FILE 2787 – March 4, 2022

CONFLICT OF INTEREST; VOTING CONFLICT

MEMBER OF BOARD OF GOVERNORS OF STATE UNIVERSITY SYSTEM SERVING AS OFFICER IN CORPORATION WHOSE PARENT COMPANY OWNS SEPARATE SUBSIDIARY DOING BUSINESS WITH A STATE UNIVERSITY

To: Vikki R. Shirley, Esq., General Counsel, Board of Governors (Tallahassee)

SUMMARY:

Under the specific circumstances presented, a prohibited conflict of interest would not be created under Sections 112.313(3) or 112.313(7)(a), Florida Statutes, were the Board of Governors of the State University System to approve a project agreement involving a state university and a corporation, when a serving Board member owns stock in the corporation's parent company and serves as a paid officer of a separate subsidiary of the parent company. However, the Board member is required to comply with the voting and participation conflicts laws in Section 112.3143, Florida Statutes, in any matters concerning the project agreement. Referenced are CEO 20-10, CEO 20-3, CEO 18-12, CEO 17-12, CEO 12-15, CEO 11-13, CEO 11-5, CEO 09-2, CEO 09-1, CEO 05-8, CEO 03-13, CEO 99-13, CEO 94-5, CEO 93-11, CEO 86-36, and CEO 86-12.

QUESTION 1:

Would a prohibited conflict of interest be created if a member of the Board of Governors of the State University System serves as a paid officer of a corporation when that corporation's parent company owns a separate subsidiary conducting business with a state university?

Under the circumstances presented, Question 1 is answered in the negative.

In your letter of inquiry and additional information provided to our staff, you indicate you are inquiring on behalf of a member of the Board of Governors for the State University System (Board). The Board member was appointed to his position by the Governor,[1] and the Board itself oversees the State University System, of which the University of Florida (UF) is a member.[2] While the Board has general responsibilities concerning the institutions within the State University System, each university is directly administered by its own board of trustees.[3]

In addition to serving on the Board, the member in question is also employed as the Chief Executive Officer of Florida Power and Light Company (FPL). FPL, you relate, is a wholly-owned subsidiary of NextEra Energy, Inc. (NEE), a publicly-traded corporation with operations spanning the United States and Canada. You state that—as the parent company—NEE appointed the Board member to his position with FPL and plays an active role in FPL's operation, with the companies sharing several of the same executive officers. You also relate the Board member has a personal ownership interest in NEE, as he owns approximately 160,917 total shares of NEE stock.[4]

However, from what you indicate, NEE currently has 1,962,000,000 shares of publicly-traded stock, meaning the Board member's ownership interest equates to less than .0001%. You

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[1] Section 7(d) of Article IX of the State Constitution allows the Governor to appoint fourteen of the seventeen members of the Board, subject to confirmation by the State Senate. See also Section 1001.70(1), Florida Statutes.

[2] Section 1000.21(6), Florida Statutes, lists the institutions included in the State University System.

[3] While Section 7 of Article IX of the State Constitution states the Board "shall operate, regulate, control, and be fully responsible for the management of the whole university system," it also states the local boards of trustees are responsible for administering each constituent university.

[4] In particular, you indicate the Board member owns 144,977 shares of stock in NEE and has an

also relate the Board member's service as an officer is with FPL alone; and state that he is not an officer, partner, director, or proprietor of NEE. And since NEE currently has over one thousand subsidiaries,[5] you state the Board member's company—FPL—is operated separate and independent from the other subsidiaries that NEE owns.

This point is especially germane to your inquiry, which concerns a separate NEE subsidiary named DG Concession Holdings, LLC (DG Concession Holdings). DG Concession Holdings is owned by a series of companies, all of which are ultimately owned by NEE.[6] You emphasize the Board member has no ownership interest in—and is not an officer, partner, director, or proprietor of—DG Concession Holdings, and has no ownership in, or status in relation to, any other corporate entity involved with DG Concession Holdings, apart from his ownership of NEE stock.

Your inquiry focuses upon the potential interface that DG Concession Holdings may have with UF. More specifically, you indicate DG Concession Holdings is part of a private consortium called Gator Campus Energy, which is an entity comprised of DG Concession Holdings and two other companies, with all the companies involved serving as equal partners.[7] Gator Campus Energy has responded to an Invitation to Negotiate (ITN) issued by UF, and recently learned it has been added to the short list of companies eligible to submit a more refined proposal. In the event that UF selects Gator Campus Energy as its preferred vendor, the University will present for the Board's

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additional 15,940 shares in a retirement savings plan.

[5] Publicly available information compiled on December 31, 2016, indicates NEE has 864 subsidiaries operating in the United States and 187 other subsidiaries worldwide. See https://www.sec.gov/Archives/edgar/data/37634/000075330817000060/nee-12312016ex21.htm.

[6] You state DG Concession Holdings is wholly owned by DG 1, which in turn is wholly owned by ESI Energy, LLC, which in turn is wholly owned by NextEra Energy Resources, LLC, which is a wholly owned subsidiary of NextEra Energy Capital Holdings, Inc., which a wholly owned subsidiary of NEE.

[7] You relate the other two companies partnering in Gator Campus Energy—those companies

approval a project agreement between UF and Gator Campus Energy. Given that DG Concession Holding is part of the Gator Campus Energy consortium—and that DG Concession Holding and FPL are both subsidiaries of NEE—you inquire whether the Board member will have a prohibited conflict of interest were the Board to approve a project agreement between UF and Gator Campus Energy.

You stress that the Board itself plays no role, and will provide no input, in the ITN process or in UF's selection of a private developer. You indicate UF is seeking, through the ITN, a private partner: (1) to assist in designing, financing, constructing, operating, and maintaining a central energy plant on campus which will produce steam, chilled water, and electricity; (2) to finance and construct new thermal distribution pipes to handle the chilled water that the energy plant will produce; and (3) to finance and construct a new electrical substation which will connect the new energy plant's electrical system to Duke Energy facilities. You state UF is, in all respects, following the Board's guidelines for soliciting private partners for capital projects, and that the ITN process is the Board's preferred method for competitively soliciting a private partner. However, you emphasize the Board's sole responsibility—after UF selects its preferred developer—will be to approve the project agreement. And you note the Board will not be a party to the agreement, which will be between UF's Board of Trustees[8] and the developer.

Nor will the Board be involved in implementing the project agreement once it is approved. You indicate the Board will not be overseeing the construction of the energy plant, the distribution pipes, or the electrical substation, and that UF will be overseeing the construction without the

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being Star America and Sacyr—are not NEE subsidiaries.

[8] The boards of trustees of institutions within the State University System have the authority to enter into contracts on behalf of their respective institutions pursuant to Board of Governors

Board's involvement.[9] And, after the different facets of the project are completed, the Board will have a minimal role in their operation. You state that, under the arrangement UF is proposing, the selected developer will operate and maintain the energy plant, while UF will operate and maintain the distribution pipes and the electrical substation, all without any involvement from the Board.

You indicate as well that FPL will not be affected if Gator Campus Energy—the consortium involving DG Concession Holdings—is selected as the project developer. As previously explained, the only parties to the project agreement will be UF's Board of Trustees and Gator Campus Energy, not FPL or NEE. You emphasize FPL will have no responsibilities concerning the project, and will receive no payment or remuneration pursuant to the project agreement. In fact, because UF is outside of FPL's regulated service territory, you state FPL is precluded from being involved in the sale of retail electricity in that region.

Relevant to whether a project agreement involving DG Concession Holdings will present a prohibited conflict of interest for the Board member are the following provisions of the Code of Ethics for Public Officers and Employees:

> DOING BUSINESS WITH ONE'S AGENCY.--No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer's or employee's spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer's or employee's spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services

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Regulation 1.001(2)(g).

[9] You do indicate UF must annually report to the Board on the status of the project, and, if there is a material change in the project agreement, the Board's guidelines for capital projects require UF to obtain the Board's approval before the agreement can be amended.

> to the officer's or employee's own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision . . . This subsection shall not affect or be construed to prohibit contracts entered into prior to:
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> (a) October 1, 1975.
> (b) Qualification for elective office.
> (c) Appointment to public office.
> (d) Beginning public employment.
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> [Section 112.313(3), Florida Statutes]

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIOSHIP.--No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, any agency of which he or she is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. [Section 112.313(7)(a), Florida Statutes]

Section 112.313(3), Florida Statutes, prohibits the Board member from acting in his official capacity, as a public officer, to purchase any realty, goods or services for his agency from a business entity where he is an officer, partner, director, or proprietor, or holds a material interest.[10] A public officer is considered acting in his or her official capacity when a body or board of which he or she is a member acts to purchase realty, goods, or services. See CEO 99-13, Question 1. The statute also prohibits the Board member, acting in a private capacity, from selling any realty, goods, or services to his agency or political subdivision. This can occur if a corporation for which the Board member is an officer or director, or in which he owns a material interest, sells the realty, goods, or services to his agency or political subdivision. See CEO 09-1.

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[10] A "material interest" is defined in Section 112.312(15), Florida Statutes, to mean direct or indirect ownership of more than 5 percent of the total assets or capital stock of a business entity.

Turning to your inquiry, an argument could be made that the Board member's "agency" for purposes of Section 112.313(3) encompasses the Board as well as the institutions within the State University System. See CEO 17-12, Question 2. Accepting this interpretation, any entity doing business with UF's Board of Trustees would be doing business with the Board member's "agency." However, in the event that the Board approves a project agreement with Gator Campus Energy, neither the Board nor UF's Board of Trustees will be purchasing services from a business entity in which the Board member is serving as an officer, partner, director, or proprietor, or in which he has a material interest. From what you indicate, the project agreement will name only Gator Campus Energy as the developer, meaning only Gator Campus Energy and its equity members, such as DG Concession Holdings, will be selling services under the agreement. The Board member has no ownership or officer-ship in Gator Campus Energy or in any of its equity members. FPL—the corporation where the Board member does serve as an officer—will not be involved in the project, and while the Board member owns stock in NEE—the parent company of DG Concession Holdings—he is not an officer, partner, director, or proprietor of NEE, and his ownership interest equates to less than .0001 percent, which is not enough to be considered a "material interest" triggering the statute's application. For these reasons, we find the Board member will not have a prohibited conflict under Section 112.313(3) if the project agreement with Gator Campus Energy is approved.

Regarding Section 112.313(7)(a), Florida Statutes, the statute has two parts. The first part prohibits the Board member from having a contractual relationship with a business entity if that entity is doing business with, or is subject to the regulation of, the Board member's agency. In CEO 99-13, the Commission stated the application of this portion of the statute hinges upon:

> (1) identifying the 'business entity' with which the official has an employment or contractual relationship and (2) [] identifying the 'business entity' that is doing business with the governmental agency, in order to determine whether the official's employment or contractual relationship is with the same 'business entity' that is doing business with his or her agency.

When applying this statutory prohibition, the Commission has, in the past, turned to the definition of a "business entity" contained in Section 112.312(5), Florida Statutes, which defines the term as:

> Any corporation, partnership, limited partnership, company, limited liability company, proprietorship, firm, enterprise, franchise, association, self-employed individual, or trust, whether fictitiously named or not, doing business in this state.

This language specifies "[a]ny corporation . . . doing business in this state[,]" which recognizes the separateness of corporations one from another. See CEO 09-2, Question 1. For this reason, the Commission repeatedly has determined that corporate subsidiaries are separate business entities from each other for purposes of the statute. See, among many, CEO 18-12, CEO 99-13, Question 1, and CEO 05-8. Or, stated another way, even if a public officer has an employment or contractual relationship with a particular corporation, that does not mean he or she also an employment or contractual relationship with that corporation's sibling subsidiaries. See CEO 09-2, Question 1.

Here, in the event that the Board approves the project agreement with Gator Campus Energy, it will be doing business with the entities comprising that energy consortium, including DG Concession Holdings. However, the Board member has no employment or contractual relationship with DG Concession Holdings, only with FPL, which is a separate and distinct corporation. While DG Concession Holdings and FPL are sibling subsidiaries of the same parent

company—NEE—this does not change the analysis. To find otherwise would mean the Board member would have an employment or contractual relationship with each of NEE's over one thousand subsidiaries simply because of his employment with one of them.

Nor will the Board member's stock in NEE—the parent company—trigger the first part of Section 112.313(7)(a) if Gator Campus Energy secures the project agreement. The Board member does have a contractual relationship with NEE by virtue of his stock ownership. See CEO 11-13. However, the Commission has long treated parent corporations as separate business entities from their subsidiaries for purposes of Section 112.313(7)(a). See CEO 11-5, Question 1, CEO 86-36, and CEO 86-12. This again reflects the language in the definition of "business entity" emphasizing the separateness of each corporation.[11] Consistent with these decisions, we find NEE is a separate "business entity" from its corporate subsidiaries for the purposes of Section 112.313(7)(a), and, therefore, the Board member's contractual relationship with NEE does not mean he has that same relationship with DG Concession Holdings. Accordingly, were the Board to approve a project agreement involving DG Concession Holdings, the Board member will not be in violation of the first part of Section 112.313(7)(a), even considering his stock ownership in NEE, because, mechanically speaking, he will not have an employment or contractual relationship with a business entity doing business with his agency.[12]

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[11] The only exception occurs when a parent company serves solely as a holding company for the stock of a wholly owned subsidiary. In such an instance, the parent company and the subsidiary company can be treated as the same "business entity." See CEO 09-2, Question 1, and CEO 94-5, Question 2. However, there is no indication here that NEE's sole function is to serve as the holding company for DG Concession Holdings, such as would be needed to treat the two corporations as the same "business entity" for purposes of Section 112.313(7)(a).

[12] Even if NEE and DG Concession Holdings are considered to be doing business due to the corporate parent relationship, we have advised that Section 112.313(7)(a) does not prohibit a public officer from being employed by, or having a contractual relationship with, a business

We also note the other requirement of this first part of Section 112.313(7)(a) is that the business entity with which the public officer has an employment or contractual relationship must be "doing business" with his or her agency. A business entity is "doing business with" an agency when they have have entered into a lease, contract, or other type of arrangement where one party would have a cause of action against the other in the event of a breach or default. See CEO 20-3, Question 1 and CEO 12-15. Traditionally, contractual relationships with a corporation result in liabilities only for that corporation, not for the shareholders or owners of that corporation. See CEO 99-13, Question 1. Stated another way, because corporations are formed to limit liability, the corporate entities themselves are the only parties legally liable in the event of a breach or default, not their shareholders or owners. Here, only Gator Campus Energy and its equity partners—including DG Concession Holdings—would be held liable for breaching the project agreement. Although NEE is DG Concession Holdings' corporate parent, neither NEE nor any of its other corporate subsidiaries would be liable. Therefore, the Board member would have no employment or contractual relationship with a business entity "doing business" with his agency if the project agreement were approved.

Regarding the second part of Section 112.313(7)(a), the statute prohibits the Board member from holding employment or a contractual relationship that would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties. See CEO 18-12. This part of the statute does not hinge on the public officer's employment or contractual relationship being tied to a business entity doing business with or being regulated by his or her

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entity that is doing business with another business entity, which, in turn, is doing business with

agency. In this respect, it is broader than the first part, and can be triggered based on any employment or contractual relationship that creates a conflict of interest. For the purposes of the statute, the phrase "conflict of interest" is defined in Section 112.312(8), Florida Statutes, to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." To determine whether such a conflict has occurred, the Fourth District Court of Appeal held in Zerweck v. State, Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), that the Commission must examine:

> The nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate and distinct or whether they coincide to create a situation which 'tempts dishonor.'

One instance where we found the second part of the statute applicable was in CEO 18-12, which involved a county commissioner who was employed by a subsidiary of a waste management company. Part of his employment duties involved serving as a marketing sales representative for a sibling subsidiary, and this sibling subsidiary was planning to respond to a Request for Qualifications (RFQ) being issued by the county. In the event that the sibling subsidiary entered into a business relationship with the county, we found the county commissioner would not be in violation of the first part of Section 112.313(7)(a), as the sibling subsidiary was a separate and distinct business entity from the corporation where he was employed. However, we found the arrangement would trigger the second part of Section 112.313(7)(a), as the county commissioner, in his private capacity, would be assisting the sibling subsidiary in performing the county contract while, at the same time, reviewing and overseeing that performance in his public capacity. Because of the overlap between his private employment

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or is regulated by the officer's public agency. See CEO 93-11.

and his public duties, we determined the second part of Section 112.313(7)(a) would be triggered were the county to enter into business with the sibling subsidiary. However, we noted this conflict would not occur if the county commissioner were reassigned to another corporate subsidiary not conducting business with the county, as then he would not have any private employment responsibilities that could affect the performance of his public duties.

Here, unlike in CEO 18-12, we do not find the situation indicates a conflict of interest under the second part of Section 112.313(7)(a). Regarding the Board member's public duties, you relate the Board's only role in the ITN selection process is to vote to approve the developer selected by UF. Otherwise, the Board has no role in the ITN process, will not be asked to provide input to UF, and will not be a party to the project agreement with the developer. And after the developer is selected, you relate the Board will largely leave the construction, management, and operation of the various facets of the project to UF and the developer, and will only become involved if a material change is needed to the project agreement. Accordingly, the Board member will have minimal to no public responsibilities concerning the project, except being asked to approve the project developer.

And, under the facts as submitted, if Gator Campus Energy is selected as the project developer, the Board member will have no private responsibilities concerning the project, and the personal benefit to him, if any, will be minimal. You relate FPL, where the Board member serves as the Chief Executive Officer, will have no responsibilities under the project agreement, and will receive no payment or remuneration of any kind related to the project. Indeed, from what you indicate, FPL cannot even provide services in the area of the State where UF is located. Therefore, it seems unlikely that the Board member's employment with FPL would affect the

performance of his public duties if Gator Campus Energy is selected as the proposed developer.

An argument could be made that the Board member's contractual relationship with NEE, via his stock ownership, could create a conflict of interest were the Board to be asked to approve an agreement involving its subsidiary, DG Concession Holdings. The argument would be that his stock ownership in NEE, and the fact that DG Concession Holdings is an NEE subsidiary, could affect his objectivity in deciding whether to approve the agreement. However, the Board member's stock ownership in NEE equates to a less than .0001% interest. And even if the consortium of which DG Concession Holdings is a member performs work on the project, it is difficult to predict how, and to what degree, this will affect the value of its parent company's stock. Clearly, there will be some economic effect on NEE, as it is the parent company, but the extent of that effect is uncertain. Considering this uncertainty, and coupling that with the Board member's comparatively small interest in NEE and the Board's limited involvement with the project, we find a prohibited conflict of interest does not exist for the Board member under the second part of Section 112.313(7)(a).

While we find that a prohibited conflict of interest will not be created for the Board member were his Board to approve the selection of Gator Campus Energy as the project developer, we caution the Board member that he needs to treat such a vote as a voting conflict under Section 112.3143, Florida Statutes, and respond in accordance with the requirements of that provision, as explained infra in Question 2. Moreover, our decision herein, which was reached based on the unique facts present in this matter, does not preclude our application of the prohibitions contained in Section 112.313(6), Florida Statutes, or Article II, Section 8(g), Florida Constitution, if the Board member engages in conduct indicative of a misuse of public position or

an abuse of public position to obtain a disproportionate benefit.

Question 1 is answered accordingly.

QUESTION 2:

Would a voting conflict of interest occur were a member of the Board of Governors of the State University System to vote to approve the selection of a corporation as a project developer, when that corporation's parent company also owns the Board member's corporate employer?

Under the circumstances presented, Question 2 is answered in the affirmative.

You also inquire whether the Board member would have a voting conflict under Section 112.3143, Florida Statutes, the voting conflict law, in the event that the Board is asked to approve a project agreement involving DG Concession Holdings. The Board member is obligated to comply with the following provisions of Section 112.3143 due to his status as an appointed state officer:

> A state public officer may not vote on any matter that the officer knows would inure to his or her special private gain or loss. Any state public officer who abstains from voting in an official capacity upon any measure that the officer knows would inure to the officer's special private gain or loss, or who votes in an official capacity on a measure that he or she knows would inure to the special private gain or loss of <u>any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained other than an agency as defined in s. 112.312(2)</u>; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer, shall make every reasonable effort to disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. If it is not possible for the state public officer to file a memorandum before the vote, the memorandum must be filed with the person responsible for

> recording the minutes of the meeting no later than 15 days after the vote. [Section 112.3143(2)(a), Florida Statutes]
>
> No appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of this or her interest in the matter. [Section 112.3143(4), Florida Statutes]

(emphasis added).

These statutory provisions indicate the Board member will have a voting conflict if a measure will inure to the special private gain or loss[13] of a "parent organization [] of a corporate principal" by which he is retained. In the past, the Commission has found that a "parent organization" can be a parent company of a corporation where one is employed. See CEO 20-10, CEO 05-8, and CEO 03-13. Therefore, if a vote by the Board will have a financial effect, great or small, on the parent company of the Board member's employer, he should treat the measure as a voting conflict and respond in accordance with the statutory provisions detailed above. Given his status as an appointed state officer, this means he will not be prohibited from voting on the measure, but he must, prior to any participation in the matter, disclose the nature of his interests in the manner set forth in the statutes above.[14]

Here, any vote approving a project agreement with Gator Campus Energy will have an economic effect on DG Concession Holdings and, by extension, its parent company, NEE. While

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[13] The phrase "special private gain or loss" is defined in Section 112.3143(1)(d), Florida Statutes, to mean "an economic benefit or harm … ."

[14] While not quoted herein, Section 112.3143(4) contains additional language clarifying how an appointed officer shall make the required disclosure in the event that he or she wants to

the exact financial effect on NEE may be unclear—and while it may not rise to the level of creating a conflict of interest for the Board member under Section 112.313(7)(a) (See Question 1, above)—it is inevitable that NEE will receive some financial gain or loss from an agreement with its subsidiary. Since NEE is the parent organization of FPL, and since FPL employs the Board member, he will have a voting conflict concerning any project agreement with Gator Campus Energy, and should respond in accordance with the statutory provisions cited above.[15]

Question 2 is answered accordingly.

JG/gps/dw

cc: Vikki R. Shirley, Esq.

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participate in the matter.

[15] In addition, while the Board member does own stock in NEE that may be affected were its subsidiary to secure the project agreement, we do not find the potential economic effect on him will trigger a voting conflict under Section 112.3143(2). Section 112.3143(1)(d)1., Florida Statutes, requires the Commission to consider the "size of the class" that will be affected by a vote when considering whether a vote presents a conflict. Given the fact that NEE is a publicly-traded corporation and that the Board member's ownership comprises less than .0001% of its stock, it appears any financial effect on the Board member will not be "special," as would be needed to find a voting conflict.

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December 17, 2021

Ms. Kerrie Stillman
Executive Director
Florida Commission on Ethics
Post Office Drawer 15709
Tallahassee, Florida 32317-5709

Dear Ms. Stillman:

I serve as the General Counsel for the Board of Governors of the State University System of Florida (Board) and have been authorized to request a formal opinion from the Florida Commission on Ethics (Commission) on behalf of Mr. Eric Silagy, a member of the Board of Governors and the Vice-Chair Elect, to determine whether a potential transaction between DG Concession Holdings, LLC and the University of Florida ("UF") would give rise to any prohibited conflicts of interest under the Code of Ethics for Public Officers and Employees for Mr. Silagy.

Mr. Silagy was appointed to the Board by Governor DeSantis on March 19, 2019. As the governing board for the State University System of Florida pursuant to Article IX, Section 7 of the Florida Constitution, the Board is responsible for the operation, regulation, control and management of the State University System, which is comprised of twelve postsecondary institutions, including UF. Article IX, Section 7 also creates university boards of trustees that are responsible for administering their respective universities.

Mr. Silagy is the Chief Executive Officer for Florida Power and Light Company (FPL), a wholly owned subsidiary of NextEra Energy, Inc. (NEE), a large publicly-traded corporation with business operations spanning the United States and Canada.[1] Mr. Silagy owns 144,977 shares of stock in NEE with an additional 15,940 shares in a retirement savings plan. NEE currently has 1,962,000,000 shares of stock as of its last 10Q report to the Securities and Exchange Commission. Consequently, Mr. Silagy owns less than .0001% of NEE's stock. Mr. Silagy is also not an officer, partner,

[1] NEE is the world's largest utility company that, through its business units, provides utility services across the United States and in Canada in the form of electrical, solar, nuclear, wind, and natural gas. It also has the largest energy storage capacity of any company in the U.S. with storage facilities in twelve states and ongoing projects in eight additional states. See NextEraEnergy.com for more information.

director or proprietor of NEE or DG Concession Holdings, LLC, or its parent company, NextEra Energy Resources, LLC (NEER).

DG Concession Holdings, LLC is wholly owned by DG 1, which is wholly owned by ESI Energy LLC, which is wholly owned by NEER. NEER is a wholly owned subsidiary of NextEra Energy Capital Holdings, Inc. (NECH), which is a wholly owned subsidiary of NEE.

Mr. Silagy and FPL have no ownership interest in DG Concession Holdings or any of the other corporate entities involved with DG Concession Holdings, including NEER, apart from Mr. Silagy's aforementioned ownership of NEE stock. And the Board of Governors does not do business with, and has no regulatory authority over FPL, NEE, DG Concession Holdings, DG 1, ESI Energy, NECH or NEER.

We recently learned DG Concession Holdings is participating in a consortium known as Gator Campus Energy that submitted a Statement of Qualifications to UF in response to Phase I of an Invitation to Negotiate (ITN) issued on September 9, 2021. DG Concession Holdings holds a 33% equity interest in Gator Campus Energy.

Under the ITN, UF is seeking a private partner to:

(a) design, finance, construct, operate and maintain a central energy plant (CEP) on campus that will deliver 100% of the steam demand required for campus operations and generate approximately 50 megawatts of net electricity capacity;

(b) finance and construct new thermal distribution pipes for the chilled water produced by the CEP; and

(c) finance and construct a new substation.

The ITN process is a preferred method for competitively soliciting a private partner under the Board of Governors' Public-Private Partnership Guidelines (P3 Guidelines) due to the need for flexibility to negotiate the most advantageous agreement to the university when looking to a private partner that will finance the construction of a capital project.

On December 16, 2021, UF announced the short list of proposers who are eligible to submit a proposal in response to Phase II of the ITN. The short list included Gator Campus Energy. In January, UF will release a draft version of ITN Phase II to the short-listed proposers, along with Technical Provisions, the Project Agreement and other information. The proposers will have the opportunity to review and comment through

one or more rounds, at which point UF will issue the final ITN Phase II to the short-listed proposers in June, with responses due in September 2022. The university will select the top scoring proposal based on the evaluation criteria in the ITN Phase II and commence negotiations with the finalist to enter into a proposed Project Agreement. The university will bring the proposed Project Agreement to the Board of Governors as part of its packet of materials for consideration of the project under the P3 Guidelines. Although the P3 Guidelines require Board approval of the P3 project, the Board will not be a party to the Project Agreement.

Mr. Silagy is seeking guidance from the Commission to ensure that no prohibited conflicts of interest would arise under the Code of Ethics as a result of his position on the Board of Governors and his position as the CEO of FPL. It should be noted that the geographic region where the university is located is outside of FPL's regulated service territory so FPL is precluded from having any involvement in the sale of retail electricity in that region.[2]

Question 1:

Would a prohibited conflict of interest be created if a member of the Board of Governors is also employed by a regulated utility company and owns shares of its corporate parent, where a separate wholly owned corporate subsidiary of the parent participates in a consortium that is seeking an award of a university contract pursuant to a competitive solicitation process?

Sections 112.313(3) and 112.313(7)(a), Florida Statutes, address conflicts of interests. The relevant portion of section 112.313(3) prohibits a public officer, acting in a private capacity, from renting, leasing, or selling any realty, goods, or services to the officer's own agency. Section 112.313(7)(a) prohibits a public officer from having an employment or contractual relationship with any business entity or agency that is subject to the regulation of, or is doing business with, his or her public agency. The statute also prohibits a public officer from having any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties, or that would impede the full and faithful discharge of his or her public duties.

Prior opinions of the Commission are instructive. In CEO 99-13, the Commission found no prohibited conflict of interest was created under either section 112.313(3) or section

[2] FPL's service territory does include other regions where state universities are located such as in Broward and Dade Counties, but as a retail seller of electricity regulated by the Florida Public Service Commission, FPL's sale of utility services to state universities within its service territory is covered by the exemption in section 112.313(12)(c) for the purchase or sale of utility services.

112.313(7)(a) where a city councilman owned a nominal amount of stock in a large publicly traded corporation that was the parent of a wholly owned subsidiary which had entered into a contract with the city. As noted in the Opinion, for purposes of section 112.313(3), an officer is deemed to be "acting in a private capacity" to sell or lease goods, services, or realty to his or her agency when a corporation of which he or she is an officer or a director, or in which he or she owns a material interest, sells or leases to his or her agency. Like the circumstances presented here, the councilman was not an officer, partner, director or proprietor of either the parent corporation or the wholly owned subsidiary nor did he own a material interest in either the parent or the subsidiary by virtue of his stock holding in the parent. Accordingly, the Commission found section 112.313(3) did not apply.

In analyzing the applicability of section 112.313(7)(a), even though the Commission found the councilman had a contractual relationship with the parent corporation by virtue of his stock ownership, the Commission explained "in many cases, the application of the statute boils down to (1) identifying the 'business entity' with which the official has an employment or contractual relationship and (2) to identifying the 'business entity' that is doing business with the governmental agency, in order to determine whether the official's employment or contractual relation is with the same 'business entity' that is doing business with his or her agency."

The Commission then discussed its prior opinions pertaining to parent and subsidiary corporations where it has recognized parent and interrelated subsidiaries as separate and distinct business entities under section 112.313(7)(a). See CEO 80-89 (housing finance authority member not prohibited from serving as vice president of a bank that was a subsidiary of a second bank that owned a third bank that entered into a trust indenture with the authority), CEO 82-78 (mayor could work for a corporation where the corporate owner was a partner in a limited partnership that held the city's cable television franchise), CEO 83-11 (no conflict for school board advisory members employed by corporations consisting of subsidiaries doing business with the district), CEO 85-31 (housing finance authority member not prohibited from being a broker in a national brokerage firm which through an extensive succession of subsidiary corporations proposed to be a 60% partner in a limited partnership seeking the authority's approval to finance a project) and CEO 86-12 (commissioner not prohibited from serving as president of an insurance corporation or owning an insurance agency that was wholly owned by the corporation where a second subsidiary of the corporation wrote insurance policies for the district).

Here, Mr. Silagy is employed by FPL and owns a nominal amount of stock in NEE in relation to the number of shares of NEE stock that are outstanding, which under prior Commission opinions, results in the existence of a contractual relationship between Mr.

Silagy and NEE. CEO 11-13 (trustee has contractual relationship by virtue of his stock ownership in the parent corporation). But neither FPL nor NEE are doing business with the Board or UF. In CEO 99-13, the Commission explained that a business entity is doing business with an agency where the parties have entered into a lease, contract, or other legal arrangement that would give rise to a cause of action against the other in the event of a default. Under these facts, Gator Campus Energy and/or its equity members, if awarded the contract, would be the business entity entering into a Project Agreement with UF. As in CEO 99-13, the obligations of Gator Campus Energy (and DG Concession Holdings as an equity member) to UF would be considered those of the consortium and its equity members and not those of FPL or NEE. Similarly, the only party that would have a cause of action against UF if there was a default on UF's obligations under the Project Agreement would be the consortium and its equity members. Because FPL and NEE are not seeking to do business with UF (or the Board), the prohibitions in section 112.313(7)(a) should not apply.[3]

Likewise, Mr. Silagy's stock holdings in NEE should not change the result. As the Commission noted in CEO 99-13, "contractual relationships with a corporation result in liabilities only for that corporation and not for the shareholders of the corporation, whether the shareholders are individuals or other corporations." And in terms of the "doing business" relationship between a business entity and a governmental agency, the Legislature intended in section 112.313(7)(a) to "limit an official's relationships directly with a corporation and not with the stockholder(s) of that corporation, even if the stockholder is a parent corporation."

Finally, as in CEO 99-13, the "extraordinary circumstances" in CEO 80-25 and CEO 91-24 are not present here. Those cases involved "public officials' ownership of holding companies that in turn owned subsidiary corporations that would have been either doing business with or would have been regulated by the officials' agencies." Mr. Silagy is the CEO and President of FPL, not the owner of a corporate holding company, and the Board has no regulatory authority over FPL or NEE or any of NEE's other wholly owned subsidiaries.

We respectfully request the Commission to find, as it did in CEO 99-13, that Mr. Silagy does not have an employment or contractual relationship with DG Concession Holdings, LLC that is prohibited by section 112.313(7)(a).

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[3] We respectfully submit that the agency in this case is the University of Florida Board of Trustees, which is the appropriate party authorized to enter into contracts on behalf of UF and the entity that can sue or be sued. See Board of Governors Regulation 1.001(2)(g).

Question 2:

Would a voting conflict of interest be created were a member of the Board of Governors, who owns a comparatively nominal amount of stock in a corporation whose subsidiary is seeking to enter into a contract with a state university for the provision of services, to vote on whether the project is approved under the Board's Public-Private Partnership Guidelines?

In CEO 99-13, the Commission concluded that the city councilman was not prohibited from voting on matters relating to the contract between the City and the wholly-owned corporate subsidiary of the parent corporation in which the councilman owned stock. Specifically, the Commission concluded that due to the large number of outstanding shares issued by the parent corporation and the nominal amount of shares owned by the city councilman, any gain or loss in the value of the councilman's stock resulting from the City's contract with the subsidiary would be so remote and speculative that the Commission could not find it would inure to the special private gain of the councilman.

Similarly, no voting conflict should be found here given that any gain or loss in the value of Mr. Silagy's stock in NEE resulting from the Project Agreement contemplated under the ITN would be so remote, speculative and immaterial to NEE's financial position that it would be difficult to conclude a special private gain would inure to Mr. Silagy.

Conclusion

On behalf of Mr. Silagy, we appreciate the opportunity to present the foregoing information to the Florida Commission on Ethics for its consideration and guidance. Please do not hesitate to contact us if you require any additional information or have any questions. I can be reached at (850) 245-0430 or vikki.shirley@flbog.edu.

Respectfully submitted,

Vikki R. Shirley
General Counsel

c: Governor Eric Silagy
Marshall M. Criser III, Chancellor

Schafer, Grayden

From: Schafer, Grayden
Sent: Monday, February 07, 2022 1:49 PM
To: Schafer, Grayden
Subject: FW: Questions Concerning Formal Opinion Request

From: Schafer, Grayden
Sent: Monday, January 10, 2022 10:07 AM
To: 'vikki.shirley@flbog.edu' <vikki.shirley@flbog.edu>
Subject: Questions Concerning Formal Opinion Request

Dear Ms. Shirley:

I am an attorney at the Florida Commission on Ethics and have been assigned the ethics inquiry brought on behalf of Board Member Silagy. I have reviewed your inquiry letter and have begun my research on the opinion. However, I have a few questions, just to make sure I understand the factual context. While some of these questions may have already been addressed in your inquiry letter, I just want to be certain that I understand the underlying facts. If you would, please respond to this email with the answers, and give me a call if you need to clarify any particular questions.

1. Am I correct in understanding that the members of the Florida Board of Governors for the State University system are appointed?

2. Was Mr. Silagy appointed as CEO for Florida Power and Light Company by NextEra Energy, Inc.? Or was he appointed or elected internally at Florida Power and Light Company?

3. Does NextEra Energy, Inc. play an active role in the operation of Florida Power and Light Company? If so, please describe it's oversight of Florida Power and Light Company.

4. Am I correct in understanding that the Board of Governors will have no input or role—of any sort—in the ITN process until UF presents a proposed project agreement? And am I correct in understanding the Board of Governors will be aware of the identity of the recommended vendor at the time that it votes on the proposed project agreement?

5. Once the Board of Directors approves the project agreement, what will its role be in implementing it? Will it oversee the construction of the central energy plant/thermal distribution pipes/substation and/or be able to provide input regarding their operation? Or—after the project agreement is approved—will UF completely oversee the implementation and operation of the project without the Board's involvement?

6. Will UF manage and staff the completed central energy plant and related pipes/substation?

7. Am I correct in understanding that neither Florida Power and Light Company nor NextEra Energy, Inc. function as holding companies for DG Concession Holdings, LLC or any of the subsidiary owners of DG Concession Holdings, LLC?

8. How many other companies are in the Gator Campus Energy consortium with DG Concession Holdings, LLC? What percentage of interest does DG Concession Holdings, LLC have in the consortium?

9. Is Mr. Silagy an officer, owner, director, or proprietor of any of the subsidiary companies that own DG Concession Holdings, LLC?

10. If Gator Campus Energy is selected following the ITN process—and if the project agreement naming them as a party is approved by the Board of Governors—will Florida Power and Light have any responsibilities under the agreement? Will Florida Power and Light receive any payment or remuneration pursuant to the agreement?

Thank you,

Gray Schafer
Assistant General Counsel
Florida Commission on Ethics
(850)-488-7864

From: Shirley, Vikki <Vikki.Shirley@flbog.edu>
Sent: Monday, January 10, 2022 11:02 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions Concerning Formal Opinion Request

Good morning Mr. Schafer,

Thank you for your questions. To ensure complete and accurate responses to the questions below, I need to touch base with Mr. Silagy, legal counsel at FP&L, and legal counsel at UF who is knowledgeable about this project.

For purposes of clarification, the reference to "Board of Directors" in question 5 means "Board of Governors", correct?

We appreciate your consideration of our inquiry and will be back in touch with the additional information you need.

Regards.

Vikki

From: Schafer, Grayden
Sent: Monday, January 10, 2022 11:13 AM
To: 'Shirley, Vikki' <Vikki.Shirley@flbog.edu>
Subject: RE: Questions Concerning Formal Opinion Request

Good morning,

Thank you for your quick response, Vikki. Yes, that reference in question 5 should have been to the "Board of Governors." Please take the time that you need, and let me know if you need any further clarification.

Gray Schafer

From: Shirley, Vikki <Vikki.Shirley@flbog.edu>
Sent: Monday, January 10, 2022 11:23 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions Concerning Formal Opinion Request

Perfect. Thanks for getting back to me so quickly too.

Regards,

Vikki

From: Shirley, Vikki <Vikki.Shirley@flbog.edu>
Sent: Tuesday, January 11, 2022 5:52 PM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Cc: 'Burnett, John T.' <John.T.Burnett@fpl.com>
Subject: RE: Questions Concerning Formal Opinion Request

Hi Gray,

Here are the responses to the questions posed in your email. Please let me know if you have any questions.

1. Am I correct in understanding that the members of the Florida Board of Governors for the State University system are appointed? Yes, except for the members who serve in ex officio capacities: the Commissioner of Education, the Chair of the Advisory Council of Faculty Senates, and the President of the Florida Student Association.

2. Was Mr. Silagy appointed as CEO for Florida Power and Light Company by NextEra Energy, Inc.? Or was he appointed or elected internally at Florida Power and Light Company? He was appointed as CEO of FPL by NextEra Energy, Inc.

3. Does NextEra Energy, Inc. play an active role in the operation of Florida Power and Light Company? If so, please describe it's oversight of Florida Power and Light Company. Yes. NextEra Energy, Inc. ("NEE") is the parent company of Florida Power and Light ("FPL") and, as such, NEE and FPL have common executive officers in many instances. However, FPL is operated as a separate and independent company, apart from other NEE subsidiaries.

4. Am I correct in understanding that the Board of Governors will have no input or role—of any sort—in the ITN process until UF presents a proposed project agreement? The Board of Governors will have no input or role in the actual ITN process that results in the selection of a private partner by UF, but the Board's Public Private Partnership Guidelines outlines the procurement procedures that universities must follow in soliciting private partners for projects. (See Section V, P3 Guidelines). And am I correct in understanding the Board of Governors will be aware of the identity of the recommended vendor at the time that it votes on the proposed project agreement? Yes.

5. Once the Board of Governors approves the project agreement, what will its role be in implementing it? The Board of Governors will not have an implementation role. Will it oversee the construction of the central energy plant/thermal distribution pipes/substation and/or be able to provide input regarding their operation? No. Or—after the project agreement is approved—will UF completely oversee the implementation and operation of the project without the Board's involvement? If the project is approved by the Board, UF will be responsible for the oversight and implementation of the project without the Board's involvement. However, if in the future there is a material change in the terms of the project agreement, the P3 Guidelines do require a university to obtain Board approval before the agreement can be amended. (See section VII(f), P3 Guidelines). There is also an annual reporting requirement for P3 projects. (See Section IX, P3 Guidelines).

6. Will UF manage and staff the completed central energy plant and related pipes/substation? Per UF's counsel, the project consists of three parts: (1) the energy plant itself, where production of steam, chilled water, and electricity will occur (the "Plant"); (2) additional underground thermal distribution piping that extends and enhances our current distribution system (the "Underground Piping"); and (3) an electrical substation and new interconnection between Duke Energy facilities and the Plant / UF's own electrical system (the "Electrical Improvements").

Under the arrangement UF is proposing, the selected developer entity in the P3 would finance and construct the Underground Piping and the Electrical Improvements (UF is responsible for design), but would turn them over to UF for operation and maintenance upon completion (per counsel, these new improvements will comprise only a fraction of UF's existing thermal and electrical distribution systems, which UF currently owns, operates and maintains). However, the Plant is different in that the developer entity will design, finance, construct, operate, and maintain the facility, but UF will still retain complete ownership of the Plant and underlying real property. UF will grant a license to the developer to access the site for purposes of construction, and upon completion and start-up of the Plant, UF and the developer will move to a management/operation phase in which the developer will be responsible for the Plant Operations and maintenance and for guaranteeing certain levels of production with respect to steam and chilled water. UF will make an "availability payment" to the developer in exchange for the developer delivering the commodities at certain levels, and if the developer fails to do so, the availability payment will be reduced in accordance with a schedule.

7. Am I correct in understanding that neither Florida Power and Light Company nor NextEra Energy, Inc. function as holding companies for DG Concession Holdings, LLC or any of the subsidiary owners of DG Concession Holdings, LLC? FPL does not function as a holding company for DG Concession Holdings, LLC or any of the subsidiary owners of DG Concession Holdings, LLC. As mentioned previously, NEE is the parent company of all other NextEra subsidiary companies, including DG Concession Holdings, LLC.

8. How many other companies are in the Gator Campus Energy consortium with DG Concession Holdings, LLC? What percentage of interest does DG Concession Holdings, LLC have in the consortium? DG Concession Holdings 1/3, Star America 1/3, and Sacyr 1/3

9. Is Mr. Silagy an officer, owner, director, or proprietor of any of the subsidiary companies that own DG Concession Holdings, LLC? No.

10. If Gator Campus Energy is selected following the ITN process—and if the project agreement naming them as a party is approved by the Board of Governors—will Florida Power and Light have any responsibilities under the agreement? Will Florida Power and Light receive any payment or remuneration pursuant to the agreement? No and No.

Regards,

Vikki

From: Schafer, Grayden
Sent: Wednesday, January 12, 2022 9:43 AM
To: 'Shirley, Vikki' <Vikki.Shirley@flbog.edu>
Subject: RE: Questions Concerning Formal Opinion Request

Thank you, Vikki! These answers are very helpful. I'll let you know if I need any more info.

From: Shirley, Vikki <Vikki.Shirley@flbog.edu>
Sent: Wednesday, January 12, 2022 10:14 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions Concerning Formal Opinion Request

Thanks, Gray. I'm happy to provide any information you need to assist with your analysis.

Vikki

From: Schafer, Grayden
Sent: Monday, February 07, 2022 9:35 AM
To: 'Shirley, Vikki' <Vikki.Shirley@flbog.edu>
Subject: RE: Questions Concerning Formal Opinion Request

Hi Vikki:

One more question for you. Regarding the other two companies that are partners in Gator Campus Energy with DG Concession Holdings—the other two companies being Star America and Sacyr—are either of them NEE subsidiaries? I'm just trying to clarify whether DG Concession Holdings is the only NEE subsidiary partnering in Gator Campus Energy. Thanks!

Gray Schafer

From: Shirley, Vikki <Vikki.Shirley@flbog.edu>
Sent: Monday, February 07, 2022 9:47 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions Concerning Formal Opinion Request

Good morning,

That is my understanding but I will confirm and get back to you.

Vikki

Vikki R. Shirley
General Counsel

State University System of Florida
Board of Governors
325 W. Gaines Street, Suite 1614
Tallahassee, FL 32399-0400
(850) 245-0430 / Fax: (850) 245-9685
Vikki.Shirley@flbog.edu / www.flbog.edu

From: Shirley, Vikki <Vikki.Shirley@flbog.edu>
Sent: Monday, February 07, 2022 12:41 PM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions Concerning Formal Opinion Request

Hi Gray,

This is to confirm that Star America and Sacyr are not related to NEE.

Let me know if you have any additional questions.

Vikki

Vikki R. Shirley
General Counsel

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From: Schafer, Grayden
Sent: Monday, February 07, 2022 1:47 PM
To: 'Shirley, Vikki' <Vikki.Shirley@flbog.edu>
Subject: RE: Questions Concerning Formal Opinion Request

OK! Thank you for the info.