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Subject:	GREC Due Diligence -- the Biggest Potential Purchase in Gainesville History -- and the Public Debate
Date:	Thursday, February 23, 2017 9:06:03 AM

Commissioners (and others copied by me or by others):

As some, most or all of you know, earlier this week I sent each City Commissioner an email -- one of several emails I have sent recently attempting to make the point that it is not possible to do adequate due diligence in deciding whether or not to buy down the GREC contract and acquire the GREC generating plant without first:

(1) Obtaining from GREC crucial records relating to the plant's construction, repair, operation and maintenance. (Much such crucial information has not been provided by GREC, and may never be provided as a result of the decision to have the arbitrator address certain contested issues by summary judgment, which decision has resulted -- as it resulted in the 2013 arbitration -- in GREC being relieved of meeting arbitration discovery obligations, which it may never be required to meet the Commission makes a decision to buy out GREC's speculators before GRU General Manager Ed Bielarski and outside counsel Winston & Strawn have taken GRU's arbitration claims to a full-fledged arbitration hearing. One of GRU's claims, not likely to be resolved short of a full-fledged hearing, is its claim that GREC has materially breached its Power Purchase Agreement, entitling GRU to declare the PPA void.)

(2) Asking questions about indicia of fraud and, if those questions are not satisfactorily answered, proceeding with a

more formalized investigation aimed at resolving those questions. (Proof of fraud that would have the effect of reducing GRU's obligations under the GREC PPA also would have the effect of reducing what would be considered a reasonable price for buying down the GREC contract, the result potentially being hundreds of millions of dollars in purchase payment and an opportunity for Gainesville residents and GRU customers that would be lost forever if a buy down/purchase proceeds without this form of due diligence.)

As some of you know, the City's ability to pursue fraud actions directly related the Power Purchase Agreement was lost on May 7, 2013 as a result of the City's failure to explore indicia of fraud related to the GREC PPA before the statute of limitations expired. Some of you may remember the appearance of GREC President Jim Gordon and his legal counsel David Dee before the Commission in December 2012 to encourage the Commission to settle the Gainesville Citizens Care lawsuit. You may also remember skepticism expressed by some commissioners, including Commissioner Hinson-Rawls, who asked of Mr. Gordon and Mr. Dee, something like: "If there has been a violation of the Sunshine Law that would void the PPA, what is to stop someone else from going to Court and seeking to void it after we settle with Gainesville Citizens Care?" Mr. Dee's answer, on behalf of Mr. Gordon, was something like, "Well that is a risk, but a slight risk, and one that will be eliminated in four or five months." Mr. Dee was referring to the four year fraud statute of limitations, which would cut off the ability of GRU customers to sue to have the PPA voided based on fraud in the inducement. Ironically, at the public hearing held in January 2013 as a condition of the GREC settlement, Mr.

Dee, after consulting with Mr. Gordon, in answer to a citizen question provided clear evidence of PPA fraud in the inducement – the details of which I repeated yet again at a City Commission meeting last month -- but the City Commission at that time was unwilling to pursue the evidence. If fraud in the inducement as to the PPA had been pled before May 17, 2013, the City might not be in the position it is in today regarding the GREC PPA.

As some of you may know, the City's ability to pursue fraud actions directly related the Equitable Adjustment settlement was lost as of May 7, 2015 upon the expiration of the fraud statute of limitations. In late 2014 I brought just acquired evidence of fraud in the inducement relating to equitable adjustment settlement to the attention of then GRU General Manager Kathy Viehe. Subsequently Ms. Viehe and I met in Commissioner Carter's office at City Hall with City Attorney Shalley, who discouraged further inquiry. At a followup meeting at City Hall Ms. Shalley made further argument against pursuing the new evidence of fraud in the inducement of the equitable adjustment settlement, suggesting that GREC had not been alone in the fraud, and the matter was dropped. (When I brought this up at a later City Commission meeting, Ms. Viehe distanced herself from the decision not to pursue the equitable adjustment indicia of fraud, indicating that although she appreciated the information, her view was not dispositive as she was not an attorney.) If such indicia of fraud had been pursued and the City's rights preserved before May 17, 2015, the City might not be in the position it is in today regarding the GREC Equitable Adjustment obligation.

As some of you may know, the fraud statute of limitations

related to the June 30, 2011 "Consent and Agreement" -- which Ms. Shalley has maintained was not discovered until the Fall of 2013 -- will not run until the Fall of 2017. Unfortunately for Gainesville residents and GRU customers the majority of the members of this Commission have demonstrated, in my view, an unseemly willingness, if not eagerness, to move toward a buy down of the GREC contract and purchase of the GREC plant without any due diligence aimed at exploring indicia of Consent and Agreement fraud in the inducement that if pursued to the point of obtaining legally admissible (i.e., forensic) evidence could be used to preserve GRU's rights before another state of limitations passes.

As I wrote each of you in an email earlier this week – an email not responded to, as prior emails about indicia of GREC fraud in the inducement and indicia of GREC fraud or impropriety in the performance have not been responded to -- last Thursday I received what seems to have been inaccurate information that three members of the Commission in that afternoon's meeting had expressed interest in following up on indicia of GREC fraud as part of GREC purchase due diligence. That inaccurate information prompted me to make a brief (and apparently unwelcome) appearance at the evening part of the meeting to try to gauge Commission interest in person, and to at the same time express support for moving forward with exploration of a possible purchase provided that the Commission did not interfere with Mr. Bielarski's ability to do due diligence in all respects.

As I wrote, review this week of the transcript of the afternoon session of Commission meeting, it appeared that although Commissioners Goston and Carter had made a statement of

interest in exploring indicia of fraud and impropriety information that if explored might result in significant benefit to GRU customers, what I had understood to have been a statement of interest by Commissioner Chase turned out to have been made in the context of wanting to discredit such information, whatever it might turn out to be. I asked Commissioner Chase to let me know if I had misread his intent, and if he in fact would support exploration of still actionable indicia of GREC fraud before the statute of limitations had expired. Two days have passed without Commissioner Chase having corrected my understanding of his intent.

Without an indication that at least three commissioners see due diligence as I see it, circulating white papers of the sort I hoped would make a difference seems to be a fool's errand best postponed until after the outcomes of the City Commission elections are known. Whether much stands to be accomplished even then remains to be seen. I have been disappointed to know that Commissioner Helen Warren in her re-election race, and some candidates in the two other races, have adopted essentially the same talking points that some of you have expressed as justification for buying down the GREC contract and purchasing the GREC plant without first pursuing further inquiry into indicia of GREC fraud.

These talking points – expressed, I believe, by candidates Warren, Arreola and Ward -- are:

1. "Navigant Consulting already has performed a forensic audit."

or, if that inaccurate statement is challenged,

2. "<u>Navigant Consulting had direction to go wherever the</u>

evidence led, and would have recommended a forensic audit if they had discovered any evidence of fraud or wrongdoing."

The underlined portion of the talking point is true to the extent that "had direction" refers to an aspirational statement articulated from the dais by a couple of Commissioners, which was not adopted by the Commission as a body, and which may or may not have been communicated by Commissioners in their private meetings with Navigant.

All of the non-underlined portion of the talking point may or may not be true. What Navigant Consulting would have done if it had discovered evidence of fraud is a matter of conjecture. Navigant in its report did in fact state that it did not identify indications of wrongdoing that would have voided the Power Purchase Agreement. That much is true. But what Navigant did or did not identify begs the question of what Navigant reasonably could have identified in any event, given the limitations of the Navigant review as it unfolded.

As some of you know, after the City Commission in 2014 chose Navigant, Navigant PI's met privately with the then City Auditor Brent Godshalk, who had consulted with Ms. Shalley in the creation of the Navigant contract, and with then commissioners for "direction" and "guidance" as Navigant characterized it in its report. Presumably, the Navigant review that followed was consistent with the "direction" and "guidance" given in the private meetings. I envision a Venn diagram in which the focus was determined to be the area of review that reflected what Mr. Godshalk/Ms. Shalley and Commissioners in their private sessions guided and directed.

The public doesn't know what was said during those private sessions. Some members of the public, and some members of the Commission, do know what happened afterwards, which suggests limitations of the nature of review actually carried out.

Below I restate and expand upon what I have previously written you (without response):

As some of you may know, the RFP on whose basis Navigant was retained – drafted by the City Attorney's office after then City Commissioner Lauren Poe's proposed $25,000 cost cap was rejected -- was circulated without language I and others had requested: specifically that there be investigation and review of *irregularities* in the biomass Power Purchase Agreement procurement, negotiation, interpretation and implementation process.

As some of you may know, the RFP objectives as drafted by the City Auditor in consultation with the City Attorney directed proposers to focus not on GREC irregularities but on *"institutional controls"* that could be *"implemented that would help avoid the management discrepancies of the past and help strengthen the working relationship between GRU management and the City Commission."*

As some of you may know, during the bid evaluation process, before the City Commission made its bid selection, the City Commission disqualified the most extensive review proposal -- submitted by the Atlanta firm of Windham Brannon, which proposed a true forensic audit was removed from consideration on the advice of the City Auditor and City Finance Director, in consultation with the City Attorney. Windham-Brannon's debarment was recommended to the Commission on the basis of an alleged violation of "blackout period" communications

ban. Specifically Windham Brannon's lead proposer had sent a letter advising that Windham Brannon's price should be considered a cap, and that if less work was required by the Commission -- presumably because the Commission did not want an actual forensic audit -- the pricing would be less.

As some of you may know, the Navigant's proposal was less expansive in its scope than the other proposals, and unlike competing proposals did not include the involvement of attorneys who could make legal determinations as to whether identified evidence of impropriety or potential wrongdoing was sufficient to call into question the validity of the GREC PPA and subsequent Equitable Adjustment.

As some of you may know, Navigant in its initial proposal did include substantial involvement of a retired Florida FBI investigator and FBI investigations supervisor working for Navigant in Tampa. (After Navigant's proposal was selected, and after members of the Navigant team met privately with the City Auditor and individual City Commissioners for "guidance" and "oversight," Navigant conducted its review without participation of the former FBI investigator and manager, though it was not requested by Mr. Godshalk to reduce its billed amount.)

As some of you may know, Navigant included in its initial proposal, utilization of proprietary Navigant software designed to determine whether GRU electronic records had been altered or deleted, and by whom. (After Navigant's proposal was selected, and after members of the Navigant team met privately with the City Auditor and individual City Commissioners for "guidance" and "oversight," Navigant conducted its review without using the proprietary software necessary for

evaluating the completeness and validity of electronic records reviewed, though it was not requested by Mr. Godshalk to reduce its bid amount.)

As some of you may know, during the Navigant contracting process GRU's then General Manager Kathy Viehe, sent out a directive partially responding to a request I made to the City Commission for a directive to GRU employees not to destroy GRU or City records until further notice.

As some of you may know, Ms. Viehe, following consultation with Mr. Stanton and the City Attorney's office, rejected my request that GRU personnel and those with access to GREC-related records and information be directed not only not to destroy records, but also be tasked with the affirmative duty to create a written report of what GREC records actually had been or were destroyed, and when and under what circumstances. (As some of you may also know, it would be later established that before and during the Navigant review, electronic records were routinely destroyed by GRU employees, without higher level review, and with advice from the City Attorney's office that when a GRU employee's electronic storage capacity had been reached electronic records could be deleted as needed at the discretion of the employee without communicating the action to the City Attorney's office or GRU management.)

As some of you may know, Ms. Viehe, following consultation with Mr. Stanton and the City Attorney's office, rejected my request that laptops, hard drives and other electronic storage devices controlled by GRU personnel be ordered to remain on the GRU premises until the completion of the review. (As some

of you may also know it would be later established that during the review hard drives were removed from GRU and that Mr. Stanton and others in brought laptops to and from GRU.)

As some of you may know, after Navigant's binding proposal was accepted by the City Commission on the recommendation of Mr. Godshalk – but prior to the City Attorney's office and Navigant was aware – I made the City Commission aware that in the Spring 2013 Navigant had represented GREC before the Federal Energy Regulatory Commission. Navigant had provided FERC with the names of every person or entity that had ownership interests in GREC. Navigant's filing on behalf of GREC came at the same time that GRU was in arbitration with GREC over the issue of GREC ownership. The arbitration, as a result of GREC's refusal to provide GRU with complete information about who actually owned GREC, had been forced to arbitrate with pleadings identifying GREC's unknown owners as "JOHN DOES NOS. 1-25." Thus, Navigant, at the very same time the City was in arbitration with GREC over the issue of ownership, was in possession of information that GREC refused to provide the City (and in fact has never provided the City. This conflict was not fully explained by Navigant.

As some of you may know, the Commission, as a result of my having presented the Commission with information about Navigant's conflict of interest, and having requested a legal prophylaxis, the City Attorney was directed to ask GREC to sign a waiver freeing Navigant from conflict of interest restrictions that could limit Navigant's ability to perform a complete independent review for GRU. The City Attorney instead decided, without City Commission approval (though possibly with private approval from a majority of the members of the

Commission) not to ask GREC for a waiver, but instead to negotiate with Navigant for contract language that would allow the City to deprive Navigant of full payment to the extent that the City, before it made final payment to Navigant, was able to establish that Navigant had performed substandard work. Substandard work, among other things, presumably would have included substandard work resulting from a conflict of interest that had prevented Navigant from materially fulfilling its duties to GRU under the contract (as those duties had been defined in private meetings with the City Auditor and individual City Commissioners).

(As some of you may know, after the Navigant report was completed, citizens discovered another possible Navigant-GREC conflict. In the Summer of 2008 Albert Morales, now GREC's Chief Financial Officer and its asset manager -- that is, manager of the GREC PPA, GREC's only significant asset -- was engaged by Navigant Consulting Inc. to provide consultation services for a report on biomass/renewable energy potential as part of a Navigant report released August 6, 2008. Less than two weeks after that Navigant report was issued, while GRU's then officials -- all now resigned, fired or retired -- were attempting to negotiate a PPA with Nacogdoches Power LLC, a new entity a new entity, Gainesville Renewable Energy Center LLC, was incorporated by Nacogdoches President Jim Gordon and other energy speculators. With Mr. Morales' guidance, Nacogdoches' assets were put beyond the reach of GRU, and Mr. Morales became part of the team negotiating with GRU as "GREC.")

As some of you may know, after Navigant and the City executed the 2014 Navigant investigative review contract, members of the

Navigant team began meeting and communicating privately with the City Auditor and individual City Commissioners, who under Navigant's stated understanding of the contract, were to provide Navigant with "guidance" and "oversight." Following some of these meetings and communications Navigant began its review of GRU and City records review by asking GRU and the City to provide specified categories of hard copy and electronic records that GRU and the City deemed relevant to the category of records requested.
As some of you may also know, Navigant, going into its review, engaged in discussions/interactions with GREC President Jim Gordon and GREC Chief Financial Officer Al Morales for the purpose of coordinating efforts and obtaining information. Navigant did not keep notes of these communications and did not refer to them in its final report to the City and GRU.

As some of you may know, Navigant in its review was unsuccessful in its attempts to interview former Gainesville Mayor (May 2004-May 2010) Pegeen Hanrahan and former GRU General Manager (February 2006-March 2008) Karen Johnson. These individuals asked for a list of questions/topics prior to agreeing to being interviewed. Navigant did not interview them, and did not refer in its final report to its attempts to interview them.

As some of you may know, Navigant contacted and reached an agreement to conduct a home interview with former GRU Assistant General Manager Ed Regan (who in 2008, together with then private consultant John Stanton, had reweighted the biomass RFP evaluative metrics, resulting in the Nacogdoches proposal moving from the bottom to the top of the short list, and who, after Mr. Stanton was hired as GRU Assistant General

Manager for Energy Supply, teamed up with him as co-lead negotiator of the GREC PPA). Navigant did not interview Mr. Regan and did not refer in its final report to its attempts to interview him.

As some of you may know Navigant attempted to set up an interview with former GRU Chief Financial Officer Jennifer Hunt. (Ms. Hunt had been excluded from the GREC PPA negotiating process, but three years later had been directed by former GRU General Manager Hunzinger in 2011 to sign the $100-million-plus equitable adjustment settlement agreement. Ms. Hunt, after a long career at GRU, had resigned from GRU in 2013, just before the first GREC invoices arrived at GRU to be paid.) If a Navigant interview with Ms. Hunt took place, neither it nor attempts to interview Ms. Hunt were referenced in its final report.

As some of you may know, Navigant had discussions with former Gainesville Assistant City Attorney Manasco. (Mr. Manasco had signed the April 29, 2009 GREC PPA. He had signed the March 16, 2011 equitable adjustment. He had also signed the June 30, 2011 Consent and Agreement, a document made ten amendments to the GREC PPA, some unrelated to GREC financing needs, and gave up GRU's right to take possession of and operate the GREC plant for the cost of paying off GRU's lenders, an option that had been represented to the City Commission when it ratified the GREC PPA in 2009). Mr. Manasco told Navigant he preferred to meet Navigant reviewers at his house and was concerned about the last meeting he had had with Gainesville Assistant City Attorney Liz Waratuke and Gainesville Outside Counsel Tim McDermott. Mr. McDermott had recommended that the City proceed with

legal action against GREC based on unauthorized signing of the equitable adjustment settlement agreement. Mr. McDermott's recommendation had been overridden by City Attorney Nicolle Shalley. A few months later the fraud statute as it applied to the equitable adjustment expired. Navigant in its report made no reference to its communications with Mr. Manasco.
As some of you may know, Navigant had discussions with former Gainesville City Attorney Marion Radson, on whose watch the GREC PPA, Equitable Adjustment and Consent and Agreement all were executed. Navigant in its report made no reference to its communications with Mr. Radson.

I am sending this email to each of you Commissioners, and, also, this time, I am copying it to other potentially affected or interested persons, in part because misstatements about the scope and significance of the Navigant Report have been expressed, circulated and repeated by some members of current City Commission and by some City Commission candidates. These same Commissioners and candidates – you know who you are – seem to want to move forward with the expenditure of hundreds of millions of dollars of public funds and future commitments without first insisting upon reasonable due diligence, with motivations only they know, if they know.

I have not spent the better part of this evening writing this long email because I want to condemn those who have made misstatements about the Navigant report, or about the GREC contract, or about anything else. No one has perfect knowledge. I have made misstatements of my own. And my purpose is not to suggest improper motivations. I assume the motivations at play here are varied, and in most cases sincere. I have written this, as I have written a number of communications recently,

because a decision will soon be made that, in my view, will have a huge impact on the quality of life in Gainesville going forward. There has been too little informed public debate in the past. The more public debate that occurs in the months ahead, the better for all of us.