

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

**THE CITY OF GAINESVILLE, FLORIDA, D/B/A GAINESVILLE REGIONAL
UTILITIES RESPONSE AND COUNTERCLAIM TO
GREC ARBITRATION DEMAND**

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EXHIBIT LIST

No.	Description
1	Power Purchase Agreement
2	Abel Emails to/from Demopoulos (May and June 2015)
3	Demopoulos Email (Oct. 21, 2015)
4	Bielarski Letter to Gordon (Aug. 17, 2015)
5	Bielarski Email to Morales (Sept. 13, 2015)
6	Fagan Letter to Stanton (Oct. 14, 2015)
7	Fagan Email to Stanton (Dec. 10, 2015)
8	Abel Email #1 to Demopoulos (Feb. 3, 2016)
9	Abel Email #2 to Demopoulos (Feb. 3, 2016)
10	Demopoulos Email (Feb. 4, 2016)
11	Bielarski Letter to Gordon (Feb. 4, 2016)
12	Demopoulos Email (Feb. 8, 2016)
13	Gordon Letter to Bielarski (Feb. 8, 2016)
14	Bielarski Letter to Gordon (Feb. 9, 2016)
15	Gordon Letter to Bielarski (Feb. 17, 2016)
16	Bielarski Letter to Gordon (Feb. 23, 2016)
17	Bielarski Letter to Gordon (Feb. 29, 2016)
18	Abel Emails to/from De Leo (March 2016)
19	Stanton Emails to/from Fagan (Oct. 4, 2012)
20	Morales Email to Bielarski (Sept. 14, 2015)

**THE CITY OF GAINESVILLE, FLORIDA, D/B/A GAINESVILLE REGIONAL
UTILITIES RESPONSE AND COUNTERCLAIM TO
GREC ARBITRATION DEMAND**

Pursuant to R-5 of the American Arbitration Association's (the "AAA") Rules for Commercial Arbitration, Respondent The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities ("GRU") hereby submits this Response and Counterclaim ("Response") to Claimant Gainesville Renewable Energy Center, LLC's ("GREC") Arbitration Demand (the "Demand").

I. Preliminary Statement

1. GRU and GREC (the "Parties") entered into the Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility dated April 29, 2009 (the "PPA"). The current dispute solely regards GREC's refusal to comply with the PPA's requirement that GREC perform annual maintenance work at GREC's biomass-fueled electric power production facility (defined in the PPA as the "Facility").¹ The PPA requires GREC to conduct maintenance at the Facility each year to ensure the Facility's reliable long-term and safe operation (defined in the PPA as "Planned Maintenance"). By refusing to conduct Planned Maintenance in 2016, GREC is in material breach of the PPA.

2. GREC's breach of the PPA deprives GRU of its reasonable expectation that GREC would conduct Planned Maintenance during a twenty-one day period in 2016 – from April 9th through April 29th – in accordance with the PPA's requirements and the written annual maintenance plan that GREC and GRU agreed to in June 2015. Based on that written annual maintenance plan, GRU understood that GREC would take a twenty-one day outage at the

¹ Except as otherwise specified herein, initially capitalized terms used in this Response have the meanings assigned in the PPA.

Facility to conduct Planned Maintenance as required by the PPA. In accordance with the PPA's pricing and payment provisions, GRU understood that it would not owe any payments to GREC for Available Energy during the twenty-one day outage. In accordance with GRU's annual ratemaking procedures, which set customer rates in July for the following fiscal year commencing on October 1st, GRU designed its customer rates for the 2016 fiscal year based on that expectation.

3. In October 2015, GREC attempted to cancel its Planned Maintenance for 2016. GREC's unilateral cancellation violates (i) GREC's obligation under the PPA to conduct annual Planned Maintenance at the Facility, and (ii) the PPA's requirement for obtaining GRU's agreement to any change to the agreed upon written annual maintenance plan.

4. GREC now seeks to realize an improper financial windfall by demanding that GRU make payments to GREC that are not owed for the period when GREC is required to conduct Planned Maintenance in accordance with its written annual maintenance plan. This financial windfall could be in excess of \$4,000,000.

5. Based on the written annual maintenance plan that was agreed to in June 2015, GRU is not required to pay GREC the \$4,000,000 that GREC now demands. That amount therefore is not included in GRU's current electric rate, and would need to be recovered through another mechanism or another account. Allowing GREC to extract a \$4,000,000 windfall would boost GREC's profits under the PPA, at the direct expense of GRU's public utility customers.

6. GREC's asserted claims in the Demand are contrary to the PPA and without merit. As explained below, GRU has acted in accordance with its right to require GREC to perform Planned Maintenance on an annual basis in accordance with the PPA. Through this Response, GRU requests that the arbitrator issue an interim award that dismisses GREC's claims

with prejudice. Through this Response, GRU also submits counterclaims and requests an award that declares GREC to be in anticipatory breach of the PPA and its implied covenant of good faith and fair dealing. GRU intends to exercise its remedies in respect of GREC's breaches, including its right to terminate the PPA.

7. Throughout the Demand, GREC repeatedly introduces extraneous discussion of previous disputes between the Parties and other alleged facts that bear no relation to the current dispute. GREC also levies repeated ad hominem attacks against GRU's General Manager, Ed Bielarski. GREC attempts to cast a prejudicial shade on Mr. Bielarski's legitimate business decisions by using such inflammatory terms as "mug-a-nug" and by alleging that GRU and Mr. Bielarski engaged in "improper" leveraging efforts. GREC's excessive vituperative invective lacks any substantive value in the current dispute. Indeed, it appears as though GREC has taken advantage of the more open pleading requirements of arbitration in an attempt to distract and prejudice the arbitrator against GRU and Mr. Bielarski. This Response will only address relevant facts and avoid any unnecessary and unhelpful commentary on GREC and its executives and employees.

8. In arguing that GRU has improperly refused to recognize GREC's purported "written annual maintenance plan," GREC relies extensively on mischaracterizations of multiple critical documents. GRU intends herein to present a clean and accurate record that will assist the arbitrator in reaching a just conclusion.

9. Finally, GREC's Demand also repeatedly cites to, and even quotes from, documents and correspondence that it has not attached as exhibits to the Demand. GREC's failure to supply the documents on which it relies is extremely prejudicial. GRU will endeavor to supply the arbitrator with a complete record.

II. Procedural Matters

10. The scope of this submission is limited to the requirements set forth in R-5 of the AAA Rules. GRU expressly reserves its right to further substantiate or alter its statement and offer necessary evidence at the appropriate later stage of the proceedings. As GRU's arguments are summary in nature at this stage, GRU shall not be taken to agree to or concede any part of GREC's allegations or claims that are not expressly disputed.

11. GRU has no objection to the jurisdiction of the AAA to hear disputes arising out of or in conjunction with the PPA, in accordance with section 24.2 of the PPA, which provides:

Arbitration Procedure. Any controversy, dispute or claim between [GREC] and [GRU] arising out of or relating to this Agreement, or the breach thereof, shall be settled finally and conclusively by arbitration according to the Rules of the American Arbitration Association then in effect, unless the parties mutually otherwise agree. If the parties fail to agree on an arbitrator within thirty (30) days following the date of a written notice by one party to the other calling for arbitration, the parties shall promptly designate an arbitrator from a list of persons from the National Roster of Arbitrators and Mediators following said Rules and that arbitrator shall select an arbitrator from the National Roster of Arbitrators and Mediators who will adjudicate the issue. The costs and expenses of arbitration shall be paid as awarded by the arbitrators; otherwise costs and expenses shall be shared equally. [GREC] and [GRU] shall each abide by and perform any required actions according to any resulting arbitration award. The arbitration award, when issued, shall be final and shall be enforceable in any court of competent jurisdiction. The location for the arbitration shall be Alachua County, Florida.

12. As set forth in section 24.2 of the PPA, and in AAA's March 15, 2016 Notice, GRU agrees that the location of the arbitration will be Alachua County, Florida. GRU also notes that pursuant to section 28.1 of the PPA, the validity, interpretation, construction, and performance of the PPA is governed by the laws of the state of Florida.

III. The Parties

A. Claimant GREC

13. GREC is a Delaware limited liability company formed to build, maintain, and operate the Facility.

B. Respondent GRU

14. GRU is a utility owned by the City of Gainesville, Florida. GRU owns and operates several power generating (and other) facilities and provides electric, natural gas, water, wastewater, and telecommunications services to approximately 93,000 retail and wholesale customers in Gainesville and surrounding areas.

IV. Relevant Factual Background

15. On April 29, 2009, GRU and GREC entered into the PPA, attached as Ex. 1. The PPA requires GREC to build, operate and maintain the Facility at a site located in Alachua County, Florida, and to sell and deliver Products (consisting of Dependable Capacity, Energy, and Environmental Attributes) to GRU at the specified Delivery Point. PPA §§ 1.2, 6.1, Ex. 1 at 1, 7. Dependable Capacity is a measure of power-generating capacity of the Facility and is determined through testing in accordance with Appendix IX of the PPA. The Facility's current Dependable Capacity is 102.5 megawatts ("MW"). The PPA allows GRU to dispatch and schedule the Facility to deliver Energy and requires GRU to pay GREC the Contract Prices specified in Appendix III for all Products produced by the Facility and delivered to the Delivery Point during the Delivery Term. *Id.* §§ 10.1, 10.5, 3.1.2.

A. Pricing and Payment Provisions of the PPA

16. The PPA requires GRU to pay GREC two separate charges for every megawatt-hour ("MWh") of Available Energy. The two charges are a Non-Fuel Energy Charge of \$56.15 per MWh and a Fixed O&M Charge of \$23.00 per MWh, for a total charge of \$79.15 per MWh. *See* PPA, Ex. 1, Appendix III.

17. Available Energy, as defined in the PPA, has three components that are measured in MWh and added together to calculate the total Available Energy that is subject to the \$79.15 per MWh charge each month: (i) each MWh of Energy generated by the Facility and

delivered to the Delivery Point (this quantity is also defined separately as “Delivered Energy”); (ii) for each hour in which GRU 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 GRU; and (iii) for each hour during which GREC would have been capable of producing and delivering Energy but was prevented from doing so due to a constraint or fault in GRU’s facilities, but only if that was not caused by a constraint or fault of facilities owned by third parties, 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 the constraint or fault. *See PPA, Ex. 1, Schedule 1* (providing the full definition of Available Energy).

18. The second category of Available Energy – the category specified in subpart (ii) of the definition – is particularly relevant to this dispute. Available Energy under subpart (ii) is the amount of Energy that the Facility could produce, but did not produce, due to GRU’s election not to dispatch the Facility at its full seasonal Dependable Capacity level. The effect of subpart (ii) is that GRU pays GREC a substantial payment – equal to \$194,709 per day, or \$5,841,270 per month² – for GREC to maintain the Facility in a state of readiness such that the Facility is available to produce Energy when called upon by GRU. Based on the calculation of Available Energy, the payment is due even if GRU does not actually require Energy from the Facility. As long as the Facility is capable of producing Energy at its full seasonal Dependable

² This is the payment for a month with 30 days when the Facility is fully available each day to produce Energy up to the seasonal Dependable Capacity level of 102.5 MW.

Capacity level, GRU pays GREC for all Energy that the Facility is capable of providing as if the Facility were dispatched at its full Dependable Capacity, at a price of \$79.15 per MWh.

19. For months when the Facility is fully available but not dispatched at all, the monthly payment to GREC has been \$5,841,270.³ For months when the Facility is fully available but dispatched at a level lower than its full seasonal Dependable Capacity level, the monthly payment is the same, because GREC is paid for the combined Delivered Energy and Available Energy attributable to the Energy that could have been delivered, but was not delivered, due to GRU's partial dispatch of the Facility.

20. In addition to the payment for Available Energy each month, GRU pays GREC variable charges for Delivered Energy (i.e., Energy that is actually produced and delivered by the Facility). These charges are the Variable O&M Charge and the Fuel Charge, as specified in Appendix III of the PPA. These amounts are designed to compensate GREC for variable costs that GREC incurs to operate the Facility, including the cost of fuel. *See* PPA, Ex. 1, at Appendix III. The effect is that GREC receives substantial payments every month to keep the Facility available and ready to operate, regardless of whether GRU dispatches the Facility to generate Energy, and GREC receives additional payments for Delivered Energy that compensate GREC for the additional costs incurred to operate the Facility when it is dispatched.

21. Under the definition of Available Energy, GREC is not paid for Energy that the Facility is not capable of generating and delivering to the Delivery Point. If the Facility shuts down or experiences an outage, there is no Available Energy during the period the Facility is down and therefore no payment obligation for the outage hours under the PPA. Similarly, if the Facility is unable to operate at its full Dependable Capacity, but is available to operate at a

³ See previous footnote.

reduced capacity level (referred to as a “derate”), the amount of Available Energy during the hours when the derate occurs would be reduced to the level of actual availability to operate. This structure is built into the definition of Available Energy and Appendix III. In addition, section 15.2 of the PPA provides that GRU “shall not be obligated to purchase Products that cannot be delivered due to disruptions, breakdowns, electrical system failures and/or mechanical failures, **maintenance** or repair.” PPA, Ex. 1, at 17 (emphasis added). Thus, during periods when the Facility is derated or experiences an outage, whether planned or forced, the payment owed for Available Energy under the PPA is reduced, potentially to zero.

B. The PPA’s Requirements for Planned Maintenance

22. The PPA allows GRU to schedule and dispatch the Facility to produce Energy, and requires GREC to provide periodic schedules and forecasts to GRU regarding the Facility’s capabilities and outages. *See generally* PPA § 10, Ex. 1, at 10–14. For example, Section 10.3.2 requires an annual forecast as follows:

At least sixty (60) days prior to . . . the beginning of ***each calendar year***, [GREC] shall provide to [GRU] [GREC]’s generation forecast for the upcoming calendar year, which forecast shall be ***consistent with the schedule of Planned Maintenance for such calendar year*** established pursuant to Section 10.4.

Id. at 11 (emphasis added).

23. The schedule of “Planned Maintenance” referred to in section 10.3.2 is governed by section 10.4.1, which imposes the following requirements in subpart (a):

[GREC] 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 start of ***each calendar year***. ***Any and all changes to such plan shall be mutually agreeable*** to [GREC], [GRU], and to FRCC

Id. at 12 (emphasis added).

24. The PPA defines “Planned Maintenance” as:

[T]he 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.*"

Id. at Schedule 1, vii (emphasis added).

25. Thus, every year, the PPA requires a written annual maintenance plan specifying the following year's Planned Maintenance. The definition of Planned Maintenance specifies that routine or regular maintenance must be performed in accordance with "Good Utility Practice," which is also defined in the PPA. The definition of Good Utility Practice specifies that "[w]ith respect to the Facility, Good Utility Practice includes but is not limited to taking reasonable steps to ensure the following: . . . (iii) That preventative, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation." *Id.* at Schedule 1.

26. The PPA specifies that GREC cannot change its written annual maintenance plan unless GRU agrees. Section 10.4.1(a) requires that "[a]ny and all changes to such plan shall be *mutually agreeable* to [GREC], [GRU], and to FRCC and promptly communicated to [GRU] *in writing* as soon as practicable." PPA § 10.4.1(a), Ex. 1, at 12 (emphasis added). Thus, GRU, GREC, and the Florida Reliability Coordinating Council, Inc. ("the FRCC")⁴ must all agree on any proposed change to the Planned Maintenance schedule.

27. The PPA also sets forth standards of reasonableness to which the Parties are bound. Generally, the Parties are obligated to act in good faith while adhering to "Good Utility Practice" and FRCC operating procedures (alternatively referred to as FRCC Requirements). These obligations are found first in section 10.3.5, which states:

⁴ The FRCC is a not-for-profit organization designed to regulate the reliability, adequacy, and security of bulk electricity supply in Florida. For more information, see <https://www.frcc.com/AboutUs/SitePages/Home.aspx>.

The details of the forecasts and schedules specified above shall be coordinated by the Parties cooperating in good faith. [GREC] shall utilize Good Utility Practice in developing and preparing the forecasts and schedules.

Id. at 11. The PPA places similar restrictions on efforts to schedule Planned Maintenance.

Section 10.4.1(d) requires:

“[GREC] shall work with [GRU] to schedule Planned Maintenance in a manner that minimizes the economic cost to [GRU] of such outages. [GREC] and [GRU] shall comply with FRCC operating procedures regarding any such Planned Maintenance.”

Id. at 12. Notably, the PPA specifically obligates GREC to schedule Planned Maintenance in such a way that “minimizes the economic cost” to GRU. *Id.*

C. The 2016 Planned Maintenance Schedule

28. GRU maintains a “10 Year Outage Schedule” and a “Rolling 12 Month Outage Schedule” (collectively, “the Outage Schedules”). These Outage Schedules are generated with input from all the power generation facilities in GRU’s system, including GREC. With the aid of the Outage Schedules, GRU is able to stagger maintenance outages for its various production facilities to ensure a safe and reliable supply of electricity. Since the inception of both the PPA and GRU’s business relationship with GREC, the Outage Schedules have been used to schedule annual Planned Maintenance outages for the Facility. See Demand ¶ 77 (indicating that GREC has provided information to assist in the preparation of the Outage Schedules “ever since GREC began operations”).

29. On May 1, 2015, GRU circulated a revised 10 Year Outage Schedule, which prompted GREC to request a Planned Maintenance outage from April 2nd through April 22nd of 2016. Abel Email to Demopoulos (May 1, 2015), Ex. 2. On June 17, 2015, GRU replied inquiring of GREC: “Would it be possible for you to reschedule your outage to April 9th – 29th? ” Demopoulos Email to Abel (June 17, 2015), Ex. 2. In response to GRU’s request, GREC replied

the following day simply: “April 9th to April 29th will work for us.” Abel Email to Demopoulos (June 18, 2015), Ex. 2. GRU further commemorated this agreement on October 21, 2015, when it circulated revised Outage Schedules confirming that GREC’s annual Planned Maintenance outage would occur in April 2016 between the 9th and the 29th. Demopoulos Email (Oct. 21, 2015), Ex. 3.

30. Thus, as of June 2015, the Parties had satisfied the requirements of section 10.4.1(a) of the PPA and agreed in writing that GREC would take a Planned Maintenance outage in April of 2016. This constitutes GREC’s written annual maintenance plan for 2016 as required in section 10.4.1(a) of the PPA.

D. Standby Status of the Facility

31. GRU is, first and foremost, a municipally owned public utility. As such, GRU has a responsibility to protect its customers, the citizens of Gainesville and Alachua County, from overpaying for essential utilities, principally, electricity.

32. As GREC admits, in recent years, the price of natural gas has dropped to near all-time lows. The consequence is that power generation available from gas-fired generation supplied in the market has become significantly more economic than the power supplied by the Facility under the PPA. The price for coal-fired generation also has dropped to compete with gas-fired generation.

33. The Facility experienced a Forced Outage on August 7, 2015, and was forced to shut down. At that time, GRU exercised its right under the PPA to issue a dispatch instruction for the Facility to remain in standby status, rather than dispatch the Facility to produce and deliver Energy. While the Facility is in standby status, GRU pays GREC the \$79.15 per MWh monthly charge for Available Energy (i.e., each MWh of Energy that the Facility is capable of generating and delivering, but is not generating or delivering because of GRU’s dispatch

instructions). This means that for months when the Facility is fully available to generate Energy at its full Dependable Capacity level, GRU pays GREC the substantial monthly payment that is described above.

34. By not dispatching the Facility for Energy, however, GRU is able to save the variable charges applicable to Delivered Energy. In an August 17, 2015 Letter to GREC, Ed Bielarski, GRU's General Manager, explained that even at a reduced minimum dispatch level, "GREC's variable pricing would still cost more than GRU's other options." Bielarski Letter to Gordon (Aug. 17, 2015), Ex. 4. Thus, the Facility was placed, and remains, in standby status.

35. GRU continues to comply with its contractual obligation to pay GREC under the PPA for all Available Energy, which applies even when the Facility is not dispatched. To obtain a savings for GRU customers, GRU has exercised its right under the PPA not to dispatch the Facility, which at least saves the additional variable O&M and fuel charges that apply to Delivered Energy. GRU still pays the large fixed charge for Available Energy, by paying GREC \$5,841,270 each month for Available Energy that is not delivered to GRU.

E. John Stanton

36. John W. Stanton served as GRU's Assistant General Manager of Energy Supply from June 2, 2008, to February 19, 2016. Mr. Stanton was terminated from his position for his actions in connection with the events that led to the current dispute between GRU and GREC.

37. Ed Bielarski twice informed GREC's executives that Mr. Stanton did not have authority to change or accept changes to the PPA or any controlling documents, including the written annual maintenance plan and the Outage Schedules. Specifically, in a letter to Jim Gordon, President of GREC, Mr. Bielarski stated:

In the meantime, please be aware that my AGM of Energy Supply, John Stanton, is not authorized to make changes to the four corners of the Power Purchase Agreement or other controlling documents. In the future, please direct

communications related to those changes to me for GRU's official position and ability to renegotiate.

Bielarski Letter to Gordon (Aug. 17, 2015), Ex. 4. Then again, in a separate email to Albert Morales, GREC's CFO, Mr. Bielarski reiterated:

Just a quick note. I had informed GREC through a letter to Jim Gordon on August 17, 2015 that John Stanton is not authorized to make changes to the PPA or any of the controlling documents.

Bielarski Email to Morales (Sept. 13, 2015), Ex. 5. Through these two communications, roughly one month apart, GRU unequivocally informed GREC that any and all proposed changes to the PPA or any controlling documents must be directed to and approved by Mr. Bielarski.

F. GREC's Unilateral Cancellation of the 2016 Planned Maintenance and the Current Dispute

38. Despite being indisputably aware that any and all changes to controlling documents were to be directed to Mr. Bielarski, on October 14, 2015, GREC sent a letter (the "October Letter") to Mr. Stanton purporting to cancel its Planned Maintenance for 2016. Fagan Letter to Stanton (Oct. 14, 2015), Ex. 6. GREC's October Letter provides, in its substantive entirety:

Given the current GREC dispatch scenario of remaining in reserve shutdown, ***GREC plans no Maintenance or Planned outages in 2016.*** However, if the dispatch scenario changes and GREC is called upon to run for some time prior to April 2016, a Maintenance Outage may be needed to meet Good Utility Practice. If that does occur, GREC will notify GRU of any intent to perform such outage.

Id. (emphasis added). Without asking whether GRU would agree to cancel Planned Maintenance for 2016, the October Letter simply informed Mr. Stanton that "GREC plans no Maintenance or Planned outages in 2016." *Id.* The October Letter was not sent or copied to Mr. Bielarski.

39. Further, Mr. Stanton did not adequately distribute the October Letter (or the information contained therein) within GRU. On October 21, 2015, one week after Mr. Stanton received the October Letter, George Demopoulos, GRU's Major Maintenance Leader, circulated

revised Outage Schedules that included GREC's Planned Maintenance outage from April 9th through April 29th. Demopoulos Email (Oct. 21, 2015), Ex. 3. Mr. Demopoulos is responsible for maintaining the annual maintenance plans for all of GRU's power generation facilities. The revised Outage Schedules were consistent with the agreed upon written annual maintenance plan, which called for a Planned Maintenance outage in April 2016.

40. The Demand claims that GREC confirmed its cancellation of the annual Planned Maintenance in an email on December 10, 2015. *See* Demand ¶ 109. The correspondence to which GREC refers was addressed solely to Mr. Stanton. *See* Fagan Email to Stanton (Dec. 10, 2015), Ex. 7. Thus, GREC once again failed to inform Mr. Bielarski, the one person with authority to agree to such changes on GRU's behalf. Further, there is no record that Mr. Stanton ever replied to GREC's December 10th email to provide the "confirmation" GREC alleges.

41. As yet another indication that GRU was effectively unaware of GREC's unilateral actions, on February 3, 2016, George Demopoulos reached out to GREC and asked for "any **new** updates" that he should add to the Outage Schedules. Demopoulos Email to Abel (Feb. 3, 2016), Ex. 8 (emphasis added). In response, Russell Abel, GREC's Plant Manager, stated simply: "There are no changes at this time." Abel Email #1 to Demopoulos (Feb. 3, 2016), Ex. 8. Then, in an immediately subsequent email, Mr. Abel purported to "remind" Mr. Demopoulos that "we have cancelled our April 2016 planned outage."⁵ Abel Email #2 to Demopoulos (Feb. 3, 2016), Ex. 9. The following day, February 4th, Mr. Demopoulos circulated revised Outage Schedules

⁵ Not only do these emails indicate that Mr. Demopoulos, as well as the rest of GRU, were unaware of GREC's intention to forego its April Planned Maintenance, GREC's statement: "we have cancelled our April 2016 planned outage," also contains a tacit admission that the April outage was in fact already a part of the written annual maintenance plan. This further shows that the October Letter was an attempt to change the written annual maintenance plan for 2016 that the Parties had previously agreed upon in June of 2015.

reflecting GREC's unilateral cancellation of the annual Planned Maintenance outage, which had not been agreed to by GRU. Demopoulos Email (Feb. 4, 2016), Ex. 10.

42. Also on February 3, 2016, the fact that GREC was under the impression that the annual Planned Maintenance had been cancelled came to the attention of Ed Bielarski (i.e., the only person with the authority to agree to a change in the written annual maintenance plan). In a letter to GREC the following day, Mr. Bielarski gave formal notice that, pursuant to section 10.4.1(a) of the PPA, "GREC's proposed change to the Planned Maintenance schedule is not agreeable to GRU." Bielarski Letter to Gordon (Feb. 4, 2016), Ex. 11. In a further confirmation that GREC must comply with its obligation to conduct Planned Maintenance under the PPA, Mr. Bielarski also informed GREC that, regardless of whether GREC performs the agreed upon maintenance, GRU will not pay Available Energy charges during the agreed upon period between April 9th and April 29th. *Id.*

43. On February 8, 2016, Mr. Demopoulos recirculated corrected Outage Schedules that once again reflected GREC's Planned Maintenance outage during the period from April 9th through April 29th, consistent with the written annual maintenance plan that was previously agreed upon. Demopoulos Email (Feb. 8, 2016), Ex. 12.

44. Also on February 8th, GREC issued a formal notice of dispute resolution under section 24(a) of the PPA, alleging that GRU will be in breach of the PPA if it fails to pay for Available Energy during the time period in April during which Planned Maintenance was to occur. Gordon Letter to Bielarski (Feb. 8, 2016), Ex. 13.

45. The following day, Mr. Bielarski responded by providing assurance that GRU did not intend to breach the PPA, and stated his belief that GREC's formal notice of dispute was premature. Bielarski Letter to Gordon (Feb. 9, 2016), Ex. 14.

46. GREC replied on February 17, 2016, by demanding that GRU acknowledge (i) that GREC will not conduct Planned Maintenance during the previously approved April 2016 Planned Maintenance outage, and (ii) that GREC will receive full-freight Available Energy payments for the entire month of April. Gordon Letter to Bielarski (Feb. 17, 2016), Ex. 15.

47. On February 23, 2016, Mr. Bielarski responded by plainly laying out the history of the April Planned Maintenance plan as agreed upon by the Parties in May and June of 2015 (see *supra* Part IV.B). Bielarski Letter to Gordon (Feb. 23, 2016), Ex. 16. Mr. Bielarski then once again informed GREC that its proposal to cancel Planned Maintenance is not agreeable to GRU. *Id.*

48. Finally, on February 29, 2016, Mr. Bielarski was forced to provide formal notice that GRU will consider GREC in breach of section 10.4.1(a) if it fails to perform the April 2016 Planned Maintenance on the Facility as agreed upon by the Parties in June of 2015. Bielarski Letter to Gordon (Feb. 29, 2016), Ex. 17.

49. Despite Mr. Bielarski's repeated, clear explanations of the Parties' respective rights and obligations under the PPA, GREC instituted this arbitration proceeding on March 10, 2016.

G. March 2016 Dependable Capacity Test and the Facility's Failure

50. As described above, under the PPA the amount owed for Available Energy under subpart (ii) of the definition is determined by the Energy that could be generated and delivered if the Facility were dispatched at its full seasonal "Dependable Capacity." *See* PPA, Ex. 1, at Schedule 1 (definition of Available Energy). Dependable Capacity is a measure of the Facility's capability to generate Energy, whereas Energy is a measure of electric energy generated by the Facility.

51. Dependable Capacity is determined from time to time through testing conducted in accordance with Appendix IX of the PPA, which allows for changes to the Dependable Capacity to account for changes in the Facility's operational capabilities. Appendix IX of the PPA provides a method by which GRU may order Dependable Capacity tests to require GREC to demonstrate the Facility's capability to generate Energy. *See id.* at Appendix IX (permitting GRU to order an Dependable Capacity test once per Demonstration Period). GRU exercised its right to order a Dependable Capacity test during the winter Demonstration Period and issued the order on March 6 of 2016. De Leo Email (Mar. 6, 2016) Ex. 18.

52. On March 7, 2016, prior to achieving a successful start of the Dependable Capacity test, as the Facility was stabilizing or warming up, GREC reported that “[a] primary air fan duct expansion joint ruptured, and we will not be able to start the test at 10 am as planned. We will let you know when we will be able to test as soon as we have an estimate.” Abel Email to De Leo (Mar. 7, 2016), Ex. 18. Due to this failure, GREC failed to perform the Dependable Capacity test and failed to meet the operating level specified by GRU at the times required by GRU. GREC experienced a Forced Outage during which time it presumably conducted necessary repairs. GREC later restarted the Facility to conduct another test and operated for six hours at 102.5 MW.

V. GREC’s Claims Contradict the PPA and the Facts.

A. Under the PPA, Planned Maintenance Is Required Annually.

53. Two basic principles of contract interpretation govern this dispute. First, “[u]nder Florida law, the basic rule of contract interpretation is that the intention of the parties is to be determined from a consideration of the whole agreement.” *Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1292 (M.D. Fla. 2012). Second, “[i]nterpretation of a contract begins with its plain language. As a general rule, evidence outside the contract language, which is known as

parol evidence, may be considered only when the contract language contains a latent ambiguity.”

Duval Motors Co. v. Rogers, 73 So. 3d 261, 265 (Fla. Dist. Ct. App. 2011) (citation omitted).

When considered as a part of the whole PPA, the plain language of section 10.4.1(a) indicates the Parties’ intent that Planned Maintenance is to be performed on an annual basis. Further, the PPA’s call for annual Planned Maintenance is not ambiguous, and as such, GREC’s reliance on Mr. Stanton’s parol evidence regarding the drafters’ intent is improper.

54. First, section 10.4.1(a) of the PPA, which is instructively titled “Planned Maintenance,” unambiguously states that GREC “***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 start of ***each calendar year***.” This instruction does not permit GREC to unilaterally opt out of performing Planned Maintenance for any given year. To the contrary, it plainly dictates that GREC “shall” schedule and perform Planned Maintenance “each calendar year.”

55. The Parties confirmed the plain meaning of section 10.4.1(a) in October of 2012. John Stanton emailed Leonard Fagan, GREC’s Vice President of Engineering, and Russell Abel instructing them that GRU “needed to get [GREC’s] 10 year outage plan, 2014 thru 2023.” Stanton Email to Fagan (Oct. 4, 2012), Ex. 19. Mr. Stanton further explained: “For 2014 and 2015 we need durations and target dates. For the later years I believe duration and expected month will be sufficient at this time.” *Id.* Clearly, Mr. Stanton understood in 2012 that Planned Maintenance was to occur every year under the PPA. Consistent with section 10.4.1(a), Mr. Stanton required a maintenance plan for every year, and critically, did not offer GREC the option to forego annual Planned Maintenance.

56. Mr. Fagan shared Mr. Stanton's understanding. In his response, Mr. Fagan set forth GREC's expectations for Planned Maintenance, and in no uncertain terms, Mr. Fagan confirmed that GREC would take annual maintenance outages. *See* Fagan Email to Stanton (Oct. 4, 2012), Ex. 19. Mr. Fagan said: "Since the facility will be completed in the fall (October or November) of [sic] 2013 we had been looking at ***annual*** outage's [sic] in that time frame. The first being for a warranty inspection and then ***in 12 month intervals.***" *Id.* (emphasis added). Mr. Fagan explicitly stated GREC's intention to take "annual" outages "in 12 month intervals." *Id.* This pledge is consistent with the plain language of the PPA and undermines GREC's claims.

57. The PPA's definition of Planned Maintenance provides further support to GRU's position. Specifically, the PPA distinguishes Planned Maintenance from other outages in that "the duration and timing of Planned Maintenance has been established during the prior business year." This distinction focuses on the annual nature of Planned Maintenance and is consistent with the remainder of the PPA's intention that Planned Maintenance be performed each year. Further, the distinction relies on the "duration" and "timing" of Planned Maintenance as aspects that are determined "during the prior business year." The distinction does not say that GREC may opt out of conducting Planned Maintenance.

58. As previously stated, Planned Maintenance is to be conducted in accordance with Good Utility Practice. With respect to the Facility, Good Utility Practice includes but is not limited to taking reasonable steps to ensure "[t]hat preventative, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation." Performing no routine, regular, preventative maintenance for an entire year puts the Facility's reliable operation at risk, and constitutes a failure to utilize Good Utility Practice.

59. GREC's failure to perform routine, regular, preventative maintenance in accordance with Good Utility Practice creates risks that the Facility will not start when needed by GRU, will not be able to perform reliably to meet GRU's requirements for Energy, and/or will fail to operate reliably on a long-term basis. GREC's recent failure to perform the Dependable Capacity test in accordance with GRU's instructions raises serious concerns in this regard. These concerns are heightened if maintenance work is not performed for the entire 2016 calendar year. GREC's failure of the test, and its refusal to perform maintenance this year, call into question its ongoing eligibility to collect payments for Available Energy, because it is not clear that the Facility is actually available to generate Energy in each hour of each month.

60. Other sections of the PPA also indicated that the Parties intended Planned Maintenance to occur every year. For example section 22.1 provides:

[GREC] shall submit to [GRU] 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.

Thus, the PPA requires an annual report, and one of the principal components of that annual report is a description of the annual Planned Maintenance. Considering the PPA as a whole, as required by Florida law, reveals the Parties' intent that Planned Maintenance be conducted annually.

61. Nevertheless, GREC argues that it has the option to unilaterally decide whether Planned Maintenance is required for any given year. In reaching this lopsided conclusion, GREC claims that “[t]he most significant determinant of whether and when a planned maintenance outage is needed is the number of hours that a facility has actually been operated or run.” Demand ¶ 83. On this theory, GREC claims that Planned Maintenance is not needed

because the Facility has been in standby status since it experienced a Forced Outage in August of 2015. *Id.* at 3. GREC's theory and position are demonstrably false.

62. First, GREC likens performing maintenance on the Facility to changing the oil in car. *See* Demand ¶ 83. Not only is GREC's oil change analogy entirely irrelevant to complex, power generation facilities, is it also factually inaccurate. In fact, a car that is not being operated needs additional maintenance to remain fully reliable. Kelley Blue Book recommends that drivers who only take their cars on short trips (i.e., cars that do not cover extensive mileages over the course of a year) should "have the oil changed every three months."

<http://www.kbb.com/car-advice/articles/when-to-change-your-oil/>.

63. In at least this regard, power plants are arguably similar to cars. A power plant that is shut down for extended periods likely would require maintenance. GREC's own Albert Morales acknowledged this reality in a September 14, 2015 email to Ed Bielarski in which he remarked:

As I'm sure you know from your background in the utility industry and by prudent operational practice, actions by a utility that dispatch a generating facility offline for extended periods of time necessitate certain operational preservation efforts by the generating facility in order to maintain the facility.

Morales Email to Bielarski (Sept. 14, 2015), Ex. 20. In its Demand, GREC has apparently forgotten the lessons learned via its "background in the utility industry and by prudent operation practice."

64. GREC has also revealed an intent to rely on Mr. Stanton's recent statements regarding the PPA drafters' intent in section 10.4.1(a). See, e.g., Demand ¶ 119 (quoting Mr. Stanton as saying "[t]he [PPA] language about outages and their approval was drafted by me so I absolutely know the intent"). As stated herein, section 10.4.1(a) is not ambiguous. Thus, GREC's attempt to use Mr. Stanton's statements to alter the plain meaning of that section

violates the parol evidence rule, which “precludes consideration of such evidence to contradict, vary, defeat, or modify a complete and unambiguous written instrument, or to change, add to, or subtract from it, or affect its construction.” *Duval Motors*, 73 So. 3d at 265 (quotation omitted). Even accounting for the more lax evidentiary standard of arbitration, Mr. Stanton’s self-interested attempts to rewrite the PPA in a manner that serves his 2016 personnel action, nearly seven years after the PPA was executed, are irrelevant.

65. Finally, the inaccuracy of GREC’s argument is only highlighted by the Facility’s recent failure during a routine Dependable Capacity test. *See* Abel Email to De Leo (Mar. 7, 2016), Ex. 18. The expansion joint demonstrated a failure mode indicative of standby status. It is entirely possible that the joint would not have failed if the Facility had operated more often or more continuously since August 2015. In any event, GREC is being paid \$194,709 per day to maintain the Facility in a state of readiness to deliver Energy when dispatched by GRU. To continue to qualify for those payments, GREC must conduct maintenance work to ensure the Facility’s reliable and safe operation.

B. The Planned Maintenance Schedule for 2016 Was Established by Correspondence in May and June of 2015.

66. As described *supra* in Part IV.C, GRU and GREC have the established practice of using a “10 Year Outage Schedule” and a “Rolling 12 Month Outage Schedule” (collectively, “the Outage Schedules”) to determine the Planned Maintenance schedule according to section 10 of the PPA. In accordance with this practice and as required by the PPA, in May 2015 GREC provided its written annual maintenance plan for 2016, and the Parties agreed in June 2015 that Planned Maintenance would occur during the period from April 9th through April 29th. *See* Demopoulos Email (Oct. 21, 2015), Ex. 3 (depicting the Parties agreement to take a Planned Maintenance outage from April 9 to April 29).

67. GREC argues that the Outage Schedules are “informal and non-contractual” and claims: (i) “There is no PPA provision that mentions these two forecasting schedules or the outage coordination process,” and (ii) “There is no PPA provision that requires GREC to submit forecasts of outages for the Rolling 12 Month Outage Schedule or the 10-Year Outage Schedule.” Demand ¶¶ 75–77.

68. GREC’s assertions contradict the plain language of section 10 of the PPA, including section 10.4.1(a). GREC’s Demand acknowledges that “GRU asks each facility to provide forecasts on a continuing basis in order to update and revise these two schedules, and GRU periodically distributes updated versions to the Facilities.” Demand ¶ 71. Yet, GREC fails to recognize the obvious parallels between its statement and section 10.3.2, which provides: “[GREC] shall provide to [GRU] [GREC]’s generation forecast for the upcoming calendar year.”

69. Moreover, GREC’s Demand acknowledges that “[b]ased on the information that GREC had as of May and June 2015, and specifically in response to email requests from GRU regarding its 10 Year Outage Schedule and Rolling 12 Month Outage Schedule, GREC informed GRU by email that it forecasted the need to take maintenance outages over specific periods in April 2016 and April 2017.” Demand ¶ 84. GREC again fails to see the parallels between this statement and the language of section 10.4.1(a), which requires GREC to “submit a written annual maintenance plan containing its forecast of Planned Maintenance for the coming year.”

70. Thus, GREC cannot reasonably dispute that the May and June Outage Schedules established the written annual maintenance plan and included a Planned Maintenance outage in April of 2016.

C. The October 14, 2015 Letter to John Stanton Did Not Relieve GREC of Its Obligation to Perform Planned Maintenance in 2016.

71. Despite their obvious application to the requirements of section 10 of the PPA, GREC ignores the May and June Outage Schedules and instead focuses on the October Letter to John Stanton.

72. GREC claims that the October Letter constitutes its “written annual maintenance plan containing its forecast of Planned Maintenance for the coming year” as required by section 10.4.1(a) of the PPA. Simply put, GREC’s repeated claims are in error – the October Letter is not a “written annual maintenance plan.”

73. Multiple objective factors indicate that the October Letter is not the written annual maintenance plan GREC claims it to be. First, the October Letter represents the first time GREC has sent any such letter, rendering it far from an annual occurrence. Further, the October Letter contains no “forecast of Planned Maintenance for the coming year.” In fact, it contains quite the opposite: GREC’s unequivocal intention to forego its contractually required annual maintenance. Third, the October Letter consists of a single, brief paragraph. It is plainly inadequate to serve as a “plan.” The October Letter lacks all of the characteristics of the Outage Schedules that make those documents valuable and effective embodiments of the requirements of section 10 of the PPA. The October Letter’s inadequacies are revealed by a comparison to the Outage Schedules of June 2015. *Compare* Fagan Letter to Stanton (Oct. 14, 2015), Ex. 6, with Demopoulos Email (Oct. 21, 2015), Ex. 3.

74. Because the October Letter is not an “annual maintenance plan,” it is necessarily an attempt to change the written annual maintenance plan approved in June 2015. However, by failing to comply with section 10.4.1(a) of the PPA, GREC rendered the October Letter ineffective.

75. GREC claims that GRU, and particularly, Mr. Bielarski, does not have the power to approve or reject the proposal of the October Letter. *See* Demand, at 4, 25. GREC's interpretation is at odds with the plain language of section 10.4.1(a), which requires that any and all changes be mutually agreeable to GREC, GRU, and the FRCC. GREC did not adequately seek, and most certainly did not obtain, the agreement of any entity other than itself.

76. GREC relies entirely on the alleged approval of John Stanton; however, as explicitly stated in Ed Bielarski's August 17, 2015 letter to Jim Gordon (Ex. 4) and in his September 13, 2015 email to Albert Morales (Ex. 5), Mr. Stanton did not have authority "to make changes to the PPA or any of the controlling documents," including the June 2015 Outage Schedules. Mr. Bielarski further requested that any such changes or proposals be directed to him so that he could provide "GRU's official position and ability to renegotiate." Bielarski Letter to Gordon (Aug. 17, 2015), Ex. 4.

77. Aware of Mr. Bielarski's request and Mr. Stanton's lack of authority, GREC nevertheless directed its improper attempt to cancel the 2016 Planned Maintenance to Mr. Stanton. Notably, GREC did not include Mr. Bielarski on this communication; however, as soon as Mr. Bielarski was made aware of the October Letter and its purported changes to the written annual maintenance plan, he immediately contacted GREC and voiced GRU's disagreement with those changes. *See* Bielarski Letter to Gordon (Feb. 4, 2016), Ex. 11. Thus, the October Letter does not satisfy the plain language of section 10.4.1(a) because GRU did not agree to it.

78. GREC repeatedly relies on the statement that Mr. Stanton "acknowledged receipt" of the October Letter. *See, e.g.*, Demand, at 4, 5, 22. However, Mr. Stanton's acknowledgement that the October Letter was sent and received bears no relation to whether Mr. Bielarski (or even Mr. Stanton, for that matter) granted GRU's agreement to the proposed changes. In fact, GREC

admits that “[n]o one from GRU responded to that notice” until Mr. Bielarski became aware of GREC’s efforts to unilaterally change the written annual maintenance plan and promptly voiced GRU’s disagreement. Demand, at 5. GRU’s October 21st Outage Schedules, which continued to call for the Planned Maintenance outage in April despite being generated one week after GREC sent the October Letter, further indicate that GRU never agreed to GREC’s proposed change.⁶

79. In sum, the October Letter is not the written annual maintenance plan GREC claims it to be. Instead, the October Letter is merely GREC’s attempted unilateral cancellation of the Parties’ agreed written annual maintenance plan. GREC’s efforts are designed to overcharge GRU in retaliation for GRU’s proper exercise of its dispatch rights under the PPA in the most cost effective manner for its customers. Neither GRU nor the citizens of Gainesville should be punished for GREC’s inability to provide cost effective power generation.

D. The Parties’ Reasonable Expectations Under the PPA

80. As previously discussed, when GREC takes an outage and performs Planned Maintenance in accordance with the PPA, there is no Available Energy and thus no payments are due for Available Energy during the outage. The expectation that Available Energy payments are not due during annual Planned Maintenance outages is part of the consideration agreed upon in the PPA. GRU and the City of Gainesville include expected Planned Maintenance outages in their calculation of the Available Energy payments that will be owed to GREC each year under the PPA and apply the resulting amounts when they calculate electric rates for the upcoming fiscal year. In September 2015, the City of Gainesville’s Commission approved electric rates for

⁶ None of the GRU’s subsequent internal correspondence is sufficient to ratify GREC’s unilateral actions. Specifically, Mr. Stanton’s February emails do not change the fact that he lacked authority to agree to the change on which GREC must now rely. In fact, Mr. Bielarski’s responses to these emails indicate that Mr. Stanton acted without authority.

fiscal year 2016, and calculated those electric rates based on the written annual maintenance plan agreed to by the Parties in June 2015. Rates thus were calculated based on the expectation that GREC would take a Planned Maintenance outage from April 9th through April 29th of 2016, which meant that Available Energy payments would not be owed for the twenty-one day outage period. As a result of that reasonable expectation, the \$4,000,000 financial windfall that GREC seeks to collect through its Demand is not included in current GRU electric rates.

81. Conversely, GREC's reasonable expectation under the PPA is that it will receive Available Energy payments from GRU only during periods when the Facility is available to operate. GREC must reasonably expect that it will not receive Available Energy payments for periods when it performs annual Planned Maintenance. Thus, like any reasonable negotiating party, GREC assuredly accounted for expected Planned Maintenance outages by bargaining for a price per MWh that accounts for expected outage periods when there will be no Available Energy. Furthermore, when the Parties agreed to the written annual maintenance plan in June 2015, GREC did not expect to be paid for Available Energy during the period from April 9th through April 29th in 2016. GREC's Demand thus seeks a financial windfall that was not expected when the PPA was negotiated and the prices were set, and that was not expected as recently as June 2015 when the written annual maintenance plan for 2016 was established. GREC will receive this unfair financial windfall if it is permitted to cancel its required annual Planned Maintenance in order to boost its revenues under the PPA.

82. The October Letter and GREC's continued reliance upon it represent a blatant attempt to unilaterally deprive GRU of the benefits of its bargain while simultaneously securing an unfair financial windfall for GREC.

VI. GREC's Asserted Claims Are Without Merit.

A. Breach of the PPA

83. GREC claims that GRU is in breach of the PPA, alleging: (1) GRU is trying to force GREC to take a maintenance outage; (2) GRU refuses to recognize GREC's October 14, 2015 "written annual maintenance plan" in which GREC cancelled the maintenance outage in April; and (3) GRU refuses to recognize GREC's contractual right to not take a maintenance outage. GREC's allegations are without merit for the following reasons.

84. First, under the express terms of the PPA, GRU has every right to force GREC to abide by the maintenance schedule that was agreed to in June of 2015. Any change to that schedule must be agreeable to GRU, and GREC failed to acquire the agreement of any individual authorized to provide the necessary agreement on account of Mr. Bielarski's repeated and explicit instructions that Mr. Stanton did not have authority to change any "controlling documents." Thus, GREC failed is not relieved of its contractual duty to take an annual Planned Maintenance outage in April.

85. Second, the October Letter is not a "written annual maintenance plan" as GREC claims. In fact, it is an attempted change to the written annual maintenance plan first set in place in May of 2015 and then modified in June of 2015. GRU timely stated its disagreement with GREC's proposed change when Mr. Bielarski, the only person with authority to grant GRU's agreement to any such change, informed GREC that its proposal to forego Planned Maintenance was unacceptable. Bielarski Letter to Gordon (Feb. 4, 2016), Ex. 11.

86. Third, GREC is incorrect that it does not owe an annual duty to perform Planned Maintenance. The PPA, when read as whole, plainly illustrates the Parties' intent that Planned Maintenance would occur annually. For example, section 10.4.1(a) states that GREC *shall* submit a written annual maintenance plan for *each calendar year*. Moreover, under section 22.1,

GREC is obligated to submit an *annual report*, which *shall* include a description of GREC's planned maintenance. Indeed, GREC's Vice President of Engineering confirmed the annual Planned Maintenance requirement in October of 2012. *See* Fagan Email to Stanton (Oct. 4, 2012), Ex. 19. Finally, annual Planned Maintenance fully accords with the PPA's definitions, which require routine, non-routine, regular, and preventative maintenance in accordance with Good Utility Practice, and to ensure reliable long-term and safe operation of the Facility. GREC cannot unilaterally decline to perform these contractual obligations.

87. GREC is required to conduct annual Planned Maintenance and to engage in mutually agreeable annual Planned Maintenance scheduling. Indeed, GREC satisfied its contractual obligations in May and June of 2015 when it scheduled a Planned Maintenance outage in April of 2016. If GREC would like to alter an agreed upon schedule, GREC is contractually obligated to satisfy the requirements of section 10.4.1(a) by acquiring the agreement of both GRU and the FRCC. GREC did not meet these requirements, and thus, GREC has no contractual right to forego the Planned Maintenance outage scheduled for April.

B. Anticipatory Breach of the PPA

88. GREC claims that GRU has committed anticipatory breach of the PPA, alleging: (i) GRU has refused to acknowledge GREC's "timely Annual Maintenance Plan;" (ii) GRU has declared that it will not pay GREC for Available Energy during the April Planned Maintenance period; and (iii) GRU has threatened to deem GREC in anticipatory breach of the PPA if GREC does not take the April outage. GREC's allegations are without merit for the following reasons.

89. First, as previously stated in Part VI.A above, GREC's October Letter to Mr. Stanton does not constitute a "written annual maintenance plan" as required by section 10.4.1(a) of the PPA. Instead, the October Letter clearly represents a request to change the written annual maintenance plan established by GREC and GRU in June of 2015. GRU is under no contractual

obligation to recognize the October Letter as anything more than it is. Indeed, GRU has acted squarely within the bounds of the PPA by refusing to agree to GREC's unilateral cancellation of the agreed Planned Maintenance.

90. Second, in the absence of an effective change to the agreed upon Planned Maintenance schedule, GREC remains obligated to perform its Planned Maintenance in April of 2016. Part and parcel to that Planned Maintenance is an outage, which is necessary to conduct the work, and which also relieves GRU of its obligation to pay for Available Energy during the period of the outage. GREC cannot unilaterally abandon the agreed upon Planned Maintenance schedule and then force GRU to pay for Available Energy over a period for which GRU reasonably expected not to incur such charges.

91. Third, GREC is in anticipatory breach of the PPA, as evidenced by its repeated refusal to conduct Planned Maintenance in 2016. GREC has plainly stated that it "is not taking a Planned Maintenance outage in April 2016." Gordon Letter to Bielarski (February 17, 2016), Ex 15. Through its distinct, unequivocal, and absolute words indicating its intention to not perform under the PPA, GREC has anticipatorily and materially breached the PPA.

C. Beach of the Covenant of Good Faith and Fair Dealing

92. GREC claims that GRU has breached the implied covenant of good faith and fair dealing, alleging: (i) GRU's actions and omissions unfairly interfered with GREC's receipt of benefits under the PPA; and (ii) GRU's conduct did not comport with GREC's reasonable contractual expectations under the PPA. GREC's allegations are without merit for the following reasons.

93. First, these allegations are insufficient to state a claim for breach of the covenant of good faith and fair dealing. Under Florida law, the "duty of good faith must relate to performance of an *express term* of the contract and is not an abstract and independent term of a

contract.” *Flagship Resort Dev. Corp. v. Interval Int'l, Inc.*, 28 So. 3d 915, 924 (Fla. Dist. Ct. App. 2010) (emphasis added & quotations omitted). “Rather than serving as an independent term within a contract, the implied covenant attaches to the performance of a specific contractual obligation.” *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001) (quotation omitted). GREC has failed to allege that GRU’s performance, or alleged lack thereof, of any specific contractual obligation has caused GREC to suffer to any alleged harm. As such GREC has failed to state a claim for breach of the implied covenant of good faith and fair dealing.

94. To the extent that GREC’s allegations of GRU’s breach of the covenant of good faith and fair dealing are derived from either of its first two claims for breach and/or anticipatory breach of the PPA, those allegations fail for the same reasons set forth previously. *See supra* Part VI.A–B.

D. Declaratory Judgment

95. Although GRU strongly disagrees with the allegations in GREC’s Demand, *see supra* Part VI.A–C, GRU agrees with GREC that a declaratory judgment is an appropriate remedy to the Parties’ dispute.

VII. Counterclaims

A. Anticipatory Breach of the PPA

96. GRU incorporates here the allegations contained in all preceding paragraphs.

97. Under Florida law, “when an anticipatory breach occurs, the non-breaching party has the right: [F]irst, to rescind the contract altogether; second, to elect to treat the repudiation as a breach by bringing suit or by making some change in position; or, third, to await the time for performance of the contract and bring suit after that time has arrived.” *Dutra v. Kaplan*, 137 So. 3d 1190, 1192 (Fla. Dist. Ct. App. 2014) (quotations omitted). Thus, “a breach of contract by

anticipatory repudiation allows the nonbreaching party to terminate his own performance and bring litigation for damages.” *Southeastern. Integrated Med., P.L. v. North Fla. Women’s Physicians, P.A.*, 50 So. 3d 21, 23 (Fla. Dist. Ct. App. 2010). Further, “[a] prospective breach of the contract occurs when there is absolute repudiation by one of the parties prior to the time when his performance is due under the terms of the contract. Such a repudiation may be evidenced by words or voluntary acts but the refusal must be distinct, unequivocal, and absolute.” *Shelby Homes at Millstone, Inc. v. Cullinane*, 61 So. 3d 472, 475 (Fla. Dist. Ct. App. 2011) (quotation omitted).

98. Section 22.1.1 of the PPA provides that a “Seller Event of Default” occurs if the “Seller defaults in any respect in the observance or performance of any material obligation hereunder” Section 25.2 of the PPA then provides GRU’s available remedies in the event of a material breach by GREC, stating: “If, during the continuance of this Agreement, one or more Seller Events of Default occurs, then in any such case, Purchaser, at its option, may terminate this Agreement by delivering written notice to the Seller and may pursue any and all legal or equitable remedies provided by law or pursuant to this Agreement.” Thus, in the event of a material breach by GREC, GRU possess the contractual right to terminate the PPA.

99. Under section 10.4.1(a) of the PPA, the Parties agreed in writing in June of 2015 that GREC would perform its annual Planned Maintenance in April of 2016. In October of 2015, GREC unilaterally stated that it will cancel Planned Maintenance for 2016, which is both a breach of the PPA’s requirements for Planned Maintenance and a change to the June 2015 written annual maintenance plan that is not agreeable to GRU. Furthermore, GREC has repeatedly and unequivocally stated that it “is not taking a Planned Maintenance outage in April 2016.” Gordon Letter to Bielarski (February 17, 2016), Ex 15. Through its distinct,

unequivocal, and absolute statements indicating its intention to not perform under the PPA, GREC has anticipatorily breached the PPA. GREC's anticipatory breach has materially harmed GRU, and as a result, GRU has the right to terminate the PPA pursuant to section 25.2 of the PPA. This filing serves as further notice to GREC of GRU's position first stated in Mr. Bielarski's Letter of February 29, Ex. 17.

B. Breach of the Covenant of Good Faith and Fair Dealing

100. GRU incorporates here the allegations contained in all preceding paragraphs.

101. Under Florida law, "the covenant of good faith and fair dealing is implied in every contract, requiring the parties to follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations." *Townhouses of Highland Beach Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 504 F. Supp. 2d 1307, 1310 (S.D. Fla. 2007). A party to a contract breaches its implied covenant of good faith and fair dealing when it breaches an express term of the contract and thereby thwarts the other party's reasonable contractual expectations. *Id.* at 1311.

102. Here, section 10.3.5 of the PPA expressly obligates GREC to coordinate with GRU in good faith to set forecasts and schedules and to utilize Good Utility Practice in developing and preparing the forecasts and schedules; section 10.4.1(a) requires GREC to conduct Planned Maintenance on an annual basis; and section 10.4.1(d) of the PPA expressly obligates GREC to work with GRU to schedule Planned Maintenance in a manner that minimizes the economic cost to GRU of such outages and to comply with FRCC operating procedures. By (i) refusing to perform annual Planned Maintenance, and (ii) conducting scheduling activities that do not comply with the requirements of the PPA, GREC has breached each of these express terms of the PPA.

103. As a result of GREC's breach, GRU's reasonable contractual expectations that (i) GREC would maintain a fully reliable power generation facility in accordance with the PPA and Good Utility Practice, and (ii) GRU would not pay for Available Energy during the scheduled Planned Maintenance outage in April, have been thwarted. GREC seeks to extract a financial windfall at the direct expense of GRU's customers and citizens. GRU has been commensurately harmed by GREC's breach of its covenant of good faith and fair dealing.

C. Declaratory Judgment

104. GRU incorporates here the allegations contained in all preceding paragraphs.

105. Under Florida's declaratory judgment statutes, FLA. STAT. §§ 86.011–111, a petitioner pursuing a declaratory judgment claim must show the following:

There is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [sic] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Bartsch v. Costello, 170 So. 3d 83, 88 (Fla. Dist. Ct. App. 2015) (quotation omitted).

106. Here, there is a bona fide, actual, present practical need for a declaration. GRU and GREC need a declaration to clarify their rights and responsibilities under the PPA. The requested declaration would deal with a present controversy as to an ascertained state of facts. More specifically, GRU seeks a declaration that (i) GREC's refusal to perform annual Planned Maintenance in 2016 as agreed to by the Parties in June of 2015 constitutes a material breach of the PPA, (ii) GREC's October Letter to Mr. Stanton did not comply with the requirements of the PPA and therefore cannot effectuate a change to the agreed upon written annual maintenance

plan established in June 2015, and (iii) under section 10.4.1(a) of the PPA, GREC is obligated to perform annual Planned Maintenance of the Facility. The powers, privileges, and rights of GRU under the PPA are dependent upon the facts presented herein. GREC has an actual, present, adverse, and antagonistic interest in the scope of GRU's rights under the PPA. GREC is before the arbitrator by proper process. And finally, the relief sought is not merely legal advice or the answer to questions propounded from curiosity, rather an actual controversy exists. For these reasons, declaratory judgment is an appropriate remedy to the Parties' dispute.

VIII. Relief Sought

107. In connection with GREC's claims against GRU, GRU respectfully requests that the arbitrator issue an interim award, at the earliest possible date, that:

- a. Dismisses the Claims against GRU with prejudice.

108. In connection with GRU's claims against GREC, GRU respectfully requests that the arbitrator issue an award that:

- a. Enters a declaratory judgment that, pursuant to section 10.4.1(a) of the PPA, Planned Maintenance is required annually;
- b. Declares GREC in anticipatory breach of the PPA, as set forth above;
- c. Declares GREC in breach of its implied covenant of good faith and fair dealing, as set forth above;
- d. Awards GRU all damages sustained on account of GREC's actions;
- e. Awards GRU interest as applicable at law;
- f. Awards GRU its attorneys' fees and costs incurred in this arbitration, in an amount to be determined after the arbitration hearing; and
- g. Grants GRU such other, further, and different relief as the Arbitrator deems just and proper under the circumstances. GRU intends to exercise all available

remedies, including the right to terminate the PPA due to GREC's breaches thereof.

Date: March 29, 2016

Respectfully submitted,

/s/ Paula W. Hinton

Paula W. Hinton

CERTIFICATE OF SERVICE

I hereby certify that the all counsel of record are being served this 29th day of March 2016, with a copy of the foregoing document via electronic mail.

/s/ Paula W. Hinton

Paula W. Hinton