MEMORANDUM December 10, 2020

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To: Jody Brooks, Esquire

From: Allen Maines, Esquire

Re: Preliminary JEA Negotiating Strategies With MEAG Regarding PPA Repurchase

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This memorandum contains hurriedly-prepared preliminary negotiating strategies to persuade MEAG to "take over" the PPA and all of JEA's obligations in connection with Plant Vogtle Units 3 & 4. We are looking to provide MEAG with compelling incentive to negotiate with JEA by offering a carrot (e.g., take back the PPA and accept $1.3 Billion present value payments, plus the ability to "re-sell" the power that JEA was to have purchased for additional profit), and using a few "sticks." This memorandum primarily explores available "sticks."

Alternatively, some of the arguments highlighted herein might be of interest to a prospective purchaser of JEA desiring to escape from its obligations under the PPA.[1] Certainly the validity and transferability of these claims and defenses might have value in the upcoming privatization discussions. For example, the purchaser and seller could agree to cooperate and to pursue litigation with MEAG or before FERC, and to split the rewards. Thus, if FERC declared the PPA to be invalid, or if a court declared it ultra vires, JEA and a purchaser could agree to divide the savings over 20 years of $1 Billion each. Or the claims could be "sold" to a litigation finance

[1] An important consideration for JEA related to any circular soliciting a proposed purchaser, or in preparing any documentation effectuating a sale, relates to what normally would be customary reps and warranties. For example, JEA may want a carve out of any rep that it had authority to enter into all of the contracts associated with the business, or that all contracts are in compliance with all regulatory requirements. Either JEA, or a purchaser of JEA attempting to escape from the PPA, might want to argue that JEA did not have authority to enter into the PPA, or to argue that the PPA or the Power Supply Agreement violates FERC's unjust and unreasonable standard of fairness to consumers. We suggest working closely during the auction process to ensure that all options remain unimpaired, because a purchaser might place significant value on the options remaining viable.

group with a joint venture split between various parties. The point is that the claims do have value—potentially huge value, and should not simply be ignored.

These strategies will need to be more fully vetted although there are legal authorities to support them, which in the interest of time and brevity mostly are omitted from this memo.

I. If the PPA and the Power Supply Agreement do not Include the "Mobile-Sierra" Waiver, FERC May be Able to Void the Agreements.

There possibly is an issue concerning the "Mobile-Sierra" doctrine. In our quick review of the documents we have copies of or access to we did not find the customary waiver wherein the parties waived their rights to go to FERC and agreed to a higher standard of review by FERC under the Federal Power Act,[2] which is quite unusual and would be a significant oversight by MEAG. Certainly it is possible that this waiver and "higher standard" agreement is incorporated elsewhere, but our quick review surprisingly found them both missing.[3]

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[2] The Supreme Court in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008) ruled that there is a single statutory standard of FERC review- the "just and reasonable" standard, which permits contract abrogation by FERC in "those extraordinary circumstances where the public will be severely harmed."

[3] The Customary waiver usually reads as follows: "FERC Standard of Review; Mobile-Sierra Waiver.
(a) Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Agreement, whether proposed by a Party (to the extent that any waiver in subsection (b) below is unenforceable or ineffective as to such Party), a non-party or FERC acting *sua sponte*, shall solely be the "public interest" application of the "just and reasonable" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) and clarified by Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish 554 U.S. __ (2008) (the "Mobile-Sierra" doctrine).
(b) In addition, and notwithstanding the foregoing subsection (a), to the fullest extent permitted by applicable law, each Party, for itself and its successors and assigns, hereby expressly and irrevocably waives any rights it can or may have, now or in the future, whether under §§ 205 and/or 206 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying the rate, charge, classification, or other term or condition agreed to by the Parties, it being the express intent of the Parties that, to the fullest extent permitted by applicable law, neither Party shall unilaterally seek to obtain from FERC any relief changing the rate, charge, classification, or other term or condition of this Agreement, notwithstanding any subsequent changes in applicable law or market conditions that may occur. In the event it were to be determined that applicable law precludes the Parties from waiving their rights to seek changes from FERC to their market-based power sales contracts (including entering into covenants not to do so) then this subsection (b) shall not apply, provided that, consistent with the foregoing subsection (a), neither Party shall seek

This means that JEA, or its purchaser, or someone who steps in JEA's shoes under the PPA, could ask FERC (1) to determine that the rate under the PPA is unjust and unreasonable when compared to JEA's power costs from alternate sources in part because it requires JEA to pay even if it receives no power, and therefore (2) to void the PPA.[4] Generally speaking the test is whether the rate under the PPA is within the "zone of reasonableness" or conversely does it seriously harm the public interest or consumers. If in fact the Mobile-Sierra waiver was omitted, this is a strong argument.

The argument could be put in play by invoking the thirty day negotiation period under the agreements and threatening to file with FERC if an agreement is not reached within that time frame. Once a party goes to FERC, FERC may not re-write the agreement between the parties; it should simply make an "up or down" determination. The parties would have the ability to end the matter before FERC by settling, but because all of MEAG's cooperatives likewise are affected, there is a possibility that FERC might go forward on its own.

Query: Can (Has) JEA determine its cost of power from alternative sources?

II. There are Fact Intensive Arguments to Support a Finding That Entering Into the PPA was an Ultra Vires Act and Void Ab Initio.

Exhibit "A" is not an exhaustive analysis and does not follow a fact investigation, but it does address what may be promising arguments that the agreements at issue are ultra vires due to some technicality, and there are legal precedents to support this position, some of which we already have provided in earlier memoranda. Bottom line: if the contract exceeded JEA's authority (e.g.,

any such changes except solely under the "public interest" application of the "just and reasonable" standard of review and otherwise as set forth in the foregoing section (a)."

[4] No doubt the "bond lawyers" who drafted the agreements will contend they are "financing documents," instead of "power purchase agreements," but that arguably raises the issue of whether JEA entering the agreement was an ultra vires act under the authorities we have provided in prior memoranda. Exhibit "A" is further analysis of JEA's authority.

by contracting for capability instead of capacity, or exceeding the 10% Rule, etc.), then this is a strong argument.

III. Additional Authorities Set Forth in Our Memoranda of November 8, and August 27, 2017, (Attached) Support Negotiating Strategies Based on Prudent Utility Practices Including Debt Management Practices, Fraud in the Inducement, Frustration of Essential Purpose, Equitable Estoppel, Breach of the Covenant of Good Faith and Fair Dealing.

These arguments not only have value to JEA's effort to negotiate a resolution with MEAG, but they also might have value to a new owner, to the City of Jacksonville, or if any of the arguments were retained by a "JEA Light." If a prospective purchaser argued that JEA's claims have "no value," then possibly JEA should consider a structure that enables it to retain some of these claims and then seek to extract some value from them. The downside seems limited.

IV. Although the Agreements at Issue Seek to Preclude Ring-Fencing, There are Strategies to Separate Assets From Liabilities, Leaving MEAG Trying to "Get Blood Out of a Turnip."

Pursuing these types of strategies is less risky because Section 504(c) of the PPA limits recoverable damages to "direct actual damages only," (generally) meaning that the most a breaching party would have to pay the non-breaching party is the amount the breaching party would owe anyway.

EXHIBIT "A"

Observations Concerning JEA's legal authority to enter into the Power Purchase Agreement ("PPA") between MEAG and JEA in 2008. We believe there are several potential legal theories that could be raised to challenge JEA's authority to enter into the PPA based on other successful challenges in various jurisdictions.

I. LAWS REGARDING THE SCOPE OF JEA'S AUTHORITY AND POWERS

Laws describing the scope of JEA's authority and powers are found in several locations, including JEA's Charter, Article 21 of the Code of Ordinances of Jacksonville, Florida; Florida Statutes; Laws of Florida; and the Florida Constitution. " 'In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers.' But municipal ordinances must yield to state statutes." *Masone v. City of Aventura*, 147 So. 3d 492, 494-95 (Fla. 2014) (quoting *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006)). This home-rule authority is found in the Florida Constitution, specifically Article VIII, section 2(b), which "recognizes the power of municipalities 'to conduct municipal government, perform municipal functions and render municipal services,' and it specifically recognizes that municipalities 'may exercise any power for municipal purposes except as otherwise provided by law.' " *Id.* at 495 (quoting Fla. Const., art. VIII, § 2(b)). Local ordinances may be expressly or impliedly preempted by state law, depending on the law's language and scope of regulation of the subject matter. *Id.*

In an analogous case to be discussed in the next section, the Supreme Court of Washington

organized its analysis of this issue as follows:

> The resolution of the [municipal] authority issue requires an examination of the entire statutory scheme governing each category of participant to determine whether they had the express power to enter into this agreement. Absent express statutory authorization, we must also consider whether participation in the agreement may be based upon necessary or implied powers. Aided by applicable rules of statutory construction and prior cases construing the various statutory powers, we ultimately must decide whether the present agreement conforms to the statutes.

Chemical Bank v. Washington Public Power Supply System ("*WPPSS*"), 99 Wash. 2d 772, 782 (1983). Following this outline, we begin with consideration of JEA's Charter.

A. JEA's Charter

JEA's Charter is found in Article 21 of Jacksonville, Florida's Code of Ordinances. Many of the provisions in Article 21 describe JEA's purpose, authority, and scope. First, Section 21.01 explains that JEA's powers are concurrent with any powers that now or could in the future be exercised by the City of Jacksonville. As such, JEA is "authorized to own, manage, and operate a utilities system within and without the City of Jacksonville." JEA Charter, § 21.01. It then explains that "JEA [was] created for the express purpose of acquiring, constructing, operating, financing and otherwise having plenary authority with respect to . . . utility systems as may be under its control now or in the future." *Id.* These "utilities may be owned, operated or managed by JEA separately or in such combined or consolidated manner as JEA may determine." *Id.* The term "utility system" means "any of the separate utility systems operated by JEA such as its electric utility system." *Id.* § 21.02(d).

Section 21.04 enumerates JEA's powers in general terms and in detail, but the particular listed powers are not exclusive, restrictive, or otherwise limiting of JEA's general powers. *See id.* § 21.05 ("Construction"). Further, "[t]he powers of JEA shall be construed liberally in favor of JEA." *Id.* JEA has the general powers "[t]o construct, own, acquire, establish, improve, extend,

enlarge, reconstruct, reequip, maintain, repair, finance, manage, operate and promote the utilities system." *Id.* § 21.04(a). There exists a colorable argument that each of these words requires JEA to maintain a certain level of ownership, control, operation, and/or management over the utilities system. For our purposes, the most ambiguous and problematic grant of authority in Section 21.04(a) is JEA's authority to "finance . . . the utilities system." MEAG will undoubtedly argue that the word "finance" should be interpreted to mean that JEA is authorized to enter into any type of financing arrangement related to its utilities system. However, this interpretation is of limited persuasion when considered in conjunction with the definition of a utility system found at Section 21.02, which defines a utility system as a system *operated by* JEA. *Id.* § 21.02(d).

The PPA expressly provides that Vogtle Units 3 and 4 will be owned and operated by Georgia Power and other co-owners, including MEAG, and JEA retains no ownership or operational interest under the PPA. *See* PPA § 104. Under JEA's Charter, JEA has authority to finance a utilities system that it operates; this places the PPA in conflict with JEA's Charter. Likely in recognition of the conflict, JEA and MEAG attempted to define the nature of JEA's payment obligations in the PPA. Specifically, the PPA provides that JEA

> agree[d] that amounts payable to MEAG under this Agreement (i) shall constitute Contract Debt (as that term is defined in Buyer's Electric System Bond Resolution), payable as a Cost of Operation and Maintenance of Buyer's Electric System (as those terms are defined in Buyer's Electric System Bond Resolution), and (ii) shall be paid by [JEA] as a cost of purchased power and energy for [JEA's] wholesale and retail load and otherwise as an expense of operation and maintenance of Buyer's Electric System.

PPA § 204(h). The PPA thus defines JEA's obligations thereunder "as an expense of operation and maintenance" of JEA's electric utilities system. It also defines JEA's costs as "purchased power and energy." These terms are an attempt to circumvent the underlying factual reality of the agreement, which does *not* qualify as an expense of operation of JEA's electric utility system—

because JEA has no operational interest in Vogtle Units 3 and 4 under the PPA—and which does *not* qualify as purchased power and energy—because JEA's costs are not based on any purchase of actual power or energy.

Regardless of how the parties to the PPA label JEA's obligations thereunder, the facts remain that JEA is not involved in the Vogtle Units 3 and 4's ownership, construction, maintenance, management, or operation. Pursuant to JEA's Charter, it may be argued that JEA does not have authority to finance a utility system that it does not operate, either alone or in a combined or consolidated manner.[5]

Section 21.04 also describes JEA's powers in detail. As relevant here, JEA has the power:

> (*l*) To enter into contracts determined by JEA to be necessary or desirable for the prudent management of JEA's funds, debt or fuels, and any and all other commodities used for the several utility systems including, without limitation, interest rate sweeps, option contracts, futures contracts, contracts for the future delivery or price management of power, energy, natural gas or other related commodities, hedging contracts, other risk management techniques, securities lending agreement and forward purchase contracts.
>
> [. . .]
>
> (n) To enter into joint project agreements as provided by part II of chapter 361, Fla. Stat., for the purpose of implementing a project, as such term is defined in Part II of Chapter 361, Florida Statutes. A copy of all such joint project agreements shall be filed with the council and the mayor at least thirty days prior to the effective date of the agreement. Anything in this provision to the contrary notwithstanding, (i) any joint project agreement that involves a transfer of any function or operation **that comprises more than ten percent of the total of the utilities system by sale**, lease or otherwise to any other utility, public or private, or (ii) any joint project agreement that involves the issuance of debt not previously authorized by s. 21.04(i)(2), shall require prior approval of the council.
>
> (o) To enter into agreements with one or more electric utilities, public or private, and related contracts with respect to joint electric power projects as provided in section 2 of chapter 80-513, Laws of Fla., as amended. The provisions of said chapter 80-513 shall govern and control JEA in all respects in the carrying out of a

[5] We researched whether the scope of the term "finance" in JEA's Charter has been previously interpreted by Florida courts, but we could not find any case law on this issue.

> joint electric power project . . . .
>
> [. . .]
>
> (u) Express authority is given JEA to enter into any contracts, leases or other agreements with other governmental bodies (either local, state or federal) for the purpose of carrying out any of the provisions, powers or purposes of this article.

§ 21.04. These provisions make clear that JEA has broad authority to enter into contracts with other entities, public or private, within or without the State of Florida, in order to assist JEA is the exercise of its duties. Notably, each of the named contracts listed in subsection (*l*) are contract types that contemplate the actual sale or delivery of energy.

B. Florida Statutes – The Joint Power Act

JEA also has the authority to enter into joint project agreements as such is defined by part II of chapter 361, Florida Statutes ("Joint Power Act"), §§ 361.10-.18, Florida Statutes, which was enacted to implement the provisions of Section 10(d), Art. VII of the Florida Constitution. It is not clear whether the PPA was implemented under the Joint Power Act. There is no reference to the Joint Power Act within the PPA, and it appears from the language of the PPA that the parties did not contemplate the Joint Power Act when drafting and executing the agreement.

It is likely the case that JEA was not required to follow the provisions of the Joint Power Act when entering into the PPA based on JEA's broad authority to enter into contracts under Section 21.04(u) of JEA's Charter. Nevertheless, two thoughts are noteworthy: (1) the Joint Power Act and its underlying constitutional provision contemplate a utility's *joint* ownership, construction, and operation of electric generation or transmission facilities with another entity or entities, and (2) Section 21.04(n) of JEA's Charter states that if JEA enters into a joint project agreement under the Joint Power Act, and if any joint power agreement involves a transfer of any function or operation that comprises more than 10 percent of the total of the utilities system to

another utility, public or private, then JEA must obtain prior approval from the Jacksonville City Council. As to the first point, JEA retains no ownership or management interest in Vogtle Units 3 and 4 under the PPA, and it is therefore not a joint power agreement under the Joint Power Act. As to the second point, JEA's recent debt disclosure indicates that the energy to be received under the PPA is projected to represent approximately 13 percent of JEA's total energy requirements in the year 2023, yet it is not clear whether JEA obtained prior approval from City Council before entering the PPA in 2008.

C. Laws of Florida

Section 21.04(o) of JEA's Charter further grants JEA authority to enter into agreements with one or more other electric utilities, public or private, with respect to joint electric power projects under section 2 of chapter 80-513, Laws of Florida, as amended. Section 2 of chapter 80-513, as amended, has two subsections. Subsection 2(a) provides that JEA may join with any other electric utility or group of such electric utilities, located within or without Florida, for the purpose of *jointly* financing, acquiring, building, constructing, erecting, extending, enlarging, leasing, improving, furnishing, equipping, owning, and operating any project. *See* Chapter 82-312, Section 2(a), Laws of Fla. (amending Chapter 80-513, Section 2(a), Laws of Fla.). Again, this provision envisions JEA's joint participation in financing *as well as* acquisition, construction, ownership, and operation of a project. However, JEA retains no ownership or management interest in Vogtle Plant Units 3 and 4, and the PPA makes this clear.

Subsection 2(b) states that JEA may contract for a period not exceeding 40 years for "[t]he purchase by take-or-pay contracts, or otherwise, of capacity or energy, or both, in any quantity from any project owned or operated directly or indirectly under lease, by any person, trust, or corporation . . . ." *See* Chapter 99-459, Section 2(b), Laws of Fla. (amending Chapter 80-513,

Section 2(b), Laws of Fla.). Thus, subsection 2(b) expressly grants JEA the authority to enter into take-or-pay contracts for capacity or energy or both, in any quantity, from any project owned or operated by another entity. At first glance, this language could be interpreted to mean that JEA had the express authority to enter into the PPA with MEAG. However, this conclusion would be hasty to make. As a preliminary matter, the term "take-or-pay" is ambiguous. In the oil and gas context, "[a] take or pay contract obligates a buyer to purchase a specified amount of a fuel at a specified price and, if it is unable to do so, to pay for that amount." *World Fuel Servs., Inc. v. John E. Retzner Oil Co.*, 234 F. Supp. 3d 1234, 1239 (S.D. Fla. 2017) (citing *Mobil Oil Exploration & Producing Se. Inc. v. United Distribution Cos.*, 498 U.S. 211, 229 (1991)). It is a forward contract or an alternative performance contract, in which the buyer "has the option to take or not take the fuel, but it must pay the contracted amount regardless." *Id.* In a basic take-or-pay contract, the seller is obligated to make available for delivery the agreed-upon quantity of fuel or other commodity to the buyer. *See id.* at 1238.

The "default" take-or-pay contract, therefore, does not include a "hell-or-high-water" clause, which reallocates the obligations and risk between seller and buyer such that the buyer assumes substantially more risk. A hell-or-high-water clause obligates the buyer to pay even if it never has the opportunity to take; in other words, the buyer must pay the seller even if the seller never makes available for delivery the commodity that forms the basis of the contract. *See, e.g.*, *Vt. Dep't of Public Serv. v. Mass. Municipal Wholesale Electric Co.* ("*MMWEC*"), 151 Vt. 73, 76 (1988). The PPA is a take-or-pay contract that contains a hell-or-high-water clause, thus obligating JEA to "pay its Obligation Share of Plant Vogtle Additional Units PPA Project Annual Costs whether or not [MEAG's] Ownership Interest is completed or is operating or operable, . . . and such payments shall not be subject to reduction, whether by offset or otherwise, and shall not be

conditioned upon the performance or non-performance by any party of any agreement for any cause whatsoever." PPA, § 204(g). This clause will be discussed in further detail below; it is highlighted now to demonstrate that Section 2 of Chapter 80-513, Laws of Florida, as amended, which grants JEA the authority to enter into take-or-pay contracts, *does not* necessarily mean that JEA has the authority to enter into take-or-pay contracts containing hell-or-high-water provisions, which materially changes the nature of the contract.

D. Summary of Applicable Laws

In sum, JEA's Charter, Florida Statutes, Laws of Florida, and the Florida Constitution grant JEA broad authority to own, operate, and manage the City of Jacksonville's utilities systems. An important similarity to be drawn between each legal source's grant of power to JEA is language that either expressly or impliedly supports the retention of an ownership, management, or controlling interest in each utility system JEA operates, either alone or jointly with another entity. The type of contract entered into between MEAG and JEA has not been described in any legal source that delineates JEA's scope of authority. In this regulatory void, the question for the court to decide is whether the law's silence regarding this particular type of agreement—specifically, placing JEA on the hook for the project's costs even if no energy is ever produced, while JEA retains no ownership or operational interest in the project—should be interpreted to mean that JEA did or did not have authority to enter into the PPA in 2008. We seek to argue that JEA exceeded the scope of its legal authority in executing this particular agreement.

II. CASE LAW IN SUPPORT OF INVALIDATION OR LIMITATION OF THE PPA

In the 1970s and 1980s, various American municipalities, PUDs, municipal corporations, agencies, etc. entered into similar power purchase agreements concerning the sale and purchase of nuclear energy for not-yet constructed nuclear power facilities. Two different projects were the

subject of years of complex litigation in multiple states, which resulted in opinions from the State Supreme Courts of Vermont and Massachusetts related to one project, and the highest courts in Washington, Oregon, and Idaho, as well as the Ninth Circuit, related to another project.

A. Choice of Law and Forum Selection Clause

There exists substantial overlap in the legal terms of the contracts at issue in those projects and the PPA at issue in this case. Interestingly, none of the cases discussed or analyzed a choice of law provision contained in the agreements, and it is unknown whether there even existed a choice of law clause in those agreements. Regardless, each state's respective court system considered the challenge to its own municipalities' authority to enter into the agreements.

The PPA at issue in our case has both choice of law and forum selection clauses. The choice of law clause states that the PPA shall be governed by, and construed in accordance with, the laws of the state of Georgia. PPA § 1003. The forum selection clause states that any dispute arising out of or relating to the PPA shall be brought in the Superior Court of Fulton County, Georgia or the U.S. District Court for the Northern District of Georgia. *Id.* We are researching legal theories to support JEA's desire to bring suit in Florida rather than Georgia, including judicial doctrines that would support the argument that Florida courts retain the inherent power to analyze the scope of Florida municipalities' powers under the home-rule doctrine. Indeed, while the case may be that a Florida court would be required to implement Georgia contract principles in interpreting the terms of the PPA, the underlying question of whether JEA had the legal authority to enter into the PPA in the first place is necessarily and exclusively a question of Florida law. And this question should (and, we will seek to argue, must) be answered by a Florida court. *See, e.g.*, *Chemical Bank v. Washington Public Power Supply System* ("*WPPSS*"), 99 Wash. 2d 772, 781 n.2 (1983) (noting that "[t]he authority of the Idaho, Oregon, Wyoming and Nevada participants is currently being

litigated in their respective states").

Ideally, we would seek to demonstrate why the PPA is void *ab initio* because JEA acted *ultra vires* and never had the authority to enter in the agreement. Other legal theories would potentially limit JEA's exposure to the strict terms of the PPA, but may not completely excuse JEA's performance thereunder. These arguments depend upon further factual development surrounding negotiations and execution of the PPA, and actions undertaken by MEAG and other co-owners since the commencement of the Vogtle Project in relation to construction, management, and financial decisions.

B. The PPA is *Ultra Vires* the Authority of JEA and is Void *Ab Initio*.

There are several legal theories to support the argument that JEA acted *ultra vires* in executing the PPA, thus rendering it void *ab initio*. In *MMWEC*, the Vermont Supreme Court considered a power purchase agreement that contained very similar terms to the PPA at issue here. *See MMWEC*, 151 Vt. 73. Several Vermont municipalities entered into identical power sales agreements with MMWEC, a Massachusetts joint planning and action agency comprised of 34 Massachusetts municipalities—similar to the structure of MEAG. *Id.* at 75. The agreements were take-or-pay contracts with hell-or-high-water provisions, yet the Vermont municipalities retained no ownership interest or decision-making power relating to the incurrence of debt, plant construction, or operation. *Id.* at 76. MMWEC was responsible for financing the project's construction and other costs by issuing bonds; in return, the Vermont municipalities agreed to commit a sufficient portion of their utility revenues to cover their respective monthly debt service to MMWEC. *Id.* at 75-76; *see also WPPSS*, 99 Wash. 2d at 777 (considering a similar fact pattern with regards to the authority of Washington municipalities to execute "participants agreements").

In both *MMWEC* and *WPPSS*, the courts focused part of their analyses on the term "project

capability," which was nearly identically defined in each agreement, in holding that the municipalities had acted *ultra vires* in entering the agreements. In each case, participants purchased shares of "project capability," which was defined as " 'amounts of electric capacity and energy, *if any*, which the Project is capable of producing at any particular time . . . .' " *MMWEC*, 151 Vt. at 76 (emphasis added); *see also WPPSS*, 99 Wash. 2d at 777-78. Both courts held that, under state law, their respective municipalities only had authority to enter into contracts for the purchase of *supplies* of capacity and energy, and the phrase "if any" meant that the municipalities did not contract for the purchase of actual supplies. *MMWEC*, 151 Vt. at 78; *WPPSS*, 99 Wash. 2d at 784 ("The unconditional obligation to pay for no electricity is hardly the purchase of electricity.").

We will need to demonstrate, by reference to Florida statutes and local ordinances, that JEA likewise only has authority to enter into contracts for the purchase of supplies of capacity and energy. For example, under the Joint Power Act, an electric utility participating in a joint power agreement has the power to "purchase capacity or energy, or both, in any quantity agreed upon in the joint power agreement from any project in which the purchaser has an ownership interest." § 361.13(3), Fla. Stat. Thus, this statute limits an electric utility's purchasing power and requires the utility to have an ownership interest in the project. *See id.*

It appears that MEAG and JEA attempted to circumvent this issue by defining the nature of JEA's obligations using different terms, as discussed above. The PPA does not use the term "project capability"; rather, it defines JEA's obligation as a "cost of purchased power and energy . . . and otherwise as an expense of operation and maintenance of Buyer's Electric System." PPA § 204(h). This is an attempt to elevate form over substance; in reality, JEA is purchasing project capability, because it has an unconditional obligation to pay for no electricity. However, the terms of the PPA state that JEA is purchasing power and energy. We will need to argue that the substance

of the PPA—what the parties actually contracted for—should prevail over the incorrect definitions used to describe the nature of JEA's payment obligations.

In *WPPSS*, the court noted that some states had provided explicit statutory authority for unconditional guaranties, which had previously been upheld by various courts. 99 Wash. 2d at 786 (citing various state statutes). Washington had no such statute.[6] The Washington Supreme Court explained that under Washington law, municipalities had authority to own, construct, acquire, and operate electric generating facilities. *Id.* at 784-85. The court had never before considered a situation where a municipality neither retained a meaningful ownership or management interest in a facility, nor contracted for the purchase of actual supplies of energy. *See id.* at 785-86. The court ultimately held that Washington statutory and case law required the participants to retain "sufficient ownership interests or management responsibilities . . . to constitute acquisition of construction of an electric generating facility." *Id.* at 791. The court also held that, "[a]s a matter of public policy, the enormous risk to ratepayers must be balanced by either the benefit of ownership or substantial management control." *Id.* at 788. Thus, as a matter of Washington law and public policy, Washington municipalities were required to retain some type of ownership or management interest in their generating facilities, especially when considering the "enormous risk to ratepayers" by contracting to purchase project capability rather than actual supplies of electricity.

The Vermont Supreme Court analyzed the ownership and management issue, as well, but framed it differently. The court held that the Vermont municipalities violated the nondelegation doctrine by retaining no ownership interest in the project and by abdicating all management

[6] Based on our research, we have not been able to locate any Florida law explicitly authorizing utilities to authorize or assume unconditional guaranties.

responsibilities for the project to MMWEC. *See MMWEC*, 151 Vt. at 81-82. The municipalities impermissibly "attempted to redelegate one of the most fundamental of its legislative powers: the spending power," and "impermissibly restricted the future exercise of discretion and judgment by their legislative bodies." *Id.* at 82.

These cases provide JEA with alternative yet complementary arguments to assert the position that JEA did not have the authority to enter into the PPA. As mentioned, the various terms that describe the scope of JEA's powers in JEA's Charter, Florida Statutes, and Laws of Florida all imply an ownership, operational, or management interest in the utility system. The most ambiguous term is related to JEA's power to "finance" its utilities systems, but when read in conjunction with other provisions, we could argue that JEA's power to finance its utilities systems is limited to those systems JEA actually operates, either alone or jointly. We could also argue that JEA's abdication of all management responsibilities and failure to retain an ownership interest constitutes an impermissible delegation of legislative power.

The Washington Supreme Court also considered the argument of implied powers. Under Washington law, a municipality's powers are construed narrowly. *WPPSS*, 99 Wash. 2d at 792 ("If there is any doubt about a claimed grant of power it must be denied. . . . If the Legislature has not authorized the action in question, it is invalid no matter how necessary it might be." (citations omitted)). Thus, the court held that the Washington municipalities did not have authority to enter into the agreements under any implied powers, since express authority to do so did not exist.

The Oregon Supreme Court in *DeFazio v. Washington Public Power Supply System* ("*DeFazio*"), 296 Or. 550 (1984), reached the opposite conclusion. In *DeFazio*, the court considered whether Oregon municipalities had the authority to enter into the same agreements that the Washington Supreme Court considered and rejected in *WPPSS*. The *DeFazio* court reviewed

two Oregon statutory Acts related to electric utilities and held that the municipalities failed to follow either statute. *Id.* at 560. The court explained that Oregon law affords a liberal construction of a utility's powers, and ultimately held that "if the cities and PUDs otherwise had authority to enter the agreements challenged in this litigation, enactment of the two statutes did not supersede that authority or restrict it, except for the policy against financing another participant's share." *Id.* at 562; *see also id.* at 580-81 ("A city can . . . define for itself what functions and services it wants its agencies to perform, consistent with statutes and the constitution. . . . In fact, the charters of several cities in this case contain directives that they be 'liberally construed.' To repeat, under home rule these are political choices for the cities."). Therefore, while the court did not use the term "implied powers," this analysis is itself implied throughout the opinion: an Oregon municipality has broad powers except as otherwise provided by law.

This important distinction between *WPPSS* and *DeFazio* presents a snag in JEA's argument, because we want a Florida court to follow the *WPPSS* court's holding based on Washington law, yet Florida's home-rule doctrine is more analogous to Oregon's home-rule doctrine. We will need to construct an argument that distinguishes the holding in *DeFazio*, as the Vermont Supreme Court did in *MMWEC*. *See* 151 Vt. at 79-80.