

MILAM HOWARD NICANDRI  
GILLAM & RENNER P.A.

To: JEA

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Re: Recapitalization: Vogtle Strategy

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## Background

In connection with JEA's Invitation to Negotiate #127-19 for Strategic Alternatives, one possible strategy concerning JEA's Plant Vogtle Unit No.s 3 and 4 Power Purchase Agreement (the "Vogtle PPA") would include the following elements:

- \* JEA would retain the obligations under the Vogtle PPA;
- \* JEA would sell energy delivered pursuant to the Vogtle PPA on the wholesale market in a manner that preserves the tax-exempt nature of existing Project J financing; and
- \* JEA would deposit a portion of the proceeds of any transaction in an escrow account to supplement the proceeds of energy sales and make payments due under the Vogtle PPA.

Under this proposal, JEA would need to preserve its right to assess JEA customers to ensure sufficient sums to pay amounts due under the Vogtle PPA. The question presented is:

Assuming JEA has sold substantially all of its assets and is no longer selling energy to customers, could JEA nevertheless retain the right to make assessments for the purpose of "backstopping" payment obligations under the Vogtle PPA if proceeds from energy sales and the escrow account prove to be insufficient?

## Analysis

There is no direct authority in Section 21 of the City of Jacksonville Charter (the "JEA Charter") for the position that JEA can make assessments after it ceases to operate the current utility systems. There are several provisions of the JEA Charter that specifically and broadly prescribe JEA's powers. Those provisions could be construed to authorize and permit the strategy outlined above. However, these grants of power are generally qualified and limited to use in connection with the utilities systems operated by JEA. Those provisions could be used to support an argument that JEA lacks the power to make an assessment for a Vogtle PPA obligation when it doesn't operate a utilities system. A better strategy may be a legislative solution in conjunction with City Council approval of any transaction.

Section 21.01 of the JEA Charter provides that JEA “is authorized to own, manage and operate a utilities system” and “is created for the express purpose of acquiring, constructing, operating, financing and otherwise having plenary authority with respect to . . . utilities systems as may be under its control now or in the future.” The broad grant of authority in this establishment clause, read together with certain enumerated powers discussed below, support an argument that JEA has the authority to establish a tariff that would supplement energy sales and an escrow account to meet Vogtle PPA obligations.

Section 21.04 sets forth the enumerated powers granted to JEA, including powers that would support JEA’s authority to implement the strategy outlined above and make assessments in a post-transaction environment. In the first enumerated power, JEA is granted the power to “construct, own, acquire, establish, improve, extend, enlarge, reconstruct, reequip, maintain, repair, finance, manage, operate and promote the utilities system.”<sup>1</sup> JEA also has the power to fix rates, assessments and fees for the use or benefit of the utilities system.<sup>2</sup> Further, JEA has the authority to sell energy on the wholesale market and to public or private entities located within or outside the State of Florida, either directly or through other entities and jointly with third parties.<sup>3</sup> JEA also has the ability to issue revenue bonds for the purpose of financing or refinancing the utilities system<sup>4</sup>, but not the power to issue general obligation bonds.<sup>5</sup>

JEA also has the authority to enter into contracts it determines to be necessary or desirable for the prudent management of JEA's funds used for its utility systems “including, without limitation, interest rate swaps, option contracts, futures contracts, contracts for the future delivery or price management of power, energy” and other financial instruments.<sup>6</sup>

In addition, JEA has broad powers to “enter into contracts with any person or entity, public or private, deemed necessary or desirable by JEA in connection with carrying out its powers and duties.”<sup>7</sup> And Section 21.05 of the JEA Charter provides:

*The powers of JEA shall be construed liberally in favor of JEA. No listing of powers included in this article is intended to be exclusive or restrictive and the specific*

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<sup>1</sup> See JEA Charter, Section 21.04(a).

<sup>2</sup> [JEA has the power] to fix, pledge to establish or establish, levy, regulate, impose and collect rates, assessments, fees and charges for the use or benefit of the utilities system and to alter and amend same from time to time, which rates, assessments, fees and charges shall result in JEA receiving or possessing an amount which, together with accumulated balances from prior years available therefore is not less than is required to operate and maintain a self-liquidating or self-sustaining utilities system. JEA Charter, Section 21.04(f).

<sup>3</sup> See JEA Charter, Section 21.04(d).

<sup>4</sup> See JEA Charter, Section 21.04(i)(1).

<sup>5</sup> See JEA Charter, Section 21.04(i)(4).

<sup>6</sup> See JEA Charter, Section 21.04(l).

<sup>7</sup> See JEA Charter, Section 21.04(e).

*mention of, or failure to mention, particular powers in this article shall not be construed as limiting in any way the general powers of JEA as stated in Section 21.04. It is the intent of this article to grant to JEA full power and right to exercise all authority necessary for the effective operation and conduct of JEA. It is further intended that JEA should have all implied powers necessary or incidental to carrying out the expressed powers and the expressed purposes for which JEA is created. The fact that this article specifically states that JEA possesses a certain power*

These enumerated powers and the broad grant of authority in Section 21.05 of the JEA Charter support an argument that JEA has the authority to enter into agreements for the funding of its obligations under the Vogtle PPA, which obligations may extend post-transaction.

However, all the enumerated powers are qualified to operate and promote the “utilities system” – a qualification that could be problematic. In the JEA Charter, the term “utilities system” is defined to mean any utility system “operated by JEA.” An argument can be made that the enumerated powers limits JEA’s powers to finance only a utility system that is operated by JEA. If that is the case, then JEA would lack the corporate authority to make post-transaction assessments to fund its obligations under the Vogtle PPA. Contrary to the enumerated powers, there is no similar qualification in Section 21.05 of the JEA Charter which dictates that the powers of JEA are to be “construed liberally in favor of JEA.” That savings clause may be sufficient to overcome the qualification regarding operation of a utilities system in the enumerated powers, but there can be no assurance in this regard.

It could also be argued that if JEA survives a transaction, even if only for the purposes of buying power under the Vogtle PPA and then selling that power on the wholesale market, then that qualifies as operating a utilities system for purposes of the JEA Charter. However, that argument runs contrary to a common understanding of the terms “operating a utilities system” and there can likewise be no assurance that such activities would be held to qualify as operating a utilities system if challenged.

It would be preferable to address this issue in City Council legislation. The Jacksonville City Council has the authority to amend the JEA Charter without action by the state legislature or public referendum.<sup>8</sup> In conjunction with the approval of any transaction, the JEA Charter could also be amended by City Council to expressly grant JEA the power to make an assessment to cover shortages under the Vogtle PPA. Or more simply, the City Council could designate the purchase of power under the Vogtle PPA and the proposed sale of that power on the wholesale market as a “utilities system” for purposes of the JEA Charter. That would then permit funding and assessment in support of the Vogtle PPA obligations. Unfortunately, such legislation could be deemed a ratification of the Vogtle

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<sup>8</sup> See JEA Charter, Section 21.11; Fla. Stat. Section 166.031.

PPA and undermine the argument taken in the pending MEAG litigation<sup>9</sup> that the Vogtle PPA is *ultra vires*. Litigation counsel should be consulted to evaluate the impact of such proposed legislation.

Another option would be the assignment of the Vogtle PPA to City of Jacksonville. The overlap of Jacksonville taxpayers and JEA customers is virtually identical. The tax-exempt nature of the purchaser would be preserved for Project J financing purposes. No counter-parties would object to the assignment of the Vogtle PPA to the City of Jacksonville, although bondholder consent may be required. The City could similarly engage in wholesale sales of the energy delivered under the Vogtle PPA. The citizens of Jacksonville are already obligated for the payments due under the Vogtle PPA, so this is not a new obligation. However, this alternative may be perceived as politically unpalatable by the administration and/or viewed negatively by voters. Such negative perception could be mitigated by pointing out that the escrow account proceeds would be distributed to the City of Jacksonville or JEA customers directly in the event the pending litigation to rescind and/or terminate the Vogtle PPA is successful, there was an excess of funds after satisfying obligations under the Vogtle PPA, or there is another resolution of the Vogtle PPA dispute and obligations which did not require the use of the escrow account. This would also avoid the potential loss of the *ultra vires* argument in the MEAG litigation.

### **Summary**

The JEA Charter grants JEA certain enumerated powers and broad authority with respect to financing and assessments in connection with its operation of utilities systems. However, the JEA Charter defines utilities systems as those operated by JEA. It is not clear that JEA's charter powers would extend post-transaction to permit assessments in support of a pre-transaction obligation when JEA is not operating a utilities system. It would be preferable to have the Jacksonville City Council resolve this issue by legislation expressly granting JEA the authority to make assessments post-transaction to fund any shortfall on Vogtle PPA obligations after proceeds from wholesale energy sales and exhaustion of the escrow account, or declaring the purchase of power under the Vogtle PPA and the proposed sale of that power on the wholesale market as a "utilities system" for purposes of the JEA Charter, or having the Vogtle PPA assigned to and assumed by the City of Jacksonville.

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<sup>9</sup> *City of Jacksonville and JEA v. Municipal Electric Authority of Georgia*, 3:18-CV-1174-J-39JRK, in the U.S. District Court in and for the Middle District of Florida; and *Municipal Electric Authority of Georgia v. JEA*, 1:18-CV-4295-MHC, in the U.S. District Court in and for the Northern District of Georgia