

OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 255-5050



MEMORANDUM

TO: JEA FILE

FROM: Jason R. Gabriel, General Counsel *JRG*

RE: JEA Long Term Performance Unit Plan (the "PUP")

DATE: November 12, 2019

The JEA Long Term Performance Unit Plan, approved by the JEA Board on July 23, 2019 (the "PUP"), was proposed by JEA as a voluntary employee benefit program designed as a deferred compensation plan that would have allowed full-time JEA employees to personally invest in the growth of JEA in the next three years. It was developed by JEA in consultation with and reliance on outside special legal counsel (Foley & Lardner and Pillsbury Winthrop Shaw & Pittman).

At the time of Board approval on July 23, 2019, the PUP was understood by OGC in general, conceptual terms as an employee incentive program. Since enrollment in the PUP would not take place until December 2019 with possible subsequent implementation of the plan in January 2020, OGC was assured by JEA that it had the few months from the time of the Board meeting on July 23, 2019 to the enrollment date to learn of the details of the plan, review outside counsel's findings as to the validity and legality of the plan, and to independently research and provide OGC's position on the plan at the conclusion of that process.

Because of how unique this suggestion was to the government sector, it was important to OGC to conduct its own research with respect to the validity and legality of the plan under federal, state, and local law, with a special emphasis on what is permitted, required, or prohibited under the Charter. Through the course of several conferences and meetings between outside counsel for JEA, OGC attorneys, and JEA management, OGC researched and conferred on the issues related to the plan.

This internal review resulted in a final determination by OGC and a recommendation to JEA that the proposed PUP, in its current form, would not be authorized under the City Charter, and had outstanding issues and unanswered questions related to state, local, and federal law. In addition, because ultimately it is City funds that are in question, *at a minimum*, Council approval would be required for the plan to be implemented. I expressed this legal position in several conversations with JEA. OGC's review and discussions occurred during the months of September, October and into the beginning of November. OGC's final position as to the PUP prompted the need for a formal meeting with outside counsel and JEA to discuss the outstanding legal issues prior to any further implementation of the plan.

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Accordingly, on November 5, 2019, I met with Aaron Zahn and Herschel Vincyard from JEA, Lawsikia Hodges and Lynne Rhode from OGC, Kevin Hyde (special legal counsel with Foley & Lardner), Steve Amdur and Jessica Lutrín by phone (special legal counsel with Pillsbury Winthrop Shaw & Pittman), to discuss OGC's issues with the PUP; to note and categorize the current legal deficiencies with the plan, and to outline minimum requirements necessary to continue with any sort of employee incentive plan or deferred compensation plan. The main purpose of the meeting was to review these ultimate legal concerns regarding the PUP, that though were brought up in some form or another to JEA over the course of the preceding several weeks, needed to be officially dealt with in the appropriate manner.

On that date, the following concerns were brought up by OGC and discussed with JEA: Upon our review, the PUP is seemingly *akin* to an employee stock option plan, and for similar size *private* multi-billion dollar corporations, employee programs like the PUP may be the norm. However, the PUP would be unique to the public sector and founded on the fundamental principle that a governmental entity, such as JEA, may underwrite and offer for sale a portion of JEA's value as an "investment product" pursuant to Section 112.215, *Florida Statutes*. This fundamental PUP principle is not only a novel concept to our Consolidated Government but is also novel to government concepts and principles in general. Further, in addition to the more fundamental issues associated with the PUP, there were other issues cited, including allowing non-JEA employees in the plan and various potential adverse tax consequences.

Accordingly, we advised that the current plan should be officially dissolved. Should JEA insist on pursuing some version of the PUP as currently proposed in the future, the following minimum prerequisites must be met:

- 1) City Council review and approval (via legislation) authorizing JEA to sell a portion of JEA's value as an "investment product" under Section 112.215, Florida Statutes;
- 2) An opinion in accordance with Section 112.215, Florida Statutes from an appropriate federal agency or agencies (i.e., Internal Revenue Service (IRS)) stating that any compensation deferred under the PUP would not be included in a participating employee's taxable income under federal or state law until it is actually received;
- 3) An opinion from the IRS indicating that JEA, as a governmental entity, will incur no negative or adverse tax consequences or penalties under the PUP;
- 4) Removal of any PUP requirement that directly or indirectly obligates JEA to pay any excise tax, interest or penalties under the IRS Code incurred by a participating employee under the PUP;
- 5) Removal of any non-JEA employees as participants in the PUP; and
- 6) Any other applicable requirements under state and federal law necessary to implement and administer the PUP.

Based on this advice from our office, I was informed that JEA would not proceed with the PUP.

On November 12, 2019, the JEA CEO sent a letter to me informing me officially that JEA was "postponing indefinitely" the PUP. On that same date I, in turn, sent JEA a letter reiterating that there were outstanding legal issues with the plan as currently structured.

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