BEFORE THE SUPREME COURT OF THE STATE OF [redacted]

CASE NO. 62,647

STATE OF FLORIDA, and the

taxpayers, property owners and citizens, including non-residents owning property or subject to taxation therein, of Leon County, Florida; and the Cities of Alachua, Florida; Bartow, Florida; Clewiston, Florida; Ft. Meade, Florida; Green Cove Springs, Florida; Homestead, Florida; Jacksonville Beach, Florida; Kissimmee, Florida; Leesburg, Florida; Moore Haven, Florida; Newberry, Florida; St. Cloud, Florida; Starke, Florida; and Vero Beach, Florida; the foregoing being municipal corporations organized and existing under and by virtue of the laws of the State of Florida, and the Taxpayers, Property Owners and Citizens, including non-residents owning property or subject to taxation within any of the foregoing said Cities; and the holders of any outstanding debt obligations previously issued by any of said Cities payable from the revenues of such Cities' electric or integrated utility system; the Ft. Pierce Utilities Authority, and the Taxpayers, Property Owners, and Citizens of the City of Ft. Pierce, Florida, including non-residents owning property or subject to taxation therein, and the holders of any outstanding debt obligations previously issued by said Utilities Authority; the Utility Board of the City of Key West, Florida, and the Taxpayers, Property Owners and Citizens of the City of Key West, Florida, including non-residents owning property or subject to taxation therein, and the holders of any outstanding debt obligations previously issued by said Utility Board; the Lake Worth Utilities Authority, and the Taxpayers, Property Owners and Citizens of the City of Lake Worth, Florida, including non-residents owning property or subject to taxation therein, and the holders of any outstanding debt obligations previously issued by said Utilities Authority; the Utilities Commission, City of New Smyrna Beach, Florida, and the Taxpayers, Property Owners and Citizens of the City of New Smyrna Beach, Florida, including non-residents owning property or subject to taxation therein, and the holders of any outstanding debt obligations previously issued by said Utilities Commission; and the Sebring Utilities Commission, and the Taxpayers, Property Owners, and Citizens of the City of Sebring, Florida, including non-residents owning property or subject to taxation therein, and the holders of any outstanding debt obligations previously issued by said Utilities Commission; the foregoing Boards, Commission, and Author-

ities being public bodies corporate and politic, organized and existing under and by virtue of the laws of the State of Florida, corporation,

Appellant,

v.

FLORIDA MUNICIPAL POWER AGENCY,

a separate legal entity, organized and existing under and by virtue of the Laws of the State of Florida,

Appellee.

ANSWER BRIEF OF APPELLEE

FREDERICK M. BRYANT, HOWARD E. ADAMS, and CATHI C. O'HALLORAN of Pennington, Wilkinson, Gary & Dunlap
Post Office Box **3985**
Tallahassee, Florida **32303**
(904) 385-1103

Freeman, Richardson, Watson and Kelley
1200 Barnett Bank Building
Jacksonville, Fla. **32202**
(904) 353-1264

Mudge Rose Guthrie & Alexander
20 Broad Street
New York, N. Y. **10005**

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PRELIMINARY STATEMENT

The Florida Legislature in 1982 made significant amendments to Chapter 163 and Chapter 361, Fla. Stat., (1981) through passage of Chapter 82-53, Laws of Florida (1982).

Throughout this brief, wherever statutory sections of these chapters are cited, use of the words "as amended" refers to this section as amended by Chapter 82-53, Laws of Florida (1982).

Throughout this brief citations to the joint appendix are denoted: (App. Tab ____).

This Court has jurisdiction of this appeal pursuant to Article V, Section 3(b)(2), Fla. Const., Chapter 75, Fla. Stat. (1981) and Section 163.01(7)(c), Fla. Stat. (1981), as amended by Section 1 of Chapter 82-53, Laws of Florida (1982).

This Court further has jurisdiction to consider and rule upon the validity and binding effect of the underlying contracts and agreements and the terms and conditions thereof which form the security for the bond issue. See Chapter 75, Fla. Stat. (1981) and see Section 163.01(15)(e), Fla. Stat., as created by Section 1 of Chapter 82-53, Laws of Florida (1982).

STATEMENT OF THE CASE AND FACTS

Florida Municipal Power Agency ("FMPA"/Appellee) is a separate legal entity created under statutory authorization granted by Chapter 163, Part I, Fla. Stat., ("Interlocal Act") and Chapter 361, Part 11, Fla. Stat. ("Joint Power Act"). Both the Interlocal Act and Joint Power Act were substantially amended by the Florida Legislature through Chapter 82-53, Laws of Florida, (1982) (the "1982 Amendments"). The Interlocal Act and Joint Power Act as amended by the 1982 Amendments are herein collectively referred to as the Enabling Acts. The Enabling Acts seek to implement Article VII, Section 10(d), of the Fla. Const.

FMPA is essentially a "co-operative" of Florida's municipal electric utilities. Similar types of "joint action agencies" such as FMPA are in existence in many states. The proposed joint venture between FMPA and FP&L is not the first joint ownership of a nuclear unit in Florida. The Crystal River Nuclear plant is jointly owned by Florida Power Corporation and eleven municipal electric utilities and was the first joint venture pursuant to the Joint Power Act. However, the FMPA/FP&L joint venture is the first for FMPA.

FMPA was created to allow joint ventures in order to take advantage of economies of scale and to avoid duplicative expenses if the municipalities were to purchase their shares individually. (Testimony of Calvin Henze, Transcript, pp. 12-23, App. Tab S.)

FMPA as Appellee otherwise adopts and makes a part hereof, the Statement of Case and Facts as set forth in the Brief of Appellant, the State Attorney.

ARGUMENT

POINT I

THE ENABLING ACTS UNDER WHICH FMPA WAS ORGANIZED AND EXISTS AND THE BOND RESOLUTION, PROJECT AGREEMENTS, POWER SALES AND PROJECT SUPPORT CONTRACTS ARE CONSTITUTIONAL.

The provisions of the Enabling Acts and the St. Lucie Unit No. 2 Participation Agreement, the Reliability Exchange Agreement, the Replacement Power Agreement and the Tax Indemnity Agreement ("Project Agreements") and the Bond Resolution, Power Sales and Project Support Contracts are constitutional since (A) the statutes were properly enacted as general rather than special laws; (B) the statutes and contracts do not unlawfully pledge the public credit; (C) the statutes and contracts do not result in a pledge of ad valorem taxation without voter approval; and (D) the statutes and contracts do not unlawfully delegate municipal powers.

A. GENERAL V. SPECIAL LAW.

The first constitutional issue raised is that the Enabling Acts should have been passed as special laws pursuant to Sections 11.02-11.04, Fla. Stat. (1981). However, the Enabling Acts are of general applicability and were properly adopted by the Legislature.

The traditional criterion for distinguishing a general law from a special law is whether it relates to "persons and things of a class" rather than to "particular persons or things within a class." *Carter* v. *Norman*, 38 So.2d 30 (Fla. 1948). *Collier* v. *Cassady*, 63 Fla. 390, 57 So. 617 (1912) described the issue as whether it is "potentially applicable to all political subdivisions

of the same class," even though at the time of its passage, it applies to only some of them. By these standards, the Enabling Acts are clearly general laws, for they potentially encompass every electric utility in the State on June 25, 1975, which is, or may in the future become, a participant in a joint power project.

The State Attorney contends that the Enabling Acts are special laws because they are limited in applicability to a closed class consisting of electric utilities in operation on June 25, 1975. This contention is without merit. *State* v. *Florida State Turnpike Authority*, *80* So.2d 337 (Fla. 1955), dealt with a general law which authorized the construction of a turnpike between Broward and St. Lucie counties. The application of the law was thus limited to the "closed class" of Florida counties *i.e.*, those through which the turnpike would pass. The court found that the "very nature of the Act rescued it from [the] category of special law," for it formed a part of the highway network which facilitates travel for the tourist industry and Florida business in general and potentially affected the entire state, directly or indirectly. 80 So. 2d at 344. Analogously, the Project will form part of a statewide network of electric generation and transmission facilities of direct and indirect benefit to the State as a whole. *State* v. *City* of *Miami Beach*, 234 So.2d 103 (Fla. 1970) involved a law permitting the levy of a resort tax in counties within a specified population bracket whose charters authorized, as of a date certain, such a tax. This Court held the statute to be general rather than special, although its application extended to only those counties qualifying on the specified date. The court again found statewide

benefit and reasoned that the law was general in view of "this state's interest in the promotion and further development of the tourist industry." 234 So.2d at 106. FMPA suggests that these precedents are controlling and the Enabling Acts were properly adopted as general laws.

B. PLEDGE OF PUBLIC CREDIT.

The State Attorney asserts that the Enabling Acts contravene the constitutional prohibition on the loan of credit contained in Article VII, Section 10, Fla. Const. The Enabling Acts and the various agreements applicable to the St. Lucie Project (hereinafter referred to as the "Project") are constitutional because they fall squarely within the exception to the prohibition contained in Section 10(d) which sanctions laws authorizing:

> (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. [Emphasis added].

The State Attorney contends that the Project is not exempt from the loan of credit prohibition because Section 361.17 of the Joint Power Act implies that the transactions effected under such Act are not governed by Section 10(d). FMPA asserts Section 361.17 was enacted to insure that private utilities could not utilize the Joint Power Act to become exempt from taxation. The Joint Power Act and the 1982 Amendments provide that their purpose is to implement the provisions of Article VII, Section 10(d). Section 361.10, Fla. Stat. (1981); Section 8 of Chapter 82-53, Laws of Fla., (1982). Thus, the Legislature has clearly expressed its intention that the Enabling Acts and joint projects

shall be encompassed within the joint power project exception to Article VII, Section 10.

Even if Section 10(d) were inapplicable and the transaction were subject to the constitutional prohibition, a close review of the Enabling Acts, and the various agreements for the project reveals that there is no pledge of the credit of the members of FMPA participating in the Project (the "Participants"). FMPA has no taxing powers and is prohibited from obligating the Participants to levy taxes. §163.01(7)(c), Fla. Stat., as amended. In addition, the Participants have not pledged any tax or general revenues for payment of their obligations under the Power Sales and Project Support Contracts. As discussed at Point I(C), under the the Bond Resolution and Contracts, the Participants are required to make payments solely from the revenues of their utility systems.

The Florida courts have consistently held that the loan of credit prohibition does not apply when: (1) there is a paramount public purpose to the debt issuance and (2) the bonds are payable from revenues from a "special fund" so that the municipality is not obligated to levy taxes. ***See State v. Tampa Sport Authority,*** 188 So.2d 795 (Fla. 1966); ***State v. City of Jacksonville,*** **53** So.2d **306** (Fla. 1951); ***State v. City of Miami,*** **113** Fla. 280, 152 So. **6** (1933). The Project and the related Bonds serve a paramount public purpose in securing reliable cost-efficient electric energy for the citizens of Florida and reducing dependence on foreign oil. ***(See*** Testimony of C. Henze, Transcript pp. 12-13, App. Tab S). The Florida Legislature recognized this by the passage of the Joint Power Act and the unanimous passage of the 1982 Amendments. The "special fund" doctrine states that the

loan of credit prohibition is inapplicable where bonds are payable solely from a specific source of funds rather than general tax revenues. ***See Wald*** v. ***Sarasota County Health Facilities Authority,*** 360 So.2d 763, 768 (Fla. 1978). The source of payments by FMPA to the Bondholders are payments made by the Participants under the Power Sales and Project Support Contracts and the Participants are only obligated to make such payments from the revenues of their electric systems. FMPA's Bonds are thus payable from a special fund.

The State Attorney next argues that the default provisions of the Participation Agreement violate the loan of credit prohibition. In the event of a default by FMPA, Section 33.4.1 of the Participation Agreement provides that FP&L may suspend FMPA's right to receive power and energy from the Project and Section 33.4.3 gives FP&L the option to purchase FMPA's interest in the Project in the event of default. Such default provisions are authorized by Section 163.01(15)(b) (1) and (2), Fla. Stat. Further, the default provisions do not result in either a direct or indirect pledge of the taxing power or credit of FMPA or any Participant. FMPA does not possess any taxing power and cannot compel the Participants to levy taxes to satisfy their obligations under the Power Sales and Project Support Contracts. §163.01(7)(c) and Point I(C). Section 4(g) of the Power Sales Contracts and Section 3(i) of the Project Support Contracts expressly state that the Participants are not "obligated or compelled to levy ad valorem taxes to make payments" thereunder. The default provisions are valid contractual provisions which are authorized by statute and should be upheld.

The State Attorney argues that Section 19(c) of the Power Sales Contracts (App. Tab M) which requires an assumption by the remaining Participants of a portion of the Power Entitlement Share and related payment obligations of a defaulting Participant, known as "step-up" provision, violates Article VII, Section 10, Fla. Const. (such assumption also extends to obligations under the Project Support Contracts). The "step-up" is limited to 125% of a Participant's original entitlement share and becomes operative only if other Participants do not voluntarily assume the share of the defaulting Participant. There is statutory authorization for Section 19(c) at Section 163.01(15)(b)1, Fla. Stat.

In ***Frank*** v. ***City of*** *Cody,* 572 P.2d 1106 (Wyo. 1977), the step-up provision in an agreement between a corporation and participants in a joint municipal agency was challenged as constituting a "lending or giving of the credit of the Agency to a private corporation ..." 572 P.2d at 1111.[1] The court rejected such contention, stating:

> While...the agreement...does provide for making up deficiencies created by a defaulting participant, it also provides that a pro rata share of the portion in System entitlements, owned by the defaulter, shall accrue to the benefit of the other participants. This neutralizes any concept of giving or lending credit to anyone since something is received in return. The constitutional prohibition against a municipality lending its credit to a private corporation has no application when there is an exchange of consideration between the parties. [572 P.2d at 1111-12]

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[1] ***See also Cremer v. Peoria Housing Authority,*** 339 Ill. 579, 78 N.E. 2d 276 (1948); ***Bair*** v. ***Layton City Corporation,*** 6 Utah 2d 138, 307 P.2d 895 (1957); ***Los Angeles Gas & Electric Corporation v. City of Los Angeles,*** 188 Cal. 307, 205 P. 125 (1922), all of which upheld a "step-up" provision.

As in ***Frank v. City of Cody,*** the Power Sales Contracts increase the non-defaulting Participants' entitlements to capacity and energy corresponding to the increase in the obligations for which they are responsible. The assumption of additional shares in the Project by non-defaulting Participants will keep the Project a viable source of electricity for such non-defaulting Participants. A default by one Participant could result in FMPA defaulting under the Participation Agreement and on the Bonds and all the Participants losing their right to obtain energy from the Project. The purpose of the Florida statutes authorizing the joint participation in electric projects is to permit electric utilities to share both the benefits and associated economic risks derived from the pooling of their revenues and resources, for the ultimate benefit of the Participants' consumers. Thus, the **"step-up"** provision of the Power Sales Contracts is valid because it is authorized by statute, does not result in an unconstitutional pledge of credit, and serves a public purpose.

The provision of the Project Support Contracts providing for payments by the Participants regardless of project completion or operation and regardless of level of operation are constitutional. Section 163.01(15)(b)(7), Fla. Stat. expressly authorizes "take or pay" provisions, and case law provides independent support for their validity.

Although there is no Florida case law directly on point, courts in other jurisdictions have concluded that where payments on the contracts are derived only from revenues of a project or a "special fund," take or pay contracts are valid and enforceable. ***See,*** Board of ***Commissioners of Louisiana Municipal Power Commission v. All Taxpayers,*** 360 So.2d 863 (La. 1978) (unconditional obligation

to pay for power upheld since payments were to come solely from revenues of municipal electric systems); ***Murray City Corp. v. Brown,*** No. 79-16808 (Utah Jan. 25, 1980) ***State ex rel Mitchell v. City of Sikeston,*** 555 S.W. 2d 281 (Mo. 1977) (en banc) (take or pay contract upheld where the municipalities' obligations were payable solely from the revenues generated from the sale of electricity); ***Barlow*** V. ***Clearfield City Corp.,*** 1 Utah 2d 419, 268 P.2d 682 (1954) (unconditional obligation to make payments for water found reasonable use of city's funds since city needed the water and there was no proof of bad faith); 56 ***Am.*** Jur. 2d, Municipal Corporations $648 (1971). The arguments used in these cases to uphold such contracts in other jurisdictions appear in Florida case law. Numerous Florida cases have recognized the special fund doctrine.[2] This Court should validate the take or pay provisions on the grounds that the take or pay provisions are authorized by the Legislature and they are secured solely by a special fund -- the revenues of the Participants' electric systems.

The State Attorney also argues that FMPA's agreement to indemnify FP&L for taxes and for its negligence in the Participation Agreement violate Article VII, Section 10. As discussed in Point I (C), because FMPA has no taxing power and such indemnity payments will be made solely from revenues of the Participants' electric systems, there is no use of taxing power to benefit FP&L.

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[2] ***State v. City of Miami,*** 113 Fla. 280, 152 So. 6 (1933); ***Wald v. Sarasota County Health Facilities Authority,*** 360 So.2d 763 (Fla. 1978); ***Nohrr*** v. ***Brevard County of Educational Facilities Authority,*** 247 So.2d 204 (Fla. 1971); ***State*** v. ***City of Pensacola,*** 135 Fla. 239, 184 So. 768; 13 Fla. Jur. 2d ***Counties*** $280 (1979).

C. PLEDGE OF AD VALOREM TAXATION WITHOUT VOTER APPROVAL.

Article VII, Section 12, Fla. Const. authorizes municipalities and certain other entities with taxing power to issue indebtedness payable from ad valorem taxation only upon voter approval. FMPA is not subject to the constitutional referendum requirement of Article VII, Section 12, because it is not expressly included in the list of entities subject to such provision, It is a separate legal entity -- separate from the municipalities, boards, commissions or authorities which are its members. In addition, FMPA has no taxing power and it cannot obligate its members to utilize their taxing power to meet their obligations under the Power Sales and Project Support Contracts. In addition, Section 4(g) of the Power Sales Contracts and Section 3(i) of the Project Support Contracts state that the Participants are not obligated to utilize taxing power to make payments under such contracts.

Even if Article VII, Section 12 were applicable to FMPA, the present transaction in no way violates such constitutional provision. This provision does not require voter approval where indebtedness is payable solely from sources other than ad valorem taxes and does not otherwise pledge the municipalities' taxing power. *State v. Orange County,* 281 So.2d 310 (Fla. 1973); ***Orange*** *County Civic Facilities Auth.* v. *State,* 286 So.2d 193 (Fla. 1973). This Court has held that Article VII, Section 12 does not apply where bonds are payable from revenues of a project.

> This Court very early held that article IX, section 6 of the Constitution of 1885 [the predecessor of Article VII, Section 123 did not require a referendum when bonds were proposed to be sold to finance construction of a public works project that...would generate revenue sufficient to repay the bonds without any supplemental allocations of

tax revenues to that purpose. *[State v. Miami Beach Redevelopment Agency,* 392 *So.* 2d 875, 897 (Fla. 1980).]

See also *Hope* ***v. City of Gainesville,*** 195 So.2d 849 (Fla. 1967). Several cases also hold that indebtedness issued to pay for a utility which is to be paid solely from the income of such utility does not violate Article VII, Section 12. ***E.g., State v. City of Jacksonville,*** 159 Fla. 328, 31 So.2d 385 (1947), ***State v. City of Pensacola,*** 143 Fla. 823, 197 So. 520 (1940).

Article VII, Section 12, has also been interpreted to require voter approval for the issuance of debt which is (1) directly secured by the pledge of the municipality's taxing power or (2) indirectly secured by ad valorem taxation by creating a mortgage or lien on the municipality's property. ***See,*** Hollywood, ***Inc. v. Broward County,*** 90 So.2d 47 (Fla. 1956); ***Boykin v. Town of River Junction,*** 121 Fla. 902, 164 ***So.*** 558 (1935). There is neither a direct nor indirect pledge of ad valorem taxation in the present case. The provisions of the Bond Resolution, and Power Sales and Project Support Contracts establish that ad valorem taxes are not pledged. The purchase of the Project will be financed from bond proceeds. The payments on the bonds will be secured by (i) bond proceeds, (ii) payments under the Power Sales and Project Support Contracts, (iii) revenues, and (iv) funds established under the Bond Resolution. (Bond Resolution, §501, App. Tab L). Additionally, Section 4(g) of the Power Sales Contracts (App. Tab M) and Section 3(i) of the Project Support Contracts (App. Tab N) expressly state Participants are not obligated to make payments from ad valorem taxation, and that the payment obligation shall not constitute a lien on property of the Participants.

In addition, the pledge in the present case does not constitute an indirect pledge of ad valorem taxes by creating a mortgage on municipal property. This Court has required voter approval for a contract which mortgages municipal property on the rationale that the municipality will levy ad valorem taxation to prevent foreclosure on this property; the mortgage on municipal property is seen as an indirect pledge of ad valorem taxes. See ***Boykin v. Town of River Junction, supra; Hollywood, Inc. v. Broward County, supra.***

Both ***Hollywood*** and ***Boykin*** involved a direct mortgage on municipal property. In ***Hollywood,*** this Court held that acquisition of property subject to a mortgage creates a charge against county property which violates the intent of Article VII, Section 12. ***Boykin*** held that issuance, without voter approval, of revenue certificates secured by a mortgage upon physical properties of the municipality subject to foreclosure violates the Florida Constitution. Unlike the ***Boykin*** and ***Hollywood*** cases, neither FMPA's ownership interest in St. Lucie Unit No. 2 nor any other municipal property is subject to a mortgage. Upon default under the Participation Agreement, it is not contemplated that ad valorem taxation would be levied. FMPA has no taxing power and has no power or right to compel the Participants to utilize their ad valorem taxing power. The Participants have only agreed to make payments from the revenues of their electric system.

Even if this Court were to determine that a mortgage on the Project were created by this transaction, the Project does not constitute "municipal" property. FMPA has acquired the ownership interest in the Project and the Participants have no direct

ownership interest in it.[3] The Power Sales Contracts give the Participants the right to receive energy; but do not give the Participants an ownership interest. There is no mortgage intended or accomplished.

A number of cases have validated indebtedness payable solely from revenues of a project where there were ancillary pledges of property, but no municipal obligation to utilize its taxing powers. ***State v. Inter-American Center Authority,*** **143** So.2d **1** (Fla. 1962); ***State v. City of Jacksonville,*** **159** Fla. 328, **31** So.2d 385 **(1947).**

In ***Inter-American Center Authority,*** the Authority issued revenue bonds secured by an indenture creating a mortgage on its properties. This Court rejected the plaintiff's contention that such pledge violated Article IX, Section 6, Fla. Const., since no taxing power or ability to enforce payment against the property of any municipality was involved. ***Inter-American*** is distinguish able from the ***Hollywood and Boykin*** cases. In ***Inter-American,*** the trust indenture did not provide for foreclosure on the authority's property and the bond form (as do the FMPA bond forms) expressly provided that the authority was obligated to pay the bonds only from the revenue of the project. The court concluded that "any pledge or 'mortgage' created by the trust indenture lacks the elements required to incur the constitutional prohibition...." **143** So.2d **4.** FMPA contends that if the court finds that a pledge of municipal property has been made in the present transaction, such pledge likewise lacks the elements which would create a violation of Article VII, Section 12.

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[3] Additionally, it should be noted that the reversionary interest of the Project Participants in the Project arising by virtue of the Interlocal Agreement is not the type of "municipal" property whose loss a municipality would conceivably feel compelled to prevent by use of its taxing powers.

In ***County*** of ***Volusia v. State of Florida,*** No. 61,267 (Fla. June 10, 1982) this Court held that where a county pledges revenues from all sources available to it except ad valorem taxes, and, in addition, promises to maintain the services generating such revenues, such pledge results in an indirect pledge of ad valorem taxes and violates the Florida Constitution. This Court determined that Volusia's agreement to maintain the programs producing the pledged revenues would "inevitably require that ad valorem taxes be increased...." ***Id.*** at 6. This Court recently held in ***Jacksonville Shipyards, Inc. v. Jacksonville Electric Authority,*** No. 62,260 (Fla. September 23, 1982) that where a municipality has pledged only its utility revenues and not all its ad valorem tax revenues, the holding in ***Volusia, supra,*** is inapplicable.

As in the J.***E.A.*** case, the facts here are clearly distinguishable from ***Volusia.*** The Power Sales and Project Support Contracts provide that the obligations are payable solely from the revenues of the Participants' electric systems. (Section 4(g), Power Sales Contracts App. Tab M; Section 3(i), Project Support Contracts, App. Tab N). Since each Participant has pledged only these utility monies, there is no general pledge of ad valorem revenue without voter approval. ***Volusia*** can also be distinguished from the present facts because the Participants have not agreed to maintain all programs which produce all their revenues.

This Court has validated numerous bonds which have pledged revenue sources without referendum even though the pledge of the funds would have an incidental effect on ad valorem taxing power. ***See State v. Alachua County,*** 335 So.2d 554 (Fla. 1976); *Town* of ***Medley v. State,*** 162 So.2d 257 (Fla. 1964). FMPA asserts that even if this Court determines the pledge of revenues could

affect the ad valorem taxes of the Participants, it would merely be an incidental effect. There is no intention that ad valorem taxes will be utilized to pay the costs of the Project. To prevent foreclosure on the Project, the Participants have pledged to increase utility rates to provide the required funds.[4] These rate covenants, [Section 712 of the Bond Resolution (App. Tab L), Section 14 of the Power Sales Contracts (App. Tab M), and Section 4 of the Project Support Contracts (App. Tab N)] do not violate Article VII, Section 12, Fla. Const. Section 163.01(15)(b)11, Fla. Stat., specifically empowers FMPA and the Participants to include rate covenants in agreements relating to joint power projects.

The State Attorney argues that FMPA's agreement to indemnify FP&L for taxes and negligence might violate Section 12, Article VII. This contention is also without merit. In the Participation Agreement, FMPA has agreed to indemnify FP&L for increases in FP&L's income taxes resulting from the sale of an interest in the Project to FMPA,[5] and for its share of claims resulting from FP&L's negligence except for damages resulting from willful acts. (Section 25, Participation Agreement, App. Tab G). These indemnification provisions are expressly authorized by Section 163.01(15)(b)9, Fla. Stat., as amended.

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[4] A number of the Participants do not possess taxing powers, themselves, as they are separate utility commissions or authorities. (Fort Pierce Utilities Authority, Lake Worth Utilities Authority, New Smyrna Beach Utilities Commission, Sebring Utilities Commission).

[5] Section 6.1 of the Participation Agreement provides that FMPA will include in its payment of costs (for St. Lucie Unit No. 2) compensation to FP&L for increased federal or Florida income tax liability related to the treatment of AFC (as defined in the Participation Agreement) (App. Tab H) due to the transfer to FMPA of its interest in St. Lucie Unit No. 2.

The State Attorney's argument that indemnification is unconstitutional has no merit because there are no tax revenues pledged to the payment of any costs in connection with the Project.[6] FMPA's only sources of funds, other than Bond proceeds, to pay any costs associated with the Project, are the payments to be made by the Participants under the Power Sales Contracts (App. Tab M) and the Project Support Contracts (App. Tab N). These both state that "[n]either the Participant nor the State of Florida or any agency or political subdivision thereof shall ever be obligated or compelled to levy ad valorem taxes to make the payments provided in this Section."[7]

The indemnity agreements would be lawful since Florida case law permits municipalities to contract to indemnify a private party. ***See, City*** of ***Jacksonville v. Franco,*** 361 So.2d 209 (Fla. 1st DCA 1978), ***cert. dismissed,*** 367 So.2d 1122 (Fla. 1978); ***First Church*** of ***Christ Scientists V. City of St. Petersburg,*** 344 So.2d 1302 (Fla. 2d DCA 1977). The responsibility for taxes and damage claims undertaken by FMPA is thus valid and lawful based on statutory and case law.

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[6] A number of Florida cases have invalidated indemnity provisions where indemnification was to be made through use of municipal taxing power. ***See Seaboard Air Line R.R. Co. v. Sarasota-Fruitville Drainage Dist.,*** 255 F.2d 622 (5th Cir.), ***cert. denied,*** 358 U.S. 836 (1958); ***Lykes*** *Bros.* ***Inc. V. City of Plant City,*** 354 So.2d 878 (Fla. 1978). These cases can be distinguished since FMPA has no taxing power and no tax moneys are required to be used to make the payments to FP&L.

[7] If this Court were to hold that FMPA cannot assume its share of FP&L's obligation with respect to pollution control bonds as discussed below in this Point I (C), and the Tax Indemnity Agreement would become operative (App. Tab K), such Agreement is constitutional under Article VII, Section 12 on the same basis as are the tax indemnity provisions of the Participation Agreement.

The default provisions of Sections 33.4.1 and 33.4.3 of the Participation Agreement do not violate Article VII, Section 12, Fla. Const. As noted above at Point I(B), general contract law and Section 163.01(15)(b)(1), Fla. Stat., authorize FMPA to enter into a contract which includes default provisions. Moreover, the default provisions do not result in either a direct or indirect pledge of ad valorem taxes. FMPA is not the type of entity subject to Article VII, Section 12; it does not possess any taxing power; and cannot compel the Participants to levy ad valorem taxation. The Participants have expressly stated in the Power Sales and Project Support Contracts that they have not pledged their ad valorem taxing powers.

The State Attorney alleges that FMPA, in assuming FP&L's obligations to the holders of FP&L' pollution control bonds, is acting contrary to law. FMPA asserts that the assumption of the "mortgage" in question is legal and will place neither FMPA nor the Participants in the position of being coerced to levy ad valorem taxes to prevent a threatened foreclosure.

This Court has held that where revenue bonds are secured by a mortgage on the property to be financed, the bond issue must be approved by voters, ***Boykin v. Town of River Junction, supra; Broward County Port Authority v. State,*** 129 Fla. 73, 175 So. 796 (1937). The rationale is that if revenues should be insufficient and the bondholders move to foreclose on the mortgage, the issuer might feel compelled to levy taxes to pay off the mortgage. The Trust Indenture between St. Lucie County and the Trustee for

the pollution control facilities bondholders (App. Tab R), however, merely assigns such County's security interest in the pollution control facilities to the Trustee, without providing for foreclosure.

In ***State v. Inter-American Center Authority, supra,*** when the indenture did not provide for foreclosure and stated that no taxing power was pledged to the payment of the bonds. This Court stated: "the pledge or 'mortgage' created by the Trust Indenture lacks the elements required to incur the constitutional prohibition...." ***Id.*** at 4. Similarly, the Trust Indenture between St. Lucie County and the Trustee merely assigned such County's security interest in the pollution control facilities without providing for the right of foreclosure. Additionally, in ***Inter-American*** the Trustee was empowered to sell the Authority's property to protect bondholders, whereas in the present transaction the Trustee is only entitled to take possession and lease the facilities. Finally, as in ***Inter-American,*** the pollution control bondholders are only entitled to payment out of the revenues and have no right to compel a levy of taxes. Under the ***Inter-American*** rationale, the security interests assumed by FMPA should not be considered the type of mortgage that violates the constitution.

Should the Court disregard ***Inter-American,*** and classify the security interest assumed by FMPA as a mortgage, FMPA's lack of taxing power and the fact that the Participants only pay FMPA from electric system revenues undercut the rationale of the

m rtgage line of cases.[8]

The State Attorney also contends that the "step-up" provision of the Power Sales Contract violates Article VII, Section 12, Fla. Const. It is FMPA's position that the "step-up" provision does not violate Article VII, Section 12, because it does not result in either a direct or indirect pledge of municipal property. E'MPA is acquiring the ownership interest in the St. Lucie Project. Because FMPA is not a municipality, has no taxing power and cannot compel the Participants to levy taxes, its property cannot be subject to a lien which can be discharged through the levy of ad valorem taxation. The Participants have not acquired a direct interest in the Project; rather, they have contracted for a supply of electricity. FMPA, not the Participants, owns the Project. Therefore, there is no mortgaged municipal property.

The State Attorney further contends the "take or pay" provisions of the Project Support Contracts violate Article VII,

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[8] In *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla. 1971), this Court held that if a county would feel morally compelled to levy taxes or appropriate funds to prevent the loss of properties through, absent a legal obligation, foreclosure, there must be an election. *Nohrr* is distinguishable on several grounds. First, if the college failed to make the lease payments, there was no other source of funds available except the general funds of the county. FMPA can simply raise the rates charged to the Participants and the Participants can pass along the rate increase to their customers -- indeed they have contracted to do so. Second, should any of the Participants default in their related payments, the remaining Participants are obligated, within specified limits, to accept a pro-rata share of the defaulting Participant's Power Entitlement Share (as defined in the Bond Resolution) and the payment obligation. The Participants' ability to raise their rates cuts off the compulsion to levy taxes present in *Nohrr*. Third, unlike *Nohrr* and the other mortgage cases, in which the entire facility paid for with the bonds is mortgaged to secure those bonds, only a portion of the facilities to be purchased FMPA are even arguably secured by a mortgage.

Section 12. This argument is also without merit, because there are no ad valorem taxes required or agreed to be levied.

Although no Florida cases on point were located, courts from sister states have addressed this question. In ***Board*** of ***Commissioners*** of ***Louisiana Municipal Power Commission v. All Taxpayers, Property Owners and Citizens,*** **360** So.2d **863** (La. **1978),** the court favorably construed contracts very similar to those in the present case. Four Louisiana cities had created a municipal power commission to issue revenue bonds for construction of an electric generating plant. The cities were to pay the bonds solely from electric utility revenues, and were required to make payments whether or not the project was ever completed. **360** So.2d at **866-867.** The court found that these contracts requiring payment irrespective of completion of the project were authorized by the enabling legislation and did not violate the Louisiana Constitutional provisions prohibiting bonds issued in connection with revenue producing utilities from being a charge on other revenues of a political subdivision because the payments to be made under such contracts were payable only from the revenues of the municipal utility systems. 360 So.2d at **867-868.** ***See*** also, ***Johnson v. Piedmont Municipal Power Agency,*** **287** S.E. 2d **476** (S.C. **1982);** ***State ex.rel. Mitchell v. City of Sikeston, 555*** S.W. 2d **281** (Mo. **1977)** (en banc).

D. DELEGATION OF POWERS.

The State Attorney contends that the statutes authorize and the agreements implement an unlawful delegation of legislative power (1) from FMPA to FP&L as "managing agent" of the Project and (2) from the Participants to FMPA. FMPA contends that such

delegations are constitutional.

In Section 12 of the Participation Agreement, FMPA irrevocably appoints FP&L as agent for the performance of all work authorized or contemplated by the Participation Agreement. Section 163.01 (15)(a), Fla. Stat., authorizes the appointment of a "managing agent."

Certain municipal powers cannot properly be delegated, namely, legislative and governmental functions. ***Conner v. Joe Hatton, Inc.,*** 216 So.2d 209 (Fla. 1968). In providing electric utility services, however, municipal corporations are performing proprietary rather than governmental functions. ***Hamler v. City of Jacksonville,*** 97 Fla. 807, 122 So.220 (1929); ***State v. City of Key West,*** 153 Fla. 226, 14 So.2d 707 (1943).

There is no constitutional or statutory prohibition against the delegation of such functions in the manner contemplated by the Enabling Acts. As to the "first tier" of delegation, *i.e.,* from FMPA to a "managing agent" (FP&L), this Court has held that technical engineering tasks and functions are particularly appropriate subjects for delegation. See ***State V. Inter-American Center Authority,*** 84 So.2d 9 (Fla. 1955). Clearly the functions delegated by FP&L are technical in nature. 6163.01 (15)(a), Fla. Stat., as amended. FMPA asserts that it may lawfully appoint FP&L as managing agent for the construction and operation of the Project. There is no constitutional or statutory prohibition against the delegation by a municipality of its "proprietary," functions.

Although the State Attorney contends that the delegation to FP&L as managing agent lacks sufficient guidelines, the Project

Agreements contain a recognized and accepted industry standard, FP&L has covenanted to perform its obligations according to "Generally Accepted Electric Utility Practices". Section 24, Participation Agreement (App. Tab G).[9] As a practical matter, FMPA is further protected against the malfeasance or nonfeasance of FP&L as managing agent since it is in FP&L's interest as principal owner to perform its obligations as managing agent according to "Generally Accepted Electric Utility Practices."

As to the "second tier" delegation from the electric utilities to FMPA, the Attorney General has opined in regard to another agency that the joint exercise of common powers through an interlocal agreement is not an unconstitutional delegation of governmental powers and duties. 1977 Op. Att'y Gen. Fla. 077-16 (Feb. 9, 1977).

Under municipal "home rule" as established by Article VIII, Section 2, Fla. Const., and Section 166.042, Fla. Stat. (1981), Florida municipalities have all governmental, corporate and proprietary powers necessary to enable them to render municipal services and may exercise any power for municipal services except as may otherwise be provided by law. Even absent the Enabling Acts, municipalities could properly enter into interlocal agreements and joint power projects.

FMPA further asserts that the rate covenant contained in the Bond Resolution is valid and not violative of constitutional

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[9] Since St. Lucie No. 2 is a nuclear facility, such generally accepted utility practices would include conformance with all rules and regulations governing nuclear facilities. ***See generally,*** Regulations of the Nuclear Regulatory Commission, 10 Code of Federal Reg. Section 1, et seq.

provisions dealing with delegation of power. The rate covenant of the Bond Resolution (Section 712; App. Tab L) provides FMPA shall at all times maintain its rates at a level high enough to operate and maintain the St. Lucie Project and to service the debt.

The Joint Power Act allows electric utilities to cooperate in the formation of joint electric projects. Section 361.12, Fla. Stat., as amended, specifically permits electric utilities to create a separate legal entity for this purpose. The Participants have created FMPA pursuant to the Interlocal Act which grants an entity the power to fix rates.

Section 163.01(7)(c), Fla. Stat., as amended, permits a separate legal entity comprised of electric utilities to exercise all powers in connection with the authorization, issuance, and sale of bonds as are conferred upon municipalities by Part I of Chapter 159 or Part III of Chapter 166, or both. The effect of this provision is to give an agency such as FMPA all legal powers possessed by municipalities with respect to the issuance of bonds, including the ability to pledge funds (Section 166.111, Fla. Stat.) and to secure the bonds in any manner (Section 166.121, Fla. Stat.). Thus, it is clear that FMPA has the same power as a municipality to set rates and pledge to maintain those rates at a level sufficient to service outstanding debt.

This Court has long upheld the covenants of municipal utilities to maintain rates at a level sufficient to operate and maintain the facility and to pay principal and interest of the bonds. *See, e.g., State* v. *MacConnell*, 125 Fla. 130, 169 So. 628 (1936); *State v. City of Ft. Pierce*, 126 Fla. 184, 170 So. 742 (1936); *Trudnak v. City of Ft. Pierce*, 135 Fla. 573, 185 So. 353 (1938).

The Interlocal Act provision that permits an electric utility to covenant to establish rates is clearly constitutional, In ***Cooksey*** v. ***Utilities Commission,*** 261 So.2d 129 (Fla. 1972), this Court addressed whether a special act granting a city utilities commission full and exclusive power and authority to prescribe rates was a constitutional delegation of power. In holding it was a constitutional delegation, the court interpreted the power of municipalities to render municipal services (Article VIII, Section 2(b), Fla. Const.).

> Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities. The fixing of fair and reasonable rates for utilities services provided is an incident of the authority given by the Constitution and statutes to provide and maintain these services. 261 So.2d 129, 130 (Fla. 1972) (footnote omitted).

Later Florida cases have reaffirmed the principal that electric utilities may covenant to establish rates. ***See, Mohme v. City of*** *Cocoa,* 328 So.2d 422 (Fla. 1976); ***City*** of ***Pompano Beach v. Oltman,*** 389 So.2d 283 (Fla. 4th DCA 1980), petition denied, 399 So.2d 1144 (Fla. 1981). One significant aspect of the authority to enter into rate covenants is the requirement that the rates be "reasonable." ***Cooksey*** v. ***Utilities Commission, supra; Gainesville Gas & Electric Power Co. v. City of Gainesville,*** 63 Fla. 425, 58 So. 785 (1912); ***City*** of ***Pompano Beach v. Oltman, supra.*** Section 710 of the Bond Resolution limits FMPA to only incur expenditures which are "reasonable," enabling electric utilities who will purchase power from FMPA to covenant to establish rates which are also "reasonable." Section 711(2) of the Bond Resolution states that "FMPA shall at at all times use its best efforts to operate or cause to be operated the Project properly and in an

efficient and economical manner..." These provisions indicate that the rates to be established to meet the requirements of the Power Sales and Project Support Contracts will be reasonable.

It is not inherently unreasonable for electric utilities to covenant to set rates at levels sufficient to provide revenues to pay all costs of the supply of power and other output for the utility system including costs of operation, administration, maintenance, debt service, and liens and charges on the revenues of the utility. Such expenses are reasonable and necessary in a project financing of this nature, and are consistent with the public policy of this State.

POINT II

THE INTERLOCAL AGREEMENT, PROJECT AGREEMENTS, BOND RESOLUTION, POWER SALES CONTRACTS AND PROJECT SUPPORT CONTRACTS ARE VALID AND NOT CONTRARY TO STATUTORY OR CASE LAW OR PUBLIC POLICY.

A. FMPA IS A VALIDLY EXISTING SEPARATE LEGAL ENTITY LEGALLY EMPOWERED TO ENTER INTO CONTRACTS AND AGREEMENTS AND TO ISSUE BONDS.

Appellee asserts that FMPA is a "separate legal entity" under the Enabling Acts and is legally competent to enter into contracts and to issue bonds in its own name.

The Interlocal Act provides that an interlocal agreement may provide for the organization of a "separate legal entity" and may designate its powers. §163.01(7)(a), Fla. Stat. Although there are no Florida cases construing the statute, courts in other states have found that interlocal agreements create separate legal entities. In ***Pease*** v. Board ***of County Commissioners, Osage County,*** 550 P.2d 565 (Okla. 1976), the Oklahoma Supreme Court favorably construed an Oklahoma statute with provisions similar to the Interlocal Act. In the ***Pease*** case, the court stated:

> [the parties'] agreement is more than a simple agreement to cooperate; it creates an organization or council that the law recognizes as having a legal existence and thus is a legal entity. [Emphasis supplied]. 550 P.2d at 567.

The State Attorney suggests that FMPA is not a "separate legal entity" because it does not fall within the traditional concept of "legal **entities."** A review of current Florida law reveals, however, a number of non-traditional legal entities created by the Legislature. ***See, e.g.,*** Florida Patients Compensation Fund Act, Chapter 768, Fla. Stat.; Limited Liability

Company Act, Chapter 82-177, Laws of Florida (1982). Also FMPA possesses the traditional criteria for determining the existence of a separate legal entity: the power to sue and be sued; the power to enter into contracts in its own name; and the power to incur obligations not constituting the obligations of its members. §163.01(15), Fla. Stat., as amended. Further, the Interlocal Agreement which created FMPA was approved, as required by then applicable law, by the Attorney General of Florida by Opinion letter, November 30, 1977. (App. Tab P).[10]

With respect to whether FMPA is legally competent to enter into the contracts and agreements and to issue the Bonds for the St. Lucie Project. Section 163.01(7)(b), Fla. Stat., provides that a separate legal entity created pursuant to the Interlocal Act may make and enter into contracts in its own name, and Section 163.01(7)(c), Fla. Stat., provides that such separate legal entity may issue bonds pursuant to Parts I, 11, and III of Chapter 159 or Part III of Chapter 166, or both. Thus, FMPA is a separate legal entity and is legally competent to enter into the contracts and agreements and to issue its Bonds.

B. COVENANTS NOT TO DISSOLVE UNDER FLORIDA LAW.

Section 163.01(15)(b)(10), Fla. Stat. provides that an interlocal agreement may include provisions that a legal entity may not dissolve until payment of its Bonds. Pursuant thereto, FMPA and the Participants have agreed that FMPA will not be dissolved until payment of the Bonds. Article VI, Section 1, Interlocal Agreement (App. Tab F). Section 40, Participation

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10 Section 163.01(11), Fla. Stat. (1977) requiring Attorney General approval of interlocal agreements was repealed by Section 2, Chapter 79-31, Laws of Florida (1979).

Agreement (App. Tab G) provides that such contract will remain in effect until abandonment of St. Lucie No. 2 or for 200 years. Further, the Participants in the Power Sales Contract (Section 14, App. Tab M) agree not to withdraw from FMPA during the term of such Contract.

The State Attorney contends that the foregoing agreements not to dissolve FMPA are invalid as a municipal contract of indefinite duration. The Enabling Acts authorize such covenants, evidencing a legislative determination that such covenants are vital to the feasibility of a project of this magnitude and serve the public interest. ***See*** 163.01(15)(b)10, Fla. Stat., as amended.

Absent the statutory authorization, such covenants would be proper in view of the recognized exception to the prohibition against contracts of indefinite duration for contracts which give rise to a continuing consideration or advantage to a municipality. ***See City*** of ***Daytona Beach v. Stansfield***, 258 So.2d 809 (Fla. 1972). Moreover, the rule which limits the duration of municipal contracts does not apply with respect to the exercise of a municipality's proprietary functions. 12 Fla. Jur. 2d, Counties and Municipal Corporations, $215. Clearly, the Project will give rise to a continuing benefit to the Participants in terms of the ongoing receipt of, or right to receive power and energy from, St. Lucie and in entering into the Project Agreements, they are acting in their proprietary capacity.

FMPA's contends the Project Agreements, and Power Sales and the Project Support Contracts are for a specific duration, and, even if they were not, the Enabling Acts specifically authorize agreements of indefinite or unspecified duration. Section

163.01 (15)(b), Fla. Stat., as amended. Section 40 of the Participation Agreement (App. Tab G) provides the agreement shall remain in effect until the abandonment of St. Lucie or for a period of 200 years. Section 2 of both the Power Sales (App. Tab M) and the Project Support Contracts App. Tab N), provide the contracts shall continue in effect until the Bonds are paid or St. Lucie Unit No. 2 is decommissioned.

C. AGREEMENTS FOR REIMBURSEMENT FOR TAXES AND DAMAGES ARE NOT CONTRARY TO LAW.

FMPA contends, that its agreement to reimburse FP&L for taxes and to respond for liability for damage claims are lawful and valid. Both agreements are authorized by Section 163.01(15)(b), Fla. Stat. The Legislature recognizing that joint power projects because of their public benefit may require the granting of certain additional contractual powers to public entities such as FMPA to effect joint power projects, has thus sanctioned as a valid public policy, the indemnification of private entities for taxes or damage claims when such amounts relate to a joint power project.

In conformity with this statutory sanction, FMPA, as noted in Point I(C) in Sections 1.1(ii) and 6.1 of the Participation Agreement, (App. Tab G), has contracted to indemnify FP&L for its pro rata share of taxes actually incurred by FP&L as a result of the sale to FMPA. In addition, in Section 6.5.2(c) of the Participation Agreement, (App. Tab H) FMPA agrees to indemnify FP&L for taxes imposed on revenues received by FP&L from FMPA. The purpose of these provisions is to enable the parties to calculate the exact portion of the acquisition price of the Project attributable to taxes. Rather than speculating on

additional tax FP&L will incur as a result of the acquisition by FMPA and adding such estimated amount to the contract price, the parties agreed to delay arriving at that portion of the acquisition price until the actual amount has become certain. FMPA's indemnification of FP&L's tax expenses represents nothing more than one element of FMPA's acquisition cost.

FMPA in Section 25 of the Participation Agreement (App. Tab G) with FP&L has contracted to indemnify FP&L for its pro rata share of liability, to the extent of its ownership interest, in contract or tort except for liability resulting from "willful action."

Florida case law permits municipalities to contract to indemnify a private party. ***See City*** of ***Jacksonville v. Franco,*** 361 So.2d 209 (Fla. 1st DCA 1978), ***cert. dismissed,*** 367 So.2d 1122 (Fla. 1978); ***Claughton Hotels, Inc. v. City of Miami,*** 140 So.2d 608 (Fla. 3d DCA 1962), ***cert. denied,*** 146 So.2d 750 (Fla. 1962).[11]

D. PARTICIPANTS MAY VALIDLY CONTRACT TO LIMIT DEFAULT REMEDIES AGAINST FMPA UNDER STATUTORY AND CASE LAW.

The Participants are entitled to contract for the limitation of remedies set forth in Section 21 of the Power Sales Contracts and Section 10 of the Project Support Contracts. The limitation of remedies clause is authorized by Sections 163.01(15)(b)1 and 8, Fla. Stat.

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[11] If this Court were to determine that FMPA cannot assume its proportionate share of FP&L's obligation with respect to pollution control bonds, as discussed above at Point I(C), and the Tax Indemnity Agreement were to become operative, the Tax Indemnity Agreement is valid on the same grounds as discussed above with respect to the tax indemnity provisions of the Participation Agreement.

There is also no constitutional basis for invalidation of the limitation of remedies clause. Although the Florida Constitution at Article I, Section 21 guarantees the right of access to the courts, the remedies clauses contained in the Power Sales and Project Support Contracts do not preclude such access. The decisions interpreting this constitutional provision, are limited to statutory, rather than contractual abolition of a right of action. ***See, Faulkner*** V. ***Allstate,*** 367 So.2d 214 (Fla. 1979); ***Overland Construction V. Sirmons,*** 369 So.2d 572 (Fla. 1979). ***Kluger*** V. ***White, 281 So.2d 1, (Fla. 1973).***

The sole remedy waived by virtue of the limitations clause is the right to recover damages at law. Practically, however, the remaining remedies provide ample protection for the rights of Participants. The Participants have contracted to purchase electric power, which is not always readily available elsewhere. Money damages would not provide effective relief in such an instance. The limitation of remedies clause is lawful, and as a practical matter, the remedies which are preserved under such clause are the only viable remedies available to Participants.

E. FP&L AS THIRD PARTY BENEFICIARY.

The Enabling Acts authorize FP&L's status as a third party beneficiary of the contracts between FMPA and the Participants. Section 163.01(15)(b)8, Fla. Stat., as amended.

FP&L and FMPA recognize FP&L's status as a third party beneficiary in Section 43 of the Participation Agreement (App. Tab G), and FMPA and the Participants expressly recognize such status. Section 24(c) of the Power Sales Contracts (App. Tab M) and Section 17(c) of the Project Support Contracts (App. Tab N).

Recognizing the importance of FP&L's third party beneficiary status under the Power Sales and Project Support Contracts to the contractual arrangements between FP&L and FMPA, the Participants and FMPA similarly agreed that FP&L's status as third party beneficiary would not be "rescinded, amended, supplemented or altered in any way without the express written consent of [FP&L]." Power Sales Contracts, Section 24(c)(App. Tab M); Project Support Contracts, Section 17(c) (App. Tab N). FP&L and FMPA agreed that the said Contracts "may not be rescinded, amended, supplemented or altered in any other way that would materially lessen, release or alter the rights of [FP&L] or the obligations of Members [the Participants] to [FP&L] without the express written consent of [FP&L]." Participation Agreement, Section 43 (App. Tab G).

In addition, Florida case law supports a conclusion that FP&L can be validly granted third party beneficiary status and that FP&L is a third party beneficiary of the Power Sales and Project Support Contracts. Florida courts recognize the concept of a third party beneficiary to a contract and permit a third party to maintain a cause of action for breach of contract where the contracting parties intend that a third party be a beneficiary to a contract, and the contract directly benefits that third party. *See, Marianna Lime Products Co. v. McKay,* 109 Fla. 275, 147 So. 264 (1933); *American Surety Co. of New York v. Smith,* 100 Fla. 101, 130 So. 440 (1930); 11 Fla. Jur. 2d Contracts § 152 (1979). Intent of the parties is proven by the language of the contracts and the benefit conferred on the beneficiary. *Woodbury* v. *Tampa Waterworks Co.,* 57 Fla. 243, 49 So. 556 (1909). The express language of the contracts between FMPA and FP&L and

between EMPA nd the Particip nts pr ves the intent of all parties thereto that FP&L is to be a third party beneficiary to the contracts between **FMPA** and the Participants. ***See, International Erectors, Inc. v. Wilhoit Steel Erectors*** & ***Rental Service,*** 400 F.2d 465 (5th Cir. 1968). In addition, FP&L receives a direct benefit from the contract. FMPA and the Participants recognized that if the Participants fail to pay FMPA, FP&L will be injured because the payments from the Participants to FMPA under the Power Sales and Project Support Contracts are FMPA's primary source of revenues to pay its obligations on the Project to FP&L. This direct benefit allows FP&L to claim third party beneficiary status. ***City of Miami Beach v. City of North Bay Village,*** 313 So.2d 126 (Fla. 3d DCA 1975).

F. WAIVER OF PARTITION.

The waiver of the right to partition contained in Section 28 of the Participation Agreement (App. Tab G) is specificially authorized by statute. Section 163.01(15)(b)3, Fla. Stat., as amended. Further, Florida case law which permits the waiver of the right to partition provided that the waiver is not for an indefinite or unreasonable period of time. ***Condrey*** v. ***Condrey,*** 92 So.2d 423 (Fla. 1957). In view of the fact that the Participation Agreement has a definite term of existence ***(See,*** Point II (B) above), the waiver of partition does not fall within the prohibition established in ***Condrey*** against indefinite waivers of the right to partition. The waiver of partition also contains a "savings clause" which provides that the waiver "shall be for such lesser period as may be required under applicable law." Based upon the foregoing, the waiver of partition is valid.

G. THE RATE COVENANTS ARE VALID.

The State Attorney asserts that FMPA and the Participants are not legally empowered to enter into the rate covenants contained in the Bond Resolution and Power Sales and Project Support Contracts. The rate covenants contained in Sections 706 and 712 of the Bond Resolution (App. Tab L), Section 14 of the Power Sales Contracts (App. Tab M) and Section 4 of the Project Support Contracts (App. Tab N) provide FMPA shall have the power to establish and maintain rates to cover the amounts required to be paid under the Bond Resolution, and the Participants must maintain their rates at a level high enough to make payments required by the Power Sales and Project Support Contracts and to pay all other costs of their utility systems.

FMPA asserts that the rate covenants are lawful. See, Section 163.01(15)(b)11, Fla. Stat., as amended. The State Legislature has granted FMPA the power to establish and collect rates in Section 163.01(15)(b)11, Fla. Stat.

The Constitution of the State of Florida, Section 2(b), Article VIII provides that: "Municipalities shall have governmental, corporate and proprietary powers to enable them to...render municipal services...." The legislature, pursuant to the above provision, enacted Section 166.042, Fla. Stat., which conferred upon municipalities the power to continue to exercise all powers authorized by former Chapter 172, Fla. Stat. which granted municipalities authority to own electric utilities and to set rates. Section 172.08, Fla. Stat. (1971).

This Court has long upheld the covenants of a municipal utility to maintain rates at a level sufficient to operate and maintain the facility and to pay the interest and principal

obligations of the bonds. *E.g.*, ***State*** v. *MacConnell*, 125 Fla. 130, 169 So. 628 (1936).

The rate covenants in the Bond Resolution, the Power Sales and Project Support Contracts comport with existing statutory and case law, do not violate public policy and should be found valid.

H. THE "STEP-UP" AND "TAKE OR PAY" PROVISIONS ARE NOT CONTRARY TO PUBLIC POLICY.

FMPA asserts that the assumption of additional shares in the St. Lucie Project as required of non-defaulting Participants by the "step up" provisions of the Power Sales Contracts does not violate the public policy of this State. The "step up" provision has been expressly authorized by in Section 163.01(15)(b)1, Fla. Stat., as amended.

The "step up" provisions will serve to keep the Project a viable source of electricity for the non-defaulting Participants in the event that one or more Participants defaults. FMPA has only the revenues from the Participants as a source for paying all obligations associated with the Project. It has no taxing powers, and cannot use any other revenues from other projects to make payments on the obligations associated with the Project. Further, as discussed under Point I(b), a default by one Participant could, absent the step-up provision, result in FMPA's loss of the right to receive energy, to the detriment of the Participants as well as the consuming public.

The "take or pay" provision of the Project Support Contracts is also valid. The 1982 Amendments to the Interlocal Act specifically authorize "take or pay" provisions. §163.01(15)(b)7, Fla. Stat., as amended. Further, the "take or pay" provisions also

serve clear public purpose. The Participants in order to receive the benefits of cost efficient electric power generated by the Project must assume some of the risks of such Project. The risk is created by the need to assure bondholders and the other joint owners of St. Lucie Unit No. 2 that FMPA will meet its obligations. Thus, the Participants have agreed to pay FMPA, regardless of the receipt of electric power, in order to assure a stream of income to FMPA with which to retire the Bonds and pay other costs associated with the Project. The benefit to the public, in the form of reliable, cost-efficient electric power as sanctioned by the legislative policy-making, clearly outweighs the public policy argument by the State Attorney.

I. CAPACITY AND ENERGY SALES CONTRACTS ARE VALID.

The Capacity and Energy Sales Contract (App. Tab Θ) provide for the sale by certain Participants to other Participants of electric capacity and energy from the Project. Such Contracts further appoint FMPA as agent to effectuate the sale. FMPA is authorized by statute to enter into the Capacity and Energy Sales Contracts by its general power to contract in its own name. Section 163.01(7)(b), Fla. Stat., as amended. Additionally, municipalities may validly enter such contracts under their "home rule" powers granted by Article VIII, Section 2(b), Fla. Const. and Chapter 166, Fla. Stat. Under Chapter 166, Florida municipalities were granted authority to continue to exercise the powers granted under former Chapter 172, Fla. Stat. Chapter 172 had formerly authorized municipalities to own and operate electric utilities. When read in conjunction with the Constitutional provision of Article VIII, Section 2(b), municipalities clearly

have the corporate, governmental, and proprietary powers necessary to enter the Capacity and Energy Sales Contracts as cited. Thus, there is ample statutory and constitutional authority for these contracts and they should be upheld by this Court.

J. FMPA MAY LEGALLY APPLY BOND PROCEEDS FOR PAYMENT OF NON-CAPITAL EXPENSES.

FMPA asserts that under statutory authority the proceeds of bonds may be used to finance any governmental undertaking approved by its governing body of FMPA. Working capital, reload fuel and costs of damages are necessary to the operation of the Project and FMPA may properly issue bonds to pay costs associated with such items.

FMPA is an entity created under the authority of Chapter 361 and Chapter 163. Section 163.01(7)(c), Fla. Stat., authorizes FMPA to exercise all the powers in connection with the issuance of bonds as are conferred by Chapter **166** or Chapter **159**. Section 166.111, Fla. Stat., **(1981),** provides that:

> The governing body of every municipality may borrow money, contract loans, and issue bonds as defined in **§166.101** from time to time to finance the undertaking of any capital or other project....

It is significant that the language refers to "**capital** or other projects", implying that the financing need not be limited to capital expenditures.

The term "**project**" as defined in Section **166.101**(8), Florida Statutes, **(1981)** means:

> A governmental undertaking approved by the governing body and includes all property rights, easements, and franchises relating thereto and deemed necessary or convenient for the construction, acquisition or operation thereof, and embraces any capital expenditure which the governing body of the municipality shall deem to be made for public purpose....

In the definition of the term "project" reference is made to property rights, easements, franchises and capital expenditures. While these words refer to what may commonly be called capital expenses, they are prefaced by the words "embrace" and "include"; therefore, the references are nonexclusive. The key phrase in the definition of the term "project" is the language referring to "a governmental undertaking approved by the governing body." The Florida Attorney General has opined that this phrase may be read to include operating expenses. Opinion of the Attorney General 075-185, (June 19, 1975).

If a municipality may issue bonds to pay for general operating expenses, then FMPA may do the same since Section 163.01 (7)(c) provides that a Chapter 361 entity, such as FMPA, may exercise all powers in connection with the authorization, issuance, and sale of bonds as conferred upon municipalities by Part I of Chapter 159 or Part III of Chapter 166.

Additionally, Sections 163.01 and 361.11, Fla. Stat., respectively, define "electric project" and "project" broadly. Section 163.01(3)(d), Fla. Stat., as amended, defines "electric project" to mean "[a]ny plant, works, system, facilities, and real and personal property of any nature whatsoever, together with all parts thereof and appurtenance thereto, located within or without the state, used or useful in the generation, production, transmission, purchase, sale, exchange, or interchange or electric capacity and energy . . . ." (Emphasis added). "Project" is defined under Section 361.11(1), Fla. Stat., as amended, to mean "any and all facilities, including all equipment, structures, machinery, and tangible and intangible property, real and personal for the joint generation or transmission of electric energy, or

b th, including any fuel supply or source useful for such a project." (Emphasis added). Clearly working capital, reload fuel and costs of damages are useful and necessary to generation, transmission or production of electricity and thus constitute an "electric project" or "project" under the Enabling Acts. Additionally, Section 361.15 provides that the cost of a project which may be paid for with bond proceeds includes any fuel supply.

The State Attorney has argued that under Section 361.15, Fla. Stat. (1981), bonds for a Chapter 361 project are subject to the narrower provisions of Chapter 159. However, Section 163.01(7)(c), Fla. Stat., as amended, provides that a Chapter 361 entity may exercise all powers in connection with the authorization and issuance of bonds as are conferred upon municipalities by either Chapter 159 or Chapter 166. FMPA is proposing to issue the Bonds under the authority of Chapter 166. Section 166.141, Fla. Stat. (1981), states that Chapter 166 is full authority for the issuance of bonds and Section 159.14, Fla. Stat. (1981), provides that "this part shall be deemed to provide an additional and alternative method for the doing of things authorized hereby and shall be regarded as supplemental and additional to powers conferred by other laws".

POINT III

PROVISIONS OF THE POWER SALES CONTRACTS PROVIDING FOR PAYMENTS FOR POWER MADE AVAILABLE TO THE PARTICIPANTS AS OPERATING EXPENSES OF THEIR ELECTRIC SYSTEMS CONSTITUTE NEITHER A BREACH OF THE PROVISIONS OF THEIR OUTSTANDING REVENUE BONDS NOR AN IMPAIRMENT OF THEIR OBLIGATION THEREUNDER.

Section 4(g) of the Power Sales Contracts (App. Tab M) provides that Participants make payments to FMPA for capacity and energy in respect of any month during any part of which both capacity and energy is made available to them. The State Attorney asserts that Section 4(g) by providing that such payments be treated by the Participants as operating expenses of their electric systems, constitute a breach of certain provisions contained in the resolutions authorizing their outstanding revenue bonds and constitute an unconstitutional impairment of their obligations to the holders of such revenue bonds. FMPA maintains that Section 4(g) creates no such breach of contract or impairment of obligation. ~~under Section 4(g).~~ The obligations created under Section 4(g) are called "take ~~or~~ and pay" provisions. ~~This~~ The unconditional, contractual arrangement (the "take-or-pay" arrangement) is established in Section 3(h) of the Project Support Contract (App. Tab N). Section 4(b) of the Project Support Contract (App. Tab N) specifies that payments thereunder are subordinated to debt service on the Participants' outstanding bonds.

Three of the Participants (Fort Meade, Moore Haven and Newberry) have no outstanding bonds; thus the question of breach or impairment of a bond resolution never arises. The remaining thirteen Participants have outstanding bonds (Resolutions for which are collected at App. Tab Q and the resolutions relating thereto contain one of two types of covenants which Section 4(g)

of the Power Sales Contracts is alleged to breach or impair.

The first type of covenant contained in the bond resolutions of five cities (Alachua, Green Cove Springs, Jacksonville Beach, Starke and Vero Beach) is an agreement by the Participant not to create any debt, lien, pledge, or other obligation having a lien upon the revenues of its electric or other integrated utility system unless such debt, lien, pledge or other encumbrance expressly recites that it is junior and subordinate to the lien on such system revenues of such Participants' outstanding bondholders, without any reference to any debt service component. The following language is representative of such covenants prohibiting the creation of superior debts, liens or pledges (the example is from the Jacksonville Beach, Florida, Section 15(Q), Bond Resolution, App. Tab Q):

> The Issuer will not issue any other obligations payable from the revenues of the System, nor voluntarily create or cause to be created any debt, lien, pledge, assignment, encumbrance or other charge having priority to or being on a parity with the lien of the **1976** Bonds issued pursuant to this instrument and the interest thereon, upon said revenues except under the conditions and in the manner provided herein. Any obligations issued by the Issuer other than the **1976** Bonds herein authorized and additional parity obligations provided for in Subsection R below, payable from such revenues, shall contain an express statement that such obligations are junior and subordinate in all respects to the **1976** Bonds herein authorized, as to lien on and source and security for payment from such revenues.

However, such resolutions permit and such covenants do not interfere with the payment of operating expenses by such Participants. The bond resolutions of the Participants typically define costs of operation as follows (the example is from the Alachua, Florida, Bond Resolution, Article I, Section 1.01, App. Tab Q):

> "Operating Expenses" shall mean the current expenses, paid or accrued, for the operation, maintenance and

repair of all facilities of the System, as calculated in accordance with such accepted accounting methods, and shall include, without limiting the generality of the foregoing, insurance premiums, administrative expenses of the Issuer related solely to the System, labor, cost of materials and supplies used for such operation and charges for the accumulation of appropriate reserves for current expenses not annually recurrent but which are such as may reasonably be expected to be incurred in accordance with such accepted accounting methods, but shall exclude payments into the Sinking Fund or the Reserve Account therein and any allowance for depreciation or for renewals or replacements of capital assets of the System. (Emphasis added)

In covenanting with FMPA to treat payments for capacity and energy made available to them under the Power Sales Contracts as operating expenses in any month in respect of which both capacity and energy from the Project are made available, the Participants with outstanding electric revenue bonds are not creating a debt, lien, and pledge upon their electric system revenues. Rather the Participants are simply providing for the payment of the cost of supplies (electric capacity and energy, *i.e.*, purchased power) in the same manner as they have traditionally paid for such supplies - as a cost of operation and maintenance of their electric or other integrated utility sytem. The Uniform System of Accounts Prescribed for Public Utilities and Licensees as established by the Federal Energy Regulatory Commission includes a separate account (No. 555) for purchased power under the operation and maintenance account. Thus, the treatment by the Participants of purchased power as an operating expense is in accordance with accepted accounting methods.

The Participants, at the time their outstanding bond resolutions were executed, had existing agreements to purchase power from other utilities and treated and continue to treat the payments for those purchases as operating expenses even where such agreements

contain provisions, similar in effect to a "take and pay" contract, requiring through a minimum fixed demand charge some payment for power made available when the Participant elects not to take all or part of such power. Therefore, it would be unreasonable to construe the provisions prohibiting the creation of a debt, lien, or pledge as prohibiting payments for the cost of purchased power as is provided in Section 4(g) of the Power Sales Contracts.

The outstanding bond resolutions of Clewiston, Fort Pierce Utilities Authority, Homestead, Kissimmee, Leesburg, Lake Worth Utilities Authority, Utilities Commission of New Smyrna Beach and the Sebring Utilities Commission contain a second type of covenant which Section 4(g) of the Power Sales Contracts is alleged to breach and impair. Such resolutions provide that the portion of payments for purchased power representing debt service on the bonds of the seller of such power shall not be treated as operating expenses, and expressly exclude such debt service component from the cost of operation and maintenance. The following language is representative of such a covenant and the definitions of operating expenses and debt service components, in these outstanding bond resolutions (the example is from the Leesburg, Florida, Bond Resolution, App. Tab Q):

> T. Issuance of Other Obligations. The Issuer will not issue any other obligations, including Debt Service Components, except under the conditions and in the manner provided herein, payable from the Revenues of the System nor voluntarily create or cause to be created any debt, lien, pledge, assignment, encumbrance or other charge having priority to or being on a parity with the lien of the 1977 Bonds and the interest thereon, upon said Revenues. Any other obligations (including

Debt Service Components) issued by the Issuer in addition to the 1977 Bonds herein authorized or Additional Parity Obligations provided for in subsection U below, payable from such Revenues shall contain an express statement that such obligations, junior and subordinate in all respects to the 1977 Bonds, herein authorized, as to lien on and source and security for payment from such Revenues. (Section 15(T).

"Cost of Operation and Maintenance" of the System shall mean the current expenses, paid or accrued, of operation, maintenance and repair of the System, as calculated in accordance with sound accounting practice, but shall not include any Debt Service Components or reserves for renewals and replacements, extraordinary repairs or any allowance for renewals, replacements and depreciation. (Section 2(H).

"Debt Service Component" shall mean that portion of rates, fees, charges or payments which the Issuer is obligated to pay under specific long-term contractual relationships to another entity for the purchase of electrical output, capacity or usage representing, or for the purpose of meeting, principal interest or both on that entity's debt obligations, all as determined by the Issuer's Consulting Engineer. (Section 2 (K).

Joint action agencies, such as FMPA, are in existence in a large number of the states. The issuance of bonds by these joint action agencies "backed up" by "take or pay" contracts with their participating cities is not unique to Florida, but is quite common. These so-called "take or pay" contractual provisions are well recognized and, as noted above in Point I (B) and (C), have been held to be valid. At the time the Participants in Florida were entering into the covenants in their own outstanding bond resolutions, it is reasonable to hypothesize that the pending formation of FMPA and the ensuing issuance of bonds by FMPA secured by a "take or pay" contractual arrangement was contemplated. Thus, the authors of those outstanding covenants

were aware of the "risk" to current bondholders in the event a Participant was required to make payments to FMPA when it is receiving no power. The purpose of the debt service component language in these covenants was to protect the bondholders from that risk, by requiring that payments under take or pay contracts be subordinate to the prior outstanding bondholders.

These provisions, again, were entered into at a time when the Participants had existing contracts with other utilities to purchase power (the price of which includes a portion allocable to the existing debt of the selling entity, whether or not such component of the price is specifically broken out as a separate component and whether or not such component is referred to at all), and should be construed only to prohibit treatment as operating expenses of unconditional ("take-or-pay") obligations to pay whether capacity and energy is available or not. The obligation to pay under the Power Sales Contracts is a "take and pay" obligation; the Participants only agree to make payments thereunder as operating and maintenance expenses for any month in respect of which St. Lucie Project Capacity and Energy are made available and thus these "take and pay" provisions do not violate those Participants' outstanding covenants. The "take or pay" obligation of the Project Participants is contained in the Project Support Contract, payments under which are expressly subordinated to debt service on the Participants' outstanding

bonds and thus comply with the Participants' outstanding covenants.[12]

In summary, the Participants, pursuant to the Power Sales Contracts, are simply ***buying*** power for resale and as such are incurring an ***operational*** expense the same as if they were buying supplies or fuel for their own generators. FMPA submits that an obligation to pay for currently received power, such as is contained in the Power Sales Contracts, being conditioned upon

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[12] The definition of the "Cost of operation and maintenance" contained in the Homestead resolution (Section 1(H) App. Tab Q) is atypical.

> "Cost of operation and maintenance" of the facilities shall mean the current expense, paid or accrued, of operation, maintenance and repair of the facilities, as calculated in accordance with sound accounting practice, but shall not include <u>any capital or demand charge components of the cost of purchased power from other utilities regardless of the form of contract for such purchase power</u>, nor shall it include any reserves for renewals and replacements, extraordinary repairs of allowance for renewals, replacements and depreciation (Emphasis added).

The underscored language should properly be read to mean that the debt service component of a "take or pay" contractual arrangement, whether such arrangement separately specifies such amount or attempts to disguise it in a fixed price or rate, is not to be treated as an operating and maintenance expense. To read the language as being designed to encompass a debt service component for any type of power purchase, whether such purchases are made on "the spot market" or under either "take and pay" or "take or pay" contractual arrangements would clearly be inconsistent with normal utility operations and would probably simply be commercially impossible to administer. Utilities who are selling power include in the selling price a factor for their debt service though this factor is not usually separately stated on their invoice. Further, it is doubtful that these utilities could accurately calculate this debt service component even if they were to attempt to separately state it on their invoice. Further, electric energy and capacity is dynamic, and buy and sell transactions occur not only monthly but literally hourly. To burden the flow of commerce with such a commercial impracticability, as is urged by the State Attorney, would be detrimental not only to the Participants but also the entire electric utility industry. In reality, the interpretation of this covenant urged by the State Attorney would have the effect of impairing the ability of Homestead to service electric capacity and energy in a commercially reasonble manner which it would resell to its customers in order to raise sufficient revenues to pay its bondholders.

availability of capacity and energy, is not the type of obligation contemplated by any of the covenants described above. A fair reading of the provisions of these Participants' outstanding bond resolutions suggests that this language was to apply only where the obligation to make payments was an unconditional take or pay obligation and not, as in the case with the Power Sales Contracts, where the obligation is conditioned upon availability of electric capacity and energy under such contracts.

The arrangement between FMPA and the Participants cannot be said to impair or otherwise affect the obligation or ability of the Participants to meet the requirements of these outstanding contracts. This Court has recognized that impairment occurs only when the essential obligation of the contract is repudiated. In ***State*** v. ***City of Jacksonville,*** **31** So.2d **385** (Fla. **1947)** the Court stated that there is no impairment of a contractual obligation where the evidence reveals that the revenues of an electric system are adequate to service all outstanding obligations. ***Id.*** at **387.** The Supreme Court noted that there was no showing that the revenue certificates under attack "would in the least impair the obligation of that contract or any other contract of the City depending on the same source."

This Court has made it clear that the interpretation of the Florida clause is similar to that of the Federal impairment of contract clause. ***Pomponio*** v. ***Claridge of Pompano Condominium, Inc.,*** **378** So.2d **774** (Fla. **1980).** The modern Federal mode of Contract Clause analysis starts with Home ***Building & Loan Association V. Blaisdell,*** **290 U.S. 398, 78 L.Ed.413 (1934).** Under ***Blaisdell,*** the first inquiry in determining contract impairment

must be to determine the obligation under the contract alleged to be impaired. 290 U.S. at 429. Second, there must be a determination of whether the legislative action complained of affects the obligation or the remedies for enforcement of performance. ***Id.*** Finally, under both ***Blaisdell*** and ***U.S. Trust Company of New York v. New Jersey,*** 431 U.S. 1, 52 L.Ed.2d 92, 97 S.Ct. 1505, ***reh. denied,*** 431 U.S. 975, 53 L.Ed.2d 1073, 97 S.Ct. 2942 (1977) (hereinafter ***"U.S. Trust"),*** the inquiry must determine whether the alleged impairment is reasonable in light of the public purposes sought to be served by the legislative action. ***Blaisdell, supra,*** 78 L.Ed. at 426; ***U.S. Trust, supra, 52*** L.Ed.2d at 109.

As the Supreme Court stated in ***Blaisdell:*** "The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them. . ." 290 U.S. at 431. There is no impairment in this instance, as the bond issue sought to be validated before this court neither renders invalid nor releases or extinguishes the Participants' prior obligations.

It is clear from *U.S.* ***Trust*** that a weakening of the "security" for payment of the outstanding bonds may constitute an unconstitutional impairment. 431 U.S. at 19. In ***U.S. Trust,*** The Port Authority of New York and New Jersey entered into a covenant with its bondholders which provided that the Authority would not apply funds held in the General Reserve Fund as security for the outstanding bonds for any deficit public transportation projects. Subsequently, New York and New Jersey both passed legislation retroactively repealing the covenant, thus exposing the General Reserve Fund to substantial additional deficits incurred in connection with the proposed projects. The Supreme Court held

that the complete repeal of the statutory covenant, along with the exposure of the monies in the General Reserve Fund to payment of additional deficits, lessened the security of the holders of the Authority's outstanding bonds, thus unconstitutionally impairing the obligation under those contracts. Id. The instant situation is different from the U.S. Trust situation since there will be no actual or potential diminution in the amount of money available for repayment of outstanding bonds. Indeed, the Participants have covenanted to charge rates sufficient to pay all amounts payable to FMPA in respect of the St. Lucie Project as well as all debt service and operating costs of their own utility system.

The primary security provisions in the prior bond issues are the covenants of the Participants to operate and maintain their electric or other integrated utility systems in an efficient manner and to collect sufficient rates, fees and charges to produce revenues needed to pay the operating expenses of the utility systems and debt service on Participants' outstanding bonds, and to make other payments provided for in the resolutions which authorize such bonds. The concern of the Participants' outstanding bondholders is that the interest and principal of the outstanding bonds be repaid out of the net operating revenues of the respective utility systems. Each Participant has entered into a covenant to maintain rates at a level sufficiently high to provide ample revenue to make the interest and principal payments. The fact that there are operating expenses to be made prior to the principal and interest payments is irrelevant in light of the rate covenants agreed to by the Participants.

Rather than weakening the security provisions of the outstanding bonds, an objective analysis of the proposed project reveals that the agreement to purchase power pursuant to the Power Sales Contracts actually strengthens such security, thereby complying with the covenant to operate and maintain their electric systems efficiently and economically that all the Participants have entered into with their outstanding bondholders. The reason is that the respective electrical systems of the Participants are faced with growing demand. Through the Power Sales Contracts the Participants have sought to secure supplies of electricity at the lowest possible cost. Courts have held that a substantial impairment will nevertheless be upheld if "it is imposed upon reasonable conditions that adequately protect the admittedly impaired interest." *Garris* v. *Hanover Insurance* Co., 630 F.2d 1001 (5th Cir. 1980). In the instant situation, not only is there no impairment of the outstanding bondholders' security position, but an actual enhancement as well. FMPA further states that the Power Sales Contracts reinforce the covenants to levy and collect such sufficient rates, fees and charges already contained in the Participants' outstanding bond resolutions and ordinances, thereby further strengthening the protection thereunder.

CONCLUSION

FMPA asserts that based on the foregoing reasoning and analysis and the citations of authority, that the provisions of all statutes under which these bonds are proposed to be issued are valid, constitutional, and do not violate the public policy of this State. Further, **FMPA** states that the contractual provisions and obligations pursuant to which these bonds are issued, also do not contravene case law, constitutional law, nor the statutory law of this State, and are valid in all respects. Based on the foregoing reasoning and analysis, the bonds have been validly issued pursuant to all statutory, constitutional and case law governing the issuance of such bonds, and that such bonds will be valid and binding obligations of **FMPA**.

Accordingly, this Court should affirm the ruling and final judgment of the trial court in all respects validating the procedures, the underlying contracts which form the security of the bonds, and the bond issue.

Respectfully submitted this 15th day of November, 1982.

FREDERICK M. BRYANT, HOWARD E. ADAMS and CATHI C. O'HALLORAN of
Pennington, Wilkinson, Gary & Dunlap
Post Office Box 3985
Tallahassee, Florida 32303
(904) 385-1103

Freeman, Richardson, Watson, McCarthy and Kelly
112 West Adams Street
Jacksonville, Florida 32202
(904) 353-1264

Mudge, Rose, Guthrie & Alexander
20 Broad Street
New York, New York 10005
(212) 701-1000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing ANSWER BRIEF OF APPELLEE has been furnished to Donald s. Modesitt, State Attorney, Second Judicial Circuit, 5th Floor, Lewis State Bank Building, Tallahassee, Florida 32301, on this 15th day of November, 1982, by hand delivery.

Attorney