



MEMORANDUM
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To: Andrew D. Weissman
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From: Laura LoBue
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Date: December 10, 2020

Re: JEA - Litigation Risk Assessment (PPA Section 307)

We have been asked to provide an assessment of the risk to JEA that the Municipal Electric Authority of Georgia (“MEAG”) could use litigation to delay or derail any efforts to sell JEA’s assets. We were asked to focus, in particular, on MEAG’s ability to use Section 307 of the Amended and Restated Power Purchase Agreement for Plant Vogtle Additional Units PPA Project (Project J) (the “PPA”) to inhibit JEA from moving forward with a sale.

As an initial point, it is uncertain that MEAG will actually raise PPA Section 307 as a means of blocking a sale of JEA’s assets. In February 2018, when JEA initially publicized the potential sale of its assets, MEAG responded that JEA’s proposed sale “will breach [JEA’s] obligations under the [PPA], including, but not limited to, limitations on assignment (Sections 1001, 305, and 306).” *See* MEAG’s February 23, 2018 letter.

At the time, JEA was considering assigning the PPA to a third party. In this context, MEAG’s letter made no reference to PPA Section 307. JEA is no longer contemplating assigning the PPA to a third party. While the circumstances are different now, it is possible that MEAG may not raise Section 307 in an effort to block sale of JEA’s remaining assets.

As a corollary to this point, if MEAG does raise PPA Section 307, MEAG will likely do so in the context of a larger litigation, alleging that a number of PPA provisions would be breached by a sale, including claims relating to Sections 305 and 306 of the PPA. Even if JEA has a strong basis for dismissal of any claim related to PPA Section 307 (which is discussed in Section IV.B below), this will be meaningless, unless JEA can secure dismissal of all MEAG claims.¹

¹ We were not asked to provide an assessment of other PPA provisions that MEAG may rely upon and has previously cited; we understand those are already being considered by other team members.

I. Executive Summary

At the outset, it is important to understand that, even if MEAG does not ultimately prevail in blocking the sale of JEA's assets based on the PPA, MEAG certainly has the ability to tie this up in litigation beyond the Spring of 2020.

As explained below, MEAG could seek an injunction (preliminary and permanent) to enjoin the sale of JEA's assets. JEA has a strong argument against a preliminary injunction, because MEAG could seek money damages later. JEA also has a strong motion to dismiss based on the plain language of PPA Section 307. However, aside from the likely outcome of any attempt to enjoin the sale, the timing and duration of any such attempt by MEAG could delay a sale.

The case pending between JEA and MEAG in the Northern District of Georgia (the "Pending Litigation")² could have a significant effect on the timing of any resolution of attempts by MEAG to enjoin a sale. In particular, the parties are currently litigating the formation of the PPA and whether or not the agreement is actually enforceable. It is probable that MEAG would seek an injunction either in that proceeding or in another proceeding in the same court. The resolution of the Pending Litigation could have a direct effect on whether or not MEAG could rely on PPA Section 307 to block a sale. For those reasons, it is possible that the court could defer ruling on any motion to dismiss with respect to PPA Section 307 until the Pending Litigation is resolved.

However, we understand it is possible that JEA may find a buyer who is willing to close on a transaction while the litigation is pending. If that situation occurs, then the court would be required to rule on MEAG's preliminary injunction motion before the sale closed. Although the enforcement of the PPA is currently at issue in the Pending Litigation, at present, a contract exists between the parties until the court says otherwise. Accordingly, if faced with an imminent sale, the court would address whether to enjoin that sale based on PPA provisions.

II. Risk that MEAG Will Initiate Litigation

Based on the facts we have been provided, we think it is almost certain that MEAG will pursue litigation to prohibit any disposition of JEA's assets. JEA's failure to comply with any covenant, agreement, or obligation in the PPA constitutes a default allowing MEAG to bring a lawsuit seeking an injunction to enforce the covenant, agreement, or obligation. *See* PPA § 501(b). As noted above, MEAG already indicated in February 2018 that it would pursue litigation to stop JEA from selling its assets. Considering that JEA and MEAG are already embroiled in litigation over the enforceability of the PPA, it seems almost certain that MEAG would file a lawsuit seeking to enjoin a sale of JEA's assets.

² The referenced case is captioned City of Jacksonville, Florida et al v. Municipal Electric Authority of Georgia, 1:19-cv-03234-MHC.

III. A MEAG Lawsuit to Enjoin the Sale of JEA's Assets

A. Procedure

Pursuant to PPA § 501(b) and Federal Rule of Civil Procedure 65, MEAG can file a motion for preliminary injunction against the asset sale. To obtain a preliminary injunction, a “plaintiff must plainly establish four preconditions: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a showing that plaintiff will suffer irreparable injury if an injunction does not issue, (3) proof that the threatened injury to plaintiff outweighs any harm that might result to the defendants, and (4) a showing that the public interest will not be disserved by grant of a preliminary injunction.” *Northeastern Fla. Chapter of Ass’n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990) (citations omitted). A preliminary injunction is “an extraordinary and drastic remedy not to be granted until the movant ‘clearly carries the burden of persuasion’ as to the four prerequisites. ‘The burden of persuasion in all of the four requirements is at all times upon the plaintiff.’ ” *Id.* at 1285 (citations omitted).

Moreover, a preliminary injunction cannot be issued unless MEAG posts security “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered” by JEA if JEA were found to have wrongfully been enjoined or restrained. Fed. R. Civ. P. 65(c). The amount of the bond is left to the court’s discretion and ordinarily depends on the gravity of the potential harm to the enjoined party. *See BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Serv., LLC*, 425 F.3d 964, 971 (11th Cir. 2005); *see also K-V Pharm. Co. v. Cook*, No. 1:12-CV-2491-CAP, 2012 WL 3715276, at *4 (N.D. Ga. Aug. 9, 2012) (holding that plaintiffs were required to post either a surety bond or a cash bond in the amount of \$1 million because of the drastic cost increase faced by the defendant as a result of the preliminary injunction ruling).

B. MEAG’s Argument

In seeking to enjoin the sale of JEA’s assets, MEAG could allege that PPA Section 307 prohibits the sale of any asset of JEA’s Electric System. PPA Section 307 reads:

[JEA] hereby covenants and agrees that it shall establish, maintain and collect rates and charges for the electric service of its Electric System so as to provide revenues sufficient, together with available Electric System reserves, to enable [JEA] to pay to MEAG all amounts payable under this Agreement and to pay all other amounts payable from and all lawful charges against or liens on the revenues of its Electric System.

“Electric System,” although capitalized, is not a defined term in the PPA. Electric System is defined in the Buyer’s Electric System Bond Resolution, dated March 30, 1982 (“Bond Resolution”), to mean “the existing electric generating, transmission and distribution system consisting of the existing generating plants and transmission and distribution lines and facilities

together with any and all improvements, extensions and additions thereto ...” (Bond Resolution at p. 10).³

PPA Section 307 is purely a payment guarantee. Nothing in the plain language of PPA Section 307 prohibits a sale of JEA’s assets. Accordingly, MEAG will have to argue that the entire premise of PPA Section 307 is that JEA will retain its existing Electric System and remain the utility serving Jacksonville, which enables it to charge customers for electricity in Jacksonville in an amount sufficient to enable JEA to pay all amounts under the PPA. MEAG will argue that if the Electric System is sold, JEA will have no physical assets to generate electricity to produce revenue. It will further argue that because JEA will no longer be the primary electricity provider to Jacksonville, JEA’s ability to impose charges on electricity users will be greatly diminished. Thus, MEAG will claim that if JEA sells its assets, the foundation of PPA Section 307 will disappear, leaving MEAG with far less security than it has currently.

IV. JEA’s Response to a MEAG Lawsuit

In response to a complaint and motion for preliminary injunction filed by MEAG, JEA should both oppose that motion **and** move to dismiss the PPA Section 307 claim.

A. Opposition to Motion for Preliminary Injunction

JEA should argue that MEAG cannot establish the requisite preconditions to obtain a preliminary injunction: “(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a showing that plaintiff will suffer irreparable injury if an injunction does not issue, (3) proof that the threatened injury to plaintiff outweighs any harm that might result to the defendants, and (4) a showing that the public interest will not be disserved by grant of a preliminary injunction.” *Northeastern Fla. Chapter of Ass’n of Gen. Contractors*, 896 F.2d at 1284.

Generally speaking, the first two factors are weighed most heavily and often determine the outcome of the case. In fact, “the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *see also Northeastern Fla. Chapter of Ass’n of Gen. Contractors*, 896 F.2d at 1285 (“We need not address each element [that is a precondition to a preliminary injunction] because we conclude that no showing of irreparable injury was made.”)

1. Irreparable Injury

We believe JEA has a strong chance of defeating a motion for preliminary injunction based on PPA Section 307, in particular, because MEAG cannot meet the second precondition: showing a likelihood that it will suffer irreparable harm without an injunction.

“An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.... The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Northeastern Fla. Chapter of Ass’n of Gen. Contractor*, 896 F.2d at 1285. Courts consistently

³ The Bond Resolution is referenced in the PPA and the PPA states that capitalized terms in the PPA may be defined in referenced documents. *See* PPA § 105(1).

deny motions for preliminary injunction where the party's purported injury could be addressed by monetary damages. See *Windamir Development, Inc. v. Greenheart Construction, Inc.*, 2016 WL 9308019, at *2 (N.D. Ga., Sept. 1, 2016, No. 1:16-CV-02665-ELR) ("Thus, Plaintiff cannot show irreparable injury because any injury can be fully compensated through money damages."); *Corbin v. Corbin*, 429 F. Supp. 276, 282 (N.D. Ga. 1977) ("A mere threatened monetary injury, which can be addressed in damages, is insufficient to establish the irreparable injury essential to the issuance of a preliminary injunction."); *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371, 1375 (N.D. Ga. 2001) (finding that the plaintiff could not demonstrate irreparable harm "because any injury it may suffer ... is compensable by the award of money damages").

As the Eleventh Circuit has indicated on many occasions, the purported irreparable injury "must be neither remote nor speculative, but actual and imminent." *Siegel*, 234 F.3d at 1176; see also *SME Racks, Inc. v. Sistemas Mecanicos Para, Electronica, S.A.*, 243 F. App'x 502, 504 (11th Cir. 2007) (quotation and citation omitted). The Eleventh circuit has expressly rejected the idea that "'concern for the ultimate collectability of a judgment' supports a showing of irreparable injury." *Bender v. CenTrust Mortg. Corp.*, 51 F.3d 1027, 1030 (11th Cir. 1995). As the Northern District of Georgia aptly noted, "If fear or uncertainty regarding the ability to collect on a future judgment were sufficient to obtain injunctive relief, the Court imagines most, if not all, plaintiffs in breach of contract cases would allege the same." *Windamir Development, Inc.*, 2016 WL 9308019, at *3.

MEAG's irreparable harm argument will likely fail for two reasons. First, PPA Section 307 is, on its face, a purely monetary provision. It will be hard to argue that monetary damages are inadequate if it is breached. Second, even financial harm is purely speculative, a court would have no basis to conclude that a sale of certain of JEA's assets would impair JEA's ability to pay for power purchased from MEAG.⁴

MEAG will claim that a sale of JEA's Electric Facility will mean that JEA will no longer be able to make payments under the PPA and that such failure to make payments under the PPA cannot be remedied by money damages, because JEA will not have the ability to pay. That argument can be countered with Eleventh Circuit law that speculation about ability to pay future damages cannot create irreparable harm and by showing that the structure of the sale will give JEA the ability to pay for any power purchased from MEAG. Moreover, we understand that the transaction will likely be structured in a way that provides other substantial security to MEAG regarding payments under the PPA. If this can be done, the possibility that JEA could not pay for any purchased power becomes even more remote.

2. Other Preconditions of a Preliminary Injunction

As noted above, if MEAG fails to show irreparable injury, then the court will not grant a preliminary injunction. Even if MEAG can show irreparable injury, it must still meet the three other preconditions to a preliminary injunction.

MEAG must show a substantial likelihood that it will succeed on the merits of its claim. *Northeastern Fla. Chapter of Ass'n of Gen. Contractors*, 896 F.2d at 1284 (citations omitted).

⁴ These arguments may well apply to claims under other provisions of the PPA on which MEAG will bring suit.

JEA's argument that MEAG cannot succeed on the merits is the same as JEA's argument on a motion to dismiss, discussed in Section IV.B below.

The remaining two elements are rarely determinative on preliminary injunctions. Nevertheless, prior to granting an injunction, the court must also carefully weigh the equities before granting a preliminary injunction. *United States v. Jenkins*, 714 F. Supp. 2d 1213, 1220 (S.D. Ga. 2008). Here, it seems unlikely the court would find that the equities weigh heavily in favor of either party.

The court must also determine if the injunction is in the public's interest and "[t]he public interest is served in ensuring that valid contracts are enforced." *Mattress Safe, Inc.*, 2019 WL 2714498, at *8. JEA can argue that it is in the public's interest for the court to enforce the PPA as written and not read language into the contract.

As noted above, MEAG will also have to put up security sufficient to cover JEA's costs and damages if it is later determined that JEA was improperly enjoined. This security could be substantial and would likely require posting a letter of credit in the amount of the security required by the court.

B. Motion to Dismiss

JEA should also move to dismiss for failure to state a claim under Rule 12(b)(6). We believe that JEA has a strong argument on a motion to dismiss, but it is difficult to assess the likelihood that JEA will prevail without knowing exactly what MEAG will allege in its complaint. The purpose of a motion to dismiss is to test the sufficiency of the complaint. *Southern Nuclear Operating Co., Inc. v. Elec. Data Sys. Corp.*, No. 1:06-CV-1988-TCB, 2007 WL 9758013, at *1 (N.D. Ga. May 16, 2007). Generally speaking, "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Pinckney v. SLM Fin. Corp.*, 433 F. Supp. 2d 1316, 1318 (N.D. Ga. 2005) (quoting *QualityFoodsdeCentroAmerica, S.A. v. LatinAmericanAgribusinessDev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983)); see also *Southern*, 2007 WL 9758013 at *1 (refusing to dismiss a complaint even though "the Court [was] skeptical of the meritoriousness of the claims" because "the standard applicable to motions to dismiss is stringent.").

In order to survive a motion to dismiss, MEAG must allege facts sufficient "to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiff's "[f]actual allegations must be enough to raise a right to relief above a speculative level on the assumption that the allegations in the complaint are true." *Id.* at 555 (citations, footnote and emphasis omitted). In ruling on a motion to dismiss by JEA, the Court must accept as true all of the MEAG's well-pled **factual** allegations and construe the reasonable inferences derived from those facts in the light most favorable to MEAG. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 n.1 (11th Cir. 1999); *Pinckney*, 433 F. Supp. 2d. at 1318.

The court does not, however, have to adopt MEAG's **legal** arguments regarding the interpretation of PPA Section 307. See *Kwok v. Delta Air Lines Inc.*, 994 F.Supp.2d 1290, 1295, (N.D. Ga. 2014) *aff'd* 578 Fed.Appx. 898 (11th Cir. 2014) (rejecting plaintiff's argument that the

Court must assume her interpretation is true on a motion to dismiss and noting that “the Court must only accept factual allegations as true, not legal conclusions.”)

JEA’s strongest argument to dismiss any claim under PPA Section 307 is that nothing in the plain language of PPA Section 307 prohibits JEA from selling its assets. PPA Section 307 merely talks of setting rates and relying on those rates, as well as reserves, to provide sufficient revenues to allow JEA to meet its obligations under the PPA. PPA Section 307 references the Electric System, but does not prohibit a sale of the Electric System. If MEAG wanted to specifically prohibit JEA from selling the Electric System, then MEAG could have included that language anywhere in the agreement. It did not.⁵

Because MEAG cannot rely on the plain language of PPA Section 307, MEAG will have to argue that PPA Section 307 should be read to say that JEA cannot meet its obligations under the PPA without owning the Electric System. This effort to turn a provision regarding financial payments into a prohibition on the sale of assets would be a difficult argument for MEAG. We believe JEA has the stronger of the contract interpretation arguments on PPA Section 307. Here again, JEA’s position will be bolstered if the asset sale provides security for any payments due MEAG. However, given the low standard to survive a motion to dismiss, there is the possibility that MEAG could survive a motion to dismiss of a claim based on PPA Section 307, particularly when combined with other provisions of the PPA.

V. Timing of a Decision on PPA Section 307

There is an argument that, prior to instituting any litigation, JEA and MEAG must exhaust the dispute resolution procedures in Section 801 of the PPA, which requires pre-litigation discussions for any dispute “with respect to any Party’s performance hereunder.” These procedures could take upwards of 80 days.⁶

As mentioned above, the Pending Litigation could have an effect on the timing of any resolution of any attempt by MEAG to enjoin a sale based on provisions of the PPA. If JEA does not have a buyer who is willing to move forward in the face of litigation, then any sale will likely have to await resolution of the litigation over the enforceability of the PPA. If the court defers ruling on any Section 307 claim until the Pending Litigation is resolved, then the timeline of the Pending Litigation will drive the timeline of the final ruling on an injunction.

The court may be able to resolve the Pending Litigation on motions for summary judgment, since the issues are contract interpretation. However, the deadline for filing motions for summary judgment as to the enforceability of the PPA is not until May 2020. Even if JEA files its motion early, the court is unlikely to issue a ruling until both parties’ motions have been fully briefed. By the time briefing is concluded and a decision is rendered, this fundamental

⁵ In fact, the Bond Resolution includes a specific provision that allows JEA to sell a portion of the Electric System but limits the amount of the Electric System that JEA can sell. Our understanding is that MEAG was aware of and likely reviewed the Bond Resolution prior to amending the PPA. JEA could point to that language (and MEAG’s knowledge of it) showing that MEAG certainly understood how to include language in an agreement that would prohibit JEA from selling its Electric System.

⁶ It is unlikely that PPA Section 801 would prevent an application for preliminary injunction.

issue is not likely to be decided until the Fall of 2020.⁷ Considering the gravity of the court's ruling on the enforceability of the PPA, we assume that the losing party will file an appeal. The average amount of time from filing a notice to appeal to final order in the Eleventh Circuit is 9.7 months. That pushes out resolution issue of enforceability of the PPA out until at least the Summer 2021. If the PPA is deemed enforceable, then the court would turn to the issue of whether the covenants prohibit a sale. Assuming six months for the court to rule on the motion to dismiss and another 9.7 months for any appeal, final resolution of all claims would not occur until the end of 2022.

If JEA does have a buyer willing to move forward and close on a transaction while the litigation is pending, the timeline will look much different. In that scenario, it is unlikely the court could defer ruling on an injunction to enjoin the sale until the Pending Litigation is decided. If the transaction closes, a court ruling on the preliminary becomes moot. JEA's arguments on the merits and against a preliminary injunction remain the same; only the timing is affected.

VI. CONCLUSION

Although MEAG has not yet raised PPA Section 307 as a means of prohibiting a sale of JEA's assets, MEAG could raise that section (and others) in seeking an injunction to enjoin any sale. JEA has strong arguments with respect to PPA Section 307 that should defeat a preliminary injunction motion and could get the Section 307 claim dismissed. Whether a buyer is willing to close despite pending litigation will be determinative on the timing of resolution of any Section 307 claim and motion for injunction.

⁷ We pulled statistics from the Northern District of Georgia and, on average, summary judgment motions remain pending for 186 days and over 50% of summary judgment motions remain pending for 181 days or longer.