From: Ray Washington
To: Citycomm
Cc: Dl_utility Advisory Board; Bielarski, Edward J; Brown, Thomas R; Locke, Justin M; Holt, Carlos L
Subject: The GREC Memorandum of Understanding -- the Bad and the Ugly
Date: Monday, February 27, 2017 5:43:46 PM

Commissioners:

After receiving and reviewing GRU General Manager Ed Bielarski's Proposed Memorandum of Understanding (MOU) offered Friday as pre-requisite for discussion prior to negotiation of a potential GREC contract buy-down and GREC plant purchase, week I sent each of you an email identifying what I considered positive about Mr. Bielarski's MOU. In other words, I wrote about "*The Good*," meaning "*the upside*." While not convinced of the wisdom of the $750 million starting point for contract negotiations (up nearly 90% from GRU's offer three years ago, when the City Commission followed the advice of GRU's financial advisor Public Finance Management, or PFM), I did believe that Mr. Bielarski and his team, within the constraints imposed upon by GREC and this Commission, have structured an MOU that in terms of transparency was worth of praise. It goes beyond any document I've seen in prior GREC negotiations, and is written in clear language, largely devoid of legalese, and relatively simple and straight forward. (I also have indicated that, although I am with what Mr. Beilarski attempted within the scope of what is appropriate to his duties as General Manager, and within the context of limitations on what he *can* do given political considerations driving some members of the Commission, I remain dismayed by the lack of interest shown by members of this Commission with respect to receiving, reviewing and objectively assessing indicia of GREC fraud, fiduciary pre-requisites to the Commission's consideration of Mr. Bielarski's proposals. As I have written several times, the

Commission – not Mr. Bielarski -- should authorize a full and fair examination of already known indicia of GREC fraud. Such indicia, if actually explored, could substantially strengthen GRU's GREC contract buy-down negotiating position. After this initial minimal due diligence, the Commission, as I have written, either should declare the indicia of fraud to have been disproven and irrelevant to establishing a fairer value of the GREC contract, or should declare the indicia of sufficient probity to justify acquisition of forensic evidence to preserve the rights of GRU in negotiations with GREC. That is your responsibility, Commissioners, not Mr. Bielarski's -- another story for another retelling at another time in another place.)

In any event, having received and now having read and considered Mr. Bielarski's Saturday "Blueprint to a Buyout" gloss to his MOU, I here follow Friday's "*The Good*" email with an email focused on part of what I consider to be "*The Bad*" (i.e. "*the downside*") and "*The Ugly*" (i.e. "*the sides that have been poorly or inadequately considered*") of the MOU.

The Bad.

As a starting point for negotiations, the MOU's proposed $750 million cannot in my estimation be justified. This amount is not only nearly 90% more than the City $400 million the City offered three years ago, it is more than 30% in excess of what Mr. Bielarski offered GREC CEO James Gordon three months ago. [I had originally intended not to reveal details about the offers and counteroffers arising out of the October 25, 2016 mediation negotiations in Washington D.C. But Mayor Pro Tem Warren's attempts to prohibit my saying anything at all "about the purchase of GREC" during general comment at the

February 16, 2017 City Commission meeting has convinced me to abandon my self-imposed restraint. (That bizarre episode is at 4:35:33 of the Commission meeting video @ http://gainesville.granicus.com/MediaPlayer.php?view_id=9&clip_id=2857) The documented fact: On December 1, 2016 GRU submitted a global counteroffer to GREC that, among other things, included an option for GRU to purchase the GREC facility for $575 million in 2017 and to purchase the facility for $25 million less each succeeding year, so that the purchase price would decline to $550 million in 2018 and continue on down to $25 million in 2039, and $1 the following year. GRU's global counteroffer also included an agreement that GRU would retain all of the $4 million-plus in dispute as a result of GREC's failure to perform planned maintenance in 2016 and that GREC in 2017 and each year thereafter would be required to perform at least 11 days of planned maintenance. The global counteroffer also required that, regardless of when or if GRU exercised its purchase option, GREC would be required to retrofit the facility to achieve a minimum dispatch level of 25 MWh, with GRU contributing no more than $2 million to the retrofit cost, and GREC agreeing to modify the PPA to reduce the minimum dispatch level from 70 MW to 25 MW.]

I acknowledge that past negotiating positions are not evidence of what future negotiating positions may be justified. But, the premise of the $750 million MOU starting point offer is flawed on its face. The projected costs of maintaining the GREC contract for 27 years (and the asserted *possible* savings -- $600 million to $700 million to $900 million – that assertedly *could* result from retiring the GREC contract) are significantly overstated, just as eight years ago the asserted *potential* savings

that *could* theoretically be realized by entering into the GREC contract in the first place were significantly overstated. (Savings were asserted at the time to *possibly* be as high as $492 million or more.) It is premature and unnecessary at this point for me to go into detail. GREC has not yet signed the MOU, and may never sign it. Suffice it to say that best-case-scenario analysis offered in support of the MOU does not bode any better for sound decision-making in 2017 than best-case-scenario analysis did in 2009. What is needed is a complete sensitivity analysis, including worst-case-scenarios. If this Commission or its increasingly marginalized UAB does not choose to engage in a full sensitivity analysis, at that point I will consider addressing these issues myself, and circulating the information as widely as I can.

The Ugly

"*Ugly,"* in my view, is the continuation of the GREC-drafted and GREC-imposed "Confidentiality and Non-Disclosure Agreement" (NDA) which Mr. Bielarski in his Saturday "Blueprint to a Buyout" confirmed will continue to make secret all verbal communications between the parties to the NDA. He accurately explains that this is no different from the current practice that has led to the draft MOU. But there is much about this GREC-devised carve-out from the Florida Sunshine Law that Mr. Bielarski has not explained, or has been constrained from explaining:

1. The MOU expected to be signed by Mr. Bielarski and Mr. Gordon and then to be approved by signature authority of Mayor Lauren Poe and City Attorney Nicolle Shalley adopts the existing NDA in its entirety. That NDA

by operation of its express terms excludes members of the UAB from signing the NDA or being told about any verbal communications related to the buyout negotiations with GREC, past, present and future.

2. The NDA by operation of its express terms excludes members of the City Commission from being told about verbal communications related to buyout negotiations with GREC unless Commission members sign the NDA. As of last month, no Commissioners had signed the NDA. But if Commissioners in order to have a chance of obtaining sufficient information to cast a competent GREC buyout vote do choose to sign the NDA, those Commissioners will be prohibited for all time from revealing such information to the public or anyone else not covered by the NDA.

3. The MOU recites that the NDA was executed by GRU on November 16, 2016 and by GREC on November 21, 2016. This prohibits GRU officials who are a party to the agreement from ever disclosing secret negotiating information to City Commissioners who refuse to sign the NDA. It prohibits GRU officials who sign the NDA from ever disclosing such negotiating information to members of the public. As of last month GRU officials who had signed the NDA included Mr. Bielarski (11/16/16), GRU CFO Justin Locke (12/19/16) and GRU COO Tom Brown (12/19/16).

4. The NDA was signed on behalf of GRU and City financial advisor Public Finance Management (PFM) on 12/26/16. PFM is thus prohibited from sharing

negotiating information with members of the Utility Advisory Board, and with members of the City Commission who are unwilling to sign the NDA.

5. The NDA was signed by City Attorney Nicolle Shalley on 1/5/17. Ms. Shalley has thus agreed to restrictions in her ability to share negotiating information with members of the Utility Advisory Board – or even with members of the City Commission, a violation of her employment obligations and Florida Bar required ethical obligations unless all members of the City Commission agree to sign the NDA. There is indicia that GRU's outside counsel Winston & Strawn has refused to sign the NDA.

6. The NDA by operation of its express terms allows City Auditor Carlos Holt to sign the NDA and thereby to fulfill his employment obligations. However, it is doubtful that Mr. Holt could sign the NDA without violating his professional ethical violations. As of last month, there is indicia that Mr. Holt has not signed the NDA.

As "*Ugly*" as are the GREC-required secrecy requirements cited above, it is also "*Ugly*" that some members of this Commission in agreeing with GREC's secrecy demands are willing to ignore explanations, observations and conclusions reached by Navigant Consulting as part of its GREC-contract-decision-making review.

http://www.cityofgainesville.org/Portals/0/auditor/NCI-Investigative%20Review-Gainesville-Final.pdf

Navigant explained that there were significant inconsistencies between what information was known in the GREC negotiating

process and what information was presented in City Commission meetings and to the public. (Page 167)

Navigant stated that GREC information was too general to allow for significant discussion of risks and challenges, was oversimplified, was carefully managed and portrayed GREC in the best possible light. (Page 167)

Navigant pointed out that the City Commission had responsibility to insist upon additional information and clarification when inconsistencies or concerns existed, especially in light of the growing sentiments and concerns expressed by certain GRU customers. (Page 167)

Navigant observed that the City Commission did not utilize independent reviews by the City's Internal Auditing Department, which could have provided better visibility into the status of the GREC negotiation to ensure that risks were being properly identified and discussed. (Page 167)

Navigant declared that "it is incumbent upon the City Commission to foster open, even free ranging, discussions when the benefits of disagreement and dissent may lead to achieving better decisions." (Page 168)

Navigant remarked that while the prior GREC negotiating process acknowledged the existence of certain risks, there was a failure by decision-makers to evaluate the potentiality of the risks, and their potential impact. (Page 168)

Navigant suggested that going forward the City Commission should accept responsibility for assessing risk with a careful eye on long-term impacts. (Page 169)

Navigant advised the City Commission going forward to follow best practice governing board risk assessment strategies, including:

Determining whether risks being considered by the City Commission have been presented in a comprehensive and holistic manner. (Page 170)

Determining what could go wrong or derail a proposed strategy. (Page 170)

Determining what process was used to develop the strategy and identify risk? (Page 170)

Determining what assumptions underlie the strategy, and which of those assumptions could change or be wrong? (Page 170)

Determining whether there are differences of opinion among senior GRU leadership regarding strategic recommendations and decisions. (Page 170)

Also "*Ugly*" in the apparent willingness or eagerness of some members of this Commission to allow GREC's secrecy demands to override specific Navigant recommendations offered as prophylaxis against repeating the bad GREC-related decision-making of the past.

http://www.cityofgainesville.org/Portals/0/auditor/Navigant-Summary%20Recommendations.pdf

Those of you willing to accede to GREC's excessive secrecy demands have chosen to reject Navigant's common sense recommendations to this Commission:

1. Establish guidelines for third-party experts and/or advisors providing

independent reviews, as well as guidelines for reporting observations, findings and/or recommendations. (Recommendation 24)

2. Record negotiating sessions in order to provide a record of what was discussed and negotiated. (Recommendation 17)

I do not intend to attempt to present any the above information to the City Commission in person at this week's meeting, given the hostility I encountered when I tried to make a few points about the GREC purchase analysis process at the last Commission meeting.

Nor, unless something changes, do I intend to present to the City Commission the indicia of GREC fraud in the inducement and GREC fraud or impropriety in the operation white papers to which I have alluded in recent times after learning that a GREC buyout offer had been made. Most members of this City Commission have shown zero interest in receiving and reviewing such indicia as part of GREC purchase due diligence, much less acting on it. But I do intend, prior to the election, to share this information where it might be more objectively received.

Whatever ends up happening, I acknowledge here again *"The Good,"* particularly the transparency efforts attempted by Mr. Bielarski, which, while not perfect, are light years from the attempts of a prior GRU General Manager to shroud the community in darkness. From recent experience, I also have what I believe to be a founded hope that when some light is allowed in, most of the people of Gainesville have eyes to see.