his official duties in order to obtain a special privilege, financial or otherwise.

Both § 112.313(6), Florida Statutes, and Jacksonville, Florida Municipal Code §602.401(a) contain intent and uniqueness components. An incentive program developed and implemented by managers generally responsible for developing and implementing compensation measures, that fully comports with all § 215.425, Florida Statutes, and JEA Charter strictures, under which all JEA employees are considered for the bonus in a transparent, impartial manner, and which is based upon objective financial metrics measured by an independent party generally would not run afoul of either the state or city ethics code.

B. Constraints Under Civil Service Rules and Collective Bargaining Agreements

JEA is constrained in the type of award it may issue to the extent that it is bound by the City’s Civil Service Personnel Rules and Regulations. Those JEA employees covered by the Civil Service Personnel Rules and Regulations are subject to pay plans and salary schedules. Civil Service Personnel Rules and Regulations 2.01, 2.11, 10.01 and 10.02 constrict JEA to the award of lump sum bonuses, as JEA employees’ base salary may not exceed their pay bands.

Additionally, may JEA’s employees are members of collective bargaining units. Florida Law requires that changes to wages and terms and conditions of employment are collectively bargained prior to being implemented. Thus, any bonus or incentive plan would have to be collectively bargained prior to implementation. *See Hamilton County Education Association v. Hamilton County School District*, 30 FPER ¶ 180(2004)(Unfair labor practice to unilaterally implement a bonus plan without negotiating its terms).

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MEMORANDUM

TO: Herschel Vinyard, JEA Chief Administrative Officer

FROM: Lynne Rhode, Office of General Counsel, JEA CLO

CC: Jason Gabriel, City of Jacksonville, General Counsel

SUBJECT: **Invitation to Negotiate: Public Records Considerations**

DATE: July 10, 2019

BACKGROUND

JEA senior management, at the direction of the JEA Board of Directors, in cooperation with employees across the organization, and with the assistance of McKinsey & Company consultants, is undertaking comprehensive strategic planning to deal with technology disruption of the utility industry and JEA, in particular. That strategic planning initiative involves scenario analysis and exploration, including consideration of non-traditional utility responses to declining revenue. Execution of certain scenarios may involve an invitation to negotiate (ITN) or other procurement processes.

QUESTION PRESENTED

You have asked whether and to what extent documents related to a JEA ITN process are protected from disclosure under Florida's Public Records law, Florida Statutes Chapter 119.

SHORT ANSWER

Sealed bids, proposals, and replies related to an ITN process are exempt from disclosure under Chapter 119 until such time as JEA provides notice of an intended decision or until 30 days after opening the bids, proposals, or *final* replies, whichever is earlier.

ANALYSIS

Procurement means “purchasing, renting, leasing, or otherwise acquiring; or selling, renting, leasing or otherwise disposing of any Supplies or Services. It also includes all functions that pertain to the acquisition or disposal of any Supplies or Services, including description of requirements, selection and solicitation of sources, preparation and Award of Contract.” JEA PROCUREMENT CODE (Revised 2015), Definitions. The JEA Procurement Code expressly applies to “expenditures of public funds under Contract by JEA, irrespective of their source. It shall also apply to the sale or other disposal of JEA property and Supplies. . . .” *Id.* at § 1-102; *see also* the JEA Real Estate Services Procurement Directive (May 26, 2016)(providing additional direction with respect to the disposition of real and personal property). The Procurement Code is to be “construed liberally and applied to promote its underlying purposes and policies,” including “to foster effective, broad-based competition within the free enterprise system.” *Id.* at § 1-101. The Procurement Code governs source selection and contract formation, including the ITN process (*Id.* at § 3-110). In accordance with the JEA Charter¹ and Board Governance Manual, all “rights, powers, duties, and authority” relating to procurement, including the “management, control, sale and other disposal of Supplies and Services and Real Estate,” are vested in the JEA Chief Executive Officer and JEA Chief Procurement Officer. *Id.* at § 2-103. The City of Jacksonville Office of General Counsel is tasked by the Procurement Code with providing legal counsel with respect to procurement matters. *Id.* at § 1-109.

State statute provides a time-limited degree of protection against public disclosure of documents related to JEA’s exercising of its procurement authority. The Florida Constitution creates a broad right to inspect the records of any state or local governmental body. Art. I, § 24(a), Fla. Const. It has been codified at Florida Statutes Chapter 119, the Florida Public Records Law. The Public Records Law generally requires, “Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.” F.S. § 119.07(1).² Section

¹ JEA Charter section 21.04(e) allows JEA to “enter into contracts with any person or entity, public or private, deemed necessary or desirable by JEA in connection with carrying out its powers and duties.” More specifically, the JEA Charter permits JEA to acquire for the use of the utilities system all real or personal property and to “sell, lease or otherwise transfer, with or without consideration, any such [§ 21.04(b)(4)] property when in JEA’s discretion it is no longer needed or useful, or such sale, lease or transfer otherwise is in the best interest of JEA, all upon such terms and conditions as JEA shall by resolution fix and determine.” *Id.* at § 21.04(b).

² The Florida Public Records Act “is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.” *Lightbourne v. McCollum*, 969 So. 2d 326, 332-33 (Fla. 2007). The governmental entity has the burden to demonstrate that any requested

119.071 pertains to general exemptions from the public right to inspect or copy public records.

Subsection (1)(b) creates an exemption for certain documents related to “competitive solicitation,” which is defined as “the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.” *Id.*

Section 119.071(1)(b) provides:

2. Sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt from s. [119.07](#)(1) and s. 24(a), Art. I of the State Constitution until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier.
3. If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt from s. [119.07](#)(1) and s. 24(a), Art. I of the State Constitution until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.

Thus, under Florida Statute Section 119.071(1)(b), the initial round of sealed bids, proposals, or replies related to a JEA procurement process, including an ITN, would be exempt from disclosure “until such time as the agency provides notice of an intended decision or until 30 days after opening ‘the bids, proposals, or final replies,’ whichever is earlier.” Fla. Att’y Gen. Op. 2015-10 (2015); *see also GCS Energy Recovery of Pinellas, Inc. v. Pinellas Cty.*, 175 So. 3d 802 (Fla. Dist. Ct. App. 2015) (affirming the lower court’s finding (Case No. 14-006566-CI-11) that a county’s actions were reasonable in withholding documents related to an ongoing competitive solicitation process for operation and maintenance of a waste-to-energy facility).

CONCLUSION

Sealed bids, proposals, and replies related to an ITN process are exempt from disclosure under Chapter 119 until such time as JEA provides notice of an intended decision or until 30 days after opening the bids, proposals, or *final* replies, whichever is earlier. Additionally, financial statements that an agency requires a prospective bidder to submit in order to prequalify for bidding are exempt. The cone of protection thus is triggered by receipt of financial statements related to prequalification, if applicable,

documents fall within the statutory requirements for exemption from disclosure. *Lightbourne*, 969 So. 2d at 333. If a court finds that an agency improperly withheld documents, it will award attorney's fees and costs against the offending agency. F.S. § 119.12.

or receipt of bids, proposals, or replies to the ITN and continues until 30 days after JEA opens final replies to the ITN (or provides notice of an intended decision, if earlier).

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CITY OF JACKSONVILLE**



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**MEMORANDUM
JULY 22, 2019**

TO: FILE

FROM: LAWSIKIA J. HODGES, DEPUTY GOVERNMENT OPERATIONS
LYNNE C. RHODE, JEA CHIEF LEGAL OFFICER
JASON R. GABRIEL, GENERAL COUNSEL

RE: STRATEGIC PLANNING ACTIONS TAKEN BY THE JEA BOARD BASED ON SCENARIO-BASED PLANNING
OPTIONS PRESENTED BY THE JEA SENIOR LEADERSHIP TEAM

The JEA Senior Leadership Team¹ ("SLT") has presented, and intends to present scenario-based planning options to the JEA Board ("Board") to assist the Board in making strategic planning decisions regarding JEA's future. In scenario-based strategic planning, SLT presents various scenarios regarding JEA's future to the Board, and depending on the scenario chosen by the Board, the Board makes strategic planning decisions based on the scenario selected.

SLT presented scenario-based planning option 1 (Scenario 1 - Status Quo) to the Board on May 28, 2019. SLT intends to present three additional scenario-based planning options to the Board at its regular meeting on July 23, 2019: Scenario 2A - Traditional Utility Response, Scenario 2B - Traditional Utility Response (with traditional legislative approach) and Scenario 3 - Non-Traditional Utility Response (collectively "Options" or individually "Option").

Any decision by the Board to proceed with implementing one of the Options presented by SLT will require formal actions by the Board in the form of various Board resolutions and/or motions. The Office of General Counsel, in consultation with outside counsel,² has reviewed the proposed resolutions associated with each Option (Resolutions 2019-06 through 2019-10), and we believe that the Board is authorized under its charter provisions, subject to applicable laws, to proceed with implementing through formal action one of the Options, as presented.

The decision to proceed with implementing one of the Options, as presented, is a business decision for the Board to make and within its authority under the City Charter.

¹ The Senior Leadership Team consists primarily of the Managing Director and Chief Executive Officer, the Chief Operating Officer, the Chief Administrative Officer and the Chief Financial Officer.

² Office of General Counsel engaged and relied on various outside specialized counsel to assist JEA in the preparation of the resolutions and underlying documents required for each Option presented by SLT. Accordingly, the scope of this memorandum does not address the legality of the underlying documents drafted to implement such resolutions, as such legality has been confirmed, and will continue to be developed and approved by special counsel to JEA appointed and supervised by the Office of General Counsel pursuant to the course of action approved by the JEA Board.

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OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 255-5059



MEMORANDUM

TO: Honorable Council Members

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations
Margaret M. ("Peggy") Sidman, Deputy Legislative Affairs/Managing Deputy

RE: **JEA Invitation to Negotiate #129-19 for Strategic Alternatives -
Cone of Silence Guidelines**

DATE: August 27, 2019

I. Purpose

The purpose of this memorandum is to provide you with recommended Cone of Silence Guidelines regarding the JEA Invitation to Negotiate #129-19 for Strategic Alternatives" issued on August 2, 2019 (the "JEA ITN Solicitation"). While several procurement practices and prohibitions described below tend to overlap with ethics and sunshine law requirements, any ethics or sunshine law concerns that you may have related to the JEA ITN Solicitation should be independently reviewed by our office.

II. Background

Several of you have inquired about the JEA ITN Solicitation and the extent to which the Ex Parte Communications Policy applies to City Council, individual council members, and immediate staff communications (collectively, the "Council"). In government procurement, the ex parte communications prohibition is commonly referred to as the "cone of silence." The essential purpose of the cone of silence is to ensure fair, transparent, ethical and open competition in the procurement process and to secure the best values for the government at the lowest possible expense.¹ The cone of silence for the JEA ITN Solicitation began on August 2, 2019² and will remain in effect until the JEA Board makes a contract award³ (the "Cone of

¹ *Wester v. Belote*, 138 So. 721 (Fla. 1931).

² The JEA Solicitation is available at jea.com/strategicalternatives.

³ Any JEA Board contract award under this solicitation is subject to Council approval and subsequent voter referendum. Section 21.04, JEA Charter.

Silence Period”). The Cone of Silence Period will also apply to any bid protests and remain in effect until the JEA Board resolves such protests (i.e., grant or deny).

As shown on **Attachment 1** (JEA ITN Solicitation Approval Process), the Council⁴ is a clear *potential* decision-maker in the JEA ITN Solicitation procurement process. As such, it is important that the Council understands how certain communications regarding the JEA ITN Solicitation *may* directly or indirectly impact the fair, transparent, ethical and open procurement process. The JEA Board desires to meaningfully explore strategic alternatives for JEA’s future in this procurement process and, together with Vendors and Respondents,⁵ will invest significant amounts of time and resources. The Guidelines below are intended to assist you in determining whether your desired actions and communications regarding JEA during the Cone of Silence Period are appropriate. Our office recommends that all Council actions and communications regarding JEA during the Cone of Silence Period consider the guidance and associated procurement risks described herein.

III. Cone of Silence Guidelines (“Guidelines”)

The Guidelines below address the following topics: 1) Communications to Certain Parties; 2) Publicly Noticed Meetings; 3) Legislation; 4) FY2019-2020 Budget Approval Process; and 5) Associated Procurement Risks. The Guidelines are based on the relevant laws and provisions contained on **Attachment 2** and the Council (and Mayor) should adhere to the Guidelines during the Cone of Silence Period. Except for laws governing ethics, the Guidelines will no longer apply at such time that the Cone of Silence Period is no longer in effect⁶ (i.e., JEA Board contract award).

The Guidelines are intended to serve as a practical guide during the Cone of Silence Period only. Whether a specific communication or action by the Council is permitted or prohibited by law and best government procurement practices will vary depending on the type and content of the communication in question. When in doubt, and prior to making your desired action or communication regarding this matter, please do not hesitate to seek further advice from our office.

A. Communications to Certain Parties

1) Vendors and Respondents to the JEA ITN Solicitation

Communications of any kind between the Council and Vendors/Respondents regarding the JEA ITN Solicitation, including communications regarding process participation or interest in responding, are strictly prohibited.⁷

⁴ The Mayor is also a *clear* potential decision-maker in the JEA ITN Solicitation procurement process. Thus, the Guidelines also apply to the Mayor, including his immediate Mayoral staff.

⁵ “Vendors” and “Respondents” are defined in the JEA ITN Solicitation on Pg. 83-84.

⁶ The Cone of Silence Period will no longer apply when the JEA Board makes a contract award and all bid protests, if any, have been resolved. Any contract award shall be subject to Council approval and subsequent voter referendum.

⁷ As potential decision-makers to the JEA ITN Solicitation, the Council and Mayor will have the power to approve or reject the JEA Board’s contract award during the procurement process. The JEA Board’s *Ex Parte*

Communications between the Council and Vendors/Respondents regarding any matters unrelated to the JEA ITN Solicitation are permissible. However, Council should consider appearances of impropriety when engaging in any permissible communications with Vendors/Respondents.

2) Constituents and Other Members of the Public

Communications between Council and constituents and other members of the public (collectively, the “Public”) regarding possible Vendors/Respondents and the merits of the JEA ITN Solicitation terms are strictly prohibited.

Communications between the Council and the Public regarding JEA, JEA strategic alternatives, or JEA’s future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of JEA ITN Solicitation terms.

3) Social Media and News Interviews; Other Public Statements

Communications by the Council on social media, in news interviews or other public venues and forums regarding the merits of the JEA ITN Solicitation terms are strictly prohibited.

Communications by the Council on social media, in news interviews or other public venues and forums regarding JEA, JEA strategic alternatives or JEA’s future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of JEA ITN Solicitation terms.

B. Publicly Noticed Meetings

Town hall meetings and other publicly noticed meetings held by Council regarding the merits of the JEA ITN Solicitation terms are strictly prohibited.

Town hall meetings and other publicly noticed meetings held by Council regarding JEA, JEA strategic alternatives or JEA’s future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of the JEA ITN Solicitation terms.

C. Legislation

Legislation filed by Council regarding the JEA ITN Solicitation is strictly prohibited.

Legislation filed by Council regarding JEA, JEA strategic alternatives and JEA’s future *in general* is permissible so long as Council and Council committee discussions do not lead to discussions regarding the merits of the JEA ITN Solicitation terms.

Communications Policy prohibits communications between a bidder and JEA, its members, employees, agents, and *representatives*. Given the Council’s authority in the JEA Charter to approve or reject the JEA Board’s contract award, the Council in this limited procurement instance is acting as a representative and principal decision-maker of the JEA.

Ordinance 2019-566 regarding proposed changes to JEA employees' pension benefits is scheduled to be reviewed in Council committees the week of September 2, 2019. Any discussion on this bill regarding the merits of the JEA ITN Solicitation terms is strictly prohibited. However, any discussion regarding JEA employees' pension benefits or JEA strategic alternatives and JEA's future *in general* is permissible.

D. FY2019-2020 Budget Approval Process

Any discussion by Council during the FY2019-2020 budget ordinance approval process regarding the merits of the JEA ITN Solicitation terms is strictly prohibited.

Any discussion by Council during the FY2019-2020 budget ordinance approval process regarding JEA, JEA strategic alternatives or JEA's future *in general* is permissible so long as Council and Council committee discussions do not lead to discussions regarding the merits of the JEA ITN Solicitation terms.

E. Associated Procurement Risks

Associated procurement risks for the JEA Board, Vendors, Respondents, and the Council by engaging in prohibited communications during the Cone of Silence Period include, but are not limited to the:

- *Potential* for Vendors and Respondents to be disqualified from participating in the procurement process (which leads to less competition);
- *Potential* ethics complaints and other actions to be filed against public employees and public officers;
- *Potential* for Vendors and Respondents to be misinformed during the procurement process;
- *Potential* of frustrating the pending procurement process and re-soliciting bids;
- *Potential* for the time and resources invested by the JEA, Vendors/Respondents and the City to be expended needlessly; and
- Inability of the JEA Board to pursue its decision to *explore* strategic alternatives for JEA's future.

IV. Conclusion

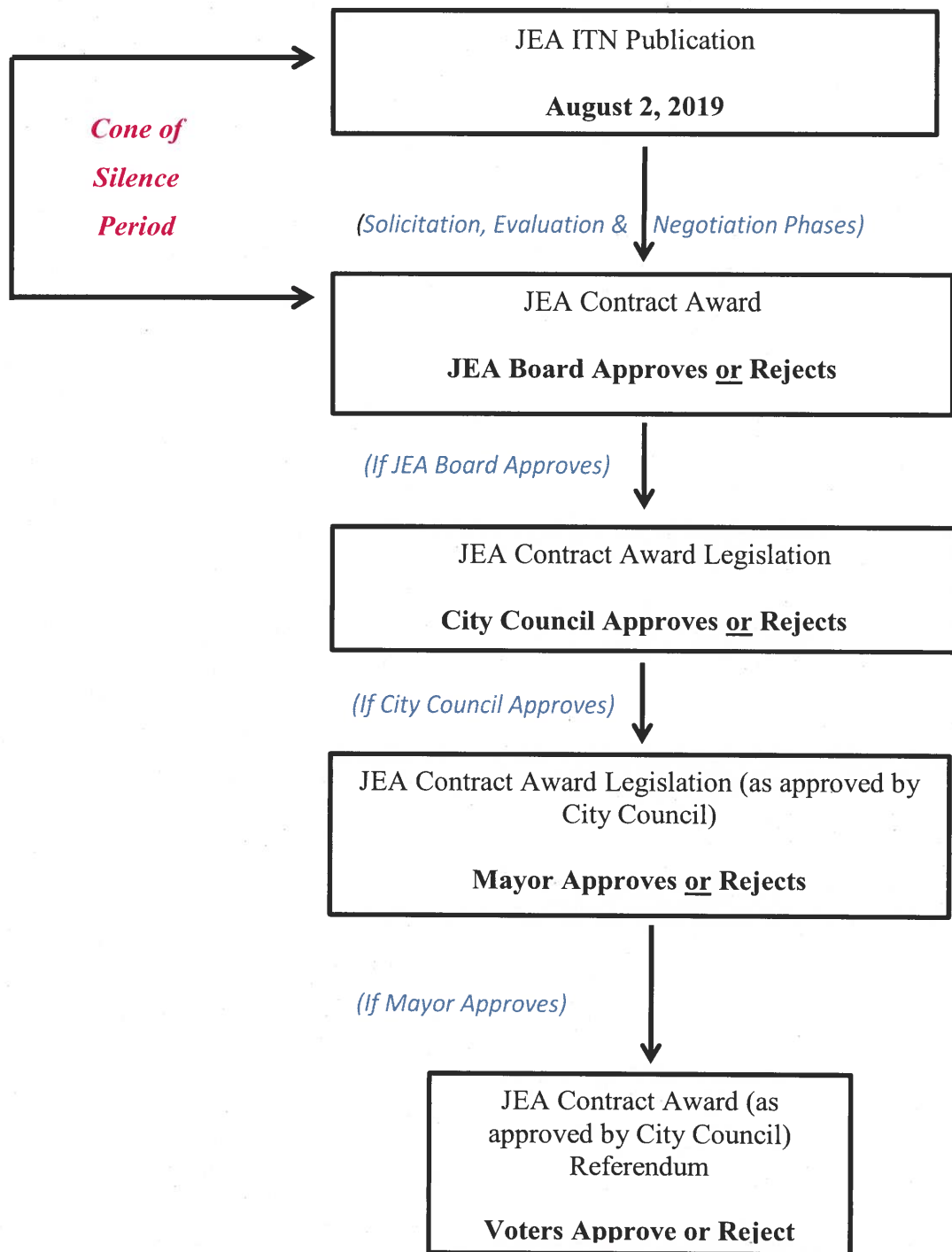
I trust that this memorandum provides the guidance you seek. As always, please do not hesitate to contact me with any questions or concerns whatsoever.

List of Attachments:

Attachment 1	ITN Procurement Approval Process
Attachment 2	Relevant Laws and Provisions

JEA ITN Solicitation Approval Process for City Agencies and Officials Only*

Attachment 1



* The City Approval Process shown above only includes City agencies and officials and does not include other required agency approvals.

Attachment 2

Relevant Laws and Provisions

I. Government Procurement Principles – Open/Fair Competition Concepts

Public policy favors competitive procurement whenever possible, even in the absence of controlling statutes and/or laws. *1966 Op. Att’y Gen. Fla. 066-9* (Feb. 7, 1966)

The purpose of public bidding is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public body] at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the [public body], by affording an opportunity for an exact comparison of bids. *Wester v. Belote*, 138 So. 721 (Fla. 1931).

Competitive procurement affords the public protection by preventing favoritism toward contractors by public officials. *City of Daytona Beach v. News Journal Corp.*, 156 So. 887 (Fla. 1934)

Public bidding seeks to ensure fair competition by providing equal terms/criteria for award of contracts. *City of Opa-Locka v. Trs. of Plumbing Indus. Promotion Fund*, 193 So.2d 29 (Fla. 3d DCA 1966)

II. JEA ITN #129-19 Provisions Regarding Communications

Ex Parte Communication is defined in the ITN as “inappropriate communication concerning the ITN between a firm submitting a Reply and a JEA representative during the time which this ITN is being advertised [through] the time of award. For more information on Ex Parte Communications, see JEA Procurement Code, Article 1-110.” *ITN, Pg. 81*

“Parties interested in making an offer related to JEA’s review of potential alternatives are required to participate in this ITN process, which will be integral to the report and recommendations that will be provided to the [JEA] Board of Directors and the Jacksonville City Council.” *Section 1.3 (Additional Information) of the ITN, Pg. 22*

“All communications regarding this ITN process should be directed to the Designated Procurement Representatives identified in Section 2.11, who will distribute communications to or solicit necessary information from JEA personnel, the Advisors, or subject matter experts as deemed appropriate.” *Section 1.4 (Advisors) of the ITN, Pg. 22*

“By signing the Reply, the Respondent certifies ... that its Reply is made without outside control, collusion, fraud, or other illegal or unethical actions. The Respondent shall comply with all JEA and City of Jacksonville ordinances, policies, and procedures regarding business ethics. *Section 2.12 (Ethics) of the ITN, Pg. 23*

III. JEA Procurement Code Provisions Regarding Ex Parte Communications

Section 1-110 of the Procurement Code provides, in relevant part, as follows:

(1) *Policy.* Ex Parte Communication denies any Company submitting a bid or proposal fair, open and impartial consideration. Adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process of public Procurement. Therefore, any Ex Parte Communication between a Company (or its employees, agents or representatives) and JEA (its members, Employees, agents, or representatives, other than the Chief Procurement Officer or Designee or JEA’s legal counsel) is strictly prohibited.

(2) *Periods.* Ex Parte Communication is prohibited during the following periods:

(a) from the advertisement of a Solicitation through the award of a Contract; and

(b) from the initiation of a protest of an Award or Contract through resolution of such protest.

IV. Florida Statutes – Procurement and Ethics Laws

Section 838.22(1) – Bid Tampering

(1) It is unlawful for a public servant or a public contractor who has contracted with a governmental entity to assist in a competitive procurement to knowingly and intentionally influence or attempt to influence the competitive solicitation undertaken by any governmental entity for the procurement of commodities or services, by:

(a) Disclosing, except as authorized by law, material information concerning a vendor’s response, any evaluation results, or other aspects of the competitive solicitation when such information is not publicly disclosed.

(5) Any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 112.313(6) – Misuse of Public Position

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege,

benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

Section 112.313(8) – Disclosure or Use of Certain Information

A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

V. Jacksonville Ordinance Code

Section 602.401 - Misuse of position, information, resources etc.

(a) Misuse of position, title, or authority. It is a violation of this Chapter for an officer, or employee of the City or an independent agency to intentionally use his or her official position, title or any authority associated with his or her public office to coerce, induce or attempt to coerce or induce another person, or otherwise act in a manner inconsistent with official duties, to obtain a special privilege or exemption, financial or otherwise, for himself, herself or others, or to secure confidential information for any purpose other than official responsibilities.

(b) Misuse of confidential information. It is a violation of this Chapter for an officer, or employee of the City or an independent agency to intentionally or knowingly disclose or use any confidential information gained by reason of said person's position for any purpose other than official responsibilities.

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MEMORANDUM

CLIENT-MATTER NUMBER
123214-0101

TO: Lynne C. Rhode

FROM: Robert H. Hosay
Benjamin J. Grossman

DATE: August 21, 2019

RE: Prohibitions on *Ex Parte Communications* and Limitations on Communications to Ensure Fair and Open Procurement Process

You have asked us to advise regarding the applicability of the prohibition on *Ex Parte Communications*, which is in place during the conduct of Invitation to Negotiate (“ITN”) #127-19, entitled “Strategic Alternatives,” to members of the City of Jacksonville City Council (the “Council”). As you know, prohibitions on *ex parte* communications are standard in government procurements, are required in all JEA procurements pursuant to JEA’s Procurement Code, and are similarly imposed by Florida law in state-level procurements and called for under the governing rules of most government jurisdictions. With respect to the question that you have posed to us, in short, we conclude that there is a strong basis to read the prohibition on *ex parte* communications as applying to members of the Council, and that the City of Jacksonville and the Council would best serve the public purposes underlying the prohibition on *ex parte* communications by abiding by the communication limits contained within JEA’s purchasing policies.

Analysis:

On Friday, August 2, 2019, JEA released ITN #127-19, entitled “Strategic Alternatives.” The release of the ITN caused a prohibition on *ex parte* communications between potential bidders and JEA and its representatives (commonly referred to as a “cone of silence”) to take effect. This prohibition is described in more detail in section 1-110 of the JEA Procurement Code. As the Procurement Code states, “adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process,” and *ex parte* communications have the potential to deny fair, open, and impartial consideration to companies that may submit a response to the ITN. To ensure that this procurement is conducted in a fair, open, and impartial manner, communications between potential bidders (including their employees, agents, or representatives) and JEA (or its members, employees, agents, or representatives) are strictly prohibited between the time of the ITN’s release and the award of a contract resulting from the ITN. As explained below, because the Council is potentially a decision

maker with respect to the ITN process and, by the express terms of section 21.04 of the City Charter, may be asked to approve a potential transaction resulting from this ITN process, this prohibition on *ex parte* communications extends to members of the Council.

“*Ex Parte* Communication” is defined by the JEA Procurement Code as meaning “any oral or written communication relative to a Solicitation, evaluation, Award or Contract controversy that occurs outside of an advertised public meeting pursuant to Section 286.011, F.S.” The JEA Procurement Code, in turn, sets forth a prohibition on *Ex Parte* Communication, subject to a few narrow exceptions, at Section 1-110. This provision of the Procurement Code provides, in relevant part, as follows:

(1) *Policy.* Ex Parte Communication denies any Company submitting a bid or proposal fair, open and impartial consideration. Adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process of public Procurement. Therefore, any Ex Parte Communication between a Company (or its employees, agents or representatives) and JEA (its members, Employees, agents, or representatives, other than the Chief Procurement Officer or Designee or JEA’s legal counsel) is strictly prohibited.

(2) *Periods.* Ex Parte Communication is prohibited during the following periods:

- (a) from the advertisement of a Solicitation through the award of a Contract; and
- (b) from the initiation of a protest of an Award or Contract through resolution of such protest.

While there are certain limited exceptions to the prohibition on *ex parte* communications, each of these exceptions relate to formal activities conducted by JEA as part of the procurement or protest process (such as pre-bid meetings, site visits, negotiation sessions, meetings of the Awards Committee, or formal communications as part of the protest process), communications between a current-JEA contractor and JEA staff relating to work currently in process and unrelated to the procurement, or questions directed to the designated procurement point of contact identified in the solicitation documents.

As a practical matter, this prohibition on *ex parte* communications means that, from the time of the ITN’s release to the point at which an award is made, no conversations or communications relating to the ITN should occur between potential bidders and JEA employees, agents, or representatives other than communications between potential bidders and the Designated Procurement Representatives identified in the ITN (John McCarthy and Jenny McCollum) or communications at meetings formally scheduled by JEA as part of the procurement process. “The award of a Contract” is made, triggering the end of the prohibition on *ex parte* communications that accompanies the advertisement of the ITN, at the point that the JEA Board has considered the recommendation of the Negotiation Team and voted to make a contract award under the ITN. It is important to note, however, that under section 1-110(2)(b) of the Procurement

Code, the filing of a protest to the procurement process would result in the prohibition on *ex parte* communications going back into effect until the conclusion of the protest process.

This provision is analogous to the state-level cone of silence contained within section 287.057(23), Florida Statutes. The current state-level cone of silence requires each solicitation issued by an agency subject to chapter 287 to include the following statement:

Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response.

§ 287.057(23), Fla. Stat. This provision was adopted into law by the Florida Legislature in 2006 as section 1 of Chapter 2006-224, Laws of Florida, and was intended to formalize the prohibition on contact between vendors and any employee of the State relating to an on-going procurement. *Senate Staff Analysis and Economic Impact Statement*, CS/CS/SB 2518 (Fla. S. Ways and Means Comm. Apr. 4, 2006) at pp. 7-8. Prior to adoption of this provision, state agencies were required to include in each procurement a form developed by the Department of Management Services that provided, in part, that “Respondents shall not contact any other employee of the Buyer or the State for information with respect to this solicitation.” *Id.* These provisions are intended to serve two purposes: first, to ensure that no vendor is placed at an informational disadvantage while the procurement is ongoing and, second, to prohibit vendors from making contact during the pendency of a procurement “in an attempt to influence the decision makers.” *Cubic Transp. Sys., Inc. v. Dep’t of Transp.*, 2014 Fla. Div. Adm. Hear. LEXIS 468 at **70-71, Case No. 14-2322BID (Fla. Div. of Adm. Hear. Sept. 4, 2014). As these analogous provisions make clear, the prohibition is intended not only to prevent inappropriate contact with employees of the procuring agency itself, but likewise with any person that could have influence or appear to have influence, in either the executive or legislative branch, who a bidder may contact in an attempt to improperly influence the procurement process. Similarly here, JEA’s prohibition on *ex parte* communications extends not only to JEA itself, but also to representatives or agents of JEA, including the Council (Jacksonville’s “legislative branch”) and the mayor (Jacksonville’s “executive branch”).

As the policy portion of Section 1-110 of the Procurement Code recognizes, the prohibition on *ex parte* communications is necessary because “adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process,” and *ex parte* communications have the potential to deny fair, open, and impartial consideration to companies that may submit a response to the ITN. The Florida Supreme Court long ago held that the purpose of public bidding laws is to:

protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and

opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public body] at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the [public body], by affording an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931). These objectives have been interpreted to mean that the acts prohibited during a public procurement as contrary to competition “include those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent.” *CTS America v. Dep’t of Highway Safety and Motor Vehicles*, 2011 Fla. Div. Adm. Hear. LEXIS 264 at **61-62, Case No. 11-3372BID (Fla. Div. of Adm. Hear. Oct. 19, 2011). That a prohibited contact may not actually have the effect of corrupting the process or providing an informational advantage is not relevant to the prohibition: the simple potential of prohibited contact to have such an effect, or the appearance of impropriety that may result from prohibited contact, are themselves to be avoided. See, e.g., *Roam Secure, Inc. v. Div. of Emergency Mgmt.*, 2008 Fla. Div. Adm. Hear. LEXIS 218 at **23-24, Case No. 07-5454BID (Fla. Div. of Adm. Hear. Apr. 23, 2008) (“Roam argues that its communications to DEM during the no-contact period were harmless since DEM chose NTI’s proposal over Roam’s proposal. Notably, the success or lack thereof of a prohibited communication is not what makes it unlawful. Mr. Tiene chose to both call and email Mr. Hagan with unsolicited information during the no-contact period. Roam, thus, should have been disqualified from participation in the RFP process.”).

Because of these important purposes, competitive bidding laws such as JEA’s prohibition on *ex parte* communications must always receive a construction that ensures these objectives are met and that the laws are not circumvented. *Wester*, 138 So. at 724. As the Florida Supreme Court again explained:

Insofar as they thus serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials, and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayers’ expense, are of highly remedial character, and should receive a construction always, which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded or defeated.

Id.

Consistent with the public policy articulated by the Florida Supreme Court in the *Wester* decision, the prohibition on *ex parte* communications contained within JEA’s Procurement Code should be given a broad construction that effectuates its purpose of preventing both anticompetitive conduct and attempts to influence the process, or the appearance of or opportunity for such actions. Thus, to the degree that there is any question as to whether the provision applies to members of the Council, this question should be resolved in favor of finding that the provisions apply to ensure

that the purposes of the prohibition are served and impropriety, or the appearance thereof, are avoided such that public confidence in the procurement process is not eroded.

Under this analysis, it appears clear in this context that members of the Council should be considered representatives or agents of JEA who are subject to the prohibition on *ex parte* communications contained in Section 1-110 of the Procurement Code. One Florida appellate court has analyzed the meaning of the word “representative” as follows:

Black’s Law Dictionary 1302 (6th ed. 1990), defines “representative” as “[a] person or thing that represents, or stands for, a number or class of persons or things, or is equivalent to, another person or thing.” Black’s Law Dictionary recognizes that when one represents another in a special capacity as an agent, the term “representative” may be interchangeable with the term “agent.” However . . . the terms “agent” and “representative” are not synonymous.

Breed Techs. v. AlliedSignal, Inc., 861 So. 2d 1227, 1232 (Fla. 2d DCA 2003) (analyzing meaning of terms “representative” and “agent” for purposes of venue statutes). Given that the Council will be asked to play a role in and approve any transaction that may result from the ITN, *see* § 21.04(p), *Charter of the City of Jacksonville, Florida*, has approval authority over the JEA budget, *see id.* at § 21.07(b), and expressly has legislative authority over JEA as provided in section 21.11 of the City Charter, it would be difficult to argue that the Council does not “represent” or “stand for” JEA, at least in some respects, with respect to the ITN. Further, to the degree that a Councilmember attempted to exert influence over the JEA solicitation process, or held him or herself out as having the ability to influence the process, such actions would certainly appear to confirm that such Councilmember is a “representative” of JEA with respect to the process. Moreover, particularly in light of the well-established public policy in favor of fair and open procurements, as well as the clear purpose of the prohibition on *ex parte* communications to prohibit attempts to influence the procurement process and eliminate potential unfair advantages, it appears clear that, as a matter of policy, the Council and its members should ensure that their actions are consistent with this policy and purpose. As a result, Council members are prohibited from communicating with any potential bidders or their employees, agents, or representatives.

While it is understandable that members of the Council may be interested in – or wish to have a say regarding – this procurement process, as the City Charter provides, the appropriate time for them to do so is when any proposed transaction requiring Council approval is brought before the Council. As it is possible that this procurement never results in a transaction that would come before the Council, any attempt to become involved prior to that time would be premature. Taking meetings with any interested parties, or any direct or indirect communications, would be clearly prohibited under the terms of the JEA Procurement Code. Similarly, constituent communications (even if conducted on an individual basis or in a public meeting) relating to the ITN would be problematic under the prohibition given that the “cone of silence” prevents communications with both potential bidders and their employees, representatives, or agents. Because Council members are not the Designated Procurement Representatives under the ITN and such communications are not part of the formal ITN process, and such communications thus would not constitute

communications coming within one of the enumerated limited exceptions to the prohibition. Moreover, while the Council can certainly consider legislation relating to JEA during the pendency of the procurement, any legislation that would interfere in the process or address any individual participants would likely be problematic. This is, however, not intended to be an exhaustive list of actions that may be included within the prohibition on *ex parte* communications, and any fact based inquiries that the Council may have should be brought to the attention of the Office of General Counsel so that appropriate guidance can be provided.

In addition to the provisions of the JEA Procurement Code, Florida law also contains provisions that are relevant to this analysis. Specifically, section 838.22, Florida Statutes, the bid tampering statute, makes it unlawful for any public servant to knowingly and intentionally attempt to influence a competitive government procurement. This statute provides in relevant part that:

It is unlawful for a public servant . . . to knowingly and intentionally influence or attempt to influence the competitive solicitation undertaken by any governmental entity for the procurement of commodities or services, by:

(a) Disclosing, except as authorized by law, material information concerning a vendor's response, any evaluation results, or other aspects of the competitive solicitation when such information is not publicly disclosed.

§ 838.22(1), Fla. Stat. (emphasis added). It is important to note that this prohibition, by its express terms, does not only prohibit a public servant from attempting to influence a competitive procurement by the entity for which he or she works, but instead prohibits attempts to influence solicitations “undertaken by *any governmental entity*.” *Id.* (emphasis added). Thus, even if one were to assume for the sake of argument that members of the Council were not encompassed within the terms of the prohibition on *ex parte* communications contained within the JEA Procurement Code, section 838.22, Florida Statutes, would still serve to limit their ability to disclose non-public information relating to the procurement. The bid tampering statute is a criminal statute and imposes substantial penalties, providing that a violation of its terms constitutes a felony of the second degree. § 838.22(5), Fla. Stat.

Conclusion:

In short, the prohibition on *ex parte* communications or “cone of silence” applies to the Council because the City and Council are or may appear to be “members, [e]mployees, agents, or representatives” of JEA. While the cone of silence does not prevent or preclude the Council from conducting the City of Jacksonville’s business in its ordinary course, it does prohibit communications between members of the Council and potential bidders or their employees, agents, and representatives. In addition, Council members should be aware of the provisions of section 838.22 and ensure that they do not take actions that could be interpreted as an attempt to influence the competitive solicitation undertaken by JEA through the disclosure of non-public information relating to the solicitation.



FOLEY & LARDNER LLP

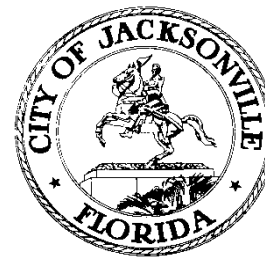
The Strategic Alternatives ITN is an important, time-consuming, and costly procurement that is currently being undertaken by JEA and is subject to a prohibition on *ex parte* communications. It would be prudent to take every reasonable precaution in order to mitigate any risk to the process. Thus, if there are Council duties or work that could potentially implicate JEA or the Strategic Alternatives ITN, we would recommend that the Council mitigate risk where it is possible to do so by deferring the activity until the expiration of the prohibition on *ex parte* communications and seeking advice from counsel.

Notwithstanding the analysis set forth above, it should be expressly noted that our analysis does not constitute a guaranty or a defense to a contrary decision which may later be rendered by appropriate authorities, which have broad discretion to interpret and apply the applicable laws, or by a court construing the same laws. This analysis is limited to the laws of Florida in effect on this date, and we have not analyzed the laws of any other jurisdiction. This analysis is intended to apply only to those facts and circumstances that exist and have been brought to our attention as of the date of this memorandum, and we assume no obligation or responsibility to update or supplement this analysis to reflect any facts or circumstances that may come to our attention after that date or any changes in laws that may occur or have occurred this date, or to inform you of any change in circumstances occurring after the date of this memorandum that would alter this analysis.

This analysis is being provided solely for your benefit and is limited to the matters expressly described or adopted by reference in this memorandum, and no conclusions may be inferred or implied beyond the matters expressly stated in this memorandum. This analysis may not be used or relied upon for any other purpose or by any other party without our prior written consent.

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**OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 255-5050**



LEGAL MEMORANDUM

TO: Honorable Council Members

FROM: Jason Gabriel, General Counsel

RE: Legislative Counsel & Specialized Legal Counsel

DATE: September 23, 2019

I. Background, History & Purpose

A request was made at a Special Council meeting held on September 16, 2019 seeking direction from the Office of General Counsel with regard to engaging specialized outside counsel to assist with JEA-related matters. This memo provides guidance with respect to that process.

The Council's chief legal officer is the General Counsel, and any assistant general counsel may be assigned to the Council by the General Counsel to counsel the Council. Additionally, Section 7.01, Charter, provides that "the council may create an office of legislative counsel within the legislative branch whose purpose shall be to advise and assist the council and its committees and members in the achievement of a clear, faithful and coherent expression of the legislative policies and to perform such other related duties for the council as the council may direct." This provision permits the City Council to create an office within the Consolidated Government which works within, and is part of, the legislative branch.

According to the Charter, such an office would provide services similar to those currently provided by the Office of General Counsel through Peggy Sidman and Paige Johnston (and others). The position(s) would be housed, funded, budgeted and administered by the City Council (under the Council President's immediate supervision). In this format, the City Council may hire the attorneys of its choice. Because of the narrow Charter authority granted to the Legislative Counsel, such counsel would be required to coordinate with the Office of General Counsel so as to assure the proper distribution of labor, allocation of resources and understanding of the role. The Office of General Counsel would be willing to provide training to such attorney(s) and remain in close cooperation and collaboration with such staff. The lawyers within the Legislative Counsel's Office must understand their labor would relate solely to legislative prerogatives such as drafting legislation, providing procedural counsel, etc.

Additionally, such lawyers would be prohibited from drafting contracts or items that involve executive branch functions.

To be clear, City Council is not authorized to hire attorneys to provide adversaries to the Office of General Counsel or to challenge a binding legal opinion. The Office of Legislative Counsel would be bound by the binding legal authority of the General Counsel in the same manner as the Council and any office or agency of the Consolidated Government. The Office of Legislative Counsel would not be authorized to provide legal opinions or advice that run counter to the opinions or advice of the General Counsel. Article 7 of the Charter ensures a single legal voice for the Consolidated City, including the Council. Article 7 centralizes legal advice so as to streamline government and eliminate intergovernmental litigation, as well as the need for the taxpayer dollars that underwrite such internal fights.

The Council has previously experimented with having an Office of Legislative Counsel. Shortly after creating that Office, the City Council, in 1987, recognized that the hiring of Legislative Counsel carries with it complications and difficulties and eliminated the Office of Legislative Counsel. At the time, the Council recognized that its legislative needs were most efficiently met by lawyers from the Office of General Counsel providing those services. See Ordinance 87-1150-614 where Council, in eliminating the Office of Legislative Counsel, set forth several reasons for finding that it was not in the best interests of the City to have an Office of Legislative Counsel, including the fact that it led to duplications in office expenditures as well as problems in coordination and consultation between the Office of Legislative Counsel and Office of General Counsel. Furthermore, the City Council determined that it was in the best interests of the City that the legal staffs providing legal services to the Council “be united under one consolidated office, the Office of General Counsel, in accordance with the original intent and structure of the Consolidated Government.”

Should the Council seek to hire an attorney or firm on a special project basis, the hiring of that attorney or firm would be subject to the requirements of the Charter which provide that any outside counsel may be hired only upon finding of a need by the General Counsel. Section 7.01, Charter (“The General Counsel may authorize the City to engage outside private counsel upon written certification by the General Counsel of its necessity, and such engagement shall be in accordance with procedures set for the by the City Council.”) Should the Council seek counsel other than as the Legislative Counsel, or an assistant to the Legislative Counsel, the Council must coordinate the request for acquisition of such legal counsel through the General Counsel. All legal service requests for the entire consolidated government for outside engagement flow through the Office of General Counsel. Section 7.01, City Charter.

II. Scope of Service, Budget, Selection & Engagement of Special Counsel

With respect to hiring specialized outside counsel regarding JEA questions, I recognize the needs of the Council in this matter and the acquisition of such counsel may be justifiable in accordance with the City Charter. As I recommended at the Special Meeting, the most optimal and efficient method of handling these inquiries is to, as they arise, pose the question to the Office of General Counsel. Our office would in turn either answer the question with in-house expertise, or, if necessary, engage specialized outside counsel to address the matter. The other option would be to engage specialized outside counsel to address the matters as they arise. The

remainder of this memo addresses that process (i.e., the procedures related to engaging specialized legal counsel for legislative-related purposes).

1. Scope of Service

First, the set of questions to be answered or slate of services desired should be considered, articulated and drafted. In the instance of the potential recapitalization of all or a part of the JEA, this could involve corporate, transactional, mergers and acquisition counsel (“M&A”), particularly in the context of a governmental agency examining potential privatization.

2. Budget

Based on the scope of services, anticipated rates, the longevity and complexity of the project and other considerations, an anticipated budget is approximated and the appropriate budget appropriation made. For example, an initial recommended budget for M&A counsel as referenced here might be in the range of \$250,000.00 to \$500,000.00. The budget would be revisited during the course of the engagement and when necessary amended or extended as dictated by the scope of the project.

3. Selection of Counsel

As General Counsel, I would provide either a firm, or list of firms, that would be optimally situated with the appropriate expertise to handle the quality, quantity and breadth of services that is anticipated with the project scope. Council in turn would approve the firm, or set of firms, for that specialized set of legislative-related legal work. This is accomplished via legislation that includes an approved engagement letter as described in the next section.

4. Engagement of Counsel

Once the appropriate counsel is selected, an engagement letter is entered into, in a form substantially similar to the one attached hereto as Exhibit A. The engagement letter is also where approval by the General Counsel is made thereby satisfying the written certification required by the Charter as to the necessity of the legal service. This engagement letter is typically included as an exhibit to the considered legislation referred to above.

III. Conclusion

This memo addresses the process for obtaining and engaging a law firm to serve as legislative counsel for a special project engagement involving legislative-related legal counsel on a particular issue.

Please contact me with any questions or concerns.

EXHIBIT A
ENGAGEMENT LETTER

Date

_____, Esquire
Firm Name: _____
Firm Address: _____

Email: _____

RE: Engagement of [Firm Name] for specialized legislative-related legal services regarding _____

Dear Mr./Ms. _____ :

This letter is to confirm the engagement of [Firm Name] (the “Firm”) by the City of Jacksonville, Office of General Counsel (“OGC”) on behalf of the City of Jacksonville (“City”) for specialized legislative-related legal counsel related to _____. The Firm is being retained to provide specialized legal services as outside counsel to the City Council. Specifically, the Firm will provide the following scope of services to the City Council in close cooperation and consultation with the City Council and the OGC:

- Advise and counsel the City Council and OGC on _____.
- Provide all other legal services as may be requested by the Council and OGC and reasonably related to the matter described.

The first purpose of this letter is to confirm the Firm’s initial engagement as counsel and to confirm certain information concerning fees and billing, and other terms that will govern our relationship. You will be the Firm’s primary contact. As agreed, you are to provide legal services to the City at the rate of \$____.00 per hour. The rate for other attorneys and paraprofessionals who may work on this matter and their respective rates are as follows: _____. Secretarial time will not be billed. In the event that the Firm may, from time to time, recommend that other attorneys and/or paralegals be enlisted to provide assistance on these matters, you will notify OGC when that is recommended to obtain prior written approval and agreement upon the hourly rate for each such person. It is anticipated that routine paralegal and attorney support will be provided directly by OGC.

This engagement is limited to a “not-to-exceed” amount of \$____.00, and is governed by Section 108.505(____) of the City of Jacksonville Ordinance Code, in addition to other provisions of the Ordinance Code. The Firm agrees to notify OGC when \$____.00 of the budget has been expended and recognizes that the *not-to-exceed* amount cannot be modified without written amendments authorized in accordance with the Ordinance Code. No fees or costs shall be billed to the City beyond the foregoing amount without a written amendment to this engagement letter signed by the Firm and the General Counsel or his designee, and subject to the required and authorized approvals as set forth in the Ordinance Code. All files created during

your retention of the matters at hand are the property of the City. Upon the conclusion of the matters, or upon a written request by the Council or OGC for their production, all such files shall be returned.

The Firm will comply with the City's travel reimbursement policy (including but not limited to Chapter 106 (Budget and Accounting Code), Part 7 (Travel and Expense Reimbursement). No travel costs exceeding the amounts allowed by such policy will be reimbursed to the Firm. The Firm shall not charge for travel time to or from Jacksonville, Florida. The Firm also agrees to charge the City the lowest amounts that it charges to other governmental clients for administrative costs such as photocopying, faxing, delivery, etc., although it is contemplated that billing for such services should be minimal because such services will normally be provided by the OGC.

Detailed monthly billings will be submitted by the 10th of each month to the City via OGC, c/o Margaret M. Sidman, Managing Deputy General Counsel, at PSidman@coj.net and hard copy to her attention at 117 W. Duval Street, Ste. 480, Jacksonville, FL 32202, along with electronic copy to Cheryl L. Brown, Director/Council Secretary at CLBrown@coj.net, and electronic copy to me at JGabriel@coj.net. The Firm shall also submit reasonably detailed itemized bills to OGC in tenth-of-an-hour billing increments format, and shall break down the tasks performed by each person involved, and will identify by initials or name each person who performs the respective tasks to OGC. Payment will be remitted by the City approximately thirty days following receipt of the billings. The parties will endeavor in good faith to resolve promptly any billing issues as may arise from time to time.

The City is aware that the nature of the Firm's practice is such that the Firm may from time to time concurrently represent one client in a particular case or matter and an adversary of that client in an unrelated case or matter if it is the Firm's professional judgment that the Firm can undertake the concurrent representation impartially and without any adverse effect on the other responsibilities the Firm has to either client. The Firm will provide the City with information regarding such matters, and seek a written acknowledgment that such concurrent representation, in unrelated matters, is not inappropriate and consent to any such present or future concurrent representations.

OGC may terminate the Firm's representation by delivering a written notice of termination to the Firm. The Firm will also have the right to withdraw from its representation of the City any time with the City's consent or for good cause without the City's consent. If the Firm is discharged or elects to withdraw, the parties will take all steps necessary to free each other of any obligation to perform further, including the execution of any documents necessary to complete the termination of the representation, and will take all steps that are reasonably practicable to protect the City's interests. If a discharge or withdrawal occurs, the Firm, subject to the applicable not-to-exceed amount, will be entitled to be paid or reimbursed for all authorized costs and expenses paid or incurred on the City's behalf, and the Firm will be entitled to be paid a reasonable fee for the authorized professional services rendered to the date of termination and for which the Firm previously had not been paid.

If this letter correctly reflects your understanding of the scope, terms, and conditions of your representation of the City Council and the City of Jacksonville, please execute the enclosed

copy of this letter in the space provided below and return it to my attention. If you have any questions concerning this letter or your representation, please do not hesitate to call me.

Sincerely,

Jason R. Gabriel
General Counsel

The foregoing is approved and agreed to:

By: _____
_____, Esquire
_____, Firm

Date: _____

Approved:

Scott Wilson
Council President

Date: _____

Approved:

Cheryl Brown
Director/Council Secretary

Date: _____

Approved:

Margaret M. Sidman
Managing Deputy General Counsel

Date: _____

I have confirmed that funds are appropriated and can be encumbered to support this retention.

[Name of authorized official]
[Title of authorized official]

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OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
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PHONE: (904) 255-5050



MEMORANDUM

TO: Honorable Council Members

FROM: Jason R. Gabriel, General Counsel

RE: Ex Parte (a/k/a Cone of Silence) Guidelines; JEA Invitation to Negotiate

DATE: September 24, 2019

I. Purpose & Background

The purpose of this memorandum is to provide you with simple guidelines on Ex Parte (a/k/a Cone of Silence) communication requirements with respect to the procurement process related to the JEA's exploration of potential recapitalization, namely, JEA Invitation to Negotiate #127-19 for Strategic Alternatives issued on August 2, 2019 (the "ITN"). This memo summarizes and supplements previously issued guidance on this topic pursuant to a memorandum issued by this office dated August 27, 2019.

In government procurement, the ex parte communications restriction is commonly referred to as the "cone of silence." The essential purpose of the cone of silence rules is to ensure fair, transparent, ethical and open competition in the procurement process and to secure the best values for the government at the lowest possible expense.¹ The cone of silence for the ITN began on August 2, 2019² and will remain in effect until JEA (through its Board) makes a contract award³ (the "Cone of Silence Period"). The Cone of Silence Period will also apply to any bid protests and remain in effect until JEA resolves such protests (i.e., grant or deny). As discussed, the Council⁴ is a clear *potential* decision-maker in the ITN procurement process. This is a function of the City Charter. In particular, Section 21.04(p), Charter sets forth the following:

Nothing in this article shall authorize or be construed to authorize JEA to transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or

¹ *Wester v. Belote*, 138 So. 721 (Fla. 1931).

² The JEA Solicitation is available at jea.com/strategicalternatives.

³ Any JEA Board contract award under this solicitation is subject to Council approval and subsequent voter referendum. Section 21.04, JEA Charter.

⁴ The Mayor is also a *clear* potential decision-maker in the JEA ITN Solicitation procurement process. Thus, the guidelines also apply to the Mayor, including his immediate Mayoral staff.

private without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum approval of the terms and conditions of the sale.

As such, the Council has ultimate legislative authority to decide whether such a transfer or sale is sent to the voters to decide. Accordingly, it is important that the Council understand how various types of communication regarding the ITN *may* directly or indirectly impact the fair, transparent, ethical and open procurement process. In order for the JEA Board to meaningfully explore strategic alternatives for JEA's future in this procurement process and, together with Vendors and Respondents,⁵ it will invest significant amounts of time and resources. The guidelines below are intended to assist you in discerning appropriate actions and communications regarding JEA during the Cone of Silence Period.

II. Ex Parte (Cone of Silence) Guidelines

The guidelines are based on applicable laws⁶ and are relevant until such time that the Cone of Silence Period ends. The Cone of Silence Period ends and no longer applies when the JEA Board makes a contract award and all bid protests, if any, have been resolved. Of course, any contract award is subject to Council approval and subsequent voter referendum.

This summary is intended to serve as a practical guide during the Cone of Silence Period only. Whether a specific communication or action by the Council is permitted or prohibited by law and best government procurement practices will vary depending on the type and content of the communication in question. When in doubt, and *prior to* making your desired action or communication regarding this matter, please do not hesitate to seek further advice from our Office. There are two essential ITN-related communication restrictions⁷ during the Cone of Silence Period: (1) communications with vendors or respondents to the ITN, and (2) communications regarding the merits of the ITN terms. These restrictions are explained below:

⁵ "Vendors" and "Respondents" are defined in the JEA ITN Solicitation on Pg. 83-84.

⁶ Public policy favors competitive procurement whenever possible, even in the absence of controlling statutes and/or laws. *1966 Op. Att'y Gen. Fla. 066-9* (Feb. 7, 1966). The purpose of public bidding is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public body] at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the [public body], by affording an opportunity for an exact comparison of bids. *Wester v. Belote*, 138 So. 721 (Fla. 1931). Competitive procurement affords the public protection by preventing favoritism toward contractors by public officials. *City of Daytona Beach v. News Journal Corp.*, 156 So. 887 (Fla. 1934). Public bidding seeks to ensure fair competition by providing equal terms/criteria for award of contracts. *City of Opa-Locka v. Trs. of Plumbing Indus. Promotion Fund*, 193 So.2d 29 (Fla. 3d DCA 1966). Also see *Florida Statutes, Section 838.22(1) – Bid Tampering, Section 112.313(6) – Misuse of Public Position, Section 112.313(8) – Disclosure or Use of Certain Information. City of Jacksonville, Ordinance Code, Section 602.401 - Misuse of position, information, resources etc.*

⁷ These restrictions are analogous to state-level cone of silence requirements contained within Section 287.057(23), Florida Statutes. That law intended to prohibit contact between vendors and employees of the State related to on-going procurement processes. Such provisions are intended to serve two purposes: first, to ensure that no vendor is placed at an informational disadvantage while the procurement is ongoing and, second, to prohibit vendors from making contact during the pendency of a procurement "in an attempt to influence the decision makers." *Cubic Transp. Sys., Inc. v. Dep't of Transp.*, 2014 Fla. Div. Adm. Hear. LEXIS 468 at **70-71, Case No. 14-2322BID (Fla. Div. of Adm. Hear. Sept. 4, 2014). As these analogous provisions illustrate, the prohibition is intended not only to prevent inappropriate contact with employees of the procuring agency itself, but likewise with any person that could have influence or appear to have influence, in either the executive or legislative branch, who a bidder may contact in an attempt to improperly influence the procurement process. Similarly here, JEA's prohibition on ex parte communications extends not only to JEA itself but also to representatives or agents of JEA, including the Council (Jacksonville's "legislative branch") and the mayor (Jacksonville's "executive branch").

(1) Communications with Vendors/Respondents

Communications of any kind between the Council and Vendors/Respondents regarding the ITN, including communications regarding process participation or interest in responding, are strictly prohibited.⁸ Communications between the Council and Vendors/Respondents regarding any matters unrelated to the JEA ITN Solicitation are permissible. However, Council should consider appearances of impropriety when engaging in any permissible communications with Vendors/Respondents.

(2) Communications on the merits of the ITN terms

Communications between Council and members of the public, on social media, in news interviews or other public venues and forums regarding the merits of the JEA ITN Solicitation terms are strictly prohibited. Communications regarding JEA, JEA strategic alternatives, or JEA's future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of ITN. This would also apply to legislation filed by Council. Legislation filed by Council regarding JEA, JEA strategic alternatives and JEA's future *in general* is permissible so long as Council and Council committee discussions do not lead to discussions regarding the merits of the ITN. The same applies during the budget process.

Procurement risks associated with engaging in prohibited communications during the Cone of Silence Period are covered in the previously referenced August 27, 2019 memorandum. Those risks include the potential for Vendors and Respondents to be disqualified from participating in the procurement process which in turn could reduce competition, perpetuate misinformation during the process, and counteract time, money and resources expended by JEA, Vendors/Respondents and others, in undertaking JEA's decision to explore strategic alternatives for JEA's future.

III. Conclusion

As described above, there are essentially two (2) main ITN-related communication restrictions during the Cone of Silence Period: (1) communications with vendors or respondents to the ITN, and (2) communications regarding the merits of the ITN terms. All other policy-related discussion points with respect to the JEA are permissible. As always, please do not hesitate to contact me with any questions or concerns whatsoever.

⁸ As potential decision-makers to the JEA ITN Solicitation, the Council and Mayor will have the power to approve or reject the JEA Board's contract award during the procurement process. The JEA Board's *Ex Parte* Communications Policy prohibits communications between a bidder and JEA, its members, employees, agents, and *representatives*. Given the Council's authority in the JEA Charter to approve or reject the JEA Board's contract award, the Council in this limited procurement instance is acting as a representative and principal decision-maker of the JEA.

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MEMORANDUM

TO: Lawsikia Hodges, Esq.
Jason Gabriel, Esq.

CC: Lynne Rhode, Esq.

FROM: Kevin E. Hyde

DATE: September 25, 2019

RE: JEA Performance Unit Plan

This memorandum addresses the Long Term Performance Unit Plan (the "PUP" or the "Plan") approved by the JEA Board on July 23, 2019 and the application, if any, of various federal and state laws relating to securities and deferred compensation. We also comment on whether the PUP constitutes "extra compensation" under Florida law.

Description of the PUP

The PUP allows eligible employees to defer compensation in order to purchase a specified number of performance units from JEA and redeem them for a cash payment equal to the redemption price. The PUP is entirely voluntary. Any eligible employee may decide to participate or decline.

Eligible employees include all full-time employees (including full-time attorneys from the Office of the General Counsel dedicated exclusively to JEA, appointed employees, and represented employees) actively employed with JEA for at least three months prior to the performance units purchase date. The eligibility of employees to participate in the program is dependent solely on their employment status and execution of and compliance with a performance plan participation agreement. To participate, the employee must agree in a performance plan participation agreement to comply with the following covenants: (i) devote his/her best efforts to faithfully discharge his/her duties on behalf of the JEA and not take any action that would be contrary to the best interests of the JEA and (ii) not disclose confidential JEA information except as required by law or to perform employment duties. A breach of these covenants would result in the forfeiture of unvested units except for a return of the aggregate purchase price for such units. The agreements regarding the Plan will be subject to sections 409A and 457(f) of the Internal Revenue Code and will be governed by the laws of Florida and subject to arbitration in Duval County.



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A pool of units will be allocated¹ amongst employees based on his/her position level and the most recent annual performance review. The units will be available for purchase at \$10.00 per unit on January 15th of the calendar year following the calendar year in which JEA's annual financial audit statement is completed. Unpurchased units will return to the pool. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary (equal to the aggregate purchase price for the performance units) into an FDIC-insured savings account. At redemption, the employee will receive a cash payment in the amount of the redemption price that will include the purchase price paid per unit. JEA's Chief Financial Officer will calculate the redemption price, and it will be certified no later than 30 days following the completion of JEA's annual financial audit statement.

The calculation of the redemption price is dependent on JEA's current year value, which is defined as the sum of JEA's net position per JEA's annual audited financial statement, the aggregate consideration paid, distributed, credited, or otherwise provided to the City of Jacksonville during the 12-month period prior to the end of the performance period, and the aggregate consideration paid, distributed, credited, or otherwise provided to JEA's customers during the 12-month period prior to the end of the performance period. Depending on the increase or decrease of JEA's current year value, the redemption price for the units will increase or decrease. Payments made regarding the units will be paid less applicable withholding taxes.²

The employee must be actively employed on the vesting date for the units to vest. If an employee is involuntarily terminated (without cause or due to death or disability) prior to the vesting date, then the employee will receive a payment for the units at the same time as the amounts would have been paid had the employee not been terminated. If the employee's termination of employment is voluntary, then the employee forfeits the units. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

1. The PUP Does Not require Registration Under the Securities Laws

As described above, the PUP is an opportunity for JEA employees to defer compensation, purchase units within the PUP, and realize gain, if any, if the enterprise value of JEA increases. The PUP is designed to allow employees to personally invest in the enterprise growth of JEA in the next three years (i.e. encourage employees to have "skin in the game" with respect to improving the health of the utility). JEA's performance will be measured on the change in JEA's net position during the performance period.

¹ The allocation of performance units available to each employee for purchase will be directed by the JEA Compensation Committee Chair, who is the Administrator of the Plan.

² As a part of the JEA's Board's exploration of alternative scenarios to address the utility's fiscal challenges, JEA is also considering selling the utility. If that occurs, the performance period ends, the amount owed to the employee will be paid, and the Plan will be extinguished.



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A security may be considered any situation where individuals invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of someone other than themselves. However, since the performance units are being issued and sold by JEA, then the performance units are exempt from registration under both the federal and state securities laws. The units are exempt from registration since they are being issued by a public instrumentality of a state. Section 3(a)(2) of the Securities Act of 1933 and Section 517.051(1) of the Florida Statutes provide this exemption.

As long as the total subscription for the PUP does not exceed \$1,000,000.00,³ the municipal securities disclosures required for offerings of \$1,000,000 or more as provided by Rule 15c2-12 of the Securities Exchange Act of 1934 will not be applicable.

2. The PUP is Akin to Deferred Compensation Plans Allowed by Florida Law

Florida law and the JEA Charter allows employees of a governmental unit to participate in a deferred compensation plan.

The relevant Florida statute, F.S. 112.215, states in part:

In accordance with a plan of deferred compensation which has been approved as herein provided, the state or any state agency, county, municipality, other political subdivision, or constitutional county officer may, by contract or a collective bargaining agreement, agree with any employee to defer all or any portion of that employee's otherwise payable compensation and, pursuant to the terms of such approved plan and in such proportions as may be designated or directed under that plan, place such deferred compensation in savings accounts or use the same to purchase fixed or variable life insurance or annuity contracts, securities, evidence of indebtedness, or such other investment products as may have been approved for the purposes of carrying out the objectives of such plan. Such insurance, annuity, savings, or investment products shall be underwritten and offered in compliance with the applicable federal and state laws and regulations by persons who are duly authorized by applicable state and federal authorities. (F.S. 112.215(3)) (Emphasis added)

The statute further provides the basis for establishing the plan and criteria for approving the various accounts and investment accounts or vehicles. (F.S. 112.215(5-6)).

Article 21.07(j) of the JEA Charter specifically provides that "JEA shall have the option to establish an employee deferred compensation program separate from the city's employee deferred compensation program." Under this authority, the JEA 457 Deferred Compensation Plan was established in 2002 for the purpose of providing employees of JEA and employees of

³ As written, the PUP is scheduled to have 100,000 units at \$10.00 per unit.

the (now former) St. Johns River Power Park System with a voluntary method deferring taxation on compensation until death, retirement or certain other events. See memo dated July 6, 2018 from Aaron Zahn to JEA Board and as approved by JEA Board on July 30, 2018.

The PUP is not a traditional deferred compensation plan such as the one currently in place with JEA. However, the PUP is akin to and fits with the deferred compensation plan allowed by F.S. 112.215. Specifically, the JEA Board has approved the PUP; JEA will seek a determination that the compensation deferred by employees to purchase the PUP is not currently taxable (F.S. 112.215(5); and that the proceeds to the employees from the PUP, if any, will not be included in the employee's taxable income until proceeds are actually received (F.S. 112.215(6)(a)). Finally, the PUP does not impose any liability on JEA, "except to show that the payments have been [or will be] remitted for the purposes for which the compensation has been deferred." (F.S. 112.215(9)). Specifically, Section 9(c) of the JEA Long-Term Performance Unit Plan states, "[t]his Plan is intended to constitute an 'unfunded' program, and no amount shall be set aside to fund any payments hereunder prior to the end of the Performance Period. JEA's obligations under this Plan are unfunded and unsecured, and the Participants have no rights other than those of general unsecured creditors of the JEA Group with respect to any payment hereunder." Further, a JEA Employee stands to gain nothing if the Threshold Value Target is not attained during the applicable Performance Period. (Section 2(t) of the JEA Long-Term Performance Unit Plan).

If requested, we can provide a more detailed analysis but our initial review is that the PUP appears to be a permissible form of deferred compensation under F.S. 112.215.

In addition to the requirements under F.S. 112.215, the Administrator of the PUP should consult F.S. 112.21 to determine the applicability of requirements of custodial accounts in which the deferred compensation used to purchase performance units will be held. It is our understanding that JEA intends to hold the deferred compensation in an interest-bearing FDIC insured account such as those currently used for other existing JEA deferred compensation plans.

3. JEA is Not Pledging Credit to Participating Employees

Article 7, Section 10 of the Florida Constitution prohibits JEA from becoming a "joint owner with, or stockholder of, or giv[ing], lend[ing] or us[ing] its taxing power or credit to aid any corporation, association, partnership or person." As indicated above, JEA is not giving or using its taxing power or credit to help any JEA employee who purchases a PUP with deferred compensation. The Florida Supreme Court has described the pledging of credit as follows:

As used in Article VII, section 10, "credit" means "the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision for the benefits of private enterprises. This Court has explained that the lending of public credit means:



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[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.

Under this definition, we conclude that the COP's in this case do not contemplate a pledge of the District's credit, and that only a public purpose, and not a paramount public purpose, need be shown.

Miccouskee Tribe v. South Florida Water Management District, 48 So.3d 811, 823 (Fla. 2010) (internal citations omitted).

As earlier explained, a participating employee only realizes a gain on the deferred compensation used to purchase the PUP if the Threshold Value Target set forth on the Redemption Price Schedule is attained during the applicable Performance Period, i.e. there is an increase in value of JEA itself. No public property is placed in jeopardy by default of the participating employee or any other third party.

Given that no credit is being pledged, Article VII, Section 10 requires only that a public purpose be met. The PUP's stated public purpose 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 Northeast Florida; (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville. (Section 1(a) of the JEA Long-Term Performance Unit Plan)."

The Florida Attorney General has opined that "if the expenditure primarily or substantially serves a public purpose, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10. "AGO 2005-02. The AGO further stated that the determination of whether the expenditure of funds fulfills a public purpose is one that the legislative body, in this case the JEA Board, must make. *Id.* As noted above, the PUP specifies the public purpose, and the JEA Board has approved the PUP.

3. The PUP is Permissible under Florida Laws related to "Extra Compensation"

JEA's PUP gives employees the choice of purchasing units that can increase in value if the value of JEA increases and decrease in value if the value of JEA decreases. The Plan is voluntary and requires employees that wish to participate to buy-in by deferring their personal compensation to purchase the units and to execute an agreement pertaining to the Plan. As developed below, the Plan does not therefore constitute "extra compensation" under section 215.425, Florida Statutes.

Section 215.425 provides that "no extra compensation shall be made to any [public employee] after the service has been rendered or the contract made." The intent behind this provision is that public employees should not receive gratuities for services that were already rendered. AGO 2005-07 ("The purpose of such a provision is to prevent payments in the nature of gratuities for past service, and the restriction pertains to extra compensation given after service has been performed, not to compensation earned during service.").

We have reviewed the applicable legislative history of section 215.425 and have not identified anything suggesting that plans such as the PUP are, or are intended to be, prohibited by the statute. The provision applies principally in instances where public employees were to receive retroactive compensation for work already performed. *See* AGO 92-49 (holding that the Police Pension Board of Trustees could not pay a cost of living allowance to a retired police officer already receiving pension benefits for prior services); *see also* AGO 91-51 (holding that severance payments in lieu of notice violated the provision because the employee renders no service after termination and the payments were compensation for work already performed).

JEA's PUP plainly does not constitute "extra compensation" because the redemption payments are not compensation for the services that the employees render as part of their employment with JEA. Rather, the PUP allows all eligible employees to participate through a voluntary payment in enterprise creation at the risk of not receiving a return on the investment made to purchase the performance units. The PUP also does not serve to provide gratuities to the employees for their past service that they have been previously paid for and does not serve as a bonus program or incentive program to reward employees. Indeed, to participate in the Plan, JEA employees must opt-in at their sole discretion and expend their personal funds to purchase the units. The number of performance units available for purchase by each employee is directed by the Plan Administrator and is based on the employee's position level and annual performance review. The redemption payments for the units depend solely on the change in value of JEA. Thus, section 215.425 does not apply to the Plan, and the Plan does not constitute "extra compensation."

Conclusion

We appreciate the opportunity to review the PUP. Please call if there are any questions.

GC-1332648 (.pdf)

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OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE

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October 1, 2019

*BOARD CERTIFIED CITY, COUNTY
AND LOCAL GOVERNMENT LAW

The Honorable Ashley Moody
Attorney General, State of Florida
The Capitol PLO1
Tallahassee, Florida 32399-1050

RE: Request for Opinion

Dear General Moody:

Pursuant to Section 16.01(3), Florida Statutes, JEA (formerly known as the "Jacksonville Electric Authority") requests respectfully an official opinion and legal advice regarding a matter of importance to JEA and, critically, to the approximately 2000 JEA employees who provide dedicated service to JEA and its customers. JEA is an independent agency of the City of Jacksonville and is subject to the jurisdiction of the Jacksonville City Charter, ordinances and, of course, state laws and regulations. Pursuant to section 16.01(3), Florida Statutes, JEA constitutes a "unit of local government" entitled to request an official opinion in writing on a question of law.¹

Over the past few months, the Board and Senior Leadership Team of JEA have been exploring multiple scenarios of operation and investment to ensure that JEA customers and Northeast Florida receive the most cost-effective and efficient electric, wastewater, and water utility services. This exploration is necessary due to the rapidly evolving utility industry and declining sales resulting from energy efficiency measures taken by its customers. This fiscal and

¹ JEA is established as a "body politic and corporate," an independent authority of the City of Jacksonville pursuant to Laws of Florida 78-538, 80-515, 92-341 and Section 21.01 of the Charter of the City of Jacksonville, Florida. JEA is a unit of local government within the meaning of F.S. 16.01(3). The Florida Attorney General has previously issued advisory opinions at the request of the General Counsel of JEA. See AGO 92-43.

technological shift has necessitated development of a number of initiatives designed to improve and optimize the fiscal health of the utility and promote employee retention

In order to proactively engage and retain employees in this evolving and challenging financial landscape, the JEA Board on July 23, 2019 passed Resolution 2019-10, approving a Long Term Performance Unit Plan (the "PUP" or the "Plan"). The PUP is designed to allow employees to benefit from the enterprise growth of JEA in the next three years. JEA's performance will be measured on the change in JEA's net position during the performance period.

Attached is a copy of Resolution 2019-10 and Exhibits 1 and 2 to that resolution. Exhibits 1 and 2 provide a detailed summary of the PUP and Redemption Price Schedule for the PUP. Also attached is the Long Term Performance Unit Plan and Form of Long Term Performance Unit Agreement.

In summary, and as detailed below, the PUP provides full-time JEA employees an opportunity to defer compensation in order to purchase units at \$10.00 per unit and later redeem them for an amount dependent on JEA's current year value. Participation in the Plan is voluntary, and eligibility is dependent upon employment status. Benefits like the Plan are commonplace in the corporate world, where employees benefit from the success of a company, but are less so in government. The Office of General Counsel of the City of Jacksonville (the "OGC") and JEA Special Counsel (selected by the OGC) have assisted throughout the development and drafting of the PUP and associated PUP Agreement, and have confirmed the JEA Board's authority to pass Resolution 2019-10. While, as outlined herein, we believe the PUP complies with Florida law, given the absence of available case law or advisory opinions directly on point, JEA requests respectfully an opinion confirming that the PUP is not subject to section 215.425, Florida Statutes; and, if it is, that the PUP is not prohibited by section 215.425.²

A. The Long-Term Performance Plan:

The PUP allows eligible employees to defer compensation in order to purchase a specified number of performance units from JEA and redeem them for a cash payment equal to the redemption price. The PUP is entirely voluntary. Any eligible employee may decide to participate or decline.

Eligible employees include all full-time employees (including full-time attorneys from the Office of the General Counsel dedicated exclusively to JEA, appointed employees, and represented employees) actively employed with JEA for at least three months prior to the performance units purchase date. The eligibility of employees to participate in the program is dependent solely on their employment status and execution of and compliance with a performance plan participation agreement. To participate, the employee must agree in a performance plan participation agreement to comply with the following covenants: (i) devote his/her best efforts to faithfully discharge his/her duties on behalf of the JEA and not take any

² While JEA has not identified any other Florida Statutes implicated by the Plan, JEA intends to seek similar guidance from the Florida Commission on Ethics.

action that would be contrary to the best interests of the JEA and (ii) not disclose confidential JEA information except as required by law or to perform employment duties. A breach of these covenants would result in the forfeiture of unvested units except for a return of the aggregate purchase price for such units. The agreements regarding the Plan will be subject to sections 409A and 457(f) of the Internal Revenue Code and will be governed by the laws of Florida and subject to arbitration in Duval County.

A pool of units will be allocated³ amongst employees based on his/her position level and the most recent annual performance review. The units will be available for purchase at \$10.00 per unit on January 15th of the calendar year following the calendar year in which JEA's annual financial audit statement is completed. Unpurchased units will return to the pool. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary (equal to the aggregate purchase price for the performance units) into an FDIC-insured savings account. At redemption, the employee will receive a cash payment in the amount of the redemption price that will include the purchase price paid per unit. JEA's Chief Financial Officer will calculate the redemption price, and it will be certified no later than 30 days following the completion of JEA's annual financial audit statement.

The calculation of the redemption price is dependent on JEA's current year value, which is defined as the sum of JEA's net position per JEA's annual audited financial statement, the aggregate consideration paid, distributed, credited, or otherwise provided to the City of Jacksonville during the 12-month period prior to the end of the performance period, and the aggregate consideration paid, distributed, credited, or otherwise provided to JEA's customers during the 12-month period prior to the end of the performance period. Depending on the increase or decrease of JEA's current year value, the redemption price for the units will increase or decrease. Payments made regarding the units will be paid less applicable withholding taxes.⁴

The employee must be actively employed on the vesting date for the units to vest. If an employee is involuntarily terminated (without cause or due to death or disability) prior to the vesting date, then the employee will receive a payment for the units at the same time as the amounts would have been paid had the employee not been terminated. If the employee's termination of employment is voluntary, then the employee forfeits the units. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

B. The Plan does not Violate Section 215.425, Florida Statutes

JEA's PUP gives employees the choice of purchasing units that can increase in value if the value of JEA increases and decrease in value if the value of JEA decreases. The Plan is voluntary and requires employees that wish to participate to buy-in by deferring their personal compensation to purchase the units and to execute an agreement pertaining to the Plan. As

³ The allocation of performance units available to each employee for purchase will be directed by the JEA Compensation Committee Chair, who is the Administrator of the Plan.

⁴ As a part of the JEA's Board's exploration of alternative scenarios to address the utility's fiscal challenges, JEA is also considering selling the utility. If that occurs, the performance period ends, the amount owed to the employee will be paid by the Purchaser, and the Plan will be extinguished.

developed below, the Plan does not therefore constitute "extra compensation" under section 215.425, Florida Statutes.

Section 215.425 provides that "no extra compensation shall be made to any [public employee] after the service has been rendered or the contract made." The intent behind this provision is that public employees should not receive gratuities for services that were already rendered. AGO 2005-07 ("The purpose of such a provision is to prevent payments in the nature of gratuities for past service, and the restriction pertains to extra compensation given after service has been performed, not to compensation earned during service.").

We have reviewed the applicable legislative history of section 215.425 and have not identified anything suggesting that plans such as the PUP are, or are intended to be, prohibited by the statute. Moreover, the consistent theme of prior Opinions from your Office – which are consistent with the clear intent of the statute – is that the provision applies principally in instances where public employees were to receive retroactive compensation for work already performed. *See* AGO 92-49 (holding that the Police Pension Board of Trustees could not pay a cost of living allowance to a retired police officer already receiving pension benefits for prior services); *see also* AGO 91-51 (holding that severance payments in lieu of notice violated the provision because the employee renders no service after termination and the payments were compensation for work already performed).

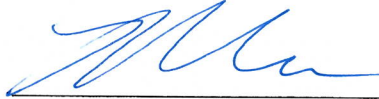
JEA's PUP plainly does not constitute "extra compensation" because the redemption payments are not compensation for the services that the employees render as part of their employment with JEA. Rather, the PUP is a benefit that allows all eligible employees to participate through a voluntary payment in enterprise creation at the risk of not receiving a return on the investment made to purchase the performance units. The PUP also does not serve to provide gratuities to the employees for their past service that they have been previously paid for and does not serve as a bonus program or incentive program to reward employees. Indeed, to participate in the Plan, JEA employees must opt-in at their sole discretion and expend their personal funds to purchase the units. The number of performance units available for purchase by each employee is directed by the Plan Administrator and is based on the employee's position level and annual performance review. The redemption payments for the units depend solely on the change in value of JEA. Thus, section 215.425 does not apply to the Plan, and the Plan does not constitute "extra compensation."

C. Conclusion

In sum, while it appears clear based on our research that the PUP is permissible under Florida law, given the potential significance of the Plan to both JEA and its approximately 2000 employees, we seek guidance from your Office to confirm that the PUP is lawful. Particularly, whether section 215.425, Florida Statutes, is applicable to the PUP and, if so, whether the PUP comports with section 215.425.

JEA appreciates greatly your attention to and assistance with this matter. Please advise if you or your Office have any question or would like additional information.

Sincerely,



Lynne Rhode
VP and Chief Legal Officer
JEA Office of General Counsel,
City of Jacksonville

RESOLUTION 2019-10

A RESOLUTION APPROVING LONG-TERM PERFORMANCE UNIT PLAN AND RELATED DOCUMENTATION AND AUTHORIZING THE CEO TO TAKE ANY AND ALL ACTION TO PURSUE THE IMPLEMENTATION OF SUCH PLAN AND RELATED DOCUMENTATION

WHEREAS, in accordance with Board Policy 2.7, the Compensation Committee directed JEA management in January 2019 to develop a compensation policy to align with talent market and guiding principles, JEA management presented to the Compensation Committee and the Compensation Committee approved in June 2019 the framework for a compensation plan, including a long-term incentive plan;

WHEREAS, at its June 2019 Board meeting, the Board approved the framework of JEA's long-term compensation plan and authorized JEA management to develop the plan and present it to the Board at the July 2019 Board meeting for final approval;

WHEREAS, the Board believes that it is in the best interest of JEA to adopt a long-term performance unit plan in connection with annual performance reviews and general operation of JEA; and

WHEREAS, the Board has reviewed the summary of the terms and conditions of the Long-Term Performance Unit Plan, which summary is attached hereto as Exhibit 1 (the "Long-Term Performance Plan Summary").

BE IT RESOLVED, by the Board that:

1. The Chief Executive Officer and Managing Director (the "CEO") or his designee shall have the authority to (i) implement a long-term performance unit plan (the "Long-Term Performance Unit Plan") on the terms and conditions set forth on the Long-Term Performance Plan Summary, (ii) execute with each actively employed eligible full-time employee, any full-time JEA employee as otherwise recommended by the CEO and approved by the Administrator of the Long Term Performance Unit Plan, and each actively employed eligible full-time attorney from the Office of General Counsel of the City of Jacksonville who is dedicated exclusively to JEA an agreement under the Long-Term Performance Unit Plan, (iii) in consultation with the Office of General Counsel, make technical and clerical amendments to the Long-Term Performance Unit Plan and/or the Form Long-Term Performance Agreement, all of which do not increase the financial obligations or liability of JEA under the Long-Term Performance Unit Plan and/or the Form Long-Term Performance Agreement, and (iv) take, or cause to be taken, any and all action and to prepare, execute and deliver, or cause to be prepared, executed and delivered, any and all documents that the CEO or his designee deems necessary or advisable to carry out the intent of this resolution.
2. The Chair of the Compensation Committee of the Board be, and hereby is, appointed as the Administrator of the Long-Term Performance Unit Plan with full power and authority to administer the Long-Term Performance Unit Plan in accordance with the terms

therewith.

3. The 2019 Redemption Price Schedule under the Long-Term Performance Unit Plan for the Performance Units to be purchased by Participants in January 2020 attached hereto as Exhibit 2 is hereby approved.
4. This resolution shall be effective immediately upon its adoption.

Dated this 23rd day of July 2019.

JEA

By: _____
April Green, Chair

Secretary

Form Approved:

Office of General Counsel

RESOLUTION 2019-10 EXHIBIT 1

The Long-Term Performance Plan Summary

RESOLUTION 2019-10 EXHIBIT 1

Long-Term Performance Plan Summary

Overview	<p>Subject to the satisfaction of the conditions described below, each eligible employee may purchase a specified number of performance units from JEA on January 15th of each year. Eligible employees will be notified in and will execute the Long-Term Performance Unit Plan Agreement in Q4 of calendar year 2019 that they may purchase performance units and the first purchase date will be January 15, 2020.</p> <p>Each performance unit represents a potential right to receive a cash payment equal to the redemption price (as described below) for such unit.</p>
Documentation	<p>All eligible employees will be subject to a plan and will be required to sign an agreement with JEA.</p>
Eligible Employees	<p>All (i) full-time employees who are actively employed with JEA for at least three months prior to the purchase date and (ii) full-time attorneys from the Office of the General Counsel of the City of Jacksonville who are dedicated exclusively to JEA for at least three months prior to the purchase date are eligible to purchase performance units.</p> <p>Any exceptions to the above must be recommended by JEA's CEO and approved by the administrator (as described below).</p>
Pool	<p>A total of 100,000 performance units are available for purchase under the plan.</p>
Purchase Price Payment	<p>Each performance unit will have a purchase price of \$10.00.</p> <p>To pay the purchase price, an eligible employee will elect to defer a portion of his or her pay equal to the aggregate purchase price for the performance units.</p> <p>Each eligible employee may elect to defer his or her pay in a lump sum or equal installments during the payroll periods as selected by such employee and such employee's pay will be deferred at such time as such pay would otherwise have been paid but not for the deferral election.</p> <p>An eligible employee will elect to defer in the calendar year prior to the year in which the compensation is earned.</p>
Performance Period	<p>Each performance period will be a three-year period that is used to calculate the redemption price (if a Recapitalization Event occurs, the performance period will be truncated and will end on the closing date of such Recapitalization Event).</p>

<p>Redemption Price</p>	<p>An eligible employee will receive a cash payment equal to the redemption price for each performance unit that such employee purchases. The redemption price will include the purchase price paid by an eligible employee for such unit.</p> <p>The redemption price will increase by \$100.00 per performance unit for each Value Change Percentage increase of 1% in excess of the “Challenge Value Target” and will decrease by \$0.50 per performance unit for each “Value Change Percentage” decrease of 1% below the Threshold Value Target, but the redemption price will not be less than \$0.00 per performance unit.</p> <ul style="list-style-type: none"> • The “Challenge Value Target” will be 110% for the first performance period and the “Threshold Value Target” will be 90% for the first performance period. • The “Value Change Percentage” means a percentage equal to the “Current Year Value” divided by the “Base Year Value.” • “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 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 JEA’s customers during the 12-month period prior to the end of the performance period. Any consideration and change in Net Position, as applicable, in connection with the Recapitalization Event will be taken into account for purposes of calculating the amounts in (i) – (iii). • For the first performance period, “Base Year Value” is the amount equal to the Current Year Value for fiscal year 2019 as reflected on JEA’s audited financial statements when available. <p>JEA’s Chief Financial Officer will calculate the redemption price.</p> <p>The administrator will certify the redemption price as soon as practicable following the completion of JEA’s audit for the applicable performance period, but in no event later than 30 days thereafter (or, if a Recapitalization Event occurs, no later than 30 days following the closing date of such Recapitalization Event).</p>
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<p>Payments and Vesting Generally</p>	<p>The performance units will vest on the earlier to occur of (i) the first anniversary of the last day of the performance period and (ii) the date on which a Recapitalization Event occurs (the “Vesting Date”). Except as otherwise described herein, an eligible employee must be employed on the Vesting Date for the performance units to vest.</p> <p>Payments will be paid to an eligible employee no later than 30 days after the redemption price has been certified by the administrator as described above.</p>
<p>Termination of Employment</p>	<p>If an eligible employee experiences an involuntary termination of employment (as described below) prior to the applicable Vesting Date, such employee will receive a payment in respect of all of his performance units. Any amounts payable to a terminated eligible employee in respect of his performance units will be paid to such employee at the same time as the amounts would have been paid had there been no termination of employment.</p> <p>An involuntary termination means a termination of employment by JEA without cause or due to the eligible employee’s death or disability.</p> <p>An eligible employee will forfeit his performance units and aggregate purchase price on a termination of employment that is not involuntary.</p>
<p>Retirement Eligible Employees</p>	<p>If an eligible employee becomes a retirement eligible employee (as described below) and retires, in each case, prior to the applicable Vesting Date, such employee’s performance units will vest on the applicable Vesting Date.</p> <p>An eligible employee is retirement eligible if such employee has attained one of the retirement milestones as described in the General Employees Retirement Plan.</p>
<p>Recapitalization Event</p>	<p>“Recapitalization Event” means the closing and funding of a transaction or a series of related transactions in accordance with Article 21 of the Charter of the City of Jacksonville and any other applicable law that results in either (i) unencumbered cash proceeds to the City of Jacksonville of at least Three Billion Dollars (\$3,000,000,000) or (ii) at least 50% of the net depreciated property, plant and equipment value of either JEA’s electric system or JEA’s water and wastewater system being transferred, assigned, sold or otherwise disposed of.</p>
<p>Conditions to Receipt</p>	<p>An eligible employee will receive the cash payment in respect of his performance units if: (i) he executes an agreement; (ii) the employee is continuously employment with JEA (except as set forth above); (iii) the employee executes and does not revoke a release of claims in favor of JEA and the City of Jacksonville; (iv) the employee complies with the covenants set forth below; and (v) the conditions in Section 215.425(3), Florida Statutes are satisfied.</p>

Employee Covenants	<p>Each eligible employee must (i) devote his best efforts to faithfully discharge his duties on behalf of JEA and not take any action that would be contrary to the best interests of JEA, (ii) not disclose confidential JEA information (except as required by applicable law or to perform his job duties) or (iii) not make any unauthorized public statements about, among others, JEA and government officials of the City of Jacksonville.</p> <p>If an eligible employee breaches or threatens to breach these covenants, such employee will forfeit his unvested performance units and JEA will not pay to such employee any amount in respect of his performance units (including any purchase price paid by such employee for the performance units) and/or such employee will promptly repay all or any portion of the cash payment previously paid to him in respect of his performance units, as applicable.</p>
Administrator	<p>The Chair of the Compensation Committee will be the administrator.</p>
Miscellaneous	<p>Any payments made to an eligible employee will be paid less applicable withholding taxes.</p> <p>The plan and agreements will be subject to Sections 409A and 457(f) of the Internal Revenue Code (the "Code") and will be construed and interpreted accordingly.</p> <p>The agreements will be governed by the laws of the State of Florida and subject to arbitration in Duval County in the State of Florida.</p> <p>If or as required, JEA will collectively bargain the plan and applicable agreements with unions representing covered bargaining unit employees of JEA.</p> <p>If any payments under the plan or an agreement to an eligible employee are subject to any excise tax, interest or penalties under the Code (the "Penalties"), JEA will pay to such employee an amount equal to the full amount of the Penalties. JEA will not pay to an eligible employee any amount in respect of Penalties caused by such employee's breach of his or her agreement or such employee's failure to comply with applicable law.</p>

RESOLUTION 2019-10 EXHIBIT 2

2019 Redemption Price Schedule under the Long-Term Performance Unit Plan

RESOLUTION 2019-10 EXHIBIT 2

Long-Term Performance Unit Plan – 2019 Redemption Price Schedule

SCHEDULE A 2019 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 110%.

(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 (a), (b) and (c), 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 100%.

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

JEA LONG-TERM PERFORMANCE UNIT PLAN

RECITALS:

WHEREAS, all Employees of JEA, a body politic and corporate under the laws of the State of Florida and an independent agency of the Consolidated City of Jacksonville (“JEA”), perform valuable services for the customers and citizens they serve;

WHEREAS, JEA provides a work environment which emphasizes safety and a positive culture;

WHEREAS, JEA operates in a rapidly evolving business climate to provide energy, water and wastewater utility services;

WHEREAS, JEA desires to recognize the past and continued service of its Employees;

WHEREAS, JEA desires to have long-term incentives, in accordance with its total compensation philosophy approved by the Board in January 2019 and the compensation framework approved by the Board in June 2019, that motivates Employees to drive the customer, community and environmental value of JEA;

WHEREAS, in recognition of the Employees obtaining performance standards that shall be individually determined and evaluated based on the Employees’ proportionate contribution to JEA, JEA desires to allow Employees to participate in a long-term performance unit plan on the terms and conditions set forth herein; and

WHEREAS, except as otherwise recommended by JEA’s Chief Executive Officer and approved by the Administrator, all Employees are eligible to participate in the plan.

SECTION 1 PURPOSE

(a) The purpose of this JEA Long-Term Performance Unit Plan (this “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.

(b) 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.

SECTION 2 CERTAIN DEFINITIONS

As used in this Plan, the following terms shall have the meanings given to them in this Section 2. Certain other terms are defined elsewhere in this Plan.

(a) “Administrator” means the Chair of the Compensation Committee of the Board and, following a Recapitalization Event, the entity designated in the definitive agreement entered into in connection with such Recapitalization Event to act as the representative of JEA’s interests under such agreement (and, in the absence of such a designation, the Chair of the Board).

(b) “Agreement” means a Long-Term Performance Unit Agreement in the form prescribed by the Administrator for the purchase of Performance Units under this Plan.

(c) “Applicable Law” means any constitution, law, statute, ordinance, rule, regulation, regulatory requirement, code, order, judgment, injunction or decree enacted, issued, promulgated, enforced or entered by a federal, state, provincial or local government or other political subdivision thereof, any entity, authority or body exercising executive, legislative, judicial, regulatory or administrative functions of any such government or political subdivision.

(d) “Board” means the Board of Directors of JEA.

(e) “Cause” means (x) in the case where a Participant has an employment agreement, consulting agreement or similar agreement in effect with JEA at the time of purchase of the Performance Units that defines a termination for “cause” (or words of like import), “cause” as defined in such agreement or (y) in the case where a Participant does not have an employment agreement, consulting agreement or similar agreement in effect with JEA at the time of purchase of the Performance Units or where there is such an agreement but it does not define “cause” (or words of like import):

(i) the Participant has been convicted of, pled guilty or no contest to or entered into a plea agreement with respect to, (A) any felony under Applicable Law or (B) any crime involving dishonesty or moral turpitude;

(ii) the Participant has engaged in (A) any willful misconduct or gross negligence or (B) any act of dishonesty, violence or threat of violence, in each case with respect to this clause (B), that would reasonably be expected to result in a material injury to the JEA Group;

(iii) the Participant willfully fails to perform the Participant’s duties to the JEA Group and/or willfully fails to comply with lawful directives of the Board;

(iv) the Participant materially breaches any term of any contract to which the Participant and any member of the JEA Group is a party; or

(v) the Participant materially breaches any term of this Plan and/or his or her Agreement;

provided that, with respect to clauses (iii), (iv) and (v) and if the event giving rise to the claim of Cause is curable, JEA provides written notice to the Participant of the event within thirty (30) days of JEA learning of the occurrence of such event, and such Cause event remains uncured fifteen (15) days after JEA has provided such written notice; provided further that any termination

of the Participant's employment for "Cause" with respect to clause (iii), (iv) or (v) occurs no later than thirty (30) days following the expiration of such cure period.

Notwithstanding the foregoing, to the extent that this definition of "Cause" is inconsistent with a definition of "cause" (or words of like import) in any applicable and lawful collective bargaining agreement or the applicable and lawful Civil Service and Personnel Rules and Regulations of the City of Jacksonville (the "Civil Service Rules"), the definition of "cause" (or words of like import) in such collective bargaining agreement or the Civil Service Rules, as applicable, shall control.

(f) "Closing Date" means the date on which the Recapitalization Event occurs.

(g) "Code" means the Internal Revenue Code of 1986, as amended, and the rules, regulations and guidance issued thereunder.

(h) "Deferral Election" means an election by an Employee under the Agreement to defer pay to purchase Performance Units under this Plan payable for services to be performed in calendar years beginning after the date the Election Notice becomes irrevocable. An Employee shall make a new Deferral Election with respect to each Performance Period to the extent that such Employee is eligible to participate in this Plan for such Performance Year.

(i) "Disability" means (i) if JEA provides long-term disability insurance to its employees generally and if JEA's long-term disability plan defines the term "disability," then the same meaning as in JEA's long-term disability plan or (ii) if JEA does not provide long-term disability insurance to its employees generally, a condition that renders a Participant unable to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment as determined by JEA's absence management vendor; provided, however, that the absence management vendor has no obligation to investigate whether Disability exists, unless the Participant or representative thereof puts JEA on notice within ninety (90) days after the Participant's termination of employment.

(j) "Election Notice" means the notice or notices established from time to time by the Administrator for making Deferral Elections under this Plan. The Election Notice shall include the amount of compensation to be deferred and the number of Performance Units to be purchased (subject to any minimum or maximum amounts set forth herein). Each Election Notice shall become irrevocable as of December 31st of the calendar year immediately preceding the calendar year in which the Purchase Date occurs (or such earlier date as determined by the Administrator).

(k) "Employee" means, except as otherwise recommended by JEA's Chief Executive Officer and approved by the Administrator, any (i) full-time employee of the JEA Group who has been employed by any member of the JEA Group for at least three (3) months prior to the Purchase Date and (ii) full-time attorney from the Office of the General Counsel of the City of Jacksonville who is dedicated exclusively to JEA for at least three (3) months prior to the Purchase Date.

(l) "Involuntary Termination" means, with respect to a Participant, a termination of the Participant's employment by any member of the JEA Group without Cause or due to such Participant's death or Disability.

- (m) “JEA Group” means JEA and its affiliates, assigns, subsidiaries and successors.
- (n) “Participant” means any Employee who makes a Deferral Election to purchase Performance Units under this Plan.
- (o) “Performance Period” means a three (3)-year period used to measure the Value Change Percentage beginning on the applicable Purchase Date and ending on the earlier to occur of the third anniversary of the Purchase Date and the Closing Date.
- (p) “Performance Unit” means a bookkeeping entry representing a potential right to receive a payment under this Plan.
- (q) “Purchase Date” means the date on which Performance Units are purchased by Participants under this Plan, which shall be each January 15th of the calendar year following the calendar year in which JEA’s annual financial statements audit is completed (or, if January 15th falls on a weekend or a holiday, the next business day thereafter). The first Purchase Date under the Plan shall be January 15, 2020.
- (r) “Purchase Price” means the price to be paid by a Participant for each Performance Unit under this Plan which shall be no less than \$10.00 per Performance Unit.
- (s) “Recapitalization Event” means the closing and funding of a transaction or a series of related transactions in accordance with Article 21 of the Charter of the City of Jacksonville and any other Applicable Law that results in either (i) unencumbered cash proceeds to the City of Jacksonville of at least Three Billion Dollars (\$3,000,000,000) or (ii) at least fifty percent (50%) of the net depreciated property, plant and equipment value of either JEA’s electric system or JEA’s water and wastewater system being transferred, assigned, sold or otherwise disposed of.
- (t) “Redemption Price” means a price per Performance Unit payable by JEA to each Participant calculated in accordance with the redemption price schedule substantially in the form attached hereto as Schedule A (the “Redemption Price Schedule”); provided, however, that if the Threshold Value Target (as defined on Schedule A attached hereto) set forth on the Redemption Price Schedule is not attained during the applicable Performance Period, the Redemption Price for such Performance Period may be reduced to \$0. The Redemption Price shall include the Purchase Price per Performance Unit.
- (u) “Retirement Eligible Employee” means an Employee who has attained one of the retirement milestones as described in the General Employees Retirement Plan.
- (v) “Vesting Date” means the last day of the Performance Period.

SECTION 3 ADMINISTRATION; CERTIFICATION

- (a) Appointment; Delegation. This Plan shall be interpreted and administered by the Administrator, whose actions shall be final and binding on all persons, including the Participants. The Administrator may delegate all or any of its responsibilities hereunder to the Board, a committee of the Board or any member of JEA’s senior executive management.

(b) Powers. The Administrator, in its sole but reasonable discretion, shall have the power, subject to, and within the limitations of, the express provisions of this Plan:

(i) to determine whether any individual has status as a Participant, the number of Performance Units that may be purchased by a Participant, and whether a Participant is entitled to payment hereunder;

(ii) to determine for a Participant any additional terms and conditions of participation in this Plan not inconsistent with the terms of this Plan, which such additional terms and conditions shall be set forth in the Agreement;

(iii) to certify whether or not the performance metrics set forth on the Redemption Price Schedule for the applicable Performance Period have been attained, including whether or not the Value Target for the applicable Performance Period has been attained;

(iv) to establish procedures to allow Employees to make deferral elections (provided that such procedures shall be designed to comply with requirements of Applicable Law);

(v) to take all other action as may be required hereunder; and

(vi) to interpret this Plan.

Notwithstanding the foregoing, JEA's Chief Financial Officer shall determine the amount of the Redemption Price.

(c) Certification. As soon as practicable following the completion of JEA's financial statements audit for the applicable Performance Period and in no event later than thirty (30) days following the end of such Performance Period, the Administrator shall certify in writing the Value Change Percentage as set forth on the applicable Redemption Price Schedule for such Performance Period. Notwithstanding the foregoing, if a Recapitalization Event occurs, the Administrator shall certify in writing the Value Change Percentage as set forth on the applicable Redemption Price Schedule for such Performance Period no later than thirty (30) days following such Recapitalization Event.

SECTION 4

EFFECTIVE DATE; NUMBER OF PERFORMANCE UNITS

(a) Effective Date. This Plan is effective as of July 23, 2019 (the "Effective Date").

(b) Performance Unit Limit. The aggregate number of Performance Units which may be purchased by Participants under this Plan is one hundred thousand (100,000) Performance Units.

SECTION 5 VESTING; REDEMPTION PRICE

(a) Agreement. Each Performance Unit purchased under this Plan by a Participant shall represent a contractual right to receive, on the terms and subject to the conditions of this Plan and the applicable Agreement evidencing such purchase, payments under this Plan on the terms and subject to the conditions of this Plan and the applicable Agreement.

(b) Number of Units. The number of Performance Units purchased by each Participant shall be set forth in such Participant's Agreement.

(c) Time of Purchase. On or before the Recapitalization Event, upon the conclusion of JEA's annual financial statements audit, Employees may purchase Performance Units on an annual basis. Following the Recapitalization Event, no Performance Units may be purchased.

(d) Vesting Schedule. The Performance Units purchased by any Participant shall vest on the Vesting Date if a Participant's employment with any member of the JEA Group had not previously terminated. Notwithstanding the foregoing, in the event of a Participant's Involuntary Termination prior to the applicable Vesting Date, such Participant shall be eligible to receive all of his or her Performance Units and such Performance Units shall vest on the Vesting Date. Any amount payable to a Participant pursuant to the foregoing sentence shall be paid to such Participant at the same time as the Redemption Price for the Performance Units (to the extent unpaid) would have been paid had there been no termination of employment.

(e) Forfeiture. Unvested Performance Units held by a Participant whose employment with any member of the JEA Group is terminated prior to the applicable Vesting Date shall be forfeited for no consideration (but only after giving effect to any vesting pursuant to Section 5(d)). Performance Units forfeited pursuant to the preceding sentence may be available for purchase by other Participants in accordance with the terms of this Plan. If a Participant forfeits all or any of his or her Performance Units, he or she shall be refunded the Purchase Price paid by such Participant for such Performance Units; provided, however, that any forfeiture due to a termination of employment for Cause or a resignation of employment for any reason shall result in a forfeiture of unvested Performance Units and the Purchase Price paid for such unvested Performance Units.

(f) Retirement Eligible Employees. Notwithstanding Section 5(d), if a Participant becomes a Retirement Eligible Employee prior to the applicable Vesting Date and such Participant retires from employment with any member of the JEA Group prior to the Applicable Vesting Date, such Participant's Performance Units shall vest on the applicable Vesting Date. Any amount payable to a Participant pursuant to the foregoing sentence shall be paid to such Participant at the same time as the Redemption Price for the Performance Units (to the extent unpaid) would have been paid had the Participant not retired from employment. The Administrator shall determine in its sole and absolute discretion whether a Participant's termination shall qualify as a retirement for purposes of this Section 5(f).

(g) Civil Service Reversion. If at any time during the period commencing on the date on which an Employee is notified by JEA of his or her eligibility to participate in the Plan and ending on the last day of the Performance Period, such Employee's designation changes from

appointed to civil service (whether or not such change is voluntary), the level at which such Employee participates in the Plan shall be adjusted to reflect such change. If such change occurs (i) at any time prior to the Purchase Date, the number of Performance Units that such Employee shall be eligible to purchase shall be reduced to a number of Performance Units that is equal to the number of Performance Units such Employee would have been eligible to purchase had such Employee been civil service on the date on which such Employee was notified of his or her eligibility to participate in the Plan or (ii) at any time on or after the Purchase Date, but prior to the last day of the Performance Period, the Employee shall forfeit a number of Performance Units such that the Employee shall have purchased a number of Performance Units that is equal to the maximum number of Performance Units such Employee would have been eligible to purchase had such Employee been civil service on the Purchase Date (it being understood that such number of forfeited Performance Units may be zero) and JEA shall refund to the Employee the aggregate Purchase Price in respect of such forfeited Performance Units. Performance Units forfeited pursuant to the preceding sentence may be available for purchase by other Participants in accordance with the terms of this Plan.

(h) Redemption Price. On the applicable payment date, each Participant shall receive an amount equal to the number of his or her vested Performance Units multiplied by the Redemption Price per Performance Unit.

SECTION 6

PURCHASE OF PERFORMANCE UNITS; PAYMENT AND DISTRIBUTIONS

(a) Purchase of Performance Units. To purchase Performance Units under this Plan, a Participant must pay to JEA a Purchase Price for each Performance Unit that he or she would like to purchase. To pay the Purchase Price for a Performance Unit, an Employee must elect to defer a portion of his or her pay by completing an Election Notice and filing it with the Administrator no later than December 31st of the calendar year immediately preceding the calendar year to which the Deferral Election relates. The Election Notice must specify the amount of pay that the Employee would like to defer (such pay must be payable for services rendered in a calendar year beginning after the date the Election Notice becomes irrevocable) and the number of Performance Units that such Employee would like to purchase. The Administrator shall notify each Employee of the maximum number of Performance Units that the Employee is eligible to purchase (it being understood that an Employee may not defer an amount of pay in excess of the aggregate Purchase Price for the maximum number of Performance Units that may be purchased by such Employee).

(b) Payments. On the terms and subject to the conditions set forth in this Plan and any Agreement, a Participant who holds vested Performance Units as of the applicable Vesting Date shall be entitled to receive the Redemption Price for such Performance Units. Payments shall be made to the Participants no later than thirty (30) days following the date on which performance is certified pursuant to Section 3(c).

SECTION 7

CONDITIONS TO RECEIPT OF PAYMENT

A Participant's right to receive a payment in consideration for his or her Performance Units is conditioned on his or her execution of an Agreement and all of the following: (a) the

Participant's continuous employment with any member of the JEA Group through the Vesting Date (except as set forth herein), (b) the Participant's execution and non-revocation of a release of claims in favor of the JEA Group ("Release") in a form reasonably satisfactory to JEA, (c) the Employee's compliance with the covenants set forth in the Agreement, and (d) satisfaction of the conditions set forth in Section 215.425(3), Florida Statutes. Within sixty (60) days prior to the anticipated payment date, JEA shall deliver the Releases to the Participants and, to the extent required by Applicable Law, the Participants shall have twenty-one (21) or forty-five (45) days from the date of the Releases are delivered to the Participants to review the Releases and an additional seven (7) days to revoke the Releases. Each Participant must have executed an irrevocable Release prior to the applicable payment date to receive any payment in respect of his or her Performance Units.

SECTION 8 AMENDMENT AND TERMINATION OF PLAN

(a) General. This Plan (including the template Redemption Price Schedule attached hereto and any Redemption Price Schedule created for specific Performance Periods) may be amended or terminated at any time or from time to time by the Board; provided, however, that no such amendment or termination shall impair the then-existing rights of a Participant with regard to this Plan without such Participant's written consent.

(b) Final Distribution. This Plan shall automatically terminate upon the payment or distribution of all amounts owed to all Participants under this Plan following a Recapitalization Event.

SECTION 9 MISCELLANEOUS

(a) Rounding. All payments provided under this Plan shall be rounded down to the nearest whole cent.

(b) Tax Withholding. The JEA Group shall be entitled to make deductions from the payments hereunder in respect of any applicable income and employment tax, up to the maximum amount permitted by Applicable Law, subject to the JEA Group's normal withholding procedures.

(c) Unfunded Plan. This Plan is intended to constitute an "unfunded" program, and no amounts shall be set aside to fund any payments hereunder prior to the end of the Performance Period. JEA's obligations under this Plan are unfunded and unsecured, and the Participants have no rights other than those of general unsecured creditors of the JEA Group with respect to any payment hereunder.

(d) Sections 409A and 457(f). This Plan and any Agreements are intended to provide payments that are exempt from Sections 409A and 457(f) of the Code ("Code Sections 409A and 457(f)"), or alternatively that comply with Code Sections 409A and 457(f), and the terms of this Plan and any Agreements shall be construed and administered in a manner that is exempt from or in compliance with Code Sections 409A and 457(f), as appropriate. Each payment hereunder is intended to be treated as one of a series of separate payments for purposes of Code Sections 409A

and 457(f). Notwithstanding anything herein to the contrary, no amendment may be made to this Plan or any Agreement if it would cause this Plan, any Agreement or any payment hereunder or thereunder not to be in compliance with Code Sections 409A and 457(f).

(e) Successors and Assigns.

(i) This Plan and any Agreements shall be binding on and shall inure to the benefit of JEA and its successors (including any organization(s) that succeeds to a substantial portion of the assets and business of JEA) and assigns, and the term "JEA" whenever used in this Plan and any Agreements shall mean and include any such successors or assigns. This Plan and any Agreements shall be assigned to and assumed by any successor of JEA (including any organization(s) that succeeds to a substantial portion of the assets and business of JEA) and this Plan and any applicable Agreements may be assigned in part to and assumed by any successor of a substantial portion of the assets and business of JEA as determined by the Administrator in its sole discretion, which such determination shall be final and binding on JEA, the Participants (and their respective beneficiaries) and any such successor. Upon such assignment and assumption, the rights and obligations of JEA under this Plan and any applicable Agreements shall become the rights and obligations of such successor. Further, JEA shall require any successor to assume expressly and agree to perform this Plan and any applicable Agreements in the same manner and to the same extent that JEA would be required to perform this Plan and any such Agreements if no such succession had taken place. This Plan and any Agreements shall be administered in a manner which best reflects the spirit and purpose of this Section 9(e)(i), and the Board may amend or clarify this Plan and/or any Agreements to reflect the spirit and purpose of this Section 9(e)(i) in accordance with the amendment procedures set forth in Section 8(a).

(ii) Neither this Plan nor any Agreements nor any right or interest hereunder or thereunder shall be assignable or transferable by any Participants or their beneficiaries or legal representatives, except by will or by the laws of descent and distribution. Notwithstanding the foregoing, in the event of the death of a Participant, payments that otherwise would have been made to the Participant shall instead be made to the Participant's estate.

(f) Governing Law. All questions concerning the construction, validity and interpretation of this Plan and any Agreement shall be governed by the laws of the State of Florida, applicable to contracts to be executed and performed entirely therein, regardless of the laws of any other jurisdiction that might otherwise govern due to applicable conflicts of laws principles.

(g) Arbitration. Except for suits seeking injunctive relief or specific performance or as otherwise prohibited by law, the parties hereby agree that any dispute, controversy or claim arising out of, connected with and/or otherwise relating to this Plan and/or any Agreement and the arbitrability of any controversy or claim relating hereto shall be finally settled by binding arbitration. The parties hereby knowingly and voluntarily waive any rights that they may have to a jury trial for any such disputes, controversies or claim. The parties agree to resolve any dispute arising out of this Plan and/or any Agreement before the American Arbitration Association (the "AAA") in accordance with the AAA's then existing National Rules of Resolution of Employment

Disputes. The arbitration shall be administered by the AAA and the hearing shall be conducted in Duval County of the State of Florida before a neutral arbitrator, who must have been admitted to the practice of law for at least the last ten (10) years (the "Arbitrator"). Each party further agrees to pay its or his own arbitration costs, attorneys' fees, and expenses, unless otherwise required by the AAA's then-existing arbitration rules. The Arbitrator shall issue an opinion within thirty (30) days of the final arbitration hearing and shall be authorized to award reasonable attorneys' fees to the prevailing party, which decision of the Arbitrator shall be final, conclusive, unappealable and binding on the parties. Subject to Applicable Law, the arbitration proceeding and any and all related awards, relief or findings shall be confidential, except that any arbitration award may be filed in a court of competent jurisdiction by either party for the purpose of enforcing the award.

(h) Survival. The provisions of this Plan and any Agreement that are intended to survive this Plan and any Agreement and to survive the Participant's termination of employment shall survive in accordance with their terms.

(i) Severability. If any provision of this Plan or any Agreement becomes or is deemed invalid, illegal or unenforceable in any applicable jurisdiction by reason of the scope, extent or duration of its coverage, then such provision shall be deemed amended to the minimum extent necessary to conform to Applicable Law so as to be valid and enforceable or, if such provision cannot be so amended without materially altering the intention of the parties, then such provision shall be stricken and the remainder of this Plan or any Agreement (as applicable) shall continue in full force and effect.

(j) Collective Bargaining; Civil Service Rules. If or as required, JEA shall collectively bargain this Plan and/or any Agreement with unions representing covered bargaining unit employees of JEA. This Plan and any Agreement shall not be interpreted to be inconsistent with the Civil Service Rules, as applicable.

(k) Penalties. In the event that any payments under this Plan and/or any Agreement to any Participant are subject to any excise tax, interest or penalties under the Code (the "Penalties"), the JEA Group shall pay to such Participant an amount equal to the full amount of the Penalties. Such payment is intended to place the Participant in the same economic position such Participant would have been in if the Penalties did not apply and shall be calculated in accordance with such intent. Notwithstanding anything to the contrary contained herein, the JEA Group shall not make any Participant economically whole for Penalties caused by, relating to or arising from such Participant's breach of this Plan or any Award Agreement or such Participant's failure to comply with his or her obligations under Applicable Law.

(l) Compliance with Applicable Law. No provision of this Plan and/or any Agreement shall be deemed to violate Applicable Law and this Plan and any Agreement shall be interpreted in accordance with this intent.

(m) Determinations. All determinations regarding the Performance Units, including the amount of the Redemption Price, shall be made by JEA in its sole and absolute discretion in accordance with the terms of this Plan and any Agreement, and shall be final, conclusive and binding on all parties.

(n) Section Headings. The headings in this Plan are inserted for convenience only and shall not be deemed to constitute a part hereof nor to affect the meaning hereof.

(o) Savings Account. The aggregate Purchase Price paid by the Participants in respect of the Performance Units shall be deposited by JEA into a FDIC-insured savings account. JEA shall be entitled to any interest on the amount deposited into the savings account.

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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 (or, in the case of a Recapitalization Event, JEA’s Net Position as shown on JEA’s audited financial statements immediately following the Closing Date), (ii) the aggregate consideration paid directly or otherwise transferred 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%.

THIS LONG-TERM PERFORMANCE UNIT AGREEMENT (this "Agreement") is made effective as of the [] day of [], 2019, by and between JEA, a body politic and corporate under the laws of the State of Florida and an independent agency of the Consolidated City of Jacksonville ("JEA"), and [] (the "Participant").

RECITALS:

WHEREAS, all Employees perform valuable services for the customers and citizens they serve;

WHEREAS, JEA provides a work environment which emphasizes safety and a positive culture;

WHEREAS, JEA operates in a rapidly evolving business climate to provide energy, water and wastewater utility services;

WHEREAS, JEA desires to recognize the past and continued service of its Employees;

WHEREAS, JEA desires to have long-term incentives, in accordance with its total compensation philosophy approved by the Board in January 2019 and the compensation framework approved by the Board in June 2019, that motivates Employees to drive the customer, community and environmental value of JEA;

WHEREAS, in recognition of the Participant obtaining performance standards that shall be individually determined and evaluated based on the Participant's proportionate contribution to JEA, JEA desires to allow the Participant, and Participant desires, to participate in JEA's Long-Term Performance Unit Plan (the "Plan") on the terms and conditions set forth herein; and

WHEREAS, except as otherwise recommended by JEA's Chief Executive Officer and approved by the Administrator, all Employees are eligible to participate in the Plan.

NOW THEREFORE, in consideration of the mutual covenants and agreements contained in this Agreement, and for other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, JEA and the Participant agree as follows:

1. Certain Definitions; Incorporation by Reference. Capitalized terms used herein but not defined shall have the meanings given to such terms in the Plan. The terms of the Plan are hereby incorporated by reference.

2. Deferral Election. Pursuant to the terms of the Plan, the Participant hereby elects to defer the amount of his or her pay as set forth on Schedule I attached hereto in accordance with this Agreement, which shall be used to purchase the number of Performance Units set forth on Schedule I attached hereto. The Participant's pay shall be deferred in a lump sum or equal installments during the payroll periods as selected by the Participant in the foregoing sentence. The Participant acknowledges and agrees that (a) he or she has read and understands the terms of the Plan and this Agreement and agrees to all of its terms and conditions, (b) any amounts that the Participant defers hereunder are unfunded and unsecured and subject to the claims of JEA's creditors in the event of JEA's insolvency, (c) the Participant may consult with his or her own tax

[ID NUMBER]

advisor regarding the tax consequences of participating in the Plan and making this election and (d) the Participant may forfeit the entire amount of the Purchase Price with no consideration.

3. Payment of Redemption Price. The Performance Units shall vest in accordance with the terms of the Plan and JEA shall pay to the Participant a cash lump sum equal to the product of the number of vested Performance Units multiplied by the Redemption Price per Performance Unit in accordance with the terms of the Plan. For the avoidance of doubt, in no event shall the Participant be entitled to receive any amounts in excess of the value of the Redemption Price per Performance Unit (other than salary and other compensation (including any retention arrangements) approved by the Board in the normal course) under this Agreement.

4. Conditions to Receipt of the Performance Units. The Participant's right to retain the Performance Units and receive payment of the Redemption Price per Performance Unit is conditioned on his or her execution of this Agreement (including the completion and execution of Schedule I attached hereto) and all of the following: (a) the Participant's continuous employment with any member of the JEA Group through the Vesting Date (except as set forth in the Plan); (b) the Participant's execution and non-revocation of a release of claims in favor of the JEA Group in a form reasonably satisfactory to JEA; and (c) the Participant's compliance with the covenants set forth in Section 5 of this Agreement. If the Participant breaches or threatens to breach any of the covenants in Section 5, the Participant shall forfeit any Performance Units that have not vested in accordance with Section 5(d) or Section 5(f) of the Plan (except JEA shall refund to the Participant the aggregate Purchase Price of such forfeited Performance Units).

5. Covenants. The Participant shall comply with the following covenants:

THIS SECTION 5 IS NOT INTENDED TO USURP THE PARTICIPANT'S RIGHTS, DUTIES OR RESPONSIBILITIES AS A CITIZEN OF THE STATE OF FLORIDA; HOWEVER, THIS SECTION 5 IS INCLUDED TO ENSURE THAT JEA AND ITS EMPLOYEES, AGENTS AND REPRESENTATIVES COMPLY WITH ITS AND THEIR CONFIDENTIALITY OBLIGATIONS UNDER APPLICABLE LAW, INCLUDING, BUT NOT LIMITED TO, LAWS GOVERNING THE DISCLOSURE OF MATERIAL NON-PUBLIC OR CONFIDENTIAL INFORMATION.

(a) Cooperation. The Participant shall throughout the Performance Period: (i) devote best efforts to faithfully discharge his or her duties, obligations and responsibilities on behalf of the JEA Group as those duties, obligations and responsibilities have been performed in the past or as may be subsequently modified in writing by JEA and the Participant; (ii) provide full support and cooperation in the best interests of the JEA Group; and (iii) take no action that would be considered contrary to the best interests of the JEA Group.

(b) Confidentiality.

(i) *Protection of Information.* The Participant acknowledges and agrees that the confidentiality provision contained in this Section 5(b) is essential to protect JEA's goodwill, the value of JEA's business and assets and the investor relations that JEA has expended significant resources to develop. Subject to applicable limitations of Chapter 119 and Section 215.425(5), Florida Statutes, the Participant shall keep confidential the

Plan and this Agreement and their respective terms; provided that the Participant may provide the Plan and this Agreement on a confidential basis to his or her legal counsel, accountant, and/or tax advisor. In addition, at all times during the Participant's relationship with the JEA Group and thereafter, the Participant agrees to hold in strictest confidence and not disclose Confidential Information to any individual, corporation, partnership, association, trust or other entity or organization, including a government or political subdivision or an agency or instrumentality thereof, without prior written authorization from JEA, and not to use Confidential Information, except to perform the Participant's obligations to the JEA Group, until such Confidential Information becomes publicly and widely known and made generally available through no wrongful act of the Participant's or of others who were under confidentiality obligations as to the item or items involved. The Participant further agrees not to make any copies of Confidential Information, except as authorized in writing in advance by JEA.

(ii) *Definitions.* For purposes of this Agreement, "Confidential Information" means information not generally known or available outside the JEA Group and information entrusted to the JEA Group in confidence by third parties, including, without limitation, all technical data, trade secrets, know-how, research, product or service ideas or plans, software code and designs, developments, processes, formulas, techniques, biological materials, mask works, designs and drawings, hardware configuration information, information relating to employees and other service providers of the JEA Group (including, but not limited to, their names, contact information, jobs, compensation and expertise), information relating to suppliers and customers, information relating to lenders, price lists, pricing methodologies, cost data, market share data, marketing plans, licenses, contract information, business plans, financial forecasts, historical financial data, budgets or other business information. Notwithstanding the foregoing, the JEA Group recognizes the applicability of Chapter 119, Florida Statutes.

(iii) *Confidential Disclosure in Reporting Violations of Law or in Court Filings.* The Participant acknowledges and JEA agrees that the Participant may disclose Confidential Information in confidence directly or indirectly to federal, state, or local government officials, including, but not limited, to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General or to an attorney, for the sole purpose of reporting or investigating a suspected violation of law or regulation or making other disclosures that are protected under the whistleblower provisions of state or federal laws or regulations. The Participant may also disclose Confidential Information in a document filed in a lawsuit or other proceeding, but only if the filing is made under seal. Nothing in this Agreement is intended to conflict with federal law protecting confidential disclosures of a trade secret to the government or in a court filing, 18 U.S.C. § 1833(b), or to create liability for disclosures of Confidential Information that are expressly allowed by 18 U.S.C. § 1833(b).

6. Entire Agreement; Modification. This Agreement (including the Plan which is incorporated herein by reference) contains the entire understanding and agreement between the parties relating to the Performance Units and supersedes and replaces all prior agreements, understandings, discussions, negotiations and undertakings, whether written or oral, by or among

the parties with respect thereto (none of which remain of any force or effect). This Agreement, including this Section 6, may be modified only by agreement in writing signed by both JEA and the Participant.

7. Counterparts. This Agreement may be executed in two or more counterparts (including via facsimile or .pdf file), each of which shall be deemed an original, but all of which, when taken together, shall constitute one and the same instrument.

8. Waiver. Any failure of the Participant to comply with any of his or her obligations under the Plan and/or this Agreement may be waived only in writing signed by JEA's Vice President of Human Resources (or his or her delegate). Any failure of JEA to comply with any of its obligations under the Plan and/or this Agreement may be waived only in writing signed by the Participant. No waiver of any breach, failure, right or remedy contained in or granted by the provisions of this Agreement shall constitute a continuing waiver of a subsequent or other breach, failure, right or remedy, unless the writing so specifies.

9. Right to Seek Counsel. The Participant acknowledges that the Participant has the right to review this Agreement with legal, financial, and/or tax advisors of the Participant's choosing before signing it and that he or she was encouraged and advised to consult with such advisors prior to signing it.

10. Non-Appropriation. The Participant acknowledges that, so long as and to the extent such limitations are applicable, payments made by JEA pursuant to the Plan and this Agreement after the fiscal year following the year in which this Agreement is signed shall be contingent upon the existence of lawfully appropriated annual funds.

11. Section Headings. The section headings are included for convenience and are not intended to limit or affect the interpretation of this Agreement.

[Signature page follows]

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date written below.

JEA

By _____

Name: [●]

Title: [●]

PARTICIPANT

Name: [●]

SCHEDULE I

Purchase of Performance Units and Deferral Election

Please complete the following in order to purchase Performance Units under the JEA Long-Term Performance Unit Plan and this Agreement:

Participant Last Name: [●]

Participant First Name: [●]

No. of Performance Units Available for Purchase
(the "Available Performance Units"): [●]

Purchase Price per Performance Unit: \$10.00

No. of Performance Units Participant Purchases:
(capped at the number of Available Performance Units): _____

Aggregate Purchase Price:
(\$10.00 x No. of Performance Units Participant Purchases) _____

I hereby elect to pay the Aggregate Purchase Price by deferring my pay as follows:

A. I hereby elect to defer \$_____ of my pay for services to be rendered in
[YEAR] in (check one):

Lump sum from pay to be paid during the payroll period on [DATE] _____

Equal installments from pay to be paid over the next [NUMBER] pay
periods commencing with the payroll period on [DATE] _____

NAME

SIGNATURE

DATE

24

Rondinelli, Melissa

From: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Sent: Thursday, October 3, 2019 11:54 AM
To: Hodges, Lawsikia; Gabriel, Jason
Subject: FW: Letter to Attorney General Ashley Moody
Attachments: 2019-10-01 - Final Letter to The Honorable Ashley Moody (SIGNED) 4833-3472-6056 v.1.pdf

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Please see below and attached.

Lynne C. Rhode
Vice President and Chief Legal Officer
21 West Church Street Jacksonville, FL 32202
Office: (904) 665-4115
Email: rhodlc@jea.com



From: KHyde@foley.com <KHyde@foley.com>
Sent: Thursday, October 3, 2019 11:49 AM
To: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Cc: crodriguez@foley.com
Subject: Letter to Attorney General Ashley Moody

[External Email - Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email.]

Attached is a copy of the letter delivered to the office of Attorney General Ashley Moody on October 10, 2019. Foley & Lardner reviewed this letter and agrees with its analysis and content. Please call me if you have any questions.

-Kevin E. Hyde

Foley & Lardner LLP
One Independent Drive | Suite 1300
Jacksonville, FL 32202-5017
P 904.359.8786
C 904.613.1437

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Florida has a very broad Public Records Law. Virtually all written communications to or from State and Local Officials and employees are public records available to the public and media upon request. Any email sent to or from JEA's system may be considered a public record and subject to disclosure under Florida's Public Records Laws. Any information deemed confidential and exempt from Florida's Public Records Laws should be clearly marked. Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public-records request, do not send electronic mail to this entity. Instead, contact JEA by phone or in writing.

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OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 255-5100



MEMORANDUM

TO: Honorable Council Member Brenda A. Priestly Jackson

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations
Lynne Rhode, JEA Chief Legal Officer
Stephen M. Durden, Chief Assistant

RE: **City Council's Authority Regarding JEA and JEA Invitation to Negotiate #129-19 for Strategic Alternatives; Clarification regarding meaning of the phrase "merits of the ITN terms" as used in the Ex Parte Communications (a/k/a Cone of Silence) Guidelines Memoranda**

DATE: October 7, 2019

I. Background.

On August 2, 2019, JEA, an independent agency of the City of Jacksonville ("City"), issued JEA Invitation to Negotiate #129-19 for Strategic Alternatives pursuant to JEA's Procurement Code (the "ITN").¹ An "invitation to negotiate" is one of several competitive government procurement methods.² Pursuant to Article 21, Section 21.09 of the City Charter, JEA is not subject to the City's Procurement Code (Chapter 126, *Ordinance Code*). Section 21.09 authorizes JEA to establish its own procurement code regarding contractual services.³ JEA's Procurement Code was originally established in 1996, and JEA's contractual services are governed by its procurement code.

¹ The ITN is available at jea.com/strategicalternatives.

² An "invitation to negotiate" is similar to another government procurement method referred to as a "request for proposal". An ITN typically consists of minimum requirements, a description of services, evaluated responses, multiple negotiation sessions and a final contract award.

³ Section 21.09 provides as follows: "JEA shall not be subject to the provisions of Chapter 126, Ordinance Code of the City of Jacksonville, as the same may be amended from time to time, however, JEA in entering into any contracts relating to the construction, reconstruction, repair, operation or maintenance of the utilities system or the purchase of supplies, equipment, machinery and materials for the utilities system or the contracting or otherwise purchasing for any advisory, professional or any other services *may establish such rules, regulations or procedures as it may deem desirable or necessary in connection therewith.*"

JEA approved issuing the ITN, subject to mandatory minimum requirements, for public advertisement on July 23, 2019.⁴ City Council did not pre-approve the ITN, or any of its terms, prior to the ITN's public advertisement on August 2, 2019. Additionally, JEA did not seek City Council's approval of the ITN, or any of its terms, prior to the ITN public advertisement.

After the ITN was issued, and pursuant to several council member requests, the Office of General Counsel provided memoranda to City Council on September 24, 2019, and August 27, 2019 (the "ITN Memoranda"). The purpose of the ITN Memoranda was to provide City Council with practical guidelines related to ex parte communications (a/k/a Cone of Silence) and other communications during the Cone of Silence Period (as defined in the ITN Memoranda). These guidelines permitted City Council during the Cone of Silence Period to discuss JEA, JEA strategic alternatives, and JEA's future so long as such discussions did not lead to discussions regarding the "merits of the ITN terms."

In light of the above background, you have asked the following questions.

II. Questions Asked.

- A. What authority does the City Council have with respect to JEA and the ITN?
- B. What does the phrase "merits of the ITN terms" mean as used in the ITN Memoranda?

III. Short Answers.

- A. JEA is an independent agency of the City governed by Article 21 of the Charter. In accordance with Section 21.04, JEA is authorized to sell its assets; however, if JEA sells more than ten percent (10%) of its assets, such sale would require City Council approval and subsequent voter referendum.

In regards to the ITN, City Council has the ultimate authority to approve or reject any ITN contract award that includes a sale of more than ten percent (10%) of JEA's assets. However, City Council has no authority under the Charter to *require* the JEA Board to perform or not perform an action regarding the ITN.

- B. The phrase "merits of the ITN terms" as used in the ITN Memoranda, refers to any discussions *during* the Cone of Silence Period regarding the worthiness, or pros and cons, of essential ITN terms (i.e., minimum requirements, scope of services description, and evaluation criteria). As noted in the ITN Memoranda, City Council (and the Mayor) is a *potential* decision-maker in the ITN contract award. As public officials, council members (and the Mayor) have the *potential* to influence the procurement competition and outcome. As such, procurement and ethics laws expressly limit various

⁴ See JEA Resolution 2019-07.

communications and actions by public officials and government employees during a government procurement process.⁵

The above being said, City Council may engage in discussions, meetings, or workshops to discuss JEA, JEA strategic alternatives, JEA's future, or the ITN procedures, timelines and components so long as such discussions, meetings, or workshops during the Cone of Silence Period (as defined in the ITN Memoranda) do not lead to discussions regarding the merits of essential ITN terms.

IV. Analysis.

A. The City's independent agencies, including the JEA, were established by acts of the Florida Legislature and are identified in Section 18.07 of the Charter. The City's independent agencies' exists as separate body politic and corporates, having a corporate existence distinct and separate from the City. Among other things, the City's independent agencies can sue and be sued, own property (personal and real) in its own name, and are generally authorized to operate its business and enter into contracts without City Council approval⁶.

Article 21 of the Charter creates JEA and defines its responsibilities, authority, and powers. JEA was created for the purpose of owning, operating, and managing utilities systems (i.e., electric, water, sewer, natural gas, etc.). The majority of JEA's express powers are set forth in Section 21.04, and JEA's implied powers are set forth in Section 21.05. Pursuant to Section 21.04, JEA may sell more than ten percent (10%) of its assets, subject to City Council approval and subsequent voter referendum. Additionally, pursuant to Section 21.09, JEA is authorized to establish its own procurement code, which JEA established in 1996.

Unlike with other independent agencies, City Council has a unique authority over JEA. Namely, City Council, via supermajority vote, has the authority in its sole discretion to modify all or a portion of JEA's powers. Thus, City Council could eliminate JEA and have its duties taken over by a newly created City department, if it desired to. Further, City Council could modify JEA's relationship with the rest of the Consolidated Government by increasing or decreasing JEA's required use of Central Services (e.g., require JEA to use the City's Procurement Division). However, City Council may not interfere with JEA's exercise of its powers and duties, so long as Article 21 grants JEA particular powers and duties. In other words, and oversimplified, the Charter grants to JEA, *inter alia*, the power to operate the City's electric utility; thus, JEA, and only JEA, may operate such utility. Similarly, City Council may not, consistent with the Charter, operate the City's electric utility, directly or indirectly.⁷ So long

⁵ See Section 112.313(6) and (8), *Florida Statutes*; Section 838.22(1), *Florida Statutes*; Chapter 602, Ordinance Code; JEA Procurement Code.

⁶ Pursuant to the Charter, City Council must approve each independent agency's budget. See Article 14 of the Charter. Each independent agency has authority and powers as provided in each independent agency's applicable City Charter provisions.

⁷ Finally, while the Council may modify or repeal any or all of Article 21 by supermajority vote, the Council may not use an amendment to Article 21 as a backdoor method of amending another provision of the Charter. For example, Section 3.01(e)(2) of the Charter requires further approval by referendum of the electors for certain specified categories of the Charter such as matters involving the Council Auditor. Consequently, the Council could not amend Article 21 in a manner that modified the Charter powers and duties of the Council Auditor without the referendum required by such section of the Charter.

as JEA remains in the Charter as an independent agency, City Council and JEA must function within their respective Charter spheres.

In regards to the ITN, City Council has the ultimate authority to approve or reject any ITN contract award that includes a sale of more than ten percent (10%) of JEA's assets. Because JEA issued the ITN pursuant to its procurement code, City Council has no authority to require JEA to perform or not perform an action regarding the ITN. Notwithstanding the foregoing, City Council may engage in discussions, meetings, or workshops to discuss JEA, JEA strategic alternatives, JEA's future or the ITN procedures, timelines and components so long as such discussions, meetings, or workshops *during* the Cone of Silence Period (as defined in the ITN Memoranda) do not lead to discussions regarding the merits of essential ITN terms (i.e., minimum requirements, scope of services description, and evaluation criteria).

B. As previously discussed in the ITN Memoranda, the purpose of public bidding is to ensure fair competition upon equal terms to all bidders.⁸ Florida procurement and ethics laws expressly limit various communications and actions by public officials and government employees during a government procurement process.⁹ In order to assist council members with their obligation as *potential* decision-makers in the ITN, this Office provided practical guidelines to City Council regarding communications between council members and other parties, including vendors/respondents, the public, and the media, during the Cone of Silence Period. Under the guidelines City Council was permitted to discuss JEA, JEA strategic alternatives, and JEA's future during the Cone of Silence Period so long as such discussions did not lead to discussions regarding the "merits of the ITN terms."

The phrase "merits of the ITN terms" as used in the ITN Memoranda refers to any discussions *during* the Cone of Silence Period regarding the worthiness or pros and cons of essential ITN terms (i.e., minimum requirements, scope of services description, and evaluation criteria). Additionally, the term "merits" as used in this context means "the substantive considerations to be taken into account" regarding the worthiness of essential ITN terms.¹⁰ In light of this guidance, council members are discouraged from debating the importance of one ITN minimum requirement versus another during the Cone of Silence Period. Such discussions by City Council or individual council members during the Cone of Silence Period regarding the merits of essential ITN terms *may* (directly or indirectly) improperly sway or influence the procurement competition and process that bidders are currently participating in.

As discussed in the ITN Memoranda, whether a specific communication or action is permitted or prohibited by law and best government procurement practices will vary depending on the type and content of the communication or action in question. Ultimately, each public official must exercise their professional judgment in engaging in various communications and

⁸ *Wester v. Belote*, 138 So. 721 (Fla. 1931).

⁹ See Section 112.313(6) and (8), *Florida Statutes*; Section 838.22(1), *Florida Statutes*; Chapter 602, Ordinance Code; JEA Procurement Code.

¹⁰ See Black Laws Dictionary.

actions regarding JEA ITN related matters. When in doubt, please do not hesitate to seek further advice from this Office.

V. Conclusion.

We trust that this memorandum provides the legal guidance that you seek. Should you have any questions or require additional information, please do not hesitate to contact us for further discussion.

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M E M O R A N D U M

TO: Lawsikia Hodges, Esq.
Jason Gabriel, Esq.

CC: Lynne Rhode, Esq.

FROM: Kevin E. Hyde

DATE: October 21, 2019

RE: JEA Performance Unit Plan

This memorandum addresses the Long Term Performance Unit Plan (the "PUP" or the "Plan") approved by the JEA Board on July 23, 2019 and laws relating to its implementation.

Description of the PUP

The PUP¹ allows eligible employees to defer compensation to purchase a specified number of performance units from JEA and redeem them in later years for a cash payment equal to the redemption price. Any eligible employee may decide to participate or decline.

Eligible employees include all full-time JEA employees (including full-time attorneys from the Office of the General Counsel dedicated exclusively to JEA, appointed employees, and represented employees) actively employed with JEA for at least three months prior to the performance units purchase date. The eligibility of employees to participate in the program depends solely on their employment status and execution of and compliance with a performance plan participation agreement (Exhibit 2). To participate, the employee must agree to comply with the following covenants: (i) devote his/her best efforts to faithfully discharge his/her duties on behalf of the JEA and not take any action that would be contrary to the best interests of the JEA

¹ Attached as Exhibit 1 is the JEA Long-Term Performance Unit Plan, the plan document. Exhibit 2 is the Long-Term Performance Unit Agreement, which an individual employee will sign.



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and (ii) not disclose confidential JEA information except as required by law or to perform employment duties. A breach of these covenants would result in the forfeiture of unvested units except for a return of the aggregate purchase price for such units. The agreements regarding the Plan will be subject to sections 409A and 457(f) of the Internal Revenue Code and will be governed by the laws of Florida and subject to arbitration in Duval County.

A pool of units will be allocated² amongst employees based on his/her position level and the most recent annual performance review. The units will be available for purchase at \$10.00 per unit in the first months of the calendar year following the calendar year in which JEA's annual financial audit statement is completed. Unpurchased units will return to the pool. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary (equal to the aggregate purchase price for the performance units) into an FDIC-insured savings account. At redemption, the employee will receive a cash payment in the amount of the redemption price that will include the purchase price paid per unit. JEA's Chief Financial Officer will calculate the redemption price, and it will be certified by the Plan Administrator (the JEA Compensation Committee chair) no later than 30 days following the completion of JEA's annual financial audit statement.

The calculation of the redemption price is dependent on JEA's current year value, which is defined as the sum of JEA's net position per JEA's annual audited financial statement, the aggregate consideration paid, distributed, credited, or otherwise provided to the City of Jacksonville during the 12-month period prior to the end of the performance period, and the aggregate consideration paid, distributed, credited, or otherwise provided to JEA's customers during the 12-month period prior to the end of the performance period. Depending on the increase or decrease of JEA's current year value, the redemption price for the units will increase or decrease. Payments made regarding the units will be paid less applicable withholding taxes.³

The employee must be actively employed on the vesting date for the units to vest. If an employee is involuntarily terminated (without cause or due to death or disability) prior to the vesting date, then the employee will receive a payment for the units at the same time as the amounts would have been paid had the employee not been terminated. If the employee's termination of employment is voluntary, then the employee forfeits the units. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

² The allocation of performance units available to each employee for purchase will be directed by the JEA Compensation Committee Chair, who is the Administrator of the Plan.

³ As a part of the JEA's Board's exploration of alternative scenarios to address the utility's fiscal challenges, JEA is also considering selling the utility. If that occurs, the performance period ends, the amount owed to the employee will become the obligations of the acquirer to be paid post-closing, and the PUP will be extinguished.

Questions Related to PUP

Since inception, a number of questions have been asked about the PUP. These questions are addressed below.

1. Does JEA have the authority to issue the PUP?

Article 21 of the City of Jacksonville Charter (the “Charter”) provides plenary power to JEA to “manage, operate and promote the utilities system.” (Charter at s. 21.04(a)). JEA may “enter into contracts with any person or entity, public or private, deemed necessary or desirable by JEA in connection with carrying out its powers and duties.” (Charter at s. 21.04(e)) (Emphasis added). JEA may also “do all acts and deeds necessary, convenient or desirable, incidental to the exercise and performance of the powers and duties granted to JEA in this article.” (Charter at s. 21.04(t)).

JEA’s powers relating to employees is stated in Section 21.08 of the Charter:

All employees of the utilities system shall be employees of JEA and shall be subject to articles 16 and 17 unless otherwise provided by the council, which shall be and continue to be the legislative body as provided in section 447.203(10), Florida Statutes. JEA shall be fully responsible for the administration and operation of all utility services as set out in this article and in order to meet its administrative and operational responsibilities, JEA shall have **full and independent** authority to hire, transfer, promote, discipline, terminate and evaluate employees engaged to provide any and all of the utilities services for which it is responsible and accordingly, consistent with the provisions of article 17, JEA may establish employment policies relating to hiring, promotion, discipline and termination, and other terms and conditions of employment, and enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment and take such other employment related action as needed to assure effective and efficient administration and operation of the utilities system. In order to effectively implement the foregoing, JEA shall perform all functions with regard to its own employees that are performed by the City department or division which oversees city employees in regard to personnel matters....(emphasis added).

Except for deferred compensation,⁴ the Charter does not specifically state that JEA may establish terms of compensation. But compensation is an integral part of employment and by implication is included within the phrase “other terms and conditions of employment.” JEA’s “full and independent authority” over its employees is essentially meaningless if JEA cannot set the terms of compensation.

⁴ Section 21.09(j).



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The PUP is a form of deferred and long-term incentive compensation which is well within JEA's right to establish absent explicit and contrary authority. This inherent power is evident by Section 21.05 of the Charter:

The powers of JEA shall be construed liberally in favor of JEA. No listing of powers included in this article is intended to be exclusive or restrictive and the specific mention of, or failure to mention, particular powers in this article shall not be construed as limiting in any way the general powers of JEA as stated in Section 21.04. It is the intent of this article to grant to JEA full power and right to exercise all authority necessary for the effective operation and conduct of JEA. It is further intended that JEA should have all implied powers necessary or incidental to carrying out the expressed powers and the expressed purposes for which JEA is created. The fact that this article specifically states that JEA possesses a certain power does not mean that JEA must exercise such power unless this article specifically so requires. JEA's power to levy special assessments shall not be deemed to be the power to levy taxes.

The issue, then, is whether the PUP lends to the effective operation and conduct of JEA. The PUP and the individual Long-Term Performance Unit Agreement each contain the following recital stating the PUP's purpose:

JEA desires to have long-term incentives, in accordance with its total compensation philosophy approved by the Board in January 2019 and the compensation framework established by the Board in June 2019 that motivates Employees to drive the customer, community and environmental value of JEA.

The PUP further specifies its purpose in Section 1 (a) and (b):

(a) The purpose of this JEA Long-Term Performance Unit Plan (this "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.

(b) 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.

Based on the plenary power granted to JEA, and the PUP's stated purposes, we conclude JEA has the authority to implement the PUP.

2. May JEA establish who is eligible to purchase a PUP?

All JEA employees are eligible to participate in the PUP. "Employee" means:

"Employee" means, except as otherwise recommended by JEA's Chief Executive Officer and approved by the Administrator, any (i) full-time employee of the JEA Group who has been employed by any member of the JEA Group for at least three (3) months prior to the Purchase Date and (ii) full-time attorney from the Office of the General Counsel of the City of Jacksonville who is dedicated exclusively to JEA for at least three (3) months prior to the Purchase Date. (JEA Long-Term Performance Unit Plan at Section 2(k). (PUP at Section 2(k)).

The Charter provides the General Counsel may "employ, supervise and terminate assistant counsels to assist with the efficient provisions of legal services for the City's independent agencies." (Charter at s. 7.01)). "The general counsel shall appoint assistant counsels and fix their compensation subject to the approval of the mayor." (Charter at s. 7.07)). Nothing in these provisions prohibit an assistant counsel assigned to JEA from participating in the PUP, provided that the General Counsel has authorized it.

3. Does the PUP Violate Article 21.09 of the Charter?

Article 21.09 of the Jacksonville City Charter contains the following provision related to the award of contracts by JEA:

Section 21.09. - Awards of contracts.

- (a) JEA shall not be subject to the provisions of Chapter 126, Ordinance Code of the City of Jacksonville, as the same may be amended from time to time, however, JEA in entering into any contracts relating to the construction, reconstruction, repair, operation or maintenance of the utilities system or the purchase of supplies, equipment, machinery and materials for the utilities system or the contracting or otherwise purchasing for any advisory, professional or any other services may establish such rules, regulations or procedures as it may deem desirable or necessary in connection therewith. In the absence of such specific authority, rules, regulations or procedures, JEA shall follow the provisions of Chapter 126 of the Ordinance Code of the City of Jacksonville, as the same may be amended from time to time. JEA shall have the right to reject any and all bids, in whole or in part, in the best interests of JEA. Nothing in this chapter shall be construed to limit the power of JEA to construct, repair, or improve the utilities system, or any part thereof, or any addition, betterment or extension thereto, directly by the officers, agents, and employees of JEA, or otherwise by contract. JEA is authorized to implement and to take all actions necessary to administer a purchasing and procurement program directed to Minority Business Enterprises including, but not limited to, prime contractors, subcontractors, consultants,

subconsultants, and suppliers. Any such Minority Business Enterprise program shall be implemented by JEA to remedy discrimination or the present effects of past discrimination, if any, suffered by Minority Business Enterprises in the business community in the area served by JEA. For purposes of this chapter, the term "Minority Business Enterprise" shall be defined by JEA and shall include, at a minimum, those business entities that are legitimately owned, operated and controlled by persons who have been shown to have been discriminated against or who suffer from the present effects of past discriminations, if any, in the business community in the area served by JEA. Such program shall be used to redress and remedy discrimination or the present effects of past discrimination, if any, as may be determined by JEA, and which are shown to have been suffered by Minority Business Enterprises, in the business community in the area served by JEA.

- (b) No member of JEA or officer or employee thereof shall either directly or indirectly be a party to, or be in any manner interested in, any contract or agreement with JEA for any matter, cause or thing whatsoever in which such member shall have a financial interest or by reason whereof any liability or indebtedness shall in any way be created against JEA. If any contract or agreement shall be made in violation of the provisions of this section the same shall be null and void and no action shall be maintained thereon against JEA.

Section 21.09 relates to procurement, not employee compensation. Section 21.09(a) clearly relates to those contracts where a competitive procurement process must be used. ("JEA shall follow the provisions of Charter 126...."). This type of process is not used in employee matters.⁵ When read together, sections 21 (a) and (b) contemplate and relate to an award of contracts to vendors or suppliers to JEA rather than to employment or compensation agreements. This is evident by a number of factors.

First, the PUP is not awarded to employees or subject to any procurement process. The PUP is a voluntary benefit program in which an employee may or may not participate. To participate, the employee must purchase the PUP on the same terms as any other participant. JEA is not selecting or awarding the right to participate in the PUP. The Plan Administrator or designee determines the number of PUPs an individual may purchase.

Second, if Section 21.09(b) precluded the PUP (as some form of impermissible contract between employees and JEA), it would also preclude other forms of contractual indebtedness such as (a) individual employment agreements providing for compensation except for services previously performed; (b) pension obligation to JEA employees, namely Unfunded Actual Award Liability; and (c) deferred compensation. Each of these agreements give JEA employees a "financial interest" in JEA and a potential indebtedness of JEA. Allowing these items, but

⁵ Section 21.08 (JEA may "enter into negotiations with employee organization.")



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prohibiting the PUP would be inconsistent with Charter provisions (previously discussed) allowing JEA to establish terms and conditions of employment.

Third, the PUP requires an employee to invest deferred compensation into the PUP. An indebtedness is only created above the original investment if the Net Position Value is correspondingly increased.

4. Do some PUP participants have an advantage over others in deciding whether to participate?

The PUP is available only to a defined group of individuals – JEA employees and certain attorneys assigned to JEA. Thus, the PUP is not open to the “public.” Some have questioned whether certain individuals within the eligible group will have an impermissible advantage over others due to position held or access to information. The answer is “no.”

Because the PUP involves only transactions between JEA, on the one hand, and employees and attorneys of JEA, all of whom are “insiders,” on the other, the PUP raises no insider trading concerns. Insider trading under the securities laws requires a transaction with an “outsider” who is disadvantaged in a transaction with an insider due to lack of information, and no such outsiders are involved in the PUP.

Apart from insider trading concerns, it is important for securities law purposes that all of the PUP participants be provided with all material financial information about JEA and all material information about how the PUP payments will be calculated when they make their Deferral Elections, so that they are able to make an informed investment election. We understand that this requirement will be addressed as follows:

- Each participant will receive a copy of the PUP document itself, which outlines the conditions of an employee’s participation. Except for the precise number of PUPs made available to a particular individual, the terms are the same for all employees.
- Schedule A provides employees information as to how the PUP value is calculated. The “Value Change Percentage”, as discussed in Schedule A, determines the increase or decrease of the Redemption Price. That determination is based on JEA’s audited financial statements and the aggregate consideration paid, distributed, credited or otherwise provided to the City and to JEA customers during the “Performance Period,” all of which are public records.
- JEA intends to provide employees extensive information, including risk factors and hypothetical projections, during the enrollment period to assist employees with deciding whether to purchase one or more PUP(s). Each employee will receive the same information.



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- A representative of JEA's HR department will be available to answer questions from employees and employees will be strongly encouraged to obtain their own financial and legal counsel to advise on the Plan should they chose to do so.

There is also a concern over potential inequities among individual participants if some employees have access to information that others do not. So long as all material information relating to the PUP value calculation is disclosed to all participants, they have sufficient information to make a fully informed decision concerning their Deferral Election, and the fact that some participants have access to additional information does not impact the fairness of the other participants' Deferral Elections. To the extent there is concern that some participants may gain access to additional material information relating to the PUP value calculation, , JEA may avoid such concerns over inequity by (a) requiring those participants to elect to decide whether to participate in the PUP prior to receiving that material information or (b) excluding those participants from the PUP.

The PUP mitigates any remaining risk from these concerns by limiting the amounts that may be invested and allowing only future deferred compensation to be invested, (thus preventing an employee from investing (or jeopardizing) additional personal monies or obtaining money from any other source to purchase the PUP).

5. Does the PUP comply with the Florida Code of Ethics for Public Officers and Employees?

JEA employees eligible for the PUP are covered by F.S. 112.311, the Florida Code of Ethics for Public Officers and Employees. See F.S. 112.312(2) defining "agency" to include a "municipal government entity of this state." The prohibitions discussed below relate to employees of covered agencies.

It is important to evaluate the purpose of the PUP in reviewing the applicable ethics laws. The PUP clearly states its purpose:

The purpose of this JEA Long-Term Performance Unit Plan (this "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 Northeast Florida, (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville. (PUP at Section 1a).

Nothing in the stated purpose or the actuality of the PUP creates a conflict between the participating employee and JEA or the customers JEA serves. Indeed, participating employees only stand to benefit if the value of JEA increases.

The Florida Code of Ethics for Public Officers and Employees makes it clear that the applicable laws are designed to prevent conflicts between the personal interests of employees and the public. The law also states that governmental agencies (e.g. JEA) may take measures to retain

employees and that the code of ethics should not be a barrier from doing so. F.S. 112.311 specifies this intent:

1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

(2) It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when conflicts with the responsibility of such officials to the public cannot be avoided.

(4) It is the intent of this act to implement these objectives of protecting the integrity of government and of facilitating the recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest without creating unnecessary barriers to public service.

(5) It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part. (Emphasis added)

Nothing in the PUP is prohibited by the legislative intent expressed in F.S. 112.311. Indeed, the PUP promotes the legislative intent of recruiting and retaining governmental employees. Contrary to creating a conflict of interest, the PUP aligns the interest of employees and JEA, creating long-term value for JEA and its customers.



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Additionally, there is very limited appellate case law interpreting F.S. 112.311.⁶ But, certain cases and Attorney General Opinions provide further guidance, though not arising from potential compensation vehicles such as the PUP. The opinions underscore the intent behind the statute and the ills the statute is designed to prevent.

First, a conflict must be substantial to be prohibited. AGO 1973-215 (“the personal investment in an enterprise that is prohibited by the act is one that will create a ‘substantial conflict’ between his private interest and the public interest”). See also AGO 1980-71 (“Thus, we do not believe that the Code of Ethics should be interpreted to prohibit the most remote possibilities of conflicts of interest, but rather to prohibit those relationship which are in substantial conflict with the proper discharge of duties in the public interest.”)

Second, the Code of Ethics is designed to prevent individuals from acting against the interest of their agency or the public. “A primary objective of the Code of Ethics is that governmental officials avoid recurring situations in which there is a temptation to place personal gain, economic or otherwise, above the discharge of their fiduciary duty to the public.” *Zerweck v. State*, 409 So.2d 57, 60 (Fla. 4th DCA 1982). Contrary to acting against the interest of JEA, the PUP is designed to encourage employees to personally invest in JEA and work to increase its value. Only if this occurs does the PUP gain value and the employee stand to benefit. Thus, the interests of JEA employees and JEA itself are strictly aligned.

Likewise, the PUP does not violate the more specific provisions of Chapter 112. Specifically:

a. The PUP is not a Prohibited Gift

To participate in the PUP the employee must do a “Deferral Election.” A “Deferral Election” means:

“Deferral Election” means an election by an Employee under the Agreement to defer pay to purchase Performance Units under this Plan payable for services to be performed in calendar years beginning after the date the Election Notice becomes irrevocable. An Employee shall make a new Deferral Election with respect to each Performance Period to the extent that such Employee is eligible to participate in this Plan for such Performance Year. (PUP at Section 2(h)). (Emphasis added)

An employee who purchases a PUP is not receiving a “gift” as defined in F.S. 112. F.S. 112.311(b)1 states that a “gift” does not include “salary, benefits, services, fees, commissions, gifts or expenses associated primarily with the donee’s employment, business, or service as an officer or director of a corporation or organization.” The participating employee is deferring a part

⁶ The statute was enacted in 1974. Legislative history is only available in the state library. We have not yet been able to access that legislative history.

of his or her salary to purchase the PUP. As such, the restrictions of F.S. 112.313(2) prohibiting a public officer from soliciting or accepting a gift do not apply.⁷

b. The PUP is not Unauthorized Compensation.

Florida Statute 112.313(4) prohibits a public officer from accepting unauthorized compensation if the public officer knew or reasonably should have known that “it was given to influence a vote or action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity.” This section does not apply to the PUP. First, nothing is “given” to the participating employee. The PUP is a form of deferred compensation which has been duly authorized and adopted by the JEA Board. Employees choose how much, if any, of their earned compensation to defer for the purchase of allotted Plan units. Moreover, the PUP is offered to employees generally and not any individual specifically. Participation is purely voluntary. Thus, the PUP cannot be said to influence any individual or particular action. If anything, the PUP is designed to promote retention across all levels of JEA employees and increased or improved performance.

c. The PUP Does Not Confer a Special Benefit to a Particular Employee.

All JEA employees, as well as defined representatives of the Office of General Counsel, are eligible to purchase a PUP. This class is similar to JEA employees who are eligible to participate in the JEA deferred compensation plan, i.e. it is a benefit incidental to their employment. It is not a special privilege, benefit or exemption solely for a particular individual or one which a particular individual can secure for himself. Thus, the PUP is not prohibited by F.S. 112.313(6) (prohibits a public employee from using an official position to secure a special privilege, benefit or exemption for himself.)

d. A Participating Employee Does Not Misuse a Public Position

Section. 112.313(6) prohibits misuse of public position. That statute provides:

No public officer, employee of an agency, or local government attorney shall *corruptly* use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit or exemption for himself, herself, or others. The section shall not be construed to conflict with s. 104.31. (Emphasis added)

⁷ This conclusion is further strengthened by the definition of gift within F.S. 112.312(12)(a). A gift “for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee’s behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee’s benefit or by any other means, for which equal or greater consideration is not given within 90 days...”

The PUP is available to all employees who may decide whether or not to participate and is incidental to their employment (e.g. a form of deferred compensation). No individual is able to secure something not available to other JEA employees. It is also important to note that the PUP was developed at the instruction of the JEA Board, authorized by it, and will be administered under Board auspices and the redemption price certified by the Board. Further, an independent auditor will certify all values and financial results that will substantiate the value of the PUP. No individual can affect or create a benefit which is not approved or authorized by the Board. And, no JEA Board member can participate in the PUP. Thus, there is complete independence of participants from the creation and authorization of the PUP and certification of values related to the PUP.

To establish a violation of s. 112.313(6), the following elements must be proven by clear and convincing evidence:

“(a) the employee used or attempted to use his official position; (2) to secure a special privilege, benefit or exemption for himself or another and (3) acted corruptly in doing so, that is, with wrongful intent and for the purpose of benefiting himself or another person from some act or omission, which is inconsistent with the proper performance of his public duties. Corruptly is statutorily defined as being done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from act or omission of a public servant which is inconsistent with the proper performance of his or her duties. To satisfy this statutory element, proof must be adduced that Siplin [the Respondent/Appellant] acted with reasonable notice that [his or her] conduct was inconsistent with the proper performance of his or her public duties and would be a violation of the law of the code of ethics. *Siplin v. Commission on Ethics*, 59 So.3d 150, 151-152 (Fla. App. 5th Dist. 2011) (internal citations omitted).

Employees eligible to participate in the PUP are not receiving compensation inconsistent with the proper performance of their duties. Indeed, the PUP is based on the employee properly performing their duties and incentivizing them to do so. Moreover, all eligible participants are properly advised of the conditions of eligibility to participate in the PUP and its terms. The JEA Board has approved the PUP and the employee does not have notice that the PUP is inconsistent with performing his or her duties. Consequently, the PUP, and those who participate in it, do not violate s. 112.313(6).

6. Must the PUP Be Registered under the Securities Laws?

The PUP is exempt from registration under the securities laws. As described above, the PUP is an opportunity for JEA employees to defer compensation, purchase units within the PUP, and realize gain, if any, if the enterprise value of JEA increases. The PUP is designed to allow employees to personally invest in the enterprise growth of JEA in the next three years (i.e. encourage employees to have "skin in the game" with respect to improving the health of the utility).



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JEA's performance will be measured on the change in JEA's net position during the performance period.

A security may be considered any situation where individuals invest money in a common enterprise with the expectation to earn a profit solely through the efforts of someone other than themselves. Employees must remain employed to receive benefits under the PUP. The employees' continued effort is required. Moreover, since the performance units are being issued and sold by JEA, then the performance units are exempt from registration under both the federal and state securities laws. The units are exempt from registration since they are being issued by a public instrumentality of a state. Section 3(a)(2) of the Securities Act of 1933 and Section 517.051(1) of the Florida Statutes provide this exemption.

As long as the total subscription for the PUP does not exceed \$1,000,000,⁸ the municipal securities disclosures required for offerings of \$1,000,000 or more as provided by Rule 15c2-12 of the Securities Exchange Act of 1934 will not be applicable.

7. Is the PUP a Deferred Compensation Plan Allowed by Florida Law?

Florida law and the JEA Charter allow employees of a governmental unit to participate in a deferred compensation plan.

The relevant Florida statute, F.S. 112.215, states in part:

In accordance with a plan of deferred compensation which has been approved as herein provided, the state or any state agency, county, municipality, other political subdivision, or constitutional county officer may, by contract or a collective bargaining agreement, agree with any employee to defer all or any portion of that employee's otherwise payable compensation and, pursuant to the terms of such approved plan and in such proportions as may be designated or directed under that plan, place such deferred compensation in savings accounts or use the same to purchase fixed or variable life insurance or annuity contracts, securities, evidence of indebtedness, or such other investment products as may have been approved for the purposes of carrying out the objectives of such plan. Such insurance, annuity, savings, or investment products shall be underwritten and offered in compliance with the applicable federal and state laws and regulations by persons who are duly authorized by applicable state and federal authorities. (F.S. 112.215(3)) (Emphasis added)

The statute further provides the basis for establishing the plan and criteria for approving the various accounts and investment accounts or vehicles. (F.S. 112.215(5-6)).

⁸ As written, the PUP is scheduled to have 100,000 units at \$10.00 per unit.

Article 21.07(j) of the JEA Charter specifically provides that “JEA shall have the option to establish an employee deferred compensation program separate from the city’s employee deferred compensation program.” Under this authority, the JEA 457 Deferred Compensation Plan was established in 2002 for the purpose of providing employees of JEA and employees of the (now former) St. Johns River Power Park System with a voluntary method deferring taxation on compensation until death, retirement or certain other events. See memo dated July 6, 2018 from Aaron Zahn to JEA Board and as approved by JEA Board on July 30, 2018.

The PUP is not a traditional deferred compensation plan such as the one currently in place with JEA. However, the PUP is akin to and fits with the deferred compensation plan allowed by F.S. 112.215. If JEA desires to treat the PUP as a deferred compensation plan pursuant to §112.215, the JEA Board must approve the PUP (it has); JEA must seek a determination that the compensation deferred by employees to purchase the PUP is not currently taxable (F.S. 112.215(5) and (6)(b)); and that the proceeds to the employees from the PUP, if any, will not be included in the employee’s taxable income until proceeds are actually received (F.S. 112.215(6)(a)). Finally, the PUP does not impose any liability on JEA, “except to show that the payments have been [or will be] remitted for the purposes for which the compensation has been deferred.” (F.S. 112.215(9)). Specifically, Section 9(c) of the JEA Long-Term Performance Unit Plan states, “[t]his Plan is intended to constitute an ‘unfunded’ program, and no amount shall be set aside to fund any payments hereunder prior to the end of the Performance Period. JEA’s obligations under this Plan are unfunded and unsecured, and the Participants have no rights other than those of general unsecured creditors of the JEA Group with respect to any payment hereunder.” Further, a JEA Employee stands to gain nothing if the Threshold Value Target is not attained during the applicable Performance Period (Section 2(t) of the JEA Long-Term Performance Unit Plan).

In addition to the requirements under F.S. 112.215, the Administrator of the PUP should consult F.S. 112.21 to determine the applicability of requirements of custodial accounts in which the deferred compensation used to purchase performance units will be held. It is our understanding that JEA intends to hold the deferred compensation in an interest-bearing FDIC-insured account such as those currently used for other existing JEA deferred compensation plans.

8. Is JEA Pledging Credit to Participating Employees?

Article 7, Section 10 of the Florida Constitution prohibits JEA from becoming a “joint owner with, or stockholder of, or giv[ing], lend[ing] or us[ing] its taxing power or credit to aid any corporation, association, partnership or person.” As indicated above, JEA is not giving or using its taxing power or credit to help any JEA employee who purchases a PUP with deferred compensation. The Florida Supreme Court has described the pledging of credit as follows:

As used in Article VII, section 10, “credit” means “the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision for the benefits of private enterprises. This Court has explained that the lending of public credit means:

[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.

Under this definition, we conclude that the COP's in this case do not contemplate a pledge of the District's credit, and that only a public purpose, and not a paramount public purpose, need be shown. *Miccouskee Tribe v. South Florida Water Management District*, 48 So.3d 811, 823 (Fla. 2010) (internal citations omitted).

Further, as previously stated, any amount owed to employees under the PUP will become the obligation of the acquirer to be paid post-closing.

As earlier explained, a participating employee only realizes a gain on the deferred compensation used to purchase the PUP if the Threshold Value Target set forth on the Redemption Price Schedule is attained during the applicable Performance Period, i.e. there is an increase in value of JEA itself. No public property is placed in jeopardy by default of the participating employee or any other third party.

Given that no credit is being pledged, Article VII, Section 10 requires only that a public purpose be met. The PUP's stated public purpose 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 Northeast Florida; (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville. (Section 1(a) of the JEA Long-Term Performance Unit Plan)."

The Florida Attorney General has opined that "if the expenditure primarily or substantially serves a public purpose, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10." AGO 2005-02. The AGO further stated that the determination of whether the expenditure of funds fulfills a public purpose is one that the legislative body, in this case the JEA Board, must make. *Id.* As noted above, the PUP specifies the public purpose, and the JEA Board has approved the PUP.

9. Is the PUP permissible under Florida Laws related to "Extra Compensation?"

The PUP gives employees the choice of purchasing units that can increase in value if the value of JEA increases and decrease in value if the value of JEA decreases. The Plan is voluntary and requires employees that wish to participate to buy-in by deferring their personal compensation to purchase the units and to execute an agreement pertaining to the Plan. As developed below, the Plan does not therefore constitute "extra compensation" under section 215.425, Florida Statutes.

Section 215.425 provides that "no extra compensation shall be made to any [public employee] after the service has been rendered or the contract made." The intent behind this provision is that public employees should not receive gratuities for services that were already rendered. AGO 2005-07 ("The purpose of such a provision is to prevent payments in the nature of gratuities for past service, and the restriction pertains to extra compensation given after service has been performed, not to compensation earned during service.").

We have reviewed the applicable legislative history of section 215.425 and have not identified anything suggesting that plans such as the PUP are, or are intended to be, prohibited by the statute. The provision applies principally in instances where public employees were to receive retroactive compensation for work already performed. *See* AGO 92-49 (holding that the Police Pension Board of Trustees could not pay a cost of living allowance to a retired police officer already receiving pension benefits for prior services); *see also* AGO 91-51 (holding that severance payments in lieu of notice violated the provision because the employee renders no service after termination and the payments were compensation for work already performed).

JEA's PUP plainly does not constitute "extra compensation" because the redemption payments are not compensation for the services that the employees render as part of their employment with JEA. Rather, the PUP allows all eligible employees to participate through a voluntary payment in enterprise creation at the risk of not receiving a return on the investment made to purchase the performance units. The PUP also does not serve to provide gratuities to the employees for their past service that they have been previously paid for and does not serve as a bonus program or incentive program to reward employees. Indeed, to participate in the Plan, JEA employees must opt-in at their sole discretion and expend their personal funds to purchase the units. The number of performance units available for purchase by each employee is directed by the Plan Administrator and is based on the employee's position level and annual performance review. The redemption payments for the units depend solely on the change in value of JEA. Thus, section 215.425 does not apply to the Plan, and the Plan does not constitute "extra compensation."

CONCLUSION

We appreciate the opportunity to review the PUP. Please call if there are any questions.

GC-#1332643 (.pdf)

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PRIVILEGED & CONFIDENTIAL

To: Office of General Counsel of the City of Jacksonville, Florida
From: Pillsbury Winthrop Shaw Pittman LLP
Date: ~~October 28~~ November 4, 2019
Re: Tax and Securities Considerations Applicable to JEA Long-Term Performance Unit Plan

A. Background

JEA, a body politic and corporate under the laws of the State of Florida and an independent agency of the Consolidated City of Jacksonville (“JEA”), sponsors the JEA Long-Term Performance Unit Plan, effective July 23, 2019 (the “Plan”). As requested by the Office of General Counsel of the City of Jacksonville, this memorandum summarizes the basic terms, vesting conditions, and payment provisions applicable to performance units available for allocation to eligible employees under the Plan, and summarizes the relevant federal tax consequences of the Plan under the Internal Revenue Code of 1986, as amended (the “Code”), and related guidance as well as the relevant federal and state securities consequences of the Plan.¹

B. Plan Summary

1. Basic Plan Terms

Under the Plan, (i) employees of JEA and its affiliates, assigns, subsidiaries and successors (the “JEA Group”) who have been employed by the JEA Group for at least three months prior to the Purchase Date (as defined below) and (ii) full-time attorneys of the Office of General Counsel of the City of Jacksonville who are dedicated exclusively to JEA for at least three months prior to the Purchase Date are eligible to be allocated a number of Performance Units (as defined below) by JEA for purchase at a price of \$10 per Performance Unit. The Plan is administered by the Chairperson of the Compensation Committee of the Board of Directors of JEA (the “Administrator”).²

¹ This memorandum is based on the version of the Plan that is current through the date of this memorandum.

² Following a Recapitalization Event (as defined below), the Administrator may be such other entity designated in the definitive agreement providing for such Recapitalization Event.

Each performance unit is a bookkeeping entry that represents a potential right to receive a cash payment in the future based on attainment of specified performance metrics (the “Performance Units”). The aggregate number of Performance Units that may be purchased by eligible employees under the Plan is 100,000 Performance Units. Participation in the Plan is not mandatory and eligible employees who purchase Performance Units under the Plan are referred to in this memorandum as “Participants.”

To purchase Performance Units, an eligible employee must pay the purchase price for the Performance Units the employee wishes to purchase by electing to defer a portion of his or her pay equal to the aggregate purchase price of the Performance Units the employee wishes to purchase. To defer a portion of his or her pay, the employee must complete an election notice (a “Deferral Election”) and file it with the Administrator by no later than December 31st of the calendar year immediately preceding the calendar year to which the Deferral Election relates. Eligible employees may elect to defer their pay earned in the calendar year after the Deferral Election is made over one or two payroll periods.

Before the end of 2019, eligible employees will be allocated up to 35,000 Performance Units for purchase under the Plan. An eligible employee who wishes to purchase all or some of the Performance Units allocated to him or her must complete the Deferral Election by December 31, 2019 and elect to defer pay earned in 2020. The purchase date of the Performance Units will be January 27, 2020.

2. Vesting of Performance Units

Under the Plan, the Performance Units are subject to a time-based vesting component and a performance-based vesting component, in each case measured over a three-year performance period (the “Performance Period”) that ends on the earlier to occur of (i) the third anniversary of the Purchase Date²³ (which is January 27, 2023 with respect to Performance Units purchased on January 27, 2020) and (ii) the date on which a Recapitalization Event²⁴ occurs.

The time-based vesting component is satisfied if a Participant remains employed with any member of the JEA Group through the end of the applicable Performance Period. However, the time-based vesting component is deemed to be satisfied if, prior to the end of the applicable Performance Period, the Participant’s employment is terminated due to an involuntary termination or due to the Participant’s retirement after the Participant attains one of the retirement milestones described in JEA’s General Employees Retirement Plan. An involuntary termination of employment occurs if the Participant’s employment is terminated (i) by any member of the JEA Group without “cause” (as defined in the Plan) or (ii) due to the Participant’s death or “disability” (as defined in the Plan).

²³ The “Purchase Date” for Performance Units under the Plan is each January 27th of the calendar year following the calendar year in which JEA’s annual financial statements audit is completed, beginning with January 27, 2020.

²⁴ The Plan defines a “Recapitalization Event” as the closing and funding of a transaction or a series of related transactions in accordance with Article 21 of the Charter of the City of Jacksonville and any other applicable law that results in either (i) unencumbered cash proceeds to the City of Jacksonville of at least \$3,000,000,000 or (ii) at least 50% of the net depreciated property, plant and equipment value of either JEA’s electric system or JEA’s water and wastewater system being transferred, assigned, sold or otherwise disposed of.

If a Participant's employment is terminated prior to the end of the applicable Performance Period for any reason other than due to an involuntary termination or retirement, the Participant forfeits his or her Performance Units. In such a case, the applicable purchase price paid by the Participant in respect of the forfeited Performance Units is refunded to the Participant, provided that, if the Participant's employment is terminated by any member of the JEA Group for cause or the Participant voluntarily resigns from employment with the JEA Group for any reason (other than due to retirement), the applicable purchase price is not refunded to the Participant. As such, there exists the possibility for a Participant to forfeit completely the amount of pay deferred by the Participant under the Plan for failure to satisfy the time-based vesting component.⁴⁵

The performance-based vesting component is satisfied if, as of the end of the applicable Performance Period, JEA realizes a percentage increase in its enterprise value (taking into account its net position reflected on its financial statements, the aggregate consideration paid by JEA to the City of Jacksonville during the 12-month period prior to the end of the applicable Performance Period and the aggregate consideration paid by JEA to its customers during the 12-month period prior to the end of the applicable Performance Period) as compared to its enterprise value at the beginning of the applicable Performance Period, as more fully described on Schedule A to the Plan (the "Redemption Price Schedule"). If JEA realizes a percentage increase in its enterprise value in excess of a specific target change in value percentage and the Participant has satisfied the time-based vesting component, the Participant is eligible to receive a cash payment in respect of his or her vested Performance Units. If, however, the change in value percentage does not meet or exceed a specific threshold value percentage, the Redemption Price (including the purchase price paid for the Performance Units) may potentially be reduced to \$0, as more fully described on the Redemption Price Schedule and in the definition of "Redemption Price", and the Participant may receive no cash payment in respect of his or her Performance Units (this is true even if the Participant satisfies the time-based vesting component).⁴⁶ As such, there exists the possibility for a Participant to forfeit completely the amount of pay deferred by the Participant under the Plan for failure to satisfy the performance-based vesting component.

3. Payment for Vested Performance Units

Assuming satisfaction of both the time-based vesting component and the performance-based vesting component, on the applicable payment date, each Participant will receive an amount equal to the number of his or her vested Performance Units as of the end of the applicable Performance Period multiplied by the "Redemption Price"⁴⁷ per Performance Unit.

⁴⁵ Participants may also forfeit all or a portion of their allocated or purchased Performance Units (with the applicable purchase price refunded to them) if they incur a change in their civil service status during the applicable Performance Period, as more fully described in the Plan.

⁴⁶ If performance results in a percentage increase between the specific threshold value percentage and the specific target change in value percentage, a Participant will only be eligible to receive an amount equal to the purchase price paid for the Performance Units.

⁴⁷ The "Redemption Price" means a price per Performance Unit payable by JEA to each Participant calculated in accordance with the Redemption Price Schedule. As described more fully on the Redemption Price Schedule, the Redemption Price will increase by \$100.00 per Performance Unit for each "value change percentage" increase of

The Administrator will certify performance within 30 days following the completion of the applicable Performance Period (or, in the case of a Recapitalization Event, within 30 days following the occurrence of such Recapitalization Event) and payment will be made to the Participants no later than ~~30 days~~ March 15th of the calendar year following the ~~date on calendar year in which performance for the applicable Performance Period is certified by the Administrator. In other words, Participants will be paid the Redemption Price in respect of their vested Performance Units under the Plan no later than 60 days following the end of the applicable Performance Period ends.~~

The Plan provides that, in the event of a Recapitalization Event, the Plan and any Award Agreements thereunder will be assumed by any successor of JEA (including any organization(s) that succeeds to a substantial portion of the assets and business of JEA), and that, upon such assumption, the rights and obligations of JEA under the Plan and any applicable Award Agreements will become the rights and obligations of such successor. This means that payment of the Redemption Price under the Plan will be made by JEA's successor in a Recapitalization Event.

Payment is further conditioned on the Participant (i) executing and not revoking a general release of claims in favor of the JEA Group prior to the applicable payment date, and (ii) complying with the restrictive covenants set forth in the Participant's award agreement under the Plan (the "Award Agreement").

4. Tax Reimbursement Payment

The Plan provides that, in the event any payments under the Plan and/or any Award Agreement to any Participant are subject to any excise tax, interest or penalties under the Code (the "Penalties"), a member of the JEA Group will pay to such Participant an amount equal to the full amount of the Penalties so that such Participant is in the same economic position the Participant would have been if the Penalties did not apply. However, the JEA Group is under no obligation to make a Participant whole for the Penalties if they relate to the Participant's breach of the Plan or any Award Agreement or such Participant's failure to comply with his or her legal obligations.

C. Summary of Federal Tax Consequences

1. Code Section 457

Code Section 457 governs deferred compensation plans of "eligible employers" (i.e., state and local governments and tax-exempt organizations)⁶⁸ such as JEA. As described above, the Plan is a deferred compensation plan as Participants may elect to defer a portion of their compensation as payment for the Performance Units. Under Code Section 457, a deferred

1.00% in excess of the "challenge value target" and will decrease by \$0.50 per Performance Unit for each "value change percentage" decrease of 1.00% below the "threshold value target" (as such terms are defined in the Plan), but in no event will the Redemption Price per Performance Unit be less than \$0.

⁶⁸ See Code §457(e)(1).

compensation plan of an eligible employer is either an “eligible deferred compensation plan”⁷⁹ or a plan that is not an eligible deferred compensation plan (referred to as an “ineligible deferred compensation plan”).⁸¹⁰ A plan is an eligible deferred compensation plan if the amount that can be deferred under the plan for the applicable taxable year is limited to the lesser of (i) \$19,000 (indexed for inflation) and (ii) 100% of the participant’s includible compensation.⁹¹¹ As Participants in the Plan are not limited to a maximum deferral of \$19,000 per year, the Plan would not be treated as an eligible deferred compensation plan under Code Section 457(b) and, instead, it would be treated as an ineligible deferred compensation plan under Code Section 457(f).

Amounts (and earnings thereon) deferred under an ineligible deferred compensation plan are includable in the gross income of a plan participant for the first taxable year in which the compensation is not subject to a substantial risk of forfeiture, unless an exemption applies.¹⁰¹² In other words, amounts payable under an ineligible deferred compensation plan are taxable when they become vested, even if not actually paid until a later date. However, in 2016 the Internal Revenue Service (the “IRS”) published proposed regulations under Code Section 457(f) (the “Proposed 457(f) Regulations”)¹¹¹³ which provide that deferred compensation plans that satisfy the short-term deferral exemption (the “STD Exemption”) under Code Section 409A¹²¹⁴ are generally not considered ineligible deferred compensation plans under Code Section 457(f).¹³¹⁵

Code Section 409A contains a comprehensive set of rules regarding the taxation of nonqualified deferred compensation plans, but it does not regulate the payment of compensation where there is no delay, or only a minimal delay, between the time an amount is vested and the time the compensation is paid. Under Code Section 409A, the delay is considered minimal if a service provider actually or constructively receives payment of an amount during the first taxable year in which the amount is no longer subject to a substantial risk of forfeiture (“SROF”) or on or before the 15th day of the third month following the end of the taxable year in which the payment is no longer subject to a SROF (i.e., the short-term deferral period). Therefore, a payment is excluded from the application of Code Section 409A and Code Section 457(f) under the STD Exemption if (i) the right to the payment is subject to a condition constituting a SROF and (ii) the payment is paid within the short-term deferral period following the lapse of the

⁷⁹ See Code §457(b).

⁸¹⁰ See Code §457(f).

⁹¹¹ See Code §457(b)(2)(A).

¹⁰¹² See Code §457(f).

¹¹¹³ See Section V, “Proposed Applicability Dates,” in the preamble to the Proposed 457(f) Regulations, which provides that, until the IRS adopts the Proposed 457(f) Regulations as final, taxpayers may rely on the Proposed 457(f) Regulations.

¹²¹⁴ See Treas. Reg. §1.409A-1(b)(4)(i)(A).

¹³¹⁵ See Prop. Treas. Reg. §1.457-12(d)(2).

SROF.⁺⁴¹⁶ A SROF exists if the entitlement to the compensation is conditioned on the performance of substantial future services or the occurrence of a condition related to the purpose of the compensation and the possibility of forfeiture is substantial. Where there are two conditions that would constitute a SROF, the SROF lapses on the satisfaction of the later of the two conditions.

In the case of the Plan, there are two conditions that would constitute a SROF:⁺⁵¹⁷ (i) the time-based vesting component (i.e., the performance of substantial future services) and (ii) the performance-based vesting component (i.e., the occurrence of a condition related to a purpose of the compensation), with vesting of the Performance Units occurring on the satisfaction of the performance-based vesting component as the later of the two conditions that will be satisfied. While there exists the possibility under the Plan for a Participant to retain his or her Performance Units if he or she experiences an involuntary termination of employment or retires from employment prior to the end of the applicable Performance Period, the deferred purchase price and the Performance Units are still subject to a SROF due to the fact that the Performance Units could ultimately be redeemed for \$0 if the threshold value percentage is not attained during the applicable Performance Period.

Additionally, because payments in respect of vested Performance Units under the Plan will be made in all events ~~within 60 days~~ by no later than March 15th of the calendar year following the date on calendar year in which the SROF has lapsed (as described under “Payment for Vested Performance Units” above), payment of the Redemption Price will be made within the short-term deferral period.

Accordingly, the Plan satisfies the requirements of the STD Exemption under Code Section 409A and the Proposed 457(f) Regulations and, therefore, it should not constitute an ineligible deferred compensation plan under Code Section 457(f) and payment of the deferred purchase price and the Redemption Price should be taxable to Participants only when paid to them.

2. Code Section 409A

In addition to being subject to Code Section 457(f), ineligible deferred compensation plans are subject to the requirements of Code Section 409A⁺⁶¹⁸ governing the taxation of nonqualified deferred compensation plans, unless an exemption applies. The tax rules define a nonqualified deferred compensation plan broadly as any plan that provides for the deferral of compensation.⁺⁷¹⁹ A “deferral of compensation” occurs where a service provider has a legally binding right during a taxable year to compensation that, under the terms of the plan and the

⁺⁴¹⁶ Treas. Reg. §1.409A-1(b)(4).

⁺⁵¹⁷ See Prop. Treas. Reg. §1.457-12(e)(1).

⁺⁶¹⁸ See Prop. Treas. Reg. §1.457-12(d)(5)(i).

⁺⁷¹⁹ See Treas. Reg. §1.409A-1(a)(1); Treas. Reg. §1.409A-1(c)(1).

relevant facts and circumstances, is or may be payable to the service provider in a later taxable year.⁴⁸²⁰

If compensation is not exempt from, and does not comply with, the requirements of Code Section 409A, all compensation deferred under the applicable plan for the taxable year and all preceding taxable years is includable in the gross income of the service provider for the taxable year in which the compensation is no longer subject to a SROF (as described above). In addition, the service provider has to pay an additional 20% tax plus a potential premium interest tax on the compensation amount.⁴⁹²¹

However, compensation that satisfies the STD Exemption is not considered nonqualified deferred compensation subject to Code Section 409A. As discussed above, payments under the Plan are structured to comply with the STD Exemption under Code Section 409A and, therefore, should not be subject to the requirements of Code Section 409A.

3. Code Section 4960

⁴⁸²⁰ See Treas. Reg. §1.409A-1(b).

⁴⁹²¹ See Code §409A(a)(1).

Code Section 4960 imposes on an employer an excise tax equal to the corporate tax rate (currently 21%) on the sum of (i) remuneration²⁴²² in excess of \$1 million paid by an applicable tax-exempt organization (an “ATEO”) or a related organization²⁴²³ for the taxable year with respect to the employment of a covered employee²⁴²⁴ and (ii) any excess parachute payments²⁴²⁵ paid by an ATEO or a related organization to a covered employee. Under Code Section 4960, the employer is the common law employer (as generally determined for federal tax purposes).²⁴²⁶

Code Section 4960 applies to payments made by ATEOs, which, in relevant part, are defined to include any organization which, for the taxable year, has income excluded from tax under Code Section 115(1).²⁴²⁷ We understand from JEA that JEA is exempt from taxation under

²⁴²² See Code §4960(c)(3) and Section D. of IRS Notice 2019-9, which provide that “remuneration” is generally defined as wages under Code §3401(a) (i.e., wages subject to federal income tax withholding), but excluding (i) any excess parachute payment under Code §4960 (parachute payments that are not excess parachute payments are not excluded), (ii) designated Roth contributions under Code §402A(c), (iii) certain retirement benefits (see Code §3401(a)(12)) or certain directors’ fees (see IRS Rev. Rul. 57-246), and (iv) certain remuneration for medical services (see Code §4960(c)(3)(B)), but including amounts required to be included in gross income under Code §457(f).

²⁴²³ See Code §4960(c)(4)(B), which provides that, a person or governmental entity will be treated as related to an ATEO if such person or governmental entity: (i) controls, or is controlled by, the organization, (ii) is controlled by one or more persons which control the organization, (iii) is a supported organization (as defined in Code §509(f)(3)) during the taxable year with respect to the organization, (iv) is a supporting organization described in Code §509(a)(3) during the taxable year with respect to the organization, or (v) in the case of an organization which is a voluntary employees’ beneficiary association described in Code §501(c)(9), establishes, maintains, or makes contributions to such voluntary employees’ beneficiary association.

²⁴²⁴ See Code §4960(c)(2), which provides that a “covered employee” means an employee (including any former employee) of an ATEO if the employee (i) is one of the five highest compensated employees of the organization for the taxable year, or (ii) was a covered employee of the organization (or any predecessor) for any preceding taxable year beginning after December 31, 2016. There is no minimum compensation threshold for an employee to be treated as a covered employee.

²⁴²⁵ See Code §4960(c)(5), which provides that an “excess parachute payment” means an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment. For these purposes, “parachute payment” means a compensatory payment to a covered employee that is contingent on such employee’s separation from employment, and the aggregate present value of the compensatory payments to such employee which are contingent on his or her separation equals or exceeds three times the base amount. The “base amount” means the employee’s average annual compensation paid or treated as paid by the organization during the five taxable years immediately preceding the year in which the separation occurs (or the average annual compensation over the actual number of years of service with the organization, if fewer than five).

²⁴²⁶ See IRS Notice 2019-9, which provides interim guidance under Code §4960; however, until the Department of the Treasury and the IRS issue final guidance, taxpayers may rely on good faith, reasonable interpretations of Code §4960.

²⁴²⁷ See Code §4960(c)(1).

Code Section 115(1), although we have not independently verified this. As such, assuming that JEA is indeed exempt from taxation under Code Section 115(1), JEA would likely be considered an ATEO that is subject to Code Section 4960. In this respect, payments under the Plan to covered employees that exceed \$1 million or that constitute excess parachute payments may be subject to the 21% excise tax under Code Section 4960.

One possibility for excluding the application of Code Section 4960 may be to assert that JEA is exempt from tax under the doctrine of implied statutory immunity.²⁶²⁸ Under this doctrine, the income of a State, a political subdivision of a State or an integral part of a State or political subdivision (often referred to as a “governmental unit”) is generally not taxable unless there is a specific statutory authorization for taxing the income. However, at least in the context of a governmental entity that is exempt from tax under Code Section 501(c)(3), it appears that such entity would first need to relinquish its Code Section 501(c)(3) status for Code Section 4960 not to apply on the basis of the doctrine of implied statutory immunity, and in such a case, such entity may still be liable for the excise tax under Code Section 4960 as a “related organization” under Code Section 4960(c)(4)(B).²⁷²⁹ As such, if JEA were to assert that it was not subject to Code Section 4960 on the basis of the doctrine of implied statutory immunity, it may be the case that JEA would first have to relinquish its tax-exempt status under Code Section 115(1), although this is not clear from the relevant guidance. The only way to gain certainty on this issue would be for JEA to apply for a private letter ruling (“PLR”) with the IRS.

Another possibility for excluding the application of Code Section 4960 in the context of a Recapitalization Event may be to demonstrate that the payments are not made by an ATEO or a related organization. If the Recapitalization Event is structured as a sale of JEA’s assets and payments under the Plan are made by the purchaser of the assets following the consummation of the Recapitalization Event, then the payments would be made at a time when JEA is no longer an ATEO. This approach may prove unsuccessful, however, on account of the successor employer rules. Under these rules, any purchaser of JEA may be treated as a successor common-law employer and, therefore, subject to Code Section 4960. Moreover, payments under the Plan may need to be included in the pre-closing tax period (i.e., when JEA is an ATEO) because the payments are based on the sale of JEA. Further research (and possibly an IRS PLR) may be needed to gain greater certainty on this issue, but that is beyond the scope of this memorandum.

4. Code Section 280G

Under the golden parachute tax rules of Code Section 280G, a corporation may lose the right to take an income tax deduction with respect to certain compensatory payments made to a disqualified individual that are contingent upon a change in control of the corporation (these payments are referred to as “parachute payments”²⁸³⁰). JEA qualifies as a corporation for these

²⁶²⁸ Case law has established that JEA is entitled to sovereign immunity treatment. See *Fluid Dynamics Holdings, LLC v. Jacksonville Electric Authority*, No. 18-11082 (11th Cir. 2018).

²⁷²⁹ See IRS Notice 2019-9, Q&A-5 and Q&A-6.

²⁸³⁰ The definition of “parachute payments” for purposes of Code §280G differs from that of Code §4960, which defines parachute payments as compensatory payments that are contingent on a separation from

purposes.²⁹³¹ A “disqualified individual” is any officer or top 1% employee when ranked by pay.³⁰³² Code Section 4999 imposes on the recipient of a parachute payment a non-deductible 20% excise tax, which excise tax is in addition to the payment of any regular income and employment tax that may apply to the payment. A payment is generally treated as contingent on a change in control if the payment would not, in fact, have been made had no change in control occurred.³⁴³³ A payment made pursuant to an agreement entered into within one year before the date of a change in control is presumed to be contingent on the change in control, unless the contrary is established by clear and convincing evidence. This memorandum assumes that, for purposes of Code Section 280G, a Recapitalization Event would constitute a change in control and the payment of the Redemption Price in respect of the Performance Units under the Plan would be a payment contingent on a change in control.

Under Code Section 280G, a payment is a “parachute payment” only if the total amount of the contingent compensatory payments made to the service provider in connection with the change in control equals or exceeds three times the disqualified individual’s base amount.³²³⁴ For these purposes, the “base amount” is the average annual compensation paid or treated as paid by the corporation during the five taxable years immediately preceding the year in which the change in control occurs (or the average annual compensation over the actual number of years of service with the corporation undergoing a change of control, if fewer than five).³³³⁵ If the total payments to a disqualified individual are less than three times the individual’s base amount (his or her “parachute threshold”), the payments to that disqualified individual are not subject to the loss of tax deduction under Code Section 280G or the excise tax under Code Section 4999. In contrast, if a disqualified individual’s total parachute payments equal or exceed his or her parachute threshold, then both the loss of the tax deduction and the excise tax apply to the extent such parachute payments exceed the disqualified individual’s base amount. In other words, if the parachute threshold is equaled or exceeded, then the loss of tax deduction and the excise tax

which defines parachute payments as compensatory payments that are contingent on a separation from employment.

²⁹³¹ See Treas. Reg. Section 301.7701-2(b)(1) defines a “corporation” as “[a] business entity organized under a Federal or State statute, or under a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic”. JEA was created pursuant to Article 21 of the Charter of the City of Jacksonville, Florida, which would be a “State statute” because the Charter is pursuant to the Laws of Florida. JEA’s charter notes that it is a “body politic.”

³⁰³² See Treas. Reg. §1.280G-1 Q/A 15. A disqualified individual also includes a 1% stockholder, which does not apply in JEA’s case unless JEA is reorganized to have stockholders.

³⁴³³ See Treas. Reg. §1.280G-1 Q/A 22. A payment that would in fact have been made had no change in control occurred is treated as contingent on a change in control if the change in control accelerates the time at which the payment is made. As the occurrence of the Recapitalization Event will accelerate payment timing under the Plan, payments to participants under the Plan would likely be treated as contingent on a change in control.

³²³⁴ See Treas. Reg. §1.280G-1 Q/A 2.

³³³⁵ See Treas. Reg. §1.280G-1 Q/A 34.

apply to all parachute payments to the extent they exceed the base amount, and not just to the extent they exceed the parachute threshold.

Unless an exception applies, JEA may be subject to Code Section 280G, which could result in JEA (or its successor in a Recapitalization Event) losing its tax deduction on payments made under the Plan (to the extent a tax deduction would otherwise have been available to JEA or its successor) and being obligated under the Plan to gross up Participants for excise taxes incurred by them as a result of the application of Code Sections 280G and 4999. In general, the following payments are not treated as parachute payments for purposes of Code Section 280G:³⁴³⁶

- Payments made by a corporation that would qualify as a “small business corporation” immediately before the change in control (even if no election is in effect on the date of the change in control). To qualify as a small business corporation, a corporation must have fewer than 100 shareholders, no entity shareholders, and only one class of stock.³⁴³⁷
- Payments made by non-publicly traded corporations where the payments are approved by more than 75% of the voting power of the corporation (in accordance with the relevant shareholder approval requirements under Code Section 280G³⁴³⁸).
- Payments made by a corporation which is exempt from tax under Code Section 501(c)(3), provided that such corporation is exempt from tax under that section immediately before and immediately after the change in control.
- Payments made by a corporation that a taxpayer demonstrates by clear and convincing evidence based on all the facts and circumstances are reasonable compensation for services rendered after a change in control.³⁴³⁹ Whether compensation is reasonable depends on, among other factors, the nature of the services rendered, the disqualified individual’s historical compensation and the compensation of individuals who perform similar services outside of the change in control context.³⁴⁴⁰

Since JEA does not have shareholders, JEA would likely not be able to utilize the shareholder approval exception described in the second bullet above. However, in an IRS PLR,³⁹⁴¹ the IRS held that the approval of parachute payments by a bankruptcy court’s order could satisfy the Code Section 280G shareholder approval requirements because the creditors’

³⁴³⁶ See Treas. Reg. §1.280G-1 Q/A 5(a)(1), (2), (4) and (5), respectively.

³⁴³⁷ See Code §1361(b)(1). Note, for purposes of Code §280G, the term “small business corporation” is determined without regard to Code §1361(b)(1)(C).

³⁴³⁸ See Treas. Reg. §1.280G-1 Q/A 7.

³⁴³⁹ See Treas. Reg. §1.280G-1 Q/A 9.

³⁴⁴⁰ See Treas. Reg. §1.280G-1 Q/A 40.

³⁹⁴¹ See PLR 200212013. Note, a PLR can only be relied on by the taxpayer to whom it is issued, but it can be indicative of the IRS’s position as to the subject matter of the PLR.

committee and the bankruptcy judge represented the shareholders' interests and the shareholders were not otherwise eligible to approve the payments. Whether some other non-shareholder approval mechanism (e.g., approval by the citizens of the City of Jacksonville) might be available to JEA would likely require a PLR from the IRS. Also, as we understand that JEA is not exempt from tax under Code Section 501(c)(3) (rather, as discussed, JEA is exempt under Code Section 115(1)), JEA would not be able to qualify for the exception described in the third bullet above. However, to the extent that JEA can qualify as a small business corporation, JEA should be able to rely on the exemption under the first bullet above. Again, to gain greater certainty as to whether JEA is exempt from the application of Code Section 280G, JEA would need to seek a PLR from the IRS or, in the case of reasonable compensation analysis under the fourth bullet above, commission a study by a third-party valuation firm (such as an accounting firm) to evaluate whether some or all of the compensation is reasonable.

D. Summary of Federal and State Securities Laws

Because JEA is not a publicly traded entity and because the Performance Units are not securities (rather, as discussed above, they are contractual rights to receive cash payments), there should be no consequences for the Plan under applicable federal or state securities laws.

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Style name: Default Style	
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Original filename: JEA - Tax and Securities Considerations Memo (Privileged and Confidential).docx	
Modified filename: JEA - Tax and Securities Considerations Memo (1).docx	
Changes:	
Add	93
Delete	87
Move From	0
Move To	0
Table Insert	0
Table Delete	0
Table moves to	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	180

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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:

E L E C T R I C

W A T E R

S E W E R

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.

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

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JON R. PHILLIPS
CHERRY SHAW POLLOCK
STEPHEN J. POWELL
LYNNE C. RHODE
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MARGARET M. SIDMAN
JASON R. TEAL
ADINA TEODORESCU
KEALEY WEST
STANLEY M. WESTON
GABY YOUNG

*BOARD CERTIFIED CITY, COUNTY
AND LOCAL GOVERNMENT LAW

November 12, 2019

Aaron F. Zahn
Managing Director & CEO
JEA
21 W. Church Street, 19th Floor
Jacksonville, FL 32202

RE: JEA Long Term Performance Unit Plan (the "PUP")

Dear Aaron:

I greatly appreciate you meeting with our office last week and providing us with additional information and insight regarding the JEA Long Term Performance Unit Plan approved by the JEA Board on July 23, 2019 (the "PUP"). As you indicated, the PUP was proposed as a voluntary employee benefit program akin to a deferred compensation plan under Florida law that would have allowed full-time JEA employees to personally invest in the enterprise growth of JEA in the next three years. In theory, under the PUP, employees would have been encouraged to have "skin in the game" by deferring their compensation to purchase a performance unit and later redeeming such performance unit for an amount based on JEA's current year value (i.e., the redemption price). At the employee's investment risk, the redemption price for a performance unit at the end of the PUP performance period could have been zero, or more than ten times the employee's initial investment amount. You also advised that the primary purpose of the PUP was to incentivize employees to drive and increase JEA's customer, community and environmental value.

First, I laud you, the JEA senior leadership team, and the JEA Board for your efforts to find outside-the-box ways to increase JEA's value and motivate JEA employees to do their best work for JEA. I also appreciate the extensive time and effort that specialized outside counsel has dedicated to analyzing the PUP in order to achieve the Board's directive. The plan would be a novel approach to accomplishing the Board's goals in the public sector, but as currently structured contains outstanding issues under the City Charter and other law. That is not to say that

Aaron F. Zahn
November 12, 2019
Page 2

an appropriate plan under Section 215.425, Florida Statutes could not be designed and implemented. It is unnecessary, however, to go into any suggested restructure or outstanding issues at this time due to my understanding that JEA leadership, in consultation with the Chair and our office, has decided to postpone indefinitely the implementation of the PUP.

We appreciate the opportunity to have performed a detailed review of the plan and its documents. Our office continues to stand ready to assist you, JEA leadership and JEA Board should it decide in the future to move forward with an employee incentive plan.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. R. Gabriel', with a stylized flourish at the end.

Jason R. Gabriel
General Counsel

cc: Herschel Vinyard, Chief Administrative Officer
Lynne C. Rhode, Chief Legal Officer

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GC-1320996 (.pdf)

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OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 255-5050



MEMORANDUM

TO: JEA FILE

FROM: Jason R. Gabriel, General Counsel *JRG*

RE: JEA Long Term Performance Unit Plan (the "PUP")

DATE: November 12, 2019

The JEA Long Term Performance Unit Plan, approved by the JEA Board on July 23, 2019 (the "PUP"), was proposed by JEA as a voluntary employee benefit program designed as a deferred compensation plan that would have allowed full-time JEA employees to personally invest in the growth of JEA in the next three years. It was developed by JEA in consultation with and reliance on outside special legal counsel (Foley & Lardner and Pillsbury Winthrop Shaw & Pittman).

At the time of Board approval on July 23, 2019, the PUP was understood by OGC in general, conceptual terms as an employee incentive program. Since enrollment in the PUP would not take place until December 2019 with possible subsequent implementation of the plan in January 2020, OGC was assured by JEA that it had the few months from the time of the Board meeting on July 23, 2019 to the enrollment date to learn of the details of the plan, review outside counsel's findings as to the validity and legality of the plan, and to independently research and provide OGC's position on the plan at the conclusion of that process.

Because of how unique this suggestion was to the government sector, it was important to OGC to conduct its own research with respect to the validity and legality of the plan under federal, state, and local law, with a special emphasis on what is permitted, required, or prohibited under the Charter. Through the course of several conferences and meetings between outside counsel for JEA, OGC attorneys, and JEA management, OGC researched and conferred on the issues related to the plan.

This internal review resulted in a final determination by OGC and a recommendation to JEA that the proposed PUP, in its current form, would not be authorized under the City Charter, and had outstanding issues and unanswered questions related to state, local, and federal law. In addition, because ultimately it is City funds that are in question, *at a minimum*, Council approval would be required for the plan to be implemented. I expressed this legal position in several conversations with JEA. OGC's review and discussions occurred during the months of September, October and into the beginning of November. OGC's final position as to the PUP prompted the need for a formal meeting with outside counsel and JEA to discuss the outstanding legal issues prior to any further implementation of the plan.

Accordingly, on November 5, 2019, I met with Aaron Zahn and Herschel Vineyard from JEA, Lawsikia Hodges and Lynne Rhode from OGC, Kevin Hyde (special legal counsel with Foley & Lardner), Steve Amdur and Jessica Lutrín by phone (special legal counsel with Pillsbury Winthrop Shaw & Pittman), to discuss OGC's issues with the PUP; to note and categorize the current legal deficiencies with the plan, and to outline minimum requirements necessary to continue with any sort of employee incentive plan or deferred compensation plan. The main purpose of the meeting was to review these ultimate legal concerns regarding the PUP, that though were brought up in some form or another to JEA over the course of the preceding several weeks, needed to be officially dealt with in the appropriate manner.

On that date, the following concerns were brought up by OGC and discussed with JEA: Upon our review, the PUP is seemingly *akin* to an employee stock option plan, and for similar size *private* multi-billion dollar corporations, employee programs like the PUP may be the norm. However, the PUP would be unique to the public sector and founded on the fundamental principle that a governmental entity, such as JEA, may underwrite and offer for sale a portion of JEA's value as an "investment product" pursuant to Section 112.215, *Florida Statutes*. This fundamental PUP principle is not only a novel concept to our Consolidated Government but is also novel to government concepts and principles in general. Further, in addition to the more fundamental issues associated with the PUP, there were other issues cited, including allowing non-JEA employees in the plan and various potential adverse tax consequences.

Accordingly, we advised that the current plan should be officially dissolved. Should JEA insist on pursuing some version of the PUP as currently proposed in the future, the following minimum prerequisites must be met:

- 1) City Council review and approval (via legislation) authorizing JEA to sell a portion of JEA's value as an "investment product" under Section 112.215, Florida Statutes;
- 2) An opinion in accordance with Section 112.215, Florida Statutes from an appropriate federal agency or agencies (i.e., Internal Revenue Service (IRS)) stating that any compensation deferred under the PUP would not be included in a participating employee's taxable income under federal or state law until it is actually received;
- 3) An opinion from the IRS indicating that JEA, as a governmental entity, will incur no negative or adverse tax consequences or penalties under the PUP;
- 4) Removal of any PUP requirement that directly or indirectly obligates JEA to pay any excise tax, interest or penalties under the IRS Code incurred by a participating employee under the PUP;
- 5) Removal of any non-JEA employees as participants in the PUP; and
- 6) Any other applicable requirements under state and federal law necessary to implement and administer the PUP.

Based on this advice from our office, I was informed that JEA would not proceed with the PUP.

On November 12, 2019, the JEA CEO sent a letter to me informing me officially that JEA was "postponing indefinitely" the PUP. On that same date I, in turn, sent JEA a letter reiterating that there were outstanding legal issues with the plan as currently structured.

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**OFFICE OF GENERAL COUNSEL
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***BOARD CERTIFIED CITY,
COUNTY
AND LOCAL GOVERNMENT
LAW**

MEMORANDUM

TO: C. Christopher Anderson, III, Executive Director and General Counsel
State of Florida Commission on Ethics 325 John Knox Road Building E, Suite 200
Tallahassee, FL 32303

FROM: Lynne C. Rhode, Office of General Counsel, JEA Chief Legal Officer

CC: Jason R. Gabriel, General Counsel, Office of General Counsel, City of Jacksonville
Lawsikia J. Hodges, Deputy Government Operations, Office of General Counsel,
City of Jacksonville

RE: JEA Conflict of Interest Inquiry: ITN 127-19 Negotiation Team Members

DATE: November 13, 2019

I. INTRODUCTION

Pursuant to Rules 34-6.002 and 34-6.004, on behalf of Melissa Dykes, Herschel Vinyard, Jordan Pope, and Camille Lee-Johnson (the "ITN Negotiation Team Members"), and in accordance with their request, we are writing to request an informal written advisory opinion on the ethics laws inquiry set forth below. The ITN Negotiation Team Members have requested an opinion be issued by the Commission on Ethics as soon as possible. Please be advised that the Office of General Counsel has discussed this inquiry with you in prior telephone conversations.

II. FACTUAL BACKGROUND

A. *The ITN Process and Negotiation Team*

On July 23, 2019, the JEA Board of Directors (the “JEA Board”) approved Resolution 2019-07, authorizing the CEO of JEA to issue a competitive solicitation to investigate and pursue a non-traditional utility response as presented to the JEA Board at the July 23, 2019 JEA Board Meeting. Pursuant to this authority, on August 2, 2019, JEA issued Invitation to Negotiate #127-19, entitled “Strategic Alternatives” (the “ITN”), inviting interested parties to submit Replies detailing strategic alternatives that are aligned with JEA’s goal of maximizing customer, community, environmental, and financial value over the long term. Potential alternatives that could be proposed included, but were not limited to, operational changes, structural changes, joint ventures, development partnerships, community ownership, corporate ownership, an initial public offering, private placement, technology conversion, oil and gas conversion, utility conversion, or another recapitalization. Consistent with Resolution 2019-07, the ITN set forth certain process goals as minimum requirements for maximizing customer, community, environmental, and financial value over the long term. Those minimum requirements include (among others) protection of certain employee retirement benefits and maintenance of substantially comparable employee compensation and benefits for three years. Initial Replies to the ITN were received and a public bid opening meeting was held on October 7, 2019. Following the evaluation of the initial Replies as called for under the ITN, a Notice of Intent to Negotiate was posted on October 14, 2019, announcing JEA’s intent to negotiate with nine qualified Respondents.

Consistent with the terms of the JEA Procurement Code, Section 3.3.2 of the ITN calls for the appointment of a Negotiation Team consisting of at least three individuals to conduct negotiations with Respondents within the competitive range, review revised Replies and Best and Final Offers (“BAFOs”), and formulate a recommended award. Section 3.3.8 of the ITN contemplates that the Negotiation Team will review the final round of BAFOs and meet to determine which offer constitutes the best value to JEA based upon the Selection Criteria set forth in the ITN. Thereafter, the Negotiation Team will develop a recommendation that identifies the award that they assess will provide the best value to JEA based upon the Selection Criteria. The ITN recognizes that, following rendition of the Negotiation Team’s recommendation, the JEA Board of Directors will make the final decision as to which Respondent should be selected for award, if any, based on the recommendation of the Negotiation Team. This recommendation will be considered by the JEA Board in conjunction with additional possible alternative approaches, such as an initial public offering or the formation of a cooperative.

The JEA Board has significant discretion regarding how to handle the recommendation received from the Negotiation Team and can accept or reject the recommendation, request additional or further negotiations, request alternative terms, or reject the recommendation and determine that no contract resulting from the ITN should be pursued. In addition, the JEA Board can chose to move forward with any possible alternative approach or to move forward with no option and maintain the status quo.

In the event that the JEA Board approves moving forward with a transaction that would result in transferring any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private, certain additional approvals are required. Specifically, Section 21.04(p) of the Charter of the City of Jacksonville provides that:

Nothing in this article shall authorize or be construed to authorize JEA to transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum approval of the terms and conditions of the sale.

Thus, in order for any proposed transaction which would result in the transfer of more than ten percent of the total utility system to occur, approval by the Jacksonville City Council and approval in a referendum of the electorate of the City of Jacksonville in addition to the JEA Board action would be necessary.

Consistent with the terms of Section 3.3.2 of the ITN, calling for the appointment of a Negotiation Team consisting of at least three individuals, JEA through its Chief Procurement Officer has appointed Melissa Dykes, Herschel Vinyard, and Jordan Pope to the Negotiation Team while stating on the record that it is seeking a conflicts review by the OGC and the Commission on Ethics and that such review is pending. Ms. Dykes is JEA's President and Chief Operating Officer. Mr. Vinyard is JEA's Chief Administrative Officer. Mr. Pope is JEA's Director of Economic Development and Real Estate. Each of these ITN Negotiation Team Members are current JEA employees and have been appointed to serve on the Negotiation Team solely in their capacity as JEA Employees.

In addition to the three above-referenced ITN Negotiation Team Members, JEA through its Chief Procurement Officer plans to appoint Ms. Camille Lee-Johnson, who is the current Chairperson of the JEA Board Compensation Committee (the "Committee Chair"), a member of the JEA Board of Directors, as a fourth member of the ITN Negotiation Team, and to vest the sole and exclusive responsibility for negotiating matters concerning employee compensation and benefits with the Committee Chair. The Committee Chair, by contrast to the other ITN Negotiation Team Members, is not a JEA employee and does not participate in JEA employee benefit programs. The Committee Chair receives no compensation or employment benefits for serving on the JEA Board and would receive no compensation or employment benefits for service on the ITN Negotiation Team.

B. Employee Retention Program and Executive Employment Agreements

At the July 23, 2019 meeting of the JEA Board, the JEA Board adopted Resolution 2019-09, approving an Employee Protection and Retention Program and a Form Non-CEO Executive Employment Agreement.

Resolution 2019-09, authorizing the Employee Protection and Retention Program, provides the JEA CEO or his designee with the authority to execute with each full-time employee who is actively employed with JEA on the date of the resolution an employment protection and retention program agreement on the terms and conditions set forth in the Employee Protection and Retention Summary attached to the Resolution. These terms and conditions generally provide, subject to the occurrence of a Recapitalization Event and the satisfaction of the conditions described in the Summary, that each eligible employee may receive a cash payment equal to 100% of his annual base salary in effect on July 23, 2019. Pursuant to the terms of the Summary, all full-time employees who are actively employed with JEA on July 23, 2019 are eligible to receive such cash payment. For purposes of the Summary, a “Recapitalization Event” is defined as follows:

the closing and funding of a transaction or a series of related transactions in accordance with Article 21 of the Charter of the City of Jacksonville and any other applicable law that results in either (i) unencumbered cash proceeds to the City of Jacksonville of at least Three Billion Dollars (\$3,000,000,000) or (ii) at least 50% of the net depreciated property, plant and equipment value of either JEA’s electric system or JEA’s water and wastewater system being transferred, assigned, sold or otherwise disposed of.

Resolution 2019-09 additionally approved the Form Non-CEO Executive Employment Agreement (Exhibit 3 to Resolution 2019-09). Both Mr. Vinyard and Ms. Dykes, as two of the fourteen JEA members of the Senior Leadership Team¹, have since executed their Executive Employment Agreement in substantially the same form as the Form Executive Employment Agreement. Those Agreements set forth the material terms and duties of the respective employees, including relevant termination-related provisions. They are not linked to, contingent upon, or associated with a Recapitalization Event. Exhibit A to those Agreements is a Separation and Transition Agreement subject to execution and mutual release and indemnification and providing that the employee shall serve as a consultant to JEA for a period of six months if terminated by JEA without cause or by employee for good reason. The consulting fee is calculated using an annualized amount equal to the combined total of all items reflected on the employee’s total compensation statement for the most recent 12-month period. No additional payment or benefits are due or payable to the employee consultant.

III. DISCUSSION

ISSUES

¹ Mr. Pope is a Director and is not covered under any comparable employment agreement.

(1) Whether a prohibited conflict of interest arises under section 112.313(7), Florida Statutes, for the ITN Negotiation Team Members, as a result of the Employee Protection and Retention Program or the Executive Employment Agreements?

(2) Whether a voting conflict arises under section 112.3143(3)(a), Florida Statutes, for the ITN Negotiation Team Members, as a result of the Employee Protection and Retention Program or the Executive Employment Agreements or, in the case of the Committee Chair, as a result of her service on the ITN Negotiation Team?

LAW

Section 112.313(7)(a), Florida Statutes, provides that:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

Additionally, section 112.3143(3)(a), Florida Statutes, prohibits a county, municipal, or other local public officer from voting in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Section 112.3143(1)(d), Florida Statutes, defines a “special private gain or loss” as follows:

an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.

2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

ANALYSIS

A. There Is No Prohibited Conflict of Interest Under Section 112.313(7)(a)

Section 112.313(7)(a), Florida Statutes, generally prohibits agency employees from holding employment or contractual relationships with business entities or agencies that are subject to the regulation of, or do business with, the agency by which the individual is employed. This statute further prohibits agency employees from having employment or contractual relationships that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties. It appears clear that no conflict of interest under this provision can arise with respect to the ITN Negotiation Team Members.

As described above, the three ITN Negotiation Team Members are employees of JEA. The contemplated fourth Negotiation Team member, the Committee Chair, is a member of the JEA Board of Directors and chairs the JEA Board's Compensation Committee. Pursuant to section 21.03(a) of the Charter of the City of Jacksonville, the JEA Board is "[t]he governing body of JEA," and consists of seven members appointed by the mayor and confirmed by the City Council, and whose members, pursuant to section 21.03(b) of the Charter, are not entitled to compensation, pension, or other retirement benefits on account of service on JEA.

The "agency" of the ITN Negotiation Team Members is JEA, as the Negotiation Team is an advisory board that merely renders a recommended award (a recommendation) to JEA. *See* CEO 16-2 ("We have long held that the 'agency' of a member of an advisory board to a governing body is the governing body."); CEO 06-24 ("We also have found the 'agency' of board members whose boards were solely advisory in nature to be that unit of government which they serve."); CEO 94-36 ("[I]n determining an individual's 'agency' for purposes of the Code of Ethics, an advisory board to a governing body is a part of that body. . . . Referring to the definition of 'public officer,' above, if each 'advisory body' were an 'agency,' it would not have been necessary to specify that any person appointed to hold office in an agency includes 'any person serving on an advisory

body.’ In our view, an advisory body does not constitute a separate agency of government; instead it is a part of a larger government unit that exercises a governmental function.”). Thus, because the relevant “agency” of the ITN Negotiation Team Members for purposes of section 112.313(7)(a) is JEA, the ITN Negotiation Team Members’ employment by JEA, or service on the governing body of JEA, by definition, cannot constitute an employment or contractual relationship with a business entity or agency subject to the regulation of or doing business with JEA. Simply stated, JEA is neither subject to the regulation of, nor does it do business with, itself.

For much the same reason, it appears clear the ITN Negotiation Team Members’ employment by JEA or status as a JEA Board of Directors member cannot constitute a contractual or business relationship that creates a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties as a JEA employee or Board of Directors member. It would simply be illogical to assert that an individual’s status as a JEA employee, who is by definition eligible for compensation and benefits solely by virtue of his or her JEA employment – or as a JEA Board member who is not eligible for JEA employee benefit programs at all – in some way constitutes an employment relationship that creates a continuing or frequently recurring conflict with his or her public duties under the very same employment or Board member relationship with JEA.

B. There Is No Voting Conflict Under Section 112.3143(3)(a)

Section 112.3143(3)(a), Florida Statutes, requires county, municipal, and other local public officers to abstain from voting upon any measure which would inure to his or her special private gain or loss, or which he or she knows would result in a special private gain or loss to certain other persons or entities with specified relationships with the officer.

i. Any gain or loss is remote and speculative

As the Commission has repeatedly and consistently found, section 112.3143(3)(a) “is not applicable when the gain or loss is ‘remote and speculative.’” CEO 12-01. Stated differently, “if there is uncertainty at the time of the vote as to whether the measure will directly affect the officer or any of the listed others and, if so, what the nature or magnitude of the gain or loss might be, the measure/vote does not require the officer’s declaration, abstention, and filing.” *Id.*

In CEO 12-01, the Commission reasoned that city commissioners who owned businesses frequented by cruise ship passengers were not required to abstain from voting upon a measure to seek a channel-widening feasibility study that could ultimately result in an increase in the number of cruise ship passengers visiting their business if additional intermediate steps necessary to actually undertake such a channel widening occurred, as any potential future gain to their businesses was remote and speculative. The Commission reasoned that there was “significant uncertainty” as to whether the vote would ever result in gain or loss to the Commissioners’ businesses, as a significant number of additional events and approvals – including Congressionally-sanctioned changes to regulations – would have to occur before any channel widening that could actually result in a gain or loss to the Commissioners could be completed. *See*

also CEO 05-15 (benefit to client developer from affordable housing ordinance was “remote and speculative” “given the many approvals and events that would have to occur for the client . . . to engage in a particular new project, such as DCA approval or planning board approval[.]”); CEO 06-21 (no special private gain or loss where there were still “innumerable hurdles before any profit could be realized” and individual “d[id] not stand to benefit in any direct way as a result of the measure under consideration.”).

This circumstance is very similar. While three of the ITN Negotiation Team Members (the employees), like all other roughly 2,000 full-time JEA employees, may stand to receive a monetary gain by virtue of the Employee Protection and Retention Program if a recapitalization of JEA were to ultimately occur², any actual recapitalization of JEA is so far removed, and requires so many additional uncertain steps and approvals to be taken, that any potential gain to those ITN Negotiation Team Members is remote and speculative. As described in the above factual background, the role of ITN Negotiation Team Members is simply to conduct negotiations with the Respondents to the ITN. Such negotiations for the competitive solicitation will be occurring while JEA meanwhile continues to explore at least four other strategic alternatives (including maintaining the status quo, pursuing certain significant cost-cutting and revenue increasing measures, an initial public offering, and a community ownership structure). Through the negotiation process, the ITN Negotiation Team Members will assess which Respondent (if any) is able to meet the Board-mandated minimum requirements and constitutes the best value to JEA and should be recommended for award. Furthermore, assuming *arguendo* the negotiation phase of the procurement even results in a recommendation, that recommendation of an award by the ITN Negotiation Team Members in no way results in a recapitalization of JEA occurring. It is merely a recommendation. The Board maintains full discretion and control over the outcome. Before any recapitalization of JEA could occur, the recommendation by the ITN Negotiation Team would first have to be approved by the JEA Board, which retains complete discretion to make the decision as to which Respondent should be selected for award considering the Selection Criteria of the ITN and the Negotiation Team’s recommendation or to elect to go in a different direction entirely and not award a contract resulting from the ITN. If the JEA Board accepted the recommendation of the ITN Negotiation Team and voted to award a contract resulting from the ITN, that contract would then require the approval of the Jacksonville City Council. If the Jacksonville City Council likewise voted to approve the contract, that contract would then require approval in a referendum by the electorate of the City of Jacksonville. Only after each of these analyses and approvals had occurred could any transaction close and a “Recapitalization Event” within the meaning of the Employee Protection and Retention Program actually occur. This factual scenario (even should it materialize) requiring the analysis and selection of the appointed JEA Board, approval of the

² Neither the Employment Agreement nor attached Separation and Transition Agreement are in any way linked to, contingent upon, or associated with a Recapitalization Event. Should Melissa Dykes or Herschel Vinyard be terminated without cause or resign for good reason as a consequence of a Recapitalization Event, they would receive no consequential financial gain, only a potential contractual protection in the form of a 6-month transition consultancy, which may be triggered as it would under any other termination context.

elected Jacksonville City Council, and approval by a referendum of the electorate of the City of Jacksonville, appears to be even more distant and remote than that which the Commission determined to be “remote and speculative” in CEO 12-01 and numerous similar opinions.

ii. Any gain or loss is not a special private gain or loss

Even were the potential gain or loss not remote and speculative, however, based upon the Commission’s well-established precedent, it would not constitute a “special private gain or loss” to the ITN Negotiation Team Members.

In the context of the Employee Protection and Retention Program, such individuals are situated in a substantially similar way to a very large class – each of the approximately 2,000 employees of JEA. Each of these JEA employees stands to gain or lose in the same manner as the three employee ITN Negotiation Team Members under the Employee Protection and Retention Program if a recapitalization of JEA were to ultimately occur – through payment of a retention payment of 100% of his or her base salary under the Employee Protection and Retention Program at the time a Recapitalization Event occurred.

With respect to the Employment Agreement and attached Separation and Transition Agreement, should Melissa Dykes or Herschel Vinyard be terminated without cause or resign for good reason as a consequence of a Recapitalization Event, they would receive no consequential financial or other gain or loss. All that they have (as do all JEA Senior Leadership Team members) is a potential contractual protection in the form of a 6-month transition consultancy, which may be triggered as it would under any other termination context. Any such protection, even if *arguendo* standing alone may be considered a special gain or loss, would be subsumed by the Board’s minimum requirement to be built into the terms of any transaction of comparable salary and benefits to the large class of all employees for a minimum of three years. That minimum requirement would result in salary and benefits for any JEA employee comparable to his/her existing compensation and benefits, whatever those may be, should a Recapitalization Event occur. For example, while a union employee has multiple additional termination and other benefits under Collective Bargaining Agreements that are not applicable to an appointed employee, a pension-eligible employee has additional benefits to those not covered, and Senior Leadership Team members have a possible consultancy protection in the event of termination, all would receive compensation and benefits comparable to their current compensation and benefits.

Finally, out of an abundance of caution, the ITN Negotiation Team has been designed so that the Committee Chair will be the only team member negotiating employee compensation and benefits matters. Her role will be to conduct those particular negotiations. While the other three ITN Negotiation Team members will have knowledge of all terms proposed by Respondents, the Committee Chair alone will negotiate with Respondents on employee compensation and benefits terms and have exclusive internal jurisdiction over the outcome of those negotiations to be included in any final recommendation to the Board by the Negotiation Team. The Committee Chair is not a JEA employee, and pursuant to section 21.03(b) of the Charter is not entitled to compensation, pension, or other retirement benefits on account of her service, so she would not be

impacted in any way by the outcome of employee compensation and benefits negotiations with Respondents.

As the statute expressly recognizes, and as the Commission repeatedly has found, where the potential gain or loss to a local government officer is but a small part of the matter under consideration, and would inure to the gain or loss of a large class of which the officer is a member, there is no “special private gain or loss” within the meaning of the statute. *See, e.g.*, CEO 12-06 (city councilmember who was one of 78 retired firefighters who would be immediately impacted by a decision on the amount of the health insurance subsidy or other pension benefits under collective bargaining agreement was not presented with a voting conflict regarding ratification of the proposed collective bargaining agreement because there was no “special private gain or loss” to the commissioner relative to the other retired firefighters in the class and the agreement contained provisions not limited to retired firefighters); CEO 11-01 (city councilmember not presented with voting conflict when voting on collective bargaining agreement affecting approximately 150 police officers, including her husband, because her husband’s gain or loss was not “special” within the meaning of the statute); CEO 00-13 (city commissioner participating in Firefighter Retirement System not prohibited from voting on ratification of collective bargaining agreement or ordinance changes necessary to effectuate changes to the Retirement System because class consisted of 88 individuals and gain or loss to commissioner would not be “special”). As the Commission has noted, it has “typically . . . concluded that no voting conflict was presented in situations where the interests of the public official involved one percent or less of the class.” *Id.*; *see also* CEO 78-96 (38 out of 5,000 acres involved); CEO 84-80 (1 out of 500 persons whose property would be down zoned); CEO 85-5 (90% of 250 residents affected); CEO 87-18 (300 out of 29,000 acres); CEO 87-27 (involving the rezoning of a town having a population of 210); CEO 87-95 (650 property owners affected); CEO 91-18 (385 other property owners in the area affected by varying degrees); CEO 92-20 (land-use measures affecting 1,000 condominium units and specifically 500 which could have their northerly view impeded by high-rise construction on their north); CEO 92-52 (owner of two five-acre parcels out of 276 parcels of varying size affected by a 4.5 mile road-widening project); CEO 93-12 (297 persons is not so small a class that gain to a firefighter pension board trustee, as an individual member of the class, would be “special”); and CEO 96-12 (owner of four non-residential parcels out of 605 similar parcels affected by a proposed convention center project).

This reasoning is equally applicable here, where three of the ITN Negotiation Team Members are members of a class consisting of the majority of JEA’s approximately 2,000 employees and one is a JEA Board member, not an employee. Each of the three ITN Negotiation Team Members represents a negligible percentage of the large class, consisting of all JEA full-time employees, who stand to potentially gain if a Recapitalization Event occurs within the meaning of the Employee Protection and Retention Program. Even assuming *arguendo* that the recommendation of the ITN Negotiation Team could somehow result in a gain or loss (which it could not, in light of the aforementioned remote and speculative nature of any gain or loss given the numerous additional approvals required before any transaction could occur), the gain or loss to the ITN Negotiation Team Members would not be “special” within the meaning of the statute. Finally, again assuming *arguendo* that the recommendation of the ITN Negotiation Team could somehow

result in a gain or loss and that the gain or loss, *arguendo*, could be considered “special,” the only ITN Negotiation Team member who will have any control whatsoever over employee compensation and benefits discussions is not an employee, is not entitled to compensation, pension, or other retirement benefits, and thus could not conceivably stand to gain or lose as a result of the ITN Negotiation Team recommendation.

iii. No voting conflict for the Committee Chair

Finally, there is no basis to conclude that the Committee Chair’s ability to vote on the ITN Negotiation Team’s recommendation as a member of the JEA Board is in any way impacted by her service on the ITN Negotiation Team. Section 21.03(b) of the Charter of the City of Jacksonville expressly provides that members of the JEA Board are subject to section 286.012, Florida Statutes, which provides that a member of a board who is present at a meeting may not abstain from voting unless there is, or appears to be, a possible conflict of interest under enumerated statutes. AGO 74-31, which has previously been relied upon by the Commission, is instructive in this regard. In that opinion, the Attorney General’s Office considered whether a county commissioner who also served on the board of a mental health board may abstain from voting on a county contract with the mental health board when it came before the county commission. The Attorney General concluded that he could not, as his only interest was the public interest represented by his membership on the mental health board, and he did not stand to personally benefit. This circumstance is similar, as the Committee Chair has no possible personal interest in any transaction the Board may approve as a result of her service as an uncompensated member of the ITN Negotiation Team.

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MEMORANDUM

TO: Honorable Council Member Randy DeFoor

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations

RE: **Invitation to Negotiate #129-19 for Strategic Alternatives;
Termination by JEA**

DATE: November 25, 2019

I. Background.

On August 2, 2019, JEA issued JEA Invitation to Negotiate #129-19 for Strategic Alternatives¹ (the "ITN") pursuant to the authority contained in Article 21 of the City Charter (the "City Charter"), the JEA Procurement Code, the JEA Procurement Code Operational Procedures (the "Operational Procedures"), and Resolution 2019-07.

II. Questions Asked.

In light of the above, you have asked:

- A. May JEA suspend or terminate the ITN?
- B. If so, what actions are necessary for JEA to suspend or terminate the ITN?

III. Short Answers.

- A. Yes, pursuant to the express ITN terms, JEA may suspend or terminate the ITN, subject to the wide discretion afforded public agencies as described below.
- B. JEA, acting through its board, may definitively suspend or terminate the ITN by formal board action at a duly noticed public meeting.

¹ The ITN is available at jea.com/strategicalternatives.

IV. Analysis.

A. The ITN is governed by the City Charter, Section 3-110 of the JEA Procurement Code, Section 2.3 of the Operational Procedures, Resolution 2019-07, and the express terms and conditions of the ITN. Florida courts have long held that a public agency has wide discretion regarding a competitive solicitation, and any decision related to such competitive solicitation, when based on an honest exercise of discretion by a public agency, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree with the agency's decision.² Here, Section 3.3.8(C)(2) of the ITN expressly provides:

JEA reserves the right to *cancel*, *postpone*, modify, reissue, and/or amend this ITN at its discretion.

In the procurement context, the terms "cancel" and "postpone" are synonymous with the terms "terminate" and "suspend".³ JEA, as a public agency, has wide discretion regarding its competitive solicitations. Accordingly, JEA may terminate or suspend (i.e., cancel or postpone) the ITN as long as JEA's decision to do so is an honest exercise of JEA's discretion (i.e., such decision is not fraudulent, arbitrary, illegal or dishonest).⁴

B. Under Resolution 2019-07, the JEA Board delegated and authorized its Chief Executive Officer and Managing Director ("CEO") to pursue "Scenario 3: the non-traditional utility response". The board's delegation in Resolution 2019-07 permitted the CEO to issue the ITN, subject to certain terms and conditions. JEA is governed by *Robert's Rules*, and as a public body its decision-making requires formal action (i.e., formal motions)⁵. A quorum of four (4) JEA members is required to be present at a board meeting to transact business, and four (4) affirmative votes are required to decide all motions before the board.⁶ Thus, JEA, acting through its board, may definitively suspend or terminate the ITN (i.e., postpone or cancel), or otherwise restrict or rescind the authorizations granted to the CEO in Resolution 2019-07, by an affirmative vote of four members at a duly publicly noticed board meeting at any time prior to the board's contract award.⁷

² See *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505 (Fla. 1982); *AT&T Corp. v. State, Dept. of Management Services*, 201 So.3d 852 (Fla. 1st DCA 2016).

³ "Cancel" means to decide not to conduct or perform; "terminate" means to bring to an end; "suspend" means to cause to stop temporarily; and "postpone" means to put off to a later time. See Meriam-Webster Dictionary.

⁴ See *Gulf Real Properties v. Dept. of Health and Rehab Services*, (Fla. 1st DCA 1997) (holding that in order for a court to overturn an agency's decision to reject all bids and terminate the solicitation, a bidder must show that the agency acted "fraudulently, arbitrarily, illegally, or dishonestly" in the agency's decision).

⁵ See JEA Bylaws; *Robert's Rules*.

⁶ See Section 4.5.1 of JEA Board Policy Manual.

⁷ Note that the CEO may also terminate or postpone the ITN at any time prior to the board's contract award; however, the CEO would not be prevented from pursuing or reissuing the ITN at a later date under the authority granted the CEO in Resolution 2019-07; See *Roberts Rules* regarding the motion to rescind.

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MEMORANDUM

TO: Council Member Michael T. Boylan, Chair, JEA Fact-Finding Workshops

FROM: Margaret M. Sidman, Deputy Legislative Affairs & Managing Deputy *mmS*

RE: Inquiries from previous meeting

DATE: November 25, 2019

Question 1

Whether the City Council can request and receive non-confidential, non-exempt written opinions and guidance of outside special legal counsel hired by other City agencies or authorities?

Answer 1

Yes. All engaged outside special legal counsel, while hired for certain City agencies or authorities, are ultimately hired in the interests of the City as a whole. Accordingly, when desired, and subject to potential confidentiality and exemptions (depending on the circumstances), City Council can request, and receive, written opinions and guidance provided by outside special legal counsel. There are times (for example, during the pendency of litigation, during collective bargaining, or other exempt proceedings and circumstances), where communication on certain matters may be privileged, exempt or confidential. There are usually time periods during which the exemption may be in effect, after which time the information is disclosable. However, to the extent that the information requested is otherwise disclosable as provided by law, that information may be provided to City Council upon request. The same goes for access to the outside special legal counsel themselves. To the extent a Council Member desires to have a meeting or individual discussion with the applicable attorney regarding a certain subject matter, that can be arranged as well. Such requests (for either information, or meeting counsel) can be requested and coordinated through the Office of General Counsel and our office can assist the inquiring Council Member.

Question 2

Whether JEA has the authority to enter into discussions of selling JEA?

Answer 2

Yes. The sale of all or a part of JEA, is a sale of assets. Utilizing a procurement process to effectuate a recommendation to JEA's Board and City Council regarding the potential sale of one or more operations of JEA is authorized. Procurement processes are utilized by the City and other agencies to convey property and assets, in a variety of contexts.

As previously discussed with Council both during the Special Committee on the Future of JEA in 2018, and recently during multiple meetings in 2019, Section 21.04(p) provides authority, along with JEA's plenary authority granted in Section 21.05, for the independent ownership, management and operations of all utilities (along with all implied and incidental powers). Section 21.04(p) states in pertinent part:

(p) To transfer, sell, finance, lease or otherwise provide services or products, or by-products, developed or used by JEA incident to the exercise of the powers conferred by this article, including but not limited to, energy performance contracting, water, sewer and natural gas (and any other utility service hereafter provided by JEA) contracting, power marketing services, the testing and maintenance of customer-owned facilities such as transformers, capacitors, lighting, HVAC systems, water cooling and heating systems, energy management systems, etc.; the temporary leasing of JEA facilities such as oil storage tanks; the supply of steam or other thermal energy; the provision of specially conditioned power on the premises of customers and the provision of services or products to build, transfer, lease, finance, operate or sell cogeneration facilities, small power production facilities, specially conditioned power, energy conservation, energy efficiency and dispersed generation to other electric utilities both within and without the state or to any wholesale or retail customers of JEA, upon such terms and conditions as JEA shall by resolution fix and determine; and to transfer, sell, finance, lease or otherwise provide services, products or by-products developed or used by JEA incident to the exercise of the powers conferred by this article, in the delivery of water, wastewater and natural gas services, including but not limited to the financing, testing, maintenance and operation of customer owned facilities used in water, wastewater and natural gas functions; provided, however, that JEA will not enter into any activity pursuant to this section in addition to those activities listed herein without first providing written notice of such activities to the council auditor no less than 30 days before the commencement of such activity. ***Nothing in this article shall authorize or be construed to authorize JEA to transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum***

approval of the terms and conditions of the sale. So long as there are outstanding any of the city's "Capital Project Revenue Bonds" as originally authorized pursuant to Ordinance 97-1054-E, the council may approve only such transfer which does not materially adversely affect future receipts of JEA contributions as defined therein.

(emphasis added).

Importantly, no sale can be finalized without City Council approving it, and sending it to the voters in a referendum (for voter approval of sale terms and conditions) as the Charter provides.

Finally, Section 21.11, Charter (Legislative Authority of Council) authorizes City Council to amend or repeal all or a part of the entire JEA Article with a two-thirds vote of the membership of Council.

In other words, City Council has the ultimate legislative discretion to change JEA provisions in the Charter, or to approve a sale of all or a part of it, for that matter.

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MEMORANDUM

TO: Honorable Council Member Michael Boylan

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations 

RE: **JEA Invitation to Negotiate #129-19 for Strategic Alternatives - Notice Requirements in Section 21.04(p) of the City Charter**

DATE: December 5, 2019

I. Background.

On July 23, 2019, the JEA Board approved Resolution 2019-07, which authorized the Chief Administrative Officer and Managing Director (the "JEA CEO") to undertake a competitive solicitation regarding JEA's assets (the "Resolution"). On August 2, 2019, JEA issued Invitation to Negotiate #129-19 for Strategic Alternatives (the "ITN")¹.

II. Question Asked.

Whether the JEA Board was required under Section 21.04(p) of the City Charter to provide the Council Auditor with 30 days advance written notice of the JEA Board's action of approving the Resolution?

III. Short Answer.

No. The JEA Board was not required to provide the Council Auditor with 30 days advance written notice of the JEA Board's action of approving the Resolution because such approval by the JEA Board was not an "activity" pursuant to Section 21.04(p). The term "activity" as used in Section 21.04(p) refers to the specific activities listed therein (and any activities not listed of the same kind)² (i) that JEA, operating as a public utility, is permitted to

¹ The ITN was issued in accordance with the authority set forth in the Resolution, the JEA Procurement Code, the JEA Procurement Code Operational Procedures (the "Operational Procedures"), and Article 21 of the City Charter (the "City Charter").

² See statutory construction principle *ejusdem generis*.

enter into; and (ii) that transfers, sells, finances, leases *or otherwise provides services or products, or by-products* developed or used by JEA *incident to the exercise of the powers conferred in Article 21* of the City Charter. As a public utility, the quintessential power conferred to JEA in Article 21 is the power of JEA to own, manage and *operate a utilities system*³ within and without the City of Jacksonville⁴; all other powers conferred to JEA in Article 21, including the powers referenced in Section 21.04(p), is in support of this foremost power. As such, the activities referenced in Section 21.04(p) must constitute “services, products, or by-products” developed or used by JEA incident to operating a utilities system. As long as an activity meets the requirements of Section 21.04(p) (i.e., constitute services, products, or by-products developed or used by JEA incident to its power to operate a utilities system), JEA must provide the Council Auditor with advance written notice prior to JEA entering into such activity.

Here, the JEA Board’s action of approving the Resolution does not constitute an “activity” under Section 21.04(p) because in and of itself such action by the board is not a “service, product or by-product” developed or used by JEA incident to the powers conferred in Article 21. By way of example, the specific activities listed in Section 21.04(p) include services, products or by-products such as energy performance contracting, power marketing services, the supply of steam or other thermal energy, and the testing and maintenance of customer-owned facilities. These activities represent ordinary activities customary to JEA’s operation as a public utility, and thus, JEA is conferred authority to enter into such activities so as long as proper advance notice is provided to the Council Auditor. Here, the board’s action of approving the Resolution was a procurement authorization and approval of the JEA CEO to explore transferring a significant portion of JEA assets (comprising more than ten percent of the utilities system) to another utility to own, manage and operate for JEA (and the City).⁵ Such action by the board was not an activity similar in nature or kind to the activities listed in Section 21.04(p);⁶ therefore, the JEA Board’s action of approving the Resolution was not subject to the Council Auditor’s notice requirement contained in Section 21.04(p).⁷

³ The term “utilities systems” includes the electric utility system, the water and sewer utility system, the natural gas utility system, and any other additional utilities systems *operated* by JEA. See Section 21.02 City Charter.

⁴ See Article 21.01 of the City Charter.

⁵ Given the exploratory nature, a sale or transfer of JEA assets may or may not result from the procurement process. If the JEA Board ever seeks to consummate a sale or transfer (comprising more than ten percent of the utilities system) to another utility, the JEA Board must obtain City Council approval and a subsequent voter referendum pursuant to Section 21.04(p).

⁶ See statutory construction principle *ejusdem generis*.

⁷ Although the JEA Board was not required to provide notice to the Council Auditor under Section 21.04(p), the JEA Chief Legal Officer indicated that JEA emailed a link of the July 23, 2019 JEA Board meeting materials on July 22, 2019, to the Council Auditor’s office and also delivered a hard copy of the July 23rd board meeting materials to the Council Auditor’s office on July 23, 2019.