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Sent: Saturday, August 31, 2019 3:05 PM
To: Mr. Steve Amdur
Cc: Vinyard, Herschel T. - Chief Administrative Officer
Subject: Fwd: Privileged and Confidential: Potential Roadblocks to Privatization - Impact on Transactions and Litigation Settlement efforts

Steve see below and attached. Make sure your analysis and our contemplated structure considers these matters.

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Begin forwarded message:

From: <Allen.Maines@hklaw.com>
Date: August 31, 2019 at 2:24:35 PM EDT
To: <zahnaf@jea.com>, <vinyht@jea.com>
Subject: Privileged and Confidential: Potential Roadblocks to Privatization - Impact on Transactions and Litigation Settlement efforts

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Potential MEAG Roadblocks to JEA Privatization Transactions

(rev 8/31/2019)

Proposal Description			1. PPA Stays in “Old JEA”, which delivers Vogtle Unit 3&4 products to existing JEA ratepayers under service agreement with Newco, with power to collect retail rates sufficient to pay MEAG.	2. PPA stays in “Old JEA” which wholesales Vogtle Unit 3&4 products to Newco, which resells to JEA ratepayers at retail.	3. PPA Stays in “Old JEA” which sells Vogtle Unit 3&4 products to other municipal offtakers.
Source	Description	Potential MEAG Action	Impact on Privatization Proposal 1	Impact on Privatization Proposal 2	Impact on Privatization Proposal 3
Major Potential MEAG Roadblocks					
PPA §305	<u>JEA Resale Covenant</u> : JEA covenanted that it would not, without MEAG consent, enter into a contract with a “non-exempt” person to sell the output from Project J in a manner that results in a “private business use” under the Tax Code. “Non-exempt” person means any entity that is not a state, territory or possession of the U.S., the District of Columbia or any political subdivision thereof.	MEAG could sue to enforce this covenant and enjoin a JEA breach.	N/A – “Old JEA” would continue to make retail sales of Vogtle Units 3&4 energy to ratepayers, and presumably, claim Units 3&4 capacity for itself, as originally contemplated under the PPA. Under PLR 200827023 (April 10, 2008), an arrangement by which a utility uses tax exempt financing proceeds to acquire power and then uses transmission facilities of a non-exempt utility to deliver energy to its own customers but the transmission entity does not purchase any of the power does not impair the tax exempt status of the tax-exempt utility’s financing, under and exception for private use under Section 1.141-7(4) if the Regulations. JEA could also obtain a PLR in advance,	This is unlikely to work, or is at least highly questionable whether this would be allowed, as “Old JEA” would be wholesaling Vogtle products under a long-term (20 year) bilateral contract to NewCo which is “non-exempt”. “Old JEA” potentially could sell Vogtle Units 3&4 capacity and output to private user investor-owned utilities under certain “safe harbor” exceptions to the private use restrictions under the IRS tax-exempt bond regulations, but these sales are limited in scope and duration. These safe harbors are described in the Tax Certificate that JEA signed upon the issuance of the Project J Bonds and include the following: (1) the sale of Project J output for less than three years (including	N/A – “Old JEA” would sell Vogtle Units 3&4 products only to exempt persons.

				<p>renewal options), that are negotiated, arm's length arrangements with compensation at fair market value or are based on generally applicable and uniformly applied rates;</p> <p>(2) the sale of Project J output where compensation will not exceed JEA' s properly allocable cost of ordinary and necessary expenses that are directly attributable to the operation of Project J used by the nongovernmental person;</p> <p>(3) the sale of Project J output (i) to a retail customer under a requirements contract that does not involve minimum guaranteed payments, or (ii) under a contract where the average annual payments do not exceed 1 percent of the average annual debt service on all outstanding tax-exempt and Build America Bonds issued to finance Project J;</p> <p>(4) the sale of Project J output to a wholesale customer pursuant to a wholesale requirement contracts with (i) a term that does not exceed the lesser of 5 years or the term of the Bonds, and (ii) the amount of the output sold does not exceed 5% of the available output of Project J; or</p> <p>(5) the sale of Project J output that is allocable to portions of Project J that were financed with amounts</p>	
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				<p>other than the proceeds of tax-exempt or Build America Bonds.</p> <p>JEA and NewCo could also structure an arrangement and seek a private letter ruling (PLR) from IRS to resolve tax issues in advance.</p>	
PPA §306	<p><u>JEA Tax Covenant</u>: Similar to Resale Covenant above, JEA covenanted that it would take no action, nor consent to or approve the taking of any action affecting any right, obligation, or interest under the PPA, including any action relating to the sale of Project J output that would, in the opinion of “nationally-recognized bond counsel retained by MEAG”, adversely affect the tax-exemption on the Project J Bonds or the eligibility of the BABs to receive the interest subsidy.</p>	<p>MEAG could sue to enforce this covenant and enjoin a JEA breach.</p>	<p>JEA has a meritorious argument this is N/A – This covenant is limited to sale of Project J that would adversely affect tax-exempt status of bonds. In this proposal “Old JEA” continues to perform the PPA and retail to JEA ratepayers as a public power utility. Under PLR 200827023 (April 10, 2008), an arrangement by which a utility uses tax exempt financing proceeds to acquire power and then uses transmission facilities of a non-exempt utility to deliver energy to its own customers but the transmission entity does not purchase any of the power does not impair the tax exempt status of the tax-exempt utility’s financing, under and exception for private use under Section 1.141-7(4) if the Regulations. JEA could also obtain a PLR in advance,</p>	<p>This is unlikely to work, or is at least highly questionable whether this would be allowed, as “Old JEA” would be wholesaling products under a long-term (20-year) bilateral contract to NewCo which is “non-exempt”. “Old JEA” potentially could sell Vogtle Units 3&4 capacity and output to private user investor-owned utilities under certain “safe harbor” exceptions to the private use restrictions under the IRS tax-exempt bond regulations, but these sales are limited in scope and duration. These safe harbors are described in the Tax Certificate that JEA signed upon the issuance of the Project J Bonds and are described in the box above.</p> <p>JEA and NewCo could also structure an arrangement and seek a private letter ruling (PLR) from IRS to resolve tax issues in advance.</p>	<p>N/A – “Old JEA” would sell Vogtle Units 3&4 products only to exempt persons.</p>
PPA §307	<p><u>JEA Rate Covenant</u>: JEA covenanted that it will establish, collect and maintain rates and charges for electric service of its Electric System so as to provide sufficient revenues, together with its Electric System</p>	<p>MEAG could sue to enforce this covenant</p>	<p>Impact depends on whether “Old JEA” retains sufficient rate-generating and T&D assets or other utility assets in addition to Units 3&4 Project J PPA and JEA rights to appear reasonably likely</p>	<p>Impact depends on whether wholesale rate-generating ability of “Old JEA” appears reasonably likely to provide revenue sufficient to perform PPA obligations. The transaction can be structured so as</p>	<p>Impact depends on whether “Old JEA” retains sufficient rate-generating and T&D assets or other utility assets in addition to Units 3&4 Project J PPA and JEA rights to appear reasonably likely</p>

	reserves, to pay all amounts due under the PPA and all other amounts payable from revenues of its Electric System.	and enjoin a JEA breach.	to provide revenue sufficient to perform PPA obligations. The transaction can be structured so as not to violate this Section 307 covenant.	not to violate this Section 307 covenant.	to provide revenue sufficient to perform PPA obligations. The transaction can be structured so as not to violate this Section 307 covenant.
JEA Electric System Senior Bond Resolution, §13.G	<u>JEA Covenant Against Sale or Mortgage of Electric System</u> : JEA covenanted that it will not sell all or substantially all of the physical properties of the Electric System (nor create a mortgage or other lien thereon). “Substantially all of the physical properties of the Electric System” means physical properties of the Electric System having an aggregate depreciated cost of not less than 90% of the total depreciated cost of all of the physical properties of the Electric System at the time.	MEAG could sue to enforce this covenant and enjoin a JEA breach.	The privatization proposal might violate this bond covenant. It depends on how the 90% value is calculated.	The privatization proposal might violate this bond covenant. It depends on how the 90% value is calculated.	The privatization proposal might violate this bond covenant. It depends on how the 90% value is calculated.
JEA Electric System Senior Bond Resolution, §13.I	<u>JEA Covenant Regarding Corporate Reorganizations</u> : JEA reserved the right to effect a reorganization of its corporate structure in any manner permitted by Florida law, so long as the reorganization does not adversely affect the security for JEA’s bonds.	MEAG could sue to enforce this covenant and enjoin a JEA breach.	This proposal might violate this bond covenant, as the sale of substantial JEA assets would arguably adversely affect security for bonds previously granted by JEA and MEAG. The parties might be able to structure a credit support arrangement or other mechanism that would avoid adverse effect on security.	This proposal might violate this bond covenant, as the sale of substantial JEA assets would arguably adversely affect security for bonds previously granted by JEA and MEAG. The parties might be able to structure a credit support arrangement or other mechanism that would avoid adverse effect on security.	This proposal might violate this bond covenant, as the sale of substantial JEA assets would arguably adversely affect security for bonds previously granted by JEA and MEAG. The parties might be able to structure a credit support arrangement or other mechanism that would avoid adverse effect on security.
Other Potential MEAG Roadblocks					
PPA §203	Buyer owes additional payment obligations of \$0.50 - \$3.50 per delivered MWh (Note – if JEA defaults and MEAG stops delivering	MEAG could sue to enforce this covenant	“Old JEA” rate revenue would have to be sufficient to cover all PPA variable cost obligations.	Wholesale revenue from NewCo to “Old JEA” would have to be	Old JEA” rate revenue would have to be sufficient to cover all PPA variable cost obligations.

	energy, and honors MEAG's mitigation obligation by selling products to a third party, this may drop away.)	and enjoin a JEA breach		sufficient to cover all PPA variable cost obligations.	
PPA §204(a) through (d)	Buyer owes additional payment obligations of Buyer's Obligation Share of annual Units 3 & 4 costs.	MEAG could sue to enforce this covenant and enjoin a JEA breach	"Old JEA" rate revenue would have to be sufficient to cover all PPA annual cost obligations	Wholesale revenue from NewCo to "Old JEA" would have to be sufficient to cover all PPA variable cost obligations	"Old JEA" rate revenue would have to be sufficient to cover all PPA annual cost obligations
PPA §204	Buyer owes 50% of any payment obligation on which MEAG defaults on BANs or Take-Out bonds.	MEAG could sue to enforce this covenant and enjoin a JEA breach	"Old JEA" rate revenue would have to be sufficient to backstop all PPA contingent cost obligations	Wholesale revenue from NewCo to "Old JEA" would have to be sufficient to cover all PPA contingent cost obligations	"Old JEA" rate revenue would have to be sufficient to backstop all PPA contingent cost obligations
PPA §204(g)	Statement of Buyer's Hell or High Water payment obligation.	MEAG could sue to enforce this covenant and enjoin a JEA breach	N/A	N/A	N/A
PPA §205	Buyer obligation to pay Units 3 & 4 annual costs.	MEAG could sue to enforce this covenant and enjoin a JEA breach	Same as §204(a) through (d)	Same as §204(a) through (d)	Same as §204(a) through (d)
PPA §206(b), (c) and (d)	MEAG will bill Buyer for Obligation Share of accrued reserve fund replenishment, fuel costs, and interest costs.	MEAG could sue to enforce this covenant and enjoin a JEA breach	Same as §204(a) through (d)	Same as §204(a) through (d)	Same as §204(a) through (d)
PPA §211	Buyer must pay share of delay costs to Project.	MEAG could sue to enforce this covenant and enjoin a JEA breach	"Old JEA" rate revenue would have to be sufficient to backstop financing for all PPA contingent capital obligations.	Wholesale revenue from NewCo to "Old JEA" would have to be sufficient to cover financing for all PPA contingent capital obligations.	"Old JEA" rate revenue would have to be sufficient to backstop financing for all PPA contingent capital obligations.

PPA §401(e)	MEAG may issue additional bonds and take additional draws on DOE loan, and Buyer will be obligated for its pro-rata share.	MEAG may sue to enforce this covenant and enjoin JEA breach.	Same as §211 - "Old JEA" rate revenue would have to be sufficient to backstop financing for all PPA contingent capital obligations.	Same as §211 - Wholesale revenue from NewCo to "Old JEA" would have to be sufficient to cover financing for all PPA contingent capital obligations.	Same as §211 - "Old JEA" rate revenue would have to be sufficient to backstop financing for all PPA contingent capital obligations.
PPA §702(c), (d), (f), (g), (h)	JEA representations and warranties that: (c) Buyer has due authorization under corporate governance documents to execute and perform PPA, (d) Buyer has all government authorization needed to execute and perform PPA, (e) PPA is enforceable, (g) Buyer has sufficient financial resources to perform PPA, (h) PPA constitutes contract debt.	MEAG may interpose these representations & warranties with respect to any JEA defenses against enforcement or money damages with respect to default under PPA.	N/A – Representations and warranties were met at time of PPA execution. There does not appear to be a continuing "evergreen" provision on representations and warranties.	N/A – Representations and warranties were met at time of PPA execution. There does not appear to be a continuing "evergreen" provision on representations and warranties.	N/A – Representations and warranties were met at time of PPA execution. There does not appear to be a continuing "evergreen" provision on representations and warranties.
PPA §1001	<u>Prohibition on Assignment</u> : JEA cannot assign or transfer all or any part of any right, obligation or interest under the PPA without the prior written consent of MEAG. Any such attempted assignment or transfer is null and void. This covenant does not prevent JEA's resale of output so long as it complies with the tax covenants in PPA §§305 and 306.	MEAG could sue to enforce this covenant and enjoin a JEA breach.	The proposed transaction does not appear to require prior MEAG approval or violate this PPA §1001 assignment covenant. MEAG might argue that in substance it is a violation because "Old JEA" would be deprived of major cash flows making it more likely it will default on the PPA, but the PPA §1001 assignment covenant only applies to the PPA itself, not other assets or cash flows.	The proposed transaction does not appear to require prior MEAG approval or violate this PPA §1001 assignment covenant. MEAG might argue that in substance it is a violation because "Old JEA" would be deprived of major cash flows making it more likely it will default on the PPA, but the PPA §1001 assignment covenant only applies to the PPA itself, not other assets or cash flows.	The proposed transaction does not appear to require prior MEAG approval or violate this PPA §1001 assignment covenant. MEAG might argue that in substance it is a violation because "Old JEA" would be deprived of major cash flows making it more likely it will default on the PPA, but the PPA §1001 assignment covenant only applies to the PPA itself, not other assets or cash flows.
JEA Electric System Senior Bond Resolution, §13.D	<u>JEA Rate Covenant</u> : JEA covenanted that it will always establish and collect fees, rates and charges sufficient to pay 100% of all Costs of Operation and Maintenance, including Contracts Debts, of the Electric System. The PPA is a Contract Debt.	MEAG could sue to enforce this covenant and enjoin a JEA breach.	Same as PPA §203 -- "Old JEA" rate revenue would have to be sufficient to cover all PPA variable cost obligations.	Same as PPA §203 -- Wholesale revenue from NewCo to "Old JEA" would have to be sufficient to cover all PPA variable cost obligations.	Same as PPA §203 -- "Old JEA" rate revenue would have to be sufficient to cover all PPA variable cost obligations.

<p>JEA Charter §21.04(n)</p>	<p><u>City Council Approval Required:</u> The Charter allows JEA to enter into joint project agreements as provided by part II of chapter 361, Florida Statutes, but 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, requires prior approval of the City council.</p>	<p>MEAG could lobby the City Council not to approve a recapitalization of JEA.</p>	<p>City Council approval appears to be required.</p>	<p>City Council approval appears to be required.</p>	<p>City Council approval appears to be required.</p>
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