

MEMORANDUMCLIENT-MATTER NUMBER
123214-0101**TO:****FROM:****DATE:** November 5, 2019**RE:** JEA – Cooperative Option Under Florida Law

INTRODUCTION

JEA is considering a range of strategic alternatives to transform itself from a municipal electric utility. This memorandum focuses on the option of becoming a cooperative under Florida law. It concludes that while there is no clear and obvious path to legally undergo such a transformation, there are three potential avenues that could merit further consideration. Each would be face certain challenges, including problems stemming from the non-rural nature of Jacksonville vis-à-vis the stated purpose of the relevant Florida statute.

ANALYSIS**1. Basics and Benefits of an Electric Cooperative; Florida Utility Regulation**

JP Morgan has presented the JEA board with an overall description of how electric cooperatives function. For purposes of this memorandum, we simply note that an electric cooperative generally has several advantages over investor owned utilities, such as more money to reinvest in facilities since it need not pay federal taxes or shareholder dividends,¹ opportunities for lower cost financing,² and an elected leadership structure that can help customer/owners feel closer to the service provider. A municipal utility like JEA shares many of these advantages.

The Florida Public Service Commission (“PSC”) generally regulates electric and gas utilities. As to a “rural electric cooperative” or municipal electric utility, the PSC’s jurisdictional authority is limited specific areas, including that the PSC can (i) prescribe uniform systems of accounts and classifications of accounts, (ii) prescribe a rate structure, (iii) require electric power conservation and reliability within a coordinated grid for operational as well as emergency purposes, (iv) approve territorial agreements and settle territorial disputes, (v) prescribe

¹ [Florida law confirmation/cite]

² [Reference RUS section??]

reporting and data requirements, and (vi) prescribe safety for transmission and distribution facilities pursuant to the National Electric Safety Code. *See Fla. Stat.* §§366.04; 366.11. The PSC broad “jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.” *Fla. Stat.* § 366.04(6).

2. Florida’s Rural Electric Cooperative Law (Chapter 425)

a. Background

The statute which governs electric cooperatives³ in Florida does not provide a perfectly applicable path through which JEA could transform into an electric cooperative; however there are a number of options JEA could consider. As background, Florida’s Rural Electric Cooperative Law (Chapter 425) (“FRECL”) was adopted in 1939 with the stated purpose of allowing cooperatives to be “organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof *in rural areas.*” *Fla. Stat.* § 425.02 (emphasis added). The statute defines “rural area” to mean “any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons.” *Fla. Stat.* § 425.03(1).

None of the specific provisions in FRECL provide a clear and obvious path by which a municipal utility like JEA could become a rural electric cooperative. FRECL does include a number of provisions of interest. For example, under FRECL a Florida corporation “organized . . . for the purpose, among others, of supplying electric energy in rural areas may be converted into a cooperative” by following the procedure in Section 425.17. JEA is not a corporation and was not organized for the purpose of providing electric service in “rural areas” as that term is defined, so this section would not directly apply. Similarly, FRECL has a procedure for “one or more cooperatives” to be merged by following the requirements of Section 425.15. Since JEA is not a cooperative today, that section would not directly apply.

b. Potential Avenues for Compliance

We have identified three potential avenues to comply with FRECL while achieving the goal of JEA’s service being provided under the cooperative model.

³ We note that the provision of electricity is a heavily regulated industry. Attempting to transform JEA into a cooperative model in a manner that would completely escape electric regulation (such as through Chapter 719 or statute other than Florida’s Rural Electric Cooperative Law) would likely be strongly opposed by the PSC and would not likely be approved by the Jacksonville Office of General Counsel.

Conversion. The first option would be aimed at meeting the requirements for the “conversion of existing corporations” authority under Section 425.17. This would involve a conversion of the municipal entity into a corporation and then (presumably instantaneously) following the process required to be “converted into a cooperative and become subject to this chapter”. The required steps involve such things as forming a corporation board which would approve articles of conversion which would need to include, among other things, names of the new coop’s board of trustees, and the “manner and basis for converting either membership in or share of stock of such corporation” into coop memberships. The articles of conversion would need to be approved by voting of the corporate members/shareholders.

We note there is a statutory problem with this approach. Since Jacksonville does not fall within the “rural are” definition, and the stated “purpose” of the chapter is “promoting and extending the use thereof in rural areas,” does the law actually limit any such Section 425.17 “conversion” to entities serving rural areas? JEA might argue that “Purpose” statement in Section 425.02 should be limited to instances involving the original organization of an entity for service. *Fla. Stat.* § 425.17 (“[c]ooperative, nonprofit, membership corporations *may be organized* under this chapter for the purpose . . .”). In contrast, here JEA would not really be organizing an entity to initiate electric service for the first time. Indeed, many Florida rural electric cooperatives initially organized under the statute now serve territories where population growth means they are no longer serving solely in “rural areas”.

Acquisition by an Existing Cooperative. A second option would be to invite an existing rural electric cooperative to acquire JEA’s assets, service territory, and customers. This would arguably be allowed as one of the enumerated “powers” of a rural electric cooperative under to “purchase, take, receive . . . or otherwise acquire, and to own, hold, use, equip, maintain, and operate . . . electric transmission and distribution lines or systems, electric generating plants . . . and any and all kinds and classes of real or personal property whatsoever, which shall be deemed necessary, convenient or appropriate to accomplish the purpose for which the cooperative is organized.” *Fla. Stat.* § 425.04(8).

As with the “conversion” option, a potential obstacle to this approach is the stated “purpose” of Chapter 425, as the result of such an action is not really “supplying electric energy and promoting and extending the use thereof *in rural areas.*” *Fla. Stat.* § 425.02 (emphasis added). Further the acquiring coop may have needed to change its own bylaws/purpose to allow for such expansion.

The acquiring cooperative in this scenario could be either an existing Florida rural electric cooperative or one based in Georgia or Alabama. *See Fla. Stat.* § 425.27. That statutory section allows any “corporation organized under the laws of another state on a nonprofit or a cooperative basis for the purpose of supplying electric energy in rural areas and owning and operating electric transmission or distribution lines in a state adjacent” to Florida to transact business in Florida with the same rights as a cooperative organized under FRECL. *Id.* The acquiring foreign coop would simply need to file “with the Department of State of a certified copy of its charter or articles of incorporation” and pay a filing fee. *Id.*

Amend the Statute. A third option would be to seek a legislative amendment to FRECL which would be framed to allow a JEA conversion into an electric cooperative. The specific desirable provisions of such a statute are beyond the scope of this memorandum, as is an analysis of the likely success and extent and sources of opposition to any such amendment.

c. Process and Viability Issues

Each of the three potential avenues discussed above could face challenges. Challenges for amending the statute are not discussed here. Challenges as to the legality/propriety of the “conversion” and “acquisition by existing cooperative” options would in the first instance need to be considered by the Jacksonville Office of General Counsel. The General Counsel is empowered to . . . [insert from Kevin Hyde].

Note that either option would also likely require that the current ITN process be terminated. Unsuccessful participants in that process may attempt to raise procedural or substantive opposition to an alternative approach. [Kevin Hyde to delete/revise this paragraph as needed.]

Even if the General Counsel has blessed a particular approach, it is possible that the PSC could become involved in opposition. The PSC has general jurisdiction over Florida’s electric industry, including “jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.” *Fla. Stat.* § 366.04(6). It could use this or other general authority to investigate on its own volition the plans of JEA (and/or an acquiring coop) and try to issue an order preventing the action. That order itself would be subject to judicial appeal.

3. RUS Borrowing Eligibility

[Tim Spear insert to address:

Would a new cooperative in Jacksonville be generally eligible for RUS lending?

Is “urban” nature an impediment and if so let’s pinpoint the authority on that?

If generally eligible, would a new cooperative in Jacksonville actually be able to use RUS funding for the purpose of paying off JEA/Jacksonville for the acquisition of assets, customers, territory etc?

There is an impression that this would not be a proper purpose for RUS funding. And yet RUS funding is used by coops when they need to expand or build or acquire generation assets, so is that impression correct?]

4. Water utility

We note that this memorandum has note focused on the complications that may arise from the water utility functions that are now a part of JEA.

5. FRECL Requirements as to Cooperative Structure

FRECL includes a number of basic requirements for a rural electric cooperative. For example, these include:

- Recordkeeping a trustee meeting requirements. *Fla. Stat.* § 425.045
- The cooperative name “shall include the words ‘electric’ and ‘cooperative’ and the abbreviation ‘inc.’”. *Fla. Stat.* §425.05.
- Five or more natural persons may organize a cooperative. *Fla. Stat.* § 425.06
- Basic minimum requirements for the articles of incorporation. *Fla. Stat.* § 425.07
- Bylaws setting forth the rights and duties of members and trustees and provisions for the regulation and management of the affairs of the cooperative *Fla. Stat.* § 425.08
- Membership rights and requirements for meetings of members. *Fla. Stat.* § 425.09
- Requirements for a board of trustees of at least five members and requirements as to their election. *Fla. Stat.* § 425.10
- The bylaws may provide for territorial voting districts for elections. *Fla. Stat.* § 425.11
- Cooperative officers “consist of a president, vice president, secretary and treasurer, who shall be elected annually by and from the board of trustees.

No person shall continue to hold any of the above offices after ceasing to be a trustee. The offices of secretary and of treasurer may be held by the same person. The board of trustees may also elect or appoint such other officers, agents, or employees as it shall deem necessary or advisable and shall prescribe the powers and duties thereo.” *Fla. Stat.* § 425.12

- Provisions for amendment of articles of incorporation *Fla. Stat.* § 425.13

6. JEA Previous Statements Relevant to a Cooperative Transition

[Tom to insert key “promises” from website status Q&A and note how they might be impacted by the above analysis]