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MEMORANDUM

TO: Jeanne Miller
FROM: Thomas A. Cloud
DATE: October 22, 2019
SUBJECT: Applicable Procedure for City Council Review of JEA strategic options

The purpose of this memorandum is to review and opine on applicable procedures for City Council Review of the Jacksonville Electric Authority's (hereafter "JEA") Invitation to Negotiate #129-19, which includes five scenarios including the proposed sale of JEA's combined electric, water, and wastewater systems. This analysis focuses on the City Council's role in reviewing whatever results from the JEA process. Based upon our analysis of the City of Jacksonville's Charter and applicable state law, we are of the opinion that the City Council has a duty to insure that any referendum proposing the transfer of certain JEA functions or operations provide full and fair disclosure of material terms necessary for the voters to make an informed decision.

JEA has proposed to analyze five scenarios related to changing the ownership, operation, and management of the combined electric, water, and wastewater systems the title to which is currently held by JEA. The fifth scenario contemplates the sale of some or all of these utility systems. By proposing to transfer these systems, JEA will trigger certain process requirements under Florida law. The entity charged with the responsibility for conducting these procedures is the City Council of the City of Jacksonville, Florida (hereafter "City Council").

To understand the nature of these procedures, it is necessary to briefly review the history of utility ownership, operation, and management in Jacksonville. According to JEA's online history and based upon interviews with former JEA counsel, the City of Jacksonville originally held title and managed the combined electric, water, and wastewater systems dating back to the last quarter of the nineteenth century. Following a referendum in 1967, the Jacksonville City Charter was amended effective in 1968 to create JEA and transfer the electric system from the City. Ownership and management of the City's water and wastewater system was later transferred to JEA in 1997.

Under Florida law, cities have since the nineteenth century held the municipal prerogative to serve utilities. *See Ellis v. Tampa Waterworks Co.*, 47 S. 358, 360 (Fla. 1908); *Capital City Light & Fuel Co. v. City of Tallahassee*, 28 So. 810, 814 (Fla. 1900); *Storey v. Mayo*, 217 So.2d 304, 307 (Fla. 1968); and *Ameristeel Corp. v. Susan Clark*, 691 So.2d 473, 478 (Fla. 1997). This

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“municipal prerogative” is based upon the power to grant franchises for the exclusive right to provide utilities within the municipal territory, a power reserved to cities by statute. See §§166.042, 180.14, and 366.11, *Florida Statutes*. This municipal prerogative is held in trust for the benefit of the public by the City Council. See *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893); *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So.2d 339 (Fla. 1986); *Water Control District v. Davidson*, 638 So.2d 521 (Fla. 5th DCA 1994); *City of Wilson v. Weber*, 166 P.512 (Kan. 1917); *United Tel. Co. v. City of Hill City*, *supra* at 498-500; *Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200, 212 (N.C. 1989).

An analysis of the Jacksonville City Charter clearly reflects that the City Council ultimately holds the exclusive right to provide utilities within the City and adjacent territory. Chapter 21 of the Charter is, in essence, both a delegation and a grant of the City’s exclusive franchise to provide electric, water, and wastewater utility service. Section 21.01, Jacksonville City Charter, provides:

“It is the specific purpose of this article 21 to repose in JEA all powers 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.”

Furthermore, JEA is obligated to pay, among other charges, a “franchise fee” based in part upon *“ the exclusive right to serve electric, water and sewer customers, for use by JEA of the public rights-of-way used by it in connection with its electric distribution system and its water and sewer distribution and collection system, and in further consideration of the unique relationship of JEA and the City, in which JEA is a wholly owned public utility, and such other good and valuable consideration that has been agreed to between JEA and the City of Jacksonville.”* See Section 21.07(l), Jacksonville City Charter, *emphasis supplied*.

Under the Jacksonville Charter, this municipal prerogative to serve is protected by a provision found in numerous Florida municipal charters—the requirement to hold a referendum prior to approving the sale of this “wholly owned public utility.” Section 21.04 (p), Jacksonville City Charter, provides:

“Nothing in this article shall authorize or be construed to authorize JEA 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 without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum approval of the terms and conditions of the sale.”

Note that before a referendum can be held, the City Council must approve the transfer. Thus, the City Council alone possesses the authority to deny a transfer, even without a referendum. This is further support for the proposition that the City Council possesses the municipal prerogative to serve within the City and its territories. Indeed, JEA itself has argued on at least one occasion

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before the Florida Supreme Court that the City possesses the municipal prerogative to serve. *See Ameristeel Corp. v. Susan Clark*, 691 So.2d 473, 478 (Fla. 1997).

While there is little specific guidance within the Jacksonville City Charter as to what specific procedures would apply to the City Council's review of a proposed sale of JEA's combined systems, state law imposes at least two statutory requirements to any sale under the Jacksonville Charter. First, if the water and wastewater systems are sold, the City Council must follow the provisions of Chapter 84-84, Laws of Florida (1984), codified as § 180.301, Florida Statutes. Based upon the criteria used by the Florida Public Service Commission in reviewing sales of water and wastewater systems by private companies, this statute requires the governing bodies of Florida municipalities to hold a public hearing to determine whether the purchase or sale of a water, sewer, or wastewater reuse utility is "in the public interest." *See Senate Staff Analysis and Economic Impact Statement, CS/SB 91, Revised May 24, 1984.*

The "sale of publicly owned utilities" statute requires that the "governing bodies" of a Florida city must prepare a briefing document that analyzes the following issues in order to determine "public interest":

In determining if the purchase, sale, or wastewater facility privatization contract is in the public interest, the municipality shall consider, at a minimum, the following:

- (1) The most recent available income and expense statement for the utility;*
- (2) The most recent available balance sheet for the utility, listing assets and liabilities and clearly showing the amount of contributions-in-aid-of-construction and the accumulated depreciation thereon;*
- (3) A statement of the existing rate base of the utility for regulatory purposes;*
- (4) The physical condition of the utility facilities being purchased, sold, or subject to a wastewater facility privatization contract;*
- (5) The reasonableness of the purchase, sale, or wastewater facility privatization contract price and terms;*
- (6) The impacts of the purchase, sale, or wastewater facility privatization contract on utility customers, both positive and negative;*
- (7)(a) Any additional investment required and the ability and willingness of the purchaser or the private firm under a wastewater facility privatization contract to make that investment, whether the purchaser is the municipality or the entity purchasing the utility from the municipality;*

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(b) In the case of a wastewater facility privatization contract, the terms and conditions on which the private firm will provide capital investment and financing or a combination thereof for contemplated capital replacements, additions, expansions, and repairs. The municipality shall give significant weight to this criterion.

(8) The alternatives to the purchase, sale, or wastewater facility privatization contract, and the potential impact on utility customers if the purchase, sale, or wastewater facility privatization contract is not made; and

(9)(a) The ability of the purchaser or the private firm under a wastewater facility privatization contract to provide and maintain high-quality and cost-effective utility service, whether the purchaser is the municipality or the entity purchasing the utility from the municipality.

(b) In the case of a wastewater facility privatization contract, the municipality shall give significant weight to the technical expertise and experience of the private firm in carrying out the obligation specified in the wastewater facility privatization contract.

(10) All moneys paid by a private firm to a municipality pursuant to a wastewater facility privatization contract shall be used for the purpose of reducing or offsetting property taxes, wastewater service rates, or debt reduction or making infrastructure improvements or capital asset expenditures or other public purpose; provided, however, nothing herein shall preclude the municipality from using all or part of the moneys for the purpose of the municipality's qualification for relief from the repayment of federal grant awards associated with the wastewater system as may be required by federal law or regulation.

The municipality shall prepare a statement showing that the purchase, sale, or wastewater facility privatization contract is in the public interest, including a summary of the purchaser's or private firm's experience in water, sewer, or wastewater reuse utility operation and a showing of financial ability to provide the service, whether the purchaser is the municipality or the entity purchasing the utility from the municipality."

While there is no statute that specifically applies these same standards to municipally owned electric systems, there nevertheless may be compelling arguments to apply these same standards in the case of Jacksonville because of the requirement to hold a referendum before approving any sale.

As previously noted, the Jacksonville City Charter mandates that a referendum be held before approval of a sale. Interestingly, the Charter provision actually specifies that the "terms and conditions" be approved in the referendum. Given that the referendum is in the nature of a charter referendum, it is likely that the standards that apply to charter referenda will apply to this referendum. These standards are contained in § 101.161, Florida Statutes:

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“101.161 Referenda; ballots.—

(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word “yes” and also by the word “no,” and shall be styled in such a manner that a “yes” vote will indicate approval of the proposal and a “no” vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with ¹s. 100.371(5). The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. This subsection does not apply to constitutional amendments or revisions proposed by joint resolution.”

This language has been recently construed in the context of the referendum approval of the sale of public properties in general, and the sale of municipal electric systems in particular. Generally, Ballot summaries must give voters sufficient notice of what they are asked to decide to enable them to “intelligently” cast their ballots. *See § 101.161(1), Florida Statutes; Smith v. American Airlines, 606 So. 2d 618, 620-21 (Fla. 1992) (finding the ballot summary was not written clearly enough for even the more educated voters to understand its significance and chief purpose).* Voters must be able to comprehend the “sweep” of each proposal. *Askew v. Firestone, 421 So. 2d 151, 155-56 (Fla. 1982).* The problem can often lie not with what the summary says, but, rather, what the summary fails to say. The voters must be apprised of the true meaning and “ramifications” of an amendment and as to its “important consequences.” *Id.; Fairness Initiative, 880 So. 2d 630, 636 (Fla. 2004); Advisory Op. to Att’y Gen. re Term Limits Pledge, 718 So. 2d 798, 803 (Fla. 1999) (striking a ballot summary that failed to inform the public the Secretary of State would be granted discretionary constitutional powers which the Secretary does not currently have).* The Court should strike a ballot summary if it does not explain to the reader or sufficiently inform the public of important aspects of the proposed amendment or if it is devoid of any mention of important consequences. *Id. citing Fish & Wildlife Conservation Comm’n, 705 So. 2d at 1355; Tax Limitation, 644 So. 2d at 495.*

These legal concepts have been interpreted in the context of referenda that determine whether or not to sell public assets. The ballot summary, title and proposal must disclose, certainly, terms and conditions, but must also disclose the details and impacts of a proposed sale. *See Matheson v. Miami Dade County, 187 So. 3d 221, 226 (Fla. 3d DCA 2015).* In determining the validity of a lease approval question in Miami Beach, the Court struck the referendum because the lease approval question failed to give voters necessary information, including all material terms of

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the lease contract, and failed to even refer voters to records that would provide such information. See *Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1284 (Fla 3d DCA 2013).

Another Florida court struck a 2016 local charter initiative seeking to force divestiture of a municipal electric utility based upon the failure to disclose key information regarding an attempted forced sale of the City's electric system. To block the purchase of its poles and wires inside city limits, Sumter Electric Cooperative funded the creation of a political committee which filed a charter amendment provision to force the sale of the City's electric utility. Citing the *Let Miami Beach Decide* decision, the Circuit Court struck the referendum, specifically ruling that:

"26. Finally, the ballot summary and amendment also fail to inform the voters of other key material issues including (a) the City's existing right, under contract and ordinance, to purchase portions of SECO's electric system after an arbitration establishes the purchase price (not the other way around); (b) the amendment's effect on City Code of Ordinances § 27-36 (Ord. No. 03-13, 10-6-03) and § 96-18, which give the City the right to establish who can provide electric service and under what terms; (c) the existence of the FMPA All Requirements Contract, which if breached, will trigger significant financial penalties for the City, for which the City remains contingently liable even is the contract can be assigned; (d) the implications of permanently losing a revenue stream that the City utilizes for its general fund and for staff positions. Thus, the ballot summary and amendment should be stricken." See City of Bushnell, Florida vs. Sumter Electric Cooperative, In. and Citizens For Cooperative Power, Case No.: 2016-CA-56 (Fla. 5th Cir. Ct. 2016), Order Denying Defendant Citizens for Cooperative Power's Motion for Summary Judgment and Granting Plaintiff's Cross Motion for Final Summary Judgment.

Thus, Florida courts have already ruled that charter-derived referenda calling for the sale of a municipal electric system must disclose information strikingly similar to the kind of information required in the sale of Florida municipally-owned water and wastewater systems. Given the Jacksonville Charter's express requirement for the approval of the terms and conditions of any sale, it seems prudent that the City Council would conduct a procedure (ie, public hearing(s) and briefing document(s)) similar to that contemplated in § 180.301, Florida Statutes, to develop the information necessary to determine whether the sale would be in the public interest and to disclose publically the information necessary for municipal voters to exercise their right to vote.

While there are other processes that will undoubtedly apply prior to the approval of any sale contemplated by JEA, this memo specifically covers the processes which we believe will apply to the Jacksonville City Council. If you have further questions, please call me.