

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

**GRU'S REPLY TO ADDITIONAL ARGUMENTS IN
GREC'S APRIL 13, 2016 FILING AND
ANSWER TO COUNTERCLAIMS IN GRU'S RESPONSE**

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April 27, 2016

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Exhibit List

No.	Description
R1	Power Purchase Agreement
R2	Abel Emails to/from Demopoulos (May and June 2015)
R3	Demopoulos Email (Oct. 21, 2015)
R4	Bielarski Letter to Gordon (Aug. 17, 2015)
R5	Bielarski Email to Morales (Sept. 13, 2015)
R6	Fagan Letter to Stanton (Oct. 14, 2015)
R7	Fagan Email to Stanton (Dec. 10, 2015)
R8	Abel Email #1 to Demopoulos (Feb. 3, 2016)
R9	Abel Email #2 to Demopoulos (Feb. 3, 2016)
R10	Demopoulos Email (Feb. 4, 2016)
R11	Bielarski Letter to Gordon (Feb. 4, 2016)
R12	Demopoulos Email (Feb. 8, 2016)
R13	Gordon Letter to Bielarski (Feb. 8, 2016)
R14	Bielarski Letter to Gordon (Feb. 9, 2016)
R15	Gordon Letter to Bielarski (Feb. 17, 2016)
R16	Bielarski Letter to Gordon (Feb. 23, 2016)
R17	Bielarski Letter to Gordon (Feb. 29, 2016)
R18	Abel Emails to/from De Leo (March 2016)
R19	Stanton Emails to/from Fagan (Oct. 4, 2012)
R20	Morales Email to Bielarski (Sept. 14, 2015)
R21	Abel Email to Brown (Mar. 30, 2016)
R22	Cottle Letter to Gindraux (Mar. 31, 2106)
R23	Gordon Letter to Bielarski (Apr. 11, 2016)
R24	Gordon Letter to Bielarski (Apr. 18, 2016)
R25	Hinton Letter to Phelan (April 25, 2016)

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Respondent The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities (“GRU”) hereby submits this Reply to Additional Arguments in Claimant Gainesville Renewable Energy Center, LLC’s (“GREC”) April 13, 2016 Filing and Answer to Counterclaims in GRU’s Response (“Answer”).¹

I. Preliminary Statement

1. Throughout its Answer, GREC makes numerous conclusory claims that rely on nothing more than the *ipse dixit* of their authors.² Many of these points were fully addressed and rebutted in GRU’s Response and Counterclaim to GREC’s Arbitration Demand (“Response and Counterclaim”), filed March 29, 2016.³ However, GREC raises additional arguments in its Answer that GRU will address herein.

2. Rather than support its positions with citations to evidence or Florida law (as GRU has done in its Response and Counterclaim), GREC once again resorts to unnecessary and unhelpful invective. Consistent with GRU’s response to GREC’s Arbitration Demand, GRU will

¹ Except as otherwise specified, initially capitalized terms used herein have the meanings assigned in the PPA and GRU’s Response and Counterclaim to GREC’s Arbitration Demand.

² For example, GREC pronounces: “There is no such PPA requirement [to take annual Planned Maintenance outages]” (Answer, at 2); however, GREC does not cite to the PPA or any of the parties’ communications that plainly show the existence and understanding of such a requirement. *See, e.g.*, PPA § 10.4.1, Ex. R1, at 11–12; Ex. R19. Similarly, GREC calls on no authority or evidence to assert that “the October 2015 letter was not a ‘change’ to GREC’s written annual maintenance plan, it is that plan.” Answer, at 2 (emphasis in original); *but see* Exs. R2 & R3 (establishing a written annual maintenance plan prior to the October Letter and confirming the continued viability of that plan after the October letter).

³ For example, GRU has already addressed and fully rebutted GREC’s positions and shown (1) that annual Planned Maintenance is required regardless of whether the Facility is in standby status (*see* Response and Counterclaim §§ IV.D., V.A.); (2) that section 10.4.1 of the PPA does require annual Planned Maintenance (*see id.* §§ IV.B., V.A., V.D.); (3) that GREC’s October Letter (Ex. R6) was a unilateral and unsuccessful attempt to change the written annual maintenance plan agreed upon in June 2015 (*see id.* §§ IV.C., IV.F., V.B., V.C.); (4) that GREC was required to yet failed to acquire GRU’s agreement before changing the written annual maintenance plan for 2016 (*see id.* §§ IV.B., IV.E., V.C.).

only address relevant facts in an effort to present a clear and accurate record. Ultimately, GREC’s statement that “[t]his is a contract case” is a correct one—GRU is confident that this dispute can be resolved with a lawful application of the plain language of the PPA.

II. Discussion

A. Planned Maintenance vs. GREC’s Unidentified “Maintenance”

3. In the Answer, GREC attempts to create a distinction between the annual Planned Maintenance required by section 10.4.1 of the PPA and unidentified “maintenance” (lowercase) that GREC alleges it has performed during periods when GREC also claims that the Facility has been available to provide GRU with Energy. GREC provides no description of what this unidentified “maintenance” has entailed, but relies on its manufactured distinction to claim that it has satisfied its obligations under the PPA. GREC is incorrect for the following reasons.

4. First and foremost, GREC’s statements regarding performance of unidentified maintenance illustrate that GREC has not met the PPA’s explicit contractual requirement for annual Planned Maintenance as set forth in section 10.4.1 of the PPA. The undisputed facts show that GREC has not taken a Planned Maintenance outage and therefore has not conducted Planned Maintenance as required by the PPA.⁴ In fact, GREC has confirmed that it is “not requesting a scheduled outage period within calendar year 2016.” Abel Email to Brown (March 30, 2016), Ex. 21. GREC’s actions constitute a material breach of the PPA.

5. GREC claims that GRU is intentionally conflating the duty to perform annual Planned Maintenance with a non-specific “duty to perform maintenance.” Answer, at 4. In reality, the opposite is true—GREC has created the concept of unidentified “maintenance” and is

⁴ The previously agreed dates for the 2016 Planned Maintenance outage were April 9th to April 29th. GREC did not commence an outage on April 9th, nor has GREC conducted Planned Maintenance during this timeframe.

attempting to conflate that unidentified work with its obligation to conduct annual Planned Maintenance in accordance with the PPA. As set forth in section IV.B. of the Response and Counterclaim, the term “Planned Maintenance” has a specific definition in the PPA, and that definition requires “*the occurrence of reduced or suspended operation of the Facility for the purpose of performing routine or regular maintenance in accordance with Good Utility Practice.*” PPA, Ex. R1, at Schedule 1, vii (emphasis added). GREC insists that its Facility is and has been fully available at all times in April, which demonstrates that GREC has not reduced or suspended operation of the Facility (an action that is accompanied by a suspension of Available Energy payments) to conduct Planned Maintenance.

6. GREC maintains that, notwithstanding its unidentified maintenance work, the Facility has remained available to supply Energy, but this position shows that GREC has not complied with the PPA. First, if GREC has in fact been performing maintenance at the Facility, GREC has not reported the occurrence of any such maintenance to GRU.⁵ Second, GREC’s allegations are internally inconsistent. In order to conduct maintenance that satisfies GREC’s Planned Maintenance obligations under PPA, the Facility must be rendered *unavailable* to supply Energy. Thus, either (1) GREC has not been conducting adequate maintenance to satisfy its contractual obligations, or (2) the Facility has not actually been available during all periods to produce and deliver Energy and therefore has not qualified for Available Energy payments. GREC’s adamant assertions that it has performed maintenance sufficient to satisfy the PPA therefore raise a serious question as to whether the Facility is actually available and capable of producing Energy. GREC’s failure and forced shutdown during the March 2016 Dependable

⁵ To conduct maintenance, GREC is required to adhere to certain “lockout/tagout” procedures. Document discovery is required to obtain records of any such adherence and determine whether GREC has in fact conducted the maintenance it alleges.

Capacity test further serves to substantiate GRU's doubts as to the Facility's availability and capability to produce and deliver Energy (and thus qualify for payment for Available Energy) pursuant to the PPA in recent months. *See* Response and Counterclaim § IV.G. GRU expressly reserves its rights to pursue any claim regarding this issue.

B. GRU's Notice of Default and Jim Gordon's Letters in Response

7. As GREC notes, on March 31, 2016, GRU sent a Notice of a Seller Event of Default ("Notice") to Union Bank, N.A. in its role as the "Collateral Agent" for GREC's lenders. *See* Cottle Letter to Gindraux (Mar. 31, 2106), Ex. 22. The Notice was sent as required by section 4(c) of the Consent and Agreement ("Consent") between GRU, GREC, and the Collateral Agent, and was intended merely to comply with the plain terms of the Consent. *See* PPA, Consent and Agreement § 4, Ex. R1. Ignoring the plain language of the Consent mandating that GRU provide the Notice, Jim Gordon, President of GREC, has sent two separate letters to Mr. Bielarski accusing GRU of bad faith and demanding that GRU retract the Notice (collectively, the "Gordon Letters"). *See* Gordon Letter to Bielarski (April 11, 2016), Ex. 23; Gordon Letter to Bielarski (April 18, 2016), Ex. 24. In its Answer, GREC was once again unable to resist the call of invective, describing the Notice as "an improper GRU effort," "reckless and irresponsible," and part of a scheme "to damage GREC's reputation in the energy industry and its financial relationships." Answer, at 5. Mr. Gordon's demands are ill-founded, and GREC's accusations are misplaced. GRU was merely complying with the requirements of the Consent.

8. As explained in GRU's Response to the Gordon Letters, in issuing the Notice, GRU acted according to its obligations under the Consent. *See* Hinton Letter to Phelan (April 25, 2016), Ex. 25. GREC is the "Seller" as defined in the PPA. Section 25.1.1 of the PPA provides that a Seller Event of Default occurs when:

Seller defaults in any material respect in the observance or performance of any material obligation hereunder, including, but not limited to, failure to make a payment when due, failure by Seller to provide adequate security, or breach by Seller of a representation or warranty, and Seller has not cured such default within thirty (30) days after written notice from Purchaser specifying the default and demanding that the same be remedied; provided that if Seller has commenced reasonable efforts to cure the default within such thirty (30) days (and the default is such that it could reasonably be expected to be possible to cure) and continues to diligently pursue those efforts, then Seller shall have an additional thirty (30) days in which to cure the default.

9. GREC is in default under section 10.4.1(a) of the PPA as a result of (i) GREC's unilateral cancellation of the written annual maintenance plan that was agreed to in the PPA and for 2016 in June 2015, which provided for GREC to perform Planned Maintenance at the Facility as required by the PPA during the period from April 9th through April 29th, 2016, and (ii) GREC's stated refusal to perform Planned Maintenance in 2016. On February 29, 2016, GRU provided GREC with written notice of that default. *See* Ex. R17. Thirty days from that notice elapsed without GREC curing or commencing reasonable efforts to cure its default, and thus, a Seller Event of Default occurred on March 30, 2016. *See* Cottle Letter to Gindraux (Mar. 31, 2106), Ex. 22.

10. Section 4(c) of the Consent dictates that GRU "shall deliver" a notice of a Seller Event of Default to the Collateral Agent. *See* PPA, Consent and Agreement § 4(c), Ex. R1. Moreover, section 4(b) of the Consent requires GRU to provide at least 30 days for the Collateral Agent or its designee to cure GREC's default (upon the commencement of good faith efforts to cure the default within 30 days of the Notice the Collateral Agent receives an additional 30 days to complete the cure) before GRU may exercise any of its rights to cancel, terminate or suspend performance under the PPA. *Id.* § 4(b). GRU has expressly requested that the arbitrator declare GREC in breach of the PPA and thereby grant GRU authority to exercise its right to terminate

the PPA. Thus, far from bad faith, the Notice reflects GRU's continued adherence to its contractual duties.

11. Finally, the Gordon Letters threaten that GREC will hold GRU liable for any "financial damages" suffered by GREC. GREC's threat is baseless and contrary to Article 26 of the PPA and its clear limitation of liability.⁶ Any financial harm suffered by GREC is the direct result of GREC's material breach of the PPA, and as such, GRU denies that it may properly be held responsible for the foreseeable results of GREC's actions.

C. The Written Annual Maintenance Plan Is a "Controlling Document"

12. Mr. Bielarski's instructions to GREC regarding John Stanton's lack of authority twice informed GREC that Mr. Stanton was not authorized to make changes to the PPA "or other controlling documents." Exs. R4 & R5. GRU explained in its Answer that the written annual maintenance plan required by section 10.4.1(a) of the PPA and established in June 2015 is one such "controlling document." Thus, Mr. Stanton did not possess authority to accept changes to the written annual maintenance plan on GRU's behalf.

13. Stooping to the use of blustering rhetoric once again, GREC describes GRU's position as "an absurd claim" with "no support in the PPA, parties' course of dealing, logic, or good faith." Quite to the contrary, the written annual maintenance plan (i) is explicitly provided for in section 10.4.1(a) of the PPA, (ii) has been historically relied on by the Parties to schedule annual Planned Maintenance outages across all of GRU's facilities, and (iii) dictates the expenditure of thousands of man-hours and millions of dollars. It is therefore well within the bounds of the PPA, the parties' course of dealing, logic, and good faith to consider the written

⁶ Section 26.1 of the PPA provides in part: "Unless expressly herein provided, neither Party (including its subcontractors, vendors of any tier, or their respective officers, directors, employees, agents or affiliates) shall be liable for any incidental, consequential, punitive, exemplary or indirect damages, lost profits or other business interruption damages"

annual maintenance plan a “controlling document.” Indeed, GREC’s allegations to the contrary are unreasonable.

14. Thus, the written annual maintenance plan is a controlling document, and Mr. Bielarski specifically (twice) instructed GREC to bring changes to it to his attention and his attention alone. GREC ignored this clear instruction, directed its unilateral attempts to change the written annual maintenance plan to an individual who lacked authority to agree to any change on GRU’s behalf, and now seeks to benefit from its lapse in diligence.

III. GREC’s Affirmative Defenses

15. GREC concludes its Answer by asserting nine affirmative defenses. GREC does not support any of these defenses with any argument or law. GRU denies that any of GREC’s affirmative defenses are (1) applicable to this case, (2) properly plead, (3) legally valid, or (4) factually substantiated. Each of the boilerplate affirmative defenses contained in GREC’s Answer should be disregarded unless and until GREC provides law and facts to substantiate its allegations.

IV. Conclusion

16. In sum, GREC’s allegations of unidentified maintenance illustrate that GREC has not met its obligations under the PPA, the plain language of which requires an annual Planned Maintenance outage. GREC has not taken the contractually mandated outage or conducted the requisite Planned Maintenance, and thus has modified its written annual maintenance plan without obtaining GRU’s contractually required agreement. As such, GREC is in material breach of the PPA, and pursuant to the terms of the Consent, GRU is obligated to provide notice of GREC’s default to the Collateral Agent. GRU has complied with all of its contractual obligations. GREC cannot say the same.

Date: April 27, 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 27th day of April 2016, with a copy of the foregoing document via electronic mail.

/s/ Paula W. Hinton
Paula W. Hinton