
From: Rhode, Lynne C. (City of Jacksonville) <rhodlc@jea.com>
Sent: Sunday, April 28, 2019 6:01 PM
To: Vinyard, Herschel T. - Chief Administrative Officer
Subject: CONFIDENTIAL DRAFT Memo for discussion
Attachments: Memo NOTES.docx

Good evening Herschel,

I hope you had a nice weekend! Please find attached a draft memorandum for your review related to JEA's powers under its governing documents. I've done my best to get a substantially complete document drafted over the last few days, but it is still a work in progress. It is intended to be for discussion purposes and is not yet ready for circulation. As I mentioned on Friday, I have sent the draft to Lawsikia Hodges for her required review, and she may have requested changes. Please let me know when you have had a chance to read the document and we can discuss.

Best regards,
Lynne

Lynne C. Rhode
Vice President and Chief Legal Officer
21 West Church Street Jacksonville, FL 32202
Office: (904) 665-4115
Email: rhodlc@jea.com



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DRAFT – FOR DISCUSSION PURPOSES ONLY

Office of General Counsel
117 W. Duval Street, Suite 480
Jacksonville, FL 32202
(904) 630-1700

MEMORANDUM

TO: Herschel Vinyard, Esq., Chief Administrative Officer
FROM: Lynne C. Rhode, Vice President and Chief Legal Officer
SUBJECT: Constraints on JEA Initiatives
DATE: December 10, 2020

BACKGROUND

In her article entitled, *Incentive Regulation, New Business Models, and the Transformation of the Electric Power Industry*, author Inara Scott writes:

The electric utility sector is in the midst of paradigmatic change. Market forces include decreased load growth, technological advances in distributed energy resources, pressures for decarbonization, and demands for increased efficiency and new utility services. Meanwhile, as the utility monopoly is undermined and profits slow, financial analysts signal increasing risk to potential utility investors.

5 Mich. J. Envtl. & Admin. L. 319, 319 (2016). The twentieth century goals for electric utility regulation of reasonable rates, adequate service, and financial stability are still essential but no longer sufficient. See *Id.* at 326. “Today’s utilities report increasing pressure to provide new services to customers and engage with them on a different level. . . the utility of today must become an expert in information management, data sharing, cyber security, and privacy . . . [and] are increasingly asked to accommodate

distributed generation sources, including residential solar, commercial solar and wind, and cogeneration.” *Id.* at 336.

JEA is no exception.¹ Current projections of flat sales paired with escalating costs and demands will create a growing cash gap in the near, medium, and long terms. The JEA Senior Leadership Team members have been working with their teams to develop cost-saving and revenue-enhancing initiatives, including energy, water and wastewater, IT, customer, corporate, and cross-cutting initiatives to include in the development of a new JEA strategic plan. As a public entity, existing and operating strictly for a public purpose, JEA faces significant constraints on such initiatives that non-municipal utilities do not. Nonetheless, if JEA is to succeed in proactively addressing its very real and immediate challenges in a way that allows it to maintain its status as a top-notch, customer-focused industry leader and natural resources steward, JEA leadership must act in creative and innovative ways.

QUESTION PRESENTED

You have asked me to examine the parameters of constraints imposed by JEA’s governing documents on JEA initiatives within the following six potential opportunity arenas: (1) selling more of the same products/ acquiring new customers; (2) investing in research and development and intellectual property; (3) selling additional new products; (4) selling equity to retire debt; (5) reducing JEA’s contribution to the City of Jacksonville; and (6) selling JEA assets.

This memorandum will first discuss the general powers of JEA found in its governing documents and limitations on those powers, including pertinent general powers and limitations found in the Charter of the City of Jacksonville (the “City Charter”). Underlying this analysis is the fundamental principal that all actions

¹ As noted in the Special Committee on the Future of JEA Final Report of June 2018, “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 microturbines . . . 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 general (i.e. combined heat and power generators, fuel cells, batteries), and telecommunications (fiber optics, tower leasing, internet services).” Report, p. 14 (June 27, 2018).

undertaken by JEA must be for a public purpose, and the memorandum is intended to be read with that principal always in mind. It then analyzes the impact of such powers and limitations on the six potential opportunity areas outlined above. This memorandum is not intended to be and should not be construed to provide advice on any specific action or initiative, nor does it purport to be an in-depth look at the universe of laws, regulations, policies, and procedures that would need to be carefully considered before any specific project could be designed, initiated, or undertaken. Rather, it is intended to help provide you with tools to begin thinking about what initiatives within potential opportunity arenas are viable under current Constitutional, State law, and City Charter constraints.

SHORT ANSWER

ANALYSIS

JEA

JEA (then known as the Jacksonville Electric Authority) was established in 1968 to own and manage the electric utility which had been owned by the City of Jacksonville (“the City”) since 1895. In 1997, the City Council amended the City Charter to authorize JEA to own and operate additional utility functions and, effective on June 1, 1997, the City transferred to JEA the City’s combined water and sewer utilities system.

JACKSONVILLE, FL., ORD. 97-229-E. In 2001, JEA expanded its water and sewer territory² with the approval of City Council. JEA is today the eighth largest municipal utility in the country and the largest in Florida, owning and operating an electric system

² The JEA water and sewer system consists of facilities for the provision of potable water, facilities for the collection and treatment of wastewater, and facilities for the treatment and distribution of reclaimed water. The water and sewer system provides water and sewer service within the urban and suburban areas of the City, other than certain excluded areas. The water and sewer system’s service territory extends into St. Johns County and Nassau County and also serves a number of customers in Clay County.

with five generating plants and transmission and distribution facilities that include over 745 circuit miles of transmission lines and more than 6,760 miles of distribution lines. It also purchases energy from several solar sites located across the service territory. It serves approximately 466,000 electric, 271,000 sewer, 348,000 water, and 11,000 reclaimed water customers in Duval County and elsewhere.

JEA provides utility services to certain surrounding communities under interlocal and franchise agreements. The electric system provides service to the Town of Orange Park (Franchise Fee Agreement effective September 1, 1969), Town of Baldwin (Assignment and Assumption of Franchise Agreement (FPL) dated January 1, 2000), Atlantic Beach (Franchise Agreement), and a portion of St. John's County (Territorial Agreement (FPL) dated December 14, 1998). The water/wastewater system provides service to parts of Nassau (Interlocal Agreement dated December 17, 2001) and St. John's Counties (Interlocal Agreement dated July 1, 1999).

JEA is an economic development partner of the City, furthering the objective of State lawmakers to help drive economic growth in Florida municipalities.³ It has two program riders (incentive programs) for large corporate users of electric power – an economic development rider and an economic stimulus rider.⁴ Special Committee on the Future of JEA Final Report, p. 9 (June 27, 2018).

The governing body of JEA is comprised of seven board members, appointed by the mayor and subject to confirmation by the City Council, for a term of four years. Members of the JEA Board are subject to the provisions of F.S. § 286.012 relating to voting and §§ 112.311 – 3175 relating to financial disclosure and conflicts of interest,

³ See Florida Statute § 166.021(8)(a): “The Legislature finds and declares that this state faces increasing competition from other states and other countries for the location and retention of private enterprises within its borders. Furthermore, the Legislature finds that there is a need to enhance and expand economic activity in the municipalities of this state by attracting and retaining manufacturing development, business enterprise management, and other activities conducive to economic promotion, in order to provide a stronger, more balanced, and stable economy in the state, to enhance and preserve purchasing power and employment opportunities for the residents of this state, and to improve the welfare and competitive position of the state. The Legislature declares that it is necessary and in the public interest to facilitate the growth and creation of business enterprises in the municipalities of the state.”

⁴ Such program riders currently are utilized by companies such as Sysco International Food Group Inc., Dresser Equipment Group Inc., and Hans Mill Corporation. Special Committee on the Future of JEA Final Report, p. 9 (June 27, 2018).

among other requirements. Broadly speaking, the JEA Board has the authority to adopt bylaws and make rules and regulations relating to JEA not inconsistent with Article 21 of the City Charter or general law. City Charter § 21.03.

Florida Statutes

Florida Statutes, Title XII (Municipalities), Chapter 166 (Municipalities) is the primary body of state laws governing municipal authority. Part I concerns general provisions; Part II governs municipal borrowing; Part III governs municipal finance and taxation; and Part IV governs eminent domain.⁵ Florida Statute § 166.021 spells out the general powers of Florida municipalities, including Jacksonville, under State law:

As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. . . . ‘Municipal purpose’ means any activity or power which may be exercised by the state or its political subdivisions. . . . The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

The City of Jacksonville is a consolidated government model. It is a Florida body politic and corporate comprised of “Duval County, the municipal government of the City of Jacksonville, the Duval County Air Improvement Authority, the east Duval County Mosquito Control District, the northeast Duval County Mosquito Control District, and all boards, bodies, and officers thereof” that “were and are consolidated [by special law] into a single body politic and corporate pursuant to the power granted by former s. 9 of

⁵ It is important to note that certain other provisions of general state law additionally impose requirements and restrictions on municipalities, utilities, and other entities. For example, F.S. §166.045 dictates the procedures required when a municipality seeks to purchase any real property for a municipal purpose. A comprehensive review of general state laws impacting the City of Jacksonville and JEA is outside the scope of this memorandum.

Article VIII of the Constitution of 1885, as amended, of the State of Florida.”⁶

JACKSONVILLE, FL., ORD. 2010-616-E, § 1.101. It has jurisdiction as a chartered county government and extends territorially throughout Duval County and has jurisdiction as a municipality throughout Duval County except in the Cities of Jacksonville Beach, Atlantic Beach, and Neptune Beach and the Town of Baldwin. *Id.*

City Charter

I. Introduction

The primary body of law of the consolidated government is codified (Laws of Fla., Ch. 78-536, § 1; Laws of Fla., Ch. 92-341) and found in the Code of Ordinances, Part A, Charter and Related Laws of the City of Jacksonville. Constitution Article VIII, Section 6(e) adopts home rule powers and confirms that the City Charter governs over the provisions of the 1885 Florida Constitution. See also *Rowe v. Pinellas Sports Auth.*, 461 So. 2d 72, 77 (Fla. 1984), *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205 (Fla. 1969), *City of Orlando v. Evans*, 182 So. 264, 267 (Fla. 1938) (where a special act, such as a city charter, conflicts with state general law, the special act will prevail). Moreover, under Section 3.02 of the City Charter, the powers of the consolidated government “shall be construed liberally in favor of consolidated government,” consistent with its home rule powers under the Florida Constitution and general laws of Florida. Thus, if a State statute or Constitutional provision conflicts with the City Charter, the power given to the consolidated government in the City Charter will control.

II. Amendment

The City Charter, including any Article therein, may be amended following procedures outlined in Florida Statutes Chapter 166:

The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part

⁶ The Florida Constitution states that consolidation “may be proposed only by special law.” Art. VIII, §3, Fla. Const.

describing the boundaries of such municipality. The governing body of the municipality shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose.

F.S. § 166.031(1). State law further provides, “A municipality may amend its charter pursuant to this section notwithstanding any charter provisions to the contrary. This section shall be supplemental to the provisions of all other laws relating to the amendment of municipal charters and is not intended to diminish any substantive or procedural power vested in any municipality by present law.” F.S. § 166.031(3). Article 3 of the City Charter goes further than this general law and allows the City Council to “repeal or amend any provision of this charter . . . by ordinance, to the same extent as could be done by the Legislature of the State of Florida.” City Charter § 3.01.⁷

III. Powers

City Charter Section 4.02 creates separate executive and legislative branches and emphasizes the importance of separation of powers. The City Charter vests the mayor, as chief executive and administrative officer, with the executive power of the consolidated government, including the power and duty to administer, supervise, and control all departments and divisions created by the City Charter and by the City Council. City Charter § 6.04. Article 6 gives the mayor power to veto any ordinance or resolution adopted by City Council. *Id.* at § 6.05.

The City Charter vests all legislative powers of the consolidated government (with certain exceptions of powers retained by urban service districts) in the City Council. Such powers and duties include budgetary review of and monetary appropriations for

⁷ The Constitution Revision Commission (CRC), created in 1968, could also conceivably change the City Charter through amendment to the Florida Constitution. The CRC, a group of 37 commissioners who examine the relevance and applicability of the Constitution to current and future needs, adopts its own rules of procedure and examines change to constitutional provisions (except those related to taxation or the state budgetary process). The CRC holds two sets of public hearings, typically throughout the state, to garner ideas from the public and then to gain feedback on the revision proposals. After the proposals have been approved by the CRC, they are placed directly on a general election ballot, where a 60 percent vote statewide is required for the proposal to pass and the constitution to be amended. The City Charter could also conceivably be changed through the legislative J-bill process, where the Legislature would enact a special law amending the Charter.

independent agencies (§ 5.07), investigation and examination of accounting and financial systems and management (including audit of fiscal operations) of independent agencies (§ 5.10), and investigation of the affairs and conduct of the consolidated government (§ 5.09). The City Council may enact a (non-emergency) ordinance by majority vote. See F.S. § 166.041(4).

IV. Independent Agencies

Jacksonville's independent agencies were established by acts of the Legislature and are named in Section 18.07 of the City Charter as follows: the Duval County School Board; the Jacksonville Port Authority; the JEA; the Jacksonville Transportation Authority; the Downtown Development Authority; and the Jacksonville Police and Fire Pension Board of Trustees.

Independent agencies have a special relationship with the consolidated government. Certain provisions of the City Charter proscribe certain structural, governance, budgetary, financial, and other rules applicable to the independent agencies (where not otherwise in conflict with more specific agency-specific rules). For example, Section 16.06 of the City Charter requires independent agencies to request authorization from the City Council for the issuance of ad valorem bonds; section 7.104 requires independent agencies to compensate the consolidated government for all services provided; and section 20.01 provides that the Code of Ethics applies to independent agencies where so provided by special laws applicable to such independent agencies.

However, as the Office of General Counsel has opined, independent agencies, including the JEA, are designed to be free from state and municipal intervention where not otherwise governed by the City Charter or other law:

The independent agencies are organized as separate governmental units for the purpose of exercising power and authority over subjects committed to their jurisdiction. If the Legislature had sought to make them subordinate agencies under the legislative control of the [City] Council they could have easily done so. However, by creating the independent agencies as separate independent governmental units with their own governing bodies a clear legislative intent was shown to prevent domination by the Legislative branch of the City of Jacksonville. See *Tumulty v. Jersey City*, 155 A. 2d 148 (New Jersey 1959). If the legislature had wanted independent agencies under

the control of the city they could have easily made them departments of the city rather than independent agencies. . . . The [City] Council may exercise direct legislative power over independent agencies where the Charter or the special acts which created the independent agencies grant to the Council such power and authority. Examples of direct legislative power are the adoption of budgets and approval of ad valorem bonds. The Council does not have the authority to exercise direct legislative power over independent agencies in areas not provided in the Charter or the Special Acts. . . . The Council has indirect legislative power over independent agencies in certain other areas as provided in the Charter and Special Acts applicable to the independent agencies. Examples of indirect legislative power are legislative authority over the central services department and civil service employees.

General Counsel Opinion 69-274 (concerning the extent to which City Council can exercise control over independent agencies).

Article 21 of the City Charter (JEA)

I. Introduction

Article 21 of the City Charter creates the JEA, defining its responsibilities, authority, and power.⁸ The JEA was created for the 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.” City Charter § 21.01 (emphasis added). Such utility systems may be owned, operated, or managed by JEA separately or in such combined or consolidated manner as JEA may determine. *Id.*

II. Powers

Generally speaking, JEA is authorized to “own, manage and operate a utilities system within and without the City of Jacksonville.” City Charter § 21.01. Consistent with this authority, Section 21.04(a) (with emphasis added) gives JEA express and

⁸ As a municipal utility, JEA generally is exempt from federal and state utility-specific regulatory laws applicable to non-municipal, investor-owned utilities. Certain Federal Energy Regulatory Commission (FERC) and Florida Public Service Commission (PSC) rules, however, do apply to JEA and are an additional consideration that must be reviewed in the context of any specific project but are outside the scope of this memorandum.

fundamental power to “construct, own, acquire, establish, improve, extend, enlarge, reconstruct, reequip, maintain, repair, finance, manage, operate and promote the *utilities system*.” “Utilities systems” means:

[T]he electric utility system and the water and sewer utility system now operated by JEA which shall include . . . any ‘system’ or ‘project’ authorized pursuant to the provisions of Chapter 80-513 [Laws of Florida] . . . and any natural gas utility system to be operated in the future by JEA together with any other additional utility systems as may be hereafter designated as part of the utilities systems . . .

City Charter § 21.02. “[S]ystem or project” is defined by Section 1 of Chapter 80-513 as “electric generating plants and transmission lines and interconnections and substations for the generation, transmission and exchanging of electric power and energy both within and without the boundaries of the consolidated City of Jacksonville and in any and all counties adjacent thereto.” Fundamentally, therefore, the JEA’s authority stems from its very broad power over its current and future utilities systems, as strictly defined.

The universe of what JEA can do, however, is not fully encapsulated in Subsection (a). Many of JEA’s other broad and specific powers within the umbrella of Section 21.04(a) are further outlined elsewhere in Section 21.04 of the Charter. Certain other Article 21 sections additionally are pertinent to the incident discussion. Discussed below are those Article 21 provisions most relevant⁹ to an analysis of the parameters by which JEA initiatives falling within the six opportunity areas being considered are constrained: JEA’s broad powers; debt; provision of services; contracts generally; projects (including joint undertakings); acquisition and sale of property; payments to the City (assessments); and employment.

a. BROAD POWERS

The City Charter largely reserves to JEA powers not otherwise expressly retained or restrained and gives the utility significant latitude to operate within a defined core business space. The express purpose of Article 21 is “to repose in JEA all powers

⁹ For example, subsections (e) through (i) of Section 21.04 authorize and proscribe a variety of powers and limitations concerning JEA’s authority over rates, suit, comprehensive planning, and financing; while it is very important to consider all of these provisions in any initiative development, they do not necessarily bracket our opportunity arenas so will not be analyzed in detail by this memorandum.

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." City Charter § 21.01. Consistent with the plenary nature of this purpose, Article 21 vests JEA with extensive and broadly defined power *incident* to its core Section 21.04(a) power: "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 [Article 21] . . . provided, however, that JEA will not enter into any activity pursuant to this section . . . without first providing written notice . . . to the council auditor no less than 30 days before commencement of such activity. . . ". City Charter § 21.04(p) (with emphasis added).

Additionally, Article 21 makes clear that "[t]he powers of JEA shall be construed *liberally* in favor of JEA. . . . 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." City Charter § 21.05 (emphasis added). See also General Counsel Opinion 92-1 (opining on the ability of Council to restrict Port Authority control over travel expense reimbursement, "Council budgetary powers must be exercised with such restraint so as not to thwart the purposes for which the Authority was created and not to interfere unreasonably with the day-to-day operations of the Authority.").

Thus, broadly speaking, both by design and construction, where not otherwise restricted, JEA enjoys both direct and incidental plenary powers over its core current and future utilities business.

b. DEBT

Financing is extremely important in the context of most initiatives, wherever those initiatives fall within the various opportunity areas. Generally speaking, under existing Article 21 provisions, even where JEA has the authority to undertake an initiative, JEA's power to incur debt to fund such undertakings is controlled by the City Council. Subsection (i) of Section 21.04 governs JEA's issuance and retirement of revenue bonds and certificates for the purpose of financing or refinancing the utilities systems of

JEA. It prohibits general obligation bonds. *Id.* Bonds and certificates may be issued by JEA Board resolution but are subject to the approval of City Council of the aggregate principal amount. *Id.* Section 21.04(j) further subjects JEA borrowing other than by bond issuance or revenue certificates for purposes for which bonds or revenue certificates could be issued to the same Article 21 procedure, including City Council approval, to which bond and revenue certificate issuance are subject.

c. PROVISION OF SERVICES

JEA has broad latitude to provide traditional utility services (and to further and maintain such provision) to any person anywhere under existing Article 21 language. Section 21.04(c) allows JEA to furnish any “utility services” to any public or private person or entity within or without Jacksonville and construct and maintain electric lines, pipelines, water and sewer mains, natural gas lines and related facilities for that purpose in and along all public highways and streets within or without Jacksonville. Subsection (d) authorizes JEA to sell “utility services” and provide transmission “or other services of any kind” to anyone, anywhere, directly or indirectly or jointly through other entities engaged in such activities. While “utility services” is not defined in Article 21, it is defined elsewhere in State law as “electricity for light, heat, or power; and natural or manufactured gas for light, heat, or power, including transportation, delivery, transmission, and distribution of the electricity or natural or manufactured gas.” F.S. § 203.012 (pertaining to Gross Receipts Taxes).

d. CONTRACTS

Consistent with its broad Article 21 powers, and as otherwise restricted by constraints on debt and sale of assets, JEA generally has the authority to enter into contracts related to its utilities systems or services without City Council approval (unless otherwise triggered).

Section 21.09 gives JEA strong and independent authority over entering into 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. . . .” See also JEA Procurement Code (February 1, 1996, as amended); JEA Operational Procedures (amended June 2017). This Section further provides, “[n]othing 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.”

Section 21.04(l) more specifically allows JEA to enter into contracts that JEA in its discretion deems *necessary or desirable* “for the prudent management of JEA funds, debts, or fuels . . . including, without limitation, . . . contracts for the future delivery or price management of power, energy, . . . or other related commodities.”

JEA additionally has express authority to enter into any contracts, leases, or other agreements *with other governmental bodies* for “the purpose of carrying out any of the provisions, powers or purposes of this article.” City Charter § 21.04(u). It is prohibited, however, from appropriating any funds for payments, contributions, or transfer to any entity other than those whose *primary purpose* directly involves any utility or related matters. *Id.*

e. PROJECTS

Article 21 contemplates JEA engaging in joint projects with other entities, including private and public utilities, for the generation and transmission of electric power. Such power projects, as discussed below, require City Council approval and are constrained in duration and by restrictions on the transfer of JEA assets. Article 21 additionally, and importantly, provides JEA with broad power (again, as not otherwise constrained by debt, sale of assets, or other universal restrictions) to jointly or separately engage in projects related to the promotion or implementation of conservation, efficiency, power conditioning, and load management; such projects generally do not trigger the need for City Council approval.

Section 21.04(n) allows JEA to enter into joint project agreements for the purpose of implementing a “project”. “Project” for the purpose of subsection (n) is defined at F.S. § 361.11(1) as “a joint electric power supply project . . . for the joint generation or transmission of electrical energy, or both . . .”

Subsection (o) allows JEA to enter into agreements with other public or private electric utilities to implement joint electric power projects in accordance with Chapter 80-513, Laws of Florida, as amended, which requires a two-thirds vote of City Council to approve the agreements and generally limits agreement terms to 40 years. Section 1 of Chapter 80-513 authorizes JEA to “acquire, build, construct, erect, extend, enlarge, lease, improve, furnish, equip, own and operate” “projects,” which are defined as “electric generating plants and transmission lines and interconnections and substations for the generation, transmission and exchanging of electric power and energy both within and without the boundaries of the consolidated City of Jacksonville and in any and all counties adjacent thereto.”

Subsection (r) of Section 21.04 additionally allows JEA to “jointly or separately plan, finance, operate, use, share costs of, sponsor, publicize or *otherwise participate in* projects, systems, programs or measures to *promote or implement* electric and natural gas energy, electrotechnologies, water, wastewater and natural gas *conservation and efficiency, power conditioning and load management*, including, but not limited to, energy, water and wastewater conservation, energy efficiency and conditioning or load reducing or load shaping modifications to the maintenance and operating procedures and facilities of a building or facility or in the installation therein; energy, water and wastewater conserving and energy efficiency modifications to windows and doors, pipes, pumps and motors; caulking and weatherstripping; insulation; automatic energy control systems; load management systems; hot water systems; replacements or modifications of lighting fixtures; and energy recovery and recycling systems; and research and development relating thereto within or without the state.” (emphasis added).

If any project involves the transfer of ten percent or more of JEA assets, they require approval of the City Council (see City Charter § 21.04(p)); any debt associated with such agreements additionally requires City Council action (see City Charter § 21.04(i) and (j)).

f. ACQUISITION AND SALE OF PROPERTY

Operating within its constraints on incurring debt, JEA generally may acquire property for use of its utilities systems. It also may sell up to ten percent of its assets (property or functions) without City Council approval in accordance with City Charter Section 21.04(p).

Section 21.04, subsections (a) and (b), vests in JEA the authority to acquire for use of the utilities system any real or personal property.

Section 21.04(p) (with emphasis added) allows JEA to sell, transfer, lease, or otherwise provide services and products listed in subsection (p) and other services and products not listed by providing *written notice* of the activity to the City Council Auditor at least 30 days before undertaking the sale, transfer, lease or other activity. It also, however, 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 [sic] without approval of the council." JACKSONVILLE, FL., ORD. 2018-142-E further requires a referendum approval of any ordinance that approves the sale of more than ten percent of JEA. The Office of General Counsel has opined that ten percent refers to the assets of JEA (Opinion dated February 20, 2018) but does not include the sale of assets that are antiquated, outdated, no longer needed, or no longer used in the ordinary course of business (Opinion dated December 21, 2018).

g. PAYMENTS TO THE CITY (ASSESSMENT)

JEA's payments to the City are required by City Charter. As further detailed below, the City Charter does, however, contain a relief avenue under certain circumstances.

JEA is required by Article 21 to pay the City a combined assessment for the electric and water and sewer systems following a proscribed calculation, which has been amended from time to time and may be reconsidered by Council for amendment every fifth year. City Charter § 21.07(c) and (d). JEA may utilize any of its revenues, regardless of source, to satisfy its annual assessment obligations. City Charter § 21.07(f). In addition to the assessment, JEA must pay to the City a franchise fee (City Charter § 21.07(l)) and the City Council has the right to appropriate annually a portion of

the available revenues of each utility system other than the electric, water, and sewer systems (e.g. natural gas systems). City Charter § 21.07(e).

Subsection (d) of City Charter Section 21.07 expressly directs City Council, “If either federal or state laws are enacted or regulatory actions are taken that adversely impact JEA's financial position for the electric utility system or the water and sewer utility system, the council shall promptly consider enacting such changes to this section 21.07 as may be negotiated by JEA and the council to mitigate such adverse impact.”

h. EMPLOYMENT

City Charter language pertaining to JEA's authority within the employment arena is reflective of JEA's status as an independent agency and need to develop and implement its own employment policies and practices.

Article 21 says that JEA is not required to utilize city personnel, motorpool, purchasing, communication, or information services but *may* utilize such services on a cost-accounted basis by mutual agreement with the City. City Charter § 24.07(h). It is required to utilize city legal service on a cost-accounted basis “except in those cases when the chief legal officer of the city determines that the city legal staff cannot or should not provide legal services in the required legal area.” City Charter § 21.07(h).

JEA has “*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”. City Charter § 21.08 (emphasis added).

Section 21.08 further provides, “*consistent with* the provisions of article 17 [(Civil Service)], JEA may establish employment policies relating to hiring, promotion, discipline and termination, and other terms and conditions of employment”. *Id.* It additionally may “enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment”. *Id.* Finally, JEA expressly may “take such other employment related action as *needed* to assure effective and efficient administration and operation of the utilities system.” *Id.* (emphasis added).

Section 21.08 further provides, “[i]n order to effectively implement the foregoing, JEA shall perform *all functions with regard to its own employees* that *prior to the effective date* of the consolidation and expansion of its utility function, *were performed*

by the Personnel Division of the Department of Administration and Finance of the city.”
City Charter § 21.08 (emphasis added).

III. Amendment

Section 21.11 of the City Charter grants the City Council the authority, in accordance with the procedures outlined at that Section, to amend or repeal any portion of Article 21 of the City Charter by a two-thirds vote of the membership. That power, however, is qualified by Section 3.01, which both grants and restricts the power of City Council generally to amend the City Charter. In particular, the Council may by ordinance repeal or amend any provision of the Charter; however, “[a]ny change in this chapter [sic] made by ordinance which affects . . . the distribution of powers among elected officers [or] matters prescribed by the charter relating to appointive boards . . . cannot become effective without approval by referendum of the electors . . . ”. *Id.*

Opportunity Areas

There is a great deal of interest right now in ‘the utility of the future,’ but to reach a new paradigm, we cannot ignore the utility of the present, which is facing financial concerns due to low growth and new competition, is undercapitalized in the areas of distribution and transmission infrastructure, and is seeking to offer new services [and products] to customers. We will not be able to accomplish significant new goals for decarbonization and distributed generation without addressing the regulatory incentives [and disincentives] that have been driving the system for over a century.

Scott at 370. JEA management will look at changes to the status quo within traditional action areas, including cutting costs, increasing prices (i.e. raising rates), and reducing investment in capital expenditures. But that will not be enough. JEA has identified six other opportunity areas, some utilized by other utilities within the same challenging and changing landscape, where innovative initiatives may help the company to address its cash gap while maintaining its high performance standards. They are: (1) selling more of the same products/ acquiring new customers; (2) investing in research and development and intellectual property; (3) selling additional new products; (4) selling equity to retire debt; (5) reducing JEA’s contribution to the City of Jacksonville; and (6)

selling JEA assets. This portion of the memorandum looks at the opportunity areas and analyzes how the governing constraints and freedoms discussed *supra* impact each.

I. Sell more product/ acquire new customers

JEA is in the business of selling electricity, water, wastewater services, and reclaimed water. In order to sell more of these traditional utility products, JEA must either acquire new facilities or partner with other entities providing these products in order to expand its productivity and customer base. Whether it can do so depends upon its general powers and specific powers to acquire property, provide utility services, engage in projects that expand its provision of services, and incur debt. Generally speaking, as analyzed below, it does have the authority to sell more product but needs City Council approval to finance the expansion necessary to do so.

a. ACQUISITION OF ADDITIONAL UTILITIES FACILITIES

Acquisition can be complete or partial (joint ownership) and must be considered in the context of financing such projects.

i) Complete

Section 21.04(a) clearly contemplates a broad authority for JEA to “acquire,” “finance,” and “enlarge” its utilities system. Subsection (b) allows JEA to acquire for use of the utilities system real and personal property. JEA may, therefore, acquire 100% interest in real or personal property¹⁰ for use in expanding its utilities system (as defined).

ii) Partial

Article VII, Section 10, of the Florida Constitution generally prohibits a Florida public entity from, among other things, becoming a joint owner with or lending or using its credit to aid any private entity. Article VII, Section 10(d) provides a limited exception to this prohibition by allowing a public entity to be a joint owner of, or give, lend, or use its taxing power or credit for the joint ownership, construction, and operation of electrical generation or transmission facilities with any private entity. Article 21, consistent with

¹⁰ F.S. § 166.045 and other state laws, as well as procurement rules, may dictate municipal purchase procedures for property.

Article VII of the Constitution, allows JEA to become a joint owner of an electrical generation or transmission facility through joint electric power projects (§ 21.04(o)) or joint project agreements (§ 21.04(n)). Joint electric power projects generally require City Council approval and are restricted to a 40 year duration. City Charter § 21.04(o).

iii) Financing

Any acquisition, complete or partial, that involves the issuance of debt (bonds, revenue certificates, or other borrowing mechanism) requires City Council approval of the aggregate principal amount. City Charter §§ 21.04(i) and (j). Furthermore, any acquisition arrangement that potentially involves the transfer of JEA assets would need to be analyzed in the context of Article 21 Section 21.04(p) restrictions and procedure.

b. EXPANSION OF UTILITY SERVICES

Section 21.04(c) of the City Charter allows JEA to furnish “utility services” to anyone anywhere and to construct and maintain infrastructure in public highways and streets in order to do so. While Article 21 does not define “utility services,” the term is defined elsewhere in state law as “electricity for light, heat, or power; and natural or manufactured gas for light, heat, or power, including transportation, delivery, transmission, and distribution of the electricity or natural or manufactured gas or the transportation, delivery, transmission, or distribution of electricity or natural or manufactured gas. F.S. § 203.012 (Gross Receipts Taxes, Definitions). Subsection (d) of Section 21.04 further allows JEA to sell utility services to anyone directly or jointly through other entities engaged in such utilities services.

Thus, JEA may expand and its utility services (as defined), including its infrastructure within public roadways. If such expansion involves incurrence of new debt, transfer of assets, or partnership or joint ownership arrangements with third parties, City Council approval may be required.

c. PROJECTS

Projects that expand JEA’s ability to provide more of its traditional utility services to more customers will further a goal of selling more product. JEA generally may partner to provide expanded electrical generation or transmission services through joint

electric power projects (§ 21.04(o)) or joint project agreements (§ 21.04(n)). Joint electric power projects generally require City Council approval and are restricted to a 40 year duration. City Charter § 21.04(o).

Subsection (r) of Section 21.04 provides JEA with the latitude to jointly or separately engage in projects related to the promotion or implementation of conservation, efficiency, power conditioning, and load management. Generally speaking, these types of projects would not promote the sale of more traditional product; there may be instances, however, where JEA management sees an opportunity to sell more traditional product while falling within the subsection (r) ambit. Subsection (r) projects generally (unless by debt, transfer or otherwise) do not require City Council approval.

d. DEBT

As discussed *supra*, any initiative to sell more product that requires the incurrence of new debt requires City Council approval of the aggregate amount in accordance with City Charter § 21.04(i) and (j). More general City oversight related to its budgetary and audit functions with respect to independent agencies likewise may come into play.

II. Investing in research and development and intellectual property

The nature and structure of JEA as a municipal entity greatly constrains its ability to expand into the space of investing in research and development (“R&D”) and intellectual property (“IP”). Florida public records laws are extremely broad and eliminate most opportunity for confidential development of new IP or other inventions. Furthermore, it is very difficult for JEA to source capital for R&D initiatives; the use of customer money or debt instruments to finance high risk initiatives such as R&D generally is restrained by fiduciary considerations.

Nevertheless, there are examples of municipal utilities (e.g. the Sacramento Municipal Utility District) that have used grants and other financing involving third party consultants and partners to broach the traditionally private R&D space. Subsection (r) of City Charter Section 21.04, discussed *supra*, may provide an avenue for JEA to

explore projects independently or jointly that involve innovation within electric and natural gas energy, electrotechnologies, water, wastewater and natural gas conservation and efficiency, power conditioning and load management. It expressly contemplates JEA engaging in R&D related to such projects. *Id.*

City Charter Section 21.09 likewise provides a possible route for initiatives involving R&D and the development of IP. It gives JEA authority to enter into contracts “relating to the construction, reconstruction, repair, operation or maintenance of the utilities system” and emphasizes JEA’s power to “improve the utilities system, or any part thereof, or any addition, betterment or extension thereto” directly or by contract.

Article 21 Sections 21.04(r) and 21.09 projects generally would not trigger City Council approval but would, of course, still be subject to public records laws and restraints on financing, funding of non-utility entities, and asset transfer discussed herein.

III. Sell new products and services

JEA may, under City Charter Section 21.04(p) (emphasis added), “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 [Article 21]*’ to other electric utilities both within and without the state or to any wholesale or retail customers of JEA, including “*but not limited to*” the following services and products:

[E]nergy 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 . . . [and the] financing, testing, maintenance and operation of customer owned facilities used in water, wastewater and natural gas functions. . .

It may do so under terms and conditions set by resolution of the JEA Board, *Id.*, and only after providing at least 30 days written notice to the City Council Auditor of such

activities. *Id.* Unless such sales involve more than ten percent of JEA assets or otherwise involve debt, joint ownership, or the funding of non-utility industry entities, they generally would not need City Council approval.

JEA does have latitude to explore the sale of new products and services not expressly listed in Section 21.04(p) as well. JEA's Article 21 powers include:

- “[F]ull power and right to exercise *all authority* necessary for the effective operation and conduct of JEA . . . [and] all *implied* powers necessary or incidental to carrying out the expressed powers and the expressed purposes for which JEA is created.” City Charter § 21.05 (emphasis added).
- Section 21.04(r) authority to “publicize or *otherwise participate in* projects, systems, programs or *measures to* promote or implement electric and natural gas energy, electrotechnologies, water, wastewater and natural gas conservation and efficiency, power conditioning and load management.”

Initiatives that are undertaken in accordance with the procedures of Section 21.04(p) could encompass any of the listed subsection (p) products and services types as well as other types of new products and services that either (1) fall under the ambit of Section 21.04(r) authority or (2) are consistent with or implied or incidental to the types of products and services covered by Section 21.04(p). While each initiative involving new products or services should be analyzed carefully on a case-by-case basis, existing governing documents do give JEA significant flexibility to explore innovation within this space.

IV. Sell equity to retire debt

JEA faces a structural barrier to retiring debt through mechanisms involving equity for the simple reason that JEA, as a publicly owned municipal utility, has no equity. It is worth noting, however, that the City Charter does expressly allow JEA to enter into any contracts it deems necessary or desirable for prudent management of JEA funds, debts, or fuels. City Charter § 21.04(l). Such contracts include interest rate swaps; 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 agreements; and forward purchase contracts. *Id.*

V. Reduce JEA's annual assessment paid to the City

JEA is required by Article 21 to pay the City a combined assessment for the electric and water and sewer systems following a proscribed calculation. City Charter § 21.07(c). In addition, JEA must pay to the City a franchise fee. City Charter § 21.07(l). While this financial obligation is a City Charter requirement and the Charter contemplates revisiting the assessment amount only every five years (*Id.* at (d)), there is an avenue for relief built into Article 21. Subsection (d) of Section 21.07 expressly directs City Council, "If either federal or state laws are enacted or regulatory actions are taken that adversely impact JEA's financial position for the electric utility system or the water and sewer utility system, the council shall promptly consider enacting such changes to this section 21.07 as may be negotiated by JEA and the council to mitigate such adverse impact."

Therefore, if JEA identifies certain new laws or regulations¹¹ having a negative financial impact, it can petition the City Council under Section 21.07 to consider reducing the annual assessment, even if reevaluation is not timely under subsection (d).

VI. Sell JEA assets

JEA may, under City Charter Section 21.04(p) (emphasis added), "transfer, sell, finance, lease or otherwise provide services or products, or by-products, developed or used by JEA" to other electric utilities both within and without the state or to any wholesale or retail customers of JEA. It may do so under terms and conditions set by resolution of the JEA Board, *Id.*, and only after providing at least 30 days written notice to the City Council Auditor of such activities. *Id.* JEA's may not, however, "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 [sic] without

¹¹ For example, the pending "Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice" ballot initiative Amendment, if passed and implemented, arguably will have a significant adverse financial impact on JEA. Another example would be more stringent air or water quality regulations that are costly to JEA.

approval of the council," *Id.* (emphasis added), and a referendum approving such ordinance, JACKSONVILLE, FL., ORD. 2018-142-E. The Office of General Counsel has opined that ten percent refers to the assets of JEA (Opinion dated February 20, 2018) but does not include the sale of assets that are antiquated, outdated, no longer needed, or no longer used in the ordinary course of business (Opinion dated December 21, 2018).

General state law places additional conditions, including undertaking a public interest determination, on the purchase, privatization, or sale of water, sewer, or wastewater reuse utility assets. See, e.g., F.S. §§ 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).

Within these City Charter and other State law constraints and procedures, JEA could develop initiatives to sell assets.

VII. Other

While not directly related to a contemplated opportunity arena, I will note a possible additional avenue for JEA to consider in attempting to lower costs and improve performance within the constraints of the governing documents. It may be possible for the JEA to reduce labor costs and reduce impediments to improved labor force performance in two ways: (1) focus on cost reduction during the upcoming September 2019 labor contract renegotiations and (2) reconsider internal JEA policies relating to hiring, promotion, discipline and termination, and other terms and conditions of employment for civil service-eligible employees under JEA's City Charter Section 21.08 powers.

City Charter Section 21.08 contemplates *not* JEA's use of or adherence to Civil Service rules but *rather* independent development of its own policies "consistent with" Civil Service provisions. It furthermore notes that JEA will perform all functions formerly performed by the City in carrying out employment policies. The use of such language, coupled with the plenary powers generally afforded by City Charter Section 21.08, suggests that the drafters of the City Charter envisioned a replacement of Civil Service rules by consistent (but not identical) independent JEA employment policies and

implementation. While an in-depth look at civil service applicability is outside the scope of this memorandum, JEA may wish to consider whether the possibility of such changes may be worth examining in the context of new initiatives.

CONCLUSION

DRAFT – [JEA is a public entity, created and operated for a public purpose, subject to public records and ethics laws, and greatly constrained by its governing documents, most notably City Charter Article 21. Article 21, among other restrictions, defines the traditional utility systems space within which JEA generally may act and dictates certain City Council (and/or referendum) power over JEA debt, certain joint ownership initiatives, asset transfer, and annual assessments.

JEA also, however, enjoys certain freedoms that can create opportunity spaces outside the traditional municipal utilities systems constraints. Florida law generally encourages economic development and partners to further such development. Independent agencies are, by design, intended to have those powers not reserved to the municipalities which, in turn, enjoy those powers not reserved to the state within the special acts creating them. Generally speaking, and consistent with Article 21, JEA's powers are to be construed liberally within the clear constraints of the City Charter. As discussed herein, City Charter Sections 21.04(p), 21.04(r), 21.08, and 21.09, in particular, may offer flexibility within which JEA management can explore possible initiatives.]