

AMERICAN ARBITRATION ASSOCIATION

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THE CITY OF GAINESVILLE, FLORIDA, d/b/a/
GAINESVILLE REGIONAL UTILITIES,

Claimant,

v.

ICDR Case No.
50 198 T 00593 12

GAINESVILLE RENEWABLE ENERGY CENTER,
LLC, AMERICAN RENEWABLES, LLC, TYR
ENERGY, LLC, TYR ENERGY, INC., ENERGY
MANAGEMENT, INC., BAYCORP HOLDINGS
LTD., STARWOOD ENERGY GROUP GLOBAL,
LLC, STARWOOD ENERGY GROUP GLOBAL,
INC., RON FAGEN, DIANE FAGEN, AND JOHN
DOES NOS. 1-25,

ORDER

Respondents.

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The above-captioned arbitration was initiated by the City of Gainesville, Florida d/b/a Gainesville Regional Utilities (collectively "GRU") pursuant to a Demand for Arbitration dated December 21, 2012 and a Supplemental and Amended Demand for Arbitration dated April 15, 2013 (the "Amended Demand"). GRU alleges that Respondents have breached the terms of a certain Power Purchase Agreement ("PPA") dated as of April 29, 2009 pursuant to which Respondent Gainesville Renewable Energy Center, LLC ("GREC") was to construct, operate and maintain a biomass-fired power production plant (the "Facility"), the output of which was to be supplied to GRU for a thirty-year period. Specifically, GRU alleges that, as the result of two transfers of indirect ownership in GREC, GREC has effectively sold the Facility without honoring GRU's right of first offer ("ROFO") provided in Section 27-3 of the PPA.

Pending before the Arbitrator is GREC's request for dismissal of the Amended Demand. A hearing was held on July 23, 2013 at which time the Arbitrator heard argument on GREC's request,

joined by Respondents Tyr Energy, LLC and Tyr Energy, Inc. (“Tyr”), and on GRU’s request for dismissal of counterclaims that had been asserted by GRU in its answering statement. At the end of the hearing, all parties joined in a request for an immediate ruling on the pending requests without a detailed statement of reasons. I indicated that I would address GREC’s request for dismissal first in light of the possibility that a ruling on its request, however decided, could moot further proceedings.

Having heard argument on GREC’s request and having reviewed the submissions by the parties, I grant GREC’s request and dismiss the Amended Demand. I conclude that GREC and the other respondents have not breached the ROFO and will briefly summarize my analysis.

The ROFO contained in Section 27.3 provides, in relevant part

[GREC may not sell the Facility, either directly or indirectly through a change of control of [GREC] . . . unless . . . prior to selling the Facility, [GREC] shall give notice to [GRU] . . . and [GRU] shall have sixty [60] days from such notice to prepare an offer (the “First Offer”) to purchase the Facility.

GRU alleges that GREC breached this provision as a result of two transactions. First, on June 30, 2011 the three indirect owners of GREC (Tyr at 49%; Energy Management Inc. at 25.5%; and BayCorp Holdings, Ltd. at 25.5%) collectively transferred a 17.706% indirect interest in GREC to the Facility’s contractor, Fagen Power, Inc., in exchange for an equity contribution used to finance construction. Second, in December 2001, Tyr sold its entire equity interest (then 40.324%) to Starwood Energy Group Global, LLC (“Starwood”) apparently to address a financial situation with which it was dealing. It is undisputed that GREC did not provide GRU with Section 27.3 notice with regard to either transaction, although in late December 2011 GREC sought assurances from GRU that the Tyr-Starwood transaction was the sale of a minority (indirect) interest in GREC and, therefore, did not trigger the ROFO clause which, by its terms, was limited to a “sale” of the Facility through a “change of control” of GREC.

GRU’s assurances were not forthcoming. Indeed, GRU ultimately took the position that, by virtue of the above-two transactions, GREC had ‘sold’ the Facility in that a majority of the stock - 58% -

was in the hands of new owners, Fagen (17.706%) and Starwood (40.324%). GREC disagreed, arguing that the Fagen and Starwood acquisitions were unrelated transactions, neither of which constituted a “sale” of the Facility by means of a “change of control” of GREC. I conclude that GREC is correct.

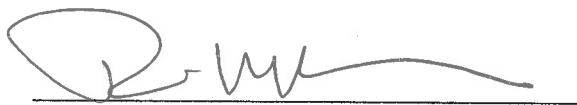
GRU does not contend that the Fagen and Starwood transactions are related but relies on the fact that their combined ownership constitutes a new majority with the consequent ability to control GREC in the near future. This may be true (at some point), but it misreads the ROFO clause which precludes a sale of the Facility through a sale of control of GREC. Neither Fagen nor Starwood purchased control of GREC. Read, as a whole, the ROFO clause applies, not to a series of unrelated sales of minority holdings, but to a single unitary transaction that effects a change of control. If such a transaction arises, GRU must be given the right of First Offer and if GRU and GREC do not agree on terms, GREC may “close on a sale of the Facility to an unaffiliated third party for a price and for terms that are no less than the price and no more onerous than the terms in the First Offer.” These provisions are unworkable as applied to unrelated minority transactions and indicate the parties’ intent to limit the application of the ROFO to a sale to a third party of a controlling interest in GREC. If Fagen and Starwood were affiliated entities perhaps an argument could be made that the two stock acquisitions should be viewed as a unitary transaction. But no such allegations are made.

Even if multiple, unrelated sales of stock could be aggregated under the ROFO clause, that clause specifically excludes from its operation any transaction that constitutes “a construction financing . . . with respect to the Facility.” The Fagen transaction is just such a financing. GRU contends that the term “construction financing” is ambiguous and that the parties actually intended to limit this exclusion to bank debt financing. I do not find the term to be ambiguous; it is a general term of common usage that broadly covers both debt and equity transactions. If the parties wished to limit the exemption to debt financings only, they could have easily done so. Since the Fagen transaction is properly excluded

from the operation of the ROFO clause, the December 2012 sale of Tyr's minority interest in GREC to Starwood could not trigger any notice obligations on the part of GREC.

In light of the foregoing conclusions, I find it unnecessary to address the remainder of the issues raised by GREC in its request for dismissal. Should the parties wish a more detailed and reasoned opinion, they may so request.

I reserve decision on all other pending requests and direct the parties to meet and confer in order to determine whether it will be necessary for the Arbitrator to rule on those requests. A telephone conference should be held on Wednesday, August 14, 2013 at 10:00 a.m. to discuss this issue.

A handwritten signature in black ink, appearing to read 'R. J. Holwell', is written over a horizontal line.

RICHARD J. HOLWELL