IN THE
SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Defendant/Appellant,

v. **Case No.**

JEA (formerly known as the Jacksonville Electric Authority), a body politic and corporate of the STATE OF FLORIDA,

Plaintiff/Appellee.

APPEAL OF FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DUVAL COUNTY (CASE NO. 00-5198-CA, DIVISION B)

DEFENDANT/APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

A. Nature of the Case; Course of the Proceedings; Disposition in Lower Tribunal

This proceeding is an appeal of a Final Judgment (the "Final Judgment") entered on September 5, 2000 in a bond validation proceeding brought by JEA (formerly known as the Jacksonville Electric Authority), Plaintiff/Appellee (hereinafter referred to as "Appellee" or "JEA"), in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County (hereinafter referred to as the "Circuit Court"), Case No.: 00-05198-CA, Division: B. In its Final Judgment, the Circuit Court validated the issuance by Appellee of not to exceed Fifteen Million Dollars ($15,000,000) of its Electric System Subordinated Revenue Bonds (hereinafter referred to as the "Alliance Revenue Bonds") for the purpose of financing any amounts that Appellee may be obligated to pay under certain guarantees hereinafter described.

The State of Florida, acting by and through the State Attorney in and for the Fourth Judicial Circuit (hereinafter referred to as "Appellant"), believes that this cause involves several important constitutional questions not heretofore addressed by this Court and, accordingly, brings this appeal in order to challenge the validity of the issuance of the Alliance Revenue Bonds and the expenditure of the proceeds thereof for the purposes specified by Appellee.

B. Statement of the Facts

The facts in this proceeding are not in dispute, and, as indicated below, the recitation of those facts is taken either from Appellee's Complaint in this cause (the "Complaint") or the Trial Brief/Memorandum of Law filed by Appellee with the Circuit Court ("Appellee's Trial Brief").

Appellee proposes to issue the Alliance Revenue Bonds for the purpose of financing amounts that it may be obligated to pay under certain guarantees (as more particularly described herein, the "TEA Guarantees") that it has executed and delivered in connection with a "strategic alliance" originally entered into in 1997 among it, the Municipal Electric Authority of Georgia, a public corporation and instrumentality of the State of Georgia ("MEAG") and the South Carolina Public Service Authority, a body corporate and politic created by the laws of the State of South Carolina ("Santee Cooper"). *See Complaint*, ¶ 18 at 12. Such strategic alliance is referred to herein sometimes as the "Alliance"; and Appellee, MEAG and Santee Cooper are referred to herein collectively sometimes as the "Original Members."

Appellee is a body politic and corporate of the State of Florida, organized and existing under and by virtue of the laws of the State of Florida, particularly Chapter 92-341, Laws of Florida, Special Acts of 1992, as amended and supplemented (the same being the Charter (the "Charter") of the City of Jacksonville, Florida (the "City"), a certified copy of

certain relevant provisions of which was attached as Exhibit A to the Complaint), and other applicable provisions of law. *Id.*, ¶ 2 at 2.

Pursuant to Section 21.04(a) of the Charter, Appellee is authorized, among other things, to own, operate and maintain a "utilities system," which is defined in Section 21.02(b) of the Charter to include, among other things, the electric utility now operated by Appellee within and without the City (referred to herein as the "Electric System"). *Id.*, ¶ 3 at 2. *See also Appellee's Trial Brief* at 1.

Pursuant to Section 21.04(i) of the Charter, Appellee is empowered, by resolution of Appellee, to issue revenue bonds for the purpose of financing or refinancing its utilities system, including without limitation the financing of any one or more enlargements, expansions, developments, replacements, acquisitions or modernizations of the utilities system, any expenses of the utilities system, any reserves deemed necessary or desirable by Appellee and any other purpose not otherwise prohibited by law, and retiring any bond, note or revenue certificate issued under Article 21 of the Charter, subject only to approval by ordinance of the Council of the City (the "Council") of the total aggregate amount of such revenue bonds. *Id.*, ¶ 5 at 3. *See also Appellee's Trial Brief* at 1-2.

In the Complaint, Appellee avers that it entered into the Alliance in 1997 in order to enable it to compete more effectively in the changing electric utility industry. *Id.*, ¶ 8 at 4. *See also Appellee's Trial Brief* at 2. Appellee asserts that, through the Alliance, the Original

Members have coordinated and facilitated, and Appellee expects the Alliance to continue to allow the Original Members to coordinate and facilitate, the operation of their electric generating facilities and the purchase and sale of electric capacity and energy. *Id.* *See also Appellee's Trial Brief* at 2. Appellee further asserts that participation in the Alliance has assisted, and Appellee expects it to continue to assist, each Original Member (a) in maximizing its available generating resources, (b) in reducing its operating costs and (c) in increasing its operating revenues (in part by expanding the geographical market available to each Original Member), while maintaining the safety and reliability of each Original Member's electric system. *Id.* *See also Appellee's Trial Brief* at 2.

In order to implement their joint undertaking, the Original Members organized a Georgia nonprofit corporation named "The Energy Authority, Inc." ("TEA"). Under the provisions of the Georgia Nonprofit Corporation Code, Ga. Code Ann. § 14-3-101, *et seq*., TEA constitutes a membership corporation. As a membership corporation, TEA does not issue capital stock. *Id.*, ¶ 8 at 5. *See also Appellee's Trial Brief* at 2.

Pursuant to the Articles of Incorporation of TEA (the "Articles of Incorporation," a certified copy of which was attached as Exhibit E to the Complaint), and the bylaws of TEA (the "Bylaws," a certified copy of which was attached as Exhibit F to the Complaint), TEA has the power and authority, among other things, to coordinate the operation of electric generating resources and the purchase and sale of electric capacity and energy on behalf of

its members. *Id.* *See also Appellee's Trial Brief* at 2. Pursuant to the Articles of Incorporation and the Bylaws, TEA is governed by a Board of Directors (the "Board") consisting of directors appointed by each of TEA's members. *Id.* *See also Appellee's Trial Brief* at 2.

In order to establish the terms of the Original Members' joint undertaking, Appellee, MEAG, Santee Cooper and TEA entered into an Operating Agreement, dated as of May 21, 1997 which has been superseded by a new Operating Agreement dated as of February 1, 2000 (the "Operating Agreement," a certified copy of which was attached as Exhibit G to the Complaint). Pursuant to Article XII of the Operating Agreement, TEA is granted sole and exclusive responsibility for performing the following services and responsibilities for and on behalf of its members:

(a) Scheduling the aggregate amount of capacity and energy provided by its members;

(b) Entering into short- or long-term purchases or sales of electric capacity, energy and/or ancillary services between or among the parties, at least one of whom shall be TEA or one of its members;

(c) Implementation of the procedures approved by the Board; and

(d) Reservation of capacity and arrangement of transmission services.

Id., ¶ 8 at 5-6. *See also Appellee's Trial Brief* at 3.

Further, under Article XII of the Operating Agreement, among other things, each of TEA's members:

(a) Designates TEA to arrange purchases and sales of energy, capacity and ancillary services on behalf of TEA's members;

(b) Agrees to provide TEA the timely operational information required to effect commitment and purchase and sales decisions for TEA's members; and

(c) Agrees to provide TEA the maximum flexibility in directing the use of the aggregate amount of capacity and energy provided by TEA's members consistent with general industry or business practices and contractual obligations of TEA's members.

Id., ¶ 8 at 5-6. *See also Appellee's Trial Brief* at 3-4.

TEA effectuates its purposes by providing the following marketing services:

1. TEA buys surplus electric capacity and/or energy from one or more of its members for sale to one or more of its members.

2. TEA buys electric capacity and/or energy from one or more third parties for sale to one or more of its members.

3. TEA buys electric capacity and/or energy from one or more of its members for sale to one or more third parties (which may include

> electric utilities serving wholesale and/or retail customers within or without the State of Florida, as well as other entities (*e.g.*, so-called "power marketers") engaged in the marketing of electric capacity and/or energy).
>
> 4. TEA buys electric capacity and/or energy from one or more third parties for sale to one or more third parties. TEA engages in these third party transactions to fill out transactions where the amount being sold by one or more of its members differs from the amount sought by a purchaser, where TEA is hedging a transaction involving one or more of its members, or in order to establish needed relationships with such third parties in order to facilitate later transactions between and among such third parties and one or more of its members. Thus, these transactions may relate to the three other categories described above.

Appellee's Trial Brief at 4.

According to Appellee, the transactions described above may involve TEA acting as the agent or broker of one or more of its members or as a principal (that is, TEA would purchase the electric capacity and/or energy and take title to it prior to the resale). *Id.*

By having TEA serve as their exclusive interface with the market for electricity and engaging actively in that market, Appellee asserts that the Original

Members sought to participate in that market on more advantageous terms than could be obtained by them individually, so as to best serve their own customers. *Id.* at 5

In order to finance its initial capital contribution to TEA, Appellee authorized the issuance of a series of its Electric System Subordinated Revenue Bonds in an amount not to exceed $500,000 (the "Prior Alliance Revenue Bonds"), which Prior Alliance Revenue Bonds were validated by a Final Judgment of the Circuit Court rendered on July 24, 1997 in *Jacksonville Electric Authority v. State of Florida, et al.*, No. 97-3361-CA (Fla. 4th Cir. Ct., July 24, 1997) (hereinafter referred to as "*JEA v. State I*"), and which Final Judgment was not appealed.[1/] *Id.*

In its Final Judgment in *JEA v. State I,* the Circuit Court ordered and adjudged as follows:

> (a) Although the prohibition contained in Article VII, Section 10 of the Florida Constitution is, in general, applicable to Appellee, such prohibition did not act to preclude Appellee's participation in the Alliance since (i) political subdivisions of other states are not included within the terms "corporation, association, partnership or person" within the meaning of Article VII, Section

[1/] Appellee states that because it had sufficient funds available to pay its initial capital contribution to TEA, it did not issue the Prior Alliance Revenue Bonds. However, Appellee asserts that, since it is unable to predict whether it will have sufficient funds available to pay any amounts that may become due under its TEA Guarantees as and when the same may become due, Appellee is seeking the validation of the Alliance Revenue Bonds in this cause. *See Appellee's Trial Brief* at 5, n. 1.

10, (ii) Appellee is neither an "owner" nor a "stockholder" of TEA within the meaning of Article VII, Section 10, (iii) Appellee, through its participation in the Alliance, is not lending or using its taxing power or credit to aid any corporation, association, partnership or person within the meaning of Article VII, Section 10 and (iv) the purpose served by Appellee's participation in the Alliance is paramountly a public one;

(b) Assuming, *arguendo*, that the prohibition contained in Article VII, Section 10 of the Florida Constitution did apply to Appellee's participation in the Alliance, the Alliance was a mechanism (effected through TEA) to provide for the joint operation of electrical energy generating or transmission facilities of the Original Members within the meaning of clause (d) of Article VII, Section 10. Accordingly, participation by Appellee in the Alliance is subject to the exception to Article VII, Section 10's prohibition set forth in clause (d) thereof, such that such participation may be authorized by law;

(c) Insofar as each of Appellee, MEAG and Santee Cooper possesses the power to own and operate electric generating facilities and to purchase and sell electric capacity and energy, Chapter 69-69, Laws of Florida, 1969 (as originally enacted, the "Interlocal Cooperation Act"), empowered Appellee to exercise such powers jointly with MEAG and Santee Cooper. Thus, the Interlocal

Cooperation Act empowered Appellee to enter into the Alliance for the purpose of providing for the joint operation of the Original Members' electric generating facilities and the purchase and sale of electric capacity and energy. Accordingly, the Interlocal Cooperation Act constitutes a law authorizing Appellee's "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" within the meaning of Article VII, Section 10(d) of the Florida Constitution;

(d) The Alliance constitutes a "joint electric power supply project" and, therefore, a "project," within the meaning of Chapter 75-200, Laws of Florida, 1975 (as amended, the "Joint Power Act"). Accordingly, since (i) Appellee constitutes an "electric utility" within the meaning of the Joint Power Act, (ii) both MEAG and Santee Cooper constitute "foreign public utilities" within the meaning of the Joint Power Act and (iii) the Operating Agreement was entered into for the purpose of implementing the joint undertaking of the Original Members, the Joint Power Act provided additional authority for Appellee's participation in the Alliance, for the purpose of jointly operating electric generating facilities;

(e) Subject to approval of the Operating Agreement by two-thirds of the

membership of the Council, participation in the Alliance by Appellee in the manner described in the Complaint in *JEA v. State I* was valid and legal; and

(f) Subject to approval of the Operating Agreement by two-thirds of the membership of the Council, expenditure by Appellee of funds to pay its share of the capitalization of the Alliance was a lawful purpose of Appellee in connection with the Electric System.

See Complaint, ¶ 11 at 6-8.

The Operating Agreement, as originally executed by Appellee, MEAG, Santee Cooper and TEA, was approved by more than two-thirds of the membership of the Council on July 22, 1997 by Resolution 97-675-A, signed by the Mayor of the City on July 25, 1997. *Id.*, ¶ 12 at 8.

Since the time of the formation of TEA, three other utilities which are either municipally-owned or are themselves political subdivisions have become members of TEA, and Appellee asserts that TEA contemplates that other utilities which are either municipally-owned or are themselves political subdivisions (hereinafter referred to collectively as "municipal utilities") also may become members of TEA in the future. *Id.*, ¶ 13 at 9. The Original Members, together with all other entities that are, or hereafter may become, members of TEA are hereinafter referred to collectively as the "Members." According to Appellee, it is contemplated that no utility that is not

a municipal utility will be permitted to become a member of TEA. *Id.*

In addition, Appellee states that TEA has entered into "resource management arrangements" with other utilities that are municipal utilities, and TEA is exploring the possibility of entering into resource management arrangements with utilities other than municipal utilities (including generation and transmission cooperatives). *Id.* Each such utility with which TEA enters into a resource management arrangement is hereinafter referred to as a "resource management partner." Under these resource management arrangements, TEA generally acts as the exclusive party to purchase for the resource management partner needed capacity and energy from Members or third parties and to sell excess capacity and energy for the resource management partner to Members or third parties. *Id.* Appellee asserts that these services are rendered by TEA for a fee and are very similar to the services rendered by TEA for Members. *Id.* Appellee further asserts that resource management partners have a contractual relationship with TEA with no voting or other membership rights. *Id.*

Appellee states that it believes that, in order to continue to take full advantage of its available generating resources, reduce its operating costs, increase its revenues and maintain the reliability of its Electric System, TEA must become larger in terms of the amount of generation resources under management. *Id.*, ¶ 14 at 9-10.

Appellee asserts that increasing the scope of TEA will achieve further economies of scale, enable it to better compete in the wholesale markets and ensure access to a larger supply of energy and capacity. *Id.* Therefore, Appellee states that it, along with the other Members of TEA, has determined that adding additional municipal utilities as Members and securing additional resource management arrangements with other utilities (whether or not municipal utilities) are both essential if TEA is to maximize the value that it can bring to its Members. *Id.* Appellee states that TEA's resource management arrangements with other utilities (all of which are municipal utilities) represent a very limited portion of TEA's business, both in terms of the volume of energy and capacity purchased and sold and the dollar value of those transactions, and that similar arrangements with other utilities which are not municipal utilities would also represent a very limited portion of TEA's business (no more than 20% of annual revenues). *Id.*

In order to provide financial support to TEA and/or to bolster TEA's reserves and thereby entice third parties to trade with TEA, each of the current Members of TEA (including Appellee) has executed and delivered certain trade guarantees and certain bank guarantees (collectively, the "TEA Guarantees"), pursuant to which each such Member is obligated, subject to the conditions and limits contained therein, to pay certain amounts owed by TEA to the extent not paid by TEA. *Id.*, ¶ 15

at 10. In the aggregate, Appellee's potential liability under its TEA Guarantees currently totals $15,000,000. *Id.* To date, no TEA Guarantee has been called upon. *Id.* Since the TEA Guarantees apply to all of TEA's electric trading activities, and are not limited to transactions entered into only on behalf of TEA's Members, to the extent that non-municipal utilities become resource management partners, Appellee would be obligated under its TEA Guarantees to pay amounts owed by TEA in respect of transactions entered into on behalf of such non-municipal utilities to the extent not paid by TEA. *Id.*

C. <u>Summary of Circuit Court's Order in its Final Judgment</u>

In its Final Judgment in this cause, the Circuit Court ordered and adjudged as follows:

(a) Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties (including those arising out of transactions entered into for non-municipally-owned or non-political subdivision utilities) to the extent amounts owed by TEA are not paid by TEA when due are not violative of the prohibition contained in Article VII, Section 10 of the Florida Constitution since, although TEA is not a political subdivision of any state it should, for purposes of Article VII, Section 10 of the Florida Constitution, be viewed as an instrumentality of its members, all of whom are political subdivisions and,

therefore, TEA is not included within the terms "corporation, association, partnership or person" within the meaning of Article VII, Section 10 of the Florida Constitution;

(b) Assuming, *arguendo*, that the prohibition contained in Article VII, Section 10 of the Florida Constitution otherwise would apply to Appellee's obligations under its TEA Guarantees, those obligations fit within the exception to Article VII, Section 10 set forth in clause (d) thereof since, as the Circuit Court found in its Final Judgment in *JEA v. State I*, (1) the Alliance is a mechanism (effected through TEA) to provide for the joint operation of electrical energy generating or transmission facilities of TEA's members within the meaning of clause (d) of Article VII, Section 10, such that Appellee's participation in the Alliance may be authorized by law, (2) the Interlocal Cooperation Act constitutes a law authorizing Appellee's "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" within the meaning of Article VII, Section 10(d) and (3) the Joint Power Act provides additional authority for Appellee's participation in the Alliance, for the purpose of jointly operating electric generating facilities;

(c) Pursuant to the Constitution and laws of the State of Florida, particularly Article 21 of the Charter, Appellee is fully authorized to issue revenue bonds for the purpose of financing or refinancing the Electric System, including without limitation the financing of any one or more enlargements, expansions, developments, replacements or modernizations of the Electric System, any expenses of the Electric System, any reserves deemed necessary or desirable by Appellee and any other purpose not otherwise prohibited by law, and retiring any bond, note or revenue certificate issued under Article 21 of the Charter, subject only to approval by ordinance of the Council the total aggregate amount of such revenue bonds; and

(d) Having been approved by the Council, the issuance by Appellee of the Alliance Revenue Bonds, in a principal amount not to exceed $15,000,000, having such characteristics and being of such form as shall be determined by Appellee in accordance with the provisions of the Subordinated Bond Resolution referred to in the Complaint, is for a proper, legal and corporate public purpose and is fully authorized by law, and the Alliance Revenue Bonds and each of them to be issued as aforesaid, together with all proceedings incident thereto, including specifically the Subordinated Bond Resolution and the provisions thereof and Ordinance 1999-797-E of the City, were validated and confirmed.

> Accordingly, the Alliance Revenue Bonds may be issued to finance Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties to the extent amounts owed by TEA are not paid by TEA when due and otherwise as provided in the Subordinated Bond Resolution and, if so issued, will be payable solely from the sources and amounts described in the Final Judgment, in the manner and under the terms and conditions contained in said Subordinated Bond Resolution.

Final Judgment at 14-16.

D. <u>Relief Sought By Appellant</u>

In order for Appellee to be authorized to issue the Alliance Revenue Bonds for the purpose of financing its obligations under its TEA Guarantees to guarantee TEA's obligations to third parties to the extent amounts owed by TEA are not paid by TEA when due, it must be determined (a) that the expenditure of the proceeds of such Bonds for such purpose is lawful and (b) that the proceedings taken in connection with the issuance of the Alliance Revenue Bonds have been taken in conformity with all applicable legal requirements.

Appellant does not dispute the Circuit Court's finding in its Final Judgment in this cause that the proceedings taken in connection with the issuance of the Alliance Revenue Bonds were taken in conformity with all applicable legal

requirements. In addition, Appellant does not dispute the conclusion of the Circuit Court in *JEA v. State I* that participation in the Alliance by Appellee in the manner described in the Complaint in *JEA v. State I* was valid and legal. However, the Circuit Court's Final Judgment in *JEA v. State I* did not address the issue of whether the guarantee by Appellee under its TEA Guarantees of amounts owed by TEA in respect of transactions entered into on behalf of non-municipal utilities violates the prohibition contained in Article VII, Section 10 of the Florida Constitution against Appellee "giv[ing], lend[ing] or us[ing] its taxing power or credit to aid any corporation, association, partnership or person." Thus, by this appeal, Appellant challenges the Circuit Court's conclusion in the Final Judgment in this cause that the expenditure of the proceeds of the Alliance Revenue Bonds for the purpose of financing Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties arising out of transactions entered into for non-municipally-owned or non-political subdivision utilities to the extent amounts owed by TEA are not paid by TEA when due is lawful.

In addition, insofar as this Court has not had occasion to interpret the meaning of the phrase "joint ownership, construction and operation of electrical energy generating or transmission facilities" contained in the exception to Article VII, Section 10's prohibition set forth in clause (d) thereof, Appellant asks this Court to determine

whether the Alliance is a mechanism (effected through TEA) to provide for the joint operation of electrical energy generating or transmission facilities of TEA's members within the meaning of clause (d) of Article VII, Section 10, such that Appellee's participation in the Alliance (and, specifically, Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties arising out of transactions entered into for non-municipal utilities to the extent amounts owed by TEA are not paid by TEA when due) may be authorized by law.

SUMMARY OF ARGUMENT

A. Appellee's Obligations Under its TEA Guarantees Would Violate the Prohibition Against Lending of Credit Contained in Article VII, Section 10 of the Florida Constitution if Non-Municipal Utilities Become Resource Management Partners

In the event that non-municipal utilities become resource management partners of TEA, Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties arising out of transactions entered into for non-municipal utilities to the extent amounts owed by TEA are not paid by TEA when due would violate the prohibition contained in Article VII, Section 10 of the Florida Constitution against the giving, lending or use of Appellee's taxing power or credit to aid any corporation, association, partnership or person.

As currently organized and operating, all of the benefits derived from

participation in the Alliance inure to the benefit of municipal utilities, which municipal utilities do not come within the words "corporation, association, partnership or person" contained in Article VII, Section 10. Therefore, the prohibition contained in Article VII, Section 10 does not preclude Appellee's participation in the Alliance. However, in the event that non-municipal utilities become resource management partners of TEA, those utilities would share in the benefits being derived from the activities of TEA. In that event, Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties (including those arising out of transactions entered into for non-municipal utilities) to the extent amounts owed by TEA are not paid by TEA when due would constitute an impermissible giving, lending or use of Appellee's taxing power or credit within the meaning of Article VII, Section 10.

In addition, insofar as the Alliance currently is organized and operated solely for the benefit of municipal utilities, participation by Appellee in the Alliance (a) does not involve Appellee in private enterprise, (b) is in furtherance of Appellee's public purposes, (c) does not result in the creation of debt of Appellee for the benefit of private enterprises and (d) does not result in the appropriation of public funds for the benefit of private parties. However, insofar as the TEA Guarantees apply to all of TEA's electric trading activities, and are not limited to transactions entered into only on behalf of TEA's Members, to the extent that non-municipal utilities become

resource management partners, Appellee would be obligated under its TEA Guarantees to pay amounts owed by TEA in respect of transactions entered into on behalf of such non-municipal utilities to the extent not paid by TEA. In that event, Appellee's obligations under its TEA Guarantees would result in the creation of debt of Appellee for the benefit of private enterprises (and, in that event, in the appropriation of public funds for the benefit of private parties) and, accordingly, should be viewed as an impermissible "giv[ing], lend[ing] or use [of Appellee's] taxing power or credit" within the meaning of Article VII, Section 10, since such giving, lending or use would inure to the benefit of, and aid, those non-municipal utilities.

Furthermore, the entry by TEA into resource management arrangements with non-municipal utilities should be viewed as resulting in benefits to those non-municipal utilities that are more than merely incidental. Thus, Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties arising out of transactions entered into for non-municipal utilities to the extent amounts owed by TEA are not paid by TEA when due should be held to be violative of the prohibition contained in Article VII, Section 10 of the Florida Constitution.

B. Appellee's Participation in the Alliance Does Not Constitute "Joint Ownership, Construction and Operation of Electrical Energy Generating or Transmission Facilities" Within the Meaning of Article VII, Section 10(d)

The prohibition against the giving, lending or use of a public body's taxing power or credit contained in Article VII, Section 10 is subject to the exception thereto set forth in clause (d) thereof, which provides that such prohibition "shall not prohibit laws authorizing . . . a municipality . . . or agency . . . 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." Art. VII, § 10(d), Fla. Const.

However, since Appellee, through its participation in the Alliance, does not seek either to own or to construct any electrical energy generating or transmission facilities jointly with any other person, Appellee's participation in the Alliance does not satisfy the requirements for availing itself of that exception.

Moreover, in the event that this Court determines that joint operation of electrical generating or transmission facilities itself is sufficient to implicate the provisions of Article VII, Section 10(d), the arrangement evidenced by the Alliance does not rise to the level of "joint operation" that is necessary in order to implicate the provisions of Article VII, Section 10(d). Accordingly, Appellee's participation in the Alliance is not of the nature that entitles Appellee to avail itself of the protections

afforded by the provisions of Article VII, Section 10(d).

ARGUMENT

A. Appellee's Obligations Under its TEA Guarantees Would Violate the Prohibition Against Lending of Credit Contained in Article VII, Section 10 of the Florida Constitution if Non-Municipal Utilities Become Resource Management Partners

1. Pertinent Provisions of Article VII, Section 10

Article VII, Section 10 of the Florida Constitution provides, in pertinent part:

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

As a body politic and corporate and an independent agency of the City, Appellant agrees that Appellee constitutes an "agency" of a "municipality," as such terms are used in Article VII, Section 10. Thus, Appellant agrees with the finding of

the Circuit Court in its Final Judgment in *JEA v. State I* that Appellee is subject to the prohibition contained in Article VII, Section 10 of the Florida Constitution. *See Complaint*, ¶ 11 at 6-8.

As was stated under the heading "STATEMENT OF THE CASE – Statement of the Facts" above, TEA is a nonprofit membership corporation organized under the laws of the State of Georgia, and each of the current Members is, and any future Members are expected to be, municipal utilities. Upon the basis of those facts, the Circuit Court in its Final Judgment in this cause concluded that TEA may be viewed as an instrumentality of its Members, and not as a private business organization. As more fully discussed below, political subdivisions of Florida and of other states are not "corporation[s], association[s], partnership[s] or person[s]" within the meaning of Article VII, Section 10 of the Florida Constitution. Thus, if all of TEA's activities are undertaken only on behalf of political subdivisions (which appears to have been the contemplation of Appellee in its Complaint in *JEA v. State I*), Appellant would not take issue with that conclusion. However, for the reasons stated below, Appellee disagrees with the conclusion of the Circuit Court that participation by Appellee in the Alliance is not proscribed by Article VII, Section 10 if non-municipal utilities become resource management partners of TEA.

2. The Prohibition Contained in Article VII, Section 10

is Applicable to Appellee's Participation in the Alliance

In Opinion of the Attorney General 072-382, October 31, 1972 (hereinafter referred to as "*OAG 072-382*"), the Secretary of State of the State of Florida asked whether "state offices, agencies, political subdivisions of the state including municipalities, federal agencies and political subdivisions thereof, and sister states and their political subdivisions, [are] included within the terms 'corporation, association, partnership or person' in Art. VII, § 10 of the State Const. 1968." The Attorney General, relying upon *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952) and a prior Attorney General's opinion (Op. Att'y Gen. Fla. 058-9 (1958), concluded that:

> [N]either the State of Florida nor its agencies and political subdivisions, including municipalities, fall within the words "corporation, association, partnership or person" in Art. VII, § 10, State Const. 1968. Also see Bannon v. Port of Palm Beach District, Fla. 1971, 246 So.2d 737; and O'Malley v. Florida Insurance Guaranty Association, Fla. 1971, 257 So.2d 9. It follows that the same would be true of federal agencies and political subdivisions thereof ***as well as sister states and their political subdivisions***. (emphasis added)

In *State v. Town of North Miami, supra*, this Court was faced with the question of whether the Town of North Miami could issue its certificates of indebtedness for the purpose of financing the purchase of land and the construction of a manufacturing plant thereon, which was to be leased to a private corporation under an agreement whereby the private corporation would carry on a manufacturing

enterprise for private profit upon the premises. Under the lease agreement, the rentals to be paid by the private corporation would fully amortize the principal amount of the certificates and the interest thereon. 59 So.2d at 779. The *Town of North Miami* Court held that the arrangement being contested violated Article IX, Section 10 of the 1885 Constitution, which was the predecessor to Article VII, Section 10 of the 1968 Constitution. 59 So.2d at 787.

Article IX, Section 10 of the 1885 Constitution provided that:

> . . . The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stock holder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

In *Town of North Miami*, the Court went to great lengths to discuss and distinguish the cases relied upon by the appellee therein, the Town of North Miami. One of those cases, *State v. City of Tallahassee*, 142 Fla. 476, 195 So. 402 (1940), involved the issuance by the City of Tallahassee of certificates of indebtedness to finance the construction of an office building in which space would be rented to federal, state and county governments. Without specifically addressing Article IX, Section 10 of the 1885 Constitution, the *City of Tallahassee* Court upheld the issuance of the certificates of indebtedness and the rental to federal, state and county governments of space in the office building to be constructed from the proceeds thereof, and concluded

that "[w]e find no constitutional objections to the certificates brought in question . . .." 195 So. at 404.

In discussing the meaning of *City of Tallahassee*, the *Town of North Miami* Court concluded that "[t]he State is not a corporation within the meaning of Sec. 10 of Article IX of the [1885] Constitution." 59 So.2d at 783.

The Attorney General, in *OAG 072-382*, found that "[w]ith a slight modification in language [Article IX, Section 10 of the 1885 Constitution] became a part of Art. VII, § 10, State Const. 1968 . . .." Since the Attorney General found that "[t]he modification in language is not significant as far as your question is concerned", the Attorney General concluded that neither the State of Florida nor its agencies or political subdivisions, nor federal agencies and political subdivisions thereof nor sister states and their political subdivisions, came within the words "corporation, association, partnership or person" in Article VII, Section 10 of the 1968 Constitution.

Opinion of the Attorney General 077-113, October 25, 1977 (hereinafter referred to as "*OAG 077-113*") also is instructive for the instant case. In that opinion, the Attorney General was asked whether participation by the City of Lakeland in the formation of a reciprocal insurance association composed entirely of Florida municipalities and organized under Chapter 629, Florida Statutes contravenes Article VII, Section 10 of the Florida Constitution. *OAG 077-113* at 1-2. The Attorney

General noted that since membership in the proposed reciprocal association was to be limited to Florida municipalities, there was no violation of Article VII, Section 10. *OAG 077-113* at 3.

Given the breadth of *OAG 077-113*, the fact that political subdivisions of several states are participating in the Alliance is not significant. Indeed, for so long as TEA acts only on behalf of municipal utilities, TEA is analogous to the reciprocal insurance association at issue in *OAG 077-113*. Thus, under the reasoning of *OAG 077-113*, Appellee's participation in the Alliance is not proscribed by Article VII, Section 10 of the Florida Constitution so long as TEA acts only on behalf of municipal utilities.

However, the entry by TEA into resource management arrangements with non-municipal utilities changes the analysis. In that event, TEA no longer would be analogous to the reciprocal insurance association at issue in *OAG 077-113*, since non-municipal utilities would share in the benefits being derived from the activities of

TEA.[2/] Thus, in the event that TEA enters into resource management arrangements with non-municipal utilities, those utilities would come within the words "corporation, association, partnership or person" in Article VII, Section 10, such that Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties (including those arising out of transactions entered into for non-municipal utilities) to the extent amounts owed by TEA are not paid by TEA when due would constitute an impermissible giving, lending or use of Appellee's taxing power or credit within the meaning of Article VII, Section 10.

[2/] As was stated under the caption "STATEMENT OF THE CASE – Statement of the Facts" above, Appellee asserts that resource management partners have a contractual relationship with TEA with no voting or other membership rights, and that the services rendered to resource management partners are very similar to the services rendered by TEA for Members, except that resource management partners are charged a fee for those services. Notwithstanding those assertions, it is reasonable to assume that non-municipal utilities would be willing to become resource management partners only if doing so results in an economic benefit to them (*i.e.*, they are able to derive some portion of the benefit arising from the joint and cooperative actions of TEA).

3. Involvement of Non-Municipal Utilities in the Alliance Renders Appellee's Obligations Under its TEA Guarantees an Impermissible Giving, Lending or Use of Appellee's Credit Within the Meaning of Article VII, Section 10

As was stated above, Article VII, Section 10 prohibits the "***giv[ing], lend[ing] or use [of a public body's] taxing power or credit*** to aid any corporation, association, partnership or person" (emphasis added). It is well-settled under Article VII, Section 10 and its predecessor provisions that the constitutional prohibition against the lending or use of credit is to prevent government from becoming entangled in private enterprise. In *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304, 309 (Fla. 1971), this Court held that

> 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*** (emphasis added).

See also State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979) ("Of course, public bodies cannot appropriate public funds indiscriminately, or ***for the benefit of private parties***, where there is not a reasonable and adequate public interest." (emphasis added)); *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875, 886 (Fla. 1981) ("Under article VII, section 10, neither the state nor any of its subdivisions may expend public funds for or participate at all in a project that is not of ***some substantial benefit to the public***, even where there is no

proposed exercise of the eminent domain power and no public indebtedness . . .." (emphasis added)).

In the instant case, the original purpose of the Alliance was to allow the Members (all of which are, or are expected to be, municipal utilities) to coordinate the operation of their generating facilities and the sale and purchase of electric capacity and/or energy, for the mutual benefit of each. Thus, insofar as the Alliance currently is organized and operated solely for the benefit of municipal utilities, participation by Appellee in the Alliance (a) does not involve Appellee in private enterprise, (b) is in furtherance of Appellee's public purposes, (c) does not result in the creation of debt of Appellee for the benefit of private enterprises and (d) does not result in the appropriation of public funds for the benefit of private parties. Accordingly, as the Circuit Court held in its Final Judgment in *JEA v. State I*, although the prohibition contained in Article VII, Section 10 is, in general, applicable to Appellee, in that case, it did not act to preclude Appellee's participation in the Alliance since Appellee, through its participation in the Alliance, was not lending or using its taxing power or credit to aid any corporation, association, partnership or person within the meaning of Article VII, Section 10.

However, as was stated under the caption "STATEMENT OF THE CASE – Statement of the Facts" above, the TEA Guarantees apply to all of TEA's electric

trading activities, and are not limited to transactions entered into only on behalf of TEA's Members. Thus, to the extent that non-municipal utilities become resource management partners, Appellee would be obligated under its TEA Guarantees to pay amounts owed by TEA in respect of transactions entered into on behalf of such non-municipal utilities to the extent not paid by TEA. In that event, Appellee's obligations under its TEA Guarantees would result in the creation of debt of Appellee for the benefit of private enterprises (and, in that event, in the appropriation of public funds for the benefit of private parties) and, accordingly, should be viewed as an impermissible "giv[ing], lend[ing] or use [of Appellee's] taxing power or credit" within the meaning of Article VII, Section 10, since such giving, lending or use would inure to the benefit of, and aid, those non-municipal utilities.

4. Article VII, Section 10's Prohibition is Applicable Since the Purpose Served by Appellee's Participation in the Alliance is Not Paramountly a Public One

It is well-settled in Florida that an expenditure of public funds, or a lending of public credit, does not violate Article VII, Section 10 of the Constitution if the primary purpose of the expenditure or the loan is to further a public purpose, even if there is an incidental private benefit. In *Bannon v. Port of Palm Beach District*, 246 So.2d 737 (Fla. 1971), this Court stated that the effect (and, presumably, the purpose) of Article VII, Section 10 of the Constitution is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefitted." *Id.* at 741. *Cf. Town of North Miami*, *supra* (interpreting Article IX, Section 10 of the 1885 Constitution to preclude the validation of certificates of indebtedness proposed to be issued to purchase land and erect a manufacturing plant for the sole use of a private corporation for private profit). Similarly, in *O'Neill v. Burns*, 198 So.2d 1 (Fla. 1967), this Court stated that:

> It is only when there is some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, that the state or its subdivisions may disburse, loan or pledge public funds or property to a non-governmental entity such as a non-profit corporation . . ..

198 So.2d at 4.

In *Orange County Industrial Development Authority v. State*, 427 So.2d

174 (Fla. 1983), following an exhaustive analysis of prior bond validation decisions relating to the requisite levels of public versus private benefit required under Article VII, Section 10, this Court stated that:

> Running throughout this Court's decisions . . . is a consistent theme. It is that there is required a paramount public purpose with only an incidental private benefit. If there is only an incidental benefit to a private party, then the bonds will be validated since the private benefits "are not so substantial as to tarnish the public character" of the project. . . . If, however, the benefits to a private party are themselves the paramount purpose of a project, then the bonds will not be validated even if the public gains something therefrom." . . . "Incidental benefits accruing to the public from the establishment of some private enterprise is [sic] not sufficient to make the establishment of such enterprise a public purpose." . . .

427 So.2d at 179 (citations omitted).

In the instant case, to the extent that TEA enters into resource management arrangements with non-municipal utilities, the entire benefits to be derived from participation in the Alliance no longer will inure solely to the Members. In that event, since the TEA Guarantees apply to all of TEA's electric trading activities, and are not limited to transactions entered into only on behalf of TEA's Members, Appellee would be obligated under its TEA Guarantees to pay amounts owed by TEA in respect of transactions entered into on behalf of such non-municipal utilities to the extent not paid by TEA, and that obligation cannot be construed as providing merely an incidental benefit to those non-municipal utilities. Accordingly, the entry by TEA into resource

management arrangements with non-municipal utilities should be viewed as resulting in benefits to those non-municipal utilities that are more than merely incidental. Thus, Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties arising out of transactions entered into for non-municipal utilities to the extent amounts owed by TEA are not paid by TEA when due should be held to be violative of the prohibition contained in Article VII, Section 10 of the Florida Constitution.

B. Appellee's Participation in the Alliance Does Not Constitute "Joint Ownership, Construction and Operation of Electrical Energy Generating or Transmission Facilities" Within the Meaning of Article VII, Section 10(d)

In its Final Judgment in this cause, the Circuit Court ordered that, assuming, *arguendo*, that the prohibition contained in Article VII, Section 10 of the Florida Constitution otherwise would apply to Appellee's obligations under its TEA Guarantees, those obligations fit within the exception to Article VII, Section 10 set forth in clause (d) thereof since, as the Circuit Court found in its Final Judgment in *JEA v. State I*, (1) the Alliance is a mechanism (effected through TEA) to provide for the joint operation of electrical energy generating or transmission facilities of TEA's members within the meaning of clause (d) of Article VII, Section 10, such that Appellee's participation in the Alliance may be authorized by law, (2) the Interlocal Cooperation Act constitutes a law authorizing Appellee's "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" within the meaning of Article VII, Section 10(d) and (3) the Joint Power Act provides additional authority for Appellee's participation in the Alliance, for the purpose of jointly operating electric generating facilities.

This Court has not had occasion to interpret the meaning of the phrase

"joint ownership, construction and operation of electrical energy generating or transmission facilities" contained in the exception to Article VII, Section 10's prohibition set forth in clause (d) thereof. *State v. Florida Municipal Power Agency*, 428 So.2d 1397 (Fla. 1983) (hereinafter referred to as "*State v. FMPA*"), is the only decision of this Court addressing the provisions of Article VII, Section 10(d) of the Constitution. In that case, this Court upheld the Joint Power Act as a valid implementation of the exception to Article VII, Section 10's prohibition contained in clause (d) thereof. *Id.* at 1398. In *State v. FMPA*, the Florida Municipal Power Agency, a legal entity organized pursuant to the provisions of the Interlocal Cooperation Act ("FMPA"), proposed to issue $375,000,000 in bonds to finance the purchase of an 8.8% ownership interest in a nuclear power plant (St. Lucie Unit 2) being constructed by Florida Power & Light Company ("FP&L"), through which it was to sell power to its members. *Id.* at 1398. This Court affirmed the validation of those bonds for that purpose, but, in so doing, did not find the need to address the scope of the phrase "joint ownership, construction and operation of electrical energy generating or transmission facilities."

The facts of the instant case are such, however, that it is appropriate that this Court now address the scope of that provision.

In *State v. FMPA*, it was beyond argument that the acquisition by FMPA

from FP&L of an undivided ownership interest in a nuclear generating unit would result in the "joint ownership, construction and operation of [an] electrical energy generating . . . facilit[y]" within the plain meaning of those words. In the instant case, however, Appellee, through its participation in the Alliance, does not seek either to own or to construct any electrical energy generating or transmission facilities jointly with any other person. Thus, to the extent that the exception to Article VII, Section 10's prohibition contained in clause (d) thereof requires "joint ***ownership, construction and operation*** of electrical energy generating or transmission facilities" (emphasis added), Appellee's participation in the Alliance does not satisfy those requirements.

Moreover, in the event that this Court determines that ***joint operation*** of electrical generating or transmission facilities itself is sufficient to implicate the provisions of Article VII, Section 10(d), Appellant respectfully suggests that the arrangement evidenced by the Alliance does not rise to the level of "joint operation." As stated in the Complaint in this cause, the Alliance constitutes a "strategic alliance," the stated purpose of which is to "allow the Original Members to coordinate and facilitate . . . the operation of their electric generating facilities and the purchase of sale of electric capacity and energy." *Complaint*, ¶ 8 at 4. In order to effectuate that purpose, TEA "is granted sole and exclusive responsibility for . . . [s]cheduling the aggregate amount of capacity and energy provided by it members . . .", and each of

TEA's Members "[a]grees to provide TEA the maximum flexibility in directing the use of the aggregate amount of capacity and energy provided by TEA's members consistent with general industry or business practices and contractual obligations of TEA's members . . .." *Appellee's Trial Brief* at 3-4. Thus, at most, the arrangement evidenced by the Alliance constitutes a mechanism for the coordination of the operation of the electric generating facilities of the Members and TEA's resource management partners, and does not constitute the "joint operation" of electrical generating or transmission facilities that is necessary in order to implicate the provisions of Article VII, Section 10(d). Accordingly, Appellant respectfully asks this Court to determine that Appellee's participation in the Alliance is not of the nature that entitles Appellee to avail itself of the protections afforded by the provisions of Article VII, Section 10(d).

CONCLUSION

Appellant seeks reversal of the Circuit Court's Final Judgment in this cause for the following reasons:

First, in the event that non-municipal utilities become resource management partners of TEA, Appellee's obligations under its TEA Guarantees to guarantee TEA's obligations to third parties arising out of transactions entered into for non-municipal utilities to the extent amounts owed by TEA are not paid by TEA when

due would violate the prohibition contained in Article VII, Section 10 of the Florida Constitution against the giving, lending or use of Appellee's taxing power or credit to aid any corporation, association, partnership or person; and

Second, insofar as Appellee, through its participation in the Alliance, does not seek either to own or to construct any electrical energy generating or transmission facilities jointly with any other person, Appellee's participation in the Alliance is not eligible for the protections afforded by the exception to Article VII, Section 10's prohibition against the lending or use of its taxing power or credit set forth in clause (d) thereof. Moreover, even if this Court should decide that joint operation of electrical energy generation or transmission facilities itself is sufficient to fall within the purview of Article VII, Section 10(d), the arrangement evidenced by the Alliance does not constitute such "joint operation" within the meaning of Article VII, Section 10(d).

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Edward C. Tannen, Esq., Assistant General Counsel, Office of General Counsel of The City of Jacksonville, Florida, 117 West Duval Street, Suite 480, Jacksonville, Florida 32202, Attorney for Plaintiff/Appellee, by hand delivery, on this 13th day of October, 2000.

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