AMERICAN ARBITRATION ASSOCIATION

GAINESVILLE RENEWABLE ENERGY CENTER, LLC, Claimant v. THE CITY OF GAINESVILLE, FLORIDA, D/B/A GAINESVILLE REGIONAL UTILITIES, Respondent.	AAA Case No. 01-16-0000-8157

GREC'S MOTION FOR SUMMARY JUDGMENT

Andrew C. Phelan
Siobhan E. Mee
Julie Silva Palmer
Emma D. Hall
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
617.951.8000

Counsel for Claimant
Gainesville Renewable Energy Center, LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

INTRODUCTION

Pursuant to Procedural Order No. 6, Gainesville Renewable Energy Center ("**GREC**") moves for summary judgment on the following issues raised in GREC's First Amended Arbitration Demand and Second Amendment (collectively "**GREC's Demand**") and GRU's Response and Amended Counterclaim to GREC's First and Second Amended Arbitration Demand ("**GRU's Counterclaim**"):

(1) The PPA does not require GREC to take an annual Planned Maintenance outage (Count 5 of GREC's Demand and Count 2 of GRU's Counterclaim);

(2) The PPA requires GRU to pay for Available Energy during GREC's startup and ramping time (Counts 7 and 9 of GREC's Demand);

(3) GRU breached the PPA by imposing a $529,439 "Payment Decrease" under Section 12.4.1 (Counts 8 and 9 of GREC's Demand);

(4) GRU breached the PPA by clawing back a prior $222,737 payment to GREC under Section 8.5 (Count 9 of GREC's Demand); and

(5) GRU breached the PPA by refusing to pay Shutdown Charges under Section 10.7 (Counts 6 and 9 of GREC's Demand).

LEGAL STANDARDS

Summary judgment should be granted where the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c); *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 30 (Fla. 1977). Where the "determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 131 (Fla. 2000) (citations omitted). The interpretation of contract terms is a question of law provided that the "language used is clear, plain, certain, undisputed, unambiguous, unequivocal, and not subject to conflicting inferences." *Friedman v. Virginia Metal Prods. Corp.*, 56 So. 2d 515, 516 (Fla. 1952) (citations omitted).

Determining "[w]hether an ambiguity exists in a contract also is a question of law." *Smith v. Shelton*, 970 So. 2d 450, 451 (Fla. 4th DCA 2007). A contract is not ambiguous simply because "both sides ascribe different meanings to the language[.]" *Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. 4th DCA 2003). A contract is ambiguous when it is "susceptible to two different interpretations, each one of which is reasonably inferred from the terms of the contract[.]" *Miller v. Kase*, 789 So. 2d 1095, 1097–98 (Fla. 4th DCA 2001). In interpreting a contract, the court places itself "in the situation of the parties, including the surrounding circumstances, to determine the meaning and intent of the language used." *Id.* at 1098. The legal effect of contractual provisions should be determined from the words of the entire contract. *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013).

ARGUMENT

I. THE PPA DOES NOT REQUIRE GREC TO TAKE A "PLANNED MAINTENANCE" OUTAGE EACH AND EVERY YEAR

In its Count 2, GRU seeks a declaratory judgment that the "performance by GREC of annual Planned Maintenance is a material obligation under the PPA." GRU's Counterclaim ¶ 176. Part of GREC's Count 5 also seeks declaratory relief as to the meaning of the PPA regarding Planned Maintenance outages, including Section 10.4.1(a). Summary judgment should enter for GREC dismissing Count 2 of GRU's Counterclaim and granting Count 5 of GREC's Demand. The PPA requires that GREC provide an annual "forecast" of any Planned Maintenance outages for the following year, but does not require GREC to take any such outage each and every year.[1]

[1] The issue allowed for cross-motions is only the pure contract interpretation issue: whether the words of the PPA require GREC to take an annual Planned Maintenance outage every single year. The parties did not request, and leave was not granted, to move on whether GREC was required under the facts regarding their 2015–2016 communications to take a Planned Maintenance outage in April 2016.

A. The PPA Definition Of "Planned Maintenance" Does Not Include Maintenance That Can Be Scheduled On Short Notice Or Performed Without An Outage

Nowhere in the PPA is there any provision that requires GREC to take a "Planned Maintenance" outage every year. The defined term "Planned Maintenance" refers *only* to maintenance that (i) is scheduled well in advance ("during the prior business year"), and (ii) requires the Facility's operation to be reduced or suspended by an outage:

> "Planned Maintenance" means the occurrence of reduced or suspended operation of the Facility for the purpose of performing routine or regular maintenance in accordance with Good Utility Practice. Planned Maintenance is distinguished from Forced Outages and Maintenance Outages in that the duration and timing of Planned Maintenance has been established during the prior business year.

PPA Schedule I, Definitions (emphasis added).[2]

In contrast, the undefined term (without initial capitals) -- planned maintenance -- refers in the ordinary usage of those words to all maintenance that may be planned from time to time, a very frequent and ongoing occurrence at any power plant, and may include measures that can be scheduled on short notice (including "Maintenance Outages") or that do not require any outage or reduction of the Facility's operation. Such distinction is critical, as GRU would conflate those two concepts to incorrectly argue that GREC would forego appropriate maintenance absent an annual "Planned Maintenance" outage, without consideration of (i) the operational condition of the Facility or (ii) whether other maintenance measures that do not require an outage planned in the previous year would be both appropriate and sufficient. This summary judgment issue is not

[2] The terms "Forced Outage" and "Maintenance Outage" are also defined in Schedule I of the PPA to include different kinds of outages. A Planned Maintenance outage is planned well in advance, while both Forced Outages and Maintenance Outages occur *unexpectedly* due to abnormal operating conditions. A "Forced Outage" occurs when the Facility suffers an "immediate reduction or suspension" of electrical output due to an "abnormal operating condition" that requires the Facility to start an outage either immediately or within less than seven days. Unlike "Planned Maintenance," a "Maintenance Outage" involves "repair or maintenance" during periods of "reduced or suspended operations" of the Facility due to "abnormal operating conditions" where the work can be scheduled seven days or more from the upset event. PPA Schedule I, Definitions.

whether GREC must perform planned maintenance (lower case) every year. Rather, the issue is whether the PPA requires GREC to take a "Planned Maintenance" outage (upper case, defined term) every year, even if other maintenance measures, including those not requiring an outage or performed during Maintenance Outages, would be appropriate and sufficient in light of the actual operational condition of the Facility.

B. The PPA Does Not Require That GREC Conduct A "Planned Maintenance" Outage Every Year

GRU's position is that Section 10.4.1(a) of the PPA unambiguously establishes an obligation for GREC to conduct maintenance in a manner that makes the Facility unavailable for dispatch (*i.e.*, the "reduced or suspended operation" of a "Planned Maintenance" outage) in each and every year. Section 10.4.1(a), however, sets forth no such requirement:

> 10.4.1 Planned Maintenance.
>
> (a) Seller shall submit a written annual maintenance plan containing its forecast of Planned Maintenance for the coming year no later than sixty (60) days prior to the Commercial Operation Date and the start of each calendar year. Any and all changes to such plan shall be mutually agreeable to Seller, Purchaser, and to FRCC and promptly communicated to Purchaser in writing as soon as practicable.

(emphasis added).

The only annual "requirement" in Section 10.4.1(a) is for GREC to submit, no later than November 1 (*i.e.*, the date that is 60 days prior to the start of the calendar year), a "written annual maintenance plan containing its forecast of Planned Maintenance for the coming year." Thus, Section 10.4.1(a) does not establish any requirement that GREC take Planned Maintenance outages. The term "forecast" establishes that this is an estimation as to future outages, rather than an obligation to take any such outage. This estimation could include multiple instances of Planned Maintenance in a given year or could include no instances of Planned Maintenance. The

clear and unambiguous words in Section 10.4.1(a) thus preclude GRU's strained reading and warrant summary judgment in GREC's favor.

The organizational structure of the PPA also confirms that Section 10.4.1(a) does not create any requirement that GREC take a Planned Maintenance outage every year. Article 10 ("Dispatch and Scheduling") focuses on administrative and reporting requirements designed to facilitate future scheduling. It includes, for example, the requirements that GREC provide "forecasts" and cooperate with the GRU "Scheduler" so s/he can prepare "schedules" necessary to coordinate outages and dispatch schedules and avoid overlapping outages with GRU's units. Such "Dispatch and Scheduling" provisions, however, do not create any right for GRU to demand that GREC take an annual Planned Maintenance outage.

Similarly, Section 22.1 creates only a requirement to submit a "report" on maintenance that occurred in the prior year. Whereas Section 10.4.1(a) called for a prospective "forecast," Section 22.1 requires only a retrospective "report":

> Seller shall submit to Purchaser an annual written report, which report shall include, at a minimum, a description of the operation of the Facility and planned maintenance, unplanned maintenance and upgrades to the Facility, and an evaluation of problems and deficiencies and a description of any planned corrective action with respect thereto. . . .

This provision is administrative in nature. It appears within Article 22 of the PPA ("Contract Administration, Monitoring, and Inspection") and imposes no performance standards or maintenance requirements. Nothing in Section 22.1 mentions the defined term "Planned Maintenance," and the lower-case words "planned maintenance, unplanned maintenance" only reference a report of the past year's events, with no requirement that GREC take an annual Planned Maintenance outage or any other operational actions.

C. GRU's Assertion That The PPA Requires GREC To Take A Planned Maintenance Outage Every Year Contradicts GREC's Performance Obligations In Section 12.1 To Maximize The Products Generated By The Facility

GRU has an economic interest in forcing GREC to take a Planned Maintenance outage every year because GREC does not get paid for Available Energy when it is in an outage. GRU's effort to create an annual Planned Maintenance outage requirement (*i.e.,* to require GREC to conduct maintenance in a manner that directly results in the "reduced or suspended operation of the Facility") contradicts Section 12.1 of the PPA, which states as follows:

> Reasonable Efforts to Maximize Performance. Subject to the terms of this Agreement, Seller shall use commercially reasonable efforts consistent with Good Utility Practice to operate the Facility in a manner that maximizes the Products generated by the Facility over the Delivery Term.

This language imposes on GREC the clear contractual mandate -- and a right -- to use commercially reasonable efforts to "maximize the Products generated by the Facility." The PPA defines the "Products" to include "Dependable Capacity" and "Energy." PPA at Schedule I, Definitions & Appendix II ("Products"). GREC cannot "maximize" its performance under Section 12.1 when it is in a Planned Maintenance outage because, by definition, an outage precludes GREC from generating any Products. This is what GRU now wants, and what motivates its effort to revise the words of the PPA to require an annual Planned Maintenance outage. GRU's position directly contradicts GREC's obligation and right in Section 12.1 "to operate the Facility in a manner that maximizes the Products generated by the Facility."

GRU's position violates a cardinal rule of contract interpretation, which requires that contractual provisions be read "harmoniously in order to give effect to all portions thereof." *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000). GRU's interpretation of "Planned Maintenance" should be rejected because it contradicts Section 12.1. *See Inter-Active Services,*

Inc. v. Heathrow Master Ass'n, Inc., 721 So. 2d 433, 435 (Fla. 5th DCA 1998) (rejecting interpretation that would deprive counterparty of performance rights under the contract).

D. GRU's Assertion That The PPA Requires GREC To Take An Annual "Planned Maintenance" Outage Contradicts The Liquidated Damages Provisions In Section 12.3 And Would Produce Absurd Results

Section 12.3 identifies "Unavailability Factors" for the Summer and Winter periods. During the Summer Period (June 1 to September 30), GREC must remain available at least 95% of the time. PPA § 12.3.1. There are 122 days in the Summer Period, meaning that, if GREC has any outage or combination of outages (Forced or Maintenance Outages or Planned Maintenance outages) for more than six total days during the Summer Period, then GREC must pay GRU liquidated damages. PPA §§ 12.3.1, 12.3.3. During the Winter Period (October 1 to May 31), GREC must remain available at least 87.5% of the time. There are 243 days in the Winter Period. If GREC has any combination of outages for more than 30 total days during the Winter Period, then GREC must pay GRU liquidated damages. PPA §§ 12.3.2–12.3.3.

GRU's interpretation of the PPA would require GREC to take a Planned Maintenance outage every year, irrespective of the operational condition of the Facility or whether other outages had already occurred, for periods lasting up to or perhaps even more than the 21-day "outage" it attributed to GREC in April 2016.[3] This interpretation would subject GREC to liquidated damages if the outage were taken during the Summer Period, when a 21-day outage

[3] Because the PPA imposes no requirement to take an annual Planned Maintenance outage, it also has no provision defining any minimum duration of any such outage. GRU nonetheless claims that a Planned Maintenance outage of 21 days was required for 2016, and it is unclear what minimum outage duration GRU would claim to be required in future years. The PPA's absence of any term defining any minimum outage scope or duration undermines GRU's argument that GREC has an obligation to take any such outage, as such an obligation would have to be defined with sufficient specificity so as to be clearly known and enforceable.

Section 10.4.1(b) further undermines GRU's position by providing that GREC has up until seven days prior to "any Planned Maintenance" to notify GRU of the timing and expected duration of any such outage and, during any Planned Maintenance, by allowing GREC to notify GRU "of any changes to the expected duration of the Planned Maintenance outage as soon as practicable."

would far exceed the six-day margin and, if taken during the Winter Period, would leave GREC with a margin of just nine days to avoid liquidated damages. The parties negotiated the operational risks and penalties that are in the PPA. GRU's interpretation would rewrite the PPA to substantially increase GREC's risk profile beyond the clear terms that the parties agreed to so as to produce absurd adverse results. *See Roberts v. Sarros*, 920 So. 2d 193, 196 (Fla. 2d DCA 2006) (rejecting interpretation that would "produce absurd results . . . contrary to the stated purpose" of the agreement).

E. Summary Judgment Should Enter For GREC On Count 5 Of GREC's Demand For Declaratory Relief And On GRU's Related Claims And Defenses

Count 2 of GRU's Counterclaim and Count 5, in part, of GREC's Demand. The above discussion addresses Count 2 of GRU's Counterclaim and, in part, declaratory relief sought by GREC in Count 5 of its Claim. Because GRU's Count 2 claim fails as a matter of law, it must be dismissed. The Arbitrator should grant Count 5 of GREC's Demand for declaratory relief on the meaning of the provisions of the PPA regarding Planned Maintenance outages. The declaratory relief warranted here is a declaration that the PPA does not require that GREC take Planned Maintenance outages each and every year. In addition, the resolution as to Count 2 of GRU's Counterclaim requires dismissal in part or in full of related GRU claims dependent on that failed Count 2. The following related counts must also be dismissed because the PPA contains no requirement that GREC take a Planned Maintenance outage each and every year.

GRU's Counterclaim, Count 1. Count 1 of GRU's Counterclaim seeks declaratory relief that GREC was required to take a Planned Maintenance outage in April 2016 based on communications the parties exchanged, an issue that involves disputed questions of material fact.

This count also contains allegations that Planned Maintenance outages are required every year. *See* Counterclaim at ¶¶ 166, 169, 170. Those allegations must be dismissed.

GRU's Counterclaim, Counts 3 and 5. Counts 3 and 5 of the GRU's Counterclaim allege breach of contract and breach of the covenant of good faith. To the extent these counts are based on the alleged requirement that GREC take a Planned Maintenance outage every year, they must be dismissed.

GRU's Counterclaim, Count 6. This count alleges specific performance and, in ¶ 191, demands a "decree requiring GREC to conduct Planned Maintenance annually for the remainder of the PPA's term." This allegation is premised on the failed assertion that the PPA requires an annual Planned Maintenance outage and must be dismissed. [4]

II. JUDGMENT SHOULD ENTER FOR GREC THAT THE PPA REQUIRES GRU TO PAY FOR AVAILABLE ENERGY DURING GREC'S STARTUP AND RAMPING TIME WHEN DISPATCHED OUT OF RESERVE SHUTDOWN

For substantially all the days since late August 2015, GRU has ordered GREC to remain in "reserve shutdown," an availability status in which GREC has shut down all generation of the Facility and disconnected from the grid.[5] For these periods of reserve shutdown, GRU has paid GREC for the full 102.5 MW of Available Energy as required by the PPA, except for disputed periods raised in this arbitration. One of those disputes concerns GREC's "startup" and "ramping" periods. GRU claims that when the Facility is in reserve shutdown, it instantly becomes "unavailable" at the moment GRU gives a startup order, and thus (i) GREC loses its

[4] Counterclaim Count 6 for specific performance must also be dismissed because Section 26.1 of the PPA limits relief to damages. Specific performance is an equitable remedy not permitted by Section 26.1. Count 6 fails for that additional reason.

[5] "Grid" is used as short form here to refer to the interconnection, or delivery point, where the breaker is closed to connect the GREC Facility to GRU's transmission facilities. "MW" and "MWh" refer to megawatts and megawatt hours.

right to any Available Energy payments[6] until the Facility can start up and reconnect to the grid, and (ii) GREC receives reduced Available Energy payments equal only to the amount of actually delivered energy (*i.e.*, less than 102.5 MW) until the Facility ramps up to the "Minimum Dispatch" level of 70 MW. GREC's Counts 7 and 9 allege that GRU breached the PPA by failing to continue to pay GREC the full Available Energy amount for 102.5 MW during the entire startup and ramping up periods. GREC seeks damages for the unpaid amounts and prospective declaratory relief. *Id.*

A. Relevant Facts

On six occasions since September 2015, when GREC has been in reserve shutdown as ordered by GRU and properly receiving Available Energy payments for 102.5 MW, GRU has ordered GREC to start up. Affidavit of Albert Morales ("Morales Aff.")[7] at ¶ 12. On each occasion, GRU has deemed GREC to become instantly "unavailable" -- and so instantly ineligible for any Available Energy payments -- from the moment of receipt of GRU's startup order until GREC starts up and reconnects to the GRU grid and, once synchronized, eligible only for reduced Available Energy charges in the amount of actually delivered energy until the Facility ramps up to 70 MW. *Id.* ¶ 13. Like all biomass and coal facilities, when in reserve shutdown, GREC cannot physically reconnect to the grid or reach the Minimum Dispatch level instantly upon receipt of GRU's startup order. *Id.* ¶ 14. The GREC Facility requires startup and ramp-up time, which allows complex machinery to start, run in sequence, and generate steam

[6] Appendix III of the PPA details the Contract Prices to be paid by GRU to GREC. These include two payments, the Non-Fuel Energy Charge and the Fixed O&M Charge, which are measured on Available Energy (the "Available Energy" payments) and two other payments, the Variable O&M Charge and the Fuel Charge, which are measured on Delivered Energy. If GRU dispatches the Facility, all four of these payments are required to be paid by GRU to GREC. However, if GRU orders GREC into a reserve shutdown, only the Available Energy payments are required to be paid as there would not be any Delivered Energy generated by the Facility.

[7] The Morales Aff. contains the undisputed facts relevant to GREC's Motion for Summary Judgment and attaches the relevant exhibits.

before connecting to the grid, and then to ramp up to the designated level of output. *Id.* For GREC, it normally takes up to approximately 35 hours to reach the Minimum Dispatch level of 70 MW (a duration that GRU has agreed is both "reasonable and supportable"[8]), with the time varying according to conditions, including how long GRU has kept the Facility in reserve shutdown. *Id.* at ¶ 14, Exhibit 1.

Applying its interpretation, GRU has failed to make Available Energy payments totaling about $1,015,264 across the following five instances between August 2015 and June 2016, as outlined in GREC's Demand:

a. $222,737 in Available Energy charges in connection with GRU's September 2015 startup order (for a GRU-ordered operational test) when the Facility was available in reserve shutdown status, as described above.

b. $228,436 in Available Energy charges in connection with GRU's November 2015 startup order when the Facility was available in reserve shutdown status.

c. $192,423 in Available Energy charges in connection with GRU's March 2016 startup order (for a GRU-ordered operational test) when the Facility was available in reserve shutdown status.

d. $208,261 in Available Energy charges in connection with GRU's May 2016 startup order (for a GRU-ordered operational test) when the Facility was available in reserve shutdown status.

e. $163,407 in Available Energy charges in connection with GREC's August 2015 maintenance outage when the Facility was available in reserve shutdown status immediately before that outage and returned to that status immediately after that outage.

The facts regarding the first four events are similar in that, in each instance, the Facility was in reserve shutdown as directed by GRU -- and being compensated for 102.5 MW of Available Energy -- and when GRU ordered GREC to run, GRU deemed GREC to instantly

[8] In September 2015, GREC estimated for GRU that restart from an extended shutdown period would be about 35 hours. Morales Aff. ¶ 14, Exhibit 1. GRU responded to GREC's estimate in writing, stating that the 35-hour restart time was "reasonable and supportable" and "meet[s] Good Utility Practice". *Id.* ¶ 10, Exhibit 2.

become unavailable upon its receipt of GRU's startup order. Morales Aff. ¶ 17. Each time, GRU failed to pay any Available Energy charges until the Facility was able to restart and reconnect to the grid, and then has paid only reduced Available Energy payments equal to the amount of actual energy delivered (*i.e.,* less than 102.5 MW) until the Facility completed ramping to 70 MW. *Id.*

The fifth event (paragraph e. above) entails a similar GRU effort. For the August 2015 event, GRU failed to pay GREC $163,407 in Available Energy charges for the period before and after GREC performed a Maintenance Outage out of reserve shutdown. *Id.* ¶ 18. Prior to commencing that outage, the Facility was in reserve shutdown. *Id.* Because the Facility was already in reserve shutdown, it did not have to ramp-down prior to commencing the outage. *Id.* Upon completion of the outage, GRU ordered the Facility to return directly to reserve shutdown status, so there was also no ramp-up to return to operation. *Id.* In other words, the Facility went instantly from the end of the Maintenance Outage into reserve shutdown. Despite the fact that there was no actual ramp-down or ramp-up, GRU deemed the Facility to have experienced reductions in Available Energy during fictitious "ramp-down" and "ramp-up" periods before and after the outage and thereby failed to pay GREC $163,407 in Available Energy payments. *Id.*

Since GREC filed its Second Amendment to its Demand, GRU has withheld additional Available Energy charges under this same rationale. *Id.* ¶ 19, Exhibit 9. Specifically, GRU failed to pay GREC $209,231 in Available Energy charges in connection with GRU's September 2016 startup order. *Id.* The declaratory relief GREC seeks on this issue warrants inclusion of these charges as well, rather than requiring GREC to further amend its Demand each time GRU withholds Available Energy charges.

B. The Clear Definition Of Available Energy In The PPA Requires GRU To Continue Payment During The Startup And Ramping Periods

For the period prior to each disputed startup, GRU had compensated GREC for the full 102.5 MW of Available Energy while GREC was in reserve shutdown. The dispute here is whether GRU may stop such payments from the moment it issues the order for GREC to start up out of reserve shutdown until GREC reconnects to the grid, under the apparent notion that GREC was not able to do so instantaneously. GRU's position is meritless, as demonstrated by clear PPA terms.

When GRU orders GREC to start up, nothing physically or otherwise happens that somehow instantly makes the Facility unavailable. The Facility continues to provide the very same 102.5 MW of Available Energy. The only change is that, having received the startup order, the Facility enters its customary startup sequence, which is required to generate steam and to safely and reliably start up the systems and equipment of the complex facility. There is no provision of the PPA that states the Facility is required or expected to be capable of an instantaneous startup. Nor is there any PPA provision that, during normal startup and ramping, GRU can deem the Facility suddenly unavailable with no right to Available Energy payments. The Facility is a solid fuel biomass facility that requires ramping time. GRU has concurred that an estimated normal period of 35 hours to start up and reach minimum load from reserve shutdown of 20 days or more is both "reasonable and supportable." Morales Aff. ¶ 10, Exhibit 2.

Nothing in the PPA supports GRU's notion that its giving the startup order suddenly renders the Facility unavailable. To the contrary, the PPA's definition of "Available Energy" refutes GRU's notion because it provides language that is clear that, when GRU has ordered the Facility to be in a status where it generates at less than 100% capacity -- such as here where GRU orders GREC into reserve shutdown -- then the Facility is deemed to be available at 100%

of its Dependable Capacity of 102.5 MW. In relevant part, the PPA defines "Available Energy" for which GRU must pay GREC as:

> the sum of the following items:
>
> (i) each MWh of Energy generated by the Facility and delivered to the Delivery Point:
>
> **plus**
>
> (ii) for each hour in which Purchaser dispatches the Facility at less than 100% of the seasonal Dependable Capacity, each MWh of Energy that could have been generated by the Facility and delivered to the Delivery Point had the Facility been dispatched at 100% of the seasonal Dependable Capacity, but that was not generated by the Facility due to dispatch instructions from Purchaser. . . .

PPA Schedule I, Definitions ("Available Energy") (emphasis added). This unambiguous language requires GRU to pay GREC for Available Energy for the entirety of all periods of time when GRU orders the Facility into reserve shutdown, including the startup and ramp times resulting from GRU's dispatch instructions. This is so because, **but for** GRU's shutdown dispatch order, GREC could otherwise have generated Energy, with the level of dispatch explicitly assumed, as quoted above, to be 100% of its proven Dependable Capacity of 102.5 MW.

Each time GRU has ordered GREC into reserve shutdown, GRU "dispatch[ed] the Facility at less than 100% of the seasonal Dependable Capacity" per subsection (ii) of the Available Energy definition. The Facility's normal startup and ramping time also results directly from GRU's dispatch instruction that placed GREC into reserve shutdown. Subsection (ii) establishes a "but-for" definition: **but for** GRU's having ordered GREC into reserve shutdown, the full 102.5 MW of Energy "**could have been generated** by the Facility and delivered to the Delivery Point" at an assumed dispatch at "100% of the seasonal Dependable Capacity". Thus, the full amount of 102.5 MW of Energy, including amounts during startup and

ramping, "was not generated by the Facility **due to dispatch instructions from Purchaser** [GRU]."

Because GRU ordered GREC into reserve shutdown and prevented it from continuously generating at 100% of its Dependable Capacity, subsection (ii) of the definition of Available Energy requires that GRU pay GREC Available Energy charges for 102.5 MW for the entire duration of lesser output caused by GRU's dispatch orders, including periods of startup and ramping. Nothing in the terms of the PPA allows GRU to deem GREC instantly unavailable simply by issuing a startup order.

C. The PPA Incorporates The Uniform National NERC/GADS Standards For Determining Generator "Availability," Which Preclude GRU's Position Of Non-Availability During Startup And Ramping Periods.

The PPA requires at Section 1.3 of Appendix V that reports of the Facility's operation "shall be in a format consistent with National Electric Reliability Council (NERC) and the Generation Availability Data System (GADS) reporting standards." Further, Section 5.10 of the Operating Procedures of the PPA, developed pursuant to Appendix VI, requires that GREC submit "Event Reports for each occurrence of derated or diminished operational capability, as defined in NERC GADS. . . ." Thus, the parties agreed in the contract documents that the Facility's availability would be determined under industry practices as set forth in the NERC/GADS provisions. As discussed below, under these incorporated standards for determining unit availability, a generator such as GREC remains fully "available" while starting up or ramping from reserve shutdown, absent and until the occurrence of an outage (a planned outage, maintenance outage, or an unplanned outage). *See* Morales Aff. at Exhibit 16 (GADS Event Reporting Instructions at p. III-8).

The GADS Rules define periods of "unavailability" to include *only* those times when a generator is in some type of outage: "*Unavailable* Hours" are defined as the "Sum of all Planned Outage Hours (POH) + Forced Outage Hours (FOH) + Maintenance Outage Hours (MO)." Consistent with that limitation, the GADS rules define "*Available* Hours" as the "Sum of all Service Hours (SH) + Reserve Shutdown Hours (RSH) + Pumping Hours + Synchronous Condensing Hours."[9] The starting and ramping hours at issue in this current dispute all constitute "Available Hours" under the NERC/GADS standards. In each instance there was no occurrence of any "outage" that could have triggered a change from the state of "Available Hours" to "Unavailable Hours." *Id.* Consistent with the foregoing, the PPA similarly defines "Unavailability Factor" to reflect only the ratio of "outage" hours to the total period hours. PPA, Schedule 1.

The GADS Rules further confirm that a generating unit that is in the process of startup out of reserve shutdown only experiences the forced outage of a "startup failure" (and thus becomes "unavailable") if and when it fails to synchronize to the grid within its "normal" startup time. The GADS Reporting Instructions state in this regard:

> **SF – Startup Failure**
>
> This is an outage that results when a unit is unable to synchronize within a specified startup time following an outage or reserve shutdown.
>
> The startup period for each unit is determined by the operating company. It is unique for each unit, and depends on the condition of the unit at the time of startup (hot, cold, standby, etc.). A startup period begins with the command to start and ends when the unit is synchronized. SF [*i.e.*, a forced outage] begins when a problem preventing the unit from synchronizing occurs. The SF ends when the unit is synchronized, another SF occurs, or the unit enters another permissible state.

[9] A copy of highlighted pages of GADS Rules, *Appendix F - Performance Indexes and Equations*, is attached to the Morales Aff. at Exhibit 16. The definitions appear on the first two pages.

GADS Data Reporting Instructions – January 2015 at III-8 (Morales Aff. at Exhibit 17). The GADS reporting instructions similarly state that "ramping" after synchronizing does not result in any loss or "derating" of a facility's availability if performed within its normal startup time, with a reduction in availability occurring only to the extent ramping takes longer than the normal time:

> **Ramping Up at Unit Startup and Down at Unit Shutdown**
>
> Each unit has a "standard" or "normal" time for reaching full load capabilities after a full outage or ramping down (coming off-line) to a full outage state. GADS doesn't set time periods for each unit; the operators know the units and can judge if a unit is taking longer than normal to ramp up after an outage or coast down for removal from service.
>
> If a unit ramps up to the full load level OR up to the level of required load within the "normal" time period — set by the operators of the unit — following a full outage, there is no derating on the unit from the time of synchronization to the load point.
>
> If the unit takes longer than normal ramp up time to the full load level OR up to the required load, then there is a derating. The generating capacity of the unit at the end of the normal period will be the level of the derate and the derate will last until the unit can either reach full load capability or level of required load.

GADS Data Reporting Instructions – January 2015 at III-14. Thus, the applicable NERC/GADS reporting instructions that the parties directed would govern directly support and confirm the plain PPA language that GREC is to receive Available Energy payments during startup and ramping out of reserve shutdown.

III. CLEAR PPA TERMS DEMONSTRATE THAT GRU BREACHED THE PPA BY IMPOSING A $529,439 "PAYMENT DECREASE" FOR MARCH 2016 UNDER SECTION 12.4.1

GRU imposed a "payment decrease" under Section 12.4.1 that reduced GREC's invoice for March 2016 by $529,439. This reduction breached Section 12.4.1 and requires a damages award and prospective declaratory relief. *See* GREC's Demand Counts 8, 9, and Relief ¶ 1(d).

Unambiguous contract terms, including in Section 12.4.1, demonstrate that summary judgment should be awarded for GREC on this issue.

A. Relevant Facts

For all of March 2016, GREC was in reserve shutdown as ordered by GRU, except for a period of time from March 6 to March 10 when GRU ordered GREC to perform a Dependable Capacity test pursuant to Section 11. Morales Aff. ¶ 20. Although GREC performed the test in full compliance with the operating levels that were specified by GRU, GRU claimed that GREC's operation for the month fell by more than 5% below its "expectation." GRU's claim, however, improperly focused only on GREC's performance during the five days associated with the test, and with operating deficiencies alleged during only 13 hours of the Facility's normal startup for the test in compliance with the specifications ordered by GRU. *Id.* at Exhibit 7.

In the invoice for March 2016 (the "**March Invoice**"), GREC billed GRU a Shutdown Charge as well as Available Energy charges for that month, which included "Delivered Energy" and charges for availability for the balance up to 102.5 MW.[10] GRU deducted from the invoiced amount three items: (1) the Shutdown Charge of $64,381; (2) Available Energy charges during startup and ramping up of $192,423; and (3) a payment decrease of $529,439. *Id.* at Exhibit 7. This section of GREC's summary judgment brief addresses the impropriety of the $529,439 payment decrease that GRU imposed under Section 12.4.1 of the PPA.[11]

[10] As set forth in the table in Appendix III of the PPA, the PPA requires that GRU pay GREC for both Delivered Energy and the balance of Available Energy up to the 102.5 MW Dependable Capacity. The Appendix III table is titled "Contract Prices" and shows that the Available Energy Charge is made up of two elements: the "Non-Fuel Energy Charge" and the "Fixed O&M Charge." The Delivered Energy Charge is made up of two different elements: the "Variable O&M Charge" and the "Fuel Charge."

[11] The impropriety of the Shutdown Charge is addressed in Section V below. The impropriety of the "ramping up" deduction is addressed in in Section II above.

B. GRU Breached The PPA By Imposing The Payment Decrease Because Section 12.4.1 Applies Only To Orders Setting Operating Levels Under Section 10 And Not To Orders To Run Capacity Tests Under Section 11.2

The unambiguous words in Section 12.4.1 show that the Payment Decrease in that provision does not apply to Dependable Capacity tests pursuant to Section 11:

> Payment Decreases. For each instance where Seller fails, after written notification from Purchaser, to meet the operating level specified by Purchaser, **pursuant to Section 10, *Dispatch and Scheduling***, by more than five percent (5%) **for a Billing Period**, the Dependable Capacity **for that Billing Period** shall be decreased by ten percent (10%). The integrated hourly net output will be used to determine if the Facility was within five percent (5%) of the specified operating level **for a Billing Period**.

PPA § 12.4.1 (emphasis added). The first highlighted clause states that Section 12.4.1 applies to operational orders that GRU makes "**pursuant to Section 10**" of the PPA. GRU's March 6 order was not an order to meet an "operating level" pursuant to Section 10. Rather, it was an order to test pursuant to Section 11.2, which is the provision of the PPA that authorizes GRU to issue orders directing GREC to conduct capacity tests. Specifically, Section 11.2 states that GREC "shall . . . test the Facility in accordance with the requirements set forth in Appendix IX" of the PPA (emphasis added). In fact, GRU explicitly ordered GREC to run a test pursuant to "section 2.3(a) of Appendix IX of the Purchase Power Agreement." Morales Aff. ¶ 27, Exhibit 10. An order to run a Dependable Capacity test is not an order within the meaning of Section 12.4.1 to meet an "operating level specified by [GRU], pursuant to Section 10, *Dispatch and Scheduling*" (emphasis added).[12] To the contrary, an order to run a Dependable Capacity test under Section 11 has a different purpose altogether: to prove the capacity rating of the Facility

[12] Since the Facility became operational three years ago, GREC has received numerous dispatch orders from GRU pursuant to Section 10, *Dispatch and Scheduling.* Unlike an order to run a Dependable Capacity test, a dispatch order contains an explicit operating level, or capacity (i.e. 100 MW), at which GRU requests GREC to operate. Morales Aff. ¶ 28.

so that GREC may "set the Dependable Capacity rating" which factors into the calculation of the charges GRU must pay GREC under the PPA. PPA Appendix IX, § 2.3. Because the tests are ordered pursuant to Section 11.2 and Appendix IX and not Section 10, tests are not subject to payment decreases under Section 12.4.1 and GRU's application of a payment decrease was improper.

C. The Three "Billing Period" References In Section 12.4.1 Refute GRU's Effort To Impose The Payment Decrease

Section 12.4.1 requires that any calculation for a Payment Decrease must be made based on the "integrated hourly net output," but GRU stops at that point, ignoring that the provision requires consideration of the entire "Billing Period." That term is defined as a full calendar month. PPA Schedule I, Definitions. The importance of addressing the full "Billing Period" is very clear. Indeed, the full calendar-month "Billing Period" is so important that it appears three times in Section 12.4.1, which contains only two sentences. Yet GRU's interpretation ignores it.

A Billing Period is a full calendar month, and not the fractional slice of a few hours that GRU would make it under its capacity test theory. In fact, a 30-day month has 720 hours, so a 6-hour Winter Period capacity test covers a mere eight thousandth (0.008), and a 12-hour Summer Period capacity test covers a mere seventeen thousandth (0.017), of a 30-day month.[13] GRU's effort to base a payment decrease on capacity tests that cover minute fractional slivers of the required 720-hour Billing Period must fail as an absurd reading that ignores the full month "Billing Period" terms. *See Inter-Active Services,* 721 So. 2d at 435 (interpretation that contradicts other contract terms will be rejected); *City of Homestead,* 760 So. 2d at 84 (proper contract interpretations must "give effect to all portions thereof"). Far from correctly interpreting Section 12.4.1, GRU tries to erase from that provision three explicit references to the

[13] *See* PPA Appendix IX , § 2.4(a)–(b) (Winter Period test is 6 hours; Summer Period test is 12 hours).

calendar month Billing Period. Ignoring explicit terms violates the basic principle of contract interpretation that all terms must be read together and that no terms are to be rendered "useless or inexplicable." *PNC Bank, N.A. v. Progressive Employer Services II*, 55 So. 3d 655, 659 (Fla. 4th DCA 2011). Cherry picking words to reach a desired result is not contract interpretation, it is contract revision, and is routinely rejected. *See id.*; *see also, e.g.*, *Vigliani v. Bank of America, N.A.*, 189 So. 3d 214, 219 (Fla. 2d DCA 2016 (holding interpretation should not depend upon "isolated words and phrases"); *City of Homestead*, 760 So. 2d at 84; *Inter-Active Services, Inc.*, 721 So. 2d at 435; *Roberts*, 920 So. 2d at 196.

D. GRU Fundamentally Misreads The PPA By Claiming That Section 12.4.1's Reference To "integrated hourly net output" Applies Only To Delivered Energy

In its Payment Decrease effort, GRU counted as "output" for the "integrated hourly net output" language in Section 12.4.1 only the sliver of hours in March 2016 when GREC physically delivered Energy, and completely ignored the vast bulk of the month where GREC delivered Available Energy. Morales Aff. at Exhibits 7, 13. This flawed argument results from GRU's misreading the PPA. Section 12.4.1 requires that the "integrated hourly net output" of the Facility be calculated for every hour of every day of the calendar-month Billing Period. This includes every hour when GRU has ordered GREC into reserve shutdown and in which GREC produces "Available Energy," the definition of which includes the energy that GREC could have delivered but for GRU's ordering GREC into reserve shutdown. *See* PPA Schedule I, Definitions. GRU, however, seeks to ignore every hour when GREC fully performed its contractual obligations in reserve shutdown. For example, according to GRU, if GRU ordered GREC to stay in reserve shutdown for 28 days and to run for just two days in a 30-day month,

one would look only at the two days (48 hours) and ignore the 28 days (672 hours) when GREC performed as ordered and provided Available Energy while in reserve shutdown.

GRU's revision effort stems from its misreading of one of the most basic provisions in the PPA to argue that "output" means only Delivered Energy. Section 12.1 mandates that GREC "maximize the Products generated by the Facility." The PPA defines those "Products" to include both "Energy" and "Dependable Capacity." PPA Schedule I, Appendix II. "Dependable Capacity" is "the amount of capacity of the Facility determined [by capacity tests] under Appendix IX." Thus, the Facility's output includes all of its "Products," explicitly including Dependable Capacity, which does not require physical delivery of energy and is reflected in GREC's obligation to provide Available Energy. The definition of "Available Energy" explicitly includes the capacity to deliver energy (e.g., the Dependable Capacity):

> each MWh of Energy that could have been generated . . . had the Facility been dispatched at 100% of the seasonal Dependable Capacity, but was not generated by the Facility due to the [reserve shutdown] dispatch instructions from [GRU].

PPA Schedule I, Definitions ("Available Energy").

Under the clear PPA terms discussed above, the Facility's "output" includes 102.5 MW of Available Energy for each hour that GREC could have generated but for the fact that GRU had ordered GREC into reserve shutdown. Thus, when Section 12.4.1 requires the calculation of the "integrated hourly net output" of the Facility for the entire Billing Period, that output must include all Products, including the 102.5 MW of Available Energy that are deemed "generated" each hour by the Facility when GRU has put it in reserve shutdown. GRU's failure to include Dependable Capacity or Available Energy as "output" despite the clear definition of "Products" to include Dependable Capacity defeats GRU's interpretation of Section 12.4.1.

E. GRU's Payment Decrease Effort Also Fails Because GREC Met Any Operating Levels Specified In GRU's Dispatch Order

This is an argument in the alternative. The dispatch order at issue here was one to conduct a Dependable Capacity test under Section 11; it was not an order to achieve any operating level requested by GRU under Section 10. Accordingly, Section 12.4.1 is inapplicable. But even if Section 12.4.1 were to apply to an order to perform a test, GREC would prevail on summary judgment because it met each "operating level" specified in GRU's orders.

On March 6 and March 10, GRU gave GREC very specific orders -- which are quoted below - and which specified "operating levels" that GREC met in all cases. In an attempt to justify the payment decrease, GRU sent a table to GREC in May 2016, captioned "GREC Hourly Data - March 2016" (the "**March Table**"). Morales Aff. ¶ 29, Exhibit 13. The March Table has three columns: (i) Date/Time; (ii) GREC MWhs "Delivered," and (iii) GREC MWhs that GRU claims it "Expected" GREC to deliver. The difference between the hourly amounts shown in the "Delivered" and "Expected" columns for 13 hours on March 7 and 10 associated with testing is the sole basis for GRU's claim that GREC failed to meet "the operating level specified by [GRU]" by more than five percent for the entire month. GRU, however, incorrectly populated the "Expected MWh" column with multiple hourly entries that not only defy physics (since, as discussed above, no solid fuel generating facility could be "expected" to instantly produce its full output) but, more importantly, are entirely inconsistent with the actual "operating levels" that GRU specified in its March 6 and March 10 dispatch orders. When GREC's operation is compared to the actual operating levels that GRU specified and expected, it is clear that GREC did not fail to meet the five percent test.

1. Facts relevant to GRU's order for GREC to run the March 2016 Dependable Capacity test

On Sunday, March 6, GRU gave the following order, directing GREC to run a Dependable Capacity test:

> At this time & date, 6:00 am on March 6, 2016, GRU exercises its rights under section 2.3(a) of Appendix IX of the Purchase Power Agreement between the parties and directs GREC to perform an operational capacity test. In accordance with Section 2.4(b) of Appendix IX the test shall be 6 hours in duration.
>
> GRU expects GREC to be at minimum load on or before 35 hours have elapsed since the issuing of this directive. Once at minimum load, GREC is directed to ramp load to the currently declared Dependable Capacity (DC). Once at Dependable Capacity, GREC will request GRU to approve beginning the test. Upon GRU approval, the test will begin & GRU will advise GREC of the effective test start time.
>
> At the conclusion of the test, whether successfully completed or aborted, GREC shall return the facility to its pre-test status."

Morales Aff. ¶ 27, Exhibit 10. Upon receiving this order, GREC began its normal startup procedures and ramped to minimum load of 70 MW at 07:00 on March 7. Since 07:00 was the 25th hour after GRU's startup order, GREC met the operating level specified by GRU to "be at minimum load on or before 35 hours have elapsed." GREC then followed GRU's order to continue ramping up to 102.5 MW: "Once at minimum load, GREC is directed to ramp load to the currently declared Dependable Capacity." In the 10:00 hour on March 7, however, GREC tripped offline into a Forced Outage, which GREC immediately reported to GRU. *Id.* ¶ 30. This Forced Outage lasted about 68 hours and required GREC to restart the test on March 10. *Id.*[14] On March 9 at 1:59 p.m., GREC advised that it had corrected the outage situation and sent the following message:

[14] For this period when GREC was in the Forced Outage, GREC was not paid for Available Energy. That adjustment is not at issue; GREC does not get paid for Available Energy when it is in any kind of outage.

> We will be ready to begin startup activities at 3 pm this afternoon. This will give us a sync time of 2 am Thursday, 3/10, at 70MW net by 5 am, and a capacity test start time of 9:00 am, 3/10. Please let us know if this meets with your approval.

Id. at Exhibit 12. GRU responded with the following dispatch order to restart the test:

> We have already set our schedule to the original test schedule as follows:Sync @ 03:00 on March 10, 201670 mw Net by 06:00 EST and on AGC [Automated Generator Control]
>
> 102.5 mw NET by 10:00 EST for 6 hours of Winter Period Dependable Capacity Testing
>
> Ramp down to 70 mw NET beginning at 16:00 EST and hold for 4 hours to burn out remaining fuel and go through a Full Soot Blowing Cycle"

Id. GREC followed these GRU dispatch specifications to the letter by (i) syncing to the grid at or about 03:00 on March 10; (ii) continuing to ramp up and reaching 70 MW at or about 06:00 on March 10; (iii) continuing to ramp up and reaching 102.5 MW at or about 10:00 EST; (iv) running at full capacity slightly above 102.5 MW for six hours until 16:00 on March 10; (v) ramping down to 70 MW beginning at 16:00; (vi) holding for four hours to burn out remaining fuel and performing a Full Soot Blowing Cycle; and (vii) shutting down by returning to reserve shutdown at or about 22:00 on March 10. *Id.* ¶ 33, Exhibit 13. For the rest of the month, GREC remained in reserve shutdown, as ordered by GRU. *Id.* ¶ 33, Exhibit 13.

There is no factual dispute regarding either (i) the operating levels specified by GRU or (ii) GREC's actual operating levels. The only issue is whether, under those facts, GREC's actual operating level for the Billing Period failed "to meet the operating level specified by [GRU]" by more than more than five percent. When GREC's operation is properly compared to the actual "operating levels" that GRU specified in its March 6 and March 9 orders (the only appropriate factor under Section 12.4.1), there is no basis to claim any five percent shortfall. The hourly values for allegedly "expected" MWhs that GRU included in its March Table to show 13 hours

of claimed deficiency are irrelevant to the calculation under Section 12.4.1 and contrary to GRU's own explicit orders and its actually stated expectations.

The March 7 Startup for Testing. At 06:00 on March 6, GRU Ordered as follows:

> GRU expects GREC to be at minimum load on or before 35 hours have elapsed since the issuing of this directive. Once at minimum load, GREC is directed to ramp load to the currently declared Dependable Capacity (DC).

Thirty-five hours from that order was March 7 at 17:00. On March 7 at about 07:00 -- 25 hours after the order -- GREC reached minimum load of 70 MW, well within the timeline that GRU expressly specified and "expected." GREC then began to ramp up towards 102.5 MW for three hours until it tripped into a Forced Outage at about 11:00, which required GREC to restart the test on March 10 once the outage was corrected. While GRU's statement of "expectation" in its order was for GREC to be at 70 MW by 17:00 on March 7, GRU now bases it payment decrease claim on the assertion shown in the March Table that it "Expected" GREC to be at 102.5 MW by 4:00 on March 7, and thus to be at 102.5 MW for each of the seven hours from 04:00 to 10:00. This revised GRU assertion directly contradicts its explicit operating instructions and expectations. Thus, none of the seven of GRU's alleged "Expected" entries for March 7 hours 04:00 through 10:00 on the March Table, indicating a supposed 426.5 MWh "deficiency," are based in fact or reflect any failure by GREC "to meet the operating level specified by [GRU]" that could justify a payment decrease under the terms of Section 12.4.1.[15]

[15] GRU's March Table also contradicts its own order in an additional way, by stating "expected" operating levels that do not account for normal (and thus expected) startup and ramp-up times, on both on March 7 and March 10. Ignoring startup and ramp-up time contradicts the express statement in GRU's orders that the Facility, like any other solid fuel facility, must when in reserve shutdown "sync" to the grid and then ramp up to minimum load, which GRU's instruction expressly "expected" to occur "on or before 35 hours" from the dispatch order, and then to ramp up to full capacity. Morales Aff. at Exhibits 10, 12, and 13.

The March 10 Startup for Testing. Similarly, GRU incorrectly alleges another 291 MWh deficiency in the alleged GREC failure to meet the specified hourly operating levels on March 10. But again, GREC met those levels. GRU's March 9 order directed GREC as follows:

> Sync @ 03:00 on March 10, 2016
>
> 70 mw Net by 06:00 EST and on AGC
>
> 102.5 mw NET by 10:00 EST for 6 hours of Winter Period Dependable Capacity Testing
>
> Ramp down to 70 mw NET beginning at 16:00 EST and hold for 4 hours to burn out remaining fuel and go through a Full Soot Blowing Cycle

Morales Aff. ¶ 32, Exhibit 12 (emphasis added). GREC met each part of this dispatch order on March 10. GREC synched to the grid at or about 03:00; ramped to 70 MW at or about 06:00; ramped to 102.5 MW at or about 10:00 EST and ran at full capacity for six hours until 16:00; and then ramped down to 70 MW beginning at 16:00 and held there for four hours "to burn out remaining fuel and to perform a Full Soot Blowing Cycle." *Id.* ¶ 33. Despite this full compliance with every part of the GRU order, GRU's March Table incorrectly claims that GRU "Expected" an operating level of 102.5 MW for the six hours from 04:00 through 10:00 even though GRU's order directed GREC to be ramping up to 102.5 during the hours before 10:00. The full output of 102.5 MW was thus neither GRU's actual expectation, nor the "operating level specified by [GRU]." To the contrary, GREC operated in exact accord with GRU's order, with no operational shortfall under Section 12.4.1.

Under undisputed facts, GRU's claim of a 5% shortfall in GREC's operation is not based upon any alleged failure "to meet the operating level specified by [GRU]" under Section 12.4.1 because GREC fully met each specified level. GRU's claim that GREC delivered only 1,835 MWhs of 2,400 MWhs is based entirely on revised and after-the-fact claims of "expectations" for 13 hours on March 7 and 10 that contradict GRU's orders and that, in all events, are

irrelevant to the calculation under Section 12.4.1. Morales Aff. at Exhibit 13 (March Table, last page). The facts recounted in the two preceding paragraphs render meaningless GRU's claimed "expectations" and confirm that GREC did not fail to meet the "operating levels specified by [GRU]" at all, much less by more than five percent. Accordingly, there was no basis for any payment decrease under Section 12.4.1 and summary judgment should enter for GREC.

IV. GRU BREACHED THE PPA BY CLAWING BACK A PRIOR $222,737 PAYMENT TO GREC UNDER SECTION 8.5

GRU claims that the PPA allowed it to "clawback" an amount paid under one prior invoice from a later invoice because the "PPA's one-year limitation on disputing invoiced amounts [in Section 8.5] can only be given effect in conjunction with the PPA's specification that GRU only pays undisputed amounts if newly discovered disputed amounts may be withheld from subsequent invoices." GRU's Counterclaim ¶ 131; GRU 9/21/16 Letter to Arbitrator. No PPA provision allows GRU to deduct an amount previously paid under one invoice from a subsequent invoice. Instead, the PPA sets a clear time limit of 15 business days from GRU's receipt of an invoice (called a "Billing Statement") for GRU to pay all uncontested portions of that invoice and subject any disputed portion to the dispute resolution procedure in Section 24 of the PPA. To the extent GRU later contends it should not have paid an amount previously paid, its sole recourse under the PPA is to seek recovery through the dispute resolution procedure of Section 24. The PPA provides no self-help clawback remedy of setoff against later undisputed invoice amounts. Accordingly, GREC moves for summary judgment on Count 9 of its Demand ordering the immediate payment of the clawed-back amount and a declaratory judgment that GRU cannot deduct amounts from later invoices that it paid without protest under prior invoices.

A. Relevant Facts

In its October 2015 Billing Statement, GREC billed GRU for the September Billing Period, including $222,737 for Available Energy charges for the period when the Facility ramped up to perform a test ordered by GRU. Morales Aff. ¶ 35. GRU received the October 2015 Billing Statement on October 9, 2015, and paid it without protest. *Id.* On November 24, 2015, GRU retroactively deducted the previously-paid $222,737 amount in Available Energy payments from uncontested amounts under the November 2015 Billing Statement (which covered the subsequent October Billing Period), giving the following reason:

> Although GRU paid GREC on the prior invoice in the amount of $222,736.62 of Available Energy Charges related to the September 19, 2015 Operational Capacity Test, GRU has identified this amount as an overcharge. GRU therefore disputes such amount and has subtracted $222,736.62 from [GREC's November] invoice to account for such overcharge on the prior invoice.

Id. ¶ 36, Exhibit 5. Mr. Bielarski of GRU clawed back this amount from a prior invoice despite himself admitting, in a column he published in the Gainesville Sun ***less than a month earlier***, that to do so was a breach of the PPA. *Id.* ¶ 37, Exhibit 14. Specifically, in his October 25, 2015 column, Mr. Bielarski wrote that the PPA does not allow the self-help clawback remedy of setoff against subsequent billings: "Unfortunately, the contract does not provide for withholding contested portions of previously paid amounts from current billings." *Id.*

B. Unambiguous Terms In Sections 8.4 And 8.5 Of The PPA Require Entry Of Summary Judgment For GREC And An Order Immediately To Repay The Clawed Back Amount

Sections 8.4 and 8.5 of the PPA set a time limit for GRU to pay all uncontested portions of a particular Billing Statement and to contest any disputed portions. This does not mean that GRU cannot later contest and seek recovery of a payment it has made. Section 8.5 contemplates that GRU might later dispute and seek to recover a prior payment, and sets a one-year deadline to

do so. But, unless timely contested before the 15-day payment deadline in Section 8.4, the current invoice amount must be paid. No provision in the PPA allows GRU to use self-help to deduct from a subsequent Billing Statement previously paid amounts that were undisputed when paid. Section 8.4 requires that GRU pay GREC "within fifteen (15) Business Days of receipt of a Billing Statement from Seller [GREC]." Section 8.5 provides, in relevant part:

> If either Seller [GREC] or Purchaser [GRU] contests a Billing Statement or Payment, any uncontested portions of invoiced amount shall be paid on or before the due date under Section 8.4 or shall be subject to Late Payment Rate interest charges. The remaining disputed amount shall be subject to the dispute resolution procedure in Section 24, *Dispute Resolution*.

For the withheld amount that GREC challenges here, GRU did not dispute its payment within the required 15-day period. Having not timely disputed it, Sections 8.4 and 8.5 required GRU to pay it to GREC, and GRU did so. GRU first informed GREC that GRU contested its payment on November 24, 2015, which was 25 days after the 15-day period in Section 8.4. Because GRU had already paid the amount under the October 2015 Billing Statement, GRU withheld and offset the disputed amount against the undisputed amounts due under the subsequent November 2015 Billing Statement. This was improper. When GRU "withheld" this money from the later invoice, it was not an amount that was in dispute under that Billing Statement. Rather, GRU withheld and offset it against undisputed amounts in the November invoice. In doing so, GRU breached Sections 8.4 and 8.5.

There is nothing inequitable in enforcing this agreed payment process. GRU still has the bargained-for remedy under the PPA for the disputed amount. Under another clause in Section 8.5, GRU has one year to raise that dispute and seek recovery, which GRU has done, asserting that issue also as an Available Energy dispute in this arbitration. This right to bring the claim within a year, however, does not allow a self-help remedy of retroactive clawback. GREC is

entitled, as a matter of law, to the return of $222,737, plus contract interest under Section 8.5 and a declaration that the PPA does not allow GRU to retroactively claw back previously paid amounts.

V. SUMMARY JUDGMENT SHOULD ENTER DIRECTING GRU TO PAY PAST OVERDUE SHUTDOWN CHARGES UNDER SECTION 10.7 WITH RELATED PROSPECTIVE DECLARATORY RELIEF

Procedural Order 6 granted the parties' requests to file dispositive cross-motions on GREC's claim that GRU breached Section 10.7 of the PPA by failing to pay Shutdown Charges relating to its orders to GREC to shut down its generation in September and November 2015 and in March and May 2016. Prospective declaratory relief is needed to prevent GRU from continuing with similar actions prospectively. GRU argues that it owes no Shutdown Charges for three of these shutdowns (September 2015, March 2016, and May 2016) because it ordered GREC to return to reserve shutdown after Dependable Capacity tests, rather than from regular operations. The PPA supports no such distinction; its plain language requires GRU to pay Shutdown Charges whenever it orders the complete shutdown of the Facility, which GRU ordered at the end of each capacity test. Accordingly, summary judgment should enter for GREC on Count 6 in the amount of $201,586 and part of Count 9 of the GREC's Demand.

A. Relevant Facts

GRU did not pay invoiced Shutdown Charges[16] to GREC associated with four Purchaser Shutdowns that GRU ordered in September and November 2015 and in March and May 2016. Morales Aff. ¶ 38. On each occasion, the Facility began in reserve shutdown per GRU's orders, with its generation completely shut down. *Id.* ¶ 39. GRU then ordered the Facility to run. *Id.*

[16] The term "Shutdown Charge" is a bit confusing in terms of timing. Although the Shutdown Charge is incurred when GRU gives the shutdown order, the amount to be paid is not invoiced until the Facility actually next restarts because the amount of the Shutdown Charge is calculated by the restart costs when GRU next orders the Facility to run. Morales Aff. ¶ 24.

After GREC ran, GRU each time ordered GREC to completely shut down its generation, albeit through orders that avoided the word "shutdown." Instead, GRU used functionally equivalent words, such as ordering GREC to return to its "pre-operational test condition" or "pre-operational dispatch status," which in each case was the complete shutdown of generation. *Id.* ¶ 39, Exhibits 10 and 15. The effect of the GRU shutdown order was the same in each case: it required GREC to completely shut down the Facility's generation, *i.e.*, to return to reserve shutdown status.[17]

GRU refused to pay the required Shutdown Charges totaling $265,442 for these four Purchaser Shutdown orders. The Shutdown Charges were in GREC invoices submitted for November 2015 ($66,003 for the September 2015 shutdown), March 2016 ($63,856 for the November 2015 shutdown), May 2016 ($60,760 for the March 2016 shutdown), and June and October 2016 ($5,029 and $69,794 for the May 2016 shutdown). Morales Aff. ¶ 41.[18] GRU later conceded that it wrongly failed to pay for the November 2015 shutdown following normal non-testing operation (reflected in the invoice for March 2016) and paid that $63,856 amount. GRU's Counterclaim ¶ 121. It was in connection with that payment that GRU apparently abandoned its "wordplay" theory in favor of its new "testing" theory to justify not paying Shutdown Charges. GREC seeks to recover as damages the amount of $201,586 for the remaining unpaid Shutdown Charges (for the September 2015 and March and May 2016 Purchaser Shutdowns), plus contractual interest. In addition, GREC seeks prospective

[17] The gamesmanship that GRU was engaging in was clear. After ordering GREC to return to its "pre-test status," for example, GRU would then defend its failure to pay a Shutdown Charge by claiming that, by its wordplay, GRU did not request a "Purchaser Shutdown" specifically because "at no time did GRU provide GREC with a dispatch order to 'Shut-down'." Morales Aff. at Exhibit 6.

[18] GREC incurred Shutdown Charges associated with the March 2016 shutdown in two separate months, June 2016 and October 2016, because in June 2016, shortly after GRU ordered the Facility to start, it issued another order directing GREC to abort the start. GREC incurred $5,029 in Shutdown Charges in June 2016 and then $69,794 in Shutdown Charges in October 2016, all associated with the GRU's March 2016 shutdown order. Morales Aff. ¶ 41.

declaratory relief that the Shutdown Charges must be paid when GRU orders GREC to shut down after testing in order to prevent a recurrence of such deductions.

B. Unambiguous Terms In Section 10.7 Require Entry Of Summary Judgment That GRU Must Pay The Disputed Shutdown Charges

The relevant provisions of Section 10.7 are simple and clear: "If Purchaser requests a Purchaser Shutdown, then Purchaser shall pay Seller the Shutdown Charge." The PPA defines a "Purchaser Shutdown" in similarly clear language, which makes no distinction for "testing" that GRU seeks to draw here. The PPA defines Purchaser Shutdown as:

> a requested complete shutdown of the Facility's generation by Purchaser other than a request that is prompted by a System Emergency which emergency is not a result of a physical condition or situation that is only on Purchaser's System.

PPA at Schedule 1, Definitions (emphasis added). This definition states no distinction between a shutdown order that follows a Dependable Capacity test under Section 11 or a shutdown order that follows operations under Section 10. Furthermore, generation of energy occurs whether the Facility operates under Section 10 or runs a test under Section 11. In fact, a Dependable Capacity test requires GREC to connect to GRU and to generate and deliver Energy to GRU at full capacity (102.5 MW) during the 6-hour Winter Period test or the 12-hour Summer Period test. From an operational perspective, ordering GREC to shut down from a test in which GREC is generating energy has no substantive difference from GRU ordering GREC to shut down when it is otherwise generating energy. From a cost perspective, there also is no difference; GREC incurs the same costs upon restart regardless of whether the order is to shut down after a test or after normal operations.

Section 10.7 does not support the distinction that GRU tries to make: it requires that GRU pay a Shutdown Charge whenever GRU "requests a Purchaser Shutdown," which the PPA

clearly, and very simply, defines as a "complete shutdown of the Facility's generation by Purchaser other than a request that is prompted by a System Emergency." Here, no shutdown resulted from a System Emergency. In each instance, GRU ordered GREC to completely shut down its generation, which is a Purchaser Shutdown under the unambiguous terms of Section 10.7.

Common sense also supports this reading. The parties agreed that a System Emergency -- which is neither party's "fault" -- would be a cost/risk borne by GREC. The PPA provides all other Shutdown Charges would be allocated to the party responsible for the shutdown. If the Facility shuts down for reasons attributable to GREC, such as for any kind of outage, then GREC is responsible for the Shutdown Charges, but whenever GRU orders a "complete shutdown of generation," GRU must pay the Shutdown Charge.

CONCLUSION

For the foregoing reasons, GREC's Motion for Summary Judgment should be granted in favor of GREC as follows:

(1) on Count 2 of GRU's Counterclaim and on Count 5 of GREC's Demand, declaring that the PPA does not require GREC to take an annual Planned Maintenance outage;

(2) on Counts 7 and 9 of GREC's Demand, ordering GRU to pay $1,224,495 plus interest, and declaring that the PPA requires GRU to pay for Available Energy during GREC's ramping time;

(3) on Counts 8 and 9 of GREC's Demand, ordering GRU to pay $529,439 plus interest, and declaring that the Section 12.4.1 Payment Decrease provision of the PPA does not apply to Dependable Capacity tests;

(4) on Count 9 of GREC's Demand, ordering GRU to pay $222,737 plus interest,[19] and declaring that GRU cannot deduct any amount paid under one invoice from a later invoice; and

[19] The amount of $222,737 also is included in the amount sought under GREC's Count 7. GREC does not seek to recover this amount twice; the total award GREC seeks as a matter of law under Counts 6, 7, 8 and 9 is $1,955,520, plus interest.

(5) on Counts 6 and 9 of GREC's Demand, ordering GRU to pay $201,586 plus interest, and declaring that GRU must pay Shutdown Charges under Section 10.7 when it orders Purchaser Shutdowns after testing.

Dated: December 16, 2016

GAINESVILLE RENEWABLE ENERGY CENTER, LLC

By Its Attorneys,

/s/ Andrew C. Phelan

Andrew C. Phelan, andrew.phelan@morganlewis.com
Siobhan E. Mee, siobhan.mee@morganlewis.com
Julie Silva Palmer, julie.palmer@morganlewis.com
Emma D. Hall, emma.hall@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
617.951.8000

CERTIFICATE OF SERVICE

I certify that on December 16, 2016, I caused a copy of the foregoing to be served by electronic mail on Paula W. Hinton, counsel for the City of Gainesville, d/b/a Gainesville Regional Utilities.

/s/ Emma D. Hall
Emma D. Hall