IN THE SUPREME COURT OF THE STATE OF FLORIDA

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 Ron-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 oning property or subject to taxation therein, and the holders of any outstanding debt obligations previously isued by said Utilities Commission; the foregoing Boards, Commission, and Authorities being public bodies corporate and politic, organized

and existing under and by virtue of the laws of the State of Florida,

Appellants,

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.

APPELLANT'S INITIAL BRIEF

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and

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

[The following citations cited to the 1982 Supplement are as amended by Chapter 82-53, Laws of Florida (1982)]

FLORIDA CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Florida Legislature in 1982 made significant amendments to Chapter 163 and Chapter 361, Florida Statutes, (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).

STATEMENT OF THE CASE AND FACTS

The Florida Municipal Power Agency ("FMPA") purports to be a separate legal entity created under statutory authorization granted by Chapter 163, Part I, Florida Statutes, (sometimes referred to herein as the "Interlocal Act" and Chapter 361, Part II, Florida Statutes (sometimes referred to herein as the "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). These enabling statutes seek to implement Article VII, Section 10(d), of the Florida Constitution.

The purpose of FMPA is to provide for the joint acquisition, construction and ownership of electric generating facilities by municipalities and other public entities in the State of Florida, either on their own or jointly with privately owned utilities. FMPA is comprised of 26 governmental bodies which are either municipalities owning and operating electrical utility systems or separate municipal utility commissions or authorities.1

Pursuant to the above statutory authority, FMPA and Florida Power and Light Corporation (FP&L) entered into the St. Lucie Unit No. 2 Participation Agreement, as amended (hereafter sometimes referred to as the "Participation Agreement") and certain other agreements (sometimes hereafter referred to collectively as the Project Agreements). FMPA seeks to purchase an approximate 8.8 percent undivided interest in the St. Lucie Unit No. 2, a nuclear generating facility owned by FP&L and now under construction at

Hutchinson Island, St. Lucie County, Florida. The facility and certain other rights of FMPA to receive capacity and energy are defined in the Bond Resolution. Collectively these interests are referred to as the "St. Lucie Project."

Pursuant to its statutory authorization conferred by Chapter 82-53, Laws of Florida (1982), FMPA filed a Complaint (Appendix Tab A) in Circuit Court, in and for Leon County, on June 3, 1982, seeking to validate the initial issue of bonds not exceeding $375,000,000 (Three Hundred Seventy-Five Million Dollars). Pursuant to the Project Agreement, FMPA will use a portion of the proceeds of the bond issue to purchase its ownership interest in the St. Lucie Project. The remaining proceeds will be expended for payment of interest during construction, funded reserves, working capital, reload fuel and other items which are more particularly described in the Complaint and the exhibits filed in the lower court.

FMPA then proposes to sell portions of the capacity and energy in St. Lucie Generation to which it is entitled to FMPA members. These FMPA members are referred to as the "Project Participants."[2] The Project Participants, will make payments to FMPA for the capacity and energy received pursuant to the Power Sales Contracts, between FMPA and each of the Project Participants. These contracts are hereafter referred to as the "Power Sales Contracts." Under the provisions of these contracts, each of the Project Participants will treat its payments for capacity and energy as operating expenses of their respective electric or

other integrated utility systems. FMPA will apply the payments made pursuant to these Power Sales Contracts to pay its share of operating expenses of the St. Lucie Project, the debt service on the Bonds, and for the maintenance of certain reserves.

In order to provide for payment of continuing operating expenses and debt service for any month in which the St. Lucie Project is inoperable or incapable of operating for such month, FMPA and each of the Project Participants have also entered into Project Support Contracts (the "Project Support Contracts") pursuant to which each of the Project Participants would pay TO FMPA its pro-rata share of these ongoing expenses for "any month of any Contract Year during which no Electric Capacity and Electric Energy from the St. Lucie Project was made available to the Project Participant." (Appendix Tab N, Section 1) The Project Support Contracts expressly provide that such payments would be junior and subordinate to payments to be made by such Project Participants under their outstanding debt instruments.

Certain Project Participants (the "Selling Systems"), have agreed, pursuant to the Capacity and Energy Sales Contracts, to sell their portion of capacity and energy to certain other Project Participants (the "Purchasing Systems"). The Selling Systems retain the right under the Capacity and Energy Sales Contracts to cancel such sales upon the giving of written notice to FMPA and the Purchasing Systems and would thereafter be entitled to receive the portion of capacity and energy previously sold to the Purchasing Systems.

Upon the filing of the validation complaint, the Circuit Court issued on June 4, 1982, its Order to Show Cause why the bond issue should not be validated. (Appendix Tab B) The State Attorney for the Second Judicial Circuit on June 14, 1982, filed an answer to the Complaint and an acknowledgment of service. Appendix Tab C). Acknowledgments of Service and Answers were also filed by all defendant parties to this action.

The Circuit Court held a final hearing in this cause on July 27, 1982. Final Judgment was entered by the Circuit Court on September 3, 1982, validating the bond issue. (Appendix Tab D) The State Attorney for the Second Judicial Circuit filed a Notice of Appeal on September 20, 1982, and this appeal followed.

For the purposes of this brief, all capitalized terms as set forth above and not otherwise defined shall have the same meaning as in the Exhibits and documents filed as an Appendix.

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[1] FMPA consists of the following member cities or utilities governing authorities: Alachua, Bartow, Bountstown, Bushnell, Clewiston, Fort Meade, Fort Pierce Utilities Authority, Gainesville Regional Utilities, Green Cove Springs, Homestead, Jacksonville Beach, Key West, Kissimmee, Lake Worth Utilities Authority, Leesburg, Moore Haven, Mount Dora, Newberry, New Smyrna Beach Utilities Commission, Ocala, St. Cloud, Sebring Utilities Commission, Starke, Tallahassee, Vero Beach, Wauchula.

[2] Not all FMPA Members are project participants. "Project Participants'' are listed as follows: Alachua, Clewiston, Fort Meade, Fort Pierce Utilities Authority, Green Cove Springs, Homestead, Jacksonville Beach, Kissimmee, Lake Worth Utilties Authority, Leesburg, Moore Haven, New Smyrna Beach Utilities Commission, Newberry, Sebring Utilities Commission, Starke, Vero Beach.

POINT I

THE PROVISIONS OF CHAPTER **163,** PART I, AS AMENDED, AND **361,** PART 11, AS AMENDED, FLORIDA STATUTES, PURSUANT TO WHICH FMPA ALLEGES ITS ORGANIZATION AND EXISTENCE, AND THE PROVISIONS OF THE PROJECT AGREEMENTS, THE POWER SALES CONTRACTS AND THE PROJECT SUPPORT CONTRACTS RELATING TO THE ST. LUCIE PROJECT ARE UNCONSTITUTIONAL.

Appellant's position is that the provisions of Chapter **163,** Part I, and Chapter **361,** Part 11, Florida Statutes, as amended by Chapter **82-53,** Laws of Florida **(1982)** (hereinafter collectively referred to as the "Enabling Acts"), and the provisions of the St. Lucie Unit No. **2** Participation Agreement, the Reliability Exchange Agreement, the Replacement Power Agreement and the Tax Indemnity Agreement (hereinafter sometimes referred to as the "Project Agreements") and the provisions of the Power Sales Contracts and the Project Support Contracts are unconstitutional because (A) said statutes were improperly passed as a general law rather than as a special law; (B) said statutes and said contractual provisions authorize the pledge of public credit for private benefit; (C) said statutes and said contractual provisions result in a pledge of ad valorem taxation without a vote of the electorate; and (D) said statutes and said contractual provisions authorize the unlawful delegation of municipal power.

A. General vs. Special Law

The Enabling Acts are unconstitutional because the statutes should have been adopted as special acts rather than as general laws. The Joint Power Act, Chapter **361,** Florida Statutes, is a special act because rather than relating to the State as a whole,

it is, by definition, limited to electric utilities which owned, maintained or operated an electric energy generation, transmission or distribution system within the State of Florida on June 25, 1975. Section 361.11(2), Florida Statutes (1981). The class to which the statute relates is, accordingly, a closed class in that only electric utilities which were in operation on June 25, 1975 qualify to participate in joint electric power supply projects and no municipal or other utilities which become engaged in electric energy generation, transmission or distribution after June 25, 1975 may participate in such projects. Since these acts were not passed in accordance with the requirements of Chapter 11, Florida Statutes, relating to special laws, they are unconstitutional pursuant to Article 111, Section 10, Florida Constitution.

B. Pledge of Public Credit

If the contemplated joint power project were implemented, FMPA would acquire an approximate 8.8% interest in St. Lucie Unit No. 2, a nuclear power plant in which FP&L, a private, investor-owned utility would retain, vis-a-vis FMPA, an approximate 91.2% ownership interest. In connection with its acquisition of its percentage interest in St. Lucie Unit No. 2, FMPA has contracted in the Project Agreements to make certain payments to FP&L and the Project Participants have, in turn, pursuant to the Power Sales Contracts and Project Support Contracts, agreed to make certain payments to FMPA. The transaction thus effects an unconstitutional pledge of public credit for the benefit of FP&L.

The Florida Constitution in Article VII, Section 10, expressly prohibits the pledge of public credit for private benefit, providing:

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

Initially, it should be noted that although it appears that subdivision (d) of Article VII, Section 10 excludes the present transaction from the general provisions of this constitutional provision, it does not appear that the State Legislature intended that transactions effectuated under the Joint Power Act would be exempt from this constitutional provision. Section 361.17 of the Joint Power Act states as follows:

> Except as provided in § 10, Art. VII of the State Constitution, no joint electric supply projects authorized under this statute shall lend or use its taxing power or credit to aid any corporation, association, partnership or person. The private interest portion of such joint projects shall be subject to all taxation in accordance with their proportionate interest in such projects.

Because this transaction is authorized by the Joint Power Act, as well as the Interlocal Act, based upon the above quoted provision, this transaction should not be exempt from the lending of credit prohibition contained in Article VII, Section 10.

The Florida courts have ruled on the question of what constitutes an illegal loan of credit. In *Wald* v. *Sarasota* ***County***

Health Facilities Authority, **360** So.2d **763** (Fla. **1978),** the court stated:

> The word "credit" as used in Fla. Const. Art. VII, § 10 **(1968),** implies the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision debt for the benefit of private enterprises.
>
> In order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody. [*Id.* at **768.1**

It is Appellant's position that the provisions of the Participation Agreement permitting FP&L to sell power produced by FMPA's share in St. Lucie Unit No. 2 (as defined in the Bond Resolution, Appendix Tab L, Section **101)** upon default of FMPA, the granting to FP&L of an option to purchase FMPA's share in St. Lucie Unit No. 2 upon default of FMPA as well as the rights and obligations of FMPA under the default provisions of the Project Agreements, and the provisions of the Enabling Acts authorizing such contractual provisions, violate the provisions of Article VII, Section 10 of the Florida Constitution.

Sections **33.4.1** and **33.4.3** of the Participation Agreement provide as follows:

> within **30** days after issuance of a final order or decision declaring Owner [FMPA] in default, Company [FP&L] may suspend the right of the defaulting Owner to receive all or any part of its Ownership Percentage of the Net Energy....
>
> [i]f default by Participant [FMPA] continues for 180 days after Company has provided notice of default, Company shall have the option, but no obligation, to purchase Participant's interest in St. Lucie Unit No. 2.
>
> (Appendix Tab G).

FMPA is expressly authorized by Section 163.01(15)(b)(1), Florida Statutes, as amended, of the Interlocal Act to include in its contracts such default provisions. However, this statutory provision and the quoted contractual provision entered into pursuant thereto violate the loan of credit prohibition of Article VII, Section 10 of the Florida Constitution because the default provisions could result in a lending of credit by the Project Participants to FP&L. Upon default by FMPA, FMPA could have its right to receive energy from the St. Lucie Unit No. 2 suspended or its interest in St. Lucie Unit No. 2 purchased by FP&L. In such a case, the Project Participants will lose their right to receive energy from the St. Lucie Project, either temporarily or permanently. They will have to obtain alternative, and possibly more expensive, energy while continuing to make payments to FMPA under the Project Supports Contracts for such items as their portion of payments FMPA must make on its Bonds. In essence, the default by FMPA creates additional liabilities for the Project Participants. The default provisions of the Participation Agreement violate the spirit of Article VII, Section 10 of the Constitution.

Subdivision (d) of Article VII, Section 10, does not save the default provisions, because it merely permits a lending of credit "for the joint ownership, construction and operation" of an electric project; it does not intend that a private enterprise can benefit upon the default of a municipality or municipal agency merely because the default is in connection with the

ownership or operation of such facility. Since the exception created in Subdivision (d) of Article VII, Section 10 is, accordingly, not applicable, the general rule against the pledge of public credit for private benefit should control.

The provision of the Power Sales Contracts commonly known as a "step-up" provision which operates upon default by one or more of the Project Participants on their obligations to FMPA violates the pledge of credit constitutional provisions.

Section 19(c) of the Power Sales Contracts (Appendix Tab M) provides that:

> In the event less than all of a defaulting Project Participant's Power Entitlement Share shall be accepted by the nondefaulting Project Participants pursuant to clause (a) or sold pursuant to clause (b) of this Section, FMPA shall transfer, on a pro rata basis (based on original Power Entitlement Share), to all other Project Participants which are not in default, the remaining portion of such defaulting Project Participant's Power Entitlement Share; provided, however, that in no event shall any transfer of any part of a defaulting Project Participant's Power Entitlement Share pursuant to clause (c) of this Section result in a transferee Project Participant having a Power Entitlement Share (including transfers to such transferee Project Participant pursuant to clause (a) of this Section) in excess of 125% of its original Power Entitlement Share.

While this "step-up" provision is expressly authorized by Section 163.01(15)(b)1, Florida Statutes, as amended, it is the position of the State of Florida, that, the step-up provision in the Power Sales Contracts is contrary to the Florida Constitution.

Appellant maintains that the step-up provision constitutes an illegal loan of credit of the Project Participants, because upon the default of another Project Participant, the remaining

Project Participants may be forced to pay to FMPA the amount of the defaulting Project Participants' obligations so that FMPA will be able to continue to make payments to FP&L. The non-defaulting Project Participants assume the liability of the defaulting Project Participant, effecting a loan of credit to such entities.

The "take or pay" provisions of the Project Support Contracts also result in an unconstitutional lending of credit.

Section 3(h) of the Project Support Contracts (Appendix Tab N) provides that:

> In order to induce the purchase from time to time of the Bonds to be issued by FMPA in respect of the St. Lucie Project and any interest coupons appertaining thereto by all who shall at any time become holders thereof, the obligation of the Project Participant to make Project Support Payments shall be absolute and unconditional and shall not be dependent upon performance of FMPA under the Power Sales Contract or this Project Support Contract; Power Sales Payments shall be made whether or not St. Lucie Unit No. 2 is completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of St. Lucie Unit No. 2 or otherwise from the St. Lucie Project for any reason whatsoever in whole or in part, and such Project Support Payments shall not be subject to any reduction, whether by offset, counterclaim or otherwise.

The take or pay provisions of the Project Support Contracts, in substance, effect a lending of credit to another entity. If the St. Lucie Project becomes inoperable, there will be no energy produced by the Project which could produce revenues for FMPA and, in turn, for the Project Participants, but the Project Participants will still have to make payments in order to enable FMPA to make its required payments to FP&L and to pay any Bonds issued for the St. Lucie Project. Indeed, if there has also then

been a default by one or more Project Participants, the remaining Project Participants' share of such payments may be increased beyond their original pro rata share pursuant to the step-up provisions of the Power Sales Contracts discussed above. Effectively, this is a loan of municipal credit in violation of Article VII, Section 10 of the Florida Constitution.

In addition, the indemnification provisions of the Participation Agreement violate Article VII, Section 10 of the Florida Constitution. Under Section 6.1 of the Participation Agreement the parties agree that FMPA's cost of acquiring an interest in St. Lucie Unit No. 2 will include a pro rata share of the Federal and state income taxes that will be assessed against FP&L as a result of the transfer of an interest in the St. Lucie Project to FMPA. Appellant recognizes that such a provision is authorized by Section 163.01(15)(b)(9), Florida Statutes, as amended, which provides that a participation agreement may include:

> Provisions obligating any such public agency, legal entity, or both, to indemnify, including, without limitation, indemnification against the imposition or collection of local, state or federal taxes and interest or penalties related thereto, or payments made in lieu thereof....

Despite the foregoing statutory authorization, Appellant contends that the tax indemnification provision should be held invalid as violative of the Florida Constitution.

In addition, Section 25 of the Participation Agreement (Appendix Tab G) provides that FMPA will indemnify for FP&L's negligence. FMPA's agreement to indemnify FP&L for taxes and for FP&L's negligence or the negligence of its employees or agents

constitutes an unconstitutional pledge of public credit for private benefit because FMPA and the Project Participants will be assuming liability for the obligations of FP&L.

C. Pledge of Ad Valorem Taxation Without a Vote of the Electorate.

The Enabling Acts, the Interlocal Agreement, the Bond Resolution, the Project Agreements, the Power Sales Contracts and the Project Support Contracts are invalid because they effect a pledge of ad valorem taxation without the vote of the electorate. Article VII, Section 12 of the Florida Constitution authorizes municipalities or certain other entities with taxing power to issue bonds payable from ad valorem taxation to finance capital projects only upon an affirmative vote of the electorate.

> Counties, school districts, municipalities, special districts and local government bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:
>
> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxaton; ....

It may be contended that this constitutional restriction is not applicable to FMPA because it is not the type of entity subject to the provisions of Article VII, Section 12. Although FMPA is not a municipality or an entity with taxing power, FMPA, nevertheless, should be subject to these constitutional restrictions. In this context, the court should consider the composition of FMPA and the substance of the transaction. The members of

FMPA are municipalities or boards, commissions or authorities thereof, and FMPA was formed in order to purchase electric projects on their behalf. The payments by these entities are the ultimate credit for the transaction -- FMPA will make interest and principal payments on the bonds from revenues received from the sale of electric power to the municipalities. The municipalities will obtain the money to make these payments solely from available electric utility revenues. To exempt FMPA from the provisions of the constitutional provision would permit the municipalities to circumvent the Florida Constitution. Recently this Court has stated: "That which may not be done directly may not be done indirectly." *County of Volusia v. State*, **No. 61,267,** slip **op.** at **7** (Fla. June **10, 1982),** reh. denied, Aug. 30, **1982.**

While the terms of Article VII, Section 12 of the Florida Constitution expressly relate to indebtedness payable from ad valorem taxation, this provision and its predecessor, Article IX, Section **6,** have been broadly interpreted by Florida courts to require an affirmative vote of the electorate 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, e.g., Hollywood, Inc. v. Broward County,* **90** So.2d **47** (Fla. **1956);** *Clover Leaf, Inc. v. City of Jacksonville,* **145** Fla. **341, 199** So. **923** (Fla. **1940);** *Boykin v. Town of River Junction,* **121** Fla. **902, 164** So. **558** (Fla. **1935);** *State* v. *City* of *Miami,* **113** Fla. **280, 152 So. 6** (Fla. **1933);** *State v. City of Daytona Beach,* **118** Fla.

29, 158 So. 300 (Fla. 1934). This Court has held that a municipal corporation may not borrow funds under financial arrangements which pledge municipal property, unless such arrangement is authorized by the electorate. ***See, Hollywood, Inc. v. Broward County,*** 90 So.2d 47 (Fla. 1956); ***Boykin v.*** *Town* ***of River Junction,*** **121** Fla. 502, 164 So. 558 (Fla. 1935). The rationale set forth in such cases is that the pledge of property creates an indirect pledge of the entity's ad valorem taxing power as the entity will be tempted to use such taxing power in order to prevent foreclosure on its property. It must be noted that this principle is not qualified or limited in use to mortgages placed upon real estate but is applicable to any asset, property or property right of a municipal corporation. ***See generally*** Op. Att'y Gen. 074-269 (Fla. 1974).

An indirect pledge of ad valorem taxation may be effected when a municipality is contingently liable, or may be or become "morally bound," to apply general revenues to prevent loan of property. ***Nohrr*** v. ***Brevard County Educational Facilities Authority,*** 247 So.2d 304 (Fla. 1971). In ***Nohrr,*** a college cafeteria project was to be financed through the issuance of bonds by the Brevard County Educational Facilities Authority. The bonds were secured by a mortgage on the project and the project was leased to a private college. The court reasoned that although there was no legal coercion upon the county to prevent the foreclosure of the mortgage on the project, the county would feel "morally compelled" to levy taxes or to appropriate funds to prevent the loss of

those properties if foreclosure were threatened. The court concluded that "absent specific constitutional authority a mortgage securing revenue bonds of a public body should not be approved without an election." Id. at 311.

Similarly, in 1980 Attorney General Opinion 80-9 (January 31, 1980), the Attorney General stated that where a city could be coerced into applying ad valorem revenues in order to avoid the loss of municipal property after a default, the financing should not be undertaken without referendum in accordance with Article VII, Section 12(a), Florida Constitution.

In addition, this Court has recently refused to validate bonds where the payments were to be secured by a county's pledge of all legally available, unencumbered sources of county revenue. In *County of Volusia v.* State, No. 61,627, slip **op.** (Fla. June 10, 1982), reh. denied, (August 30, 1982). Volusia County sought to issue bonds to finance construction of a jail. The county pledged all revenues other than ad valorem taxes to secure the bonds and then convenanted to do all things necessary to continue receiving the various revenues pledged. This Court noted that:

> [T]o maintain all of the programs that produce the revenues, while devoting the revenues themselves to the retirement of the bonds, will inevitably require that ad valorem taxes be increased *so* that the county will have sufficient operating revenue to maintain the programs and services that generate the pledged revenue. Id. at 6.

The net effect of such a transaction on ad valorem taxation would have been more than incidental and thus the court refused to validate the bonds.

The present facts are analogous to those present in the *Volusia* case. The Project Participants have each attempted to pledge all legally available electric utility revenues and have each covenanted in Section **14** of the Power Sales Contracts to "maintain its electric or other integrated utility system in good operating condition...." As a result, the pledge in the present case is unconstitutional and the bonds should not be validated.

The 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).** However, the rationale in each case was that "the incidental effect on use of the ad valorem taxing power occasioned by the pledging of other sources of revenue does not subject such bonds or certificates to **...** [the constitutional referendum] requirement." *Town* of *Medley* **v.** *State,* **162 So.2d** at **258** (emphasis added). The present case differs from *State* v. *Alachua County* and *Town* of *Medley* v. *State,* in that the Project Participants might feel compelled to levy ad valorem taxes to prevent a default under the Participation Agreement in order to continue to receive the energy generated by the St. Lucie Project and in order to preserve FMPA's ownership interest therein. See also the discussion of default provisions cited above in Point I(B)(2).

The rate covenants contained in the Power Sales Contracts and the Project Support Contracts violate Article VII, Section 12

of the Florida Constitution. As part of their undertakings in the St. Lucie Project, the Project Participants have covenanted to maintain the rates charged for electrical service at a level sufficient to raise adequate revenues to pay their obligations under the Project Support Contracts and the Power Sales Contract. See, Appendix Tab M, Section **25,** Tab N, Section 4. Under the Project Support Contracts the Project Participants are obliged to make payments irrespective of whether power is ever delivered or generated through the operation of the St. Lucie Project. These rate covenants are specifically authorized by statute §§ 163.01 (15)(b)(7), 163.01(15) (b)(11), Fla. Stat., as amended **(1982).** This statutory grant of authority to assess moneys for electric power not received is functionally equivalent to a tax and should make the above referenced constitutional provision relating to general obligation bonds applicable.

The indemnification clauses for taxes and damages of the Participation Agreement discussed above in Point **I(B)(5)** also violate Article VII, Section **12** of the Florida Constitution because the ad valorem taxing power of the Project Participants has been indirectly pledged to the payment of obligations associated with the St. Lucie Project.

Under Section 6.1 of the Participation Agreement, FMPA agrees to indemnify FP&L for taxes. Numerous Florida cases have expressly held that a municipality may not use its taxing power to satisfy contractual indemnification clauses. In ***Seaboard*** *Air* ***Line R.*** *Co.* **. *v. Sarasota-Fruitville*** *Drainage District,* **255** F.2d

622 (5th Cir. **1958),** *cert. denied,* **358 U.S. 836 (1958),** the Fifth Circuit found a municipality's agreement to use its taxing power to indemnify a railroad for losses sustained in connection with the maintenance of pipe under railroad tracks contrary to public policy and thus invalid. Similarly, in *Lykes Brothers Inc.* **v.** *City* **of** *Plant City,* **354** So.2d **878** (Fla. **1978),** this court invalidated an agreement under which the city had contracted away its taxing power by exonerating a private enterprise **from** paying taxes.*

If this Court were to determine that FMPA is not permitted to assume its proportionate share of FP&L's obligation with respect to pollution control bonds **as** discussed below under Point I(C) and the Tax Indemnity Agreement were to become operative (Appendix Tab K), it is apparent that such Tax Indemnity Agreement is subject to the same constitutional attack under Article VII, Section 12, Florida Constitution as are the tax indemnity provisions of the Participation Agreement.

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* *See also City* **of** *Daytona Beach* V. *King,* **132** Fla. **273, 181 So. 1 (1938)** (it is contrary to public policy to use tax revenues to pay for taxes incurred by a privately owned golf club). *See generally Tampa Shipbuilding & Engineering Co.* **v.** *City* of *Tampa,* 102 Fla. **549, 136 So. 458 (1931)** (without legislative authority, a municipality cannot exempt a private organization from taxation); *City* of *Tampa* V. *Kaunitz,* **39** Fla. **683, 23 So. 416 (1898)** (without legislative authority, a city cannot exempt property from taxation or limit the tax expenses on the property).

In addition, Section **25** of the Participation Agreement provides that FMPA will indemnify FP&L for damages. Because these damages could also ultimately be paid from taxes the provision violates Article VII, Section **12** and constitutes an indirect pledge of ad valorem taxation without the requisite vote of the electorate.

The default provisions of the Participation Agreement are invalid as they result in a de facto mortgage of municipal property which is prohibited under the Florida Constitution unless approved by the electorate. In construing and enforcing Section **12** of Article VII of the Florida Constitution, Florida courts have consistently looked to the substance, rather than the form, of a transaction and analyzed the operation and effect of the transaction when considered in the light of the constitutional restrictions. See ***State v. City of Miami,*** 113 Fla. **280, 152 So. 6** (Fla. **1933).** The criterion used in the "substance over form" analysis is not the name given to the instrument by the municipality; rather, the court will determine whether the financing scheme expressly or impliedly violates the constitutional restrictions. ***Clover Leaf, Inc., v. City of Jacksonville,*** **145** Fla. **341, 199 So. 923** (Fla. **1940).** Any doubts as to the constitutionality of a financing scheme will be resolved against the public officials and in favor of the people. ***See Kathleen Citrus Land Co. v. City of Lakeland,*** **124** Fla. **659, 169** So. **356** (Fla. **1936).**

Effectively, through the default provisions, FP&L has been granted a lien on the St. Lucie Unit No. **2** Project and upon

default by FMPA it obtains the right to acquire the St. Lucie Unit No. 2 by purchase. The Participation Agreement provides that in the event of a default by FMPA, FP&L after proper notice will be entitled to the energy associated with the suspended rights. If a default by FMPA continues for 180 days after such proper notice FP&L has the option, but no obligation, to purchase FMPA's interest in St. Lucie Unit No. 2. The result in either case is the same. FMPA, and in turn the Project Participants, lose the rights to electric power. The Project Participants might feel compelled to levy ad valorem taxes to prevent such foreclosure and to preserve FMPA's interest in the St. Lucie Project and their rights to receive power and energy therefrom.

Additionally, Appellant points out that the Project Participants have an interest in the St. Lucie Project through the clause embodied in the Interlocal Agreement granting them a reversionary interest in the St. Lucie Unit No. 2. The relevant provision of the Interlocal Agreement (Appendix Tab F, Section 4) provides:

> Termination of Projects. Upon the termination of any Project of the Agency (other than a Study Project) and after
>
> (a) all bonds, notes or other evidences of indebtedness of the Agency with respect to such project, and the interest thereon, shall have been paid or adequate provision for such payment made in accordance with the provisions of such bonds, notes or other evidences of indebtedness and
>
> (b) all contractual obligations undertaken by the Agency with respect to such project and all liens, charges and encumbrances to which the property constituting a part of such project is subject shall have been satisfied, released or adequately provided for,

> then all property, real, personal, tangible and intangible of the Agency constituting a part of such project shall promptly be divided among and distributed to the parties participating in such project in the proportion that each party's participation in such project bears to the participation of all parties participating in such project or in such other manner as such parties shall agree.

Upon default, FP&L's purchase would operate as a foreclosure or forfeiture of the property interest inherent in the reversion. The Project Participants might feel compelled to levy ad valorem taxes to prevent such foreclosure and to preserve their interest in the St. Lucie Project. Such a result is precisely what Article VII, Section 12 of the Constitution was intended to prevent.

The default provisions of the Power Sales Contracts and Project Support Contracts also result in a mortgage of the Project Participant's property in violation of the constitutional prohibition of Article VII, Section 12, Florida Constitution.

Section 19 of the Power Sales Contracts (Appendix Tab M) provides a mechanism by which FMPA shall dispose of the Project Participant's Power Entitlement Share (as defined in said Contracts) in the event of a default by the Project Participant:

> (a) FMPA shall first offer to transfer to all other nondefaulting Project Participants a pro rata portion of the defaulting Project Participant's Power Entitlement Share which shall have been discontinued by reason of such default....
>
> (b) In the event less than all of a defaulting Project Participant's Power Entitlement Share shall be accepted by the other nondefaulting Project Participants pursuant to clause (a), FMPA shall, to the extent permitted by law, use its reasonable best efforts to sell the remaining portion of a defaulting Project Participant's Power Entitlement Share for the remaining term of such defaulting Project Participant's Power Sales Contract with FMPA.

....

> The defaulting Project Participant shall remain liable for all payments to be made on its part pursuant to the Power Sales Contract, except that the obligation of the defaulting Project Participant to pay FMPA shall be reduced to the extent that payments shall be received by FMPA for that portion of the defaulting Project Participant's Power Entitlement Share which may be transferred or sold or for the Electric Energy associated therewith which may be sold as provided in this Section....

Although on their face the Power Sales Contracts and the Project Support Contracts represent a municipal indebtedness which is payable solely from the municipalities' available electric system revenues, when the default provisions of the Power Sales Contracts and the Project Support Contracts are closely examined the true substance of the transactions becomes apparent. Section 19 of the Power Sales Contract, as quoted above, provides that upon default by a Project Participant FMPA may either sell the defaulting Project Participant's Power Entitlement Share or sell the energy associated with such share. The default provisions work as a mortgage of the Project Participant's right to electric power, because, upon default, the defaulting Project Participant effectively loses its entitlement to power produced from the St. Lucie Project. Essentially, such default provisions result in a forfeiture of municipal property. In order to prevent such forfeiture, the municipality might feel compelled to levy ad valorem taxes to preserve its interests in the power and energy from the St. Lucie Project and this result is precisely what Article VII, Section 12, Florida Constitution, is intended to prevent. In reality, the municipalities have attempted to do

that which is forbidden. They have attempted to borrow money and secure payment by mortgaging municipal property without obtaining the approval of the electorate, in violation of the Florida Constitution.

Moreover, it is Appellant's contention that FMPA's assumption of FP&L's obligations to the holders of the pollution control bonds, pursuant to the Project Agreements, is unconstitutional because FMPA, in acquiring mortgaged facilities, is subjecting itself and the Project Participants to the possibility of being forced to prevent foreclosure of the mortgage on such facilities through the exercise of the taxing power of the Project Participants in violation of Article VII, Section **12** of the Florida Constitution.

In Section 5 of the Participation Agreement, FMPA agrees to assume its Ownership Percentage of FP&L's obligations under the Trust Indenture between St. Lucie County, Florida and the First National Bank of Miami dated January **1, 1974,** (Appendix Tab **R)** for the issuance of certain pollution control bonds. In ***Hollywood, Inc.*** v. ***Broward County,*** **90** So.2d **47** (Fla. **1956),** Broward County attempted to purchase property subject to a mortgage. This Court held that such a purchase could only be undertaken after the approval of the electorate because "when the county acquired the property the mortgage to which it was subject became a charge against the property, and the county was placed in a position of being coerced to meet the annual requirements for interest and maturing principal under the mortgage." ***Id.*** at **51.** Similarly,

in the instant situation, FMPA is placing itself and the Project Participants in the position of having to guarantee the mortgage payments in order to ensure that its electricity is not disrupted by foreclosure proceedings.

Although it is true that neither FMPA nor the Project Participants are legally obligated to pay for any cost from any sources other than electric or integrated utility revenues, as discussed above, legal coercion is not required before an improper pledge of taxing power may be found. The Project Participants will be subjected to the same sort of compulsion this court in ***Nohrr v. Brevard County Educational Facilities Authority,*** 247 So.2d 304 (Fla. 1971), discussed above, was concerned with. If, for any reason, the bondholders of the pollution control facilities move to foreclose, there is the possibility that such action will interfere with or shut down the operation of the St. Lucie Project. At this point, the Project Support Contracts obligate the Project Participants to continue to pay for their power entitlements even though they may not be receiving any electricity. If the Project Participants receive no power, (assuming no alternate source of electric generation) they would have nothing to sell to their customers and hence have no revenue with which to pay for their entitlement. The only alternative open to the Project Participants would be to raise the funds necessary to prevent foreclosure from general revenues, including ad valorem taxes. Therefore, the proposed assumption by FMPA of FP&L's obligation to the holders of FP&L's pollution control bonds should be held unconsti-

tutional.

The "step-up" provisions of the Power Sales Contracts which effectively carry over into the obligations under the Project Support Contracts result in an indirect mortgage of municipal property contrary to Article VII, Section 12 of the Florida Constitution. Upon default, the Project Participant risks the loss of two types of municipal property -- first, its right to receive power and energy from the St. Lucie Project and second, its reversionary interest in the St. Lucie Project which was described above. Thus, a default creates the risk of a foreclosure of both elements of the defaulting Project Participant's property interest, Such a defaulting Project Participant might feel compelled to levy ad valorem taxation to prevent such foreclosure in order to continue to receive lower cost energy from St. Lucie, and to retain its reversionary interest in the St. Lucie Project.

The take or pay provisions of the Project Support Contracts effect an indirect pledge of ad valorem taxation. If the St. Lucie Project becomes inoperable, there will be no revenues generated therefrom, and it is possible that there will be an amount which will be required to pay the costs of the St. Lucie Project and make payments on the bonds that will remain unfunded by the fair value of the assets. Yet, the Project Participants remain obligated to pay the costs of the St. Lucie Project and make payment on the bonds. Obviously, the Project Participants will have to pay the costs of the St. Lucie Project and make payments on the bonds from another source. In substance, said

provisions constitute obligations of the Project Participants which can be enforced by judgment against their entire revenues and assets. In addition, if the St. Lucie Project is no longer in existence, the municipalities will be forced to satisfy their power needs from other sources, and an upward adjustment will probably have to be made to the electric bills of the consuming public. In this event, the consumers will have not only lost the economic benefit of purchasing energy from the St. Lucie Project, but will also bear the burden of paying the costs of the St. Lucie Project and paying off the bonds over and above the increased cost of electricity.

Furthermore, the take or pay provisions are invalid as a matter of public policy. Should the St. Lucie Project terminate, the Participants, nonetheless, in all likelihood, would be liable for payments on the bonds and to FP&L. They would no longer be receiving electricity for their payments. They would, in effect, be paying for nothing. The court must examine the weight of the burden to be borne by the ratepayers, who will be forced to pay an additional premium for receiving nothing under such agreements. The State suggests that this is an excessive burden for the public to bear and, as such, is contrary to the public policy of this State.

D. Delegation of Powers.

The Enabling Acts, the Participation Agreement, Interlocal Agreement, and the Power Sales Contracts and the Project Support Contracts entered into pursuant thereto, are also unconstitutional

because they provide for unlawful delegation of powers.

Section 163.01(15)(b)(4), as amended, of the Enabling Act authorizes two tiers of delegation: (1) delegation of broad powers from the Project Participants to FMPA, and (2) delegation of broad, discretionary management and policy-making powers to the managing agent of a project. Pursuant to this authority, the Project Participants in the Interlocal Agreement have delegated such broad powers to FMPA as to be unlawful. In addition, under the Participation Agreement, the purported appointment of FP&L as agent for the construction and operation of St. Lucie Generation constitutes an unlawful delegation of power and is contrary to law.

Although FMPA is a separate legal entity, and not a municipality, it is a public entity and arguably subject to the same limitations as a municipal entity. The rules for delegation by political subdivisions, including municipalities, are the same as those applicable to delegation of power by the State Legislature. 2 McQuillan, Municipal Corporations, Section 10.39 (3d ed. 1979). Although a proprietary function, such as the administration of municipal electric service, may be delegated, the party making the delegation must provide guidelines for implementation of the delegated authority. In the context of a legislative delegation of authority through an administrative agency, this Court has repeatedly held that the authority granted to an administrative agency must be limited by objective guidelines and standards so that nothing is left to the unbridled discretion or whim of the

administrative agency. *E.g.*, *Lewis v. Bank* of *Pasco County*, 346 So.2d 53 (Fla. 1976); *Florida Home Builders v. Division* of *Labor*, 367 So.2d 219 (Fla. 1979); *Highridge Management Corp.* v. *State*, 354 So.2d 377 (Fla. 1977). The delegations authorized in the Project Agreements, the Interlocal Agreement, the Power Sales Contracts and Project Support Contracts should be held unlawful due to the total absence of guidelines or criteria therein.

In connection with the delegation to FP&L under the Participation Agreement, the absence of guidelines is exacerbated by the fact that the agency relationship is an irrevocable one and further, by the fact that FMPA has agreed to exculpate FP&L for its negligent acts or the negligent acts of its employees or agents, resulting in liability to third persons. The agency arrangement cannot be terminated based upon the failure to perform according to an ascertainable standard. The sole manner in which it can be terminated is if FP&L transfers all or part of its interest in the St. Lucie Unit No. 2, and in such instance FP&L's successor in interest automatically continues as agent. There is, then, effectively no control by FMPA over its agent, FP&L, in this instance,

In addition, the rate covenants contained in the Bond Resolution, the Power Sales Contracts and the Project Support Contracts also violate the Florida Constitution's restrictions on delegation of power because they may result in the imposition of unreasonable rates.

Section 712 of the Bond Resolution (Appendix Tab L) provides, in pertinent part:

> 1. FMPA shall at all times fix, establish, maintain and collect rates, fees and charges for the sale of the output, Electric Capacity, Electric Energy, use or service of the St. Lucie Project which shall be sufficient to provide Revenues in each Fiscal Year which, together with the other amounts available therefor, shall be equal to the sum of:
>
> (a) The amount estimated by FMPA to be required to be paid during such Fiscal Year into the Operation and Maintenance Fund;
>
> (b) The amounts, if any, required to be paid during such Fiscal Year into the Debt Service Fund other than any such amounts which the Annual Budget anticipates shall be transferred from other funds;
>
> (c) The amounts, if any, to be paid during such Fiscal Year into any other Fund established under Section 502 hereof; and
>
> (d) All other charges or liens whatsoever payable out of Revenues during such Fiscal Year.

Section 14 of the Power Sales Contracts (Appendix Tab M) and section 4 of the Project Support Contracts (Appendix Tab N) provide, in pertinent part:

> The Project Participant agrees . . . to establish, impose, maintain, enforce and collect rates, fees and charges for all services and facilities of its electric or other integrated utility system sufficient to provide revenues at the times and in the amounts required to pay all costs of the supply of power or other output for the Project Participant's electric or other integrated utility system, including the payments to be made hereunder, as well as all other costs of operation, administration, maintenance and debt service of its electric or other integrated utility system and all other amounts payable from or constituting a lien or charge on the revenues of its electric or other integrated utility system.

FMPA is authorized to enter into these covenants pursuant to the Interlocal Cooperation Act, Section 163.01, as amended. These covenants of the Bond Resolution, the Power Sales Contracts and the Project Support Contracts are within the purview of Section 163.01 (15)(b)(11), Fla. Stat. as amended. However, this statute is unconstitutional.

Article 8, Section 2 of the Florida Constitution gives the legislature the general power to create municipalities and to endow them with powers. Pursuant to this endowment, Article 8, Section 2(b) provides that municipalities shall have powers necessary to render municipal services. Thus, the Florida Constitution gives the State Legislature the authority to delegate some of its police powers to municipalities.

Case law interpreting Article 8, Section 2 supports this proposition and goes a step further: "Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities." ***Cooksey*** v. ***Utilities*** *Comm'n,* 261 So.2d 129, 130 (Fla. 1972). However, the ability of the legislature to delegate powers to municipalities to provide services is not unlimited.

With respect to setting rates for services provided, the legislature's ability to delegate is limited by a standard of reasonableness. As this court in ***Cooksey*** v. ***Utilities*** ***Comm'n*** stated: "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 those services,"

261 So.2d at 130 (footnote omitted)(emphasis added). *See Gainesville Gas & Elect. Power Co. v. City of Gainesville*, 63 Fla. 425, 58 So. 785 (Fla. 1912).

The instant statute fails this reasonableness test; it provides a structure through which minimum rates contracted between the parties may be unreasonble. Section 163.01(15)(b)(11), Florida Statutes, as amended, delegates to the parties the power to enter into agreements establishing rates "which shall be at least sufficient to meet" a wide variety of expenses -- including "funds sufficient to fulfill the terms of all other contracts and agreements made by such public agency [FMPA] . . . ." This provision gives FMPA broad power to contract to meet what could be unlimited expenses. Should expenses thus prove to be unreasonable, minimum rates set pursuant to the statute would be unreasonable; and, if minimum rates prove to be unreasonable, all rates set pursuant to § 163.01(15)(b)(11), Florida Statutes, as amended, would be unreasonable and, thus, would be unconstitutional.

POINT II

NUMEROUS PROVISIONS OF THE INTERLOCAL AGREEMENT, THE PROJECT AGREEMENTS, THE **BOND** RESOLUTION, THE POWER SALES CONTRACTS AND THE PROJECT SUPPORT CONTRACTS ARE CONTRARY TO **LAW.**

A. FMPA is not a "Separate Legal Entity".

The traditional legal entities recognized in Florida are the partnership, the public corporation, the for-profit corporation and the not-for-profit corporation. The "separate legal entity" which the Interlocal Agreement purports to create does not fit within the description of any of the traditional legal entities. Florida courts have never hesitated to pierce the corporate veil in those instances where a corporation was shown to be nothing more than a shell without income and assets separate from its stockholders. ***Aztec*** *Motel, Inc.* v. ***State,*** 251 So.2d 849 (Fla. 1971). In the instant case, although FMPA purports to be a separate legal entity, it is evident that it is no more than a shell created to enable its members to engage in activities in which they could not otherwise engage.

B. Covenant Not to Dissolve.

Article VI of the Interlocal Agreement and Section XIV of the Power Sales Contracts (Appendix Tab M) provide that the Interlocal Agreement will remain in effect until all bonds, notes or other evidences of indebtedness and interest are paid in full and that no Project Participant will take any action to dissolve or terminate the existence of FMPA during the term of the Participation Agreement.

The Participation Agreement (Appendix Tab G) further provides at Section 40:

> This Agreement shall remain in effect until the abandonment of St. Lucie Unit No. 2 and authorization by the Nuclear Regulatory Commission of the surrender of all licenses, renewals of licenses and replacements of licenses for and final disposition of all components of St. Lucie Unit No. 2, or for a period of two hundred years from the date hereof, whichever is less; but the covenants and agreements of Company and Participant contained in Sections 6 [Responsibility for Costs], 18 [Decommissioning and Disposal] and 25 [Liability and Indemnification] shall continue in effect beyond such term of this Agreement, and shall be governed by the provisions of Section 33 [Default].

The foregoing covenants in effect bind the Project Participants to a contract of indefinite duration with FP&L because the Participation Agreement is for an indefinite term. Under Florida law, it is unlawful for a municipal corporation to enter into a contract of perpetual existance. ***Collins*** v. ***Pic-Town*** *Water* ***Works, Inc.,*** 166 So.2d ***760*** (Fla. 2nd DCA 1964).

C. Indemnification for Taxes and Damages.

Under Section 6.1 of the Participation Agreement and the terms of the Tax Indemnity Agreement discussed above in Point I (B) and (C), FMPA has agreed to indemnify FP&L for income taxes. Appellant contends that such indemnification provisions should be held invalid as against the public policy of this State.

FMPA is to issue revenue bonds for the financing of the St. Lucie Project. The funds for the payment of FP&L's taxes are to be derived from the proceeds of FMPA's bonds which will be repaid from the revenues collected by FMPA from the Project Participants,

which, as discussed above, could either ultimately come from (i) tax levies of the Project Participants or (ii) have a substantial effect on the taxes required to be levied.

As discussed more fully above at Point I (C), Florida cases have expressly held that a municipality may not use its taxing power to satisfy contractual indemnification clauses. ***Seaboard Air Line R. Co. v. Sarasota-Fruitville Drainage District,*** 255 F.2d 622 (5th Cir. 1958), ***cert. denied,*** 358 U.S. 836 (1958); ***Lykes Brothers Inc. v. City of Plant City,*** 354 So.2d 878 (Fla. 1978); ***City*** of ***Daytona Beach v. King,*** 132 Fla. 273, 181 So. 1 (Fla. 1938). Because taxes could ultimately be used to indemnify FP&L for taxes related to the St. Lucie Project, the provisions of the Tax Indemnity Agreement are invalid.

In addition, if FMPA had not agreed to pay these taxes, F'MPA would have to raise less money either from bond proceeds or from payments by the Project Participants. This would enable FMPA to pass along the savings to the consuming public in the member municipalities who are the same individuals labeled **"taxpayers"** by the court and the State Legislature. By its payment of these taxes, FMPA is in effect benefiting a private entity at the expense of the people of the state of Florida who may now be forced to pay higher rates for the electricity they consume. The provision is therefore against the interests of the people of this State and violates public policy.

In addition, Section 25 of the Participation Agreement

provides that FMPA will indemnify and save harmless FP&L from and against the cost of discharging liability to third parties for damages, notwithstanding that such damage loss or claim results from FP&L's negligence or the negligence of its employees or agents except to the extent that the liability is discharged by insurance or that the damages were caused by "willful action." Such a contractual provision that would exculpate a party, here FP&L, for responsibility for its own acts of negligence or the intentional torts of personnel other than management personnel, is against public policy. ***See Fuentes*** V. ***Owen,*** 310 So.2d 458 (Fla. 3d DCA 1975); ***Zuckerman Vernon Corp. V. Rosen,*** 361 So.2d 804 (Fla. 4th DCA 1978).

D. Default Provisions.

The Project Agreements provide that FMPA is to "take such steps as are reasonably necessary to enforce" the obligations of the Project Participants under the Power Sales Contracts and the Project Support Contracts. See, Section 33.5, Participation Agreement, (Appendix Tab G) Among the remedies provided in the Power Sales Contracts and the Project Support Contracts upon default of the Project Participants is the remedy of mandamus. Section 18, Power Sales Contract, Appendix Tab M; Section 8, Project Support Contract, Appendix Tab N. FMPA's covenant to compel performance of the Project Participants' obligations by mandamus is unenforceable. Mandamus is not an appropriate remedy for the redress of private contract rights; municipal obligations which rest upon a contract will not be upheld by mandamus where

there is no question of trust or of official duty. **See *Board of Public Instruction* of *Gilchrist County v. Board of Public Instruction of Alachua County,* 155** Fla. **79, 19** So.2d **576 (1944); *Florida Central & Peninsular Railway v. State,* 31** Fla. **482, 13 So. 103 (1893).** Therefore, the default provisions of the Power Sales Contracts and the Project Support Contracts are contrary to law. This in turn means that the default provisions of the Participation Agreement are also contrary to law.

In addition, the default provisions of the Power Sales Contracts and the Project Support Contracts are invalid because the Project Participants are not legally empowered to limit their remedies in case of default by FMPA to those set forth in the Power Sales Contracts and Project Support Contracts. In limiting the remedies in case of default to mandamus, injunction and specific performance, the Project Participants' constitutional right to access to courts is impaired. Article I, Section 21 of the Florida Constitution provides:

> The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

In limiting their remedies as aforesaid, the parties have effectively barred the right to recover money damages resulting from non-performance of the obligations of the project agreements. The current Project Participants should not be permitted to waive indefinitely the right to recover damages for breach of contract, thereby barring or severely restricting the Participants' constitutional right of access to the courts.

E. Third Party Beneficiary Clause.

Appellant contends that Section 43 of the Participation Agreement, Section 24(c) of the Power Sales Contracts and Section 17(c) of the Project Support Contracts which grant third-party beneficiary status to FP&L with respect to the Contracts between FMPA and the Project Participants are contrary to law. Under Florida law, FMPA may not grant to FP&L third-party beneficiary status with respect to such Contracts, because FP&L is not a direct beneficiary of these agreements, but rather, is merely an incidental beneficiary. As such, FP&L may not seek to enforce these agreements, and these provisions, therefore, should be invalidated.

The statutory authority under which FMPA and FP&L entered into the third-party beneficiary provisions of the Participation Agreement, the Power Sales Contracts and the Project Support Contracts is Section 163.01(15)(b)8, Florida Statutes, as amended. While this section authorizes FMPA to grant third-party beneficiary status to FP&L under the Power Sales Contracts and Project Support Contracts, sections 24(c) and 17(c) respectively (Appendix Tab M, N), the facts surrounding the Power Sales Contracts and the Project Support Contracts, as well as such Contracts themselves, illustrate that FP&L is no more than a nominal third-party beneficiary to such Contracts. FP&L is merely an incidental beneficiary, and should not be entitled to assert third-party beneficiary status regarding the Power Sales Contracts and the Project Support Contracts.

Under Florida law, only a third person for whose benefit a contract has been made may maintain an action thereon. ***American Surety*** Co. ***of New York V. Smith,*** 100 Fla. 1012, 130 So. 440 (Fla. 1930); ***Di Camillo*** v. ***Westinghouse Electric*** *Corp.*, 122 So.2d 499 (Fla. Dist. Ct. App. 1960); ***Weimar*** v. ***Yacht Club Point Estates, Inc.,*** 223 So.2d 100 (Fla. 4th DCA 1969). The test of whether a person has third-party beneficiary status has been held to be whether it is the intent of the parties to the contract to directly and substantially benefit the third party. It is the undertaking on the part of the promisor, as a consideration to the promisee, to benefit the third person, that gives rise to a cause of action by the beneficiary against the promisor, resting upon the contract itself. ***See Marianna Lime Products Co. V. McKay,*** 109 Fla. 275, 147 So. 264 (1933); ***Woodbury*** v. ***Tampa Waterworks Co.,*** 57 Fla. 243, 49 **So.** 556 (Fla. 1909).

In the case of ***Thompson*** v. ***Commercial Union Insur. Co. of New York,*** 250 So.2d 259 (Fla. 1971), the court held that "when it is manifest from the nature ... of a contract that the formal parties thereto intended to treat a third party as a person primarily entitled to the benefit of its provision ... such beneficiary may maintain an action ... upon the contract ...." ***Id.*** at 262 (emphasis added). ***See also, American Surety Co. of New York V. Smith,*** 100 Fla. 1012, 130 So. 440 (1930).

Here, the "nature" or purpose of the Power Sales Contracts and the Project Support Contracts is to effectuate the sale and purchase of electrical power. FP&L is no more a person primarily

entitled to the benefit of the contract than would be a manufacturer in relation to a distributor-retailer contract. It is not the municipalities' primary purpose to benefit FP&L by agreeing to purchase electrical power from FMPA.

F. Waiver of the Right to Partition.

Under Section 28 of the Participation Agreement (Appendix Tab G), the parties owning an interest in St. Lucie Unit No. 2 waive their right to partition as tenants in common. The court in *Condrey* v. *Condrey,* 92 So.2d 423 (Fla. 1957), stated that the right to partition is, as a general rule, an essential part of title to property held as tenants in common. The court stated that the right to partition can be waived only if the waiver is not for an indefinite or unreasonable period of time. The waiver of partition in the Participation Agreement is open ended. It provides that the right to partition is waived for a term (i) which shall be coterminous with the Participation Agreement (and therefore of indefinite duration), or (ii) which shall be for such other period as may be required under applicable law. Insofar as FMPA's waiver of the right to partition is not limited to a specific period of time, it is contrary to law.

G. Rate Covenant.

In Section 712 of the Bond Resolution (Appendix Tab L), quoted above at Point II (D), FMPA covenants to maintain its rates at a level sufficiently high to operate and maintain the St. Lucie Project and to service its bond indebtedness. Clearly, FMPA's rate covenant is dependent upon the covenant of the Project

Participants, as contained in Sections 14 and 4 of the Power Sales Contracts and the Project Support Contracts, respectively, to maintain their rates for electrical service at a level sufficient to generate revenues to pay FMPA their obligations under said contracts. The net result of the rate covenant is, or may be, to tax electric utility customers without having complied with the constitutional and statutory requirements for the pledge of general revenues. As a result, the rate covenant contained in the Bond Resolution is unlawful and contrary to public policy.

Section 163.01(15)(b)(11) of the Interlocal Act, as amended, and the rate covenant provisions of the Bond Resolution, the Power Sales Contracts and the Project Support Contracts entered into pursuant thereto and discussed above in Point II (D), violate public policy with respect to maximum rates. The statute places no limitation on maximum rates; it allows the electric utilities to contract to establish rates at any point over a (possibly inflated) minimum. This allows FMPA too great a latitude. It encourages inefficient production and uncontrolled or irresponsible decision making; and it allows the electric utilities to contract, with respect to rates, with third parties whose personal interests can lead to inflated rates which must ultimately be paid by the consumer. Such an open-ended rate-setting provision can lead to rates which are not reasonably related to prudent costs (and returns thereon) for generating electricity. *Cooksey* v. ***Utilities*** *Comm'n.*, ***supra***, 261 So.2d 129.

This ability to contract as to establish rates which may be or may become inflated leads to a further difficulty: once the rates have been determined, they may not be reviewed. In the present case, the State Legislature is allowing the electric utilities and FMPA to contract to establish rates which may be or may become inflated. However, the Legislature may not exercise its rate-making powers to correct any unreasonable rates set pursuant to such a contract; to do so would be contrary to Article 1, Section 10 of the Florida Constitution. That constitutional provision states: "No . . . law impairing the obligation of contracts shall be passed." Article I, Section 10, Fla. Const. Thus the Legislature has created a potentially dangerous situation: it has allowed FMPA to agree to impose unreasonably inflated rates; and it is potentially foreclosed from reviewing such rates. Section 163.01(15)(b)(11) of the Interlocal Cooperation Act violates a public policy objective of this State of discouraging exorbitant rates.

H. The "step-up" Provisions and "take or pay" Provisions Violate Public Policy.

The "step-up" provisions of the Power Sales Contracts and the "take or pay" provisions of the Project Support Contracts, discussed above in Point I (B), violate the public policy of this State.

In its adoption of Section 10 and 12 of Article VII of the Constitution and in its enactment of Section 361.17 of the Joint Power Act, the State Legislature evidenced its desire to protect

the people from the use of municipal credit to benefit another entity and to protect the people from the over issuance of debt or the pledge of property by public entities without approval of the electorate. However, the step-up provision injures the very same individuals being protected by these laws.

If the non-defaulting Project Participants are required to assume responsibility for the obligations of a defaulting Project Participant, it is conceivable that such non-defaulting Project Participants would not be able to use or to economically remarket such additional power but would have to raise their utility rates to cover the costs of the purchase of surplus power. The utility rates for users of the municipal electric system, in that situation, could become exorbitant. The rates would have to be raised to the point where, at least in substance, the rate would be a tax as well as a charge for the actual energy received. This result is violative of the public policy of this State.

The take or pay provisions of the Project Support Contracts are also invalid as a matter of public policy. Should the St. Lucie Project terminate, the Participants would be liable for payments on the bonds and to FP&L. They would no longer be receiving electricity for their payments. They would, in effect, be paying for nothing. The court must examine the weight of the burden to be borne by the ratepayers, who will be forced to pay an additional premium for receiving nothing under such agreements. The State suggests that this is an excessive burden for the public to bear and, as such, is contrary to the public policy of

this State.

I. The Capacity and Energy Sales Contracts Are Contrary to Law

Appellant maintains that the Capacity and Energy Sales Contracts (Appendix Tab Θ) should be invalidated as violative of public policy. Under the Contracts, the Purchasing Systems (as defined in said Contracts) are only obligated to pay for any energy and capacity actually delivered by the Selling Systems.

The Selling Systems, because of the "take or pay" provisions of the Contracts, however, must continue to make payments for their proportionate share of the St. Lucie Project regardless of whether any energy is actually produced. As this court is well aware, nuclear generating facilities are often inoperative due to fuel reloading, maintenance or other reasons. Thus, a serious risk is created for the Selling Systems. These Selling Systems and their customers, who ultimately pay for the St. Lucie Project through electric rates, could be obligated to pay for their share of the St. Lucie Project without receiving any benefit whatsoever in the form of electric energy or capacity. These obligations, in the form of higher electric rates would be tantamount and functionally equivalent to a tax imposed by the Selling Systems. The failure to comply with the constitutional and statutory prerequisites to incuring general obligations renders this scheme of payments unlawful and void for public policy reasons.

J. Use of Bond Proceeds for Non-Capital Expenditures.

It is the position of the State that the Bond Resolution is improper because FMPA is not legally empowered to issue the Bonds

to pay for working capital, reload fuel, or the cost of damages in connection with the construction or operation of the St. Lucie Project because such expenditures are not of a capital nature.

Generally, the statutes that enable a public entity to issue bonds provide that the proceeds from the bonds should be used only to pay the costs of the "project". Therefore, the definition of the term "project" is controlling in determining the proper use of the proceeds.

Section 163.01(7)(c), Florida Statutes, as amended, provides that a Chapter 361 entity may utilize the bond provisions of either Chapter 159 or Chapter 166. In Section 166.101(B), Florida Statutes (1981), the term "project" is defined as 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 a public purpose including the refunding of any bonded idebtedness which may be outstanding in any existing project which is to be improved by means of a new project.

Although this definition of "project" appears broader than that contained in Chapter 159 all of the specific expenses enumerated in Section 166.101, Florida Statutes (1981), are of a capital nature. Further, Chapter 166 should be interpreted in light of Chapter 159 which illustrates the type of expenses intended to be paid for from the bond proceeds. Section 159.08(2), Florida Statutes (1981), provides that the proceeds of the bonds authorized by Chapter 159 shall be used for payments of the costs of the project. Section 159.02(13), Florida Statutes, states:

> The term "cost of a project" shall mean the cost of acquiring or constructing such project, and the cost of improvements and shall include the costs of all labors and materials, the costs of lands, property, rights, easements and franchises acquired, which are deemed necessary for such acquisition or construction, the costs of all machinery and equipment, financing charges, interest prior to and during construction, and for one year after the completion of construction, engineering and legal expenses, costs of plans, specifications, surveys, estimates of construction costs and of revenues, other expenses necessary or incident to determining the feasibility or practicability of such acquisition or construction, administrative expenses, and such other expenses as may be necessary or incident to the financing herein authorized and to such acquisition or construction and the placing of the project in operation.

The various items listed in the above section are capital in nature, that is, they are the expenses that are necessary to build a project and to place it in operation.

Section **159.10,** Florida Statutes **(1981),** supports the above reading of Section **159.02(13),** Florida Statutes **(1981).** According to this section, revenues from the project should be used to "pay the costs of maintaining, repairing and operating such project or projects and the principal of and interest on the revenue bonds as the same shall become due." It is the legislative scheme that the proceeds from the bond issue will go to build and place the project in operation while the revenues will go to maintain and operate it.

POINT III

THE PROVISIONS OF THE POWER SALES CONTRACTS CONSTITUTE AN ILLEGAL IMPAIRMENT OF CONTRACT BY ATTEMPTING TO GIVE ST. LUCIE BOND PAYMENTS PRIORITY OVER OUTSTANDING DEBT OBLIGATIONS.

A. Impairment of Contract.

The provisions of the Power Sales Contracts which provide that payments to be made thereunder shall be treated as operating expenses of each Project Participant's electric or other integrated utility system (See Section 4(g) of the Power Sales Contracts) (Appendix Tab M) are illegal because they constitute a breach of certain provisions under the contracts between such Project Participants and the holders of outstanding debt obligations previously issued by such Project Participants or constitute an impairment of the obligation under such contracts.

The majority of the Project Participants have outstanding revenue bonds secured by a pledge of the net revenues of their respective electric or other integrated utility systems, *i.e.*, all revenues remaining after payment of ***operating expenses*** for such systems. In order to protect the security position of these outstanding bondholders, each of the Project Participants has covenanted with such holders not to create any debt, lien, pledge, or other obligation having a lien upon the revenues of their 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 the Project Participants' outstanding bondholders.

Certain of the Project Participants' outstanding bond resolutions expressly provide that the portion of payments for purchased power representing debt service on the bonds of the seller of such power (such as the portion of the payments to be made to FMPA under the Power Sales Contracts representing debt service on FMPA's proposed bonds) shall not be treated as operating expenses. The covenant of such Project Participants to treat these expenses as operating expenses, made in Section 4(g) of the Power Sales Contract (Appendix Tab M), again, constitutes a breach of such Project Participants' covenants with their outstanding bondholders, impairs the obligation of such Project Participants to make payments to their outstanding bondholders by creating an additional level of obligations senior to the outstanding bondholders, thereby weakening the security for payment of the debts owed to the outstanding bondholders.

In covenanting with FMPA to treat payments under the Power Sales Contracts as operating expenses, the Project Participants with outstanding electric revenue bonds are creating a debt, lien, and pledge upon their electric system revenues prior to the lien thereon of their outstanding revenue bonds in breach of the covenants contained in resolutions which authorized the issuance of those bonds. In *so* doing, the Project Participants are unconstitutionally impairing the obligation to their outstanding bondholders by creating an additional level of borrowing senior to the obligations under this outstanding bond resolution, weakening the security for payment of the debts owed to outstanding bondholders.

Article I, Section 10, United States Constitution and Article I, Section 10, Florida Constitution **(1968)** prohibit the impairment of contract obligations. This Court has indicated that its approach to analysis of contract clause impairment follows the approach set forth by the United States Supreme Court. ***Pomponio*** v. ***Claridge of Pompano Condominium, Inc.*, 370** So.2d **774, 779-00** (Fla. **1979).** The most recent United States Supreme Court analysis of the contract clause, as applied to public debt obligations, is found in ***United States Trust Company of New York v. State of 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 referred to as "***U.S. Trust").***

In *U.S. **Trust,*** the Port Authority of New York and New Jersey (the "Port Authority"), a creature of joint legislation of the States of New York and New Jersey, had outstanding revenue bonds to the payment of which was pledged monies in a General Reserve Fund. In order to provide security for the Port Authority's bondholders, the two states had enacted legislation covenanting not to use monies in the General Reserve Fund except for specified purposes, which included deficit financing of mass transit facilities within certain specified limits (deficits could not exceed 1% of the General Reserve Fund balance). In order to make available additional revenues for construction and operation of public transit facilities, the States repealed the covenant regarding the use of the Port Authority's General Reserve Fund monies. A

trustee and bondholder of the outstanding Port Authority bonds filed suit in New Jersey courts to invalidate the repeal as an unconstitutional impairment of the Port Authority's contract with its bondholders. The New Jersey Superior Court upheld the legislation and the New Jersey Supreme Court affirmed. The United States Supreme Court reversed, holding that the repeal of the covenant was unconstitutional under the contract clause, Article I, Section 10, United States Constitution.

As a point of departure, the Court noted in U.S. ***Trust*** that th purpose of the contract clause is to encourage the extending of credit by promoting confidence in contractual obligations. 431 U.S. at 15. While noting that there may be a class of technical impairments that are not constitutionally prohibited, the Court stated that such an impairment must be both reasonable and necessary to promote a legitimate public purpose. ***Id.*** at 21, 26. The Court further implied in *U.S.* ***Trust*** that financial security provisions in a municipal bond are not subject to change without close scrutiny; the Court noted that only once in the Twentieth Century has modification of a municipal bond contract been sustained by the Supreme Court, and that situation involved a municipal bankruptcy. ***Id.*** at 25, 27. Finally, the Court in *U.S.* ***Trust*** set forth a test of reasonableness and necessity that basically involves an inquiry as to whether (1) less drastic methods were available to accomplish the desired change in contractual obligation or (2) alternative approaches were available to meet the public purpose alleged to justify the contractual impairment. ***Id.*** at

30.

Appellant urges that the proposal to treat payments for the cost of purchased power as operating expenses of the Project Participants' electric or other integrated utility systems constitutes an impairment of those Project Participants' obligations under their outstanding bond ordinances and resolutions because such a scheme places additional debt - FMPA's bonds - ahead of the Project Participants' own outstanding debt, thereby, in effect, giving the holders of the Project Participants' outstanding bonds a second lien on the pledged revenues in substitution for the first lien which they currently enjoy. Appellant further argues that the impairment is not technical because the priority of payments and lien status are a key feature of the ordinances and resolutions authorizing the issuance of the Project Participants' outstanding bonds and constituted an inducement to the holders of those bonds to purchase them. This fact is evidenced by the existence of the covenant against incurring any prior lien debt, and is further evidenced by the fact that all of the Project Participants' outstanding bond ordinances or resolutions impose restrictions ("parity tests") upon the ability of the Project Participants to issue additional debt payable on a parity, much less prior to, their outstanding debt. By the Power Sales Contracts, the Project Participants are, in effect, placing additional debt, not simply on a parity with their outstanding debt, but senior in priority of payments to their additional debt without the requirement that these "parity tests" be met. Further, the ability to incur

additional contractual obligations of the type evidenced by the Power Sales Contract will be subject to no contractual limitations or restrictions, and the holders of the Project Participants' outstanding bonds will, to the extent that such contracts are entered into in the future, find their security position further and further weakened.

For these reasons, the State argues that the foregoing provisions of the Power Sales Contracts constitute a breach of the provisions of the Project Participants' outstanding contracts and should not be validated and approved by this Court. Appellant further argues that the provisions of the Power Sales Contracts providing for the treatment of payments by the Project Participants to FMPA as operating expenses are unconstitutional as impairing the obligations of the Project Participants under their outstanding bond resolutions and ordinances.

CONCLUSION

Appellant, STATE OF FLORIDA, contends that the Circuit Court in and for Leon County erred in entering the final order validating the bond complaint as filed in the instant case. For the foregoing reasoning and facts as outlined in this brief, the bond issue as contemplated by FMPA is unconstitutional, contrary to law, and violative of the public policy of the State of Florida.

WHEREFORE, this Court should enter its order reversing the decision of the Circuit Court in and for Leon County and holding that the bond issue is invalid as violative of the Florida Constitution, statutes of the State of Florida, and is further invalid and void as violative of the public policy of the State of Florida.

Respectfully submitted this 14th day of October, 1982.

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Second Judicial Circuit

BY: C. W. Bloodworth, Assistant
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing APPELLANT'S INITIAL BRIEF has been furnished by regular U. S. Mail on this 11th day of October, 1982 to the following:

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