

DRAFT – NOTES

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MEMORANDUM

TO: Herschel Vinyard, Esq., JEA Chief Administrative Officer
FROM: Lynne C. Rhode, Esq., OGC, JEA Vice President and Chief Legal Officer
SUBJECT: **General Legal Constraints on JEA Initiatives**
DATE: December 10, 2020

BACKGROUND

The electric utility sector is in the midst of paradigmatic change. Market forces include decreased load growth, technological advances in distributed energy resources, pressures for decarbonization, and demands for increased efficiency and new utility services. Meanwhile, as the utility monopoly is undermined and profits slow, financial analysts signal increasing risk to potential utility investors.

Incentive Regulation, New Business Models, and the Transformation of the Electric Power Industry, 5 Mich. J. Envtl. & Admin. L. 319, 319 (2016). The twentieth century goals for electric utility regulation of reasonable rates, adequate service, and financial stability are still essential but no longer sufficient. See *Id.* at 326. “Today’s utilities report increasing pressure to provide new services to customers and engage with them on a different level. . .” *Id.* at 336.

JEA is no exception.¹ Current projections of flat sales paired with escalating costs and demands will create a growing cash gap in the near, medium, and long terms. The JEA Senior Leadership Team members have been working with their teams to develop cost-saving and revenue-enhancing initiatives,

¹ “Given the trends in electric and water sales, JEA has given some thought to expanding into other lines of business to produce additional revenues, including pole attachment revenues, wireless colocation leasing revenue, dark fiber leasing, natural gas sales, solar panel leasing, fuel cells and microturbines . . . Other utilities around the country, facing the same challenges of declining sales, have diversified into energy marketing, liquefied natural gas (LNG) processing and sales, renewable energy development (wind and solar), distributed general (i.e. combined heat and power generators, fuel cells, batteries), and telecommunications (fiber optics, tower leasing, internet services).” Special Committee on the Future of JEA Final Report, p. 14 (June 27, 2018).

including energy, water and wastewater, IT, customer, corporate, and cross-cutting initiatives to include in the development of a new JEA strategic plan. If JEA is to succeed in proactively addressing its very real and immediate challenges in a way that allows it to maintain its status as a customer-focused industry leader and natural resources steward, JEA leadership must act in creative and innovative ways. As a public entity, however, existing and operating strictly for a municipal purpose within the constraints of its charter, JEA faces significant legal (and other) limitations on such initiatives that non-municipal utilities do not.

QUESTION PRESENTED

You have asked me to examine the parameters of constraints imposed by JEA's governing documents on JEA initiatives within the following thirteen potential opportunity arenas: (1) changing rate structure and/or raising rates, (2) selling more/customized utilities services (including natural gas), (3) acquiring new customers (in Duval County and adjacent counties as well as in non-adjacent counties); (4) selling or leasing additional new products and services (utility and non-utility products and services); (5) cutting operating expenses; (6) cutting the workforce; (7) eliminating JEA's contribution to the City of Jacksonville; (8) selling JEA assets; (9) acquiring, growing, and operating new businesses throughout the United States; (10) becoming a joint owner or engaging in a joint venture with utility and non-utility entities; (11) selling a portion of equity to fund growth or deleverage; (12) investing in research and development and intellectual property for monetization; and (13) making investments purposed to accelerate and grow utilities technologies, services, and platforms.

This memorandum analyzes the legal constraints created by certain pertinent constitutional, state law (including Public Service Commission jurisdiction), and Charter of the City of Jacksonville (the "City Charter"), including Article 21 of the City Charter (the "JEA Charter"), to the potential opportunity areas outlined above. ***This memorandum is not intended to be and should not be construed to provide advice on any specific action or initiative, nor does it purport to be an in-depth look at the universe of laws, regulations, policies, and procedures that would need to be carefully considered before any specific project could be designed, initiated, or undertaken. This memorandum additionally does not discuss bond resolution parameters, policy considerations, and potential constraints imposed by JEA's business structure; such factors may be as or more controlling of JEA's actions than the legal considerations discussed herein and must be considered carefully.*** The memorandum is intended solely to help provide you with context for thinking about what initiatives within potential opportunity arenas may be viable under current *legal* constraints.

SHORT ANSWER

Any inquiry into JEA's authority to pursue a certain contemplated initiative under current law will require the following detailed legal analysis with advice of legal counsel:

- (1) Does JEA's contemplated action meet constitutional requirements that it (i) be for a municipal purpose and (ii) either (a) involve joint ownership, construction, and operation of electrical generation or transmission facilities or (b) have a (paramount) prevailing public purpose if it entails joint ownership with or lends or uses credit for the benefit of a private party? If the answer to either question is no, the action is prohibited. If the answer to both questions is yes, proceed to question two.
- (2) Is there specific, clear language in Article 21 authorizing or prohibiting the contemplated action? If the answer is yes, the action is authorized or prohibited, as provided. If the answer is no, proceed to question three.
- (3) Does the contemplated action fall within the express authority of JEA to own, manage and operate a utilities system (as strictly defined)? If the answer is yes, the contemplated action may be permissible after careful analysis. If the answer is no, the contemplated action generally is prohibited.

Undertaking that preliminary legal analysis for each of the proposed potential opportunity arenas suggests the following:

Changing rate structure / raising rates - JEA generally has the authority to raise rates. JEA likewise may change its rate structure; such change, however, would be subject to the jurisdiction of the Florida Public Service Commission.

Selling more/customized utilities services (including natural gas) - Broadly speaking, JEA has the authority to sell more services to its current customers within the electric, water and sewer, and natural gas spaces.

Acquiring new customers (in Duval County and adjacent counties as well as in non-adjacent counties) – JEA generally may expand its customer base within Duval and adjoining counties. It is prohibited from providing service to customers in non-adjointing counties.

Selling or leasing additional new products and services (utility and non-utility products and services) - In accordance with Charter Sections 21.04(p) and 21.04(r) of the JEA Charter, JEA may sell certain types of new products and services under terms and conditions set by resolution of the JEA Board. Sales of new products or services that are not captured by Sections 21.04(p) or 21.04(r) generally are prohibited.

Cutting operating expenses – JEA generally has the authority to take measures to cut its operating expenses.

Cutting the workforce – JEA generally has the authority to cut its workforce.

Eliminating JEA’s contribution to the City of Jacksonville - JEA does not have the authority to reduce or eliminate its assessment obligations. The JEA Charter allows the City Council to reconsider the assessment amount every five years and change it by ordinance at City Council’s discretion.

Selling JEA assets - JEA generally may sell, lease, or otherwise transfer real or personal property upon terms set by resolution of the JEA Board. JEA may not, however, transfer more than ten percent of its total assets without approval of the City Council and a referendum.

Acquiring, growing, and operating new businesses throughout the United States – While JEA does have the authority to make certain acquisitions within the utility space, it cannot grow and operate those businesses outside Duval and adjacent counties. JEA generally does not have the authority to acquire, grow, and operate non-utility businesses.

Becoming a joint owner or engaging in a joint venture with utility and non-utility entities – JEA has the authority to enter into certain joint ownership and joint venture agreements with other utilities so long as it maintains a necessary level of control. JEA generally is prohibited from entering into joint ownership or joint venture agreements with non-utilities.

Selling a portion of equity to fund growth or deleverage - JEA does not have the ability to sell equity because, as a municipal utility, it does not have equity.

Investing in research and development and intellectual property for monetization - The JEA Charter provides certain limited opportunities for JEA to invest in R&D and IP projects. Such projects, generally speaking, would be subject to public records laws and City Council approval of financing and are largely restricted by Charter to projects related to conservation and efficiency, power conditioning and load management, and/or improvement of the utilities system (as defined). Without the ability to protect R&D initiatives from public disclosure, the opportunity to monetize IP is extremely limited.

Making investments purposed to accelerate and grow utilities technologies, services, and platforms – JEA is Constitutionally prohibited from making such investments absent a paramount public purpose.

ANALYSIS

JEA

JEA (then known as the Jacksonville Electric Authority) was established in 1968 to own and manage the electric utility² which had been owned by the City of Jacksonville (“the City”) since 1895. In 1997, the City Council amended the City Charter to authorize JEA to own and operate additional utility

² F.S. § 366.02(2) (“‘Electric utility’ means any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.”).

functions and, effective on June 1, 1997, the City transferred to JEA the City's combined water and sewer utilities system. JACKSONVILLE, FL., ORD. 97-229-E. In 2001, JEA expanded its water and sewer territory³ with the approval of City Council. JEA today is the eighth largest municipal utility in the country and the largest in Florida, owning and operating an electric system with five generating plants and transmission and distribution facilities that include over 745 circuit miles of transmission lines and more than 6,760 miles of distribution lines.⁴ It also purchases energy from several solar sites located across the service territory. It serves approximately 466,000 electric, 271,000 sewer, 348,000 water, and 11,000 reclaimed water customers in Duval County and elsewhere. JEA provides utility services to certain surrounding communities under interlocal and franchise agreements.⁵

The governing body of JEA is comprised of seven board members, appointed by the mayor and subject to confirmation by the City Council, for a term of four years. Members of the JEA Board are subject to the provisions of F.S. § 286.012 relating to voting and §§ 112.311 – 326 relating to financial disclosure and conflicts of interest, among other requirements. Broadly speaking, the JEA Board has the authority to adopt bylaws and make rules and regulations relating to JEA not inconsistent with Article 21 of the City Charter or general law. City Charter § 21.03.

Overview: Pertinent Governing Laws

I. Florida Constitution

At the most basic level, as a municipal entity, under Florida Constitution Article VIII, Section 2, every action JEA undertakes must be for a municipal purpose.⁶ At a practical level, the primary constitutional constraint on JEA's ability to act on a strategic plan relates to Article VII, Section 10. That

³ The JEA water and sewer system consists of facilities for the provision of potable water, facilities for the collection and treatment of wastewater, and facilities for the treatment and distribution of reclaimed water. The water and sewer system provides water and sewer service within the urban and suburban areas of the City, other than certain excluded areas. The water and sewer system's service territory extends into St. Johns County and Nassau County and also serves a number of customers in Clay County.

⁴ JEA is an economic development partner of the City, furthering the objective of State lawmakers to help drive economic growth in Florida municipalities. Florida Statute § 166.021(8)(a).

⁵ The electric system provides service to the Town of Orange Park (Franchise Fee Agreement effective September 1, 1969), Town of Baldwin (Assignment and Assumption of Franchise Agreement (FPL) dated January 1, 2000), Atlantic Beach (Franchise Agreement), and a portion of St. John's County (Territorial Agreement (FPL) dated December 14, 1998). The water/wastewater system provides service to parts of Nassau (Interlocal Agreement dated December 17, 2001) and St. John's Counties (Interlocal Agreement dated July 1, 1999).

⁶ As provided Article VIII, Section 2(b), "municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. . . . 'Municipal purpose' means any activity or power which may be exercised by the state or its political subdivisions. . . ."

Section, which was grounded in concern over local governments financing railroad projects in the late 1800s, prohibits a Florida public entity from becoming a joint owner with or lending or using its credit⁷ to aid any private entity.⁸ *Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 8 So.3d 1076 (Fla. 2008). Courts have interpreted Section 10 to mean that a public entity's lending or use of credit to the benefit of a private party can only be done for a paramount public purpose with incidental benefit to the private

⁷ The Supreme Court has opined on what constitutes the lending of credit: "As used in article VII, section 10 of the Florida Constitution, the term credit 'implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.' *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So.2d 304, 309 (Fla.1971). This Court has also defined the lending of credit as follows: '[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.' *State v. Hous. Fin. Auth. of Polk County*, 376 So.2d 1158, 1160 (Fla.1979) (citing *Nohrr*, 247 So.2d 304). This Court has also explained that '[i]n order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody.' *Nohrr*, 247 So.2d at 309. *Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076, 1095 (Fla. 2008).

⁸ Article VII, Section 10 provides:

"SECTION 10. Pledging credit.—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:

(a) the investment of public trust funds;

(b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;

(c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

(d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person."

It forms the basis for one of two primary applications by Florida courts of the public purpose doctrine. The other context requiring consideration of the public purpose doctrine is eminent domain. The Florida Constitution prohibits the taking of private property for private use. Florida Constitution Article X, § 6(a) (codified at F.S. § 73.021(1)). The Supreme Court has noted that the standard for determining the question of public purpose is the same in both the sale of bonds/expenditure of public funds and eminent domain contexts. *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875, 885 (Fla. 1981).

party.⁹ Other projects not involving lending or use of credit but involving joint ownership¹⁰ with private parties still must serve a sufficiently strong public purpose.¹¹ Article VII, Section 10(d) provides a limited exception to this prohibition pertinent to the incident discussion: “. . . but this [Article VII, Section 10] shall not prohibit laws authorizing . . . a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities.”

All Florida municipalities and their independent agencies, therefore, generally are constrained by the Constitution from undertaking any action that does not serve a municipal purpose and from becoming a joint owner with or utilizing public funds in actions benefiting third parties except where the public purpose prevails. JEA, thus, is likewise constitutionally constrained except where its action falls within the limited Section 10(d) exception and meets all other relevant legal requirements.

II. Florida Statutes Chapter 166

Florida Statutes, Title XII (Municipalities), Chapter 166 (Municipalities) is the primary body of state laws governing municipal authority.¹² Consistent with the constitutional grant of home rule powers¹³, Florida Statute § 166.021 spells out the general powers of Florida municipalities, including Jacksonville, under state law and generally confers plenary powers for municipal purposes not otherwise expressly prohibited. The City, thus, including the City Council in exercising its legislative functions relative to JEA, has broad home rule power to act for municipal purposes except as constrained by City Charter or other laws.

⁹ A definition of public purpose is found in *Demeter Land Co. v. Florida Public Service Co.*, 99 Fla. 954 (1930), quoting *Boyd v. C.L. Ritter Lumber Co.*, 89 S.E. 273, 279 (Va. 1916): “A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain.” If public credit is used to aid a private party, the project must serve a “paramount” public purpose and have only incidental benefits to any private party. *Orange County Ind. Dev. Auth. v. State*, 427 So.2d 174, 179 (Fla.1983); *State v. JEA*, 789 So.2d 268 (2001).

¹⁰ See *Jackson-Shaw* at 1089 for discussion of joint ownership and joint ventures under Article VII, Section 10.

¹¹ Private parties can benefit from public entity action “if the public interest, even though indirect, is present and sufficiently strong.” *Jackson-Shaw* at 1095.

¹² A myriad of other state laws apply to actions of municipalities and municipal utilities. While a discussion of all of them is outside the scope of this memorandum, they would need to be considered on an initiative-specific basis.

¹³ Article VIII, Section 2(b) provides that “[m]unicipalities shall have governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.” *N. Port Rd. & Drainage Dist. v. W. Villages Improvement Dist.*, 82 So. 3d 69, 72 (Fla. 2012).

III. City Charter

The City of Jacksonville is a consolidated government model. JACKSONVILLE, FL., ORD. 2010-616-E, § 1.101. The primary body of law of the consolidated government (Laws of Fla., Ch. 78-536, § 1; Laws of Fla., Ch. 92-341), the City Charter, is found in the Code of Ordinances, Part A, Charter and Related Laws of the City of Jacksonville. Under Section 3.02 of the City Charter, the powers of the consolidated government “shall be construed liberally in favor of consolidated government,” consistent with its home rule powers under the Florida Constitution and general laws of Florida. *See also City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (“In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers.”). Article 3 of the City Charter gives the City Council the general power to repeal or amend any provision of the City Charter. City Charter § 3.01; *see also* F.S. §166.031(1); F.S. §166.031(3).¹⁴

City Charter Section 4.02 creates separate executive and legislative branches and emphasizes the importance of separation of powers. The City Charter vests the mayor, as chief executive and administrative officer, with the executive power of the consolidated government, including the power and duty to administer, supervise, and control all departments and divisions created by the City Charter and by the City Council. City Charter § 6.04. Article 6 gives the mayor power to veto any ordinance or resolution adopted by City Council. *Id.* at § 6.05. All legislative powers of the consolidated government are vested in the City Council.¹⁵ Such powers and duties include budgetary review of and monetary appropriations for independent agencies (§ 5.07), investigation and examination of accounting and financial systems and management (including audit of fiscal operations) of independent agencies (§ 5.10), and investigation of the affairs and conduct of the consolidated government (§ 5.09). The City Council may enact a (non-emergency) ordinance by majority vote (F.S. § 166.041(4)) unless otherwise stated.

Jacksonville’s independent agencies, including the JEA, were established by acts of the Legislature and are named in Section 18.07 of the City Charter. The City Charter proscribes certain

¹⁴ The City Charter also could conceivably be changed by the Constitution Revision Commission through amendment to the Florida Constitution or through the legislative J-bill process, where the Legislature would enact a special law amending the Charter.

¹⁵ However, certain powers are retained by urban service districts.

structural, governance, budgetary, financial, and other rules applicable to the independent agencies (where not otherwise in conflict with agency-specific rules).¹⁶

IV. Article 21 of the City Charter (JEA)

Article 21 of the City Charter, a special act of the Florida Legislature, creates the JEA, defining and constraining its responsibilities, authority, and power.¹⁷ JEA was created for the purpose of “acquiring, constructing, operating, financing, and otherwise having plenary authority with respect to electric, water, sewer, natural gas and such other utility systems as may be under its control now or in the future.”¹⁸ City Charter § 21.01. **JEA is authorized to “own, manage and operate a utilities system within and without the City of Jacksonville.” City Charter § 21.01.** “Utilities systems” means, “[T]he electric utility system and the water and sewer utility system now operated by JEA which shall include . . . any ‘system’ or ‘project’ authorized pursuant to the provisions of Chapter 80-513 [Laws of Florida] . . . and any natural gas utility system to be operated in the future by JEA together with any other additional utility systems as may be hereafter designated as part of the utilities systems . . .”. City Charter § 21.02. “[S]ystem or project” is defined by Section 1 of Chapter 80-513 as, “electric generating plants and transmission lines and interconnections and substations for the generation, transmission and exchanging of electric power and energy both within and without the boundaries of the consolidated City of Jacksonville and in any and all counties adjacent thereto.”

¹⁶ For example, Section 16.06 of the City Charter requires independent agencies to request authorization from the City Council for the issuance of ad valorem bonds; Section 7.104 requires independent agencies to compensate the consolidated government for all services provided; and Section 20.01 provides that the Code of Ethics applies to independent agencies where so provided by special laws.

¹⁷ Note that as a municipal utility, JEA generally is exempt from federal and state utility-specific laws applicable to non-municipal, investor-owned utilities. *See, e.g.*, F.S. § 350.111 (“As used in ss. 350.111-350.117 and ss. 350.121-350.128, ‘regulated company’ means any public utility as defined in s. 366.02 or any person holding a valid and current certificate from the commission under chapter 351, chapter 364, chapter 365, or chapter 367.”) and F.S. § 366.02(1) (with emphasis added)(“‘Public utility’ means every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term ‘public utility’ *does not include* . . . a municipality or any agency thereof . . .”). Certain Federal Energy Regulatory Commission (FERC) and Florida Public Service Commission (PSC) rules, however, including certain Florida Statutes found in Title XXVII (Railroads and Other Regulated Utilities) (Chapters 350-368) and PSC jurisdiction over rate structure, territorial boundaries, bulk power supply operations and planning, natural gas utilities (including municipal), and certain safety matters, may apply to JEA and are additional considerations that must be reviewed in the context of any specific project but are outside the scope of this memorandum. *See, e.g.*, F.S. § 366.04 (Jurisdiction of Commission).

¹⁸ Such utility systems may be owned, operated, or managed by JEA separately or in such combined or consolidated manner as JEA may determine. City Charter § 21.01.

The express powers outlined by the JEA Charter “shall be construed liberally in favor of JEA. . . .” and include “implied powers necessary or incidental to carrying out the *expressed powers* and the *expressed purposes* for which JEA is created.” City Charter § 21.05 (emphasis added); *see also* General Counsel Opinion 92-1 (Council budgetary powers must be exercised with restraint so as not to thwart the purposes for which the Authority was created). The majority of JEA’s specific powers are spelled out at Section 21.04 (“Powers”).

Municipal utility authorities which are created by special act “act as a separate autonomous unit of city government for prescribed specialized purposes of *providing, operating, and managing utilities* for the city,” 1979 Fla. Op. Atty. Gen. 5 at 1 (emphasis added), and are “not a ‘municipality,’ nor vested with home rule powers.” *Id.* Authorities may only exercise those powers granted to them by their enabling special act, as may be properly amended. *Id.*; *see also Dep’t of Revenue ex rel. Smith v. Selles*, 47 So. 3d 916, 918 (Fla. Dist. Ct. App. 2010) (quoting *Rinella v. Abifaraj*, 908 So.2d 1126, 1129 (Fla. 1st DCA 2005)) (“An administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction”). Any attempt to expand upon an authority’s statutorily granted powers is invalid.¹⁹ *State Department of Business Regulation v. Salvation Limited, Inc.*, 452 So.2d 65, 66 (Fla. 1st DCA 1984). JEA’s enabling special law is Article 21 of the City Charter. Therefore, if an action falls outside the parameters of Article 21, because it is not within JEA’s authority to own, manage, and operate a utilities system and is not otherwise expressly granted by the JEA Charter, JEA generally may not take such action.

Section 21.11 of the City Charter grants the City Council the authority, in accordance with the procedures outlined at that Section and consistent with its general Article 3 amendment power, to amend or repeal any portion of Article 21 by a *two-thirds* vote of the membership and requires a public hearing process. If the mayor disapproves of the change, the City Council may still enact it with a four-fifths vote. *Id.* Any Charter change JEA may need, including any necessary to pursue a strategic plan

¹⁹ Discussing the axiom that an agency cannot enlarge its statutory authority, and quoting Burris, *Survey of Florida Law: Administrative Law*, 14 Nova L.Rev. 583, 594 (1990), a Florida court has opined that there is a “distinction between [the] implied powers argument used to expand agency jurisdiction beyond that delegated to it by the Legislature as compared to when it is merely used to provide additional powers for implementing agency policy in an area clearly within its delegated area of authority”; the first is impermissible while the latter is not. *Cataract Surgery Ctr. v. Health Care Cost Containment Bd.*, 581 So. 2d 1359, 1361 (Fla. Dist. Ct. App. 1991). The court stated, “Any attempt by an agency to extend or enlarge its jurisdiction beyond its statutory authority will be declared to be invalid. . . . In determining whether the agency has enlarged upon its statutory authority, the court may look at the entire statutory framework as well as the specific provisions cited as statutory authority.” *Id.*; *cf. State Department of Business Regulation v. Salvation Limited, Inc.*, 452 So.2d 65, 66 (Fla. 1st DCA 1984) (It is “axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute” and that “a rule which purports to do so constitutes an invalid exercise of delegated legislative authority.”).

initiative, would be subject to City Council action in accordance with Section 21.11. On a more macro level, should JEA determine that “it is necessary or appropriate for it to provide, operate or maintain any other utility system or function other than electric, water [sic] wastewater and natural gas, JEA shall by resolution identify such additional utility system or systems or function or functions and indicate its desire to provide such utility service or services or function or functions to the council” for City Council approval. City Charter § 21.04(v).

JEA Opportunity Areas Analysis

There is a great deal of interest right now in ‘the utility of the future,’ but to reach a new paradigm, we cannot ignore the utility of the present, which is facing financial concerns due to low growth and new competition, is undercapitalized in the areas of distribution and transmission infrastructure, and is seeking to offer new services to customers. We will not be able to accomplish significant new goals for decarbonization and distributed generation without addressing the regulatory incentives that have been driving the system for over a century.

Scott at 370. JEA management will look at changes to the status quo within traditional action areas, including cutting costs, increasing prices (i.e. raising rates), and reducing investment in capital expenditures. But that will not be enough. JEA has identified multiple other opportunity areas, some utilized by other utilities within the same challenging and changing landscape, where innovative initiatives may help it address a cash gap while maintaining high performance standards. They are: (1) changing rate structure and/or raising rates, (2) selling more/customized utilities services (including natural gas), (3) acquiring new customers (in Duval County and adjacent counties as well as in non-adjacent counties); (4) selling or leasing additional new products and services (utility and non-utility products and services); (5) cutting operating expenses; (6) cutting the workforce; (7) eliminating JEA’s contribution to the City of Jacksonville; (8) selling JEA assets; (9) acquiring, growing, and operating new utility and non-utility businesses throughout the United States; (10) becoming a joint owner or engaging in a joint venture with utility and non-utility entities; (11) selling a portion of equity to fund growth or deleverage; (12) investing in research and development and intellectual property for monetization; and (13) making investments purposed to accelerate and grow utilities technologies, services, and platforms.

Because of the pertinent governing laws discussed *supra*, any inquiry into JEA’s authority under current law to pursue a certain contemplated initiative will require the following legal analysis with advice of legal counsel:

(1) Does JEA’s contemplated action meet constitutional requirements that it (i) be for a municipal purpose and (ii) either (a) involve joint ownership, construction, and operation of electrical

generation or transmission facilities or (b) have a (paramount) prevailing public purpose if it entails joint ownership with or lends or uses credit for the benefit of a private party? If the answer to either question is no, the action is prohibited. If the answer to both questions is yes, proceed to question two.

(2) Is there specific language in Article 21 authorizing or prohibiting the contemplated action? If the answer is yes, the action is authorized or prohibited, as provided. If the answer is no, proceed to question three.

(3) Does the contemplated action fall within the express authority of JEA to own, manage and operate a utilities system (as strictly defined) (§ 21.01)? If the answer is yes, the contemplated action may be permissible after careful analysis. If the answer is no, the contemplated action generally is prohibited.

Keeping this analysis in mind, this portion of the memorandum first discusses an important constraint common to all opportunity areas – restrictions on JEA’s authority to lend credit and incur debt. It then analyzes the key governing constraints pertaining to each opportunity area.

I. Debt (All Opportunity Areas)

Financing is extremely important in the context of most initiatives, wherever those initiatives fall within the various opportunity areas.

a. Lending credit

Article VII, Section 10, of the Florida Constitution (discussed *supra*) prohibits a Florida public entity from becoming a joint owner or lending or using its credit to aid any private entity except where (1) the (paramount) public purpose prevails over private interest or (2) the public entity is a joint owner of, or gives, lends, or uses its taxing power or credit for the joint ownership, construction, and operation of *electrical generation or transmission facilities*. Thus, fundamentally, JEA cannot become a joint owner of or lend or use its credit to aid any initiative (except an electric generation or transmission facility) that benefits a private party without a public purpose or paramount public purpose, respectively.

b. Obtaining funds

Under Article 21, even where JEA has the general authority to undertake an initiative (with or without City Council approval), JEA’s power to incur debt to fund such undertakings is controlled by the City Council. Subsection (i) of Section 21.04 governs JEA’s issuance and retirement of revenue bonds and certificates for the purpose of financing or refinancing the utilities systems of JEA. It prohibits general obligation bonds. *Id.* Bonds and certificates may be issued by JEA Board resolution but are subject to the approval of City Council of the aggregate principal amount. *Id.* Section 21.04(j) further subjects JEA borrowing other than by bond issuance or revenue certificates for purposes for which

bonds or revenue certificates could be issued to the same Article 21 procedure, including City Council approval. Furthermore, if any initiative involves the transfer of ten percent or more of JEA assets, it requires prior approval of the City Council (City Charter § 21.04(p)) and a referendum approving such ordinance (JACKSONVILLE, FL., ORD. 2018-142-E).

c. General City financial oversight

City oversight related to its budgetary and audit functions with respect to independent agencies (discussed *supra*) likewise may come into play where JEA action involves financing.

II. Raising rates and/or changing the rate structure

JEA is authorized by Charter Section 21.04(f) 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 [the] 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...”

The Florida Public Service Commission (PSC) has jurisdiction over the JEA with respect to a change to JEA’s rate structure (e.g. introduce a preferential rate structure, flat rates, critical peak pricing, rate decoupling, and real time pricing). F.S. § 366.04(2)(b). JEA thus would need to follow PSC process for approval of any such change.

III. Selling more/customized utilities services (including natural gas)

JEA has the ability to increase sales of the current services it offers within its service territory utilizing its current assets and capabilities. City Charter §§ 21.04(c), 21.04(d). Such authority would include offering its customers customized provision of those services, such as increasing renewable-sourced electricity, premium resiliency, and increasing chilled and reclaimed water sales.

IV. Acquiring new customers

a. Duval County and adjacent counties

JEA is authorized to “own, manage and operate a *utilities system* within and without the City of Jacksonville.” City Charter § 21.01 (emphasis added). It additionally has broad authority to furnish and sell utility services. City Charter §§ 21.04(c), 21.04(d). As discussed *supra*, “utilities system” is limited by Charter definition to the consolidated City of Jacksonville and any and all counties adjacent thereto. City Charter § 21.02. Within Duval and adjacent counties, JEA may acquire new customers.²⁰

²⁰ Note that if it does so through territorial agreements with other utilities, such agreements are subject to Florida Public Service Commission jurisdiction. See F.S. § 366.04(2).

b. Non-adjacent counties

As discussed *supra*, “utilities system” is limited by definition to the consolidated City of Jacksonville and any and all counties adjacent thereto. City Charter § 21.02. JEA may not acquire new customers outside this territory.

V. Selling or leasing additional new products and services

a. Utility

Consistent with its Charter, JEA is in the business of selling electricity, water, wastewater services, and reclaimed water. See City Charter § 21.01. Section 21.04(c) of the Charter allows JEA to furnish “electricity, water, sanitary sewer service, natural gas and other utility services”²¹ within and without Jacksonville and to construct and maintain infrastructure²² in public highways and streets in order to do so. Subsection (d) of Section 21.04 further allows JEA to sell utility services and provide transmission or other services to anyone directly or jointly through other utilities or entities *engaged in such services*.

b. Non-utility

As discussed *supra*, JEA generally is restricted by the JEA Charter (§ 21.01) to providing utilities services. Certain provisions within the JEA Charter, however, allow JEA to provide certain limited services and products that do not squarely fall within the traditional utilities space. JEA expressly may, under Charter Section 21.04(p), “transfer, sell, finance, lease or otherwise provide services or products, or by-products, developed or used by JEA incident to the exercise of the powers conferred by [Article 21]” to other electric utilities both within and without the state or to any wholesale or retail customers of JEA, including (but not limited to) the following specific services and products “upon such terms and conditions as JEA shall by resolution fix and determine”:

²¹ Article 21 does not define “other utility services”. The terms “electricity,” “water,” “sanitary sewer service,” and “natural gas” mirror the Section 21.02 utility systems definition’s component terms. If “other utility services” likewise mirrors utilities systems, then the term would mean services related to additional utilities systems, as may be designated by City Council.

²² Generally speaking, JEA has the authority to contract for services necessary to expand its infrastructure. Section 21.09 gives JEA authority to enter into contracts “relating to the construction, reconstruction, repair, operation or maintenance of the utilities system or the purchase of supplies, equipment, machinery and materials for the utilities system or the contracting or otherwise purchasing for any advisory, professional or any other services. . . .”. This Section further provides, “[n]othing in this chapter shall be construed to limit the power of JEA to construct, repair, or improve the utilities system, or any part thereof, or any addition, betterment or extension thereto, directly by the officers, agents, and employees of JEA, or otherwise by contract.” See also JEA Procurement Code (February 1, 1996, as amended); JEA Operational Procedures (amended June 2017). Section 21.04(l) more specifically allows JEA to enter into contracts that JEA deems necessary or desirable “for the prudent management of JEA funds, debts, or fuels . . . including, without limitation, . . . contracts for the future delivery or price management of power, energy, . . . or other related commodities.”

[E]nergy performance contracting, water, sewer and natural gas (and any other utility service hereafter provided by JEA) contracting, power marketing services, the testing and maintenance of customer-owned facilities such as transformers, capacitors, lighting, HVAC systems, water cooling and heating systems, energy management systems, etc.; the temporary leasing of JEA facilities such as oil storage tanks; the supply of steam or other thermal energy; the provision of specially conditioned power on the premises of customers and the provision of services or products to build, transfer, lease, finance, operate or sell cogeneration facilities, small power production facilities, specially conditioned power, energy conservation, energy efficiency and dispersed generation

City Charter § 21.04(p). While some products and services included in this list likely would be considered obvious utility-type services, others may not; because they are listed in the JEA Charter, JEA may provide any of them in accordance with the subsection (p) terms. JEA may still provide *non-listed* services, products, or by-products *developed or used by JEA in the delivery of water, wastewater, and natural gas services* incident to the exercise of its Article 21 powers but only after providing at least 30 days written notice to the City Council Auditor of such activities. *Id.*

Another potential avenue by which JEA could explore the sale of new products and services is Charter Section 21.04(r), which provides JEA the authority to “publicize or otherwise participate in projects, systems, programs or measures to promote or implement electric and natural gas energy, electrotechnologies, water, wastewater and natural gas conservation and efficiency, power conditioning and load management.”

Initiatives to sell new products or services, therefore, are limited to those listed subsection (p) products and services or other types of new products and services that either (1) are services, products, or by-products developed or used by JEA in the delivery of water, wastewater, and natural gas services incident to its other express Article 21 powers or (2) fall under the ambit of Section 21.04(r) (conservation and efficiency, power conditioning and load management). New product or services sales that fall outside Sections 21.04(p) and 21.04(r) generally are prohibited.

VI. Cutting operating expenses

Consistent with its power to finance, manage, and operate the utilities system (City Charter § 21.04(a)), JEA has the authority to cut its operating expenses. Its annual budget, including “estimated requirements for operations and maintenance expenses,” must be presented by July 1 for the ensuing year and is subject to City Council and Mayoral approval in accordance with Article 14 of the City Charter.

VII. Cutting the workforce

JEA has full and independent authority to terminate employees.²³ City Charter § 21.08.

VIII. Eliminating JEA's contribution to the City of Jacksonville

JEA does not have the authority to reduce or eliminate its assessment obligations.²⁴ JEA is required by Article 21 to pay the City a combined assessment for the electric and water and sewer systems following a proscribed calculation. City Charter § 21.07(c). It may utilize any of its revenue, regardless of source, to satisfy its annual assessment obligations. City Charter § 21.07(f). JEA also must pay to the City a franchise fee. City Charter § 21.07(l). By Charter, the City Council additionally has the right to appropriate annually a portion of the available revenues of each utility system other than the electric, water, and sewer systems (e.g. natural gas systems). City Charter § 21.07(e). The Charter contemplates revisiting the assessment amount only every five years (*Id.* at (d)) outside of a narrow avenue for relief²⁵.

IX. Selling JEA assets

JEA may, under City Charter Section 21.04(b)(4), with emphasis added, “sell, lease or otherwise transfer, with or without consideration, any such [“property, equipment, facilities or property rights whatsoever determined by JEA to be necessary or convenient in connection with the operation, promotion, financing, construction, management, improvement, extension, enlargement, reconstruction, re-equipment, maintenance, repair, decommissioning or disposal of the utilities system or any part thereof”] property when in JEA’s discretion it is no longer needed or useful, or such sale, lease or transfer otherwise is in the best interest of JEA, all upon such terms and conditions as JEA shall by resolution fix and determine.” *Id.* JEA may not “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 [sic] without approval of the council,” City Charter § 21.04(p), and a referendum

²³ While JEA has the authority to terminate employees, there may be other legal and contractual obligations and processes that would need to be considered.

²⁴ Even if it did have such authority, unilateral elimination or reduction of JEA’s assessment may raise concerns in the context of the constitutional municipal purpose requirement. Such action would not, on its face, appear to violate Article VII, Section 10 of the Constitution.

²⁵ Subsection (d) of Section 21.07 directs City Council, “If either federal or state laws are enacted or regulatory actions are taken that adversely impact JEA’s financial position for the electric utility system or the water and sewer utility system, the council shall promptly consider enacting such changes to this section 21.07 as may be negotiated by JEA and the council to mitigate such adverse impact.” Therefore, if JEA identifies certain new laws or regulations (for example, the pending “Right to Competitive Energy Market for Customers of Investor-Owned Utilities; Allowing Energy Choice” ballot initiative Amendment, if passed and implemented, may have an adverse financial impact on JEA) having a negative financial impact, it can petition the City Council under Section 21.07 to consider reducing the annual assessment, even if reevaluation is not timely under subsection (d).

approving such ordinance, JACKSONVILLE, FL., ORD. 2018-142-E.²⁶ The Office of General Counsel has opined that ten percent refers to the assets of JEA (Opinion dated February 20, 2018) but does not include the sale of assets that are antiquated, outdated, no longer needed, or no longer used in the ordinary course of business (Opinion dated December 21, 2018).

X. Acquiring, growing, and operating businesses throughout the United States

There is specific JEA Charter language pertaining to acquisition initiatives. Section 21.04(a) of Article 21 gives JEA the power to “construct, own, acquire, establish, improve, extend, enlarge, reconstruct, reequip, maintain, repair, finance, manage, operate and promote the utilities system.” Subsection (b) allows JEA to acquire for use of the same utilities systems real and personal property. Any acquisition, complete or partial, that involves the issuance of debt requires City Council approval of the aggregate principal amount. City Charter §§ 21.04(i) and (j).

As discussed *supra*, JEA is authorized to “own, manage and operate a utilities system within and without the City of Jacksonville.” City Charter § 21.01. “Utilities systems” means, “[T]he electric utility system and the water and sewer utility system now operated by JEA which shall include . . . any ‘system’ or ‘project’ authorized pursuant to the provisions of Chapter 80-513 [Laws of Florida] . . . and any natural gas utility system to be operated in the future by JEA together with any other additional utility systems as may be hereafter designated as part of the utilities systems . . .”. City Charter § 21.02. “[S]ystem or project” is defined by Section 1 of Chapter 80-513 as, “electric generating plants and transmission lines and interconnections and substations for the generation, transmission and exchanging of electric power and energy both within and without the boundaries of the consolidated City of Jacksonville and in any and all counties adjacent thereto.”

Thus, while JEA may acquire, grow, and operate businesses under JEA Charter Sections 21.04(a) and (b) within Duval County and adjacent counties, it may not do so outside that territory.

XI. Becoming a joint owner or engaging in a joint venture

a. With another utility

Consistent with Constitution Article VII, Section 10(d), there is specific enabling JEA Charter language pertaining to certain partnership-related initiatives. Section 21.04(n) allows JEA to enter into joint project agreements for the purpose of implementing a “project” in accordance with Florida Statutes Section 361, Part II (the “Joint Power Act”). “Project” for the purpose of subsection (n) is

²⁶ General state law places additional conditions, which may include undertaking a public interest determination, on the purchase, privatization, or sale of a water, sewer, or wastewater reuse utility. *See, e.g.*, F.S. § 180.301 (Purchase, sale or privatization of water, sewer, or wastewater reuse utility by municipality).

defined at F.S. § 361.11(1) as “a joint electric power supply project . . . for the joint generation or transmission of electrical energy, or both . . .” and is limited to projects with electric utilities (as defined more specifically at F.S. § 361.12). Subsection (o) similarly allows JEA to enter into agreements with other public or private electric utilities to implement joint electric power projects in accordance with Chapter 80-513²⁷, Laws of Florida, as amended, which requires a two-thirds vote of City Council to approve the agreement and generally limits agreement terms to 40 years.

JEA additionally has express authority to enter into any contracts, leases, or other agreements with other governmental bodies for “the purpose of carrying out any of the provisions, powers or purposes of this article.” City Charter § 21.04(u). It is prohibited, however, from appropriating any funds for payments, contributions, or transfer to any entity other than those whose *primary* purpose directly involves any utility or related matters. *Id.* And if any project involves the transfer of ten percent or more of JEA assets, it requires prior approval of the City Council (City Charter § 21.04(p)) and a referendum approving such ordinance (JACKSONVILLE, FL., ORD. 2018-142-E).

Thus, under current Charter language, JEA generally may enter into contracts with electric utilities or governmental bodies in the utility industry and partnership arrangements with other electric utilities in order to expand its ability to provide more customers more utility services. Such initiatives may require direct City Council approval and will require City Council approval if they involve new debt.

b. With non-utility private entities

As discussed *supra*, Article VII, Section 10 prohibits a Florida public entity from becoming a joint owner with or lending or using its credit to aid any private entity. The only exceptions to this prohibition are for certain projects involving other utilities or governmental bodies (as discussed *supra*) or where there is a prevailing (paramount) public purpose. Article VII, Section 10 and the public purpose analysis are discussed in more detail herein at pages 5 – 7. JEA generally, therefore, cannot enter into joint ownership or joint ventures with non-utility private entities.

XII. Selling a portion of equity to fund growth or deleverage

JEA does not have the ability to sell equity to retire debt. JEA faces a structural barrier to retiring debt through mechanisms involving equity because JEA, as a publicly owned municipal utility, has no equity.

²⁷ Section 1 of Chapter 80-513 authorizes JEA to “acquire, build, construct, erect, extend, enlarge, lease, improve, furnish, equip, own and operate” “projects,” which are defined as “electric generating plants and transmission lines and interconnections and substations for the generation, transmission and exchanging of electric power and energy both within and without the boundaries of the consolidated City of Jacksonville and in any and all counties adjacent thereto.”

XIII. Investing in research and development and intellectual property for monetization

There is specific JEA Charter language pertaining to R&D and IP initiatives. Subsection (r) of City Charter Section 21.04, discussed *supra*, provides an avenue for JEA to explore R&D and IP projects independently or jointly if such projects involve innovation within electric and natural gas energy, electrotechnologies, water, wastewater and natural gas conservation and efficiency, power conditioning and load management arenas. The subsection expressly contemplates JEA engaging in R&D related to such topics. *Id.*

City Charter Section 21.09 provides another possible route for initiatives involving R&D and IP. It gives JEA authority to enter into contracts “relating to the construction, reconstruction, repair, operation or maintenance of the utilities system” and emphasizes JEA’s power to “improve the utilities system, or any part thereof, or any addition, betterment or extension thereto” directly or by contract. *Id.*

Article 21 Sections 21.04(r) and 21.09 projects generally would not require City Council approval but would still be subject to public records laws considerations (which could be significant) as well as the financing constraints discussed herein. Initiatives involving R&D and IP falling outside the umbrella of conservation and efficiency, power conditioning and load management, and/or improvement of the utilities system or otherwise directly related to an express Charter power generally would be prohibited.

XIV. Making investments purposed to accelerate and grow utilities technologies, services, and platforms.

As discussed *supra*, Article VII, Section 10 prohibits a Florida public entity from becoming a joint owner with or lending or using its credit to aid any private entity.²⁸ The only exceptions to this prohibition are for certain projects involving other utilities or governmental bodies (as discussed *supra*) or where there is a prevailing (paramount) public purpose. Making investments in a private equity fund or other mechanism run by a third party would seem to involve the imposition of a new financial liability upon JEA which in effect results in the creation of a debt for the benefit of private enterprises and thus would run afoul of Article VII, Section 10 absent a paramount public purpose. JEA generally, therefore, cannot make investments in a private equity fund.

²⁸ Article VII, Section 10 and the public purpose analysis are discussed in more detail herein at pages 5 – 7.