

City of Vero Beach

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OFFICE OF THE
CITY MANAGER

April 19, 2012

Florida Municipal Power Agency
Attention: Nicholas P. Guarriello
General Manager and Chief Executive Officer
8553 Commodity Circle
Orlando, Florida 32819

RE: Florida Municipal Power Agency ("FMPA") and City of Vero Beach, Florida
(the "City") Power Sales and Support Contracts for Stanton, Stanton II, and
St. Lucie Projects

Dear Nick:

We thank you, Fred, Jody and Tom for meeting with us and representatives of Florida Power & Light Company ("FP&L") concerning the Stanton, Stanton II, and St. Lucie Power Sales and Support Contracts (the "Contracts"). As you are keenly aware, and as addressed during our discussions, upon consummation of the sale of the City's Electric Utility Facilities to FP&L, as contemplated by the Letter of Intent dated May 6, 2011, as amended, the City will be out of the electric utility business, and, consequently, the Electric Capacity and Electric Energy which can be produced from the City's Power Entitlement Share under the Power Sales Contracts will be in excess of the City's requirements.

In accordance with Section 27 of the Power Sales Contracts, the City requests that FMPA, on behalf of the City, use FMPA's best efforts to sell and transfer such excess Electric Capacity and Electric Energy to other Project Participants and/or other utilities. The City, as a member of FMPA, appreciates FMPA's agreement to prepare an analysis and report as to the value of the Power Sales Contracts to FMPA members.

The City would prefer to assign all of its interests in the Contracts as a bundle for the remainder of their terms; however, the City would consider offers for separate entitlements and/or partial assignment of the entitlements.

The City expects that the effective date for any sale/transfer of any portion of the entitlements would be January 1, 2014, the date anticipated for closing of the sale of the City's electric system ("Closing"). While the City's preference is to assign all of its interests in the Contracts at Closing, the City will consider offers for the assignment of all or any portion of the entitlements for periods less than the full term of the Contracts. For example, the City would consider an offer for the assignment of all or a portion of the bundled entitlements for the period commencing in the third (3rd) year after the Closing and extending through the term of the Contract.

Florida Municipal Power Agency
Attention: Nicholas P. Guarriello
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The City also recognizes that FMPA, on behalf of the All-Requirements Project, has previously taken steps to meet FMPA's obligations under the Power Sales Contracts by responding to the City's prior request for proposal concerning, in part, the transfer and assignment of the Contracts. The City looks forward to FMPA's analysis and to further good communications between the parties as the timely assignment and disposition of the City's share of these entitlements is essential to the City's exit from the electric utility business, a move that has been supported by referendum of its citizens.

Sincerely,



James R. O'Connor
City Manager

cc: Frederick M. Bryant, Esq.
Jody Lamar Finklea, Esq.
Tom Reedy
Ryan Fair
Alex Rubio, Esq.
Sam Forrest
Tim Gerrish
Wayne R. Coment, Esq.
John G. Igoe, Esq.
Richard J. Miller, Esq.



Florida Municipal Power Agency

Nicholas P. Guarriello
General Manager and CEO

May 2, 2012

Re: your letter of April 19, 2012

BY EMAIL AND U.S. MAIL

James R. O'Connor
City Manager
City of Vero Beach
1053 20th Place
P.O. Box 1389
Vero Beach, Florida 32961-4716

SUBJECT: REQUESTED ASSISTANCE

Dear Jim:

I am in receipt of your letter of April 19, 2012, which followed our meeting of April 16.

Thank you for the clarification that the City of Vero Beach (the City) and, as you described, the City's partner, Florida Power & Light Company (FPL), have given regarding your expectations for assistance from Florida Municipal Power Agency (FMPA) in furthering the proposed sale of the City's electric system to FPL. I am responding to your request for assistance as I would to any FMPA member system. As we discussed at the meeting, and pursuant to the City's request, FMPA staff has agreed to do the following:

- (1) to produce a future projection of costs associated with the City's Power Entitlement Shares (as defined in the applicable agreements) in FMPA's St. Lucie, Stanton, and Stanton II Projects (which, of course, will be partially dependent on information to be supplied by FPL and OUC); and
- (2) to provide the cost projections for the City's Power Entitlement Shares to FMPA's other member systems (other than those that are participants in the All-Requirements Power Supply Project) (the ARP) to solicit the interests of those member systems in taking an assignment (partial or total) of the City's Power Entitlement Shares in the St. Lucie, Stanton, and Stanton II Projects.

Mr. James O'Conner
May 2, 2012
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After FMPA has provided the cost projections to FMPA's members, all expressions of interest from FMPA's members will be communicated to the City, including any interest that FMPA members may have in taking an assignment of the City's Power Entitlement shares, even if at a discount to projected costs, as the City acknowledged might occur during our meeting.

As the City has requested, FMPA staff will not contact OUC to gauge its interest, since you are already in discussions with OUC. And, as we discussed, FMPA will not contact JEA, the City of Tallahassee, the City of Winter Park, or Reedy Creek Improvement District as those municipal electric systems are not FMPA members.

As the City has further requested FMPA staff will present all three of the City's Power Entitlement Shares as a bundled offering, but leave open the possibility for a member system to consider taking an assignment of the City's individual Power Entitlement Shares. Given the City's stated expectation that the assignment of its Power Entitlement Shares be effective January 1, 2014, FMPA staff will communicate that date to the member systems, but also, as requested, communicate that the City would consider an effective date after January 1, 2014, but no later than January 1, 2017, as you described at our meeting. As I understood from our conversation, the City is looking for the broadest expression of interest from FMPA's member utilities as possible.

In addition to soliciting non-ARP member interest, the City has also requested that the ARP consider taking an assignment of the City's three Power Entitlement Shares. To this end, I also agreed to use the staff's projected future costs to evaluate the ARP's possible interest, if any, in the City's Power Entitlement Shares. However, any decision made as to the ARP's interest in the City's Power Entitlement Shares would be made by the FMPA Executive Committee.

As we discussed, FMPA is not an obstacle to the City's and FPL's transaction. However, all of the City's contractual obligations must be met or otherwise addressed to the satisfaction of FMPA's bondholders, for whom the City's contracts ultimately serve as security for the debt that underwrites the St. Lucie, Stanton, and Stanton II Projects, and to the other municipal electric utility system participants in those Projects. As I have described, FMPA stands ready and will assist the City as it would any member utility.

At our meeting FPL indicated that it has received its 20 year license extension for St. Lucie Unit 2 and that it would communicate in writing to FMPA that fact and that it is FPL's intent to operate the facility through the end of the license extension term, 2043. Having written confirmation of this information would also be helpful in preparing the cost projections for the St. Lucie Project. As such, I trust that you will ask FPL to supply its confirmation of this information at FPL's earliest convenience. In addition, FPL had agreed at the meeting to provide its projections of St. Lucie Unit 2 costs, both fixed and variable costs, including projected fuel costs.

Mr. James O'Conner
May 2, 2012
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Jim, I believe this letter accurately reflects our discussion and what I agreed that FMPA staff would do to assist the City as an FMPA member utility. To address the particular contractual issues that you raise in your letter, I have asked our Office of the General Counsel to respond separately.

Sincerely,



Nicholas P. Guarriello
General Manager and CEO

NPG:su

cc: Frederick M. Bryant
Wayne R. Comment
Ryan Fair
Jody Lamar Finklea
Sam Forrest
Tim Gerrish
John G. Igoe
Richard J. Miller
Tom Reedy
Alex Rubio

NIXON PEABODY_{LLP}

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May 8, 2012

Frederick M. Bryant, Esq.
General Counsel
Florida Municipal Agency
8553 Commodity Circle
Orlando, Florida 32819

Re: Letter, dated April 19, 2012, from James R. O'Connor, City Manager, City of Vero Beach

Dear Fred:

You have provided me with a copy of a letter, dated April 19, 2012 (the "O'Connor Letter"), from James R. O'Connor, City Manager, City of Vero Beach ("Vero Beach"), to Nicholas P. Guarriello, General Manager and Chief Executive Officer of Florida Municipal Power Agency ("FMPA"). You have requested that I, as Bond Counsel to FMPA, respond to legal issues raised by the O'Connor Letter with particular reference to issues under outstanding Bond Resolutions of FMPA (the "Bond Resolutions") relating to FMPA's St. Lucie, Stanton and Stanton II Projects (the "Projects") along with the respective Power Sales Contracts (the "Power Sales Contracts"), and Project Support Contracts (the "Project Support Contracts" and collectively with the Power Sales Contracts, the "Contracts") serving as security for bonds issued pursuant to the Bond Resolutions relating to each of those Projects. I understand that you will be providing copies of this letter to representatives of Vero Beach.

The O'Connor Letter makes references a specific proposed transaction with an effective date of January 1, 2014 contemplated by a Letter of Intent, dated May 6, 2011, as amended (the "Letter of Intent"), between Vero Beach and Florida Power & Light Company ("FPL"), relating to the sale by Vero Beach to FPL of its "Electric Utility Facilities". The result of such sale will be that Vero Beach "will be out of the electric utility business."

I have previously provided you with advice as Bond Counsel as to various concerns under the Bond Resolutions, Power Sales Contracts and Project Support Contracts and as to matters relating to the preservation of the exemption from federal income taxation of interest on FMPA's outstanding bonds relating to the Projects and the continued availability of such exemption for bonds issued for such Projects in the future relating to any possible transaction involving the sale or other disposition by Vero Beach of ownership or control of its municipal electric utility system.

I specifically refer to my Memorandum, dated May 25, 2007 (the "Memorandum"), relating to a Request for Proposals from Vero Beach (the "RFP") a copy of which RFP you had provided me. A copy of the Memorandum is attached hereto as Appendix A; I understand that a copy of the Memorandum was provided to representatives of Vero Beach in May 2007. The Memorandum attempted to lay out, in reasonable detail in the context of the broad possible responses to the RFP, the issues which concerned me. The Memorandum pointed out, and I would reemphasize at this time, (i) that the Power Sales Contracts and the Project Support Contracts between FMPA and Vero Beach along with such Contracts with each of the other participants in each of these Projects are and always have been regarded as vital to the financial viability of each Project and (ii) that FMPA is expressly obligated to enforce the provisions of the various Contracts between FMPA and any participant, including Vero Beach, or FMPA risks being found to be in default under the related Bond Resolutions. Indeed, these Contracts are the principal security and source of payment for the payments made to FMPA's bondholders. In addition to FMPA's enforcement obligations, the Trustees under such Bond Resolutions as well as named third party beneficiaries have certain rights to enforce the Power Sales Contracts and the Project Support Contracts with any participant, including Vero Beach, which are independent of FMPA. At the same time, I noted that no purported independent assignment, *i.e.*, one not involving the sale of the Vero Beach electric utility system, by Vero Beach to FPL or any other entity under the RFP process, would relieve Vero Beach of its obligations under the Power Sales Contracts or the Project Support Contracts. This is especially relevant in the context of the Project Support Contracts which contain Vero Beach's take-or-pay, hell-or-high-water obligation to make payments to FMPA and to the step-up provisions affecting both Power Sales Contracts and Project Support Contracts for such Projects, which, if applied, could increase Vero Beach's obligations to up to 125% of current levels.

On the tax side, the Memorandum pointed out, and I again stress, that Vero Beach's transfer of output associated with its entitlements in the Projects, including any transfer contemplated by the Letter of Intent, could raise material federal income tax issues with respect to FMPA's current and future bond issues, in that FMPA has undertaken those financings under the presumption that Vero Beach would utilize its entire share of the output to directly serve its retail load. The sale by Vero Beach of the output it receives from the Power Sales Contracts (depending on the nature of such sale) could adversely impact FMPA's ability to issue new tax exempt bonds going forward as well as impermissibly taint the tax exempt status of FMPA's outstanding bonds. In the case of the outstanding FMPA bonds, this would likely trigger a need for FMPA to take certain remedial actions designed to prevent the interest on such bonds becoming retroactively taxable to their date of original issuance in order to protect FMPA's bondholders. In order to avoid placing an unfair burden on the other Florida municipal electric utilities participating in the Projects, all costs relating to such remedial actions, the magnitude of which could be substantial, would need to be payable by Vero Beach.

At the time such Memorandum was prepared, no specific proposal was presented to FMPA or to me for consideration, and so no final conclusion could be reached as to which provisions of the Bond Resolutions, Power Sales Contracts and Project Support Contracts would be applicable and what federal tax law considerations would be relevant.

The O'Connor Letter adds a significant degree of specificity to the transaction I need to consider. In my opinion as Bond Counsel, the O'Connor Letter constitutes the "ninety (90) days prior written notice to FMPA" required by Section 28(c) of each of the Power Sales Contracts and Section 13(c) of each of the Project Support Contracts of Vero Beach's proposed sale of its electric utility system and fully complies with the requirements of such Sections for prior written notice. In addition, it is also my opinion, based on the description of the transaction contained in the O'Connor Letter, that the provisions of Sections 28(c) and Section 13(c) provide the exclusive means under which the transaction described in the O'Connor Letter and contemplated by the Letter of Intent can be accomplished under the Power Sales Contracts and Project Support Contracts and as a related manner the Bond Resolutions.

Section 28(c) of each of the Power Sales Contracts provides:

The Project Participant agrees that it will not sell, lease, abandon or otherwise dispose of all or substantially all of its electric or integrated utility system except upon ninety (90) days prior written notice to FMPA and, in any event, will not sell, lease, abandon or otherwise dispose of the same unless the following conditions are met: (i) the Project Participant shall, subject to the Participation Agreement, assign this Power Sales Contract and its rights and interest hereunder to the purchaser or lessee of said electric or integrated system, if any, and any such purchaser or lessee shall assume all obligations of the Project Participant under this Power Sales Contract; (ii) FMPA shall be permitted by then applicable law to sell Electric Capacity and Electric Energy to said purchaser or lessee, if any; and (iii) FMPA shall by appropriate action determine, in its sole discretion, that such sale, lease, abandonment or other disposition will not adversely affect FMPA's ability to meet its obligations under the Participation Agreement and will not adversely affect the value of this Power Sales Contract as security for the payment of Bonds and interest thereon or affect the eligibility of interest on Bonds then outstanding or which could be issued in the future for federal tax-exempt status.

Section 13(c) of the Project Support Contract, in virtually identical language, omitting only clause (ii) of Section 28(c) to reflect the differing purpose of the Project Support Contracts, provides:

The Project Participant agrees that it will not sell, lease, abandon or otherwise dispose of all or substantially all of its electric or integrated utility system except upon ninety (90) days prior written notice to FMPA and, in any event, will not sell, lease, abandon or otherwise dispose of the same unless the following conditions are met: (i) the Project Participant shall, subject to the provisions of the Participation Agreement, assign this Project Support Contract and its rights and interest hereunder to the purchaser or lessee of said electric or integrated utility system, if any, and any such purchaser or lessee shall assume all obligations of the Project

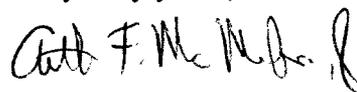
Participant under this Project Support Contract; and (ii) FMPA shall by appropriate action determine, in its sole discretion, that such sale, lease, abandonment or other disposition will not adversely affect FMPA's ability to meet its obligations under the Participation Agreement and will not adversely affect the value of this Project Support Contract as security for the payment of Bonds and interest thereon or affect the eligibility of interest on Bonds then outstanding or which could be issued in the future for federal tax-exempt status.

Together these Sections require three things: (i) a complete assignment of and assumption of all obligations under the Power Sales Contracts and Project Support Contracts to the purchaser of the system, (ii) FMPA possessing legal ability under Florida law to sell to FPL as purchaser of Vero Beach's electric system, and (iii) FMPA's determination, based upon such consultations with and advice from its bond counsel, financial advisor and consulting engineer as FMPA deems appropriate and including such notices to and obtaining consents from trustees, bondholders, bond insurers, swap counterparties and rating agencies as FMPA finds are required or appropriate, as to no adverse consequences relating to fulfillment of obligations under the participation agreements relating to each Project, the value of the Power Sales Contracts and Project Support Contracts as security and the tax status of current and future bonds. Since the detailed structure of the proposed sale to FPL and the expected operational situation after such sale have not been provided to me, I am unable to definitively advise you at this time whether the proposed transaction contemplated by the O'Connor Letter would be capable of being structured to meet the requirements of the Contracts. I would note, however, that an assignment of the Power Sales Contracts and Project Support Contracts to FPL as purchaser of the electric utility system appears to raise concerns both under Florida law and as to its effects on the federal tax status of the FMPA's bonds for the Projects. Finally, I would stress that any proposed transaction would be required to be accomplished in strict compliance with the provisions of section 28(c) of the Power Sales Contracts and Section 13(c) of the Project Support Contracts.

I would also note that FMPA has faced the issue of assignments of Power Sales Contracts and Project Support Contracts on at least two occasions in the past although in neither case was the assignment part of a sale of a utility's electric system. In each case, such assignment was to another FMPA member and complied with all applicable provisions of the relevant Bond Resolutions, Power Sales Contracts and Project Support Contracts, including the requirement that the assigning utility remain contingently liable on both Contracts. For each transaction the sequence of events was essentially as follows: a proposed deal was presented to FMPA by two members—one the proposed assignor/ transferor and the other the proposed assignee/transferee. In response, a "Game Plan" for the transaction was prepared by FMPA's General Counsel and provided to both parties. A transfer agreement was developed, approved by the governing body of each party pursuant to an authorizing resolution, and executed by the parties. Notably, the transfer agreement puts all responsibility for transactional costs associated with necessary consents, notifications, and approvals on the transferor and transferee, holding FMPA harmless from those costs. Similarly an assignment agreement was developed, approved by the governing body of each party pursuant to an authorizing resolution, and executed by the parties. All required notifications were made to and required consents obtained from the bond resolution

trustees, rating agencies and bond insurers. Copies of each of the foregoing documents for one of the transactions are attached hereto as Appendix B for your information. Such documents evidence that such prior assignments were done in strict compliance with all relevant requirements by FMPA, the assignor utility and the assignee utility. I would advise FMPA to require similar strict compliance to the relevant provisions of the Bond Resolutions, Power Sales Contracts and Project Support Contracts from Vero Beach and FPL.

Very truly yours,

A handwritten signature in black ink, appearing to read "Arthur F. McMahon, Jr.", written in a cursive style.

Arthur F. McMahon, Jr.

/csc

Frederick M. Bryant, Esq.

Re: Letter, dated April 19, 2012, from James R. O'Connor, City Manager, City of Vero Beach
May 8, 2012

APPENDIX A

NIXON PEABODY_{LLP}

To: Frederick M. Bryant, Esq.
General Counsel
Florida Municipal Power Agency

From: Arthur F. McMahon, Jr.

Date: May 25, 2007

Re: City of Vero Beach RFP

You have provided us with a copy of a document captioned: Offering Memorandum, Volume 1, City of Vero Beach Electric Utility, Requests For Proposals Regarding A Long-Term Wholesale Power Supply Agreement, April 2007, which is hereinafter referred to as the RFP. The first sentence of the RFP recites that the City of Vero Beach ("Vero Beach") is seeking indications of "interest in purchasing certain generation entitlements and supplying certain load obligations" of Vero Beach. A number of such generation entitlements relate to electric capacity and energy supplied by facilities financed, almost exclusively, with tax exempt bonds issued by Florida Municipal Power Agency ("FMPA").

In our role as Bond Counsel to FMPA and based upon a brief review of the RFP, we have previously provided to you, by email, summary comments expressing concerns, from both a bond law and document perspective and from a Federal tax perspective, about various aspects of the RFP. Our concerns could be exacerbated, or possibly mitigated, depending upon by the legal status of any successful bidder and the exact legal structure proposed by the bidder to meet the requirements of the RFP.

You have now asked us to consider the RFP in more detail and to provide comments and questions with specific references to provisions of the relevant FMPA bond resolutions and related contractual agreements between FMPA and Vero Beach as well as to provisions of Federal tax laws, rules and regulations which serve as the basis for our concerns.¹ The remainder of this memorandum provides our response to your request.

Overview

The RFP raises questions and concerns under various FMPA documents relating to the FMPA Projects in which Vero Beach is a participant. As will be set forth in more detail below,

¹ This memorandum does not discuss any possible implications of the RFP for any of the transmission arrangements, principally with Florida Power & Light Company ("FP&L"), relating to the four FMPA Projects in which Vero Beach participates. While we do not generally focus on the details of these transmission arrangements in our role as Bond Counsel, we believe, based on our exposure to information relating to the transmission arrangements in connection with various bond financings, that an examination of such arrangements is also necessary to fully understand all the implications of the RFP.

the two starting premises of our analysis are: (i) that the Contracts (described later) between FMMPA and the various participants in each of these Projects, including Vero Beach, are and always have been regarded as vital to the financial viability of each Project and (ii) that FMMPA is expressly obligated to enforce the provisions of the various Contracts between FMMPA and Vero Beach or risk being found to be in default under the related Bond Resolutions. Indeed, these Contracts are the principal security and source of payment for the payments made to FMMPA's bondholders. In addition to FMMPA's enforcement obligations, the Trustees under such Bond Resolutions as well as certain named third party beneficiaries have certain rights to enforce the Contracts with Vero Beach which are independent of FMMPA. At the same time, no purported assignment by Vero Beach to a winning bidder under the RFP would relieve Vero Beach of its obligations under the Contracts. This is especially relevant in the context of the Project Support Contracts relating to the facility specific Projects which contain Vero Beach's take-or-pay, hell-or-high-water obligation to make payments to FMMPA and to the step-up provisions affecting both Power Sales Contracts and Project Support Contracts for such Projects, which, if applied, could increase Vero Beach's obligations to up to 125% of current levels. While some potential transaction structures would require prior notice and approval by FMMPA, which generally cannot be given absent a finding of no material adverse effect on FMMPA's bondholders and no negative tax effects, no such notices have been given and no reference is made in the RFP to giving any such notices and obtaining any approval. It appears that the proposed transaction schedule leaves no opportunity for notices to be timely given or approvals obtained.

On the tax side, Vero Beach's transfer of output associated with its entitlements could raise material federal income tax issues with respect to FMMPA's current and future bond issues, in that FMMPA has undertaken those financings under the presumption that Vero Beach would utilize its entire share of the output (its "generation entitlements" referred to in the RFP under the respective Contracts with FMMPA) to directly serve its retail load. The sale by Vero Beach of the output it receives from the three project specific Contracts as well as the Contract for the All-Requirements Project could (depending on the nature of such sales) both complicate and interfere with FMMPA's ability to issue new bonds going forward as well as impermissibly taint FMMPA's outstanding bonds. In the case of the outstanding FMMPA bonds, this would trigger a need for certain remedial actions (described later), which could be very costly for Vero Beach, in order to avoid the interest on such bonds becoming retroactively taxable to their date of original issuance.²

As you will see in the context of the discussion which follows, to the extent that any of the Bond Resolution or Contract provisions are implicated by the winning bidder's proposal, the determination of compliance with the relevant provisions is to be made by FMMPA, at times along with other affected parties, and not by Vero Beach or the winning bidder.

Background

FMMPA is a governmental legal entity of the State of Florida, organized and existing under Section 163.01, the Florida Interlocal Cooperation Act of 1969 (the "Interlocal Act"), and

² According to the notes to Vero Beach's Financial Statements for the period ended September 30, 2006, Vero Beach currently has outstanding \$57,650,000 of Electric Refunding Revenue Bonds, Series 2003A; we would expect that the same tax concerns expressed as to FMMPA's Bonds are also concerns for the outstanding Vero Beach Bonds and any additional bonds Vero Beach needs to issue in the future for its electric system.

Chapter 361, Part II (the "Joint Power Act"), of the Florida Statutes, as amended; FMPA's Bonds have been issued pursuant to Chapter 166, Part II (the "Bond Act" and collectively with the Interlocal Act and the Joint Power Act, the "Act") of the Florida Statutes, as amended. The Act both defines and limits FMPA's powers and its ability to engage in various transactions with specified parties.

Both the Interlocal Act, Section 163.01(3)(f), and the Joint Power Act, Section 361.11(2), define an electric utility as:

Any municipality, authority, commission, or other public body, investor-owned utility, or rural electric cooperative which owns, maintains, or operates an electrical energy generation, transmission, or distribution system within the state on June 25, 1975.

The Interlocal Act in Section 163.01(3)(g) additionally defines a foreign public utility as:

any person whose principal location or principal place of business is not located within this state; who owns, maintains, or operates facilities for the generation, transmission, or distribution of electrical energy; and who supplies electricity to retail or wholesale customers, or both, on a continuous, reliable, and dependable basis. "Foreign public utility" also means any affiliate or subsidiary of such person, the business of which is limited to the generation or transmission, or both, of electrical energy and activities reasonably incidental thereto.

The definitions are important to understanding to whom FMPA is legally permitted to sell capacity and energy. The Interlocal Act contains a detailed provision governing such sales. Section 163.01(15)(d) provides:

d) Any such legal entity may sell services, output, capacity, energy, or any combination thereof only to:

1. Its members to meet their retail load requirements;
2. Other electric utilities or foreign public utilities which have ownership interests in, or contractual arrangements which impose on such electric utilities or foreign public utilities obligations which are the economic equivalents of ownership interests in, the electric project from which such services, output, capacity, energy, or combination thereof is to be acquired;
3. Any other electric utility or foreign public utility to dispose of services, output, capacity, energy, or any combination thereof that is surplus to the requirements of such legal entity:
 - a. If such surplus results from default by one or more of the members of such legal entity under a contract or contracts for the purchase of such services, output, capacity, energy, or combination thereof; and

b. If the revenues from such contract or contracts are pledged as security for payment of bonds or other evidences of indebtedness issued by such legal entity or if such revenues are required by such legal entity to meet its obligations under any contract or agreement entered into by such legal entity pursuant to paragraph (b);

4. Any other electric utility or foreign public utility for a period not to exceed 5 years from the later to occur of the date of commercial operation of, or the date of acquisition by such legal entity of any ownership interest in or right to acquire services, output, capacity, energy, or any combination thereof from, the electric project from which such services, output, capacity, energy, or combination thereof is to be acquired, if:

a. One or more members of such legal entity have contracted to purchase such services, output, capacity, energy, or combination thereof from such legal entity commencing upon the expiration of such period; and

b. Such services, output, capacity, energy, or combination thereof, if acquired commencing at an earlier time, could have been reasonably predicted to create a surplus or surpluses in the electric system or systems of such member or members during such period, when added to services, output, capacity, energy, or any combination thereof available to such member or members during such period from facilities owned by such member or members or pursuant to one or more then-existing firm contractual obligations which are not terminable prior to the end of such period without payment of a penalty, or both; or

5. Any combination of the above.

Nothing contained in this paragraph shall prevent such legal entity from selling the output of its ownership interest in any such electric project to any electric utility or foreign public utility as emergency, scheduled maintenance, or economy interchange service.

This provision allows FMPA to sell capacity and energy from its ownership in individual facility related projects to its own members, without restriction, to meet their power supply needs. Sales to electric utilities and foreign public utilities, each as defined above, are permitted, but only if one of three additional tests is met: first, the purchaser has an ownership interest or the equivalent thereof in the facility providing the power FMPA is selling; second, if the power being sold is surplus for FMPA's needs due to a default by one of FMPA's members participating in a project; or, third, such power is effectively surplus to FMPA's needs to serve the participants in one of its new projects during an initial period of up to five years while FMPA is growing into such new project.

Complimenting the restrictions of Section 163.01(15)(d) of the Interlocal Act, Section 361.14 of the Joint Power Act makes clear that it does not override such limitations by stating:

The additional powers and authority provided in this chapter shall in no way be considered to authorize or permit the joint ownership of any project by, or the direct or indirect sale or transfer of the services, products, capacity, or energy of any project to, any person or persons other than electric utilities; any organization, association, or separate legal entity whose membership consists only of electric utilities; foreign public utilities; or any combination thereof....

These restrictions are mirrored in briefer form in the Interlocal Agreement Creating Florida Municipal Power Agency, which is FMPA's constitutive document. Article II, Section 2(i) provides in relevant part:

...the Agency shall not sell, transfer or distribute any electrical power except on a wholesale basis and the Agency shall not sell, transfer or distribute any electrical power in violation of the provisions of Section 361.14....

Vero Beach is currently a participant in four different FMPA Projects that are relevant for purposes of our review of the RFP: three Projects which are facility specific--the Stanton Project and the Stanton II Project (together, the "Stanton Projects") and the St. Lucie Project--and the All-Requirements Power Supply Project (the "AR Project")³. While the fundamental issues underlying our concerns with the effects of the RFP are similar for all four FMPA Projects: (a) maintenance of the security provided by the various contracts to bondholders and interested other third parties as well as to other FMPA members participating in the Projects and (b) preservation of the Federal tax exemption on existing bonds and avoiding contractually prohibited restraints on FMPA's ability to issue tax exempt bonds in the future, the differences between the facility specific Projects and the AR Project are significant enough to merit separate consideration, as detailed below.

The RFP

At the outset, we would note several points about the RFP itself. In addition to the language noted above, the RFP refers to the sale of Vero Beach's existing entitlements in both Sections 1.2 and 1.3 and to the effective transfer of Vero Beach's rights and obligations under the existing entitlements in Section 1.4.1. At the same time, Section 5.2.1 appears to possibly qualify this language by stating that the Entitlements Transfer Agreement to be entered into between Vero Beach and the winning bidder "will provide the bidder, to the extent possible and practical, the rights and obligations presently afforded Vero Beach under each Generation Entitlement." [Emphasis supplied.] Section 3.6 describes the Contract for the AR Project and Vero Beach's election, as permitted by the Contract, to limit its purchase obligations thereunder to a contract rate of delivery commencing January 1, 2010.

³ As of September 30, 2006, FMPA had outstanding \$262,000,000 principal amount of Bonds relating to the St. Lucie Project, \$72,765,000 relating to the Stanton Project, \$191,750,000 relating to the Stanton II Project and \$629,155,000 relating to the AR Project.

The RFP (Section 1.1) recites that prospective bidders are receiving copies of all of the relevant contracts discussed below between FMPA and Vero Beach relating to the four relevant FMPA Projects. Sections 3.2 and 3.3 discuss the three facility specific Projects and purport to present “Key Terms” of the Contracts; it is noteworthy that the “Key Terms” do not include the step-up provisions affecting all of these Contracts or the take-or-pay, hell-or-high-water obligations created in the three Project Support Contracts. The RFP also provides that the winning bidder will be selected and definitive agreements executed by the week of July 31, 2007 without making provision for any consents or approvals required under the various Contracts with FMPA. These are significant oversights in the RFP.

The Facility Specific Projects—St. Lucie, Stanton and Stanton II

These first three Projects each relate essentially to a different single generation facility. For each of these Projects, FMPA adopted a Project-specific Bond Resolution secured by two contracts, a Power Sales Contract and a Project Support Contract, which were executed and delivered by each member of FMPA participating in that Project, including Vero Beach. Vero Beach is a significant participant in each of these Projects, having a Power Entitlement Share of 15.202% in the St. Lucie Project, 32.521% in the Stanton Project and 16.4887% in the Stanton II Project. The three Project Bond Resolutions and forms of Power Sales Contracts and Project Support Contracts are essentially identical for issues relevant to our review of the RFP. Therefore, for purposes of this review, we will generally cite specific language only from those documents for the St. Lucie Project and provide references in the text or by footnote to the parallel provisions in documents for the Stanton Projects. The Contracts are expressly pledged as security for the bonds issued under the relevant Bond Resolutions and are designed to remain in effect until all bonds have been paid or provided for and all other obligations related to the particular Project have been satisfied. The general nature of the Contracts, the term of the Contracts and the validity and enforceability of the Contracts both originally were and currently are regarded as important not only to bondholders, underwriters, rating agencies, and credit and liquidity support providers for the relevant bonds, but also by the majority joint owners of the generating facilities to which the Projects relate⁴ and other FMPA members participating in the Projects.

Validation Proceedings. In connection with the St. Lucie Project, FMPA instituted an unusually detailed bond validation proceeding which culminated in a unanimous ruling from the Supreme Court of the State of Florida affirming the favorable ruling of the circuit court. The Supreme Court validation was essential to FMPA’s ability to issue the St. Lucie Project Bonds and to effectuate the St. Lucie Project. In addition to providing favorable rulings relating to FMPA, the St. Lucie Project Bonds and associated matters, the validation judgment affirmed by the Florida Supreme Court effectively confirmed the validity and enforceability of all terms of the Power Sales Contracts and Project Support Contracts entered into between FMPA and each of the participants in the St. Lucie Project, including Vero Beach. The ruling of the Circuit Court included five specific findings regarding the Power Sales and Project Support Contracts for the St. Lucie Project, including one which provides in part:

The Contracts have been validly adopted by FMPA and each of the Project Participants pursuant to the Enabling Act and other relevant provisions of law

⁴ FP&L for the St. Lucie Project and the Orlando Utilities Commission (“OUC”) for the Stanton Projects.

and are fully authorized by law. The Contracts are legal, valid and enforceable obligations of FMPA and each of the Project Participants, respectively, in all respects.

The Circuit Court also stated in its order for the proceeding that:

The execution of the Power Sales Contracts and Project Support Contracts by FMPA and by each of the Project Participants is for a proper, legal and corporate public purpose and is fully authorized by law, does not constitute a breach or violation of, or a default or impairment of the obligation under, the Project Participants' outstanding debt instruments hereinbefore referred to, and said Contracts and each of them, together with all proceedings incident thereto, are validated and confirmed. The obligation of each of the Project Participants to make payments thereunder shall be an obligation payable solely from and secured by a lien upon and pledge of the revenues to be derived by each of the Project Participants from the operation of its electric or other integrated utility system, with the priority and otherwise as more particularly provided in said Contracts.

Pursuant to Section 75.09 of the Florida Validation Statute, "...such judgment is forever conclusive as to all matters ... and shall never be called in question in any court by any person or party."

Similar validations at the Circuit Court level were carried out for the Stanton Project and for the Stanton II Project. The final judgments in those validations repeat the language cited above relating to the St. Lucie Power Sales and Project Support Contracts in the discussion of the Stanton and Stanton II Power Sales and Project Support Contracts.

Bond Resolutions. The St. Lucie Project Revenue Bond Resolution, as originally adopted by FMPA and as amended and restated and currently in effect, makes multiple references to the Power Sales and Project Support Contracts. The first clause of the definition of Revenues refers to amounts "received or to be received by FMPA under the Power Sales Contracts [and] the Project Support Contracts". Section 202.1(7) of the Bond Resolution includes among the conditions for the issuance of Bonds receipt of opinions that "all Power Sales Contracts and Project Support Contracts are in full force and effect...." Section 501 of the Bond Resolution, which describes the pledge effected by the Resolution, lists as both the source of payment and security for the Bonds, among other items, "all right, title and interest of FMPA in, to and under the Power Sales Contracts and the Project Support Contracts." Section 803.1 dealing with the application of Revenues in a default context requires FMPA, if the Trustee demands, to "order all Project Participants to make payments of all amounts due under the Power Sales Contracts and the Project Support Contracts directly to the Trustee for deposit in the Revenue Fund" and to "grant to the Trustee the rights and remedies afforded FMPA in the Power Sales Contracts and the Project Support Contracts." All of the foregoing references to the Power Sales and Project Support Contracts in the Bond Resolution essentially emphasize the crucial role which the Contracts play in the financing and operation of the St. Lucie Project.⁵

⁵ All of the foregoing provisions appear in the same sections in the Stanton and Stanton II Bond Resolutions.

Section 712.1,⁶ which is set forth in full below, contains the covenant of FMPA regarding enforcement of the Contracts.

FMPA shall collect and forthwith cause to be deposited in the Revenue Fund all amounts payable to it pursuant to the Power Sales Contracts or the Project Support Contracts, or otherwise payable to it for the sale of the output, Electric Capacity, Electric Energy, or service of the St. Lucie Project or any part thereof or otherwise with respect to the St. Lucie Project. FMPA shall enforce the provisions of the Power Sales Contracts and the Project Support Contracts, as well as any other contract or contracts entered into relating to the sale of Electric Capacity and/or Electric Energy from, or services of, the St. Lucie Project, and duly perform its covenants and agreements thereunder. FMPA will not consent or agree to or permit any rescission of or amendment to or otherwise take any action under or in connection with any Power Sales Contract or Project Support Contract which will impair the ability of FMPA to comply during the current or any future year with the provisions of subsection 1 of Section 711⁷ [the rate covenant]; provided that this provision shall not prevent FMPA from otherwise taking any action under or in connection with the Power Sales Contracts or the Project Support Contracts which is expressly permitted pursuant to the provisions thereof. A copy of each Power Sales Contract and Project Support Contract certified by an Authorized Officer of FMPA shall be filed with the Trustee, and a copy of any such amendment certified by an Authorized Officer of FMPA shall be filed with the Trustee. [Emphasis supplied; footnote added.]

As noted above, the credit support providers were concerned about the provisions and operations of the Power Sales and Project Support Contracts, including those for the St. Lucie Project. All of the currently outstanding FMPA Bonds relating to the St. Lucie Project are insured by Ambac Assurance Corporation ("Ambac"). As a condition to providing such insurance, Ambac required that the Supplemental Bond Resolution for the Series 2000 Bonds and the Bond Series Certificate for the Series 2002 Bonds each contain the following language:

The Bond Insurer's consent shall be required in addition to the consent of the Holders of the ... Bonds, when required, for ... execution and delivery of any amendment, supplement or change to or modification of the Power Sales Contracts or the Project Support Contracts....^{8 9}

⁶ Section 713.1 of the St. Lucie and Stanton Bond Resolutions as originally adopted and Section 712 of the Stanton II Bond Resolution.

⁷ Section 712 of the St. Lucie and Stanton Bond Resolutions as originally adopted and Section 711 of the Stanton II Bond Resolution.

⁸ Section 12.13(b) of the Supplemental Resolution for the Series 2000 Bonds and paragraph 4.8(b) of the Bond Series Certificate for the Series 2002 Bonds.

⁹ Ambac is also the insurer for the Stanton and Stanton II. Ambac required similar language in the Supplemental Resolutions for the Series 2000 Stanton Bonds and the Series 2000 Stanton II Bonds and in the Bond Series Certificate for the Series 2002 Stanton II Bonds. Equivalent provisions in different language were required by MBIA as insurer of the Series 1997 Stanton Bonds, by FSA for the Series 2002 and 2003 Stanton Bonds and the Series 2003A Stanton II Bonds, and by FGIC for the Series 2004 Stanton II Bonds.

All of the foregoing discussion and references to the validations and Bond Resolutions for the St. Lucie Project and the Stanton Projects serve principally to establish the framework in which FMPA is required to evaluate the RFP--in light of the provisions of the Power Sales and Project Support Contracts which it is obligated to enforce. The real issues for the RFP arise in the context of how the Contracts work and what obligations they impose on Vero Beach which FMPA is obligated to monitor and enforce.

The Power Sales and Project Support Contracts. The combination of the Power Sales Contracts and the Project Support Contracts for the St. Lucie Project was designed to provide the details for delivery of and payment for the energy produced by FMPA's St. Lucie Project to the participating FMPA members (the "Project Participants") while also offering a strong source of security for bondholders and other concerned stakeholders of the St. Lucie Project. The two Contracts together (i) create a firm obligation on the part of the Project Participants (including Vero Beach) to pay their share of the costs of the Project even if it had never been completed or if it reduces, suspends or ceases producing electrical energy in the future before the bonds and other obligations of the St. Lucie Project are satisfied and (ii) provide that, if any Project Participant defaults, the other Project Participants can be compelled to increase their original entitlement share in the Project, and related obligations for costs, up to 125% of their original share. In the context of the St. Lucie Project these costs include costs related to the decommissioning of the St. Lucie Unit No. 2 nuclear facility.¹⁰

The firm, take-or pay obligation to pay all costs in all circumstances is described in Section 3(h)¹¹ of the Project Support Contracts as follows:

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 Payments¹² shall be absolute and unconditional and shall not be dependent upon performance of FMPA under the Power Sales Contract or this Project Support Contract; Project Support Payments shall be made whether or not St. Lucie Unit No. 2 is completed, operable or operating and notwithstanding the suspension,

¹⁰ Pursuant to current requirements of the United States Nuclear Regulatory Commission ("NRC"), FMPA is required to make deposits into a decommissioning fund to provide amounts expected to be required to pay FMPA's share of the costs of decommissioning St. Lucie Unit No. 2. Such amounts are collected monthly from Project Participants as part of their monthly power bills, and, as required by the NRC, are held in a separate escrow account. Amounts in this account are currently invested pursuant to a long term agreement at a favorable interest rate. The earnings on the investment of amounts in the account are free of Federal income taxation since FMPA and all of the Project Participants in the St. Lucie Project are not tax payers for federal purposes. If the winning bidder were not a similar governmental entity, the continued exemption of such earnings, or at least the portion thereof related to Vero Beach, from Federal income taxation would be subject to question.

¹¹ This provision appears as the same section of the Stanton and Stanton II Project Support Contracts.

¹² Project Support Payments are defined as "an amount equal to the amount the Project Participant would have been required to pay under the Power Sales Contract for such Month for Monthly Power Costs and Monthly Transmission Costs if any Electric Capacity and Electric Energy had been made available to the Project Participant during such Month."

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. [Emphasis supplied; footnote added.]

The 125% step-up provision appears in Section 19(c)¹³ of the Power Sales Contracts and provides as follows:

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) [voluntary assumption by another Project Participant] or sold pursuant to clause (b) [sale to third parties as permitted by law] 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.

Since the Power Entitlement Share governs payments under both the Power Sales Contracts and the Project Support Contracts, the step-up obligation effectively governs operation of the Project Support Contracts as well. It is important to note in connection with these two provisions, which along with the rate covenant by the Project Participants are the principal basis for the financial security provided by the two Contracts, that Section 28(a)¹⁴ of the Power Sales Contracts and Section 13(a)¹⁵ of the Project Support Contracts provide that Vero Beach would continue to be obligated under these provisions regardless of any purported assignment or transfer of the Contracts to a winning bidder.

In addition to the acknowledgement of the pledge of the Contracts to the Trustee and bondholders under the St. Lucie Bond Resolution contained in both the Power Sales and Project Support Contracts,¹⁶ Section 24 (c) of the St. Lucie Power Sales Contracts and Section 17(c) of

¹³ This provision appears as the same section of the Stanton and Stanton II Power Sales Contracts.

¹⁴ "No assignment or transfer of this Power Sales Contract shall relieve the parties of any obligation hereunder." See also Section 28(a) of the Stanton Power Sales Contracts and of the Stanton II Power Sales Contracts.

¹⁵ "No assignment or transfer of this Project Support Contract shall relieve the parties of any obligation hereunder...." See also Section 13(a) of the Stanton Power Sales Contracts and of the Stanton II Power Sales Contracts.

¹⁶ See Section 16 of the Power Sales Contracts and Section 6 of the Project Support Contracts for each of the three facility specific Contracts.

the St. Lucie Project Support Contracts provide certain third party rights to FP&L, the majority owner of St. Lucie Unit No.2,¹⁷ in essentially the same language. Section 24(c) provides:

(c) It is recognized and agreed by the parties hereto that in the event of a default on the part of the Project Participant referred to in Section 17 hereof, under the circumstances and in the manner described in Section 33 of the Participation Agreement, FP&L shall have the right on its own behalf to take any action which FMPA would be entitled to take hereunder to enforce, by action taken directly against the Project Participant, all or any obligations of the Project Participant hereunder. It is recognized by the parties hereto that FMPA and FP&L will enter into the Participation Agreement in reliance on FP&L's being a third-party beneficiary of this Power Sales Contract as provided in this Section 24(c). FP&L and FMPA have acknowledged and agreed to the position of FP&L as a third-party beneficiary of this Power Sales Contract in the Participation Agreement and the Project Participant herein does agree that this Section 24(c) of this Power Sales Contract may not be rescinded, amended, supplemented or altered in any way without the express written consent of FP&L.

FP&L and FMPA have acknowledged and agreed in the Participation Agreement and Project Participant herein does agree that his Power Sales Contract may not be rescinded, amended, supplemented or altered in any other way that would materially lessen, release or alter the rights of FP&L or the obligations of the Participant to FP&L without the express written consent of FP&L; without limiting the generality of the foregoing, it is expressly understood that any modification to the rate covenant and the obligations to make payments hereunder constitute material alteration of the rights of FP&L.

Given the broadness of the "altered in any way" language, it is conceivable that FP&L, and OUC in the case of the Stanton Projects, might assert the right to a prior required consent depending on the structure of the winning bidder's proposal. It would probably be prudent to obtain such consents to avoid any problem in consummating the transaction contemplated by the RFP.

With the foregoing provisions serving as background, the main provisions of the Contracts directly implicated by the RFP are in the case of the Power Sales Contracts: Sections 14. Project Participant Covenants; Section 28. Assignment of Power Sales Contracts, Sale of Project Participant's System; and Section 29. Termination or Amendment of Contract and in the case of the Project Support Contracts: Section 4. Project Participant's Covenants; Section 13. Assignment of Project Support Contract, Sale of Project Participant's System; and Section 14. Amendment of Contract.¹⁸

¹⁷ Equivalent third party rights are granted to OUC, the majority owner of both Stanton Unit No. 1 and Stanton Unit No.2 under Section 24(c) and (d) of the related Power Sales Contracts and Section 17(c) and (d) of the related Project Support Contract for each of the Stanton Projects.

¹⁸ All section references in the Stanton and Stanton II Power Sales and Project Support Contracts are identical to the references to the St. Lucie Project Contracts.

In addition to the expected language regarding agreeing to operate and maintain its System and charge sufficient rates to cover all costs, Section 14 of the St. Lucie Power Sales Contract contains the following covenant by the Project Participant:

The Project Participant covenants that it will not make any sales of its Power Entitlement Share, or take any other action, which would adversely affect the exemption from Federal income taxation of interest paid on the Bonds.

As discussed in more detail under Tax Issues below, this covenant covers not only what direct use is made of Vero's Power Entitlement Share from the St. Lucie Project but also any possible adverse effects of the contracts with the winning bidder generally. Since the St. Lucie Project Support Contract only operates when no power is available as provided in the Power Sales Contract, Section 4 of the Project Support Contract does not contain an equivalent tax covenant; it does, however, contain a covenant not to assign the Power Sales Contract apart from the Project Support Contract.

The relevant portions of Section 28¹⁹ of the St. Lucie Power Sales Contract provide as follows:

(a) This Power Sales Contract shall inure to the benefit of and be binding upon the respective successors and assigns of the parties to this Power Sales Contract; provided, however, that except as provided in Section 19 hereof in the event of a default and except for the assignment and pledge authorized by paragraph (b) of this Section 28 [to secure the Bonds], for the assignments authorized by paragraph (c) of this Section 28 and for the assignment permitted by paragraph (d) of this Section 28 [reallocations of shares at the outset of the St. Lucie Project], neither this Power Sales Contract nor any interest herein shall be transferred or assigned by either party except with the consent in writing of the other party hereto, which consent shall not be unreasonably withheld. No assignment or transfer of this Power Sales Contract shall relieve the parties of any obligation hereunder.

(c) The Project Participant agrees that it will not sell, lease or otherwise dispose of all or substantially all of its electric utility system except upon ninety (90) days prior written notice to FMPA and, in any event, will not sell, lease or otherwise dispose of the same unless the following conditions are met: (i) the Project Participant shall assign this Power Sales Contract and its rights and interest hereunder to the purchaser or lessee of said electric system, and such purchaser or lessee shall assume all obligations of the Project Participant under this Power Sales Contract; (ii) FMPA shall be permitted by then applicable law to sell Electric Capacity and Electric Energy to said purchaser or lessee; and (iii) FMPA shall by appropriate action determine that such sale, lease or other disposition will not adversely affect the value of this Power Sales Contract as security for the payment of Bonds and interest

¹⁹ Except for omissions and other changes necessary to reflect the fact that the Project Support Contracts apply when no power is being delivered for a month, Section 13 of the Project Support Contracts for the St. Lucie Project and each of the Stanton Projects is essentially identical to Section 28.

thereon or affect the eligibility of interest on Bonds then outstanding or which could be issued in the future for Federal tax-exempt status. [Emphasis supplied.]

Given FMPA's obligations under the St. Lucie Bond Resolution, although it is not clear that any proposal accepted in response to the RFP would implicate Section 28, we would stress the need for FMPA to be very careful that it is not a party to or otherwise a participant in any transaction by Vero Beach which in substance violates this provision regardless of the purported form of such transaction. It would appear to be equally important for Vero Beach to avoid being a party to such a transaction.

Two subsections of Section 29²⁰ are potentially relevant to any proposal received pursuant to the RFP. Section 29 (c) provides as follows:

This Power Sales Contract shall not be terminated, amended, modified, or otherwise altered in any manner that will adversely affect the security for the Bonds afforded by the provisions of this Power Sales Contract upon which the owners from time to time of the Bonds shall have relied as an inducement to purchase and hold the Bonds. So long as any of the Bonds are Outstanding or until adequate provisions for the payment thereof have been made in accordance with the provisions of the Bond Resolution, this Power Sales Contract shall not be terminated, amended, modified or otherwise altered in any manner which will reduce the payments pledged as security for the Bonds or extend the time of such payments provided herein or which will in any manner impair or adversely affect the rights of the owners from time to time of the Bonds. [Emphasis supplied.]

The triple references to "in any manner" in this provision make it one which FMPA would have to consider in evaluating any proposal accepted by Vero Beach to determine if there is any breach of this provision. In addition, it would appear that, apart from the specific requirements of various Supplemental Resolutions for specific Series of St. Lucie Project Bonds, the language of this provision may effectively require FMPA to obtain the approval of the Trustee under the St. Lucie Bond Resolution and any insurers of the St. Lucie Bonds as well as a confirmation from the rating agencies that none of the ratings on the St. Lucie Bonds would be negatively affected.

Section 29(d),²¹ which is directed more at other participants in the St. Lucie Project, provides:

No Power Sales Contract entered into between FMPA and another Project Participant may be amended so as to provide terms and conditions different from those herein contained except upon written notice to and written consent or waiver by each of the other Project Participants, and upon similar amendment being made to the Power Sales Contract of any other Project

²⁰ Section 14 of the Project Support Contracts for the St. Lucie Project and for each of the Stanton Projects contains essentially identical language.

²¹ Section 29(d) of the Power Sales Contract for each of the Stanton Projects contains an identical provision.

Participants requesting such amendment after receipt by such Project Participant of notice of such amendment.

In light of this provision, FMPA will have to consider the effect of any possible amendment, waiver or consent which would need to be agreed to between FMPA and Vero Beach to facilitate the operation of any proposal accepted by Vero Beach in response to the RFP. Thus, it may be prudent to have each of the Project Participants in the St. Lucie Project and the Stanton Projects formally waive their rights to require that they be entitled to obtain any contract amendments or waivers or consents agreed to by FMPA and Vero Beach in connection with the RFP.

Summary. Without attempting to repeat all of the points made in this section of this memorandum, we would stress that the Bond Resolutions for the St. Lucie Project and the Stanton Projects require FMPA to enforce the provisions of the respective Power Sales Contracts and Project Support Contracts and prohibit FMPA from taking any action relating to the Contracts which could impair FMPA's ability to comply with its rate covenant in the Bond Resolutions. The Contracts themselves contain provisions which prohibit Vero Beach from (i) taking any action to adversely affect the tax exemption on FMPA's Bonds, (ii) assigning the Contracts without FMPA's written consent, (iii) disposing of its utility system if FMPA determines that such disposition would adversely affect the value of the Contracts as security for FMPA's Bonds or the tax exemption of such Bonds, and (iv) altering the Contracts in any manner which would adversely affect the security for the Bonds provided by the Contracts. The joint owners of the units to which the Projects relate, FP&L and OUC, as named third party beneficiaries also have the right to enforce the provisions of the respective Contracts. Any change to or modification of the Contracts would require the consent of the various insurers of the outstanding Bonds for these Projects. Other Project Participants would also have the right to demand that their Contracts be amended in the same way that Vero Beach's may be amended to accommodate any accepted proposal, and the right could apply even if an amendment were formulated as a waiver or consent.

The All-Requirements Power Supply Project

The fourth FMPA Project in which Vero Beach is a participant, the All-Requirements Power Supply Project (the "AR Project"), is, as its name implies, not tied to a specific generating facility. The AR Project, as reflected in the terms of the All-Requirements Power Supply Project Contracts (the "AR Contracts") executed by FMPA and each of the FMPA members who have elected to become participants in the AR Project at its inception in 1985 and at various times since then, including Vero Beach which joined the AR Project in 1997 (the "AR Project Participants"), requires FMPA, subject to certain specified exceptions, to provide all of the wholesale power requirements of the AR Project Participants.

Validation Proceedings. The original AR Project Bonds and related arrangements were the subject of a favorable bond validation proceeding in Circuit Court in 1985, which repeated

the language quoted above^{22 23} concerning the St. Lucie Power Sales and Project Support Contracts in its discussion of the AR Contracts.

Bond Resolution. The All-Requirements Power Supply Project Revenue Bond Resolution, as originally adopted by FMPA and as amended and restated and currently in effect (the AR Bond Resolution”), makes multiple references to the AR Contracts. The references are similar, but not exactly identical, to those in the St. Lucie, Stanton and Stanton II Bond Resolutions due both to the differences in the underlying contracts with the AR Project Participants and simple changes in drafting style. While the definition of Revenues, in the context of a contractual structure which supplies all of the members power requirements rather than creating a hell-or-high water contractual obligation to pay for power, focuses on all revenues produced by the AR Project System, the definition of System describes all items necessary to meet FMPA’s obligations to supply power under the AR Contracts. Section 202.1(7) of the AR Bond Resolution includes among the conditions for the issuance of Bonds the receipt of opinions that “all All-Requirements Power Supply Contracts then in force have been duly authorized executed and delivered by the parties thereto and constitute valid and binding obligations of such parties in accordance with their respective terms.” Section 501 of the AR Bond Resolution, which describes the pledge effected by the Resolution, refers to the Trust Estate rather than providing a list of items serving as both the source of payment and security for the Bonds; the definition of Trust Estate includes, among other items, “all right, title and interest of FMPA in, to and under the All-Requirements Power Supply Contracts”. Section 803.1, dealing with the application of Revenues in a default context, requires FMPA, if the Trustee demands, to “order all Project Participants to make payments of all amounts due under the All-Requirements Power Supply Contracts directly to the Trustee for deposit in the Revenue Fund” and “grant to the Trustee the rights and remedies afforded FMPA in the All-Requirements Power Supply Contracts.” All of the foregoing references to the AR Contracts in the AR Bond Resolution essentially emphasize the crucial role, although different than that played by the Power Sales and Project Support Contracts, which the AR Contracts play in the financing and operation of the AR Project. Section 712, which is set forth in full below, contains the covenant of FMPA regarding enforcement of the Contracts.

FMPA shall collect all amounts payable to it pursuant to the All-Requirements Power Supply Project Contracts or payable to it pursuant to any other contract for the sale or use of output, capacity or other service from the System or any part thereof and as soon as practicable after receipt thereof,

²² “The Contracts have been validly adopted by FMPA and each of the Project Participants pursuant to the Enabling Act and other relevant provisions of law and are fully authorized by law. The Contracts are legal, valid and enforceable obligations of FMPA and each of the Project Participants, respectively, in all respects.”

²³ “The execution of the Contracts by FMPA and by each of the Project Participants is for a proper, legal and corporate public purpose and is fully authorized by law, does not constitute a breach of violation of, or a default or impairment of the obligation under, the Project Participants’ outstanding debt instruments hereinbefore referred to, and said Contracts and each of them, together with all proceedings incident thereto, are validated and confirmed. The obligation of each of the Project Participants to make payments thereunder shall be an obligation payable solely from and secured by a lien upon and pledge of the revenues to be derived by each of the Project Participants from the operation of its electric or other integrated utility system, with the priority and otherwise as more particularly provided in said Contracts.”

and in any event within ten days of such receipt, shall deposit the same into the Revenue Fund. FMPA shall enforce the provisions of the All-Requirements Power Supply Project Contracts and duly perform its covenants and agreements thereunder. FMPA will not consent or agree to or permit any rescission of or amendment to any All-Requirements Power Supply Contract unless it shall have delivered to the Trustee (a) a certificate of the Consulting Engineer stating that, in its opinion, such action will not preclude FMPA from complying with the covenant set forth in Section 711 [the rate covenant²⁴]hereof and (b) a certificate of an Authorized Officer of FMPA setting forth a determination by FMPA's Board²⁵ that, taking into account all relevant facts and circumstances, including, if and to the extent the Board deems appropriate, the advice or opinions of the Consulting Engineer²⁶ as to engineering matters, its Bond Counsel as to legal matters and other consultants and advisors, such action will not have a material adverse effect on the interests of Bondholders. The extension of the term of any All-Requirements Power Supply Contract and the extension of the full requirement period of any All-Requirements Power Supply Contract shall not constitute such an amendment nor shall any change in or amendment to any schedule to any All-Requirements Power Supply Contract. A copy of each All-Requirements Power Supply Contract certified by an Authorized Officer of FMPA shall be filed with the Trustee, and prior to execution by FMPA of any such amendment thereof, a copy of such amendment certified by an Authorized Officer of FMPA shall be filed with the Trustee. [Emphasis supplied; footnotes added.]

Similar to the concerns noted above in the context of the Power Sales and Project Support Contracts, the credit support providers were concerned about the provisions and operations of the AR Contracts. All of the currently outstanding FMPA Bonds relating to the AR Project are insured. As a condition to providing such insurance, Ambac required that the Supplemental Bond Resolutions for the Series 2000. Series 2000-1 and 2000-2 Bonds each contain the following language:

The Bond Insurer's consent shall be required in addition to the consent of the Holders of the ... Bonds, when required, for ... execution and delivery of any amendment, supplement or change to or modification of the ... Contracts....

²⁴ The rate covenant in the AR Bond Resolution also makes specific reference to maintaining and collecting amounts under the AR Contracts.

²⁵ It would be prudent if such determination were evidenced by a resolution of the FMPA Executive Committee making such determination.

²⁶ While it is not possible to determine at this time whether a particular response to the RFP would require a review and opinion from the Consulting Engineer, we would point out that the timing contemplated by the RFP makes no allowance for any such review, if required. We would also point out that since any such review by the Consulting Engineer and any similar review by Bond Counsel or other consultants are solely for the benefit of Vero Beach and not the other AR Project Participants, it would not be appropriate to include the costs of these or any other consultants in costs paid by the AR Project Participants generally and that such costs would need to be paid by Vero Beach.

Similar language was required by FSA for the Series 2003A, 2003B-1 and 2003B-2 Bonds and by CFIG for the Series 2006A, 2006B-1, 2006B-2, 2006B-3, 2006B-4 and 2006C Bonds.

As was the case in the earlier discussion of the St. Lucie Project and the Stanton Projects, the foregoing discussion and references to the validation and Bond Resolution for the AR Project serve principally to establish the framework in which FMPA is required to evaluate the RFP in light of the provisions of the AR Contracts which it is obligated to enforce. The real issues for the RFP arise in the context of how the AR Contract works and what obligations it imposes on Vero Beach which FMPA is obligated to monitor and enforce.

The AR Contracts. While Vero Beach will reduce its obligations in respect of the purchase of power when it goes to a Contract Rate of Delivery under its AR Contract, such change will not reduce its need to comply with the other provisions of the AR Contract, even if the Contract Rate of Delivery is de minimis. These provisions cover essentially the same matters as the Contracts for the St. Lucie Project and the Stanton Projects in language which is generally similar.

Section 8 of the AR Contract contains four separate covenants by Vero Beach potentially relevant to FMPA's evaluation of the RFP. The tax covenant, the implications of which are discussed below under Tax Issues, is much more detailed than those contained in the various facility specific Contracts. Section 8 (f) states:

The Project Participant covenants and agrees that it shall not use or permit to be used any of the electric capacity and energy acquired under this All-Requirements Power Supply Project Contract in any manner or for any purpose or take any other action or omit to take any action which would result in the loss of the exclusion from gross income for Federal income tax purposes of the interest on any Bond or Bonds issued by FMPA or which could be issued by FMPA in the future as that status is governed by Section 103 of the Internal Revenue Code of 1986, as amended, and the Treasury Regulations or any rulings promulgated thereunder or as affected by a decision of any court of competent jurisdiction or the loss of State of Florida tax exempt status of the interest on such Bonds. The Project Participant covenants that, 180 days prior to entering into any contract whereby a person agrees to take, or to take or pay for, electric capacity and energy provided to the Project Participant under this Contract, the Project Participant shall notify FMPA of its intent to enter into such contract and provide copies of such contract to FMPA.²⁷ As soon as practicable after receipt of such notice, FMPA shall advise the Project Participant as to whether, in the opinion of counsel of recognized standing in the field of law relating to municipal bonds selected by FMPA, the entering into of such contract would result in a violation of the covenant contained in this subsection. The Project Participant agrees that if FMPA advises the Project Participant that such a violation will or might result, the Project Participant will not enter into such contract. Except as attached as an exhibit hereto, the Project Participant covenants that

²⁷ We note this provision was drafted and adopted prior to the expansion, in proposed, then final Treasury Regulations, of the scope of output contracts that were the subject of Federal income tax restrictions. The use of the phrases "to take, or to take or pay" reflected the legal standards then in effect.

it does not have, and has no present intention of entering into, any contract which would be subject to the provisions of this paragraph (f). [Emphasis supplied, footnote added.]

The procedural requirement of 180 days prior notice to FMPA of intent to enter into any contract covered by this provision appears to create a clear problem for the timing assumed in the RFP.

Turning to some of the non-tax related covenants, Section 8(c) provides:

The Project Participant may sell at wholesale any of the electric capacity and energy delivered to it hereunder to any customer of the Project Participant or any other entity for resale by that customer or entity, provided that it has first given FMPA five years' written notice of its intent to sell such electric capacity and energy and at the time of such notice provided FMPA with projected data regarding any such sales anticipated for the ensuing five year period. FMPA, after receipt of such notice, shall have 180 days in which to impose limits on the amount of electric capacity and energy to be sold or to veto such sale if the sale will jeopardize FMPA's availability of resources to serve its Project Participants, increase the cost of electric capacity and energy to FMPA, or violate the covenant of the Project Participant contained in paragraph (f) of this Section 8. [Emphasis supplied.]

Depending on the structure proposed by the winning bidder and its use of the power provided at the Contract Rate of Delivery, this provision could be of great concern. While it may be possible to comply with it substantively, the time period for the required notice to FMPA is again a problem.

The covenant contained in Section 8(d) of the AR Contracts parallels closely that contained in Section 28(c) and Section 13 of the St. Lucie Power Sales Contracts and Project Support Contracts, respectively. Section 8(d) contains additional language intended to protect FMPA's ability to fulfill its obligations under multiple contracts relating to the AR Project. The subsection reads as follows:

The Project Participant shall not sell, lease, abandon or otherwise dispose of all or substantially all of its electric or integrated utility system except on 90 days' prior written notice to FMPA²⁸ and, in any event, shall not so sell, lease, abandon or otherwise dispose of the same unless the following conditions are met: (i) the Project Participant shall assign this All-Requirements Power Supply Project Contract and its rights and interest hereunder to the purchaser or lessee of the electric system and such purchaser or lessee shall assume all obligations of the Project Participant under this All-Requirements Power Supply Project Contract; (ii) FMPA shall be permitted by then applicable law to sell electric capacity and energy to said purchaser or lessee, if any; and (iii) FMPA shall by appropriate action determine, in its sole discretion, that such sale, lease, abandonment or other disposition (A) will not adversely affect FMPA's ability to meet its obligations under this Contract or any contract, agreement or arrangement to which FMPA is a party as either principal or agent pursuant to which FMPA satisfies all or any part of its obligations to provide electric capacity and energy and dispatching and transmission services under this All-Requirements Power Supply Project Contract or the All-Requirements Power Supply Project Contracts with other

²⁸ Again, it would appear that the schedule set forth in the RFP violates this 90 day notice provision.

Project Participants, (B) will not adversely affect the value of this All-Requirements Power Supply Project Contract as security for the payment of Bonds and interest thereon, or (C) will not adversely affect the eligibility of interest on Bonds then outstanding or which could be issued in the future for Federal or State of Florida tax-exempt status. The Project Participant has no present intention of selling, leasing, abandoning or otherwise disposing of all or substantially all of its electric or integrated utility system. [Emphasis supplied; footnote added.]

While as was the case with the Section 28(c) of the St. Lucie Power Sales Contracts it is not clear that any proposal accepted in response to the RFP would implicate Section 8(d), given FMPA's obligations under the AR Bond Resolution, we would stress the need for FMPA to be very careful that it is not a party to or otherwise a participant in any transaction by Vero Beach which in substance violates this provision regardless of the purported form of such transaction. It would appear to be equally important for Vero Beach to avoid being a party to such a transaction. Much the same is true of the final covenant contained in Section 8, which, it is noteworthy, does not have a parallel in the St. Lucie Contracts. Section 8(e) provides:

The Project Participant covenants and agrees that it shall take no action the effect of which would be to prevent, hinder or delay FMPA from the timely fulfillment of its obligations under this All-Requirements Power Supply Project Contract, any other All-Requirements Power Supply Project Contract, the outstanding Bonds or the Bond Resolution.

Paralleling Section 28(a) of the St. Lucie Power Sales Contracts, Section 16(a) of the AR Contracts provides as follows:

This All-Requirements Power Supply Project Contract shall inure to the benefit of and shall be binding upon the respective successors and assigns of the parties to this Contract; provided, however, that, except for the assignment by FMPA authorized by clause (b) of this Section 16 [the pledge by FMPA to the Trustee to secure the Bonds] and except for any assignment in connection with the sale, lease or other disposition of all or substantially all of the Project Participant's electric system as provided in Section 8(d) hereof, neither this All-Requirements Power Supply Project Contract nor any interest herein shall be transferred or assigned by either party hereto except with the consent in writing of the other party hereto. No assignment or transfer of this All-Requirements Power Supply Project Contract shall relieve the parties of any obligation hereunder. [Emphasis supplied.]

It is not determinable at this time whether this provision is applicable to the RFP. However, FMPA's obligations under the AR Bond Resolution and Vero Beach's obligations under the AR Contract obligate FMPA and Vero Beach to each consider any possible implications. It is also worth pointing out that this provision also makes clear that no assignment relieves Vero Beach of any obligation to FMPA.

Section 19(a) of the AR Contracts is almost identical to Section 29(c) of the St. Lucie Power Sales Contracts and the triple references to "in any manner" in this provision make it one which FMPA must consider in evaluating any proposal accepted under the RFP to determine if there is any breach of this provision. The text of Section 19(a) is as follows:

Except as provided in Section 29 of this All-Requirements Power Supply Project Contract, this Contract shall not be terminated, amended,

modified, or otherwise altered in any manner that will adversely affect the security for the Bonds afforded by the provisions of this All-Requirements Power Supply Project Contract upon which the owners from time to time of the Bonds shall have relied as an inducement to purchase and hold the Bonds. So long as any of the Bonds are outstanding or until adequate provisions for the payment thereof have been made in accordance with the provisions of the Bond Resolution, this All-Requirements Power Supply Project Contract shall not be terminated, amended, modified, or otherwise altered in any manner which will reduce the payments pledged as security for the Bonds or extend the time of such payments provided herein or which will in any manner impair or adversely affect the rights of the owners from time to time of the Bonds. [Emphasis supplied.]

As was discussed in the context of Section 29(c) of the St. Lucie Power Sales Contract, it would appear that, in addition to the specific requirements of various Supplemental Resolutions or Bond Series Certificates for specific Series of AR Bonds, the language of this provision may as a practical matter require FMPA to obtain the approval of the Trustee under the AR Bond Resolution and any insurers of the AR Bonds as well as a confirmation from the rating agencies that none of the ratings on the AR Bonds would be negatively affected.

Finally, Section 19(b) of the AR Contracts provides:

No All-Requirements Power Supply Project Contract entered into between FMPA and another Project Participant may be amended so as to provide terms and conditions different from those herein contained except with written notice to and written consent or waiver by each of the other Project Participants, and upon similar amendment being made to the All-Requirements Power Supply Project Contract of any other Project Participants requesting such amendment after receipt by such Project Participant of notice of such amendment.

This language is almost identical to the parallel language of Section 29(d) of the St. Lucie Power Sales Contracts. As was the case with that provision, FMPA will have to be cognizant of the effect of any possible amendment, waiver or consent which would need to be agreed to between FMPA and Vero Beach to facilitate the operation of any proposal accepted by Vero Beach in response to the RFP. Thus, it may be prudent to have each of the AR Project Participants formally waive their rights to require that they be entitled to any contract amendments or waivers or consents agreed to by FMPA and Vero Beach in connection with the RFP.²⁹

Summary. As stated above in the discussion of the St. Lucie Project and the Stanton Projects, without attempting to repeat all of the points made in this section of this memorandum, we would stress that the Bond Resolution for the AR Project requires FMPA to enforce the provisions of the AR Contracts and prohibit FMPA from agreeing to any amendment to the AR Contract which has a material adverse effect on Bondholders. The AR Contract itself contains provisions which prohibit Vero Beach from (i) taking any action which would result in the loss of the tax exemption on FMPA's Bonds; (ii) contracting to sell electric capacity and energy except on 180 days prior notice to FMPA and a finding by FMPA's counsel that the sale would not violate the prohibition referred to in clause (i); (iii) selling electric capacity and energy at wholesale except upon five years notice to FMPA and a finding that such sale does not violate

²⁹ See, e.g., Section 14 of St. Lucie Contract, discussed above, and Section 8 of the All-Requirements Contract.

the tax covenant described in clause (i), jeopardize the availability of FMPA's resources to serve other Project Participants or increase FMPA's costs of electricity; (iv) assigning the Contracts without FMPA's written consent; (v) disposing of its utility system if FMPA determines that such disposition would adversely affect the value of the Contracts as security for FMPA's Bonds, the tax exemption of such Bonds, or FMPA's ability to meet its contractual obligations to parties from whom it has contracted to obtain electric capacity and energy or transmission services or the other Project Participants in the AR Project; (vi) taking any action which would interfere with FMPA's ability to perform its obligations under any AR Contract, the AR Bonds or the AR Bond Resolution; or (vii) altering the AR Contract in any manner which would adversely affect the security for the AR Bonds provided by the Contract. Any change to or modification of the AR Contract would require the consent of the various insurers of the outstanding Bonds for the AR Project. Other AR Project Participants would also have the right to demand that their Contracts be amended in the same way that Vero Beach's may be amended to accommodate any accepted proposal, and the right could apply even if an amendment were formulated as a waiver or consent.

Tax Issues

As stated above, a substantial portion of the physical assets of FMPA relating to all of the Projects in which Vero Beach participates has been financed with the proceeds of tax-exempt bonds issued by FMPA. In each of the respective Bond Resolutions governing the sale and delivery of those Bonds, FMPA has covenanted in effect to not take any action that would cause such bonds to become subject to federal income taxation by virtue of including the interest thereon in federal gross income. FMPA in turn has imposed these covenants on each of the participants, including Vero Beach, through the provisions of the respective Power Sales Contracts and the AR Contract, as described above.

In short, every bond issue that FMPA³⁰ has issued to date, and every issue it would expect to sell in the future to finance or refinance facilities included in any of the FMPA Projects in which Vero Beach is a participant, was or would be undertaken under the presumption that Vero Beach would utilize its entire share of the electric output to directly serve its retail load. The RFP contemplates that Vero Beach would, if successful in its efforts, not use the output from the entitlement internally for retail load, but instead seek to transfer those power supply resources to a third party who may or may not use the output to serve Vero Beach's retail load. Taking the limitations and restrictions imposed under federal income tax law into account, the sale by Vero Beach of the output it receives from its entitlements under the St. Lucie, Stanton and Stanton II Contracts as well as the AR Contract could (depending on the nature of such sales) both complicate and interfere with FMPA's ability to issue new bonds going forward as well as impermissibly taint FMPA's outstanding bonds; in the case of the outstanding FMPA bonds, this would trigger a need to undertake certain remedial actions described in this memorandum in order to avoid the interest on such bonds becoming retroactively taxable to their date of original issuance.

The federal gross income exclusion of the interest on the existing outstanding Bonds with respect to the three facility specific Projects and the AR Project is governed by the provisions of

³⁰ While it is beyond the scope of this memorandum, much the same restrictions and concerns would arise as to Vero Beach's bonds issued to finance its electric utility assets.

the Internal Revenue Code of 1986, as amended (the "Code"). Specifically, Section 103 of the Code provides, in pertinent part, the requirements a state or local bond must satisfy in order for the interest thereon to be "tax-exempt" (that is, the interest is to be excluded from federal gross income). While there are several preconditions to qualifying for the exclusion of interest from federal gross income under Code Section 103, our primary focus in evaluating the implications of the RFP is on the private activity bond limitations imposed by Section 103(b)(1) of the Code.³¹ The tests for avoiding classification as a private activity bond are provided in Section 141 of Code.³²

In addition to the typical private activity bond limitations described herein, the take-or-pay contracts for the St. Lucie Project and the Stanton Projects may be considered – for federal income tax purposes – as loans by FMPA to the participants, thereby subjecting them to the provisions (imposing even more restrictive limitations) of Code Section 141(c).³³ Finally, to the extent any of the property acquired by FMPA with proceeds of its Bonds for any of the four Projects was "existing" property at the time FMPA acquired and financed it,³⁴ Code section 141(d) imposes further limitations on the use of that property, generally requiring that the output from such property be consumed almost exclusively within the existing service area of the respective participants. Each of these limitations is described further below. In many cases,

³¹ Section 103 of the Code, in pertinent part, provides as follows:

§ 103. Interest on State and Local Bonds.

(a) Exclusion. Except as provided in subsection (b), gross income does not include interest on any State or local bond.

(b) Exceptions. Subsection (a) shall not apply to—

(1) Private activity bond which is not a qualified bond. Any private activity bond which is not a qualified bond (within the meaning of section 141). * * *

Note that none of FMPA's bonds for the Projects under discussion herein have been financed with "qualified bonds" within the meaning of Code sections 141(b)(1) and 141(e).

³² Section 141 provides, in pertinent part, as follows:

§ 141. Private Activity Bond; Qualified Bond.

(a) Private Activity Bond. For purposes of this title, the term "private activity bond" means any bond issued as part of an issue—

(1) which meets—

(A) the private business use test of paragraph (1) of subsection (b), and

(B) the private security or payment test of paragraph (2) of subsection (b), or

(2) which meets the private loan financing test of subsection (c).

³³ Section 141(c) of the Code provides as follows:

(c) Private loan financing test.

(1) In general. An issue meets the test of this subsection if the amount of the proceeds of the issue which are to be used (directly or indirectly) to make or finance loans (other than loans described in paragraph (2)) to persons other than governmental units exceeds the lesser of—

(A) 5 percent of such proceeds, or

(B) \$5,000,000.

(2) Exception for tax assessment, etc., loans. For purposes of paragraph (1), a loan is described in this paragraph if such loan—

(A) enables the borrower to finance any governmental tax or assessment of general application for a specific essential governmental function,

(B) is a nonpurpose investment (within the meaning of section 148(f)(6)(A)), or

(C) is a qualified natural gas supply contract (as defined in section 148(b)(4)).

³⁴ It is our understanding the Key West Units 2 and 3, located at the Stock Island Plant and owned by FMPA, are refurbished units which were purchased from Seimens.

these limitations are phrased in terms of percentage or dollar limitations “per issue” or “per project”, and we believe that in order to apply those limitations fairly across all of the participants, any percentage or dollar based limitations would have to be construed as available in proportion to Vero Beach’s entitlement.

The Basic Private Activity Bond Test – Private Business Use and Payment/Security. The basic private activity bond tests are set forth in Code section 141(b)³⁵ and focus on two “prongs”: that the proceeds of the bond (including the property financed with such proceeds, such as the Projects) is the subject of more than a de minimis permitted amount of “private business use”³⁶ and that the bonds are paid or secured (directly or indirectly) by private payments or security. The permitted “de minimis” “nonqualified” amounts permitted to be financed with proceeds vary, in some cases being the lesser of a percentage or aggregate dollar limitation,³⁷ with the latter

³⁵ Section 141(b) of the Code, in pertinent part, provides as follows:

- (b) Private business tests.
- (1) Private business use test. Except as otherwise provided in this subsection, an issue meets the test of this paragraph if more than 10 percent of the proceeds of the issue are to be used for any private business use.
- (2) Private security or payment test. Except as otherwise provided in this subsection, an issue meets the test of this paragraph if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of such issue is (under the terms of such issue or any underlying arrangement) directly or indirectly—
 - (A) secured by any interest in—
 - (i) property used or to be used for a private business use, or
 - (ii) payments in respect of such property, or
 - (B) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

* * *

³⁶ Defined in Section 141(b) as follows:

- (6) Private business use defined.
 - (A) In general. For purposes of this subsection, the term “private business use” means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. For purposes of the preceding sentence, use as a member of the general public shall not be taken into account.
 - (B) Clarification of trade or business. For purposes of the 1st sentence of subparagraph (A), any activity carried on by a person other than a natural person shall be treated as a trade or business.
- (7) Government use. The term “government use” means any use other than a private business use.
- (8) Nonqualified amount. For purposes of this subsection, the term “nonqualified amount” means, with respect to an issue, the lesser of—
 - (A) the proceeds of such issue which are to be used for any private business use, or
 - (B) the proceeds of such issue with respect to which there are payments (or property or borrowed money) described in paragraph (2).

³⁷ Section 141(b) specifies the various dollar-limitations as follows:

- (4) Lower limitation for certain output facilities. An issue 5 percent or more of the proceeds of which are to be used with respect to any output facility (other than a facility for the furnishing of water) shall be treated as meeting the tests of paragraphs (1) and (2) if the nonqualified amount with respect to such issue exceeds the excess of—
 - (A) \$15,000,000, over
 - (B) the aggregate nonqualified amounts with respect to all prior tax-exempt issues 5 percent or more of the proceeds of which are or will be used with respect to such facility (or any other facility which is part of the same project).

(Footnote continued on next page)

being either per issue or (in the case of bonds issue to finance "output" projects, such as FMMPA's bonds) "per project," and in some cases can be increased so long as the issue is the subject of an allocation of the State's private activity bond volume cap at the time the bonds are issued (see, e.g., Code section 141(b)(5) and Section 146).

Section 141(b) is further illuminated in the Treasury Regulations contained in section 1.141-3, 1.141-4 and 1.141-7. The short explanation of the import of these provisions is that, while retail power and energy sales by the participants to their retail customers are not considered private business use, the sale or transfer of such "output" to an intermediary who then resells (even if ultimately to the same customers) could be considered private use due to the interposition of the non-governmental intermediary and could result in the retroactive taxability of FMMPA's bonds. Sales of output from the FMMPA financed projects might be permitted under the tax law, however, pursuant to certain limited exceptions provided in the regulations promulgated pursuant to Section 141. If the output from FMMPA financed projects is sold to private businesses in a manner other than pursuant to the permitted types of contracts, it will result in private business use, possibly even private loans.

The general rule (contained in Treasury Regulation section 1.141-7(c)(1)) is that the sale of output pursuant to a contract by a nongovernmental person of the output (referred to in the regulations as an "output contract") of an output facility financed with proceeds of an issue is taken into account under the private business tests, if the sale has the effect of transferring the benefits of owning the facility and the burdens of paying the debt service on bonds used (directly or indirectly) to finance the facility (referred to in the applicable regulations as "the benefits and burdens test"). Contracts for the sale of output that are (i) "take" contracts or (ii) "take-or-pay" contracts or (iii) most wholesale requirements contracts, and many substantial retail requirements contracts may be considered to result in private use for Federal tax purposes.

One of the permitted arrangements would allow the transfer of FMMPA bond-financed output entitlement as sales under a short-term contract, under the following exception in Treasury regulation section 1.141-7(f)(1)³⁸:

(f) Exceptions for certain contracts - - (1) Small purchases of output. An output contract for the use of a facility is not taken into account under the

(Footnote continued from previous page)

There shall not be taken into account under subparagraph (B) any bond which is not outstanding at the time of the later issue or which is to be redeemed (other than in an advance refunding) from the net proceeds of the later issue.

(5) Coordination with volume cap where nonqualified amount exceeds \$15,000,000. If the nonqualified amount with respect to an issue—

(A) exceeds \$15,000,000, but

(B) does not exceed the amount which would cause a bond which is part of such issue to be treated as a private activity bond without regard to this paragraph, such bond shall nonetheless be treated as a private activity bond unless the issuer allocates a portion of its volume cap under section 146 to such issue in an amount equal to the excess of such nonqualified amount over \$15,000,000.

* * *

³⁸ The provisions of Treasury Regulation section 1.141-7 generally apply to bonds sold on or after November 22, 2002; for tax-exempt bonds issued prior to that date, other rules could apply, depending on when such bonds were issued and whether FMMPA has elected one regulation over another.

private business tests if the average annual payments to be made under the contract do not exceed 1 percent of the average annual debt service on all outstanding tax-exempt bonds issued to finance the facility, determined as of the effective date of the contract.

Similarly, another exception (*i.e.*, a generally permitted contract for sale) is described in Treasury regulation section 1.141-7(f)(3) as follows:

(3) Short-term output contracts. An output contract with a nongovernmental person is not taken into account under the private business tests if—

(i) The term of the contract, including all renewal options, is not longer than 3 years;

(ii) The contract either is a negotiated, arm's-length arrangement that provides for compensation at fair market value, or is based on generally applicable and uniformly applied rates; and

(iii) The output facility is not financed for a principal purpose of providing that facility for use by that nongovernmental person.

"Changes in Use" and Remedial Actions to Preserve Tax-Exemption of Bonds. Under appropriate circumstances, FMPA might be able to take certain remedial actions to preserve the exclusion of interest on its bonds in the face of an otherwise impermissible (from a Code section 141 perspective) sale of the output by Vero Beach. However, qualifying for this remedial action might require the contribution of significant funds by Vero Beach in order to retire or defease the affected bonds, and FMPA might need to provide for the remediation of more of the bonds than just the share allocable to Vero Beach's entitlement (since remediation is generally required of all non-qualifying use, not just to the extent it results in non-qualifying amounts in excess of the limits). Specifically, FMPA's Bonds were or will be issued as tax-exempt based on certain expectations as to the extent of the nonqualified use over the appropriate measurement period. If, subsequent to the issuance, FMPA or the participants take intentional actions such that the actual facts are different from those expectations, due, for instance, to a sale of the output to a third party in a manner that is not an exception to the private use limitations, FMPA must take remedial action with respect to the bonds attributed to the property that was the subject of that change-in-use.

The applicable regulations provide for two possible approaches to satisfying the private activity bond tests – the main approach presumes that the limitations will be satisfied throughout the term of the bond issue and the alternative test presumes an expectation of noncompliance at some point in the future.³⁹ Even if the issuer (*e.g.*, FMPA) has the right expectations at the time

³⁹ Treasury Regulation Sections 1.141-2(d), (e) and (f) provide – in pertinent part (portions omitted) -- as follows:

(d) Reasonable expectations and deliberate actions—

(1) In general. An issue is an issue of private activity bonds if the issuer reasonably expects, as of the issue date, that the issue will meet either the private business tests or the private loan financing test. An issue is also an issue of private activity bonds if the issuer takes a deliberate action, subsequent to the issue date, that causes the conditions of either the private business tests or the private loan financing test to be met.

(2) Reasonable expectations test—

(i) In general. In general, the reasonable expectations test must take into account reasonable expectations about events and actions over the entire stated term of an issue.

(Footnote continued on next page)

bonds are issued, ongoing compliance with the limitations is required, taking into account "deliberate actions."⁴⁰

A decision by Vero Beach, as one of the participants in the FMPA Projects and associated bond issuances, to resell the output associated with its entitlements to a non-governmental third party in a manner that would not have qualified the bond issue as a governmental bond would trigger the "deliberate action" provisions.⁴¹ In such circumstances, it would be necessary for FMPA to take remedial actions as required in Treasury Regulation section 1.141-2(f)⁴² to preserve the tax-exemption of the interest on those bonds.

Treasury Regulation section 1.141-12 provides remedies, in great detail, for this situation, by describing three⁴³ possible avenues for "remediation" of the bonds that are the subject of the

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- (ii) Special rule for issues with mandatory redemption provisions. An action that is reasonably expected, as of the issue date, to occur after the issue date and to cause either the private business tests or the private loan financing test to be met may be disregarded for purposes of those tests if—
 - (A) The issuer reasonably expects, as of the issue date, that the financed property will be used for a governmental purpose for a substantial period before the action;
 - (B) The issuer is required to redeem all nonqualifying bonds (regardless of the amount of disposition proceeds actually received) within 6 months of the date of the action;
 - (C) The issuer does not enter into any arrangement with a nongovernmental person, as of the issue date, with respect to that specific action; and
 - (D) The mandatory redemption of bonds meets all of the conditions for remedial action under § 1.141-12(a).

⁴⁰ Treasury Regulation section 1.141-2(d)(3) defines a deliberate action, as follows:

(3) Deliberate action defined—

- (i) In general. Except as otherwise provided in this paragraph (d)(3), a deliberate action is any action taken by the issuer that is within its control. An intent to violate the requirements of section 141 is not necessary for an action to be deliberate.
- (ii) Safe harbor exceptions. An action is not treated as a deliberate action if—
 - (A) It would be treated as an involuntary or compulsory conversion under section 1033; or
 - (B) It is taken in response to a regulatory directive made by the Federal government. See § 1.141-7(g)(4).

* * *

⁴¹ Section 1.141-2(e) governs the timing of this action, for purposes of the tax implications, and it may occur prior to the actual transfer of the output associated with the entitlement. That Regulation provides as follows:

- (e) When a deliberate action occurs. A deliberate action occurs on the date the issuer enters into a binding contract with a nongovernmental person for use of the financed property that is not subject to any material contingencies.

⁴² That section provides as follows:

- (f) Certain remedial actions. See § 1.141-12 for certain remedial actions that prevent a deliberate action with respect to property financed by an issue from causing that issue to meet the private business use test or the private loan financing test.

⁴³ In addition, the IRS may create additional remedies in the future; Treasury Regulation section 1.141-12(h) provides as follows:

(Footnote continued on next page)

deliberate action that causes the private activity bond limitations to be exceeded. The three avenues are as follows: redemption/defeasance of the non-qualified bonds;⁴⁴ alternative use of the "disposition proceeds" or the alternative use of the financed facility.⁴⁵ If FMPA could

(Footnote continued from previous page)

- (h) Authority of Commissioner to provide for additional remedial actions. The Commissioner may, by publication in the Federal Register or the Internal Revenue Bulletin, provide additional remedial actions, including making a remedial payment to the United States, under which a subsequent action will not be treated as a deliberate action for purposes of § 1.141-2.

⁴⁴ That action is described in Regulation section 1.141-12(d), as follows:

- (d) Redemption or defeasance of nonqualified bonds—
- (1) In general. The requirements of this paragraph (d) are met if all of the nonqualified bonds of the issue are redeemed. Proceeds of tax-exempt bonds must not be used for this purpose, unless the tax-exempt bonds are qualified bonds, taking into account the purchaser's use of the facility. If the bonds are not redeemed within 90 days of the date of the deliberate action, a defeasance escrow must be established for those bonds within 90 days of the deliberate action.
 - (2) Special rule for dispositions for cash. If the consideration for the disposition of financed property is exclusively cash, the requirements of this paragraph (d) are met if the disposition proceeds are used to redeem a pro rata portion of the nonqualified bonds at the earliest call date after the deliberate action. If the bonds are not redeemed within 90 days of the date of the deliberate action, the disposition proceeds must be used to establish a defeasance escrow for those bonds within 90 days of the deliberate action.
 - (3) Notice of defeasance. The issuer must provide written notice to the Commissioner of the establishment of the defeasance escrow within 90 days of the date the defeasance escrow is established.
 - (4) Special limitation. The establishment of a defeasance escrow does not satisfy the requirements of this paragraph (d) if the period between the issue date and the first call date of the bonds is more than 10 1/2 years.
 - (5) Defeasance escrow defined. A defeasance escrow is an irrevocable escrow established to redeem bonds on their earliest call date in an amount that, together with investment earnings, is sufficient to pay all the principal of, and interest and call premium on, bonds from the date the escrow is established to the earliest call date. The escrow may not be invested in higher yielding investments or in any investment under which the obligor is a user of the proceeds of the bonds.

⁴⁵ Treasury Regulation section 1.141-12 preconditions these remedial actions on the following:

§ 1.141-12. Remedial Actions.

- (a) Conditions to taking remedial action. An action that causes an issue to meet the private business tests or the private loan financing test is not treated as a deliberate action if the issuer takes a remedial action described in paragraph (d), (e), or (f) of this section with respect to the nonqualified bonds and if all of the requirements in paragraphs (a)(1) through (5) of this section are met.
- (1) Reasonable expectations test met. The issuer reasonably expected on the issue date that the issue would meet neither the private business tests nor the private loan financing test for the entire term of the bonds. For this purpose, if the issuer reasonably expected on the issue date to take a deliberate action prior to the final maturity date of the issue that would cause either the private business tests or the private loan financing test to be met, the term of the bonds for this purpose may be determined by taking into account a redemption provision if the provisions of § 1.141-2(d)(2)(ii)(A) through (C) are met.
 - (2) Maturity not unreasonably long. The term of the issue must not be longer than is reasonably necessary for the governmental purposes of the issue (within the meaning of § 1.148-1(c)(4)). Thus, this requirement is met if the weighted average maturity of the bonds of the issue is not greater than 120 percent of the average reasonably expected economic life of the property financed with the proceeds of the issue as of the issue date.
 - (3) Fair market value consideration. Except as provided in paragraph (f) of this section, the terms of any arrangement that results in satisfaction of either the private business tests or the private loan financing test

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qualify for any of the three remedial actions, it could preserve the exclusion of interest on the effected bonds.⁴⁶ For the purposes of this memorandum, we have assumed that the option of

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are bona fide and arm's-length, and the new user pays fair market value for the use of the financed property. Thus, for example, fair market value may be determined in a manner that takes into account restrictions on the use of the financed property that serve a bona fide governmental purpose.

- (4) Disposition proceeds treated as gross proceeds for arbitrage purposes. The issuer must treat any disposition proceeds as gross proceeds for purposes of section 148. For purposes of eligibility for temporary periods under section 148(c) and exemptions from the requirement of section 148(f) the issuer may treat the date of receipt of the disposition proceeds as the issue date of the bonds and disregard the receipt of disposition proceeds for exemptions based on expenditure of proceeds under § 1.148-7 that were met before the receipt of the disposition proceeds.
- (5) Proceeds expended on a governmental purpose. Except for a remedial action under paragraph (d) of this section, the proceeds of the issue that are affected by the deliberate action must have been expended on a governmental purpose before the date of the deliberate action.

* * *

(c) Disposition proceeds—

- (1) Definition. Disposition proceeds are any amounts (including property, such as an agreement to provide services) derived from the sale, exchange, or other disposition (disposition) of property (other than investments) financed with the proceeds of an issue.
- (2) Allocating disposition proceeds to an issue. In general, if the requirements of paragraph (a) of this section are met, after the date of the disposition, the proceeds of the issue allocable to the transferred property are treated as financing the disposition proceeds rather than the transferred property. If a disposition is made pursuant to an installment sale, the proceeds of the issue continue to be allocated to the transferred property. If an issue does not meet the requirements for remedial action in paragraph (a) of this section or the issuer does not take an appropriate remedial action, the proceeds of the issue are allocable to either the transferred property or the disposition proceeds, whichever allocation produces the greater amount of private business use and private security or payments.
- (3) Allocating disposition proceeds to different sources of funding. If property has been financed by different sources of funding, for purposes of this section, the disposition proceeds from that property are first allocated to the outstanding bonds that financed that property in proportion to the principal amounts of those outstanding bonds. In no event may disposition proceeds be allocated to bonds that are no longer outstanding or to a source of funding not derived from a borrowing (such as revenues of the issuer) if the disposition proceeds are not greater than the total principal amounts of the outstanding bonds that are allocable to that property. For purposes of this paragraph (c)(3), principal amount has the same meaning as in § 1.148-9(b)(2) and outstanding bonds do not include advance refunded bonds.
- (g) Rules for deemed reissuance. For purposes of determining whether bonds that are treated as reissued under paragraphs (e) and (f) of this section are qualified bonds—
 - (1) The provisions of the Code and regulations thereunder in effect as of the date of the deliberate action apply; and
 - (2) For purposes of paragraph (f) of this section, section 147(d) (relating to the acquisition of existing property) does not apply.

⁴⁶ Specifically, Treasury Regulation Section 1.141-12(b) provides:

(b) Effect of a remedial action—

- (1) In general. The effect of a remedial action is to cure use of proceeds that causes the private business use test or the private loan financing test to be met. A remedial action does not affect application of the private security or payment test.
- (2) Effect on bonds that have been advance refunded. If proceeds of an issue were used to advance refund another bond, a remedial action taken with respect to the refunding bond proportionately reduces the

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using the "disposition proceeds" in a qualifying manner is not available, as the result of the fact that it would not be expected that the output would be sold with a single up-front payment and so there would not be disposition proceeds available upon the occurrence of the deliberate action.⁴⁷ Likewise, we have also assumed that the "alternate use of the facility" will not be an available remedy because the use of Vero Beach's entitlement by a private business will not qualify for tax-exempt financing on its own.⁴⁸

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amount of proceeds of the advance refunded bond that is taken into account under the private business use test or the private loan financing test.

- (i) Effect of remedial action on continuing compliance. Solely for purposes of determining whether deliberate actions that are taken after a remedial action cause an issue to meet the private business tests or the private loan financing test—
- (1) If a remedial action is taken under paragraph (d), (e), or (f) of this section, the private business use or private loans resulting from the deliberate action are not taken into account for purposes of determining whether the bonds are private activity bonds; and
- (2) After a remedial action is taken, the amount of disposition proceeds is treated as equal to the proceeds of the issue that had been allocable to the transferred property immediately prior to the disposition. See paragraph (k) of this section, Example 5.

⁴⁷ That action is described in Regulation section 1.141-12(e), as follows:

- (e) Alternative use of disposition proceeds—
- (1) In general. The requirements of this paragraph (e) are met if—
- (i) The deliberate action is a disposition for which the consideration is exclusively cash;
- (ii) The issuer reasonably expects to expend the disposition proceeds within two years of the date of the deliberate action;
- (iii) The disposition proceeds are treated as proceeds for purposes of section 141 and are used in a manner that does not cause the issue to meet either the private business tests or the private loan financing test, and the issuer does not take any action subsequent to the date of the deliberate action to cause either of these tests to be met; and
- (iv) If the issuer does not use all of the disposition proceeds for an alternative use described in paragraph (e)(1)(iii) of this section, the issuer uses those remaining disposition proceeds for a remedial action that meets paragraph (d) of this section.
- (2) Special rule for use by 501(c)(3) organizations.

Note that Regulation Section 1.141-12(c)(2), quoted in footnote 45 above, would leave the bonds attributed to the private use.

⁴⁸ That action is described in Regulation section 1.141-12(f), as follows:

- (f) Alternative use of facility. The requirements of this paragraph (f) are met if—
- (1) The facility with respect to which the deliberate action occurs is used in an alternative manner (for example, used for a qualifying purpose by a nongovernmental person or used by a 501(c)(3) organization rather than a governmental person);
- (2) The nonqualified bonds are treated as reissued, as of the date of the deliberate action, for purposes of sections 55 through 59 and 141, 142, 144, 145, 146, 147, 149 and 150, and under this treatment, the nonqualified bonds satisfy all the applicable requirements for qualified bonds throughout the remaining term of the nonqualified bonds;

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Satisfying the remedial action requirements could be economically deleterious to FMPA and the remaining participants for the obvious reason (e.g., coming up with a source of funds, losing the benefit of the tax-favored financing, paying early redemption penalties) and not so obvious reasons (e.g., the requirement in subsection 1.141-12(j)(1)⁴⁹ that the private use portions of all participants' bonds, not just Vero Beach's, would need to be remediated). Because of the complexities of many of the federal tax issues that would arise in such circumstances, including allocation considerations, FMPA might be compelled to seek a favorable private ruling from the IRS on how to proceed with such a remediation resulting from Vero Beach's action, prior to permitting it.

In addition to the sale of the output potentially tainting the tax-exemption of the interest on FMPA's bonds, Vero Beach's engagement of a private or non-governmental "middle-man" to transact such sales on its behalf might also itself constitute private business use under Treasury Regulation section 1.141-3(b)(4), unless the service contract by which those services were provided conformed to certain guidelines promulgated by the IRS for service contracts in Revenue Procedure 97-13, 1997-1 C.B. 632, as modified by Revenue Procedure 2001-39, both as attached hereto as Appendix 1.

Acquisition of Existing Non-governmental Output Property May Result in Characterization as a Private Activity Bond. In addition to the foregoing private activity bond provisions, the Code also subjects output-type bonds (such as FMPA's) to an additional level of limitations. Section 141(d)⁵⁰ of the Code restricts the ability of a governmental unit (such as

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- (3) The deliberate action does not involve a disposition to a purchaser that finances the acquisition with proceeds of another issue of tax-exempt bonds; and
- (4) Any disposition proceeds other than those arising from an agreement to provide services (including disposition proceeds from an installment sale) resulting from the deliberate action are used to pay the debt service on the bonds on the next available payment date or, within 90 days of receipt, are deposited into an escrow that is restricted to the yield on the bonds to pay the debt service on the bonds on the next available payment date.

* * *

⁴⁹ That section is as follows:

- (j) Nonqualified bonds—
 - (1) Amount of nonqualified bonds. The percentage of outstanding bonds that are nonqualified bonds equals the highest percentage of private business use in any 1-year period commencing with the deliberate action.
 - (2) Allocation of nonqualified bonds. Allocations to nonqualified bonds must be made on a pro rata basis, except that, for purposes of paragraph (d) of this section (relating to redemption or defeasance), an issuer may treat bonds with longer maturities (determined on a bond-by-bond basis) as the nonqualified bonds.

⁵⁰ Section 141(d) of the Code provides – in part – as follows:

- (d) Certain issues used to acquire nongovernmental output property treated as private activity bonds.
 - (1) In general. For purposes of this title, the term "private activity bond" includes any bond issued as part of an issue if the amount of the proceeds of the issue which are to be used (directly or indirectly) for the acquisition by a governmental unit of nongovernmental output property exceeds the lesser of—
 - (A) 5 percent of such proceeds, or

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FMPA) to use the proceeds of tax-exempt bonds to acquire “existing non-governmental output property” and that provision will be potentially tripped by the sale of any of FMPA’s output outside its current member’s service areas, to the extent its bonds for any of the four projects have been used to acquire existing property.

As the result of the fact that the output associated with each participant’s entitlement in the various Projects was to be consumed to serve that participant’s retail load within in its existing service area, FMPA has not in the past, nor did it expect in the future, to be constrained in its ability to acquire existing output property.⁵¹ If Vero Beach were to resell all, or a material

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(B) \$5,000,000.

- (2) Nongovernmental output property. Except as otherwise provided in this subsection, for purposes of paragraph (1), the term “nongovernmental output property” means any property (or interest therein) which before such acquisition was used (or held for use) by a person other than a governmental unit in connection with an output facility (within the meaning of subsection (b)(4)) (other than a facility for the furnishing of water). For purposes of the preceding sentence, use (or the holding for use) before October 14, 1987, shall not be taken into account.

⁵¹ This is as a result of the provisions of Code Section 141(d)(3), as follows:

- (3) Exception for property acquired to provide output to certain areas. For purposes of paragraph (1)—
- (A) In general. The term “nongovernmental output property” shall not include any property which is to be used in connection with an output facility 95 percent or more of the output of which will be consumed in—
- (i) a qualified service area of the governmental unit acquiring the property, or
- (ii) a qualified annexed area of such unit.
- (B) Definitions. For purposes of subparagraph (A)—
- (i) Qualified service area. The term “qualified service area” means, with respect to the governmental unit acquiring the property, any area throughout which such unit provided (at all times during the 10-year period ending on the date such property is acquired by such unit) output of the same type as the output to be provided by such property. For purposes of the preceding sentence, the period before October 14, 1987, shall not be taken into account.
- (ii) Qualified annexed area. The term “qualified annexed area” means, with respect to the governmental unit acquiring the property, any area if—
- (I) such area is contiguous to, and annexed for general governmental purposes into, a qualified service area of such unit,
- (II) output from such property is made available to all members of the general public in the annexed area, and
- (III) the annexed area is not greater than 10 percent of such qualified service area.
- (C) Limitation on size of annexed area not to apply where output capacity does not increase by more than 10 percent. Subclause (III) of subparagraph (B)(ii) shall not apply to an annexation of an area by a governmental unit if the output capacity of the property acquired in connection with the annexation, when added to the output capacity of all other property which is not treated as nongovernmental output property by reason of subparagraph (A)(ii) with respect to such annexed area, does not exceed 10 percent of the output capacity of the property providing output of the same type to the qualified service area into which it is annexed.
- (D) Rules for determining relative size, etc. For purposes of subparagraphs (B)(ii) and (C)—

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portion of, the output associated with its entitlements outside its service area, that could trigger adverse consequences as to any bond-financed existing non-governmental output property⁵². This limitation, like the other private activity bond requirements, is subject to ongoing monitoring. Taking an action that triggered its application would result in the need to take potentially costly remedial actions as to the bonds attributable to that change in use.

In summary, FMPA's bonds were marketed and sold on a tax-exempt basis, with the tax analysis based on the current Contracts and the expectation that the participants in each of the Projects would avail themselves of output for nearly exclusively "governmental" purposes within their respective existing service areas, and not for re-sale to other wholesalers or outside the traditional service area. Any sale by a participant other than to retail customers within that participant's historic service area must be carefully considered under the Federal income tax law limitations described above and the extent of any resulting non-qualified use of the proceeds of any currently outstanding FMPA Bonds must be analyzed to determine continued expected compliance with the Federal income tax law limitations described above. If the limitations on non-qualified use with respect to any particular FMPA bond "issue" could be exceeded were an agreement pursuant to the RFP to be consummated by Vero Beach, then FMPA may be obligated to take action to stop that transaction absent effective remediation of the issue. So, each sale will require fairly detailed and complex analysis to determine the extent to which it causes the limits to be exceeded. We believe that it would be unfair to impose the costs of such analysis – triggered by requests for permission to sell by Vero Beach - on the other participants in the four Projects who are not engaging in this activity and that FMPA will need to pass along the costs of those analysis only to Vero Beach. In addition, under current federal income tax law, there is no effective way to take a broad based remedial action prior to arranging the details of Vero Beach's change in use, as the current regulations do not contemplate remediation in anticipation of an unspecified, future non-qualifying use. FMPA would have to wait until the details of Vero Beach's sale or transfer of its entitlement were finalized before it could then take remedial actions (though such actions must be undertaken within a relatively short period upon the occurrence of the change). Finally, we would remind you that most, if not all, of the tax concerns that we raise herein would likely apply equally to Vero Beach's outstanding tax exempt bonds relating to its electric system and to any bonds which Vero Beach needs to issue in the future for its electric system.

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- (i) The size of any qualified service area and the output capacity of property serving such area shall be determined as the close of the calendar year preceding the calendar year in which the acquisition of nongovernmental output property or the annexation occurs.
 - (ii) A qualified annexed area shall be treated as part of the qualified service area into which it is annexed for purposes of determining whether any other area annexed in a later year is a qualified annexed area.
- * * *
- (6) Treatment of joint action agencies. With respect to nongovernmental output property acquired by a joint action agency the members of which are governmental units, this subsection shall be applied at the member level by treating each member as acquiring its proportionate share of such property.

⁵² See note 30 above.

Appendix I

**Rev. Proc. 97-13 1997-1 C.B. 632--Management Contract Guidelines
(Supersedes Rev. Proc. 93-19)
1997-1 C.B. 632; 1997 IRB LEXIS 14; 1997-5 I.R.B. 18; REV. PROC. 97-
13
(Also Part I, §§ 103, 141, 145; 1.141-3, 1.145-2.)
February 3, 1997**

SECTION 1. PURPOSE

The purpose of this revenue procedure is to set forth conditions under which a management contract does not result in private business use under § 141(b) of the Internal Revenue Code of 1986. This revenue procedure also applies to determinations of whether a management contract causes the test in § 145(a)(2)(B) of the 1986 Code to be met for qualified 501(c)(3) bonds.

SECTION 2. BACKGROUND

.01 Private Business Use.

(1) Under § 103(a) of the 1986 Code, gross income does not include interest on any state or local bond. Under § 103(b)(1) of the 1986 Code, however, § 103(a) of the 1986 Code does not apply to a private activity bond, unless it is a qualified bond under § 141(e) of the 1986 Code. Section 141(a)(1) of the 1986 Code defines "private activity bond" as any bond issued as part of an issue that meets both the private business use and the private security or payment tests. Under § 141(b)(1) of the 1986 Code, an issue generally meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Under § 141(b)(6)(A) of the 1986 Code, private business use means direct or indirect use in a trade or business carried on by any person other than a governmental unit. Section 145(a) of the 1986 Code also applies the private business use test of § 141(b)(1) of the 1986 Code, with certain modifications.

(2) Corresponding provisions of the Internal Revenue Code of 1954 set forth the requirements for the exclusion from gross income of the interest on state or local bonds. For purposes of this revenue procedure, any reference to a 1986 Code provision includes a reference to the corresponding provision, if any, under the 1954 Code.

(3) Private business use can arise by ownership, actual or beneficial use of property pursuant to a lease, a management or incentive payment contract, or certain other arrangements. The Conference Report for the Tax Reform Act of 1986, provides as follows:

The conference agreement generally retains the present-law rules under which use by persons other than governmental units is determined for purposes of the trade or business use test. Thus, as under present law, the use of bond-financed property is treated as a use of bond proceeds. As under present law, a person may be a user of bond proceeds and bond-financed property as a result of (1) ownership or (2) actual or beneficial use of property pursuant to a lease, a management or incentive payment contract, or (3) any other arrangement such as a take-or-pay or other output-type contract. 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-687-688, (1986) 1986-3 (Vol. 4) C.B. 687-688 (footnote omitted).

(4) A management contract that gives a nongovernmental service provider an ownership or leasehold interest in financed property is not the only situation in which a contract may result in private business use.

(5) Section 1.141-3(b)(4)(i) of the Income Tax Regulations provides, in general, that a management contract (within the meaning of § 1.141-3(b)(4)(ii)) with respect to financed property may result in private business use of that property, based on all the facts and circumstances.

(6) Section 1.141-3(b)(4)(i) provides that a management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operation of the facility.

(7) Section 1.141-3(b)(4)(iii), in general, provides that certain arrangements generally are not treated as management contracts that may give rise to private business use. These are--

(a) Contracts for services that are solely incidental to the primary governmental function or functions of a financed facility (for example, contracts for janitorial, office equipment repair, hospital billing or similar services);

(b) The mere granting of admitting privileges by a hospital to a doctor, even if those privileges are conditioned on the provision of de minimis services, if those privileges are available to all qualified physicians in the area, consistent with the size and nature of its facilities;

(c) A contract to provide for the operation of a facility or system of facilities that consists predominantly of public utility property (as defined in § 168(i)(10) of the 1986 Code), if the only compensation is the reimbursement of actual and direct expenses of the service provider and reasonable administrative overhead expenses of the service provider; and

(d) A contract to provide for services, if the only compensation is the reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties.

(8) Section 1.145-2(a) provides generally that §§ 1.141-0 through 1.141-15 apply to § 145(a) of the 1986 Code.

(9) Section 1.145-2(b)(1) provides that in applying §§ 1.141-0 through 1.141-15 to § 145(a) of the 1986 Code, references to governmental persons include section 501(c)(3) organizations with respect to their activities that do not constitute unrelated trades or businesses under § 513(a) of the 1986 Code.

.02 Existing Advance Ruling Guidelines. Rev. Proc. 93-19, 1993-1 C.B. 526, contains advance ruling guidelines for determining whether a management contract results in private business use under § 141(b) of the 1986 Code.

SECTION 3. DEFINITIONS

.01 Adjusted gross revenues means gross revenues of all or a portion of a facility, less allowances for bad debts and contractual and similar allowances.

.02 Capitation fee means a fixed periodic amount for each person for whom the service provider or the qualified user assumes the responsibility to provide all needed services for a specified period so long as the quantity and type of services actually provided to covered persons varies substantially. For example, a capitation fee includes a fixed dollar amount payable per month to

a medical service provider for each member of a health maintenance organization plan for whom the provider agrees to provide all needed medical services for a specified period. A capitation fee may include a variable component of up to 20 percent of the total capitation fee designed to protect the service provider against risks such as catastrophic loss.

.03 Management contract means a management, service, or incentive payment contract between a qualified user and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract. See §§ 1.141-3(b)(4)(ii) and 1.145-2.

.04 Penalties for terminating a contract include a limitation on the qualified user's right to compete with the service provider; a requirement that the qualified user purchase equipment, goods, or services from the service provider; and a requirement that the qualified user pay liquidated damages for cancellation of the contract. In contrast, a requirement effective on cancellation that the qualified user reimburse the service provider for ordinary and necessary expenses or a restriction on the qualified user against hiring key personnel of the service provider is generally not a contract termination penalty. Another contract between the service provider and the qualified user, such as a loan or guarantee by the service provider, is treated as creating a contract termination penalty if that contract contains terms that are not customary or arm's-length that could operate to prevent the qualified user from terminating the contract (for example, provisions under which the contract terminates if the management contract is terminated or that place substantial restrictions on the selection of a substitute service provider).

.05 Periodic fixed fee means a stated dollar amount for services rendered for a specified period of time. For example, a stated dollar amount per month is a periodic fixed fee. The stated dollar amount may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective external standards. Capitation fees and per-unit fees are not periodic fixed fees.

.06 Per-unit fee means a fee based on a unit of service provided specified in the contract or otherwise specifically determined by an independent third party, such as the administrator of the Medicare program, or the qualified user. For example, a stated dollar amount for each specified medical procedure performed, car parked, or passenger mile is a per-unit fee. Separate billing arrangements between physicians and hospitals generally are treated as per-unit fee arrangements.

.07 Qualified user means any state or local governmental unit as defined in § 1.103-1 or any instrumentality thereof. The term also includes a section 501(c)(3) organization if the financed property is not used in an unrelated trade or business under § 513(a) of the 1986 Code. The term does not include the United States or any agency or instrumentality thereof.

.08 Renewal option means a provision under which the service provider has a legally enforceable right to renew the contract. Thus, for example, a provision under which a contract is automatically renewed for one-year periods absent cancellation by either party is not a renewal option (even if it is expected to be renewed).

.09 Service provider means any person other than a qualified user that provides services under a contract to, or for the benefit of, a qualified user.

SECTION 4. SCOPE

This revenue procedure applies when, under a management contract, a service provider provides management or other services involving property financed with proceeds of an issue of state or local bonds subject to § 141 or § 145(a)(2)(B) of the 1986 Code.

SECTION 5. OPERATING GUIDELINES FOR MANAGEMENT CONTRACTS

.01 In general. If the requirements of section 5 of this revenue procedure are satisfied, the management contract does not itself result in private business use. In addition, the use of financed property, pursuant to a management contract meeting the requirements of section 5 of this revenue procedure, is not private business use if that use is functionally related and subordinate to that management contract and that use is not, in substance, a separate contractual agreement (for example, a separate lease of a portion of the financed property). Thus, for example, exclusive use of storage areas by the manager for equipment that is necessary for it to perform activities required under a management contract that meets the requirements of section 5 of this revenue procedure, is not private business use.

.02 General compensation requirements.

(1) In general. The contract must provide for reasonable compensation for services rendered with no compensation based, in whole or in part, on a share of net profits from the operation of the facility. Reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties is not by itself treated as compensation.

(2) Arrangements that generally are not treated as net profits arrangements. For purposes of § 1.141-3(b)(4)(i) and this revenue procedure, compensation based on--

(a) A percentage of gross revenues (or adjusted gross revenues) of a facility or a percentage of expenses from a facility, but not both;

(b) A capitation fee; or

(c) A per-unit fee is generally not considered to be based on a share of net profits.

(3) Productivity reward. For purposes of § 1.141-3(b)(4)(i) and this revenue procedure, a productivity reward equal to a stated dollar amount based on increases or decreases in gross revenues (or adjusted gross revenues), or reductions in total expenses (but not both increases in gross revenues (or adjusted gross revenues) and reductions in total expenses) in any annual period during the term of the contract, generally does not cause the compensation to be based on a share of net profits.

(4) Revision of compensation arrangements. In general, if the compensation arrangements of a management contract are materially revised, the requirements for compensation arrangements under section 5 of this revenue

procedure are retested as of the date of the material revision, and the management contract is treated as one that was newly entered into as of the date of the material revision.

.03 Permissible Arrangements. The management contract must be described in section 5.03(1), (2), (3), (4), (5), or (6) of this revenue procedure.

(1) 95 percent periodic fixed fee arrangements. At least 95 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee. The term of the contract, including all renewal options, must not exceed the lesser of 80 percent of the reasonably expected useful life of the financed property and 15 years. For purposes of this section 5.03(1), a fee does not fail to qualify as a periodic fixed fee as a result of a one-time incentive award during the term of the contract under which compensation automatically increases when a gross revenue or expense target (but not both) is reached if that award is equal to a single, stated dollar amount.

(2) 80 percent periodic fixed fee arrangements. At least 80 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee. The term of the contract, including all renewal options, must not exceed the lesser of 80 percent of the reasonably expected useful life of the financed property and 10 years. For purposes of this section 5.03(2), a fee does not fail to qualify as a periodic fixed fee as a result of a one-time incentive award during the term of the contract under which compensation automatically increases when a gross revenue or expense target (but not both) is reached if that award is equal to a single, stated dollar amount.

(3) Special rule for public utility property. If all of the financed property subject to the contract is a facility or system of facilities consisting of predominantly public utility property (as defined in § 168(i)(10) of the 1986 Code), then "20 years" is substituted--

(a) For "15 years" in applying section 5.03(1) of this revenue procedure; and

(b) For "10 years" in applying section 5.03(2) of this revenue procedure.

(4) 50 percent periodic fixed fee arrangements. Either at least 50 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee or all of the compensation for services is based on a capitation fee or a combination of a capitation fee and a periodic fixed fee. The term of the contract, including all renewal options, must not exceed 5 years. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the third year of the contract term.

(5) Per-unit fee arrangements in certain 3-year contracts. All of the compensation for services is based on a per-unit fee or a combination of a per-unit fee and a periodic fixed fee. The term of the contract, including all renewal options, must not exceed 3 years. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the second year of the contract term.

(6) Percentage of revenue or expense fee arrangements in certain 2-year contracts. All the compensation for services is based on a percentage of fees charged or a combination of a per-unit fee and a percentage of revenue or expense fee. During the start-up period, however, compensation may be

based on a percentage of either gross revenues, adjusted gross revenues, or expenses of a facility. The term of the contract, including renewal options, must not exceed 2 years. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the first year of the contract term. This section 5.03(6) applies only to--

(a) Contracts under which the service provider primarily provides services to third parties (for example, radiology services to patients); and
(b) Management contracts involving a facility during an initial start-up period for which there have been insufficient operations to establish a reasonable estimate of the amount of the annual gross revenues and expenses (for example, a contract for general management services for the first year of operations).

.04 No Circumstances Substantially Limiting Exercise of Rights.

(1) In general. The service provider must not have any role or relationship with the qualified user that, in effect, substantially limits the qualified user's ability to exercise its rights, including cancellation rights, under the contract, based on all the facts and circumstances.

(2) Safe harbor. This requirement is satisfied if--

(a) Not more than 20 percent of the voting power of the governing body of the qualified user in the aggregate is vested in the service provider and its directors, officers, shareholders, and employees;

(b) Overlapping board members do not include the chief executive officers of the service provider or its governing body or the qualified user or its governing body; and

(c) The qualified user and the service provider under the contract are not related parties, as defined in § 1.150-1(b).

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 93-19, 1993-1 C.B. 526, is made obsolete on the effective date of this revenue procedure.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective for any management contract entered into, materially modified, or extended (other than pursuant to a renewal option) on or after May 16, 1997. In addition, an issuer may apply this revenue procedure to any management contract entered into prior to May 16, 1997.

DRAFTING INFORMATION

The principal author of this revenue procedure is Loretta J. Finger of the Office of Assistant Chief Counsel (Financial Institutions and Products). For further information regarding this revenue procedure contact Loretta J. Finger on (202) 622-3980 (not a toll-free call).

**Rev. Proc. 2001-39 2001-28 I.R.B. 38--Modification of Rev. Proc. 97-13
2001 IRB LEXIS 229; 2001-28 I.R.B. 38; REV. PROC. 2001-39
(Also Part I, §§ 103, 141, 145; 1.141-3, 1.145-2.)
July 9, 2001**

SECTION 1. PURPOSE

This revenue procedure modifies the definitions of capitation fee and per-unit fee in Rev. Proc. 97-13, 1997-1 C.B. 632, to permit an automatic increase of those fees according to a specified, objective, external standard that is not linked to the output or efficiency of a facility (for example, the Consumer Price Index).

SECTION 2. BACKGROUND

.01 Rev. Proc. 97-13 sets forth conditions under which a management contract does not result in private business use under § 141(b) of the Internal Revenue Code. The revenue procedure also applies to determinations of whether a management contract causes the test in § 145(a)(2)(B) to be met.

.02 Section 3 of Rev. Proc. 97-13 defines various terms, including capitation fee, periodic fixed fee, and per-unit fee.

.03 Section 3.02 of Rev. Proc. 97-13 defines a capitation fee as a fixed periodic amount for each person for whom the service provider or the qualified user assumes the responsibility to provide all needed services for a specified period so long as the quantity and type of services actually provided to covered persons varies substantially. A capitation fee may include a variable component of up to 20 percent of the total capitation fee designed to protect the service provider against risks such as catastrophic loss.

.04 Section 3.05 of Rev. Proc. 97-13 defines a periodic fixed fee as a stated dollar amount for services rendered for a specified period of time. The definition of periodic fixed fee provides that the stated dollar amount may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility.

.05 Section 3.06 of Rev. Proc. 97-13 defines a per-unit fee as a fee based on a unit of service provided specified in the contract or otherwise specifically determined by an independent third party, such as the administrator of the Medicare program, or the qualified user.

.06 Neither the capitation fee definition nor the per-unit fee definition expressly contemplates an automatic increase based on a specified, objective, external standard not linked to the output or efficiency of the facility.

.07 This revenue procedure clarifies that a capitation fee and a per-unit fee may be determined using an automatic increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility (for example, the Consumer Price Index).

SECTION 3. SCOPE

This revenue procedure applies when, under a management contract, a service provider provides management or other services involving property financed with proceeds of an issue of state or local bonds subject to § 141 or § 145(a)(2)(B).

SECTION 4. MODIFICATIONS

.01 Section 3.02 of Rev. Proc. 97-13 is modified to add the following text immediately before the last sentence:

A fixed periodic amount may include an automatic increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective, external standards.

.02 Section 3.06 of Rev. Proc. 97-13 is modified to add the following text at the end:

A fee that is a stated dollar amount specified in the contract does not fail to be a per-unit fee as a result of a provision under which the fee may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective, external standards.

SECTION 5. INQUIRIES

For further information regarding this revenue procedure contact David White at (202) 622-3980 (not a toll-free call).

SECTION 6. EFFECT ON OTHER DOCUMENTS

This revenue procedure modifies Rev. Proc. 97-13, 1997-1 C.B. 632.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective for any management contract entered into, materially modified, or extended (other than pursuant to a renewal option) on or after July 9, 2001. In addition, an issuer may apply this revenue procedure to any management contract entered into prior to July 9, 2001.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Mary Truchly and Rebecca Harrigal, Office of Chief Counsel.

Frederick M. Bryant, Esq.

Re: Letter, dated April 19, 2012, from James R. O'Connor, City Manager, City of Vero Beach
May 8, 2012

APPENDIX B

MSS



7201 Lake Ellenor Drive
Orlando, Florida 32809-5769
(407) 859-7310 Fax (407) 856-6553
1 800 859-0744

December 22, 1994

*per Fred
held contracts
in Escrow
until SEC 2 is
CO.
in fireproof
Cabinet*

Mr. Robert W. Brush
Utilities Director
City of Homestead
675 North Flagler Avenue
Homestead, FL 33030

Mr. James C. Welsh
General Manager
Kissimmee Utility Authority
P. O. Box 423219
Kissimmee, FL 34742-3219

Dear Rob and Jim:

RE: Stanton Project and Stanton II Project

Pursuant to my December 21st phone conversation with Rob, I understand that Homestead and KUA have essentially reached agreement for 50% of Homestead's capacity and energy entitlements, (as set forth in their Power Sales and Project Support Contracts with FMPA), in FMPA's Stanton and Stanton II Projects to be transferred or to accrue to the benefit of KUA. Also I understand that the desired effective date of this transaction is to be June 1, 1996, or such date that approximates the commercial operation date of OUC's SEC Unit No. 2.

I further understand that shortly after the first of the year Homestead and KUA desire to execute a "letter of intent" or "memorandum of understanding" or some such document.

As Rob and I discussed, and after a very preliminary review by staff and General Counsel, from the Agency's standpoint the transaction would involve the following:

- For Stanton II Project: amend the Power Sales and Project Support Contracts to increase KUA's entitlement percentage share and likewise decrease Homestead's entitlement percentage share.
- For Stanton Project: amend the Power Sales and Project Support Contracts to decrease Homestead's entitlement percentage share. KUA would execute a Power Sales and Project Support Contract to acquire the entitlement percentage share relinquished by Homestead.
- Amend the Participation Agreement between OUC and FMPA for both the Stanton and Stanton II Projects.

Mr. Robert Brush, City of Homestead;
Mr. James C. Welsh, Kissimmee Utility Authority;
December 22, 1994

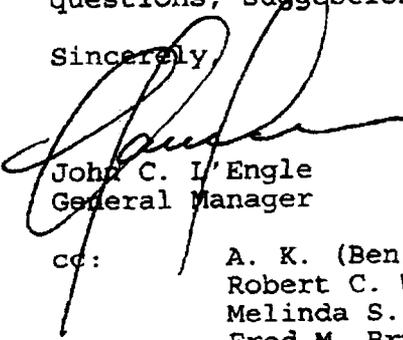
Page -2-

- Secure opinions from General Counsel and Bond Counsel relative to bond covenants, tax matters, etc.
- Secure approval from Trustees (Nations Bank for Stanton and Bank of New York of Florida for Stanton II).
- Secure approval from bond insurers (MBIA for Stanton and AMBAC for Stanton II).
- Comply with new SEC guidelines regarding disclosure. (May require producing a mini official statement for submission to appropriate repositories.)
- Disclosure and possible presentation to Moodys and Standard & Poor's.
- Modification of existing TSA Agreement with FPL.
- Set up an account to accumulate FMPA costs to accomplish transaction. Costs would be for legal work, including opinions, mini official statement, presentations to rating agencies, etc. Very preliminarily, costs should not be more than \$100,000 total. The responsibility for the costs could be split between KUA and Homestead as they like. As a suggestion, 50/50 seems appropriate.

This list is not meant to be final, or all inclusive, and is subject to change as we proceed. I suggest that a meeting of all parties and their attorneys would be appropriate soon after the first of the year to further discuss the details of the transaction and the drafting of the memo of understanding (or whatever is appropriate). The memo will probably need some language to cover some contingencies and help FMPA in our efforts to facilitate the transaction. We can explore this further after you all have reviewed this letter and your individual plans.

The very best of holidays to you. Call me if you have any questions, suggestions, or comments.

Sincerely,



John C. I'Engle
General Manager

cc: A. K. (Ben) Sharma, KUA
Robert C. Williams
Melinda S. Short
Fred M. Bryant



COPY

7201 Lake Ellenor Drive
Orlando, Florida 32809-5769
(407) 859-7310 Fax (407) 856-6553
1 800 859-0744

January 9, 1995

Mr. Robert W. Brush
Utilities Director
City of Homestead
675 North Flagler Avenue
Homestead, FL 33030

Mr. James C. Welsh
General Manager
Kissimmee Utility Authority
P. O. Box 423219
Kissimmee, FL 34742-3219

Dear Rob and Jim:

RE: Stanton Project and Stanton II Project

Following up on my December 22nd letter and our later phone conversations, Fred has prepared an activity check list and a proposed schedule, which fleshes out the list in my letter, and a document that he calls a "transfer agreement" which establishes the intent on the part of both parties to do the deal. All of these are transmitted herein for your review. Working with all parties' schedules, it appears that February 7th is the earliest we can get together; so unless I hear from you, I am scheduling a 1:30 p.m. meeting for that date in the FMPA Board Room to finalize the transfer agreement, as well as update the check list and schedule.

One new development: there are several Stanton Project reserve accounts, which have been funded in part or in whole from revenues, (i.e. Rate Stabilization, R & R, Contingency, etc.). As the purpose of these accounts is to fund future costs, Homestead has accrued an equity and will be due some reimbursement from KUA when that equity is transferred to KUA. Stanton II Project is not yet an operating project, so it has no such accounts. We will have the current standing of these accounts for you on or before the February 7th meeting.

One last item: in my December 22nd letter, I very preliminarily mentioned that the cost would not exceed \$100,000. Further refinement indicates that the cost should be significantly less and if a full-blown presentation to S&P and Moody's is not required, the cost should be very significantly less. We will try to also have the rating agency issue resolved by February 7th.

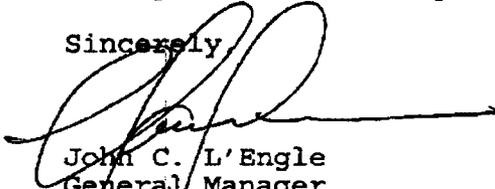
Mr. Robert W. Brush, City of Homestead;
Mr. James C. Welsh, Kissimmee Utility Authority
January 9, 1995

Page -2-

I have taken the liberty to send copies to Ed Brinson and Mike Watkins, attorneys for KUA and Homestead, respectively.

Please call if you have any questions, suggestions or comments. In any case I'll see you on February 7th.

Sincerely,



John C. L'Engle
General Manager

JCL/ae
Enclosures

cc: Edward Brinson - w/enclosures
Fred M. Bryant - w/enclosures
A. K. (Ben) Sharma - w/enclosures
Melinda S. Short - w/enclosures
Michael E. Watkins - w/enclosures
Robert C. Williams - w/enclosures

DRAFT OF 1/9/95

GAME PLAN**Homestead to KUA Transfer of
50% Entitlement Share of Stanton and Stanton II Projects**Time Period

- | | |
|-----------------|---|
| January | <ul style="list-style-type: none"> • Circulate draft of Transfer Agreement to Homestead and KUA for their review. • Inform FMPA Board that transfer is being processed and will require subsequent Board approval. |
| February | <ul style="list-style-type: none"> • Approval by Homestead City Commission and KUA Board of Transfer Agreement Between Homestead/KUA. • Discuss proposed transfer with insurance companies, trustee, OUC, rating agencies to make sure no problems. • Circulate drafts of closing documents to Homestead and KUA for their approval. |
| March | <ul style="list-style-type: none"> • Execute all documents between Homestead/KUA/FMPA and obtain Resolutions of Approval from Homestead City Commission, KUA Board and FMPA Board. • Obtain official consents from insurance companies/trustee. |
| April | <ul style="list-style-type: none"> • Obtain OUC approval/execution of changes to Participation Agreement. • Send completed documents (amendments, etc.) and certificates by FMPA authorized officer to trustee, insurance company. • Modify TSA with FPL. • Comply with new SEC disclosure requirement (if any). |

DRAFT of 1/9/95

FMPA CHECKLIST**Homestead to KUA Transfer of
50% Entitlement Share of Stanton and Stanton II Projects**

- I. Stanton Project.
 - A. Participation Agreement with OUC.
 1. Amend definition of FMPA Participating Members (Page 5 and 6) by amending Exhibit I to add KUA.
 2. Furnish copy of new FMPA Member Contract (KUA) to OUC pursuant to §7.01. (This is the Power Sales and Project Support Contract.)
 3. Obtain consent from OUC to add KUA. (This is accomplished by OUC executing the necessary amendment to Exhibit I to Participation Agreement.) **NOTE:** OUC consent may not be necessary under §7.01, but OUC does need to "agree" to this Homestead/KUA transaction.
 - B. Power Sales and Project Support Contracts.
 1. KUA needs to execute these contracts. Need to make some very minor changes to these contracts such as: date & changes to "Whereas" clauses.
 2. Consent from FMPA to transfer of 50% of Homestead's Power Entitlement Share to KUA (§28). This can be accomplished by FMPA executing the amendment to Homestead contracts and by FMPA executing the KUA contracts.
 3. Amend Annex I to reduce Homestead's percentage of Power Entitlement Share to 12.195% and add KUA at 12.195%. Need to send a copy of this amended Annex I to other participants.
 4. Obtain opinion letter from KUA attorney pursuant to form in Annex 2. Some minor changes to form of this opinion will be necessary.
 5. Homestead and FMPA execute an amendment to Power Sales and Project Support Contracts reflecting a reduction in Homestead's Power Entitlement Share to 12.195%.

C. Bond Resolution.

1. Obtain consent from Trustee and Co-Trustee — (See §713).
2. File with Trustee and Co-Trustee a copy of KUA's Power Sales and Project Support Contract, certified by an authorized officer of FMPA (§713).
3. File with Trustee and Co-Trustee a copy of amendment to Annex I of Power Sales and Project Support Contract depicting Reduction of Homestead's Power Entitlement Share to 12.195%, certified by an authorized officer of FMPA (§713).
4. File with Trustee and Co-Trustee a copy of amendments to Participation Agreement, said amendments certified by an authorized officer of FMPA (§713).

D. Miscellaneous.

1. Assignment of Stanton Power Entitlement Share from Homestead to KUA.
2. Consent from MBIA.
3. Amendment to TSA with FPL to reflect decrease in Homestead's Power Entitlement Share to 12.195%.
4. Resolution approving, adopting and authorizing execution (etc.) from FMPA Board, Homestead and KUA.
5. Various certificates as to signatures, etc. from FMPA, Homestead and KUA.

II. Stanton II Project.**A. Participation Agreement with OUC.**

1. No amendments necessary as KUA is already a FMPA Participating Member (pursuant to Amendment No. 1 dated April 8, 1992).
2. Obtain consent of OUC to Homestead/KUA transfer in order to comply with §7.01.

B. Power Sales and Project Support Contracts.

- 1. Amend Homestead and KUA Contracts to reflect decrease in Homestead's Power Entitlement Share to 8.24435% and increase in KUA to 24.73305%.
- 2. Consent of FMPA — this can be accomplished by FMPA signing amendment to KUA/Homestead contracts.

C. Bond Resolution.

- 1. File with Trustee a copy of the amendment to KUA and Homestead contracts reflecting reduction of Homestead Power Entitlement Share, said amendment having been certified by an authorized officer of FMPA (§712).

D. Miscellaneous.

- 1. Assignment of Stanton II Power Entitlement Share from Homestead to KUA.
- 2. Consent from AMBAC.
- 3. Resolution approving, adopting and authorizing execution (etc.) from FMPA, Homestead and KUA.
- 4. Various certificates as to signatures, etc. from FMPA, Homestead and KUA.

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RESOLUTION NO. R-95-04-21

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HOMESTEAD, DADE COUNTY, FLORIDA, (I) MAKING CERTAIN FINDINGS; (II) AUTHORIZING AND APPROVING THE ASSIGNMENT BETWEEN THE CITY OF HOMESTEAD AND KISSIMMEE UTILITY AUTHORITY OF A 12.195% POWER ENTITLEMENT SHARE IN THE STANTON PROJECT; AND (III) PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HOMESTEAD, DADE COUNTY, FLORIDA:

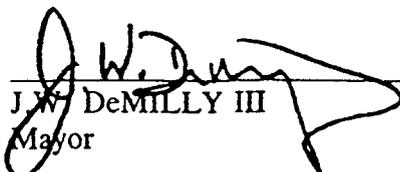
SECTION 1. FINDINGS. It is hereby ascertained, determined and declared that:

- 1.0.1 The Kissimmee Utility Authority ("KUA") and the City of Homestead ("Homestead") have heretofore entered into the Agreement Between City of Homestead and Kissimmee Utility Authority For Transfer of 50% of City of Homestead's Power Entitlement Share of Stanton and Stanton II Projects or, in the Alternative, the Transfer of All of Homestead's Stanton II Power Entitlement Share ("Transfer Agreement"), a copy of which is attached hereto as Exhibit "A".
- 1.0.2 Pursuant to the terms and conditions of the Transfer Agreement, Homestead has agreed to transfer to KUA a 12.195% Entitlement Share in the Stanton Project.
- 1.0.3 The Assignment Between the City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment") implementing and effectuating the Transfer Agreement is attached hereto as Exhibit "B".

SECTION 2. APPROVAL OF ASSIGNMENT. The Assignment attached hereto as Exhibit B is hereby approved and the Mayor and City Clerk of the City are hereby authorized to execute and deliver the Assignment.

SECTION 3. EFFECTIVE DATE. This Resolution shall take effect immediately upon its adoption.

PASSED AND ADOPTED this 3rd day of April, 1995.



J.W. DeMILLY III
Mayor

ATTEST:

Velva J. Burch
VELVA J. BURCH, CMC
City Clerk

APPROVED AS TO FORM & CORRECTNESS:

Michael E. Watkins
MICHAEL E. WATKINS
City Attorney

Offered by Mrs. Perry . Motion to adopt by Mrs. Perry , seconded by Mrs. Campbell .

FINAL VOTE AT ADOPTION

| | |
|---------------------------------|----------------------|
| <i>Mayor J.W. DeMilley III</i> | <u><i>Absent</i></u> |
| <i>Vice Mayor Roscoe Warren</i> | <u><i>Yes</i></u> |
| <i>Councilman Ruth Campbell</i> | <u><i>Yes</i></u> |
| <i>Councilman Jeff Kirk</i> | <u><i>Absent</i></u> |
| <i>Councilman Eliza Perry</i> | <u><i>Yes</i></u> |
| <i>Councilman Steve Shiver</i> | <u><i>Absent</i></u> |
| <i>Councilman Nick Sincore</i> | <u><i>Yes</i></u> |

R95-04-21



CITY OF HOMESTEAD, FLORIDA

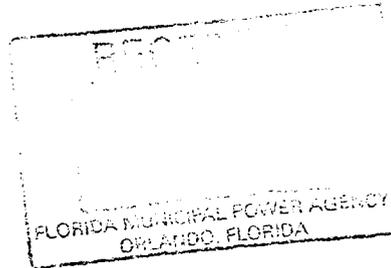
790 N. HOMESTEAD BOULEVARD/HOMESTEAD, FLORIDA 33030/TELEPHONE: (305) 247-1801

J.W. DEMILLY III, *Mayor*
ROSCOE WARREN, *Vice-Mayor*
WILLIAM T. RUDD, *City Manager*

COUNCILMEN:
RUTH L. CAMPBELL
JEFF KIRK

ELIZA D. PERRY
STEVE SHIVER
NICHOLAS R. SINCORE

April 10, 1995



James C. Welsh, P.E.
President & General Manager
Kissimmee Utility Authority
Post Office Box 423219
Kissimmee, FL 34742-3219

RE: Transfer Agreement between Homestead
and Kissimmee Utility Authority
for Stanton and Stanton 2 Capacity

Dear Jim:

Attached is a copy of the Agreement as signed today by Homestead, together with copy of the authorizing Resolution No. R-95-04-21 as passed April 3, 1995.

By copy to Claude L'Engle, I'm asking that he proceed with the transmission service agreement work which will lead to a conclusion as to which of the alternatives (Stanton 2 versus a mix of Stanton 1 and 2) will become the basis for implementation of the Agreement, as well as with the other necessary steps.

Thank you for your cooperation in working out this matter to our utilities' mutual advantage.

Sincerely,

Robert W. Brush, P.E.
Director of Utilities

RWB/pj

cc: ✓ Claude L'Engle P.E. FMPA
Will Rudd
Jim Swartz

**AGREEMENT BETWEEN CITY OF HOMESTEAD AND
KISSIMMEE UTILITY AUTHORITY FOR TRANSFER OF APPROXIMATELY
50% OF CITY OF HOMESTEAD'S POWER ENTITLEMENT SHARE OF STANTON
AND STANTON II PROJECTS OR, IN THE ALTERNATIVE, THE TRANSFER
OF ALL OF HOMESTEAD'S STANTON II POWER ENTITLEMENT SHARE**

This Agreement between the City of Homestead and the Kissimmee Utility Authority for the Transfer of approximately 50% of City of Homestead's Power Entitlement Share of the Florida Municipal Power Agency Stanton Project and the Florida Municipal Power Agency Stanton II Project or, in the Alternative, the Transfer of All of Homestead's Stanton II Power Entitlement Share ("Transfer Agreement") is hereby entered into by and between the City of Homestead ("Homestead") and the Kissimmee Utility Authority ("KUA") (jointly hereafter the "Parties") on this 10 day of APRIL, 1995.

WITNESSETH:

WHEREAS, Homestead, pursuant to the Stanton Project Power Sales Contract between Florida Municipal Power agency and City of Homestead, Florida ("Stanton Power Sales Contract") and the Stanton Project Project Support Contract between Florida Municipal Power Agency and City of Homestead ("Stanton Project Support Contract") both dated January 16, 1984, and collectively referred to hereinafter as the "Stanton Contracts," acquired a 24.390% Power Entitlement Share in the Stanton Project, as those terms are defined in the Stanton Contracts; and

WHEREAS, Homestead, pursuant to the Stanton II Project Power Sales Contract between Florida Municipal Power Agency and City of Homestead, Florida ("Stanton II

Power Sales Contract") and the Stanton II Project Project Support Contract between Florida Municipal Power Agency and City of Homestead, Florida ("Stanton II Project Support Contract"), both dated May 24, 1991, and collectively referred to hereinafter as the "Stanton II Contracts," acquired a 16.4887% Power Entitlement Share in the Stanton II Project as those terms are defined in the Stanton II Contracts; and

WHEREAS, Homestead, due to unforeseen circumstances primarily attributed to Hurricane Andrew, will be unable to economically utilize its entire Power Entitlement Share in the Stanton and Stanton II Projects and, thus, desires to sell and assign to KUA a portion of its excess Power Entitlement Share in those projects; and

WHEREAS, KUA can economically utilize and desires to obtain a portion of Homestead's Power Entitlement Share in the Stanton and Stanton II Projects; and

WHEREAS, KUA has an undivided ownership interest in the Stanton Unit No. 1 but it does not currently have a Power Entitlement Share in the Stanton Project; and

WHEREAS, KUA does currently have a 16.4887% Power Entitlement Share in the Stanton II Project; and

WHEREAS, FMPA and FPL have heretofore entered into the Stanton Transmission Service Agreement which must be amended in order to decrease the Transmission Contract Demand established for Homestead's Stanton Power Entitlement Share;

WHEREAS, by letter dated February 10, 1995, FMPA has requested FPL to amend the Stanton Transmission Service Agreement by reducing Homestead's Transmission Contract Demand by one-half (1/2), and FPL by letter to FMPA dated

February 27, 1995, has tentatively agreed to this request, subject to appropriate Stanton Transmission Service Agreement modifications; and

WHEREAS, in the event FPL and FMPA are unable to reach agreement on the amendments to the Stanton Transmission Service Agreement, Homestead and KUA, in the alternative, are desirous of Homestead transferring to KUA all of Homestead's Stanton II Power Entitlement Share; and

WHEREAS, the Florida Municipal Power Agency is a party to the Stanton and Stanton II Contracts and has agreed to facilitate this Transfer Agreement;

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and for Ten and No/100 (\$10.00) Dollars and other mutual and valuable considerations, the receipt of which is hereby acknowledged, the Parties agree as follows:

SECTION 1. EFFECTIVE DATE.

1.1 This Transfer Agreement shall become effective upon the execution and delivery by the respective governing body of Homestead and KUA. This Transfer Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original but all of which, together, shall constitute one and the same instrument.

SECTION 2. INTENT OF THE PARTIES.

2.1 It is the intent of the Parties that Homestead transfer to KUA approximately one-half (1/2) of Homestead's Power Entitlement Share (12.195%) in the Stanton Project so that Homestead's Power Entitlement Share in the Stanton Project will be reduced to

12.195% and KUA will become a Project Participant in the Stanton Project with a 12.195% Power Entitlement Share.

2.2 It is further the intent of the Parties that Homestead transfer to KUA approximately one-half (1/2) of Homestead's Power Entitlement Share (8.24435%) in the Stanton II Project so that Homestead's Power Entitlement Share in the Stanton II Project will be reduced to 8.24435% and KUA's Power Entitlement Share in the Stanton II Project will be increased to 24.73305%.

2.3 It is the intent of the Parties that the necessary approvals, consents and documents and amendments to effectuate this Transfer Agreement be obtained and finalized as soon as practicable and that the actual transfer by Homestead to KUA of approximately one-half (1/2) of Homestead's Power Entitlement Share in the Stanton and Stanton II Project becomes effective on the Commercial Operation Date of Stanton II.

2.4 It is also the intent of the Parties that the Transfer of approximately one-half (1/2) of Homestead's Power Entitlement Share in the Stanton and Stanton II Projects must be accomplished simultaneously. In the event that FMPA fails to obtain from FPL a satisfactory amendment to the Stanton Transmission Service Agreement thereby reducing Homestead's Stanton Transmission Contract Demand by one-half (1/2), Homestead, in the alternative, will transfer to KUA all of Homestead's Stanton II Power Entitlement Share as soon as possible.

SECTION 3 EXECUTION OF ADDITIONAL DOCUMENTS, CO-OPERATION AND BEST EFFORTS.

3.1 Homestead and KUA recognize and agree that in order to effectuate this Transfer Agreement, both Parties will be required to execute additional documents and will do so in a timely manner after receipt and review.

3.2 Homestead and KUA shall cooperate with each other and with FMPA and use their best efforts in all activities related to this Transfer Agreement.

SECTION 4. DESIGNATION OF FMPA AS AGENT.

4.1 The Parties hereby designate FMPA as their agent to prepare all documents and obtain all consents and approvals necessary to accomplish the aforesaid transfer of the Stanton and Stanton II Power Entitlement Shares or, in the alternative, the transfer of all of Homestead's Stanton II Power Entitlement Share and to coordinate and effectuate this transfer.

4.2 The Parties agree that they will share equally and pay to FMPA all costs incurred by FMPA, pursuant to §4.1, irrespective of whether or not the transfer of the Stanton and Stanton II Power Entitlement Shares is finalized. These costs shall not exceed \$100,000 without prior authorization from Homestead and KUA.

SECTION 5. TERMINATION OF TRANSFER AGREEMENT.

5.1 This Transfer Agreement shall terminate at any time the Parties are notified in writing by FMPA that said transfer cannot be accomplished by the Commercial Operation Date of the Stanton II Project. If the Parties are so notified, this Transfer Agreement will automatically terminate thirty (30) days subsequent to the date of said

written notification by FMPA unless the Parties mutually agree to extend this Transfer Agreement.

SECTION 6. LIABILITY FOR COSTS OF STANTON AND STANTON II POWER ENTITLEMENT SHARES.

6.1 Prior to the transfer set forth in this Transfer Agreement, Homestead shall remain solely liable for all costs relating to Homestead's Power Entitlement Share of the Stanton Project and the Stanton II Project.

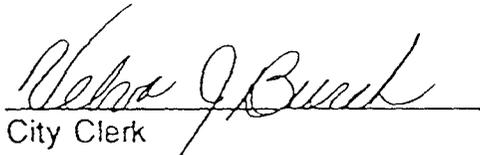
6.2 The Parties recognize and hereby agree that Homestead has pre-paid certain Stanton Project costs and that upon an accounting to the Parties by FMPA of these pre-paid costs, KUA will reimburse Homestead for these pre-paid costs at the time of the transfer of one-half (1/2) of the Stanton Power Entitlement Share by Homestead to KUA pursuant to this Transfer Agreement.

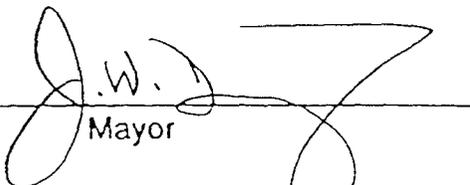
IN WITNESS WHEREOF, the Parties have caused this Transfer Agreement to be executed by their proper officers, respectively, being thereunto duly authorized and their corporate seals to be hereto affixed as of this day and year first above written.

(SEAL)

CITY OF HOMESTEAD

Attest:


City Clerk

By: 
Mayor

Approved as to Form and Correctness:


City Attorney

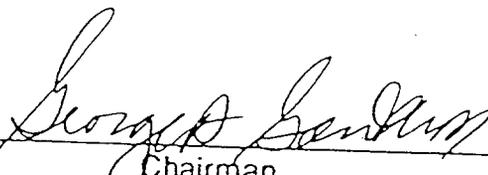
(SEAL)

KISSIMMEE UTILITY AUTHORITY

Attest:



Secretary

By: 
Chairman

Approved as to Form and Correctness:


Authority Attorney

Resolution 95-B-4
Board of Directors
April 28, 1995

A RESOLUTION OF THE BOARD OF DIRECTORS OF FLORIDA MUNICIPAL POWER AGENCY, (I) APPROVING THE AGREEMENT BETWEEN CITY OF HOMESTEAD AND KISSIMMEE UTILITY AUTHORITY FOR TRANSFER OF APPROXIMATELY 50% OF CITY OF HOMESTEAD'S POWER ENTITLEMENT SHARE OF STANTON AND STANTON II PROJECTS OR, IN THE ALTERNATIVE, THE TRANSFER OF ALL OF HOMESTEAD'S STANTON II POWER ENTITLEMENT SHARE; AND (II) PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF FLORIDA MUNICIPAL POWER AGENCY:

SECTION 1. APPROVAL OF TRANSFER AGREEMENT. The Agreement Between City of Homestead and Kissimmee Utility Authority for Transfer of Approximately 50% of City of Homestead's Power Entitlement Share of Stanton and Stanton II Projects or, in the Alternative, the Transfer of all of Homestead's Stanton II Power Entitlement Share ("Transfer Agreement"), a copy of which is attached hereto as Exhibit "A," is hereby approved. The staff of FMPA is hereby directed and authorized to proceed with any and all actions necessary to implement the Transfer Agreement.

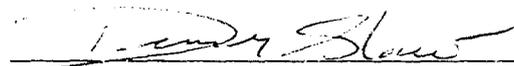
SECTION 2. EFFECTIVE DATE. This Resolution shall take effect immediately upon its adoption.

APPROVED AND ADOPTED by the Board of Directors of Florida Municipal Power Agency on April 28, 1995.

Attest:

FLORIDA MUNICIPAL POWER AGENCY


Secretary/Treasurer


Chairman

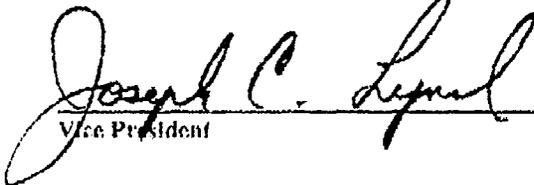
**CONSENT OF
MBIA INSURANCE CORPORATION**

Pursuant to Section 10.03 of Article X of the Florida Municipal Power Agency Fifth Supplemental and Amendatory Stanton Project Revenue Bond Resolution and Subordinated Debt Resolution No 5, adopted February 8, 1991, MBIA Insurance Corporation ("MBIA") hereby consents to the Assignment between the City of Homestead and Kissimee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment"), a copy of said Assignment being attached hereto as Exhibit "A".

IN WITNESS WHEREOF, MBIA has caused this consent to be executed on its behalf by its duly authorized officers this 23th day of May, 1995.

MBIA Insurance Corporation

(formerly known as Municipal Bond Investors Assurance Corporation)


Vice President

MBIA

MBIA Insurance Corporation
113 King Street
Armonk, NY 10504
914 273 4545

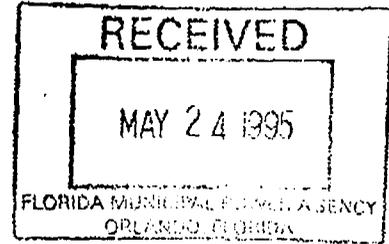
To: FRED B.

From: m. Shurt

Via Courier

2 pgs

May 23, 1995



John C. L'Engle, General Manager
Florida Municipal Power Agency
7201 Lake Ellenor Drive
Orlando, Florida 32809-5769

RE: **Transfer of Power Entitlement Share**
\$98,835,000 Florida Municipal Power Agency, Stanton Project Refunding
Revenue Bonds, Series 1991
[Policy No. 9172]

Dear Mr. L'Engle:

Enclosed is MBIA's executed consent to the transfer of one-half (1/2) of the City of Homestead's Power Entitlement Share (12.195%) in the Stanton Project to Kissimmee Utility Authority, thereby making Homestead's and Kissimmee's Power Entitlement Share 12.195% each, in conjunction with the above referenced issue.

Please forward an executed copy of the documents generated from this transaction to my attention when available. Please call me at 914-765-3935 if I can be of any further assistance.

Sincerely,

Helena Aldrich-Suber
Associate

RESOLUTION R95-07-40

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HOMESTEAD, (I) MAKING CERTAIN FINDINGS; (II) AUTHORIZING AND APPROVING THE ASSIGNMENT BETWEEN THE CITY OF HOMESTEAD AND KISSIMMEE UTILITY AUTHORITY OF A 12.195% POWER ENTITLEMENT SHARE IN THE STANTON PROJECT; (III) AUTHORIZING AND APPROVING AMENDMENT NO. 1 TO THE STANTON POWER SALES CONTRACT AND PROJECT SUPPORT CONTRACT; AND (IV) PROVIDING AN EFFECTIVE DATE

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HOMESTEAD, FLORIDA;

SECTION 1. FINDINGS. It is hereby ascertained, determined and declared that:

1.0.1 The City of Homestead ("Homestead") and Kissimmee Utility Authority ("KUA") have heretofore entered into the Agreement between the City of Homestead and Kissimmee Utility Authority For Transfer of 50% of the City of Homestead's Power Entitlement Share of Stanton and Stanton II Projects, or, in the alternative, the Transfer of All of Homestead's Stanton II Power Entitlement Share ("Transfer Agreement"), a copy of which is attached hereto as Exhibit "A."

1.0.2 Pursuant to the terms and conditions of the Transfer Agreement, Homestead has agreed to transfer to KUA a 12.195% Power Entitlement Share in the Stanton Project.

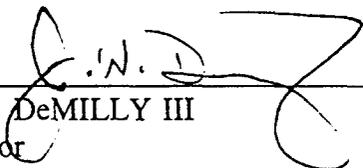
1.0.3 The Assignment between the City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment") implementing and effectuating the Transfer Agreement is attached hereto as Exhibit "B."

SECTION 2. APPROVAL OF ASSIGNMENT. The Assignment attached hereto as Exhibit B is hereby approved and the Mayor and City Clerk of the City of Homestead are hereby authorized to execute and deliver the Assignment.

SECTION 3. APPROVAL OF AMENDMENT NO. 1 TO THE STANTON POWER SALES CONTRACT AND STANTON PROJECT SUPPORT CONTRACT. The approval of the Assignment necessitates an amendment to the Stanton Power Sales Contract and the Stanton Project Support Contract between Florida Municipal Power Agency and the City of Homestead. Amendment No. 1 to the Stanton Project Power Sales Contract between Florida Municipal Power Agency and the City of Homestead, Florida, attached hereto as Exhibit "C," and Amendment No. 1 to the Stanton Project Support Contract between Florida Municipal Power Agency and the City of Homestead, Florida, attached hereto as Exhibit "D" (collectively referred to as "Amendments") are hereby approved and the Mayor and City Clerk of the City are hereby authorized to execute and deliver said Amendments.

SECTION 4. EFFECTIVE DATE. This Resolution shall take effect immediately upon its adoption.

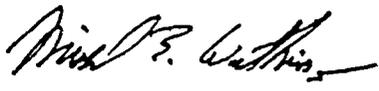
APPROVED AND ADOPTED by the City Council of the City of Homestead this 17th day of July, 1995.


 J.W. DeMILLY III
 Mayor

ATTEST:


 VELVA J. BIRCH, CMC
 City Clerk

APPROVED AS TO FORM & CORRECTNESS:


 MICHAEL E. WATKINS
 City Attorney

Offered by Mrs. Perry. Motion to adopt by Mrs. Perry, seconded by Mrs. Campbell.

FINAL VOTE AT ADOPTION

| | |
|--------------------------|------------|
| Mayor J.W. DeMilly III | <u>Yes</u> |
| Vice Mayor Roscoe Warren | <u>Yes</u> |
| Councilman Ruth Campbell | <u>Yes</u> |
| Councilman Jeff Kirk | <u>Yes</u> |
| Councilman Eliza Perry | <u>Yes</u> |
| Councilman Steve Shiver | <u>Yes</u> |
| Councilman Nick Sincore | <u>Yes</u> |

R95-07-40

July 20, 1995
RESOLUTION 95-B-11

A RESOLUTION OF THE BOARD OF DIRECTORS OF FLORIDA MUNICIPAL POWER AGENCY, (I) APPROVING THE ASSIGNMENT BETWEEN CITY OF HOMESTEAD AND KISSIMMEE UTILITY AUTHORITY OF A 12.195% POWER ENTITLEMENT SHARE IN THE STANTON PROJECT; (II) APPROVING AMENDMENT NO. 1 TO THE CITY OF HOMESTEAD'S STANTON POWER SALES CONTRACT AND STANTON PROJECT SUPPORT CONTRACT; (III) APPROVING AND AUTHORIZING THE KISSIMMEE UTILITY AUTHORITY'S STANTON POWER SALES CONTRACT AND STANTON PROJECT SUPPORT CONTRACT; (IV) APPROVING THE ASSIGNMENT BETWEEN CITY OF HOMESTEAD AND KISSIMMEE UTILITY AUTHORITY OF AN 8.24435% POWER ENTITLEMENT SHARE IN THE STANTON II PROJECT; (V) APPROVING AMENDMENT NO. 1 TO THE CITY OF HOMESTEAD'S STANTON II POWER SALES CONTRACT AND STANTON II PROJECT SUPPORT CONTRACT AND AMENDMENT NO. 2 TO THE KISSIMMEE UTILITY AUTHORITY'S STANTON II POWER SALES CONTRACT AND STANTON II PROJECT SUPPORT CONTRACT; (VI) APPROVING SUBJECT TO OBTAINING AMENDMENT TO TRANSMISSION AGREEMENT; AND (VII) PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF FLORIDA MUNICIPAL POWER AGENCY:

SECTION 1. APPROVAL OF STANTON ASSIGNMENT. The Assignment Between City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project, a copy of which is attached hereto as Exhibit "A," is hereby approved.

SECTION 2. APPROVAL OF AMENDMENT NO. 1 TO STANTON POWER SALES AND PROJECT SUPPORT CONTRACTS. The Amendment No. 1 to the City of Homestead's Stanton Power Sales and Project Support Contracts, copies of which are attached hereto, respectively, as Exhibits "B" & "C" are hereby approved and the Chairman and Secretary/Treasurer are hereby authorized to execute and deliver the aforesaid amendments at such time as the Amendment to the Transmission Agreement with Florida Power and Light Company is obtained as set forth in Section 6 hereof.

SECTION 3. APPROVAL OF KISSIMMEE UTILITY AUTHORITY'S STANTON POWER SALES CONTRACT AND STANTON PROJECT SUPPORT CONTRACT. The Stanton Project Power Sales Contract and Stanton Project Project Support Contract between Florida Municipal Power Agency and Kissimmee Utility Authority, attached hereto as Exhibits "D" and "E", respectively, are hereby approved and the Chairman and Secretary/Treasurer are hereby authorized to execute and deliver the aforesaid contracts at such time as the Amendment to the Transmission Agreement with Florida Power & Light Company is obtained as is set forth in Section 6 hereof.

SECTION 4. APPROVAL OF STANTON II ASSIGNMENT. The Assignment Between City of Homestead and Kissimmee Utility Authority of an 8.24435% Power Entitlement Share in the Stanton II Project, a copy of which is attached hereto as Exhibit "F," is hereby approved.

SECTION 5. APPROVAL OF AMENDMENT NO. 1 TO CITY OF HOMESTEAD'S STANTON II POWER SALES AND PROJECT SUPPORT CONTRACTS AND AMENDMENT NO. 2 TO KISSIMMEE UTILITY AUTHORITY'S STANTON II POWER SALES AND PROJECT SUPPORT CONTRACTS. The Amendment No. 1 to the City of Homestead's Stanton II Power Sales and Project Support Contracts and Amendment No. 2 to the Kissimmee Utility Authority's Stanton II Power Sales and Project Support Contracts, copies of which are attached hereto, respectively, as Exhibits "G", "H", "I" and "J" are hereby approved and the Chairman and Secretary/Treasurer are hereby authorized to execute and deliver the aforesaid amendments at such time as the Amendment to the Transmission Agreement with Florida Power & Light Company is obtained as set forth in Section 6 hereof.

SECTION 6. APPROVAL SUBJECT TO OBTAINING AMENDMENT TO TRANSMISSION AGREEMENT. The approval of the documents set forth in Sections 1 through 5 above is subject to FMPA obtaining an Amendment to the Stanton Transmission Agreement Between Florida Power & Light Company and the Florida Municipal Power Agency reducing Homestead's Contract Demand by 50%. In the event Florida Municipal Power Agency is unable to obtain such an amendment, this Resolution shall be deemed rescinded by the Board of Directors of Florida Municipal Power Agency.

SECTION 7. EFFECTIVE DATE. This Resolution shall take effect immediately upon its adoption.

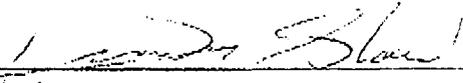
APPROVED AND ADOPTED by the Board of Directors of Florida Municipal Power Agency on July 20, 1995.

Attest:

FLORIDA MUNICIPAL POWER AGENCY



Secretary/Treasurer



Chairman

(SEAL)

c:\wpdoc\1\mpa\home\ee\1\mpa.ms.b11

A RESOLUTION OF THE KISSIMMEE UTILITY AUTHORITY, (I) MAKING CERTAIN FINDINGS; (II) AUTHORIZING AND APPROVING THE ASSIGNMENT BETWEEN CITY OF HOMESTEAD AND KISSIMMEE UTILITY AUTHORITY OF A 12.195% POWER ENTITLEMENT SHARE IN THE STANTON PROJECT; (III) AUTHORIZING AND APPROVING THE STANTON PROJECT POWER SALES CONTRACT AND STANTON PROJECT PROJECT SUPPORT CONTRACT; AND (IV) PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE KISSIMMEE UTILITY AUTHORITY OF THE CITY OF KISSIMMEE, FLORIDA:

SECTION 1. FINDINGS. It is hereby ascertained, determined and declared that:

- 1.0.1 The Kissimmee Utility Authority ("KUA") and the City of Homestead ("Homestead") have heretofore entered into the Agreement Between City of Homestead and Kissimmee Utility Authority For Transfer of 50% of City of Homestead's Power Entitlement Share of Stanton and Stanton II Projects, or, in the Alternative, the Transfer of All of Homestead's Stanton II Power Entitlement Share ("Transfer Agreement"), a copy of which is attached hereto as Exhibit "A."
- 1.0.2 Pursuant to the terms and conditions of the Transfer Agreement, Homestead has agreed to transfer to KUA a 12.195% Power Entitlement Share in the Stanton Project.
- 1.0.3 The Assignment Between the City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment") implementing and effectuating the Transfer Agreement is attached hereto as Exhibit "B."
- 1.0.4 KUA is not currently a Project Participant in the Stanton Project but desires to become a Project Participant by effect of the Transfer Agreement and the Assignment.

SECTION 2. APPROVAL OF ASSIGNMENT. The Assignment attached hereto as Exhibit B is hereby approved and the Chairman and Secretary of the Authority are hereby authorized to execute and deliver the Assignment.

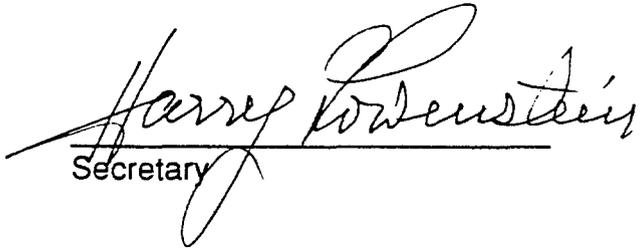
SECTION 3. APPROVAL OF STANTON PROJECT POWER SALES CONTRACT AND STANTON PROJECT PROJECT SUPPORT CONTRACT. The Stanton Project Power Sales Contract and Stanton Project Project Support Contract between Florida Municipal Power Agency and Kissimmee Utility Authority, attached hereto as Exhibits "C" and "D", respectively, are hereby approved and the Chairman and Secretary of the Authority are hereby authorized to execute and deliver them to Florida Municipal Power Agency.

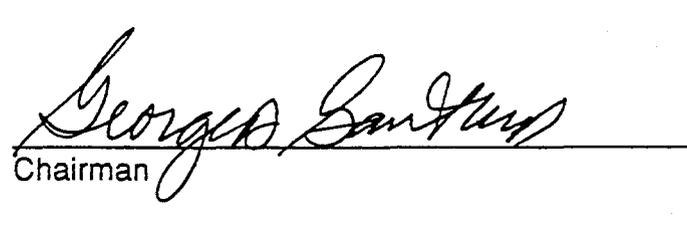
SECTION 4. EFFECTIVE DATE. This Resolution shall take effect immediately upon its adoption.

APPROVED AND ADOPTED by the Kissimmee Utility Authority on
July 26, _____, 1995.

Attest:

KISSIMMEE UTILITY AUTHORITY


Secretary


Chairman

(SEAL)

**ASSIGNMENT BETWEEN CITY OF HOMESTEAD AND
KISSIMMEE UTILITY AUTHORITY OF A 12.195%
POWER ENTITLEMENT SHARE IN THE STANTON PROJECT**

This Assignment hereby entered into this 26th day of July, 1995, between the City of Homestead ("Homestead") and the Kissimmee Utility Authority ("KUA") (jointly hereafter "the Parties" or singularly, "the Party").

W I T N E S S E T H :

WHEREAS, Homestead is a Project Participant in the FMPA Stanton Project with a 24.390% Power Entitlement Share; and

WHEREAS, due to unforeseen circumstances and power supply factors primarily attributed to Hurricane Andrew, Homestead has an excess power supply and its present 24.390% Power Entitlement Share of the Stanton Project is not entirely needed; and

WHEREAS, KUA is not a Project Participant in the Stanton Project, but desires to assume and be assigned 50% of Homestead's Power Entitlement Share; and

WHEREAS, Homestead did on January 16, 1984, enter into the Stanton Power Sales Contract and the Stanton Project Support Contract, which are in full force and effect; and

WHEREAS, Homestead and KUA have on the 10th day of April, 1995, entered into the Transfer Agreement.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and for Ten and No/100 (\$10.00) Dollars and other mutual and valuable considerations, the receipt of which is hereby acknowledged, the Parties agree as follows:

Section 1 - Definitions - as used herein

1.1 Assignment - Means this Assignment between City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project.

1.2 Bonds - Means the Bonds from time to time issued by FMPA to pay any part of the cost incurred by FMPA for the planning, design, engineering, licensing, acquisition, construction, operation, maintenance, repair, renewal, replacement, improvement, modification, decommissioning and disposal of Stanton Unit No. 1.

1.3 FMPA - The Florida Municipal Power Agency, a validly created and existing legal entity pursuant to Section 163.01, Florida Statutes (1993).

1.4 Participation Agreement - The Participation Agreement between Orlando Utilities Commission and Florida Municipal Power Agency (Stanton Project) made as of January 16, 1984, as amended, and as may be further amended from time to time.

1.5 Power Entitlement Share - Means Homestead's 24.390% of the Project Capability as defined in the Power Sales Contract, as the same may be adjusted from time to time in accordance with the provisions of the Power Sales Contract.

1.6 Power Sales Contract - The Stanton Project Power Sales Contract made and entered into as of January 16, 1984, by and between FMPA and Homestead, as amended, and as may be further amended from time to time.

1.7 Project Support Contract - The Stanton Project Project Support Contract made and entered into as of January 16, 1984, by and between FMPA and Homestead, as amended, and as may be further amended from time to time.

1.8 Stanton Project - FMPA's undivided ownership interest in the Curtis H. Stanton Energy Center Unit One.

1.9 Transfer Agreement - The Agreement between City of Homestead and Kissimmee Utility Authority for Transfer of 50% of City of Homestead's Power Entitlement Share of Stanton and Stanton II Projects, or In the Alternative, the Transfer of All of Homestead's Stanton II Power Entitlement Share.

1.10 Construction - In this Assignment, unless the context otherwise requires:

(i) The terms "hereby," "hereof," "hereto," "herein," "hereunder" and any similar terms refer to this Assignment, and the term "hereafter" shall mean after, and the term "heretofore" shall mean before, the date of execution of this Assignment.

(ii) Words of the masculine gender shall mean and include correlative words of the feminine and neuter genders, and words importing the singular number shall mean and include the plural number and vice versa.

Section 2 - Effective Date and Term

2.1 This Assignment shall be effective upon its execution and delivery by the respective governing body of each Party. This Assignment may be executed simultaneously in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

2.2 Term of Assignment - This Assignment shall remain in effect until the latter of (i) the date the principal of, premium, if any, and interest on all Bonds have been paid or funds set aside for the payment thereof, or (ii) the date Curtis H. Stanton Energy Center Unit One is decommissioned or finally disposed of as an electric generating unit

pursuant to the Participation Agreement or the interest of FMPA in Curtis H. Stanton Energy Center Unit One is terminated pursuant to the Participation Agreement or is otherwise disposed of, or (iii) the date all obligations of FMPA under the Participation Agreement have been paid, performed or duly provided for as provided therein.

Section 3 - Applicable Law

3.1 This Assignment is made under and shall be governed by the laws of the State of Florida.

Section 4 - Assignment

4.1 Subject to the provisions of this Assignment and subject to the provisions of Sections 27 and 28 of the Power Sales Contract and Section 13 of the Project Support Contract, Homestead hereby assigns and transfers to KUA one-half (1/2) of its right, title and interest in its Power Entitlement Share of the Stanton Project, hereby reducing Homestead's Power entitlement Share to 12.195%. KUA hereby accepts said assignment and transfer of the 12.195% Power Entitlement Share and agrees to assume the corresponding obligations of Homestead under the Power Sales Contract and Project Support Contract. This assignment and transfer shall not relieve Homestead of any of its obligations under the Power Sales Contract or Project Support Contract.

4.2 If KUA decides at any time to sell and/or transfer (other than by operation of the default provisions of the Power Sales Contract or the Project Support Contract) all or any portion of the 12.195% Power Entitlement Share acquired from Homestead (or any entitlement in the Stanton Project), Homestead shall have the right of first refusal, subject to the provisions of the Power Sales Contract and Project Support Contract, to purchase

and/or have transferred to it such entitlement up to the 12.195% Power Entitlement Share being transferred herein under the same terms and conditions being offered by KUA to others with respect to such sale and/or transfer. KUA shall immediately notify Homestead in writing of any such proposed sale and/or transfer and thereafter Homestead shall notify KUA in writing within 30 days of its exercise of its option.

Section 5 - Hold Harmless and Indemnification

5.1 As of the effective date of this Assignment, KUA agrees to assume and hold harmless and indemnify Homestead for any and all payments, duties or obligations which Homestead has incurred, may incur or would incur pursuant to the Power Sales Contract, Project Support Contract or Participation Agreement to the extent of the 12.195% Power Entitlement Share being assigned hereto.

Section 6 - Default

6.1 An event of default under this Assignment shall occur upon failure on the part of either Party to make any payments as required herein or to meet any obligations as required herein.

6.2 The non-defaulting Party shall promptly notify the defaulting Party in writing of any event of default. If such default is not remedied within thirty days of such notice, the non-defaulting Party shall have the right to take any available legal action or remedy to enforce the terms of this Assignment or to remedy the default.

6.3 An event of default under this Assignment shall not be construed as a termination of this Assignment, and all of the duties and obligations of the defaulting Party shall remain in full force and effect as if such default had not occurred.

6.4 An event of default by KUA under the Power Sales Contract or the Project Support Contract shall not be construed as a termination of this Assignment.

6.5 In the event of default as specified herein, the defaulting party shall pay all reasonable attorneys' fees and costs incurred in enforcing any rights, remedies or obligations under the terms of this Assignment.

Section 7 - Miscellaneous Provisions

7.1 In the event that any of the terms, covenants, or conditions of this Assignment or its application shall be held invalid as to any person, corporation, or circumstance by any court having jurisdiction, the remainder of this Assignment and the application and effects of its terms, covenants, or conditions to such persons, corporation, or circumstance shall not be affected thereby.

7.2 Any notice, demand, or request required or authorized by this Assignment shall be deemed properly given if mailed certified mail, return receipt requested, to the affected Party at the address as shown on Exhibit 1 attached hereto.

7.3 All the provisions of this Assignment are subject to the rights of FMPA under the Power Sales Contract and the Project Support Contract and this Assignment shall not take effect until approved by the Board of Directors of FMPA.

(SEAL)

ATTEST:

Valera J. Burch
Title: City Clerk

CITY OF HOMESTEAD

BY: *J. W. [Signature]*
Title: Mayor

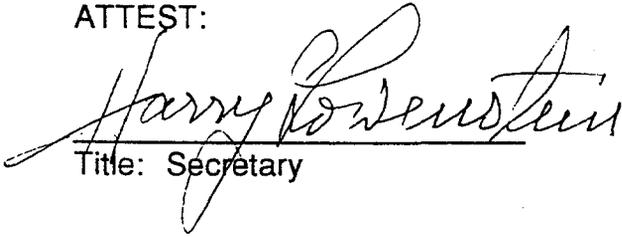
Approved as to Form and Contents:

BY: *[Signature]*
City Attorney

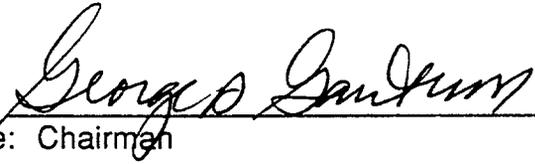
(SEAL)

KISSIMMEE UTILITY AUTHORITY

ATTEST:



Title: Secretary

BY: 

Title: Chairman

Approved as to Form and Contents:

BY: 

Authority Attorney

c:\wpdocs\mpa\homesteal\stanton\assignme

EXHIBIT 1

City of Homestead
790 N. Homestead Boulevard
Homestead, Florida 33030
Attn: Will Rudd, City Manager

Kissimmee Utility Authority
1701 W. Carroll Street
Kissimmee, Florida 34742-3219
Attn: James C. Welsh, General Manager

**AMENDMENT NO. 1 TO THE STANTON PROJECT
POWER SALES CONTRACT BETWEEN FLORIDA
MUNICIPAL POWER AGENCY AND CITY OF HOMESTEAD, FLORIDA**

This Amendment No. 1 to the Stanton Project Power Sales Contract Between Florida Municipal Power Agency and City of Homestead, Florida, is hereby entered into by and between the Florida Municipal Power Agency and the City of Homestead on this 12th day of September, 1995.

W I T N E S S E T H:

WHEREAS, the City of Homestead ("Homestead") and the Florida Municipal Power Agency ("FMPA") entered into the Stanton Project Power Sales Contract between Florida Municipal Power Agency and City of Homestead, Florida ("Homestead's Stanton Power Sales Contract"), dated January 16, 1984, whereby Homestead acquired a 24.390% Power Entitlement Share in the Stanton Project; and

WHEREAS, Homestead, due to unforeseen circumstances primarily attributed to Hurricane Andrew, will be unable to economically utilize its entire Power Entitlement Share in the Stanton Project; and

WHEREAS, the Kissimmee Utility Authority ("KUA") does not currently have a Power Entitlement Share in the Stanton Project but desires to acquire one-half (1/2) of Homestead's Power Entitlement Share; and

WHEREAS, Homestead and KUA have entered into the Assignment Between City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment"), a copy of which is attached hereto as Exhibit "A"; and

WHEREAS, Annex 1 to Homestead's Stanton Power Sales Contract needs to be amended to reflect Homestead's Power Entitlement Share being reduced to 12.195%.

NOW THEREFORE, Homestead and FMPA hereby agree that:

A) Annex 1 of Homestead's Stanton Power Sales Contract is hereby amended by this Amendment No. 1 to reflect a reduction of Homestead's Power Entitlement Share from 24.390% to 12.195% and to reflect KUA obtaining a 12.195% Power Entitlement Share, a copy of the Amended Annex 1 being attached hereto as Exhibit "B."

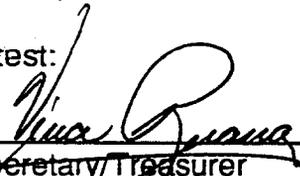
B) No other provisions of Homestead's Stanton Power Sales Contract shall be amended by this Amendment No. 1.

C) The Assignment between Homestead and KUA (Exhibit "A") was entered into pursuant to Sections 27 and 28 of Homestead's Stanton Power Sales Contract and the Assignment does not relieve Homestead or KUA of any obligations thereunder.

IN WITNESS WHEREOF, FMPA and Homestead have caused this Amendment No. 1 to be executed by their proper officers, respectively, being thereunto duly authorized and their corporate seals to be hereto affixed as of the day and year first above written.

(SEAL)

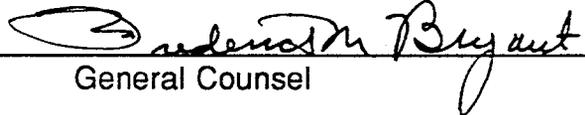
Attest:


Secretary/Treasurer

FLORIDA MUNICIPAL POWER AGENCY

By: 
Chairman

Approved as to Form and Correctness:

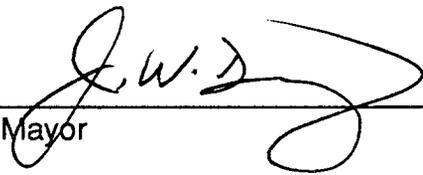

General Counsel

(SEAL)

Attest:


City Clerk

CITY OF HOMESTEAD

By: 
Mayor

Approved as to Form and Correctness:


City Attorney

AMENDED ANNEX 1

SCHEDULE OF PROJECT PARTICIPANTS

| <u>Name and Address of Participant</u> | <u>Power Entitlement Share</u> |
|---|--------------------------------|
| Fort Pierce Utilities Authority P.O. Box 3191 Fort Pierce, FL 33450 | 24.390% |
| City of Homestead 790 N. Homestead Blvd. Homestead, FL 33030 | 12.195% |
| City of Lake Worth 1776 Lake Worth Road Lake Worth, FL 33460 | 16.260% |
| City of Starke P.O. Drawer "C" Starke, FL 32091 | 2.439% |
| City of Vero Beach P.O. Box 1389 Vero Beach, FL 32960 | 32.521% |
| Kissimmee Utility Authority 1701 W. Carroll Street Kissimmee, FL 34742-3219 | 12.195% |
| Total | 100.000% |

**AMENDMENT NO. 1 TO THE STANTON PROJECT
PROJECT SUPPORT CONTRACT BETWEEN FLORIDA
MUNICIPAL POWER AGENCY AND CITY OF HOMESTEAD, FLORIDA**

This Amendment No. 1 to the Stanton Project Project Support Contract Between Florida Municipal Power Agency and City of Homestead, Florida, is hereby entered into by and between the Florida Municipal Power Agency and the City of Homestead on this 12th day of September, 1995.

W I T N E S S E T H:

WHEREAS, the City of Homestead ("Homestead") and the Florida Municipal Power Agency ("FMPA") entered into the Stanton Project Project Support Contract between Florida Municipal Power Agency and City of Homestead, Florida (Homestead's Stanton Project Support Contract"), dated January 16, 1984, whereby Homestead acquired a 24.390% Power Entitlement Share in the Stanton Project; and

WHEREAS, Homestead, due to unforeseen circumstances primarily attributed to Hurricane Andrew, will be unable to economically utilize its entire Power Entitlement Share in the Stanton Project; and

WHEREAS, the Kissimmee Utility Authority ("KUA") does not currently have a Power Entitlement Share in the Stanton Project but desires to acquire one-half (1/2) of Homestead's Power Entitlement Share; and

WHEREAS, Homestead and KUA have entered into the Assignment Between City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement

Share in the Stanton Project ("Assignment"), a copy of which is attached hereto as Exhibit "A"; and

WHEREAS, Annex 1 to Homestead's Stanton Project Support Contract needs to be amended to reflect Homestead's Power Entitlement Share being reduced to 12.195%.

NOW THEREFORE, Homestead and FMPA hereby agree that:

A) Annex 1 of Homestead's Stanton Project Support Contract is hereby amended by this Amendment No. 1 to reflect a reduction of Homestead's Power Entitlement Share from 24.390% to 12.195% and to reflect KUA obtaining a 12.195% Power Entitlement Share, a copy of the Amended Annex 1 being attached hereto as Exhibit "B."

B) No other provisions of Homestead's Stanton Project Support Contract shall be amended by this Amendment No. 1.

C) The Assignment between Homestead and KUA (Exhibit "A") was entered into pursuant to Section 13 of Homestead's Stanton Project Support Contract and the Assignment does not relieve Homestead or KUA of any obligations thereunder.

IN WITNESS WHEREOF, FMPA and Homestead have caused this Amendment No. 1 to be executed by their proper officers, respectively, being thereunto duly authorized and their corporate seals to be hereto affixed as of the day and year first above written.

(SEAL)

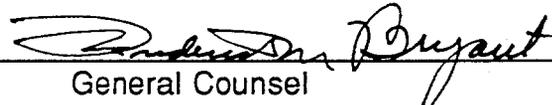
Attest:


Secretary/Treasurer

FLORIDA MUNICIPAL POWER AGENCY

By: 
Chairman

Approved as to Form and Correctness:

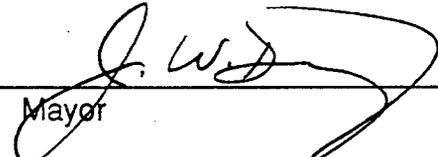

General Counsel

(SEAL)

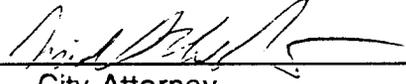
Attest:


City Clerk

CITY OF HOMESTEAD

By: 
Mayor

Approved as to Form and Correctness:


City Attorney

AMENDED ANNEX 1

SCHEDULE OF PROJECT PARTICIPANTS

| <u>Name and Address of Participant</u> | <u>Power Entitlement Share</u> |
|---|--------------------------------|
| Fort Pierce Utilities Authority P.O. Box 3191 Fort Pierce, FL 33450 | 24.390% |
| City of Homestead 790 N. Homestead Blvd. Homestead, FL 33030 | 12.195% |
| City of Lake Worth 1776 Lake Worth Road Lake Worth, FL 33460 | 16.260% |
| City of Starke P.O. Drawer "C" Starke, FL 32091 | 2.439% |
| City of Vero Beach P.O. Box 1389 Vero Beach, FL 32960 | 32.521% |
| Kissimmee Utility Authority 1701 W. Carroll Street Kissimmee, FL 34742-3219 | 12.195% |
| <hr/> | |
| Total | 100.000% |

FLORIDA MUNICIPAL POWER AGENCY

**Certificate of the Secretary-Treasurer
Pursuant to Section 713 of the Stanton
Project Revenue Bond Resolution**

I, Vicente R. Ruano, Secretary-Treasurer of Florida Municipal Power Agency, a legal entity organized under the laws of the State of Florida, DO HEREBY CERTIFY, pursuant to Section 713 of the Stanton Project Revenue Bond Resolution as follows:

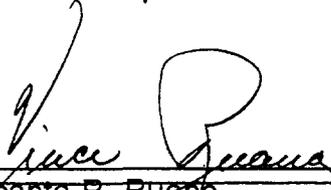
1. Amendment No. 1 to Stanton Project Power Sales Contract Between Florida Municipal Power Agency and City of Homestead and Amendment No. 1 to Stanton Project Project Support Contract Between Florida Municipal Power Agency and City of Homestead (copies of which are attached hereto respectively as Exhibits "A" and "B") and the Stanton Power Sales Contract and the Stanton Project Project Support Contract between Florida Municipal Power Agency and Kissimmee Utility Authority (copies of which are attached hereto respectively as Exhibits "C" and "D") were duly approved and adopted by the Board of Directors of the Florida Municipal Power Agency at a meeting duly called and held on July 20, 1995, at which meeting a quorum was present and acting throughout. These Amendments and Contracts have not been modified, amended or rescinded and they are in full force and effect on the date hereof.

2. A copy of the Consent of Orlando Utilities Commission to Assignment Between City of Homestead and Kissimmee Utility Authority of Homestead's 12.195% Power Entitlement Share in the Stanton Project is attached hereto as Exhibit E and it

has not been modified, amended or rescinded and is in full force and effect on the date hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Florida Municipal Power Agency this 12th day of September 1995.

(SEAL)



Vicente R. Ruano
Secretary-Treasurer

**CONSENT OF ORLANDO UTILITIES COMMISSION
TO ASSIGNMENT BETWEEN CITY OF HOMESTEAD AND
KISSIMMEE UTILITY AUTHORITY OF 50% OF HOMESTEAD'S 24.390%
POWER ENTITLEMENT SHARE IN THE STANTON PROJECT**

WHEREAS, the Orlando Utilities Commission ("OUC") and the Florida Municipal Power Agency ("FMPA") have heretofore entered into the Participation Agreement Between Orlando Utilities Commission and Florida Municipal Power Agency for the Joint Ownership of Curtis H. Stanton Energy Center Unit One Generation Project ("Participation Agreement"); and

WHEREAS, pursuant to Section 7.01 of the aforesaid Participation Agreement, the City of Homestead ("Homestead") is a FMPA Participating Member (as said term is defined in Section 1.15 of the Participation Agreement) and as such Homestead was designated on Exhibit I of the Participation Agreement as one of the "List of FMPA Participating Members"; and

WHEREAS, FMPA has informed OUC that Homestead due to unforeseen circumstances and power supply factors primarily attributed to Hurricane Andrew, has an excess power supply and that Homestead can no longer economically utilize all of its Stanton Project Power Entitlement Share; and

WHEREAS, FMPA has informed OUC that the Kissimmee Utility Authority ("KUA") desires to acquire one-half (1/2) of Homestead's 24.390% Power Entitlement Share; and

WHEREAS, Homestead and KUA have executed the Assignment between City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment"), a copy of which is attached hereto as Exhibit "A"; and

WHEREAS, FMPA and KUA have entered into the Stanton Power Sales Contract and Stanton Project Support Contract, copies of which are attached hereto as Exhibits "B" and "C" respectively and, thus, KUA is now a FMPA Participating Member as defined in Section 1.15 of the Participation Agreement; and

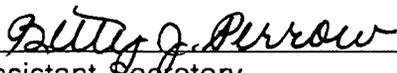
WHEREAS, pursuant to Section 7.01 of the Participation Agreement, OUC is consenting to the aforesaid Assignment and addition of KUA as a FMPA Participating Member.

NOW THEREFORE, OUC hereby consents to and approves the Assignment attached hereto as Exhibit "A" and the Amended Exhibit I to the Participation Agreement attached hereto as Exhibit "D."

IN WITNESS HEREOF, OUC has caused this Consent to be executed by its duly authorized officers on this 10th day of OCTOBER, 1995.

ORLANDO UTILITIES COMMISSION

BY: 
General Manager & CEO

Attest: 
Assistant Secretary

(SEAL)

**ASSIGNMENT BETWEEN CITY OF HOMESTEAD AND
KISSIMMEE UTILITY AUTHORITY OF A 12.195%
POWER ENTITLEMENT SHARE IN THE STANTON PROJECT**

This Assignment hereby entered into this 26th day of July, 1995, between the City of Homestead ("Homestead") and the Kissimmee Utility Authority ("KUA") (jointly hereafter "the Parties" or singularly, "the Party").

W I T N E S S E T H :

WHEREAS, Homestead is a Project Participant in the FMPA Stanton Project with a 24.390% Power Entitlement Share; and

WHEREAS, due to unforeseen circumstances and power supply factors primarily attributed to Hurricane Andrew, Homestead has an excess power supply and its present 24.390% Power Entitlement Share of the Stanton Project is not entirely needed; and

WHEREAS, KUA is not a Project Participant in the Stanton Project, but desires to assume and be assigned 50% of Homestead's Power Entitlement Share; and

WHEREAS, Homestead did on January 16, 1984, enter into the Stanton Power Sales Contract and the Stanton Project Support Contract, which are in full force and effect; and

WHEREAS, Homestead and KUA have on the 10th day of April, 1995, entered into the Transfer Agreement;

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and for Ten and No/100 (\$10.00) Dollars and other mutual and valuable considerations, the receipt of which is hereby acknowledged, the Parties agree as follows:

STANTON PROJECT

POWER SALES CONTRACT

BETWEEN

FLORIDA MUNICIPAL POWER AGENCY

AND

KISSIMMEE UTILITY AUTHORITY
KISSIMMEE, FLORIDA

EXHIBIT "B"

STANTON PROJECT

PROJECT SUPPORT CONTRACT

BETWEEN

FLORIDA MUNICIPAL POWER AGENCY

AND

KISSIMMEE UTILITY AUTHORITY
KISSIMMEE, FLORIDA

EXHIBIT "C"

AMENDED EXHIBIT I

LIST OF FMPA PARTICIPATING MEMBERS

Fort Pierce Utilities Authority

City of Homestead

Lake Worth Utilities Authority

City of Starke

City of Vero Beach

Kissimmee Utility Authority



201 Lake Ellenor Drive
Orlando, Florida 32809-5769
407) 859-7310 Fax (407) 856-6553
800 859-0744

November 9, 1995

Mr. John Incorvaia
Vice President SE Region
Moody's Investors Service
99 Church Street
New York, NY 10007

Dear John:

Re: Assignment Between City of Homestead and Kissimmee Utility
Authority of a 12.195% Power Entitlement Share in the
Stanton Project

For informational purposes, please find enclosed a copy of the
Assignment Between City of Homestead and Kissimmee Utility
Authority of a 12.195% Power Entitlement Share in the Stanton
Project ("Assignment"), together with the Consent to this Assign-
ment of MBIA Insurance Corporation, the bond insurer on the
Stanton Project Revenue Bonds.

Pursuant to the provisions of Sections 27 and 28 of the Stanton
Power Sales Contract, Section 13 of the Stanton Project Support
Contract and Section 4 of the enclosed Assignment, KUA has assumed
50% of the obligations of Homestead under the Stanton Power Sales
and Project Support Contracts.

However, this Assignment does not relieve Homestead of any of its
financial obligations under the aforesaid Stanton Power Sales and
Project Support Contracts.

Should you have any questions, please feel free to contact me.

Sincerely,

Melinda S. Short
Director of Finance

MSS/sl
Enclosures



7201 Lake Ellenor Drive
Orlando, Florida 32809-5769
(407) 859-7310 Fax (407) 856-6553
1 800 859-0744

November 9, 1995

Ms. Mary Colby
Standard and Poor's Corporation
Municipal Finance Department
25 Broadway 20th Floor
New York, NY 10004-1064

Dear Mary:

Re: Assignment Between City of Homestead and Kissimmee Utility
Authority of a 12.195% Power Entitlement Share in the
Stanton Project

For informational purposes, please find enclosed a copy of the
Assignment Between City of Homestead and Kissimmee Utility
Authority of a 12.195% Power Entitlement Share in the Stanton
Project ("Assignment"), together with the Consent to this Assign-
ment of MBIA Insurance Corporation, the bond insurer on the
Stanton Project Revenue Bonds.

Pursuant to the provisions of Sections 27 and 28 of the Stanton
Power Sales Contract, Section 13 of the Stanton Project Support
Contract and Section 4 of the enclosed Assignment, KUA has assumed
50% of the obligations of Homestead under the Stanton Power Sales
and Project Support Contracts.

However, this Assignment does not relieve Homestead of any of its
financial obligations under the aforesaid Stanton Power Sales and
Project Support Contracts.

Should you have any questions, please feel free to contact me.

Sincerely,

Melinda S. Short
Director of Finance

MSS/sl
Enclosures



7201 Lake Ellenor Drive
Orlando, Florida 32809-5769
(407) 859-7310 Fax (407) 856-6553
1 800 859-0744

November 9, 1995

Mr. William Pinakiewicz
Vice President
Smith Barney, Inc.
390 Greenwich Street
2nd Floor
New York, NY 10013

Dear Bill:

Re: Assignment Between City of Homestead and Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project

Please find enclosed a copy of the Assignment Between the City of Homestead and the Kissimmee Utility Authority of a 12.195% Power Entitlement Share in the Stanton Project ("Assignment"). I am also enclosing a copy of the Consent from AMBAC Indemnity Corporation to this Assignment.

You will note in Section 4 of the aforesaid Assignment that Homestead is not relieved of any of its financial obligations under the Stanton Power Sales or Project Support Contracts.

Should you have any questions, please feel free to contact me.

Sincerely,

Melinda S. Short
Director of Finance

MSS/sl
Enclosures