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 OMNIBUS MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

TABLE OF EXHIBITS

Exhibit No.	Description
M1	Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility by and between Gainesville Renewable Energy Center, LLC and The City of Gainesville, Florida d/b/a Gainesville Regional Utilities dated as of April 29, 2009 (GRU_014780 to GRU_014857)
M2	Equitable Adjustment for Change of Law of the Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility by and Between Gainesville Renewable Energy Center, LLC and The City of Gainesville, Florida d/b/a Gainesville Regional Utilities dated as of March 16, 2011
M3	Consent and Agreement dated as of June 30, 2011, entered into among The City of Gainesville, Florida d/b/a Gainesville Regional Utilities, a municipal corporation duly organized and validly existing under the laws of the State of Florida, Gainesville Renewable Energy Center, LLC, a limited liability company duly organized and existing under the laws of the State of Delaware, and Union Bank, N.A., as collateral agent for the Lenders and other Secured Parties.
M4	Email from Len Fagan to Dino De Leo and several other recipients, dated October 8, 2012, with a subject of "RE: GREC 10 Year Outage Plan," with an attachment named "GREC 10 year outage schedule 2014_2023.xlsx"
M5	Email from Russell Abel, the plant manager of the GREC facility, to George Demopoulos, GRU's Major Maintenance Leader, with a subject line of "FW: GREC 10 year outage schedule 2014_2023.xlsx," sent on November 2, 2012, along with the file attachment to the email, a file named GREC 10 year outage schedule 2014_2023.xlsx (GRU_010396 to GRU_010397)
M6	Email chain, with an internal email from John Stanton to Al Morales, dated December 16, 2013, with a subject of "Re: Claiming of Dependable Capacity" (GRU_018217)
M7	Email from Russell Abel to George Demopoulos, dated May 5, 2015, with a subject line of "GREC planned outage dates 2017" (GRU_000100)
M8	Email chain between Russell Abel, the plant manager of the GREC facility, and George Demopoulos, GRU's Major Maintenance Leader, with the final email dated June 18, 2015 with a subject line of "RE: Revised Energy Supply 10 Year Outage Schedule" (GRU_000129 to GRU_000132)
M9	Revision 5, dated June 18, 2015, to The Operating Procedures for the Power Purchase Agreement for the Supply of Dependable Capacity, Energy, and

Exhibit No.	Description
	Environmental Attributes from a Biomass-Fired Power Production Facility by and between Gainesville Renewable Energy Center, LLC, and the City of Gainesville, Florida d/b/a Gainesville Regional Utilities, dated as of April 29, 2009, as amended
M10	Email from John Stanton to Jim Gordon and other recipients, dated August 11, 2015, with a subject line of "Confirmation of GREC in CSB" (GRU_008158)
M11	Letter from Edward Bielarski to Jim Gordon, dated August 17, 2015, regarding communications between John Stanton and Len Fagan (GRU_072361)
M12	Email chain, with the last email from Russell Abel to Eric Walters, dated August 19, 2015, with a subject line of "RE: GREC Maintenance Outage Request" (GRU_009913 to GRU_009916)
M13	Letter from Leonard Fagan to John Stanton, dated September 3, 2015, with a subject line of "Cold Startup Time to Return to Service" (GRU_007739 to GRU_007742)
M14	Email chain, the last email of which is an email from Al Morales to John Stanton and other recipients, dated September 9, 2015, with a subject of "RE: Revised letter from Len Fagan re: GREC Cold Start up Time with attachment" (GRU_005209 to GRU_005210)
M15	Email from Edward Bielarski to Al Morales, dated September 13, 2015, with a subject line of "GREC start up times" (GRU_007784)
M16	Email from John Stanton to Jim Gordon and other recipients, dated September 19, 2015, with a subject line of "GREC Operational Capacity Test" (GRU_035457)
M17	October 5, 2015 Graphical depiction of Available MWh for the GREC Maintenance Outage, 8/25/2015-8/29/2015, and the GREC Trip, 8/7/2015 (GRU_076640 to GRU_076641)
M18	Letter from Leonard Fagan of GREC to John Stanton of GRU, dated October 14, 2015, with a subject of "Notice of Maintenance Schedule 2016," and the corresponding email transmitting it, sent from Carolyn Wasdin to John Stanton and Eric Walters of GRU, as well as to GREC recipients, sent on October 14, 2015, with a subject of "Notice of GREC 2016 Maintenance Schedule" (GRU_008373 to GRU_008374)
M19	Email from John Stanton to Carolyn Wasdin, dated October 15, 2015, with a subject of "RE: Notice of GREC 2016 Maintenance Schedule" (GRU_008375)

Exhibit No.	Description
M20	Email from George Demopoulos to several recipients, dated October 21, 2015, with a subject of "Revised Energy Supply 10 Year Outage Schedule and Rolling 12 month schedule" with attachments named "ROLLING 12 MONTH OUTAGE SCHEDULE FY2016-10-21-2015.docx" and "Energy Supply 10 Year Outage Dates REVISED_10_21_2015.xls" (GRU_000044 to GRU_000047)
M21	Letter from Justin Locke to Jim Gordon, dated November 24, 2015, with a subject of "Dispute Regarding Invoice Number: GREC OPER 201510" (GRU_072612 to GRU_072613)
M22	Email chain, the last email of which is from Leonard "Len" Fagan to John Stanton, dated December 10, 2015 regarding an updated 2016 outage plan (GRU_074466)
M23	Letter from Edward Bielarski to Jim Gordon, dated December 17, 2015, with a subject of "Dispute over Invoice number: GREC OPER 201511" (GRU_073276 to GRU_073277)
M24	Email from Thomas Brown to Edward Bielarski, dated January 11, 2016, with a subject line of "GREC – Outage postponement/other" (GRU_009295)
M25	Email chain, the last email of which is an email from Russell Abel to George Demopoulos, sent on February 3, 2016, with a subject line of "RE: GREC request for updated outage dates" (GRU_000069 to GRU_000070)
M26	Email chain, the last email of which is an email from Russell Abel to George Demopoulos, sent on February 3, 2016, with a subject line of "RE: GREC request for updated outage dates" (GRU_000111 to GRU_000112)
M27	Email chain, the last email of which is an email from Edward Bielarski to John Stanton, dated February 4, 2016, with a subject line of "RE: GREC outage" (GRU_005184 to GRU_005188)
M28	Email from George Demopoulos to several individuals at GRU and GREC, dated February 4, 2016, with a subject line of "Revised Energy Supply 10 Year Schedule and Rolling 12 Month Schedule" with attachments named "ROLLING 12 MONTH OUTAGE SCHEDULE FY2016-2-4-2016.docx" and "Energy Supply 10 Year Outage Dates REVISED_2_4_2016.xlsx" (GRU_000074 to GRU_000076)
M29	Email from George Demopoulos to several individuals at GRU and GREC, dated February 4, 2016, with a subject line of "Recall" Revised Energy Supply 10 Year Schedule and Rolling 12 Month Schedule" (GRU_000001)

Exhibit No.	Description
M30	Letter from Edward Bielarski to Jim Gordon dated February 4, 2016, with a subject line of "RE: Proposed request to change the mutually agreed upon Planned Maintenance Outage for April 9-29, 2016" (GRU_038880)
M31	Email from George Demopoulos to several individuals at GRU and GREC, dated February 8, 2016, with a subject line of "Revised Energy Supply 10 Year Outage Schedule and Rolling 12 Month Schedule" with attachments named "Energy Supply 10 Year Outage Dates REVISED_2_8_2016.xls" and "ROLLING 12 MONTH OUTAGE SCHEDULE FY 2016-2-8-2016.docx" (GRU_000082 to GRU_000084)
M32	Email from Russell Abel to Dino De Leo and several other recipients, dated March 7, 2016, with a subject line of "RE: GREC Operational Capacity Test" (GRU_068600 to GRU_068601)
M33	Letter from Winston & Strawn LLP, on behalf of GRU, to Hugo Gindraux of Union Bank, N.A., dated March 31, 2016, with a subject line of "Notice of Seller Event of Default, Provided Pursuant to Section 4 of the Consent and Agreement," along with the enclosure and the fax transmittals (GRU_074584 to GRU_074588)
M34	Letter from Jim Gordon to Edward Bielarski, dated April 11, 2016, with a subject line of "GRU Default Notice and AAA Filing" (GRU_009215 to GRU_009216)
M35	Letter from Jim Gordon to Edward Bielarski, dated April 18, 2016, with a subject of "GRU Default Notice and Termination Threat" (GRU_008877)
M36	Letter from Winston & Strawn LLP, on behalf of GRU, to Andrew Phelan and Siobhan Mee of Morgan, Lewis & Bockius LLP, dated April 25, 2016, with a subject of "Response to April 11, 2016 and April 18, 2016 Letters to Edward J. Bielarski, Jr., General Manager" (GRU_009280 to GRU_009282)
M37	Letter from Edward Bielarski to Jim Gordon, dated April 26, 2016, with a subject of "Dispute Regarding Invoice Number: GREC OPER 201603" (GRU_074596 to GRU_074597)
M38	Letter from Union Bank, N.A. to GRU, dated May 5, 2016, with a subject line of "Notice of Seller Event of Default" (GRU_071995 to GRU_071996)
M39	Email chain, with the last email from Eric Walters to Stuart Sohn, dated May 5, 2016, with a subject line of "Backup for Invoice GREC Oper 201603" and file attachments named "Disputed Available Energy Calculation March 2016 Detail.pdf" and "Disputed Available Energy Calculation March 2016 Detail.xlsx" (GRU_010403 to GRU_010408)

Exhibit No.	Description
M40	Letter from Edward Bielarski to Jim Gordon, dated June 27, 2016, with a subject of "Dispute Regarding Invoice Number: GREC OPER 201605" (GRU_036555 to GRU_036556)
M41	Email from Eric Walters to John Stanton, dated February 3, 2016, with a subject line "Re: Tom Brown Request" (GRU_050339 to GRU_050341)
M42	Email from John Stanton to Eric Walters, dated February 3, 2016, with a subject line "Re: Tom Brown Request" (GRU_043894 to GRU_043896)
M43	October 7, 2016 Letter from A. Phelan to Arbitrator T. Brewer re GREC's Response to GRU's Rule 33 Letter
M44	October 19, 2016 GREC Reply in Support of its Motion to Bifurcate
M45	November 2, 2016 GREC Letter in Opposition to GRU Rule 33 Letter re Counts 2 and 4
M46	Excerpts from GREC's Responses and Objections to GRU's First Set of Interrogatories (Nos. 1 - 10)
M47	Letter from Edward Bielarski to Jim Gordon, dated September 29, 2015, with a subject of "Dispute over Invoice number: GREC OPER 201508," with an enclosure entitled "Calculated Discrepancy on August 2015 GREC Invoice" (GRU_072566 to GRU_072569)
M48	Letter from Jim Gordon to Edward Bielarski, dated February 8, 2016, with a subject of "GREC Dispute Resolution Notice per §24 of the Power Purchase Agreement" (GRU_028457)
M49	September 22, 2016 GREC Motion to Bifurcate
A	Affidavit of Edward J. Bielarski
B	Affidavit of Eric A. Walters
C	Affidavit of Dino S. De Leo
D	Affidavit of George Demopoulos

Respondent/Counterclaimant the City of Gainesville, Florida, d/b/a Gainesville Regional Utilities ("GRU") respectfully moves for partial summary judgment against Gainesville Renewable Energy Center, LLC ("GREC") as explained herein:

I. SUMMARY OF THE ARGUMENT

Pursuant to R-33 of the American Arbitration Association's (the "AAA") Rules for Commercial Arbitration and the Tribunal's Procedural Orders No. 6, 8, and 9, GRU moves for partial summary judgment as to the Parties' claims as follows:

- motion for partial summary judgment declaring that Section 10.4.1 of the PPA requires performance of Planned Maintenance on an annual basis and, accordingly, that GRU did not breach section 10.4.1 of the PPA, and that GREC breached a material obligation of the PPA by refusing to perform Annual Planned Maintenance, that the breach constituted a Seller Event of Default, and that, as a result, GRU is entitled to terminate the PPA (impacting GREC's Counts 1, 5 and 9, and GRU's Counts 1, 2, 3, 5, and 6);

- motion for partial summary judgment of no breach because, under the PPA, no Available Energy payments are due under Schedule I of the PPA (other than payments for any Delivered Energy) when the Facility is dispatched and ramping up, prior to Energy being delivered (impacting GREC's Counts 7 and 9);

- motion for partial summary judgment of no breach regarding Section 12.4.1 of the PPA because GRU was permitted to impose a Payment Decrease for the March 2016 Billing Period (impacting GREC's Counts 8 and 9);

- motion for partial summary judgment of no breach under Section 8.5 of the PPA because GRU may retroactively withhold disputed amounts under that section of the PPA, including with respect to the Shutdown Charges from the September 2015 Dependable Capacity test (impacting GREC's Counts 7 and 9);

- motion for partial summary judgment of no breach of Section 10.7 of the PPA because a return to standby condition after Dependable Capacity tests does not require payment of a Shutdown Charge (impacting GREC's Counts 6 and 9);

- motion for partial summary judgment that GRU did not intentionally interfere with GREC's business relations because there is no genuine issue of material fact that GRU did not know of GREC's refinancing efforts or refinancing relationships and that GRU was contractually mandated and/or economically justified to take the accused actions (impacting GREC's Counts 4, 5, and 9);[1]

[1] GRU is also filing a motion to dismiss on GREC's intentional interference with business relations claim.

- motion for partial summary judgment that the cooperation requirement in Section 20 of the PPA requires GREC to seek cooperation, and that GREC never sought GRU's cooperation in refinancing the Facility (impacting GREC's Counts 2, 3, 5, and 9);

- motion for partial summary judgment of no liability and dismissal for GREC's Counts 2 and 4 on the basis that Section 26.1 of the PPA expressly precludes liability for incidental, consequential, punitive, exemplary, or indirect damages, or lost profits or other business interruption damages, whether filed in contract or tort, thereby prohibiting GREC from asserting its Counts 2 and 4 (impacting GREC's Counts 2, 3, 4, 5, and 9);

- motion for partial summary judgment of no liability and dismissal of GREC's Count 4 on the basis that both Section 26.1 of the PPA and Florida state law prohibit GREC's assertion of a contractual claim as a tort (impacting GREC's Counts 4, 5, and 9); and

- motion for partial summary judgment that damages recovery in the arbitration is limited to the statutory cap corresponding to Florida's limited statutory waiver of sovereign immunity, absent action by the Florida State Legislature (impacting GREC's Counts 4, 5, and 9).

For the reasons explained herein, GRU respectfully requests that the Tribunal grant each of these motions for summary judgment and enter the appropriate orders relating thereto.

II. STATEMENT OF UNDISPUTED FACTS

The arguments and evidence presented herein show that the following facts are undisputed[2] and therefore, no material issue of fact is in dispute:

1. GRU and GREC entered into the Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility by and between Gainesville Renewable Energy Center, LLC and The City of Gainesville, Florida d/b/a Gainesville Regional Utilities dated as of April 29, 2009 (the "Power Purchase Agreement" or "PPA") on April 29, 2009. **Bielarski Affidavit**, ¶ 7; **Exhibit M1**.

2. On March 16, 2011, GRU and GREC entered into the Equitable Adjustment for Change of Law of the Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility by and Between Gainesville Renewable Energy Center, LLC and The City of Gainesville, Florida d/b/a Gainesville Regional Utilities dated as of March 16, 2011. **Bielarski Affidavit**, ¶ 8; **Exhibit M2**.

[2] In the remainder of this brief, the specific undisputed statements of fact set forth in the numbered paragraphs in this section are referred to as "**SOF #**."

3. On June 30, 2011, GRU and GREC entered into the Consent and Agreement dated as of June 30, 2011, entered into among The City of Gainesville, Florida d/b/a Gainesville Regional Utilities, a municipal corporation duly organized and validly existing under the laws of the State of Florida, Gainesville Renewable Energy Center, LLC, a limited liability company duly organized and existing under the laws of the State of Delaware, and Union Bank, N.A., as collateral agent for the Lenders and other Secured Parties. **Bielarski Affidavit**, ¶ 9; **Exhibit M3**.

4. GRU maintains a 10 year outage schedule that identifies planned maintenance outage periods for each of GRU's own generating units and the planned maintenance outage period for the GREC biomass facility. **Walters Affidavit**, ¶ 6; **De Leo Affidavit**, ¶ 7; **Demopoulos Affidavit**, ¶ 5.

5. In order to coordinate planned outages among each of its generating facilities, as well as among the GREC biomass facility, GRU required that GREC provide a ten year outage plan. **De Leo Affidavit**, ¶ 7; **Demopoulos Affidavit**, ¶ 5.

6. Prior to the GREC biomass facility beginning commercial operation, GREC provided GRU with a ten year outage plan, which spanned from 2014 to 2023. **De Leo Affidavit**, ¶ 7; **Demopoulos Affidavit**, ¶ 5.

7. On October 5, 2012, Mr. Dino De Leo, Director of Production Assurance Support for GRU's Energy Supply Department, emailed Mr. Len Fagan, GREC's Vice President of Engineering, and Mr. Russell Abel, the plant manager of GREC's biomass facility seeking a ten year outage plan from GREC. **De Leo Affidavit**, ¶ 7; **Exhibit M4**.

8. On October 8, 2012, Mr. Fagan replied and provided an initial ten year outage plan. **De Leo Affidavit**, ¶ 7; **Exhibit M4**.

9. GREC's original proposal was for its outages to take place in the Fall because the facility was slated to be completed in Fall 2013. **De Leo Affidavit**, ¶ 7; **Demopoulos Affidavit**, ¶ 5; **Exhibit M4**.

10. Because scheduling the GREC facility's outages in Fall conflicted with the planned maintenance outages for GRU's generating facilities, particularly for GRU's Deerhaven 2 coal fired generating unit, GRU asked GREC's plant manager, Mr. Russell Abel, to meet and further discuss GREC's outage plan. **De Leo Affidavit**, ¶ 7; **Demopoulos Affidavit**, ¶ 5.

11. GREC's plant manager for the GREC biomass facility, Mr. Russell Abel, met in late 2012 with GRU's Major Maintenance Leader, Mr. George Demopoulos to discuss GREC Planned Maintenance outage scheduling. **De Leo Affidavit**, ¶ 8; **Demopoulos Affidavit**, ¶ 6.

12. After the meeting, GREC provided revised inputs for its Planned Maintenance outages, reflecting Planned Maintenance outages occurring in Spring, following an

initial warranty period outage in the Fall of 2014. **De Leo Affidavit**, ¶ 8; **Demopoulos Affidavit**, ¶ 6; **Exhibit M5**.

13. GREC's outage plan showed an outage for 2016 in the month of April. **De Leo Affidavit**, ¶ 8; **Demopoulos Affidavit**, ¶ 6; **Exhibit M5**.

14. GREC's revised ten year outage plan from 2014 to 2023 included Planned Maintenance outages each year in April of 2015 through 2023. **Demopoulos Affidavit**, ¶ 6; **Exhibit M5**.

15. GREC's ten year outage plan reflected a duration of between 18 and 28 days for the Planned Maintenance outages scheduled from 2015 to 2023. **Demopoulos Affidavit**, ¶ 6; **Exhibit M5**.

16. In 2012, GREC forecast a Planned Maintenance outage for 2016 to last for 21 days, from April 2, 2016 to April 22, 2016. **Demopoulos Affidavit**, ¶ 6; **Exhibit M5**.

17. The outage schedule reflected that the activity for the 2016 outage would be "turbine minor." **Demopoulos Affidavit**, ¶ 6; **Exhibit M5**.

18. On May 1, 2015, GRU's Major Maintenance Leader, Mr. George Demopoulos, sent an email with GRU's revised 10 year outage schedule. **Walters Affidavit**, ¶ 6; **De Leo Affidavit**, ¶ 9; **Demopoulos Affidavit**, ¶ 7; **Exhibit M8**.

19. On May 1, 2015, the plant manager of the GREC biomass facility, Mr. Russell Abel, emailed Mr. Demopoulos back, stating, "We'd like to plan out [sic] spring 2016 outage for April 2-22. Please let me know if that works for GRU." **Walters Affidavit**, ¶ 6; **De Leo Affidavit**, ¶ 9; **Demopoulos Affidavit**, ¶ 7; **Exhibit M8**.

20. On June 17, 2015, Mr. Demopoulos replied to Mr. Abel's email and asked if GREC could reschedule its outage to April 9, 2016 to April 29, 2016. **Walters Affidavit**, ¶ 6; **De Leo Affidavit**, ¶ 9; **Demopoulos Affidavit**, ¶ 7; **Exhibit M8**.

21. Mr. Abel replied, stating "April 9th to April 29th will work for us." **Walters Affidavit**, ¶ 6; **De Leo Affidavit**, ¶ 9; **Demopoulos Affidavit**, ¶ 7; **Exhibit M8**.

22. On May 5, 2015, the plant manager of the GREC biomass facility, Mr. Abel, emailed Mr. George Demopoulos and requested that, if it met with GRU's approval, Mr. Demopoulos schedule GREC's 2017 planned outage for April 1 to April 21. **De Leo Affidavit**, ¶ 10; **Demopoulos Affidavit**, ¶ 8; **Exhibit M7**.

23. On August 7, 2015, the GREC biomass facility tripped offline after a lightning strike. **Bielarski Affidavit**, ¶ 11; **Walters Affidavit**, ¶ 7; **Exhibit M10**.

24. Prior to that time, the GREC biomass facility was typically being dispatched by GRU to provide energy. **Bielarski Affidavit**, ¶ 10; **Walters Affidavit**, ¶ 7.

25. Later on August 7, 2015, GREC advised that its biomass facility was available to return to service. **Bielarski Affidavit**, ¶ 11; **Walters Affidavit**, ¶ 7; **Exhibit M10**.

26. After GREC's trip, GRU opted not to dispatch GREC to generate energy based upon the economics of GRU's dispatch model. **Bielarski Affidavit**, ¶ 11; **Walters Affidavit**, ¶ 7; **Exhibit M10**.

27. GRU informed GREC that GRU was unlikely to dispatch GREC again until at least October 2015. **Bielarski Affidavit**, ¶ 11; **Walters Affidavit**, ¶ 7; **Exhibit M10**.

28. In August 2015, after the trip of the GREC biomass facility, personnel at GRU and GREC exchanged communications regarding Available Energy charges in light of the August 7, 2015 trip. **Bielarski Affidavit**, ¶¶ 12, 37; **Walters Affidavit**, ¶ 26.

29. On August 11, 2015, Mr. John Stanton, then Assistant General Manager of Energy Supply at GRU, informed Mr. Edward Bielarski, General Manager of GRU, that he had received a phone call from Mr. Jim Gordon, President of GREC. **Bielarski Affidavit**, ¶ 12.

30. In light of those communications, Mr. Bielarksi directed Mr. Stanton to funnel communications through him (Mr. Bielarski), and informed Mr. Stanton that Mr. Bielarski would handle communications regarding legal issues. **Bielarski Affidavit**, ¶ 12.

31. During this time frame, Mr. Leonard Fagan, GREC's Vice President of Engineering, spoke with Mr. Stanton and inquired whether GRU would dispatch GREC online if the minimum dispatch level in the PPA was at 55 megawatts, rather than at 70 MW. **Bielarski Affidavit**, ¶ 13.

32. Mr. Bielarski sent a letter to Mr. Gordon at GREC to address the discussion of minimum dispatch levels on August 17, 2015. **Bielarski Affidavit**, ¶ 14; **Exhibit M11**.

33. In the August 17, 2015 letter, Mr. Bielarski informed GREC of Mr. Stanton's limited authority, writing, "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 Affidavit**, ¶ 14; **Exhibit M11**.

34. Approximately two weeks later, on September 3, 2015, Mr. Fagan, GREC's Vice President of Engineering, wrote Mr. Stanton regarding expected start-up times for the GREC biomass facility. **Bielarski Affidavit**, ¶ 15; **Walters Affidavit**, ¶ 8; **Exhibit M13**.

35. After this letter, Mr. Stanton exchanged further communications with GREC regarding expected start-up times, finally garnering a response from Mr. Al

Morales, GREC's Chief Finance Officer and General Counsel, on September 9, 2015. **Bielarski Affidavit**, ¶ 16; **Walters Affidavit**, ¶ 8; **Exhibit M14**.

36. On September 13, 2015, Mr. Bielarski wrote to Mr. Morales regarding the discussion of start-up times. In his email to Mr. Morales, Mr. Bielarski reminded him, "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 Affidavit**, ¶ 17; **Walters Affidavit**, ¶ 9; **De Leo Affidavit**, ¶ 11; **Exhibit M15**.

37. On October 14, 2015, GREC emailed Mr. Stanton and Mr. Eric Walters, GRU's Administrative and Fuels Operations Director, sending a letter dated October 14, 2015, addressed to John Stanton. **Walters Affidavit**, ¶ 10; **Exhibit M18**.

38. The letter stated, "Given the current GREC dispatch scenario of remaining in reserve shutdown, GREC plans no Maintenance or Planned outages in 2016." **Walters Affidavit**, ¶ 10; **Exhibit M18**. Mr. Walters, of GRU, is unaware of GREC having previously sent a letter to address outage planning, instead relying upon emails to relay outage plans. **Walters Affidavit**, ¶ 10.

39. On October 15, 2015, Mr. Stanton, GRU's Assistant General Manager of Energy Supply, replied to GREC's email transmitting the letter and said that he was "acknowledging receipt." **Walters Affidavit**, ¶ 11; **Exhibit M19**.

40. On October 21, 2015, Mr. George Demopoulos, GRU's Major Maintenance Leader, sent an email entitled "Revised Energy Supply 10 Year Outage Schedule and Rolling 12 month schedule." **Walters Affidavit**, ¶ 12; **De Leo Affidavit**, ¶ 12; **Demopoulos Affidavit**, ¶ 9; **Exhibit M20**.

41. The attached outage schedules continued to reflect that GREC was taking a Planned Maintenance outage from April 9, 2016 to April 29, 2016. **Walters Affidavit**, ¶ 12; **De Leo Affidavit**, ¶ 12; **Demopoulos Affidavit**, ¶ 9; **Exhibit M20**. At this time, no one from GRU or GREC emailed Mr. Demopoulos to assert that GREC was foregoing its annual Planned Maintenance outage. **Demopoulos Affidavit**, ¶ 9.

42. On January 11, 2016, Thomas Brown, GRU's Chief Operating Officer, emailed Mr. Bielarski and told him, "John Stanton informed me this morning that due to the GREC plant not being dispatched, the next scheduled outage from April 9th through April 29 has been cancelled." **Bielarski Affidavit**, ¶ 18; **Exhibit M24**.

43. The issue was discussed in early February 2016. Mr. Bielarski recalls that Mr. Stanton, GRU's former Energy Supply Officer, informed him some weeks before that time that GREC was requesting to forego annual Planned Maintenance. **Bielarski Affidavit**, ¶ 19.

44. Mr. Bielarski recalls telling Mr. Stanton that GRU would need to think about that request and what response to provide. **Bielarski Affidavit**, ¶ 19.

45. In early February—approximately February 3, 2016—Mr. Bielarski inquired through GRU staff into correspondence regarding GREC's annual Planned Maintenance outage. **Bielarski Affidavit**, ¶ 20; **Walters Affidavit**, ¶ 13.

46. On February 3, 2016, regarding GREC's October letter regarding the April 2016 outage, Mr. Eric Walters emailed John Stanton, GRU's Energy Supply Officer, and told him, "I can't remember but I don't believe we ever sent them an official reply; yes or no." **Walters Affidavit**, ¶ 13; **Exhibit M41**.

47. Mr. Stanton replied to Mr. Walters' email and stated that he thought he (Mr. Stanton) had sent an email acknowledging that he (Mr. Stanton) had received GREC's letter. **Walters Affidavit**, ¶ 13; **Exhibit M42**.

48. Afterwards, Mr. Walters searched the correspondence on the subject. **Walters Affidavit**, ¶ 13.

49. Although Mr. Walters had read the letter from GREC, he was initially unable to find it or a response to it. **Walters Affidavit**, ¶ 13.

50. After this initial search, Mr. Walters emailed all the correspondence he could find to Ms. Shayla McNeill, GRU's Utilities Attorney, and told her that he was unable to find the GREC request or a response to it. **Walters Affidavit**, ¶ 13.

51. Mr. Walters then forwarded that email with the correspondence and his statement that he was unable to find a response to Mr. John Stanton. **Walters Affidavit**, ¶ 13.

52. Later that day (February 3, 2016), Mr. Walters was able to find the correspondence from GREC and an email from John Stanton acknowledging receipt of the letter. **Walters Affidavit**, ¶ 13.

53. Mr. Walters is unaware of any correspondence from GRU, authorized or unauthorized, that approved GREC foregoing a Planned Maintenance outage in 2016. **Walters Affidavit**, ¶ 13. Additionally, Mr. Walters is unaware of any agreement by the Florida Reliability and Coordination Council (FRCC) to GREC's purported change to the annual Planned Maintenance after the original plan was communicated to FRCC. **Walters Affidavit**, ¶ 13.

54. Notwithstanding the absence of any correspondence approving GREC's request to forego a planned maintenance outage in 2016, Mr. Walters understands that Mr. Stanton subsequently argued that his email acknowledging receipt constituted an approval. **Walters Affidavit**, ¶ 13.

55. On February 3, 2016, Mr. George Demopoulos, GRU's Major Maintenance Leader, emailed Mr. Russell Abel, the plant manager of the GREC biomass facility, to inform Mr. Abel that he was updating GRU's ten year outage plan, and inquired into whether GREC had any new updates to include in the plan. **Walters Affidavit**, ¶ 14; **De Leo Affidavit**, ¶ 13; **Demopoulos Affidavit**, ¶ 10; **Exhibit M25**.

56. Mr. Abel replied a few minutes later and stated, "There are no changes at this time." **Walters Affidavit**, ¶ 15; **De Leo Affidavit**, ¶ 14; **Demopoulos Affidavit**, ¶ 11; **Exhibit M25**.

57. A short while later, Mr. Abel responded again to Mr. Demopoulos' original February 3, 2016 email and stated, "George, as a reminder, we have canceled our April 2016 planned outage." **Walters Affidavit**, ¶ 16; **De Leo Affidavit**, ¶ 15; **Demopoulos Affidavit**, ¶ 12; **Exhibit M26**.

58. On February 3, 2016, Mr. Bielarski emailed Mr. Stanton and expressed disappointment in how Mr. Stanton had handled the issues surrounding GREC's request to forego annual Planned Maintenance, and the two subsequently exchanged emails on the subject. **Bielarski Affidavit**, ¶ 20; **Exhibit M27**.

59. On February 4, 2016, Mr. Bielarski sent Mr. Gordon, of GREC, a letter regarding the issue of GREC's annual Planned Maintenance outage for April 2016. **Bielarski Affidavit**, ¶ 21; **Walters Affidavit**, ¶ 19; **De Leo Affidavit**, ¶ 18; **Exhibit M30**.

60. In the letter, Mr. Bielarski stated:

> Pursuant to the Power Purchase Agreement ("PPA") between the City of Gainesville d/b/a Gainesville Regional Utilities ("GRU") and Gainesville Renewable Energy Center, LLC ("GREC"), on June 18, 2015, GRU and GREC mutually agreed to the 2016 Planned Maintenance outage schedule. GRU and GREC mutually agreed that GREC would complete Planned Maintenance from April 9 through April 29, 2016. On October 14, 2015, GRU received a request from GREC to change the mutually agreed upon Planned Maintenance outage schedule.
>
> Pursuant to Section 10.4.1(a) of the PPA, please accept this correspondence as notice that GREC's proposed change to the Planned Maintenance schedule is not agreeable to GRU. As such, GRU expects GREC to complete their Planned Maintenance from April 9 to April 29, 2016. . . .

Exhibit M30; **Bielarski Affidavit**, ¶ 21; **Walters Affidavit**, ¶ 19; **De Leo Affidavit**, ¶ 18.

61. GREC continued to maintain that it would not perform an annual Planned Maintenance outage in 2016. **Bielarski Affidavit**, ¶ 22.

62. GREC has not performed an annual Planned Maintenance outage in 2016. **Bielarski Affidavit**, ¶ 22; **Walters Affidavit**, ¶ 21; **De Leo Affidavit**, ¶ 20; **Demopoulos Affidavit**, ¶ 16.

63. On February 4, 2016, Mr. Demopoulos updated the ten year outage schedule based on Mr. Abel's February 3, 2016 email that GREC had canceled its April 2016

planned outage, and emailed it with the schedule reflecting no April 2016 Planned Maintenance outage for GREC. **Walters Affidavit**, ¶ 17; **De Leo Affidavit**, ¶ 16; **Demopoulos Affidavit**, ¶ 13; **Exhibit M28**.

64. Shortly thereafter, on February 4, 2016, Mr. Demopoulos sent an email attempting to recall his email with the updated ten year outage schedule. **Walters Affidavit**, ¶ 18; **De Leo Affidavit**, ¶ 17; **Demopoulos Affidavit**, ¶ 14; **Exhibit M29**.

65. On February 8, 2016, Mr. Dino De Leo emailed Mr. George Demopoulos, GRU's Major Maintenance Leader, and Lonnie Little, and asked them to edit the outage plan to reflect GREC's planned outage from April 9, 2016 to April 29, 2016. **Walters Affidavit**, ¶ 20; **De Leo Affidavit**, ¶ 19; **Demopoulos Affidavit**, ¶ 15.

66. On February 8, 2016, Mr. George Demopoulos, GRU's Major Maintenance Leader, emailed a revised ten year outage schedule and a rolling twelve month outage schedule. **Walters Affidavit**, ¶ 20; **De Leo Affidavit**, ¶ 19; **Demopoulos Affidavit**, ¶ 15; **Exhibit M31**. These updated schedules again reflected that GREC's biomass facility would be performing annual Planned Maintenance from April 9, 2016 to April 29, 2016. **Walters Affidavit**, ¶ 20; **De Leo Affidavit**, ¶ 19; **Demopoulos Affidavit**, ¶ 15; **Exhibit M31**.

67. In a letter dated February 8, 2016, Mr. Jim Gordon of GREC sent a dispute resolution notice per section 24 of the PPA to Mr. Edward Bielarski regarding the dispute on annual Planned Maintenance. **Bielarski Affidavit**, ¶ 22; **Exhibit M48**. GRU refused to capitulate to GREC's demands. **Bielarski Affidavit**, ¶ 22. On March 10, 2016, GREC filed an arbitration demand, beginning this arbitration. **Bielarski Affidavit**, ¶ 22.

68. After Mr. Demopoulos' updated email sent on February 8, 2016, Mr. Russell Abel, plant manager for the GREC biomass facility, responded and stated that GREC would not be taking an outage. **De Leo Affidavit**, ¶ 20; **Demopoulos Affidavit**, ¶ 15. On February 29, 2016, Mr. Edward Bielarski of GRU sent Mr. Jim Gordon of GREC a response to GREC's dispute resolution notice and identified that GREC's current position not to perform Planned Maintenance on the Facility would be a breach of GREC's obligations pursuant to Section 10.4.1(a) of the PPA. **Exhibit M33** at GRU_074588.

69. On March 31, 2016, Winston & Strawn LLP sent a letter to Union Bank, N.A., GREC's collateral agent, captioned a "Notice of Seller Event of Default, Provided Pursuant to Section 4 of the Consent and Agreement." **Bielarski Affidavit**, ¶ 23; **Exhibit M33**. The Notice Letter was sent pursuant to the terms of the Consent and Agreement and PPA in order to preserve GRU's rights under the PPA. **Bielarski Affidavit**, ¶ 23; **Exhibit M33**.

70. On April 11, 2016, Mr. Gordon, of GREC, sent Mr. Bielarski a letter with the subject, "GRU Default Notice and AAA Filing." **Bielarski Affidavit**, ¶ 24; **Exhibit M34**.

71. One week later, on April 18, 2016, Mr. Gordon sent Mr. Bielarski another letter, this time with a subject of "GRU Default Notice and Termination Threat." **Bielarski Affidavit**, ¶ 25; **Exhibit M35**.

72. In response to the April 11, 2016 letter and the April 18, 2016 letter, Winston & Strawn LLP sent a letter to GREC's counsel at Morgan, Lewis & Bockius LLP on April 25, 2016, with a subject of "Response to April 11, 2016 and April 18, 2016 Letters to Edward J. Bielarski, Jr., General Manager." **Bielarski Affidavit**, ¶ 26; **Exhibit M36**.

73. On May 5, 2016, GREC's collateral agent, Union Bank, sent a letter to GRU with a copy to Winston & Strawn LLP regarding "Notice of Seller Event of Default." **Bielarski Affidavit**, ¶ 27; **Exhibit M38**.

74. In the letter, Union Bank stated that it was in receipt of the Notice Letter sent on March 31, 2016, "which describes an alleged Seller Event of Default (as defined in the PPA) related to the alleged non-performance by GREC of certain Planned Maintenance (as defined in the PPA) in 2016 . . ." **Bielarski Affidavit**, ¶ 27; **Exhibit M38**.

75. Union Bank stated, "Given that the existence of a Seller Event of Default arising from the Alleged Default is currently the subject of an arbitral proceeding, GRU is not in a position to unilaterally determine that GREC is in default under Section 10.4.1(a) of the PPA, that a Seller Event of Default occurred on March 30, 2016 and that GRU has the right to terminate the PPA pursuant to Section 25.2 thereof on the basis of the Alleged Default." **Bielarski Affidavit**, ¶ 27; **Exhibit M38**.

76. Union Bank also noted that, "pursuant to the terms of Section 24.3 of the PPA, both GREC and GRU are required to continue performing their obligations under the PPA (including, for the avoidance of doubt, payment of any amounts duly invoiced thereunder) during the pendency of any controversy, dispute or claim arising out of or relating to the PPA." **Bielarski Affidavit**, ¶ 27; **Exhibit M38**.

77. Union Bank then asked that GRU "[p]lease continue to provide us with copies of all notices as required by Section 4(c) of the PPA Consent." **Bielarski Affidavit**, ¶ 27; **Exhibit M38**.

78. At the time that the letter (**Exhibit M33**) was sent to the collateral agent, Union Bank, GRU had no knowledge of GREC actively pursuing refinancing. **Bielarski Affidavit**, ¶ 30.

79. GRU had no knowledge of a business relationship between GREC and Union Bank for refinancing the GREC biomass facility. **Bielarski Affidavit**, ¶ 30.

80. GRU had no knowledge of a prospective business relationship between GREC and Union Bank for refinancing the GREC biomass facility. **Bielarski Affidavit**, ¶ 30.

81. GRU had no knowledge of business relationships between GREC and any other lender for refinancing the GREC biomass facility. **Bielarski Affidavit**, ¶ 30.

82. GRU had no knowledge of a prospective business relationship between GREC and any other lender for refinancing. **Bielarski Affidavit**, ¶ 30.

83. It is now GRU's understanding that GREC maintains that there were no business relationships or prospective business relationships with lenders for refinancing. **Bielarski Affidavit**, ¶ 30.

84. At the time that the notice letter (**Exhibit M33**) was sent, GRU had no knowledge of a business relationship between GREC and MUFG as a placement agent for refinancing. **Bielarski Affidavit**, ¶ 31.

85. At that time, GRU had no knowledge of a prospective business relationship between GREC and MUFG as a placement agent for refinancing. **Bielarski Affidavit**, ¶ 31.

86. GRU had no knowledge as to a business relationship for refinancing between GREC and MUFG that would have been completed if not for GRU's alleged interference. **Bielarski Affidavit**, ¶ 32.

87. GRU had no knowledge of GREC and MUFG attempting to enter into a business relationship but being unable to do so. **Bielarski Affidavit**, ¶ 32.

88. GRU had no knowledge of GREC and MUFG having an actual and identifiable understanding or agreement that was not completed. **Bielarski Affidavit**, ¶ 32.

89. Even after receiving GREC's April 18, 2016 letter (**Exhibit M35**), GRU had no knowledge of this—GRU had no knowledge that GREC was allegedly ready to enter into any agreement or relationship with MUFG, or anyone else, as a placement agent, but was unable to do so. **Bielarski Affidavit**, ¶ 32.

90. Likewise, after receiving both the April 11, 2016 letter from Jim Gordon (**Exhibit M34**) and the April 18, 2016 letter from Jim Gordon (**Exhibit M35**), GRU had no knowledge of GREC being ready to enter into an agreement or relationship with any placement agent or lender regarding refinancing. **Bielarski Affidavit**, ¶ 32.

91. GRU did not send the Notice Letter directly to MUFG. GRU's counsel sent the letter to Union Bank, the designated collateral agent, as identified in the PPA. GRU did not send any communications directly to MUFG. **Bielarski Affidavit**, ¶ 33.

92. Despite sending GRU two letters in April 2016 (**Exhibits M34** and **M35**), GREC did not ask for GRU's cooperation in any refinancing efforts. **Bielarski Affidavit**, ¶ 34.

93. GREC did not ask GRU to provide any consents or related documents to any lenders. **Bielarski Affidavit**, ¶ 34.

94. GREC did not ask GRU to provide, execute, or deliver documents, certificates, instruments, consents or other information in GRU's control. **Bielarski Affidavit**, ¶ 34.

95. GREC did not ask GRU to modify the PPA to accommodate a refinancing lender's request. **Bielarski Affidavit**, ¶ 34.

96. Instead, GREC demanded that GRU retract its notice letter to the collateral agent. **Bielarski Affidavit**, ¶ 34.

97. Additionally, GREC did not ask for GRU's cooperation or for any consents, related documents, certificates, instruments, or other information in the time frame the parties were engaged in a dispute regarding the Construction Cost Adjustor, or in the time frame that the dispute regarding the April 2016 Planned Maintenance outage arose. **Bielarski Affidavit**, ¶ 35.

98. GRU and GREC approved Revision 5 to The Operating Procedures for the Power Purchase Agreement for the Supply of Dependable Capacity, Energy, and Environmental Attributes from a Biomass-Fired Power Production Facility By and Between Gainesville Renewable Energy Center, LLC, and the City of Gainesville, Florida d/b/a Gainesville Regional Utilities, dated as of April 29, 2009, as amended. **Walters Affidavit**, ¶ 24; **Exhibit M9**.

99. Revision 5 to the Operating Procedures was approved and effective as of June 18, 2015. **Walters Affidavit**, ¶ 24; **Exhibit M9**.

100. Revision 5 to the Operating Procedures includes an Exhibit G, entitled "Calculation of GREC Available Energy after Dispatch into Cold Standby Subsequent to a Forced Outage Event." **Walters Affidavit**, ¶ 25; **Exhibit M9**.

101. Exhibit G addresses both the calculation of Available Energy after a trip, as well as the calculation of Available Energy following conclusion of a forced outage. **Walters Affidavit**, ¶ 25; **Exhibit M9**.

102. Following the August 7, 2015 trip of the GREC biomass facility, GREC requested to take a maintenance outage for three days over August 25, 26, and 27, 2015. **Walters Affidavit**, ¶ 27; **Bielarski Affidavit**, ¶ 38; **Exhibit M12**.

103. GRU approved GREC's maintenance request. **Walters Affidavit**, ¶ 27; **Bielarski Affidavit**, ¶ 38; **Exhibit M12**.

104. GRU and GREC discussed Available Energy charges both in light of the maintenance outage and the August 7, 2015 trip. **Walters Affidavit**, ¶ 28. GRU challenged GREC's invoice relating to this maintenance outage in a letter sent on September 29, 2015 from Mr. Edward Bielarski to Mr. Jim Gordon. **Bielarski Affidavit**, ¶ 38; **Exhibit M47**.

105. GRU developed a graphical portrayal of Available Energy for both the maintenance outage and the trip. **Walters Affidavit**, ¶ 28; **Exhibit M17**.

106. This representation of Available Energy uses the same method described in Exhibit G of Revision 5 of the Operating Procedures. **Walters Affidavit**, ¶ 28.

107. On the morning of September 19, 2015, GRU directed GREC to perform an operational capacity test under the PPA. **Bielarski Affidavit**, ¶ 39; **Walters Affidavit**, ¶ 29; **Exhibit M16**.

108. The directive included instructions for the GREC biomass facility to return to its pre-test status after completion of the test. **Bielarski Affidavit**, ¶ 39; **Walters Affidavit**, ¶ 29; **Exhibit M16**.

109. Prior to the test, the facility had been in standby. **Bielarski Affidavit**, ¶ 39; **Walters Affidavit**, ¶ 29.

110. Following the September 2015 Dependable Capacity test, GRU disputed GREC's invoice on the basis that no Shutdown Charge was payable. **Bielarski Affidavit**, ¶ 40.

111. On November 24, 2015, GRU's Chief Financial Officer, Justin Locke, sent a letter further disputing Available Energy charges for the September 2015 Dependable Capacity test from the time that the dispatch order was transmitted to perform the Dependable Capacity test to the time GREC tied to the grid. **Bielarski Affidavit**, ¶ 41; **Exhibit M21**.

112. On November 3, 2015, GRU dispatched the GREC biomass facility from a standby condition to generate Energy. **Bielarski Affidavit**, ¶ 42.

113. After receiving the November invoice, GRU disputed the Available Energy charges for the November 3, 2015 start-up from the time that the dispatch order was given until GREC tied to the grid. **Bielarski Affidavit**, ¶ 42; **Exhibit M23**.

114. On the morning of March 6, 2016, GRU directed GREC to perform a Dependable Capacity test under the PPA. **Bielarski Affidavit**, ¶ 43; **Walters Affidavit**, ¶ 30; **Exhibit M32**.

115. The March 6, 2016 directive included instructions for the GREC biomass facility to return to its pre-test status after completion of the test. **Bielarski Affidavit**, ¶ 43; **Walters Affidavit**, ¶ 30; **Exhibit M32**.

116. Prior to the March 6, 2016 directive, the facility had been in standby. **Bielarski Affidavit**, ¶ 43; **Walters Affidavit**, ¶ 30.

117. As GREC was attempting to start the March 6, 2016 Dependable Capacity test, the GREC biomass facility suffered a plant casualty when a primary air fan duct

expansion joint ruptured, preventing the test from proceeding as requested. **Bielarski Affidavit**, ¶ 44; **Walters Affidavit**, ¶ 31; **Exhibit M32**.

118. On April 26, 2016, as GRU's General Manager, Mr. Bielarski sent a letter to GREC disputing invoiced Available Energy charges pertaining to the March 2016 Dependable Capacity test, on the basis that GRU should not have been invoiced for any Available Energy charges from the time the order was given to perform the test of Dependable Capacity under the PPA to the time that the breaker closed and GREC tied to the grid. **Bielarski Affidavit**, ¶ 45; **Exhibit M37**.

119. Additionally, GRU disputed the invoice line item for Shutdown Charges, given that GRU did not dispatch GREC to shutdown, but rather GREC was instructed to return to its pre-test condition. **Bielarski Affidavit**, ¶ 45; **Exhibit M37**.

120. Finally, GRU disputed the invoice on the basis that GREC failed to meet the operating level specified by GRU by more than five percent for a billing period under Section 12.4.1 of the PPA. **Bielarski Affidavit**, ¶ 45; **Walters Affidavit**, ¶ 32; **Exhibit M37**.

121. With respect to this dispute of Available Energy charges pursuant to Section 12.4.1 of the PPA, as GRU's Director of Business, Fuels, and Power Operations, Mr. Eric Walters communicated with GREC personnel and provided spreadsheets supporting GRU's assertion that GREC had failed to meet the operating level specified by GRU by more than five percent for the March 2016 billing period. **Walters Affidavit**, ¶ 32; **Exhibit M39**.

122. GRU issued an order to perform a Dependable Capacity test again on May 25, 2016, and the test directive included instructions for the GREC biomass facility to return to its pre-test status after completion of the test. **Bielarski Affidavit**, ¶ 46.

123. Again, at the time of the directive, the GREC facility had been in standby. **Bielarski Affidavit**, ¶ 46.

124. On June 27, 2016, as GRU's General Manager, Mr. Bielarski sent a letter to Mr. Gordon of GREC disputing Available Energy charges invoiced for the May 2016 time period. **Bielarski Affidavit**, ¶ 47; **Exhibit M40**.

125. In its letter, GRU maintained that it should not have been invoiced for Available Energy charges for the May 25, 2016 test from the time the order was given to perform a test of Dependable Capacity to the time when GREC tied to the grid. **Bielarski Affidavit**, ¶ 47; **Exhibit M40**.

126. GRU also disputed the Shutdown Charges for the May 25, 2016 test on the basis that GREC was instructed to return to GREC's pre-test condition, and GRU did not dispatch GREC to shutdown. **Bielarski Affidavit**, ¶ 47; **Exhibit M40**.

127. After the GREC biomass facility began commercial operation on December 17, 2013, the facility suffered a number of equipment issues. **Walters Affidavit**, ¶ 22.

128. In May 2014, GREC informed GRU that it found a number of superheater tubes with issues—GREC found a leak in the superheater tubes. **Walters Affidavit**, ¶ 22.

129. Despite attempting repairs through welding, GREC continued to find cracks in previously repaired welds. **Walters Affidavit**, ¶ 22.

130. Eventually, after monitoring superheater weld leaks, GREC decided to come offline in January 2015 to attempt repairs, after initially attempting to wait until its Planned Maintenance outage in April 2015. **Walters Affidavit**, ¶ 22.

131. GREC ended up replacing the tertiary superheater outlet header, a major boiler component, to address the issue. **Walters Affidavit**, ¶ 22.

132. GREC has experienced a number of trips resulting from lightning strikes, including the one in August 2015. **Walters Affidavit**, ¶ 22.

133. During the March 2016 operational capacity test, a primary air fan duct expansion joint ruptured. **Walters Affidavit**, ¶ 22.

134. In September 2016, GREC tripped due to an issue with fuel quality. **Walters Affidavit**, ¶ 22.

135. The Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, made a finding of fact that design problems with the GREC biomass facility's fuel handling system made the plant unable to efficiently and effectively handle ground biomass, even though it was provided within the specifications of GREC's fuel contract. Final Judgment, *Wood Resource Recovery, LLC v. Gainesville Renewable Energy Center, LLC*, Case No. 2015-CA-001218, Div. K, slip op. at 7 (Fla. Cir. Ct. June 23, 2016).

136. The Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, made a finding of fact that the Fuel Procurement Manager of GREC noted on October 2, 2013, that the fuel handling system was "routinely getting plugged up on ordinary material that meets the spec [*i.e.*, contract specification]" even after modifications had been made to the fuel handling system. Final Judgment, *Wood Resource Recovery, LLC v. Gainesville Renewable Energy Center, LLC,* Case No. 2015-CA-001218, Div. K, slip op. at 7 (Fla. Cir. Ct. June 23, 2016).

137. Under the Power Purchase Agreement (**Exhibit M1**), prior to commercial operation, the GREC biomass facility performed an initial capacity test to determine its Dependable Capacity, and the initial capacity test established the Dependable Capacity of the GREC biomass facility at 102.5 MW. **Walters Affidavit**, ¶ 5; **De Leo Affidavit**, ¶ 6.

138. During subsequent dependable capacity tests, the Dependable Capacity has remained at 102.5 MW. **Walters Affidavit**, ¶ 5; **De Leo Affidavit**, ¶ 6.

III. LEGAL STANDARDS

A. Legal Standards for Granting Summary Judgment

Summary judgment is appropriate where, as here, "the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FLA. R. CIV. P. 1.510(c); *Wills v. Sears, Roebuck & Co.*, 351 So. 2d 29, 30 (Fla. 1977). The party seeking summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *The Florida Bar v. Mogil*, 763 So. 2d 303, 307 (Fla. 2000). However, once the movant tenders competent evidence to support its motion, "'the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. *It is not enough for the opposing party merely to assert that an issue does exist*.'" *Id.* (quoting *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979)) (emphasis in original).

GREC, as the non-movant, must do more than merely come forward with assertions or legal arguments. *Mogil*, 763 So. 2d at 307. It cannot rely upon its pleadings. *MacGregor v. Hosack*, 58 So. 2d 513, 516 (Fla. 1952); *see also* FLA. R. CIV. P. 1.510(c) (discussing use of affidavits, answers to interrogatories, admissions, depositions, and other materials admissible in evidence); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (the non-movant must "go beyond the pleadings and, by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial'"). Florida case law is clear that, in the face of the movant's evidence satisfying the initial burden, a party cannot rely upon its pleadings, or paper issues, to defeat a motion for summary judgment, but rather must come forward with sufficient evidence to create a genuine issue of material fact. *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782 (Fla. 1965) ("To defeat a motion which is supported by evidence which reveals no genuine issue, it is not sufficient for the opposing party

merely to assert that an issue does exist."); *Page v. Staley*, 226 So. 2d 129, 130 (Fla. 4th DCA 1969) ("The function of summary judgment procedure is to determine if there is sufficient evidence to justify trial upon the issues made by the pleadings, to expedite litigation, and to obviate expense. . . . We feel that the rule was properly used in this instance and particularly where defendant having shown there was no dispute as to facts, the plaintiff chose to rely upon the paper issues and did nothing to contradict the facts submitted by defendant."); *Soper v. Stine*, 184 So. 2d 892, 894-95 (Fla. 2d DCA 1966) ("On a motion for summary judgment, after the movant initially demonstrates the non-existence of factual issues, the non-moving party must make a showing, aside from his pleadings, that a fact issue can be generated, unless the undisputed facts would not entitle the movant to judgment as a matter of law."). After the movant sustains its initial burden, if the nonmovant fails "to come forward with competent evidence revealing a genuine issue of fact," and is entitled to judgment as a matter of law, then summary judgment is appropriate. *Landers*, 370 So. 2d at 370; *Boyle v. Hernando Beach S. Prop. Owners Ass'n, Inc.*, 124 So. 3d 317, 318 (Fla. 5th DCA 2013).

B. Legal Standards for Interpretation of Unambiguous Contracts

Issues as to the construction of a written document such as a contract are especially appropriate for summary judgment. *Volusia Cty. v. Aberdeen at Ormond Beach L.P.*, 760 So. 2d 126, 131 (Fla. 2000) ("Indeed, '[w]here the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment.'" (quoting *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999))). Accordingly, interpretation of an unambiguous contract presents a question of law for the court, or here, the Tribunal. *DEC Elec., Inc. v. Raphael Const. Corp.*, 558 So. 2d 427, 428 (Fla. 1990); *Friedman v.*

Virginia Metal Prods. Corp., 56 So. 2d 515, 516 (Fla. 1952); *Ellenwood v. Southern United Life Ins. Co.*, 373 So. 2d 392, 394 (Fla. 1st DCA 1979).

Of course, "[w]hether an ambiguity exists in a contract also is a question of law." *Smith v. Shelton*, 970 So. 2d 450, 451 (Fla. 4th DCA 2007). A contract is ambiguous when it is "susceptible to two different interpretations, each one of which is reasonably inferred from the terms of the contract." *Miller v. Kase*, 789 So. 2d 1095, 1097-98 (Fla. 4th DCA 2001). A contract is not ambiguous simply because "both sides ascribe different meanings to the language." *Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. 4th DCA 2003).

In interpreting a contract, the court places itself "in the situation of the parties, including the surrounding circumstances, to determine the meaning and intent of the language used." *Miller*, 789 So. 2d at 1098. Contracts are interpreted according to their plain meaning to give effect to the contract as a whole, and the legal effect of contractual provisions should be determined from the words of the entire contract. *Wash. Nat'l Ins. Corp. v. Ruderman*, 117 So. 3d 943, 948 (Fla. 2013); *Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., LLC*, 196 So. 3d 557, 563 (Fla. 4th DCA 2016); *Audiology Distribution, LLC v. Simmons*, No. 8:12-cv-02427-JDW-AEP, 2014 WL 7672536, at *5 (M.D. Fla. May 27, 2014). As a rule, contracts must be interpreted so as to not render meaningless or superfluous any provision, but rather to reach a reasonable interpretation that gives effect to all portions of the contract. *Daake v. Decks N Such Marine*, 201 So. 3d 179, 181 (Fla. 1st DCA 2016); *Silver Shells Corp. v. St. Maarten at Silver Shells Condominium Ass'n, Inc.*, 169 So. 3d 197, 203-04 (Fla. 1st DCA 2015).

IV. MOTIONS FOR SUMMARY JUDGMENT, ARGUMENT, AND AUTHORITIES

A. Motion for Partial Summary Judgment Regarding Section 10.4.1 and Annual Planned Maintenance

GRU respectfully requests that the Tribunal grant a motion for partial summary judgment declaring that Section 10.4.1 of the PPA requires performance of Planned Maintenance each year. Further, GRU requests that the Tribunal grant a motion for partial summary judgment declaring that GRU did not breach section 10.4.1 of the PPA by withholding payment for GREC's previously declared Planned Maintenance outage. GRU also respectfully requests that the Tribunal grant a motion for summary judgment that GREC breached a material obligation of the PPA by refusing to perform annual Planned Maintenance, constituting a Seller Event of Default, and declare that, as a result, GRU is allowed to terminate the PPA.[3] Summary judgment is appropriate because Section 10.4.1 of the PPA is an unambiguous portion of the contract and contract interpretation is an issue of law for the Tribunal to determine. *See Volusia Cty.*, 760 So. 2d at 131; *Friedman*, 56 So. 2d at 516.

1. A Planned Maintenance Outage Is an Annual Requirement Under the PPA

The PPA makes it clear that annual Planned Maintenance is a contractual requirement. Section 10.4 of the PPA is entitled "Outages," and has three subsections, each contemplating a different type of outage the Facility may experience. Section 10.4.1, which is entitled "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***. PPA, **Exhibit M1**, § 10.4.1(a), at 12 (emphasis added). Notably, the PPA states that an annual maintenance plan ***shall*** be submitted, not ***may*** be submitted.

[3] These motions for summary judgment pertain to GREC's Counts 1, 5, and 9, and GRU's Counts 1, 2, 3, 5, and 6.

Accordingly, the PPA does not allow GREC to opt out of performing Planned Maintenance for any given year.

The PPA's definition of "Planned Maintenance" reinforces GRU's stance that Planned Maintenance is required annually:

> "Planned Maintenance" means 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. 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.

PPA, **Exhibit M1**, Schedule 1, at vi. As confirmed in this provision, Planned Maintenance is distinguished from Forced Outages and Maintenance Outages based on the annual nature—that it is always established in duration and timing in the previous year. *Id.*

Of course, the PPA must be read to give effect to the contract as a whole (*see Wash. Nat'l*, 117 So. 3d at 948) and interpretation of the PPA requires the Tribunal placing itself in the situation of the parties, including the surrounding circumstances, to determine the meaning and intent (*see Miller*, 789 So. 2d at 1098). Reading the PPA in this light further underscores the correctness of GRU's position on annual Planned Maintenance because other sections of the PPA also indicate that the Parties intended Planned Maintenance to occur every year. One such section includes Section 22.1:

> [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.

PPA, **Exhibit M1**, § 22.1, at 26 (emphasis added). Thus, the annual report contemplates an annual description of annual Planned Maintenance. *See id.*

The Parties have also promulgated a series of Operating Procedures pursuant to PPA Appendices V § 1.3 and VI, which further demonstrate the Parties' agreement and intent that

Planned Maintenance must occur each year. Section 5.11 of these Operating Procedures, which are incorporated into the PPA by Section 29.1, expressly requires GREC to submit, "each calendar year," a request for its "desired scheduled outage periods for no less than one calendar year." Operating Procedures to the PPA, **Exhibit M9**, § 5.11. The Operating Procedures go on to state that sixty days prior to the start of a Planned Maintenance outage, the Parties "will review the outage schedule and determine adjustments." *Id.* Consistent with the definition of Planned Maintenance discussed above, the Parties may agree to a "***duration*** of the outage different from that originally scheduled." *Id.* (emphasis added). However, the Operating Procedures do not give either Party the right to cancel a Planned Maintenance outage entirely. *See id.* Additionally, to the extent the Operating Procedures and the PPA conflict, the PPA controls. **Exhibit M9**, § 14.1, at 11.

In fact, the Operating Procedures provide that "[a]ny updates to the requested scheduled outage periods should be provided to GRU at least one (1) calendar year in advance of the effective date." *Id.* Accordingly, the Operating Procedures demonstrate that Planned Maintenance is to occur every year—only the duration and scope may vary, with "adjustments" determined based on "things like unexpected actual operating hours, maintenance outage work completed, and the results of any inspections performed." Given the Operating Procedures agreed to by both Parties, lower operating hours may only affect the duration of Planned Maintenance—they may not result in cancellation.

Moreover, Planned Maintenance is to be conducted in accordance with "Good Utility Practice." "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." PPA, **Exhibit M1**, Schedule 1, at v. Likewise,

"Good Utility Practice" requires taking reasonable steps to ensure "[t]hat equipment will function properly under both normal and reasonably expected emergency conditions." *Id.* at v-vi.

In light of the performance of the GREC Facility to date, annual Planned Maintenance is consistent with Good Utility Practice. The GREC Facility began commercial operation only recently, on December 17, 2013. **SOF 127**; **Exhibit M6**, at GRU_018217. Since that time, the Facility has suffered a number of equipment issues. **SOF 127**. For instance, in May 2014, GREC informed GRU that it found a number of superheater tubes with issues—specifically, GREC found a leak in the superheater tubes. **SOF 128**. GREC attempted to repair the welds, only to find cracks in previously repaired welds. **SOF 129**. GREC attempted to wait until its annual Planned Maintenance outage in 2015 to address these issues. **SOF 130**. However, eventually, after monitoring these superheater weld leaks for months, GREC relented and came offline in January 2015 to attempt repairs. **SOF 130**. GREC ended up having to replace the tertiary superheater outlet header, which is a major boiler component, in order to address the issue. **SOF 131**.

GREC has suffered other equipment casualties in its short operation. In March 2016, during the performance of an operational capacity test, a primary air fan duct expansion joint ruptured on the Facility. **SOF 133**. In September 2016, the GREC Facility tripped due to an issue with fuel quality. **SOF 134**. In fact, a Florida court has already made findings of fact in a final judgment against GREC that there were design problems with the GREC Facility's fuel handling system. **SOF 135**. Because of these design problems, the Facility was unable to efficiently and effectively handle the ground biomass that was provided in compliance with the specifications of GREC's fuel contracts. **SOF 135**. More specifically, the court found that GREC's fuel handling system was routinely getting plugged up by fuel that met its fuel specifications. **SOF 136**. GREC has also suffered a number of trips due to lightning strikes, including one in August 2015. **SOF**

23, 132. Certainly, in light of the problematic material condition of the GREC facility, performing no Planned Maintenance for an entire year puts the Facility's reliable operation at risk, and constitutes a failure to utilize Good Utility Practice.

2. GREC Originally Submitted a Plan to Take an Annual Planned Maintenance Outage in April 2016

Notwithstanding the requirement in the PPA to take an annual Planned Maintenance outage, GREC has not taken a Planned Maintenance outage in 2016. **SOF 62**. GREC has argued that there is no annual Planned Maintenance requirement. The language of the PPA directly controverts this assertion. GREC also appears, in its pleadings, to insinuate, but not argue, that if there were a requirement to take annual Planned Maintenance, then GRU approved a change in the outage plan. As seen below, that is not the case because, in the first instance, the addressee of the communication from GREC lacked authority to remove the requirement for an annual Planned Maintenance outage and, in the second instance, the addressee never actually approved GREC's request to cancel the annual Planned Maintenance requirement. Further, such a change would require an amendment to the PPA, which has not occurred.

GREC originally communicated its plan to take an annual Planned Maintenance outage well in advance. GRU maintains a ten year outage schedule that identifies planned maintenance outage periods for each of GRU's generating units. **SOF 4**. This ten year outage schedule also includes the annual Planned Maintenance outage periods for the GREC Facility. **SOF 4**. Before the GREC Facility even began commercial operation, GRU requested that GREC provide a ten year outage plan for the GREC Facility, so that GRU could better coordinate planned outages among the GRU generating facilities and the GREC Facility. **SOF 5**. GREC obliged, providing GRU with a ten year outage plan that spanned from 2014 to 2023, with a warranty inspection and then annual Planned Maintenance outages in 12 month intervals. **SOF 6-8**; **Exhibit M4**, at 2.

GREC's initial ten year outage plan proposed taking outages in the Fall because the GREC Facility was slated to begin commercial operation in Fall 2013. **SOF 9**. However, the Fall scheduling posed issues with planned maintenance outages for GRU facilities. **SOF 10**. As a result, GRU asked the plant manager of the GREC Facility, Mr. Russell Abel, to meet with GRU to further discuss GREC's ten year plan. **SOF 10**. In late 2012, Mr. Abel met with GRU's Major Maintenance Leader, Mr. George Demopoulos, to discuss GREC Planned Maintenance outage scheduling. **SOF 11**. After that meeting, GREC provided revised inputs for its Planned Maintenance outages. **SOF 12**. That revised ten year plan reflected annual Planned Maintenance outages in the Spring (including April outages in 2015 through 2023), following an initial warranty period outage in the Fall of 2014. **SOF 12, 14**. This ten year plan reflected Planned Maintenance outages from 2015 to 2023 that varied in duration between 18 days and 28 days. **SOF 15**. As explained earlier, GREC's outage plan showed an outage for 2016 in the month of April. **SOF 13, 14**. In this ten year forecast, GREC forecasted the 2016 annual Planned Maintenance outage to last for 21 days from April 2, 2016 to April 22, 2016, with the activity for the annual outage reflecting that "turbine minor" work or inspections would be included. **SOF 16, 17**.

On May 1, 2015, GRU's Major Maintenance Leader, Mr. Demopoulos, sent an email with GRU's revised ten year outage schedule. **SOF 18**. The same day, the plant manager of the GREC Facility, Mr. Russell Abel, emailed Mr. Demopoulos, stating, "We'd like to plan out [sic] spring 2016 outage for April 2-22. Please let me know if that works for GRU." **SOF 19**. Notably, these are the same dates that GREC had already communicated as early as 2012. **SOF 16**. On June 17, 2015, Mr. Demopoulos replied to Mr. Abel's email and asked if GREC could reschedule its outage to April 9, 2016 to April 29, 2016. **SOF 20**. Mr. Abel replied that April 9, 2016 to April 29, 2016

would work for GREC. **SOF 21**. In fact, on May 5, 2015, Mr. Abel had also emailed Mr. Demopoulos and provided dates for GREC's 2017 outage. **SOF 22**.

3. GRU Did Not Approve Foregoing the Contractually Required Annual Planned Maintenance Outage

On August 7, 2015, the GREC Facility tripped offline after a lightning strike. **SOF 23**. Prior to that time, the GREC Facility was typically being dispatched by GRU to provide energy. **SOF 24**. After GREC advised that the Facility was ready to return to service, GRU opted not to dispatch GRU to provide Energy based upon the economics of GRU's dispatch model. **SOF 25-26**. In fact, GRU informed GREC that GRU was unlikely to dispatch the GREC Facility again until at least October 2015. **SOF 27**.

a. John Stanton Lacked Authority to Forego Contractually Required Annual Planned Maintenance or to Approve Changes to the Terms of the PPA

After the August 2015 trip, personnel at GRU and GREC began to communicate regarding Available Energy charges in light of the trip. **SOF 28**. In mid-August, Mr. John Stanton, then Assistant General Manager of Energy Supply at GRU, told Mr. Edward Bielarski, GRU's General Manager, that he had received a phone call from Mr. Jim Gordon, President of GREC. **SOF 29**. In light of those direct communications, Mr. Bielarski told Mr. Stanton to funnel communications through him (Mr. Bielarski) and further instructed Mr. Stanton that Mr. Bielarski would handle communications regarding legal issues. **SOF 30**. During this same time frame, Mr. Leonard Fagan, GREC's Vice President of Engineering, spoke with Mr. Stanton and inquired whether GRU would dispatch GREC online if the minimum dispatch level in the PPA was at 55 megawatts, rather than at 70 megawatts. **SOF 31**. Mr. Bielarski sent a letter to Mr. Gordon, of GREC, to address this discussion of minimum dispatch levels. **SOF 32**. In this August 17, 2015 letter, Mr. Bielarski informed GREC of Mr. Stanton's limited authority:

> [P]lease 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.

SOF 33; **Exhibit M11**.

Approximately two weeks later, on September 3, 2015, Mr. Fagan, GREC's Vice President of Engineering, wrote Mr. Stanton regarding expected start-up times for the GREC Facility. **SOF 34**. After this letter, Mr. Stanton exchanged further communications with GREC regarding expected start-up times, finally garnering a response from Mr. Al Morales, GREC's Chief Finance Officer and General Counsel, on September 9, 2015. **SOF 35**. On September 13, 2015, Mr. Bielarski wrote to Mr. Morales regarding the discussion of start-up times. **SOF 36**. In his email, Mr. Bielarski reminded GREC:

> 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.

Exhibit M15; **SOF 36**.

Accordingly, Mr. Stanton lacked both actual and apparent authority to approve GREC's request to forego annual Planned Maintenance. Moreover, in light of the fact that annual Planned Maintenance is a contractual requirement, an amendment to the PPA would be necessary to remove that requirement. The PPA may be amended or modified only by a written agreement between the parties. PPA, **Exhibit M1**, § 29.11. Additionally, in the event of an amendment or modification, City Commission approval would be required as well. Notably, there has been no amendment or modification of the PPA. Given that the PPA required annual Planned Maintenance outages, an amendment to the PPA requires a written agreement and City Commission approval, and that there is no such amendment, Mr. Stanton lacked the authority to modify the PPA to accommodate such a request.

b. John Stanton Did Not Approve Foregoing the Contractually Required Annual Planned Maintenance Outage

Although GRU had communicated that Mr. Stanton lacked authority to make changes to the PPA or any of the controlling documents, GREC nonetheless emailed Mr. Stanton a letter on October 14, 2015 in which GREC stated, "Given the current GREC dispatch scenario of remaining in reserve shutdown, GREC plans no Maintenance or Planned outages in 2016." **Exhibit M18**; **SOF 37-38**.[4] Mr. Stanton replied to GREC's transmittal email with a simple, "Thanks! …acknowledging receipt." **Exhibit M19**; **SOF 39**. Subsequent events demonstrate that Mr. Stanton's email was an acknowledgment, not an approval, and that Mr. Stanton delayed considerably in communicating the contents of GREC's letter to GRU's General Manager, Chief Operating Officer, and other GRU personnel. A week later, GRU's Major Maintenance Leader, Mr. George Demopoulos, who was tasked with maintaining the outage schedules, circulated the 10 year outage schedule and rolling 12 month outage schedule, both reflecting that GREC was taking a Planned Maintenance outage from April 9, 2016 to April 29, 2016. **SOF 40-41**. No one from GRU or GREC told Mr. Demopoulos that GREC was foregoing its previously scheduled annual Planned Maintenance outage. **SOF 41**. In fact, after acknowledging receipt, Mr. Stanton himself appears to have forgotten about receiving the letter and acknowledging receipt of it. On December 10, 2015, Mr. Stanton emailed GREC's Vice President of Engineering, Mr. Len Fagan, and asked what planned outage time GREC was scheduling in April 2016. **Exhibit M22**. Mr. Stanton said, "I'm thinking you gave us this info, but if so I cannot find it. With your current status of Standby, what, if any, planned outage time are you scheduling next April?" **Exhibit M22**. Mr.

[4] GREC attempts to portray this letter as the annual Planned Maintenance plan. However, GRU personnel are unaware of any other instance in which GREC communicated its plan via this type of letter. **SOF 38**. In fact, GREC's previous communications of its annual Planned Maintenance plans suggest that this letter was not the plan. *See* **SOF 4-22**.

Fagan replied and stated that GREC "did submit an updated 2016 outage plan" and that no April outage was planned. **Exhibit M22**.

The next documented mention of GREC's October 14, 2015 letter is on January 11, 2016, when Mr. Thomas Brown, GRU's Chief Operating Officer, emailed GRU's General Manager, Mr. Bielarski, and informed him, "John Stanton informed me this morning that due to the GREC plant not being dispatched, the next scheduled outage from April 9th through April 29 has been cancelled." **Exhibit M24**; **SOF 42**. When Mr. Stanton informed Mr. Bielarski that GREC was requesting to forego annual Planned Maintenance, Mr. Bielarski recalls telling Mr. Stanton that GRU would need to think about that request and what response to provide. **SOF 43-44**. As discussed herein, GREC's request was not approved, and the PPA was not amended to allow GREC to forego an annual Planned Maintenance outage.

In early February, Mr. Bielarski inquired through GRU staff into correspondence regarding GREC's annual Planned Maintenance outage. **SOF 45**. On February 3, 2016, Mr. Eric Walters, GRU's Administrative and Fuels Operations Director, who had also received the letter from GREC in October 2015, emailed Mr. Stanton and stated, "I can't remember, but I don't believe we ever sent them an official reply; yes or no." **Exhibit M41**; **SOF 37, 46**. Mr. Stanton replied to Mr. Walters' email and stated that he thought he (Mr. Stanton) had sent an email acknowledging that he (Mr. Stanton) had gotten GREC's letter. **SOF 47**. Mr. Walters continued to search for correspondence on the subject. **SOF 48**. After Mr. Walters was initially unable to find the correspondence, he emailed all the correspondence he could find relating GREC's outages to Ms. Shayla McNeill, GRU's Utilities Counsel, telling her that he was unable to find the GREC request or a response to it. **SOF 49-50**. Mr. Walters then forwarded to Mr. Stanton that email with the correspondence and his statement that he was unable to find a response. **SOF 51**. Later on

February 3, 2016, Mr. Walters found the correspondence from GREC and an email from Mr. Stanton acknowledging receipt. **SOF 52**. However, Mr. Walters is unaware of any correspondence from GRU, authorized or unauthorized, that purportedly approved GREC foregoing an annual Planned Maintenance outage in 2016. **SOF 53**. Similarly, Mr. Walters is unaware of any approval from FRCC for GREC foregoing its 2016 outage. **SOF 53**. Notably, under the PPA, if there is a modification to the original annual Planned Maintenance outage (the one submitted in June 2015), both GRU and FRCC must agree to the changes. PPA, **Exhibit M1**, § 10.4.1(a) ("Any and all changes to such plan shall be mutually agreeable to Seller, Purchaser, and to FRCC and promptly communicated to Purchaser in writing as soon as practicable."). There is no mention of a cancellation being permitted.

In fact, even as the search for correspondence was ongoing in February 2016, Mr. Demopoulos, GRU's Major Maintenance Leader in charge of maintaining the outage schedule, apparently was not informed of any change, approved or otherwise. Mr. Demopoulos emailed GREC's plant manager on February 3, 2016, informing him that he was updating the ten year outage plan, and inquiring into whether GREC had any new updates to include in the plan. **SOF 55**. Mr. Abel, GREC's plant manager, responded a few minutes later and stated, "There are no changes at this time." **Exhibit M25**; **SOF 56**. Then, a short while later, Mr. Abel again responded, stating, "George, as a reminder, we have canceled our April 2016 planned outage." **Exhibit M26**; **SOF 57**. Mr. Demopoulos actually updated the ten year outage schedule based on Mr. Abel's February 3, 2016 email, but soon thereafter sent an email recalling the email with the updated ten year outage schedule. **SOF 63-64**. On February 8, 2016, Mr. Demopoulos was requested internally to edit the outage plan to again reflect that GREC was taking an annual Planned Maintenance outage from April 9, 2016 to April 29, 2016. **SOF 65**. Mr. Demopoulos emailed

this updated schedule on February 8, 2016. **SOF 66**. After Mr. Demopoulos sent his email, Mr. Abel responded and stated that GREC would not take an outage. **SOF 68**.

Notwithstanding the absence of any correspondence approving GREC's request to forego a Planned Maintenance outage in 2016, Mr. Stanton subsequently argued that his email acknowledging receipt was an approval. **SOF 54**. Of course, his actions in the interim belie that later adopted stance. Mr. Stanton received the GREC letter on October 14, 2015, and simply acknowledged receipt, without approving or disapproving GREC's request. **SOF 37-39, 46, 53**. Then, just two months later, Mr. Stanton appears to have forgotten whether he even received anything from GREC on the April outage, as he had to email GREC and ask. **Exhibit M22**. Then another month later, in January 2016, Mr. Stanton appears to have spoken to Mr. Brown to inform him. **SOF 42**. Even in February, days before proclaiming that he had "approved" GREC's request, Mr. Stanton was still trying to recall what had transpired, offering, "I think I sent a 'got your letter' email, I'll check next week." **SOF 47**; **Exhibit M42**, at GRU_043894.[5] Furthermore, Mr. Demopoulos, who was actually in charge of tracking the outage schedules, did not appear to know of GREC purportedly foregoing annual Planned Maintenance, sending out an updated outage schedule in October that reflected GREC taking a 21 day outage in April 2016, and not learning of GREC's purported plans until February 2016. **SOF 40-41, 55-57**. Others who knew of GREC's October 2015 letter did not believe that Mr. Stanton had approved or disapproved GREC's letter, and are, to this day, unaware of any correspondence approving GREC's request. **SOF 46-53**. Mr. Stanton did not approve GREC's request. GRU did not approve GREC's request.

[5] Mr. Bielarski later emailed Mr. Stanton and expressed disappointment in how Mr. Stanton had handled the issues surrounding GREC's request to forego its annual Planned Maintenance outage for April 2016, prompting a fervent and defensive exchange of email. **SOF 58**; **Exhibit M27**.

c. GRU Disapproved GREC's Attempt to Forego Contractually Required Annual Planned Maintenance in 2016

On February 4, 2016, Mr. Bielarski provided a response from GRU regarding GREC's request to forego annual Planned Maintenance. **SOF 59**. Mr. Bielarski sent a letter to Mr. Gordon of GREC on the subject. **SOF 59**. In the letter, Mr. Bielarski stated:

> Pursuant to the Power Purchase Agreement ("PPA") between the City of Gainesville d/b/a Gainesville Regional Utilities ("GRU") and Gainesville Renewable Energy Center, LLC ("GREC"), on June 18, 2015, GRU and GREC mutually agreed to the 2016 Planned Maintenance outage schedule. GRU and GREC mutually agreed that GREC would complete Planned Maintenance from April 9 through April 29, 2016. On October 14, 2015, GRU received a request from GREC to change the mutually agreed upon Planned Maintenance outage schedule.
>
> Pursuant to Section 10.4.1(a) of the PPA, please accept this correspondence as notice that GREC's proposed change to the Planned Maintenance schedule is not agreeable to GRU. As such, GRU expects GREC to complete their Planned Maintenance from April 9 to April 29, 2016. . . .

Exhibit M30; **SOF 60**. GREC has continued to maintain that it will not perform an annual Planned Maintenance outage in 2016. **SOF 61**. To date, GREC has not performed an annual Planned Maintenance outage in 2016. **SOF 62**.

The undisputed material facts demonstrate that GRU never approved GREC's unilateral request to cancel the annual Planned Maintenance outage requirement in the PPA, and no modification has been made to the PPA. GRU personnel acknowledged receipt but never provided an approval. To the extent that GREC argues that Mr. Stanton approved the change, there is no correspondence demonstrating approval—only an email acknowledging receipt of a letter.[6]

[6] Moreover, Mr. Bielarski's express disclaimer of Mr. Stanton's authority in his August letter and his September email clearly removed GREC's ability to rely upon either Mr. Stanton's actual or apparent authority to approve of GREC's request to forego contractually required annual Planned Maintenance. *See Thomkin Corp. v. Miller*, 24 So. 2d 48, 49 (Fla. 1945) ("The authority of the agent may be real or it may be apparent and the public may rely on either unless in the case of apparent authority the circumstances are such as to put one on inquiry."); *RNR Investments Ltd. P'ship v. Peoples First Community Bank*, 812 So. 2d 561, 563 (Fla. 1st DCA 2002) (no reliance upon apparent authority if a party had actual knowledge or notice of restricted authority). Mr. Bielarski clearly communicated that Mr. Stanton lacked such authority.

Further, as previously explained, Mr. Stanton did not have such authority, nor could he modify the terms of the contract. The facts demonstrate that it was not until sometime in January that Mr. Stanton started to inform GRU personnel of GREC's request. The only other GRU employee copied on the email transmitting GREC's October 14, 2015 letter could not find any communication approving GREC's request—he could only find an acknowledgment of receipt, and is unaware of any approval of GREC's request. The first actual response to the letter came on February 4, 2016, when Mr. Bielarski stated that GRU would not approve of the change. Accordingly, GREC failed to perform an annual Planned Maintenance outage in violation of the PPA.

4. GREC's Failure to Perform an Annual Planned Maintenance Outage in 2016 Is a Breach of a Material Obligation in the PPA and Constitutes a Seller Event of Default

GREC failed to perform an annual Planned Maintenance outage in 2016. **SOF 61-62**. As explained above, annual Planned Maintenance is a contractual requirement under the PPA. Moreover, GREC's failure to take an annual Planned Maintenance outage is a breach of a material obligation under the PPA, for the reasons explained below. Under the PPA, a "Seller Event of Default" exists when "Seller defaults in any respect in the observance or performance of any material obligation hereunder . . . 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 . . . ." PPA, **Exhibit M1**, § 25.1.1. In the event of a Seller Event of Default, GRU, as the "Purchaser" may elect to terminate the PPA. PPA, **Exhibit M1**, § 25.2(a).

GRU notified GREC of its default and GREC has failed to cure that default. Specifically, on February 29, 2016, after GREC had sent GRU a dispute resolution notice and stated that it would not take a Planned Maintenance outage in April 2016 (**SOF 67**; **Exhibit M48**), GRU sent a letter to GREC notifying GREC that GRU would consider GREC in breach of GREC's

obligations pursuant to Section 10.4.1(a) of the PPA if GREC refused to take an annual Planned Maintenance outage in April 2016 (**SOF 68**; **Exhibit M33** at GRU_074588). GREC failed to cure its default within thirty days after written notice, as GREC has continued to refuse to take an annual Planned Maintenance outage and, in fact, has not taken one. **SOF 61-62**. After GREC failed to cure, GRU sent a Notice of Seller Event of Default to GREC's collateral agent, as required by the Consent and Agreement. **SOF 69**.

Material terms, or obligations, are those dealing with a "significant issue." BLACK'S LAW DICTIONARY (10th ed. 2014). A term or obligation is material if it is of sufficient importance that the contract would not have been made without it. *Cf. AVVA-BC, LLC v. Amiel*, 25 So. 3d 7, 11 (Fla. 3d DCA 2009) (discussing in terms of dependent covenants). Breaches are material when they "go to the essence of the contract." *Beefy Trail, Inc. v. Beefy King Int'l, Inc.*, 267 So. 2d 853, 857 (Fla. 4th DCA 1972).

The requirement to perform annual Planned Maintenance goes to the essence of the PPA. The very first recital under the PPA requires GREC to "build, operate, and ***maintain***" the Facility. PPA, **Exhibit M1**, at 1. One section of the PPA is entitled "OPERATIONS, MAINTENANCE AND PERFORMANCE STANDARDS." *Id.* at § 12. Under that section, GREC is required to take reasonable steps to maximize performance: "Subject to the terms of this Agreement, Seller shall use commercially reasonable efforts consistent with Good Utility Practice to operate the Facility in a manner that maximizes the Products generated by the Facility over the Delivery Term." *Id.* at § 12.1. Certainly, Planned Maintenance is required to maximize performance over the long term. The PPA emphasizes the need to satisfy Operational Capacity performance goals. *See id.* at § 12.4. Planned Maintenance on the Facility is important enough that there is a requirement to describe Planned Maintenance performed on the Facility in the annual written

report submitted to GRU. *Id.* at § 22.1. Likewise, the PPA ensures that GRU has the right to perform operational audits, during which it may investigate maintenance issues. *Id.* at § 22.2.

GRU is entitled to purchase Energy from the Facility (PPA, **Exhibit M1**, at 1, Recitals), and GRU is required to purchase Available Energy (*id.* at Schedule I, at i; *id.* at Appendix II, at xiii; *id.* at Appendix III, at xiv). Beyond the fact that GRU is paying for Available Energy (and maintenance ensures that Energy will be Available), GRU has a vested interest in annual Planned Maintenance being performed for reliable service from the Facility and also because GRU has an option to purchase the Facility at year twenty-nine of the contract. PPA, **Exhibit M1**, § 27.1.

Additionally, the PPA requires that "The Facility will be designed in accordance with standards normally used in the utility industry so that the Facility will, with standard operating and maintenance practices, be designed to provide full service over the forty-two (42)-year design life of the Facility." *Id.* at Appendix I, at xi. If the Facility is not maintained properly, it will not achieve full service over 42 years, dashing the benefit of the bargain struck by GRU. Certainly, the failure to perform annual Planned Maintenance is a breach of a material obligation in the PPA—the parties would not have entered into the contract without the requirement to perform such annual Planned Maintenance that goes to the heart of many provisions in the PPA. Accordingly, GRU requests that the Tribunal enter partial summary judgment for GRU declaring that Section 10.4.1 of the PPA requires performance of Annual Planned Maintenance and, that GRU did not breach section 10.4.1 of the PPA. Similarly, GRU requests that the Tribunal enter partial summary judgment for GRU declaring that GREC breached Section 10.4.1, that the failure to perform annual Planned Maintenance was a breach of a material obligation, and accordingly was a Seller Event of Default entitling GRU to terminate the PPA.

B. Motion for Partial Summary Judgment Regarding Available Energy During Ramp Periods

GRU has disputed Available Energy charges during ramp-up periods in connection with Dependable Capacity tests in September 2015, March 2016, and May 2016, during a ramp-up associated with a November 2015 dispatch, and during ramp-up and ramp-down periods associated with GREC's August 2015 Maintenance Outage. For each of these disputed charges, Available Energy payments are not owed under Schedule I of the PPA, as is explained below. In particular, no Available Energy payments are due because the Facility was dispatched to 100% of the seasonal Dependable Capacity, meaning that GREC is only owed Delivered Energy charges, and then, only after the breaker is shut and the Facility is on the grid. Accordingly, GRU moves for partial summary judgment of no breach as to each of the disputed charges because, under the PPA, no Available Energy payments are owed.

1. Ramp-Up Periods During Dependable Capacity Tests

GRU has directed GREC to perform several Dependable Capacity tests under the PPA. Section 2 of Appendix IX of the PPA addresses Operational Capacity Testing. PPA, **Exhibit M1**, Appendix IX, § 2. Under Section 2.3 of Appendix IX, GRU may request new tests of Dependable Capacity once per Demonstration Period (Summer or Winter Period), and any time GREC fails to meet the operating levels prescribed by GRU. PPA, **Exhibit M1**, Appendix IX, § 2.3. In either of these cases, GRU may request one additional test if GRU is not satisfied with the results of the first test. PPA, **Exhibit M1**, Appendix IX, § 2.3. As these are tests of Dependable Capacity, the Facility is operated at capacity for either six or twelve hours. PPA, **Exhibit M1**, Appendix IX, § 2.4.

GREC's claim is that GRU is in breach of the PPA for failing to pay GREC for claimed "Available Energy" during the "ramp-up" periods from standby for these Dependable Capacity

Tests. GRU directed GREC to perform Dependable Capacity tests under the PPA on September 19, 2015, March 6, 2016, and May 25, 2016. **SOF 107, 114, 122**. In the times prior to these tests, the Facility had been in standby. **SOF 109, 116, 123**. For each of these Dependable Capacity tests, GRU disputed the invoices because GREC attempted to charge GRU for Available Energy from the time that the dispatch order was given until GREC tied to the grid. **SOF 111, 118, 124-125**.

GRU's calculation of the Available Energy payments due while the Facility is returning from standby status is fully consistent with the PPA's definition of Available Energy. The PPA defines Available Energy to have three separate components that are measured in MWh and are added together to calculate the total Available Energy. The PPA defines "Available Energy" as follows:

> "Available Energy" is, for the applicable period, the sum of the following items:
>
> ***(i) each MWh of Energy generated by the Facility and delivered to the Delivery Point***;
>
> ***plus***
>
> ***(ii) for each hour in which Purchaser 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 Purchaser***, to be calculated for each such hour by subtracting the actual capacity level in MW for such hour from the seasonal Dependable Capacity, or if Seller has notified Purchaser of a curtailment or derating for such hour, each MWh of Energy that could have been generated by the Facility and delivered to the Delivery Point had the Facility been dispatched at the maximum capacity available, to be calculated for each such hour by subtracting the actual capacity level in MW for such hour from the seasonal Dependable Capacity;
>
> ***plus***
>
> ***(iii) for each hour during which Seller would have been capable of producing and delivering Energy, but was prevented from doing so due to a constraint or fault in Purchaser'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 at 100% of the seasonal Dependable Capacity, but that was not generated by the Facility due to the constraint or fault***, to be calculated for each such hour by subtracting the actual capacity level in MW for such hour from the seasonal Dependable Capacity, or if Seller has notified Purchaser of a curtailment or derating for such hour, each MWh of Energy that could have been generated by the Facility and delivered to the Delivery Point had the Facility been dispatched at the maximum capacity available, to be calculated for each such hour by subtracting the actual capacity level in MW for such hour from the maximum capacity available for such hour.

PPA, **Exhibit M1**, Schedule I, at i-ii (emphasis added). Accordingly, the three potential components of Available Energy are (i) each MWh of Energy generated by the Facility and delivered to the Delivery Point (this component is also defined in the PPA 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 and delivered by the Facility, and (iii) for each hour during which GREC was prevented from delivering Energy due to a constraint or fault in GRU's facilities, each MWh of Energy that could have been generated and delivered by the Facility if not for the constraint or fault. *Id.* In Count 7, the applicable Count regarding these ramp-up periods in GREC's second amended demand, GREC does not allege any fault or constraint—thus, only categories (i) and (ii) are potentially relevant.

If GRU dispatches the Facility at 100% of the seasonal Dependable Capacity, which is the case during tests of Dependable Capacity, then subsection (ii) no longer applies (i.e., the condition of GRU dispatching the Facility at less than 100% no longer exists), making the only applicable category of Available Energy the actual Delivered Energy of part (i). Thus, if the Facility is dispatched at 100% and is not delivering any Energy, then, the Available Energy is zero, and if the Facility is delivering Energy during the ramp-up period, then the Available Energy is only comprised of the actual Delivered Energy.

Under the PPA, "Delivered Energy" means "for the applicable period, the sum of each MWh of Energy generated by the Facility and delivered to the Delivery Point." PPA, **Exhibit M1**, Schedule I, at iii. The "Delivery Point" means "the point of interconnection between the Facility and the Gainesville Regional Utilities high voltage transmission systems as described in the Interconnection One Line Diagram contained in Appendix IV. The point of interconnection is located in Alachua County, Florida, in the Purchaser's existing Deerhaven Switching Station. Specifically, the point of interconnection shall be defined as the points where Purchaser's 138 kV conductors connect to Seller's 4-hole pad connections on Seller's 138 kV dead-end structure." PPA, **Exhibit M1**, Schedule I, at iii; *see also infra* Section IV.B.3. Thus, based on the language of the PPA, GRU contests the invoicing of Available Energy charges other than MWh of Energy actually delivered to GRU, which commences after the Facility is tied to the grid with the breaker closed. Therefore, because GREC was required to produce Energy at 100% of Seasonal Dependable Capacity, only subpart (i) of Available Energy applies, and Available Energy only refers to Energy actually delivered—prior to the breaker being closed and GREC being on the grid, no Energy is being delivered to the Delivery Point. For these reasons, GRU properly disputed ramp-up Available Energy charges and is not in breach.

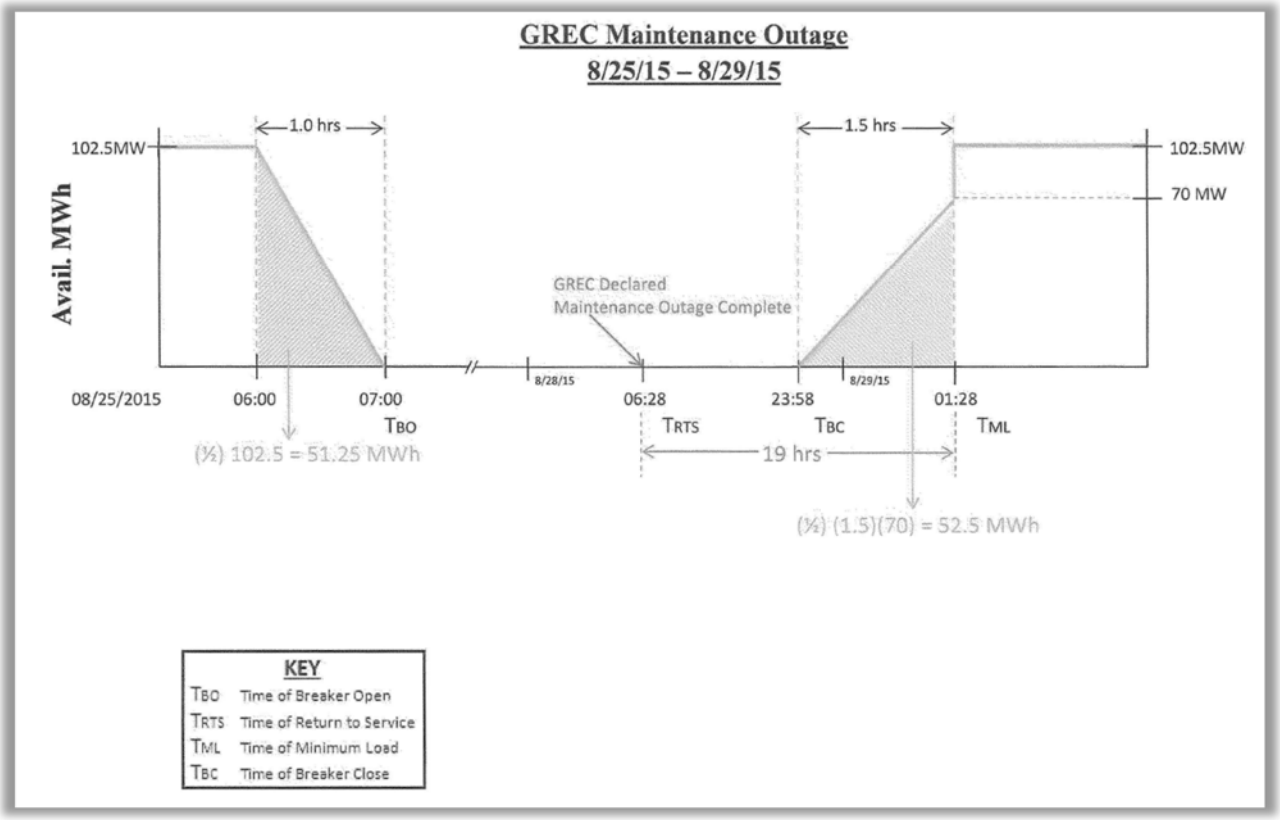
2. August 2015 Maintenance Outage

GREC's allegations that it is owed Available Energy Payments for the ramp-down and ramp-up periods of the August 2015 Maintenance Outage is resolved in GRU's favor by reference to the Operating Procedures agreed to by the parties. In June of 2015, before the current standby period began, the Parties collaborated to revise the Operating Procedures to the PPA. **SOF 98-99**. As part of this revision, the Parties added an Exhibit G to govern the calculation of Available Energy after dispatch into cold standby subsequent to a Forced Outage event. **SOF 101**; **Exhibit**

M9, § 6.3.6, Exhibit G. Pursuant to Exhibit G, a ramp-up period was added to the calculation of Available Energy following a Forced Outage event when the Facility was to remain in standby, and therefore would not actually be started up. **Exhibit M9**, § 6.3.6, Exhibit G. The ramp-up period more accurately reflects the realities of bringing the Facility back online following a Forced Outage—that is, once dispatched online, the Facility would not immediately be at 100% of its seasonal Dependable Capacity upon the conclusion of the Forced Outage, but would rather remain down for a time while the Facility was brought online and then gradually increase (i.e., ramp-up) to the dispatched output. *See id.* (graphically depicting the ramp-up). In this way, the Available Energy charges were made to most closely reflect the actual availability and operating capabilities of the Facility, and ensure that GRU would not be overcharged for Energy that was not actually available or capable of being produced. Stated another way, for periods when the Facility is dispatched to standby following a Forced Outage, the Parties agreed to calculate Available Energy as though the Facility were actually operating after the Forced Outage, by recognizing that there would be a startup and ramp up period before the Facility reaches its full dispatched operating level.

In August 2015, the circumstances contemplated by Exhibit G to the Operating Procedures came to pass as the Facility suffered a Forced Outage event and was subsequently dispatched into standby. **SOF 23**. While the Facility was in this standby period, GREC conducted a 72-hour Maintenance Outage that began on August 25, 2015. **SOF 102-103**. Under the PPA, GREC is not paid for Available Energy during a Maintenance Outage because the Facility is not capable of generating and delivering Energy while the Maintenance Outage is occurring. *See* PPA, **Exhibit M1**, Schedule I, at i-ii. GRU challenged GREC's invoice relating to this Maintenance Outage in a letter sent on September 29, 2015. **SOF 104**; **Exhibit M47**.

For the time preceding and following the Maintenance Outage, GRU addressed the Available Energy charges using the same framework as is utilized in the Operating Procedures (Exhibit G) for a Forced Outage. **SOF 105-106**. **Exhibit M17** provides a graphical portrayal of Available Energy for the Maintenance Outage. As demonstrated in **Exhibit M17** (an excerpt of which is provided below), for the period of days leading up to the start of the maintenance outage on August 25th, GREC was receiving Available Energy payments as if the Facility was operating at 100% of its seasonal Dependable Capacity:



As the Parties had contemplated in connection with Exhibit G to the Operating Procedures discussed above, the August 2015 Maintenance Outage should be treated as if it had occurred while the Facility was operating at full capacity. Under the definition of Available Energy in the PPA, Available Energy should be calculated as though the Facility were actually operating. *See* PPA, **Exhibit M1**, Schedule I, at i (defining Available Energy, in part, to refer to "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 . . .”). The GREC Facility would have been physically unable to go from the starting point of 102.5 MW to the ending point (and beginning of the maintenance outage) of 0 MW without ramping down, as no prudent operator would operate the Facility in this manner. With this understanding, Available Energy should be calculated using a ramp-down period of one hour, during which the Facility is treated as if it is gradually being brought offline from full dispatch. **Exhibit M17**, at GRU_076640. Accordingly, under Exhibit G, GREC is entitled to Available Energy at 102.5 MW until 06:00 on August 25, 2015. *Id.* The ramp-down occurs over the next hour. *Id.* Taking the area under the ramp curve, from 06:00 to 07:00, the Facility is entitled to ½ x 1.0 hrs x (102.5 MW – 0 MW),[7] which is equal to 51.25 MWh. *Id.* As explained above, this ramp-down period reflects the reality that no prudent operator would ever purposefully trip off a generation facility while it was operating at 100%.

The Maintenance Outage lasted from 07:00 on August 25, 2015 until 06:28 on August 28, 2015. *Id.* Following the conclusion of the Maintenance Outage, the Facility was dispatched back into standby; however, had the Facility been dispatched to deliver Energy, the Facility would have commenced its startup process with a gradual ramp-up period before reaching either minimum load or the requested dispatch level (if higher than minimum load). In this case, GREC was instructed to remain in standby following the Maintenance Outage (*see* **SOF 26-27, 108**), so the physical startup and ramp-up process did not actually occur. Just as with the calculation of Available Energy following a Forced Outage, to which the parties agreed (**Exhibit M9**, Exhibit G, Graphic), it should be assumed that the Facility would begin its start-up from the time that the Maintenance Outage is declared complete (or the time of the return to service). **Exhibit M17**, at

[7] This is the equation for the area of a triangle, area = ½ x base x height.

GRU_076640. In the case of the startup in August 2015, the Facility was in cold standby, and GREC had reported that it would take 18 to 20 hours (i.e., approximately 19 hours) to startup from standby. **Exhibit M13**, at GRU_007741. Using the same method described in Exhibit G to the Operating Procedures, it is assumed that it takes 19 hours to startup from the 06:28 end of the Maintenance Outage, which would place the Facility at minimum load at 01:28 on August 29, 2015. **Exhibit M17**. Given the ramp rate associated with the Facility in Exhibit G, it takes 1.5 hours to ramp from 0 MW to the minimum load of 70 MW. Accordingly, Available Energy on start-up would ramp from 0 MW at 23:58 on August 28, 2015 to 70 MW at 01:28 on August 29, 2015. **Exhibit M17**, at GRU_076640. Using the same calculation as in Exhibit G to the Operating Procedures (**Exhibit M9**), the Available Energy at ramp-up would be ½ x 1.5 hrs x (70 MW – 0 MW), which is 52.5 MW. **Exhibit M17**, at GRU_076640. After the imputed time of reaching minimum load, the Facility was then credited with Available Energy at 102.5 MW. *Id.*

As explained above, the calculation of Available Energy for hours when the Facility is not dispatched at 100% of its seasonal Dependable Capacity only includes Energy that the Facility "could have" generated and delivered. The Facility could not have generated and delivered Energy immediately following a Maintenance Outage, and could have generated and delivered Energy only according to its established ramp rate. Just as the Operating Procedures calculate a theoretical ramp-up of Available Energy, even though the Facility is remaining in standby, in order to approximate how the Facility would actually be operated (**Exhibit M9**, at Exhibit G), so too did GRU approximate a theoretical ramp-up of Available Energy coming out of a Maintenance Outage (**Exhibit M17**, at GRU_076640).

GREC improperly failed to take these physical constraints into account when it calculated the amounts due for Available Energy following its August 2015 Maintenance Outage. Exhibit G

to the Operating Agreement demonstrates that the Parties agreed to apply these types of physical constraints when calculating Available Energy. GRU applied the correct calculations in its dispute notice and payment and is therefore not in breach of the PPA. By applying the same principles underlying Exhibit G of the Operating Procedures (which is integrated into and not in conflict with the PPA), the Tribunal should find that GRU is not in breach of the PPA due to non-payment of Available Energy for the ramp-up and ramp-down periods surrounding the August 2015 Maintenance Outage.

3. Ramp-Up Period During November 2015 Dispatch

GREC also complains that GRU breached by not paying asserted Available Energy charges related to a November 2015 dispatch. In the case of the November 2015 dispatch, the Facility was dispatched from a standby condition. **SOF 112**. After receiving the invoice for November, GRU disputed the Available Energy charges for the November 3, 2015 start-up from the time that the dispatch order was given until GREC tied to the grid. **SOF 113**. GRU's letter disputing the invoice for November 2015 describes the nature of the dispute:

> Fourth, GRU disputes the Available Energy Charges of approximately $228,436.16 of Available Energy related to the November 3, 2015 start-up. Upon the dispatch order to start-up, GRU should not have been invoiced for Available Energy Charges from the time the dispatch order was given (approximately 1413 hours on 11/3/15) until the time the breaker closed and GREC tied to the grid (approximately 1629 hours on 11/4/15). Between the time that GRU gave the notice of dispatch to start-up and the time when GREC tied to the grid, the Facility failed to generate and deliver any MWh of Energy to the Delivery Point and, as a result, no "Available Energy" can be charged under the PPA for such period. Following the breaker being closed at 1629 hours on November 4, 2015, the Available Energy should have been charged equal to Delivered Energy until minimum load of 70 MW (which occurred at 1948 hours on November 4, 2015) was achieved. At which point, Available Energy should be charged based on declared "Dependable Capacity" of 102.5 MW. As such, GREC overcharged GRU in the amount of $228,436.16 of Available Energy Charges.

Exhibit M23, at GRU_073276-77.

Here, again, GREC is not entitled to the payment of Available Energy charges during start-up and ramp-up of the Facility. As can be seen from the above, this dispute relates again to the definition of Available Energy.

Under the terms of the PPA, "Available Energy" consists of three potential subparts. PPA, **Exhibit M1**, Schedule I, at i. Subpart (iii) of the definition of Available Energy does not apply because neither party alleges that there was a constraint or a fault in GRU's facilities. Accordingly, the issue revolves around subparts (i) and (ii). Subpart (i) includes "each MWH of Energy generated by the Facility and delivered to the Delivery Point." PPA, **Exhibit M1**, Schedule I, at i. The "Delivery Point" is defined in the PPA, and is also defined in the Operating Procedures. PPA, **Exhibit M1**, Schedule I, at iii; **Exhibit M9**, at 3. The Operating Procedures describe the Delivery Point and the Point of Connection as follows:

> 2.1 The Generating Facility is an independent power producer (IPP) with an original Contract Capacity of 100 MW that is interconnected to GRU's system in Alachua County, Florida. The Point of Connection is the physical and electrical connection where GREC's 138 kV transmission line (i.e., Line 18) is terminated on the **dead end in GRU's Hague Substation**. . . .
>
> 2.2 The Interconnection Facilities consist of a Generator Step-up Transformer (GSU), a Station Service Transformer (SST), and circuit breakers (CB) 52-1 and 52-2 connecting the GREC Substation located at the Generating Facility to the GRU system at the **Point of Connection located at GRU's Hague Substation** via approximately 4500 feet of 138 kV string bus, identified as Line 18, between the GRU's Hague Substation and the GREC Substation.
>
> 2.3 The Interconnection Point is one and the same as the **Delivery Point**
>
> 2.4 Interconnection one-line diagrams are included for reference as Exhibit "A".

Exhibit M9, at 3. Accordingly, per the above, GREC connects to GRU's grid when circuit breakers (CB) 52-1 and 52-2 are shut. **Exhibit M9**, at 3, § 2.2. According to the Operating Procedures, GREC "has exclusive control of the 138 kV circuit breakers (CB) 52-1 and 52-2 that

are located in the GREC Substation," and the generator is actually synchronized across circuit breaker (CB) 52-1. **Exhibit M9**, at 3-4, § 3.2. Accordingly, it is not until these breakers (shown in the GREC/GRU Interconnection One-Line Diagram at Exhibit A to the Operating Procedures, **Exhibit M9**) are shut (and the Generator Breaker is shut) that the GREC Facility is actually delivering energy to the Delivery Point. *See* **Exhibit M9**. Up until the point that the breakers ((CB) 52-1 and 52-2, along with the Generator Breaker) are shut, GREC is not delivering energy to the Delivery Point, making the Delivered Energy component of Available Energy equal to zero. This is true based on the definitions in the PPA and in the Operating Procedures.

Next, it is necessary to consider subpart (ii) of the definition of Available Energy. Under this subpart, Available Energy includes:

> (ii) for each hour in which Purchaser 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 Purchaser . . . .

PPA, **Exhibit M1**, Schedule I, at i. Thus, this subpart turns upon "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." *Id.* (emphasis added). During this start-up phase, the start-up itself demonstrates that the Facility is physically not able to generate Energy. If the Facility actually was able to generate Energy, then the breakers (CB) 52-1 and 52-2 could be immediately shut, along with the Generator Breaker, and Energy could be delivered to the Delivery Point—but it is not that simple. During the start-up, the Facility is not available to do anything other than the start-up. The Facility is in a transient state and is not able to provide power (therefore, the need to start-up). This same thought process is demonstrated in Exhibit G to the Operating Procedures. **Exhibit M9**, Exhibit G. Exhibit G governs the calculation of GREC available energy after dispatch into cold standby, subsequent to a Forced Outage event. *Id.* The

Graphic included in Exhibit G demonstrates this calculation. *Id.* Under the Graphic, during the notional start-up, no Available Energy is credited to GREC until the Time of Breaker Close (T_{BC}). *Id.* Although Exhibit G is premised upon a slightly different situation of a notional start-up after a forced outage, rather than upon an actual physical start-up, the underlying reasoning and application of the PPA's definition of Available Energy is the same.

The Available Energy credited to GREC after the time the breakers are closed in the November 2015 start-up can also be explained using the agreed-upon rationale of Exhibit G to the Operating Procedures. *See* **Exhibit M9**, at Exhibit G Graphic. Just as in Exhibit G, GRU maintains in its dispute letter that from the time the breakers are closed to the time that the Facility achieves minimum load, GREC is only paid for Delivered Energy. The Facility is coming up to the PPA mandated minimum load of 70 MW (PPA, **Exhibit M1** § 10.6) in this time frame. As the plant is still ramping-up, it is not physically able to generate more Energy, as the plant is physically limited to a ramp rate. *See* **Exhibit M9**, Exhibit G (assumed ramp rate of 0.78 MW/min based on April 16, 2015 startup). Accordingly, during the ramp-up, after the breakers are shut, Available Energy is equal to Delivered Energy—the start-up demonstrates that the Facility is not capable of generating and delivering more Energy.

It is not until the Facility reaches the minimum load of 70 MW that the Facility is credited with being able to generate and deliver 100% of the seasonal Dependable Capacity, just as in Exhibit G to the Operating Procedures, as well as in Exhibit F to the Operating Procedures. GRU and GREC agreed in the Operating Procedures, that a Forced Outage event is deemed to start when the output of the Facility drops below the contractually mandated minimum load of 70 MW. **Exhibit M9**, at Exhibit F. Accordingly, under the same reasoning, here too the Facility is not considered to reach its declared Dependable Capacity level until after it reaches the minimum load

of 70 MW. The parties also agreed that the end time of the Forced Outage event is deemed to have ended at the time output reaches minimum load of 70 MW, and at that end time, the Facility is considered to reach its declared Dependable Capacity level. **Exhibit M9**, at Exhibit F. For these reasons, GRU's refusal to pay Available Energy charges for the time the Facility was starting and ramping-up for the November 2015 dispatch was justified under the PPA.

C. Motion for Partial Summary Judgment Regarding Section 12.4.1 and Payment Decrease in March 2016

GREC alleges that GRU breached the PPA by invoking the payment decrease specified in Section 12.4.1 of the PPA as to the March 2016 invoice. However, invoking the proper interpretation of Section 12.4.1 reveals that GRU's actions were in compliance with the PPA. Accordingly, GRU moves for partial summary judgment of no breach regarding Section 12.4.1 of the PPA because GRU properly imposed a payment decrease on GREC for March 2016.

On the morning of March 6, 2016, GRU directed GREC to perform a test of Dependable Capacity under the PPA. **SOF 114**. The Facility had been in standby prior to the test, and was not generating Energy. **SOF 116**. As GREC was attempting to start the March 6, 2016 Dependable Capacity test, the GREC Facility suffered a plant casualty when a primary air fan duct expansion joint ruptured, preventing the test from proceeding as directed. **SOF 117**. On April 26, 2016, GRU sent a letter disputing GREC's invoice for Available Energy charges for March 2016, and explaining that a ten percent payment decrease for the month was appropriate under Section 12.4.1 of the PPA. **SOF 118-120**.

GREC alleges that GRU has breached the PPA by holding GREC accountable for failing to meet the operational level set by GRU for the month of March 2016 by at least 5% and invoking the 10% Payment Decrease for that month as prescribed by Section 12.4.1 of the PPA. Section 12.4.1 requires a payment decrease as follows:

> Payment Decreases. For each instance where Seller fails, after written notification from Purchaser, to meet the operating level specified by Purchaser, pursuant to Section 10, *Dispatch and Scheduling*, by more than five percent (5%) ***for a Billing Period***, the Dependable Capacity ***for that Billing Period*** shall be decreased by ten percent (10%). The integrated hourly net output will be used to determine if the Facility was within five percent (5%) of the specified operating level for a Billing Period.

PPA, **Exhibit M1**, § 12.4.1, at 15 (emphasis added). It is undisputed that the Facility suffered a Forced Outage event during GREC's first attempt at completing a Dependable Capacity test in March 2016. *See* **SOF 117**. In early May of 2016, GRU's Director of Business, Fuels, and Power Operations, Mr. Eric Walters, calculated the integrated hourly net output for the relevant days of March 2016 and communicated this information to GREC. **SOF 121**; **Exhibit M39**. Mr. Walters determined that GREC had tied to the grid and delivered Energy during 25 hours in the month of March, for a total of 1,835.35 MWh, while GRU had specified operating levels totaling 2,400 MWh over those 25 hours. **Exhibit M39**, at GRU_010407. Thus, GREC had only delivered 76.5% of the Energy requested by GRU. **Exhibit M39**, at GRU_010407. Stated another way, GREC failed to meet the operating level specified by GRU by 23.5% (i.e., more than 5%). *See id.* Because GREC's integrated hourly net output for March 2016 failed to meet the operating level specified by GRU by more than 5%, Section 12.4.1 dictates that the Dependable Capacity for the associated Billing Period must be reduced by 10%.

GREC has not explained to GRU why it believes that the payment decrease under Section 12.4.1 of the PPA was improper. However, in its Second Amended Demand, GREC complained that GRU "ignored the GREC Facility's full availability for the 29 non-testing days of March." GREC's Second Amended Demand, ¶ 43. GREC's statement suggests that GREC believes that GREC should be credited with 100% for each day that it was not dispatched, under the assumption that GREC was ***available*** to operate at 100%.

However, the language of section 12.4.1 makes clear that it is not evaluating ***availability***, but rather ***operating levels***. The measure provided in the PPA is the use of the ***integrated hourly net output***. PPA, **Exhibit M1**, § 12.4.1, at 15. This metric, in and of itself, demonstrates that the Facility must actually be ***outputting*** Energy, not just be available to output Energy, for the calculations of Section 12.4.1 to apply. The plain language of the PPA requires the calculation of a specific "***operating*** level" and, of course, the calculation of an "integrated hourly net ***output***."

The plain language of "integrated hourly net output," as it does in mathematics (*i.e.*, calculus) requires a determination of the area under the curve (*see, e.g.*, Integral – from Wolfram MathWorld, http://mathworld.wolfram.com/Integral.html), with the curve comprising the actual rate of energy generation for a period of time multiplied by the period of time. The definition of the word "integrate" means "to indicate the whole of : give the sum or total." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1174 (2002). For example, if the Facility was generating an average of 100 MW for one hour, the integrated hourly net output for that hour would be 100 MW x 1 hour = 100 MWh. If the Facility was generating an average of 100 MW for 24 hours, the integrated hourly net output for that time period would be 2,400 MWh. This type of determination is made for every hour the Facility is actually outputting Energy during the month to determine that month's integrated hourly net output. The same determination is done for the specified operating level. If the Facility was asked to produce and deliver 100 MW for a given hour, then, for that hour, the specified operating level would be 100 MWh. For every hour in the month when the Facility is outputting Energy, this calculation is done for both the integrated hourly net output and the specified operating level, and then those two sums are compared to determine whether the integrated hourly net output was within five percent of the specified operating level. This is exactly the type of analysis that GRU undertook. *See* **Exhibit M39**.

Understanding that one portion of this calculation (the denominator) is the specified operating level makes GREC's approach ostensibly ridiculous. Mistakenly relying on notional availability, GREC ignores the plain language of Section 12.4.1, which relates solely to the Facility's net (*i.e.*, actual) output. Under GREC's approach, for a given hour, the specified operating level could be 0 MW because no energy is being requested. But, meanwhile, GREC would maintain that it was ***available*** to produce at 100% of seasonal Dependable Capacity (*e.g.*, 102.5 MW). Thus, according to GREC, its integrated hourly net output (notwithstanding the violence this approach does to the meaning of the word output) would be equivalent to its alleged availability at the seasonal Dependable Capacity, *i.e.*, 102.5 MW x 1 hour = 102.5 MWh. Thus, in determining the percentage, GREC would take 102.5 MWh as the integrated hourly net output and divide it by 0 MWh for the specified operating level, which would result in the percent Energy delivered of infinity. Accordingly, GREC's argument that notional availability should be taken into consideration simply does not make sense.

More so, though, including "availability" in this calculation would undercut the purpose of Section 12.4.1. The section is captioned "Operational Capacity Performance." PPA, **Exhibit M1**, § 12.4. The Payment Decrease provision uses "operating levels" and "net output" for the calculation. PPA, **Exhibit M1**, § 12.4.1. If the Facility's net output is not within five percent of the specified operating level for the Billing Period, then "the Dependable Capacity for that Billing Period shall be decreased by ten percent (10%)." *Id.* Dependable Capacity, in turn, factors into the calculation of Available Energy. PPA, **Exhibit M1**, Schedule I, at i. As a component of Available Energy, then, Dependable Capacity factors into what GREC is paid. *See* Equitable Adjustment, **Exhibit M2**, Appendix III. Accordingly, ***operating*** performance is being used as a metric to determine whether GREC should be paid for being ***capable*** of producing Energy. That

is, if in a Billing Period GREC proves that it is unreliable, and fails to stay within five percent of the specified operating level, then that poor operating performance serves as a proof that it would not actually have been capable of generating and delivering Energy at the seasonal Dependable Capacity. Accordingly, if GREC has demonstrated that it is not reliable in operating, its compensation for Available Energy is adversely affected for the Billing Period by lowering the Dependable Capacity for the Billing Period. In that light, GREC's suggestion that "availability" should be included to bulwark a measure of its Operational Capacity Performance is nonsensical. GREC gets paid for being capable of generating and delivering up to the Dependable Capacity. But the proof is in the pudding. If GREC cannot maintain the operating levels that are specified when it is asked to operate, then it does not get full credit for being capable of generating up to the seasonal Dependable Capacity. GREC urges an approach that games the system, shoring up its "Operational Capacity Performance" based upon a fictional capability (100% seasonal Dependable Capacity) that its actual results dispel.

GRU's position is consistent with the plain language of the PPA, whereas GREC's apparent position is simply illogical. For these reasons, the Tribunal should grant GRU's motion for partial summary judgment regarding Section 12.4.1 of the PPA and declare that GRU did not breach the PPA by imposing a payment decrease on GREC for the month of March 2016 in accordance with Section 12.4.1 of the PPA.

D. Motion for Partial Summary Judgment Regarding Section 8.5 and Retroactive Withholding

GREC complains that retroactive withholding of disputed amounts from invoices is not allowed under the PPA. However, to give full effect to Section 8.5 of the PPA, which permits billing disputes for up to one year, retroactive withholding must be permitted under the PPA.

Accordingly, GRU moves for partial summary judgment of no breach under Section 8.5 of the PPA because GRU may retroactively withhold disputed amounts under that section of the PPA.

In particular, the issue here involves retroactive withholding in November 2015 of Available Energy charges from the September 2015 invoice. Specifically, on November 24, 2015, GRU's Chief Financial Officer, Mr. Justin Locke, sent a letter disputing Available Energy charges for the September 2015 Dependable Capacity test from the time that the dispatch order was transmitted to perform the Dependable Capacity test to the time that GREC tied to the grid (i.e., the ramp-up charges discussed above). **SOF 111**; **Exhibit M21**.

Section 8.5 of the PPA allows for billing disputes:

> Billing Disputes. If either Seller or Purchaser contests a Billing Statement or Payment, any uncontested portions of invoiced amount shall be paid on or before the due date under Section 8.4 or shall be subject to Late Payment Rate interest charges. The remaining disputed amount shall be subject to the dispute resolution procedure in Section 24, *Dispute Resolution.* Neither Seller nor Purchaser shall have the right to challenge any Billing Statement or any Payment, to invoke arbitration of the same, or to bring a legal or administrative action of any kind regarding such Billing Statement or Payment after a period of one (1) year from the date of receipt of such Billing Statement or Payment. . . .

PPA, **Exhibit M1**, § 8.5, at 10. Notably, Section 8.5 allows a full year to contest any invoice and provides that only the uncontested portion of any invoice should be paid, while the remainder (the disputed amount) should be withheld subject to the dispute resolution procedure of Section 24 of the PPA. PPA, **Exhibit M1**, § 8.5, at 10. The PPA's one year limitation on disputing invoiced amounts can only be given effect in conjunction with the PPA's specification that GRU only pays undisputed amounts if newly discovered disputed amounts may be withheld from subsequent invoices. Certainly, the PPA provides no prohibitions on retroactive withholding. *See* PPA, **Exhibit M1**, § 8.5, at 10.

That retroactive withholding is allowable is also congruous with the PPA's provisions on Estimated Information. Under Section 8.3, GREC may estimate certain unavailable data in its

invoices. PPA, **Exhibit M1**, § 8.3, at 10. For any estimated data, within a year, GREC must adjust the estimated data to reflect actual data received. PPA, **Exhibit M1**, § 8.3, at 10. However, Section 8.5 still provides a year after the adjustment to actual data to dispute the invoiced amounts. PPA, **Exhibit M1**, § 8.5, at 10. This provision demonstrates that withholding rights are not limited to the billing period immediately after the original invoice is sent.

GRU may retroactively withhold disputed amounts under the PPA in order to give full effect to the one year limitation period. Accordingly, GRU did not breach section 8.5 of the PPA, and GRU respectfully requests that the Tribunal grant its motion for partial summary judgment of no breach as to Section 8.5 and retroactive withholding.

E. Motion for Partial Summary Judgment Regarding Section 10.7 and Shutdown Charges Following Dependable Capacity Tests

GREC alleges that GRU breached the PPA because GRU did not pay Shutdown Charges following GREC's Dependable Capacity tests. Specifically, GREC alleges that GRU breached the PPA by not paying Shutdown Charges in connection with alleged "Purchaser Shutdown" events in September 2015, March 2016, and May 2016. However, no Shutdown Charges are due because GRU did not dispatch a Purchaser Shutdown, but rather directed GREC to return to its pre-test condition, and because the remainder of the PPA demonstrates that Dependable Capacity tests from standby do not end in Purchaser Shutdowns. Accordingly, GRU moves for partial summary judgment of no breach of Section 10.7 of the PPA because a return to standby condition after Dependable Capacity tests does not require payment of a Shutdown Charge.

GRU directed GREC to perform Dependable Capacity tests pursuant to Section 2.3 of Appendix IX of the PPA (**Exhibit M1**, Appendix IX, at xxxii) on September 19, 2015, March 6, 2016, and May 25, 2016. **SOF 107, 114, 122**. For each of these tests, the GREC Facility was dispatched from standby. **SOF 109, 116, 123**. In each instance, GRU directed GREC to return to

its pre-test status after completion of the test. **SOF 108, 115, 122**. After GREC attempted to invoice GRU for a Shutdown Charge for each of the Dependable Capacity tests, GRU disputed those Shutdown Charges. **SOF 110, 119, 126**.

Under Section 10.7 of the PPA, Shutdown Charges are due if GRU requests a Purchaser Shutdown:

> Maximum Shutdowns. Purchaser shall not dispatch and schedule more than sixteen (16) Purchaser Shutdowns in any Winter Period. Purchaser shall not dispatch and schedule any Purchaser Shutdowns during any Summer Period. If Purchaser requests a Purchaser Shutdown, then Purchaser shall pay Seller the Shutdown Charge. If the Facility shuts down for any reason other than Purchaser Shutdown, the shutdown shall not count toward these sixteen (16) Purchaser Shutdowns and Purchaser shall not pay the Shutdown Charge.

PPA, **Exhibit M1**, § 10.7, at 14. "Purchaser Shutdown" is also defined in the PPA:

> "Purchaser Shutdown" means a requested complete shutdown of the Facility's generation by Purchaser other than a request that is prompted by a System Emergency which emergency is not a result of a physical condition or situation that is only on Purchaser's System.

PPA, **Exhibit M1**, Schedule I, at viii.

GRU did not request Purchaser Shutdowns in conjunction with any of these tests of Dependable Capacity. Rather, GRU simply exercised its contractual rights under Section 11.2 of the PPA to test the Facility's availability by instructing GREC to perform Dependable Capacity tests pursuant to Section 2.3(a) of Appendix IX of the PPA.[8] **SOF 107, 114, 122**. At the conclusion of these Dependable Capacity tests, GRU instructed GREC to return the Facility to the pre-test condition of standby. **SOF 108-109, 115-116, 122-123**. Ordering a Dependable Capacity test pursuant to Section 11.2 of the PPA is distinct from dispatching the Facility into "generation"

[8] GRU is permitted to perform Dependable Capacity tests once per Demonstration Period (Summer or Winter) and again if GRU is unsatisfied with the first test. PPA, **Exhibit M1**, Appendix IX, § 2.3, at xxxii. Of course, under the PPA, GRU is entitled to a maximum of sixteen Purchaser Shutdowns, and none of them may be dispatched and scheduled for the Summer Period. PPA, **Exhibit M1**, § 10.7.

as contemplated by Section 10 of the PPA; thus, at no point did GRU dispatch GREC into generation such that GRU could request a "complete shutdown of the Facility's generation" as required by the PPA's definition of Purchaser Shutdown.

Fundamentally, the return to a pre-test condition does not constitute a Purchaser Shutdown. In fact, GREC's own actions suggest that it did not consider these Dependable Capacity tests to end with Purchaser Shutdowns. This is particularly evidenced with respect to the September 19, 2015 Dependable Capacity test. September 19, 2015 falls within the "Summer Period" as that term is defined by the PPA—specifically, "Summer Period" means "a period that begins at 12:00 am on June 1st and ends at 11:59 pm September 30th." PPA, **Exhibit M1**, Schedule I, at ix. According to the terms of Section 10.7 of the PPA, "Purchaser [GRU] shall not dispatch and schedule any Purchaser Shutdowns during any Summer Period." PPA, **Exhibit M1**, § 10.7, at 14. If Dependable Capacity tests, such as the September test, ended in Purchaser Shutdowns, then GREC would have demanded that it be left on the grid, protesting that no Purchaser Shutdowns are permitted in the Summer Period—but GREC did not pursue that course of action. In fact, Section 2.3 of Appendix IX of the PPA specifically provides that GRU may request new tests of Dependable Capacity once per Demonstration Period (i.e., once each during the Summer Period and Winter Period), in addition to being able to request an additional test if GRU is unsatisfied with the first test. PPA, **Exhibit M1**, Appendix IX, § 2.3, at xxxii. If a return to standby condition following a Dependable Capacity test constituted a Purchaser Shutdown, then GRU could never utilize a contractually provided Dependable Capacity test during a Summer Period while GREC was in standby.

Moreover, GREC's interpretation imposes upon the contractually negotiated rights for Dependable Capacity tests an additional charge that does not exist in the PPA. As such, GREC's

interpretation of Section 10.7 does violence to the rights granted in Section 2.3 of Appendix IX of the PPA. Given that contracts must be interpreted to give effect to the contract as a whole, and so as to not render meaningless or superfluous any provision (*see supra* Section III.B), GREC's interpretation cannot be correct. Meanwhile, GRU's interpretations of Section 10.7, Purchaser Shutdown, and the PPA's provisions for Dependable Capacity tests are internally consistent with the remainder of the PPA and with the plain language of the PPA. For all of these reasons, the Tribunal should grant GRU's motion for partial summary judgment of no breach of Section 10.7 of the PPA.

F. Motion for Partial Summary Judgment Dismissing GREC's Intentional Interference Claim Because GRU Lacked Knowledge of Any Refinancing Relationships and GRU's Actions Were Justified

GREC's Count 4 purports to assert a claim of intentional interference with business relations. However, there is no genuine issue of material fact as to GRU having had no knowledge of any business relationships with respect to GREC refinancing its debt for the Facility. Moreover, there is no genuine issue of material fact as to GRU's justification and excuse for its actions—GRU was contractually and economically justified in taking that actions that are now alleged to be interference. Accordingly, GRU moves for partial summary judgment that GRU did not intentionally interfere with GREC's business relations because there is no genuine issue of material fact that GRU did not know of GREC's refinancing efforts or refinancing relationships and that GRU was contractually and economically justified to take the accused actions.[9]

1. The Law of Intentional Interference with Business Relations

Under Florida law, "[t]he elements of tortious interference with a business relationship are '(1) the existence of a business relationship . . . (2) knowledge of the relationship on the part of the

[9] GRU is also moving separately to dismiss GREC's Count 4 for intentional interference with business relations in a motion for judgment on the pleadings, because GREC has inadequately pleaded that Count.

defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.'" *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994) (quoting *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985)). The ***knowledge element*** refers back to the ***business relationship***. *See id.*; *see also Ferris v. So. Fla. Stadium Corp.*, 926 So. 2d 399, 401 (Fla. 3d DCA 2006) ("Intentional interference with a business relationship requires: (1) existence of a business relationship that affords the plaintiff with existing or prospective legal or contractual rights; (2) defendant's knowledge of ***that*** relationship . . . ."). The business relationship does not refer to mere communications, pleasantries, or even offers and the like, between businesses. Rather, "[a]n action for tortious interference with a prospective business relationship requires ***a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered***." *ISS Cleaning Servs. Grp., Inc. v. Cosby*, 745 So. 2d 460, 462 (Fla. 4th DCA 1999) (emphasis added); *see also Ethan Allen*, 647 So. 2d at 814 ("An action for intentional interference is appropriate . . . if the jury finds that an understanding between the parties would have been completed had the defendant not interfered. . . . A mere offer to sell, however, does not by itself, give rise to sufficient legal rights to support a claim of intentional interference with a business relationship."); *Rekal Co., Inc. v. PGT Indus., Inc.*, No. 8:13-cv-1433, 2014 WL 29104, at *4 (M.D. Fla. Jan. 2, 2014) ("Florida law has recognized the ***existence of a business relationship*** only ***where parties have an understanding as to a specific transaction that has gone beyond the 'mere offer' stage***.") (emphasis added). Accordingly, knowledge of the business relationship means more than just knowledge of businesses communicating with one another; rather, knowledge of the business relationship requires knowledge of a relationship that has progressed to the point of being "evidenced by an

actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *See ISS*, 745 So. 2d at 462.

The business relationship must also be with an identifiable entity, not a broad category of potential counter parties. *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 (11th Cir. 1999) (affirming dismissal because a "business relationship" requires "a relationship with a particular party, and not just a relationship with the general business community"). The interference must be direct, and must be made by someone who is a third party. *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1294 (11th Cir. 2001); *Allied Portables, LLC v. Youmans*, Case No. 2:15-cv-294, 2015 WL 6813669, at *7 (M.D. Fla. Nov. 6, 2015).

Additionally, the tort of intentional interference with business relations cannot stand if the alleged "interference" was justified or unintentional. *See Ethan Allen*, 647 So. 2d at 814. "Protecting a company's own economic interest to reduce the risk of incurring further loss does not constitute intent to damage within the meaning of a cause of action for intentional interference with business relationship," and courts have held the exercise of such rights to not constitute an actionable cause of action. *Networkip, LLC v. Spread Enters., Inc.*, 922 So. 2d 355, 358 (Fla. 3d DCA 2006). Put simply, there is no tortious interference "if the complained-of actions of the defendant are justified or privileged." *McIntosh v. Harbour Club Villas Condominium Ass'n*, 468 So. 2d 1075, 1079 (Fla. 3d DCA 1985). Specifically, "[a]ction taken to safeguard or promote one's own financial or contractual interests are held to be privileged and entirely non-actionable." *Id.*; *see also Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. 3d DCA 1980) (explaining that "activities taken to safeguard or promote one's own financial, and contractual interests are entirely non-actionable"). This is true, even if the defendant harbors personal malice or ill will. *Ethyl*, 386

So. 2d at 1224; *Florida Telephone Corp. v. Essig*, 468 So. 2d 543, 544-45 (Fla. 5th DCA 1985); *Wackenhut Corp. v. Maimone*, 389 So. 2d 656, 658 (Fla. 4th DCA 1980).

2. GREC's Allegations of Intentional Interference

GREC's allegations of intentional interference have been mercurial, varying from its pleadings to its briefing in opposition to Rule 33 letter requests and its motion for bifurcation. In its pleadings, GREC alleges that the subject of the alleged interference involved lenders:

> 179. GREC has business relationships with its ***lenders***, including Union Bank, N.A.
>
> 180. GRU is aware of GREC's business relations with its ***lenders*** . . . .
>
> 181. GRU intentionally and without justification interfered with GREC's business relations with its ***lenders*** and prospective ***lenders*** . . . .

GREC Amended Demand, at ¶¶ 179-81 (emphasis added). GREC references "lenders" elsewhere in its pleadings. *See, e.g.*, GREC Amended Demand, at ¶¶ 158, 170; *id*. at 35. GREC even represented directly to the Tribunal that its allegations related to lenders. *See, e.g.*, October 7, 2016 Letter from A. Phelan to Arbitrator T. Brewer re GREC's Response to GRU's Rule 33 Letter, **Exhibit M43**, at 5 ("GREC's intentional interference count alleges that GRU interfered with GREC's business relations with its lenders and prospective lenders in refinancing efforts . . . .").

However, more recently, outside of its pleadings, GREC asserts that the relationship interfered with was not with the lenders, but with MUFG, a placement agent:

- "GRU's arguments in Part II.B of its brief mischaracterize the interference claim as interfering with the ultimate lenders. GRU Opp. At 12-15. This is wrong. GRU's arguments fail because the relationship that GRU interfered with was with GRU's business relationship *with MUFG*, the placement agent, not the ultimate lenders. *See* GRU Opp. At 13. Accordingly, the question for the liability phase is whether GRU illegally interfered with GREC and MUFG's business relationship by preventing them from proceeding with the refinancing, from going to the market, and, ultimately, from obtaining a refinancing." October 19, 2016 GREC Reply in Support of its Motion to Bifurcate, **Exhibit M44**, at 6-7 (bold emphasis added; italics in original).

- "GRU apparently believes that GREC's claim concerns GRU's interference with the business relationship between GREC and the ultimate lenders, i.e., the lenders who would have participated in the refinancing that GREC was seeking to accomplish. This is not the case. GRU's interference was with GREC's business relationship with the placement agent, MUFG, which was working with GREC to put the refinancing together. This interference prevented GREC from going to the marketplace to present refinancing proposals to ultimate lenders." October 19, 2016 GREC Reply in Support of its Motion to Bifurcate, **Exhibit M44**, at 5-6 (emphasis added).

- "GREC alleges that GRU interfered with its relationship with its financial advisor when it sent the Default Notice to one of GREC's lenders in March 2016, and later refused to retract the notice." November 2, 2016 GREC Letter in Opposition to GRU Rule 33 Letter re Counts 2 and 4, **Exhibit M45**, at 4.

- "GRU's focus on GREC's lenders is misplaced. GRU's interference prevented GREC from approaching the lenders in the first place. GREC clearly alleged the fact that GRU sent the Default Notice to Union Bank, not because Union Bank is the entity with which GREC alleges interference, but because that is the action that caused the termination of the refinancing efforts that GREC and the financial advisor were making." November 2, 2016 GREC Letter in Opposition to GRU Rule 33 Letter re Counts 2 and 4, **Exhibit M45**, at 6.

Despite GREC's ever changing allegations, a few things are true with respect to either set of allegations (interference with lenders or interference with placement agents). First, both sets of GREC's allegations identify the act of alleged interference as GRU's sending of a Seller Event of Default letter to the collateral agent, Union Bank. *See* GREC Amended Demand, ¶ 181 ("GRU intentionally and without justification interfered with GREC's business relations with its lenders and prospective lenders under a refinancing, including by sending the false and misleading Default Notice to Union Bank, N.A., by wrongfully claiming that GREC materially breached the PPA, and by threatening to terminate the PPA."); GREC's Response to GRU Interrogatory No. 7, **Exhibit M46**, at 9 ("GREC has been harmed by GRU's intentional interference with its refinancing efforts, including by GRU's actions in deliberately providing inaccurate information to GREC's lender, Union Bank, N.A., in a purported Default Notice dated March 31, 2016."). Second, as to either set of allegations, those actually pleaded, or those later contrived, there is still no genuine issue of

material fact as to GRU having had no knowledge of any business relationships with respect to GREC refinancing its debt for the Facility. Third, as to either set of allegations, there is no genuine issue of material fact as to GRU's justification and excuse for its actions.

3. The Factual Background

As explained earlier, GREC opted not to perform an annual Planned Maintenance outage in 2016. **SOF 61-62**. GRU, of course, maintains that GREC's failure to perform annual Planned Maintenance constitutes a breach of Section 10.4.1 of the PPA. *See supra* Section IV.A. GRU communicated to GREC that GRU would consider nonperformance of annual Planned Maintenance to be a breach of GREC's obligations under Section 10.4.1(a) of the PPA. **Exhibit M33**, at GRU_074588.

Under Section 4 of the Consent and Agreement into which GREC, GRU, and Union Bank entered on June 30, 2011 (**SOF 3**; **Exhibit M3**), GRU was required to provide notice to the Collateral Agent, Union Bank, in order to preserve GRU's rights under the PPA:

> (b) Upon the occurrence of a Seller Event of Default, Purchaser shall not exercise any of its rights set forth in the Assigned Agreement [the PPA] to cancel, terminate or suspend performance under, the Assigned Agreement unless it has first afforded the Collateral Agent or its designee a cure period for a duration of (i) in the case of monetary defaults, 30 days from the expiration of Seller's right to cure such default under the Assigned Agreement; and (ii) in the case of nonmonetary defaults, 60 days from the expiration of Seller's right to cure such default under the Assigned Agreement; provided, in the case of this clause (ii) that the Collateral Agent (or its designee) has commenced in good faith to cure any such Seller Event of Default within 30 days from the expiration of Seller's right to cure such default under the Assigned Agreement.
>
> (c) ***Purchaser shall deliver to the Collateral Agent*** at the address set forth in Section 6(b) below, or at such other address as the Collateral Agent may designate in writing from time to time to Purchaser, concurrently with the delivery thereof to Seller, ***a copy of each notice of material breach by Seller or a Seller Event of Default given by Purchaser pursuant to the Assigned Agreement***.

Consent and Agreement, **Exhibit M3**, §§ 4(b)-(c), (emphasis added). Accordingly, on March 31, 2016, Winston & Strawn LLP, counsel for GRU, sent a letter to Union Bank, N.A., GREC's

collateral agent, captioned a "Notice of Seller Event of Default, Provided Pursuant to Section 4 of the Consent and Agreement."[10] **SOF 69**. Both Jim Gordon and counsel for GREC were copied on this letter, and the parties subsequently exchanged further correspondence. On April 11, 2016, Mr. Gordon, President of GREC, sent Mr. Bielarski, General Manager of GRU, a letter with the subject, "GRU Default Notice and AAA Filing." **SOF 70**. In the letter, Mr. Gordon demanded that GRU retract the Notice letter. **Exhibit M34**, at GRU_009215. One week later, on April 18, 2016, Mr. Gordon sent Mr. Bielarski another letter, this time with the subject of "GRU Default Notice and Termination Threat." **SOF 71**. In this letter, Mr. Gordon again demanded that GRU withdraw its Notice letter. **Exhibit M35**, at GRU_008877. In response to the April 11, 2016 letter (**Exhibit M34**) and the April 18, 2016 letter (**Exhibit M35**), Winston & Strawn LLP sent a letter to GREC's counsel at Morgan, Lewis & Bockius LLP on April 25, 2016, with a subject of "Response to April 11, 2016 and April 18, 2016 Letters to Edward J. Bielarski, Jr., General Manager." **SOF 72**. Through its counsel, GRU declined to retract the Notice letter. **Exhibit M36**, at GRU_009280. GRU also identified inaccuracies in both of the GREC letters. **Exhibit M36**, at GRU_009280-81.

On May 5, 2016, GREC's collateral agent, Union Bank, sent a letter to GRU with a copy to Winston & Strawn LLP regarding "Notice of Seller Event of Default." **SOF 73**. In the letter, Union Bank stated that it was in receipt of the Notice Letter sent on March 31, 2016. **SOF 74**. Union Bank characterized the Notice Letter as "describ[ing] an alleged Seller Event of Default (as defined in the PPA) related to the alleged non-performance by GREC of certain Planned Maintenance (as defined in the PPA) in 2016 . . ." **Exhibit M38**, at GRU_071996; **SOF 74**. Union Bank stated in its letter:

[10] GRU had previously noticed GREC as to the default and allowed GREC an opportunity to cure, which it did not. *See supra* Section IV.A.4.

> Given that the existence of a Seller Event of Default arising from the Alleged Default is currently the subject of an arbitral proceeding, GRU is not in a position to unilaterally determine that GREC is in default under Section 10.4.1(a) of the PPA, that a Seller Event of Default occurred on March 30, 2016 and that GRU has the right to terminate the PPA pursuant to Section 25.2 thereof on the basis of the Alleged Default.
>
> We further note that, pursuant to the terms of Section 24.3 of the PPA, both GREC and GRU are required to continue performing their obligations under the PPA (including, for the avoidance of doubt, payment of any amounts duly invoiced thereunder) during the pendency of any controversy, dispute or claim arising out of or relating to the PPA.
>
> . . .
>
> ***Please continue to provide us with copies of all notices as required by Section 4(c) of the PPA Consent.***

Exhibit M38, at GRU_071996; **SOF 75-77** (emphasis added).

4. GRU Did Not Have Knowledge of Business Relationships with Lenders or with MUFG

A necessary element of intentional interference with business relations is knowledge of the business relationship. *Ethan Allen*, 647 So. 2d at 814; *Ferris*, 926 So. 2d at 401. The business relationship refers to one "evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *See ISS*, 745 So. 2d at 462. Whether the alleged business relationship was with lenders, or with a placement agent (MUFG), GRU had knowledge of neither one.

Of course, as to the lenders, GREC has already disclaimed that there was any interference with lenders. *See supra* Section IV.F.2. Accordingly, it is difficult to see how GRU could have any knowledge of a business relationship that GREC has already explained did not exist. *See id.*; **SOF 83**. Nonetheless, GRU's General Manager has testified that GRU had no knowledge of a business relationship or a prospective business relationship between GREC and Union Bank for refinancing the GREC Facility. **SOF 79-80**. Similarly, GRU had no knowledge of a business

relationship or a prospective business relationship between GREC and any other lender for refinancing the GREC Facility. **SOF 81-82**. In fact, at the time that the letter was sent to the collateral agent, Union Bank, GRU had no knowledge that GREC was actively pursuing refinancing. **SOF 78**. GREC pleaded that the interference was with lenders and has since disclaimed that there was any interference with lenders, explaining that GREC did not go to the marketplace to present refinancing proposals to ultimate lenders. **Exhibit M44**, at 6.

Next, as to MUFG, GREC's alleged placement agent, GRU had no knowledge of a business relationship related to refinancing. At the time of the alleged interference—when the Notice Letter was sent on March 31, 2016—GRU had no knowledge of an ongoing or prospective business relationship between GREC and MUFG as a placement agent for refinancing. **SOF 84-85**. Moreover, GRU had no knowledge of a business relationship with MUFG that would have been completed if not for GRU's alleged interference. **SOF 86**. Similarly, GRU had no knowledge of GREC and MUFG attempting to enter into a business relationship, nor did GRU have any knowledge of GREC and MUFG having an actual and identifiable understanding or agreement. **SOF 87-88**. GREC attempts to allege that GRU knew of MUFG after GREC's April 18, 2016 letter. However, even after receiving GREC's April 18, 2016 letter, which simply stated that "GRU has now been informed by the financial advisor assisting GREC with its refinancing efforts that GRU's Notice and termination threat prevent GREC's refinancing efforts from proceeding," GRU had no knowledge of any actual and identifiable understanding or agreement between GREC and MUFG—GRU had no knowledge that GREC was allegedly ready to enter into any agreement or relationship with MUFG, or anyone else, as a placement agent, but was unable to do so. **SOF 89**; **Exhibit M35**. Likewise, after receiving both the April 11, 2016 letter from GREC and the

April 18, 2016 letter from GREC, GRU had no knowledge of GREC being ready to enter into an agreement or relationship with any placement agent or lender regarding refinancing. **SOF 90**.

Notwithstanding the absence of any evidence that GRU knew of MUFG at the time of the Notice Letter, GREC continues to allege that GRU knew of a relationship between GREC and a placement agent. In part, GREC relies upon the statement in its April 18, 2016 letter, that it had a financial advisor. But, this is too little and too late. GREC cannot allege knowledge and interference nearly three weeks after the alleged act of interference took place. The interference that is alleged must be both direct and intentional—alleged interference that is merely an indirect consequence is insufficient. *Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n*, 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986); *see also Peninsula Federal Sav. and Loan Ass'n v. DHK Properties, Ltd.*, 616 So. 2d 1070, 1073 n.4 (Fla. 3d DCA 1993) (explaining that indirect interference "simply does not meet the requirements of the intentional tort of interference. There is no such thing as a cause of action for interference which is only negligently or consequentially effected"). GREC attempts to bootstrap the mention of a financial advisor in a letter sent three weeks after the alleged interfering act of sending the Notice Letter into an act sufficient to maintain this tort. This is patently insufficient. GRU did not sent the Notice Letter directly to MUFG, nor did GRU send any communications directly to MUFG; rather, GRU's counsel sent the letter to Union Bank, the designated collateral agent, as identified in the PPA. **SOF 91**. In fact, GREC readily admits that the alleged interfering act was aimed at the collateral agent Union Bank, not MUFG. *See* **Exhibit M45**, at 4, 6; **Exhibit M46**, at 9. GREC is hard pressed to argue that sending a letter to a different entity is a direct interference. Likewise, GREC is hard pressed to argue that GRU not retracting a letter (at best, an act of omission rather than an act of commission) that GRU did not send to MUFG is a direct and intentional interference with an alleged business relationship between

MUFG and GREC. *See Security Title Guarantee Corp. of Baltimore v. McDill Columbus Corp.*, 543 So. 2d 852, 855 (Fla. 2d DCA 1989) (no interference when defendant's alleged interference was passive, namely refusal to execute a release when asked to do so); *Lawler*, 497 So. 2d at 1263 (interference must be direct and intentional). Accordingly, the Tribunal should reject GREC's argument that GRU knew of the alleged relationship with MUFG simply because GREC mentioned that it had a financial advisor in the April 18, 2016 letter.

To the extent that GREC seeks to rely upon the PPA provisions of Sections 20.1 and 20.2 to give rise to inferences that GREC must have business relationships relating to refinancing of which GRU must have knowledge, GREC again misreads the requirements to establish tortious interference. Even crediting GREC's reliance on Section 20.1's reference to cooperation with financing, and Section 20.2's circuitous reference to the potential for refinancing at a later time (*see* PPA, **Exhibit M1**, § 20.1, Schedule I), at best, these Sections would give rise to knowledge that GREC ***could*** refinance. They do not give rise to an inference that GREC ***was actively attempting*** to refinance. Moreover, they certainly would not give GRU reason to believe that there was a business relationship relating to refinancing that had reached the point of an agreement or understanding that would have been reached but for the alleged interference, or that there was a relationship with attendant legal rights. This is too far a leap. GRU lacked knowledge of a requisite business relationship to support a cause of action for intentional interference with business relations.

5. GRU Was Justified and Excused to Send the Notice Letter Under the PPA and the Consent and Agreement

Notwithstanding GRU's lack of knowledge of a business relationship pertaining to refinancing, GRU's actions were justified. GRU's actions are justified and excused because they were actions taken to safeguard and promote GRU's financial and contractual interests. *See*

McIntosh, 468 So. 2d at 1079. Because GRU's actions were justified, GREC's cause of action for intentional interference fails as a matter of law. *See id.*

GRU's Notice Letter was required under the terms of the Consent and Agreement. As noted above, the Notice Letter was required under Section 4 of the Consent and Agreement. *See* Consent and Agreement, **Exhibit M3**, § 4(b). In order to preserve its rights to cancel, terminate, or suspend performance, GRU was required to provide the Collateral Agent, Union Bank, with a copy of each notice of material breach or a Seller Event of Default. Consent and Agreement, **Exhibit M3**, §§ 4(b)-(c). It is well established that such actions in Florida constitute justifications and render claims such as this one non-actionable. *See, e.g.*, *Networkip*, 922 So. 2d at 358 (defendant company was justified in exercising right to terminate agreement and service for non-payment, even though a consequence of termination was the loss of service to plaintiff's customers); *McIntosh*, 468 So. 2d at 1079 (defendant was justified in inducing counterparties in lawsuit to settle despite one of the counterparties being in a contract with the counterparty to oppose defendant's development project, because the defendant was protecting its own financial interests); *Security Title*, 543 So. 2d at 855 (defendant's desire not to surrender right to seek recovery from a third party justified refusal to execute release). GRU acted simply to preserve its rights with respect to what it considers a breach of contract by GREC—namely, GREC refusing to perform annual Planned Maintenance under Section 10.4.1 of the PPA. GREC cannot convert GRU's attempt to preserve its contractual and economic rights under the PPA and the Consent and Agreement into the tort of intentional interference with business relations.

Likewise, GREC cannot transform GRU's subsequent refusal to withdraw its Notice Letter into an unjustified interference. To start, as explained above, GRU's refusal to withdraw the Notice Letter after GREC's April 11, 2016 and April 18, 2016 letters was neither direct nor

intentional. Courts have found similar refusals to act insufficient to state a cause of action for intentional interference because such ***inaction*** is neither direct nor intentional. *Security Title,* 543 So. 2d at 855. Similarly, when a party refuses to act, for the purposes of protecting its own financial or contract interests, in the way a plaintiff desires, such inaction is justified. *See id.* That is, just because GREC ***demanded*** that GRU retract its Notice Letter does not mean that GRU loses the justification that protected the act of sending the Notice Letter in the first place.

In its pleadings, GREC has attempted to mischaracterize GRU's actions to preserve its own contractual and financial rights as being motivated by malice or ill will. Notwithstanding that GRU's actions were not motivated by malice or ill will, but rather pursuant to the terms of the Consent and Agreement (**SOF 69**), it would not even matter if there had been malice or ill will, as the actions were justified by GRU's attempts to preserve its rights. *See Ethyl*, 386 So. 2d at 1224 (explaining that "activities taken to safeguard or promote one's own financial, and contractual interests are entirely non-actionable" and that, in light of that excuse, there is no action to be had even if an individual actually harbored personal malice or ill will).

Accordingly, as a matter of law, GRU's actions to protect its contractual rights were entirely non-actionable. In light of the absence of any material fact as to justification, GREC's claim for intentional interference with business relations cannot be sustained, and GRU is entitled to summary judgment as a matter of law that it did not intentionally interfere with GREC's business relations.

G. Motion for Partial Summary Judgment Regarding Section 20 and GREC's Failure to Seek Cooperation on Refinancing

GREC alleges, in Count 2 of its Amended Demand, that GRU breached Section 20 of the PPA because GRU, allegedly, did not cooperate with GREC to refinance the Facility. However, the PPA does not demand "cooperation" in a vacuum—cooperation implies ***seeking*** cooperation.

Exercising contractual rights under the PPA does not constitute a lack of cooperation. There is no genuine issue of material fact that GREC never sought GRU's cooperation. Moreover, GREC's interpretation of the PPA improperly seeks to subjugate all other rights under the PPA to an unspoken need to "cooperate" pursuant to Section 20. Such an interpretation renders superfluous all other portions of the contract and improperly suggests that GRU may not assert its rights or engage in any dispute resolution procedures without risking a breach of Section 20. That cannot be. For these reasons, GRU moves for partial summary judgment that the cooperation requirement in Section 20 of the PPA requires GRU to seek cooperation, and that GREC never sought GRU's cooperation in refinancing the Facility.

1. GREC's Faulty Allegations

Section 20 of the PPA reads as follows:

> 20. COVENANTS RELATING TO CONSTRUCTION FINANCING
>
> 20.1 Cooperation. Purchaser [GRU] recognizes that Seller [GREC] may seek to obtain debt financing for the Facility and Purchaser [GRU] hereby agrees to cooperate reasonably with Seller's efforts to secure such financing, and to provide Seller [GREC] and its lenders on a timely basis with such consents and related documents, as are reasonably requested by the lenders and reasonably acceptable to Purchaser [GRU].
>
> 20.2 Documents. Purchaser [GRU] shall provide, execute and deliver to Seller [GREC], or at Seller's [GREC's] request, to Lender, such documents, certificates, instruments, consents and information as shall be within the control of Purchaser [GRU] to provide and as Seller [GREC] or Lender may reasonably request as a condition to any takedown of any portion of the Facility Financing. Purchaser [GRU] further agrees to act in good faith to modify the Agreement to accommodate Lender's reasonable and customary requirements; *provided, however*, that no such modification shall change the economic terms of the Agreement or impose any obligation on Purchaser [GRU] that would materially increase Purchaser's [GRU's] costs or the risk allocated between the Parties.
>
> 20.3 Notices. Seller [GREC] shall deliver to Purchaser [GRU], as soon as practicable and in any event, unless otherwise specified, within

> ten (10) business days after Seller [GREC] obtains actual knowledge thereof, written notice of (i) the occurrence of any Material Adverse Change, and (ii) any litigation or similar proceeding affecting Seller [GREC] in which the amount involved is in excess of Five Million Dollars ($5,000,000).

PPA, **Exhibit M1**, § 20 (emphasis original).

In Count 2 of its Amended Demand, GREC alleges, "GRU has interfered with GREC's financing and refinancing efforts, including by violating GRU's obligation to cooperate in GREC's efforts to secure financing and refinancing as contemplated by Article 20 of the PPA." GREC Amended Demand, at ¶ 169. GREC then goes on to identify the specific alleged contractual breaches that give rise to its claim:

> 170. GRU's actions in breach of its contractual obligations include its efforts regarding the Construction Cost Adjuster, the fictitious and unnecessary April 2016 outage, GRU's sending an alleged notice of Seller Event of Default to GREC's lender, and GRU's refusal to retract that notice upon the several requests made by GREC.
>
> 171. By these and other actions, GRU has breached the PPA and interfered with GREC's rights and reasonable expectations under the PPA . . .

GREC Amended Demand, at ¶¶ 170-71.

2. GREC's Erroneous Interpretation of Section 20

Thus, GREC has effectively argued that "cooperation" under Section 20 requires GRU to abstain from any disputes under the PPA (Construction Cost Adjuster and April 2016 Planned Maintenance Outage), and to subjugate any of GRU's rights to what GREC implicitly regards as its superior rights under Section 20's cooperation requirement (sending the Seller Event of Default letter and refusing to retract it upon GREC's demand). Under GREC's interpretation of the PPA, GRU is powerless to challenge GREC's performance under any aspect of the contract, or if GRU does, then it must retreat from that dispute at GREC's whim. GREC's unnatural reading of Section 20 effectively makes any alleged breach of the PPA, or even a dispute regarding the PPA, a breach

of Section 20 of the PPA, even in the absence of any knowledge by GRU that GREC is even contemplating financing or refinancing its loans for the Facility. Under GREC's reading, if GRU disputed any amount in its monthly invoice, withheld that amount, and implemented an arbitration, then those actions would be factored in as violations of Section 20, for which GREC could apparently seek $100 million in damages if it happened to be attempting, in secret, to refinance its Facility debt obligations at the time.

Section 20 of the PPA does not give rise to the obligations that GREC asserts in its Amended Demand. Nowhere does Section 20 suggest that it prohibits any alleged breaches of any other section of the PPA or any disputes of GREC's actions under the PPA. Nor does it prohibit attempts to enforce rights under the PPA or otherwise dispute the meaning of the PPA's terms. Rather, reading Section 20 in its entirety, it is clear that Section 20 requires GRU to cooperate reasonably by providing information, consents, and documents within GRU's control that GREC and its lenders "may reasonably request" to allow GREC to finance the Facility.

Section 20 of the PPA clearly conceives of reasonable cooperation by GRU upon requests for cooperation—*i.e.*, GREC must seek cooperation in order to expect cooperation. Section 20 does not suggest that there is a duty to cooperate when GREC does not even seek GRU's cooperation. Until GREC complained of GRU's sending of notice to the Collateral Agent (the "Default Notice"), GRU had no knowledge that GREC was allegedly attempting to refinance its debt. But, GREC's reliance on its unreasonable demand to retract that notice is misplaced because compliance with GREC's demand would require GRU to forfeit its rights and to breach its obligations under the PPA and Consent and Agreement. No reasonable interpretation of Section 20 would require GRU to take such an action.

Indeed, GREC's interpretation that a demand to retract a contractually required notice letter is a request to cooperate would undercut many other important aspects of the PPA, and would run afoul of the principle of interpretation that contracts are to be interpreted according to their plain meaning to give effect to the contract as a whole, and the legal effect of contractual provisions should be determined from the words of the entire contract. *Wash. Nat'l*, 117 So. 3d at 948; *Utopia Provider*, 2016 WL 4016321, at *6; *Audiology*, 2014 WL 7672536, at *5. As a rule, contracts must be interpreted so as to not render meaningless or superfluous any provision, but rather to reach a reasonable interpretation that gives effect to all portions of the contract. *Daake*, 2016 WL 4505924, at *2; *Silver Shells*, 169 So. 3d at 203-04. By focusing on the retraction demand, GREC implicitly argues that Section 20's requirement to "cooperate reasonably" means at least (1) that there may be no active dispute resolution under Section 24, (2) that there can be no dispute about Planned Maintenance outages under Section 10.4.1, (3) that there can be no billing disputes under Section 8.5, (4) that GRU may not follow the procedures of Sections 4(b) and 4(c) of the Consent and Agreement, and (5) that there may be no declared Seller Events of Default under Section 25, because any such dispute might constitute a lack of cooperation. GREC seeks to place Section 20 above all other contractual provisions. But such an interpretation is wrong as a matter of law. Section 20 gives no indication that GRU was beholden not to dispute any issues under the PPA just in case GREC wanted to refinance.

3. Dictionary Definitions and the Text of the PPA Make Clear that "Cooperation" Under Section 20 Requires Communications or Requests Seeking Cooperation

Under Florida law, the words used by the parties are to be "given their plain and ordinary meaning." *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999); *Grove at Harbor Hills Homeowners v. Harbor Hills Development, L.P.*, 158 So. 3d 611, 612 (Fla. 5th DCA 2013) ("Unless ambiguous, contract language must be given its plain meaning. . . . When interpreting

contracts, we may consult references commonly relied upon to supply the accepted meaning of words."). In order to find the plain and ordinary meaning of words, courts look to the dictionary. *Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker*, 160 So. 3d 955, 958 (Fla. 5th DCA 2015) ("The intent of the parties governs contract interpretation and that intent is to be determined from the plain language of the agreement and the everyday meaning of the words used. . . . Dictionaries are commonly consulted to ascertain the plain meaning of words used in a contract."); *Grove*, 158 So. 3d at 612 ("Unless ambiguous, contract language must be given its plain meaning. . . . When interpreting contracts, we may consult references commonly relied upon to supply the accepted meaning of words.").

Consulting dictionary definitions here plainly reveals that GREC's construction of Section 20 simply cannot stand, as it is at odds with the plain and ordinary meaning of the word "cooperate." The word "cooperate" means "to act or work with another or others : act together." WEBSTER'S TENTH NEW COLLEGIATE DICTIONARY 254 (2002). Elsewhere, the word "cooperate" is defined as "to act jointly or concurrently toward a common end." WEST'S LAW & COMMERCIAL DICTIONARY, A-J 347 (1985). Still elsewhere, "cooperate" means "to act or work with another or others to a common end : operate jointly" or "to act together : produce an effect jointly." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 501 (2002). Similarly, "cooperate" is defined as "1. to work or act together or jointly for a common purpose or benefit. 2. to work or act with another or other persons willingly and agreeably." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 446 (2d ed. 1987). Still another definition of "cooperate" is "[t]o acquiesce willingly; be compliant" (THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 414 (3d ed. 1996)), which suggests a request or communication—it is unclear how a person can acquiesce or comply in the absence of some request or communication. Similarly,

many definitions include working "jointly" or "together." It is difficult to see how two companies could work "jointly" or "together" without some communication. "Jointly" and "together" imply discussions—if they were operating towards the same goal without coordinating, the definition would be something along the lines of working independently toward a common goal. But it is not.

Yet another definition is to "work jointly towards the same end" or "assist someone or comply with their requests." English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/cooperate. Indeed, other available definitions confirm that "cooperation" implies a request. For example, the English Oxford Living Dictionaries' definition of "cooperation" includes "***[a]ssistance***, especially by ***complying with requests***." English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/cooperation (emphasis added). Similarly, the online version of Merriam-Webster's dictionary includes a simple definition of "cooperate" as "to be helpful by doing what someone asks or tells you to do." Merriam-Webster, http://www.merriam-webster.com/dictionary/cooperate. Yet another dictionary defines "cooperate" as "***assist someone or comply with their requests***." THE NEW OXFORD AMERICAN DICTIONARY 378 (2001) (emphasis added). The usage of the word in the dictionary likewise suggests a communication or a request. *See id.* (demonstrating usage with "*the leaders promised to* ***cooperate in*** *ending the civil war*" and "*I was the villain for not* ***cooperating with*** *the FBI*"). Indeed, it is hard to imagine how two entities can cooperate if the common goal or effort has not been communicated or requested. The party desiring cooperation must communicate or seek assistance, not just hope for it.

The word "cooperate" implies ***joint knowledge of the need to work together***. A party does not cooperate with another by merely acting in the blind and coincidentally abstaining from actions

that might be troublesome to the other. Cooperation implies ***assistance or compliance in light of another's requests***. Cooperation suggests joint action or action together, not independent actions that just happen to be supportive of one another. Indeed, these same meanings and connotations can be seen by looking at the plain text of Section 20.

Section 20.2 of the PPA clearly pertains only to documents.[11] It only requires providing, executing, and delivering "documents, certificates, instruments, consents and information" within GRU's control that GREC or its Lender "may reasonably request." Section 20.3 of the PPA requires only certain notices. It is not alleged that GRU violated any portion of Section 20.2 or Section 20.3. Even if GREC was alleging breaches of Section 20.2 or Section 20.3, however, it is clear that no breach occurred because GRU's obligation to deliver documents is not unlimited. GRU is only required to deliver documents that are within GRU's control and that are "reasonably" requested by GREC or its Lender.

4. GREC Has Not Requested GRU's Cooperation in Refinancing

Despite GREC accusing GRU of breaching the PPA by failing to cooperate in GREC's alleged refinancing efforts, GREC has never actually requested GRU's cooperation. Despite sending GRU two letters in April 2016 (**Exhibits M34** and **M35**), GREC did not ask for GRU's cooperation in any refinancing efforts—it merely threatened GRU and demanded retraction of the contractually required notice letter sent to the collateral agent. **SOF 92, 96**. GREC did not ask GRU to provide any consents or related documents to any lenders. **SOF 93**. GREC did not ask GRU to provide, execute, or deliver documents, certificates, instruments, consents or other information in GRU's control. **SOF 94**. GREC did not ask GRU to modify the PPA to accommodate a refinancing lender's request. **SOF 95**. Simply put, GREC did not ask GRU to

[11] This is also reflected in the subsection heading of "Documents."

provide any of the documents or information often required in refinancings. *See* **SOF 93-95**. Nor did GREC ask for cooperation during the time of the Construction Cost Adjustor dispute or in the time frame in which the dispute regarding the April 2016 Planned Maintenance outage originally arose. **SOF 97**. Similarly, during these times, GREC did not ask for any consents, related documents, certificates, instruments, or other information. **SOF 97**.

GREC insists that GRU committed a breach of the PPA in refusing to rescind its Default Notice upon repeated demands by Mr. Gordon, but Mr. Gordon's demand was not reasonable (nor was it a request for cooperation), as it would have required GRU to (i) ignore its contractual obligations under Section 4(c) of the Consent and Agreement, which clearly required GRU to send the Default Notice once GRU notified GREC that it had breached a material obligation under the PPA, and (ii) compromise GREC's own contractual rights under the PPA because Section 4(b) of the Consent and Agreement requires GRU to afford the Collateral Agent additional time and opportunity to cure GREC's Seller Event of Default. The request was not reasonable and therefore no breach of Section 20 could have occurred.

It is uncontroverted that, until GRU sent its Default Notice, GREC disclosed nothing to GRU about attempting to refinance (and GRU was unaware of GREC's refinancing efforts). *See supra* Section IV.F.4. GREC did not seek GRU's assistance and did not request any documents from GRU. Accordingly, GREC's allegation that GRU breached Section 20 of the PPA through other contractual disputes holds no water. GRU did not breach Section 20 of the PPA. Accordingly, GRU respectfully requests that the Tribunal grant partial summary judgment of no breach as to GREC's Count 2 for Breach of Contract.

H. Motion for Partial Summary Judgment of No Liability Regarding Section 26.1's Limitations on Liability

In its Counts 2 and 4, GREC seeks to recover alleged damages that are far attenuated from the alleged wrongs committed. For example, GREC alleges that it ***may*** have damages in excess of $100 million either due to the alleged breach of contract in Count 2 or the alleged tortious interference in Count 4. But, as explained below, these are neither direct nor actual damages. Because the PPA limits liability to "direct actual damages only," and because Counts 2 and 4 run afoul of this prohibition, GRU moves for partial summary judgment of no liability and dismissal for GREC's Counts 2 and 4 on the basis that Section 26.1 of the PPA expressly limits liability for incidental, consequential, punitive, exemplary, or indirect damages, or lost profits or other business interruption damages, whether filed in contract or tort, thereby prohibiting GREC from asserting its Counts 2 and 4.

In the PPA, the Parties expressly limited their liability:

> Limitation on Liability. 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***, by statute, ***in tort or contract***, under any indemnity provision or otherwise . . . . Unless expressly herein provided, and subject to the provisions of Section 17 (Indemnities), it is the intent of the parties that the limitations herein imposed on remedies and ***the measure of damages be without regard to the cause or causes related thereto, including the negligence of any party, whether such negligence be sole, joint or concurrent, or active or passive***. . . . If no remedy or measure of damages is expressly provided herein, ***the obligor's liability shall be limited to direct actual damages only, such direct actual damages shall be the sole and exclusive remedy and all other remedies or damages at law or in equity are waived***. . . . The Parties further confirm that the express remedies and measure of damages provided by this Agreement satisfy the essential purposes of the Agreement.

PPA, **Exhibit M1**, § 26.1 (emphasis added). This section of the PPA expressly states that neither party will be liable for attenuated damages such as consequential damages. Rather, each party may only be liable for direct, actual damages. This limitation applies whether the damages are

sought in tort or in contract. Additionally, that the "measure of damages be without regard to the cause or causes related thereto, including the negligence of any party . . ." further reinforces that a contract claim may not be repackaged and presented as a tort claim to avoid the contractual limitation on liability.

As an initial matter, it is clear that GREC's Count 2 seeks consequential damages, not direct damages, in contravention of Section 26.1. GREC fails to state any direct damages that flow from GRU's alleged actions. It is well known, that "in actions sounding in contract, generally the damages recoverable are limited to those which are the natural and proximate result of the breach, or such as may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract." *Travelers Indem. Co. v. Parkman*, 300 So. 2d 284, 285 (Fla. 4th DCA 1974). "General damages are 'those damages which naturally and necessarily flow or result from the injuries alleged . . . .' Stated another way, general damages may be described as those damages 'as may fairly and reasonably be considered as arising in the usual course of events from the breach of contract itself.'" *Hardwick Properties, Inc. v. Newbern*, 711 So. 2d 35, 39-40 (Fla. 1st DCA 1998) (quoting *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972) and *Florida E. Coast Ry. V. Beaver St. Fisheries, Inc.*, 537 So. 2d 1065, 1068 (Fla. 1st DCA 1989) (internal citation omitted)). Meanwhile, "consequential damages 'do not arise within the scope of the immediate buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.'" *Hardwick*, 711 So. 2d at 40 (quoting *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y. 1974)).

Notwithstanding that GREC's purported damages are not foreseeable and are not proximately caused by GRU's alleged breaches, they are also far removed from the breaches alleged such that they are better categorized as consequential, or indirect, damages. GREC alleges that its purported damages arose out of contractual breaches by GRU:

> GRU's action in breach of its contractual obligations include its efforts regarding the Construction Cost Adjuster, the fictitious and unnecessary April 2016 outage, GRU's sending an alleged notice of Seller Event of Default to GREC's lender, and GRU's refusal to retract that notice upon the several requests made by GREC.

GREC Amended Demand, ¶ 170. GREC then alleges that "[b]y these and other actions, GRU has breached the PPA and interfered with GREC's rights and reasonable expectations under the PPA." *Id.*, ¶ 171. Certainly, damages alleged by GREC do not naturally and necessarily flow from the contractual disputes regarding the Construction Cost Adjuster (CCA), the 2016 annual Planned Maintenance outage, and the contractual requirement to send an event of default letter. Rather, at best (*i.e.*, crediting the remainder of GREC's allegations), such losses would be a proximate result of the alleged breach, and involve third parties—at best, they would be consequential or indirect damages. Yet, those damages are specifically prohibited under the PPA, meaning that Counts 2 and 4 are contractually prohibited.

Other courts have explained indirect or consequential damages in a manner consistent with *Hardwick* as involving third party relationships or agreements (such as the case here with Count 2). *See Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 475 (Tex. App. 2003) ("Profits lost on other contracts or relationships resulting from the breach are classified as 'indirect' damages."); *Airlink Commc'ns, Inc. v. Owl Wireless, LLC*, Civ. No. 3:10 CV 2296, 2011 WL 4376123, at *3 (N.D. Ohio Sept. 20, 2011) ("Furthermore, when damages claimed by a plaintiff are contingent on collateral third-party agreements—as is the case here—those damages are consequential, not direct."). As GREC describes its speculative damages, it alleges that (a) GRU's sending of the

Notice Letter resulted in (b) its placement agent, MUFG, advising GREC to suspend the alleged refinancing efforts, which in turn, (c) led to GREC not going to the market for lenders for refinancing, which in turn, (d) led to GREC not obtaining a refinancing. *See, e.g.*, **Exhibit M44**, at 6-7. GREC's twisted explanation of causation, which demonstrates steps and complexity akin to a Rube Goldberg machine, simply does not demonstrate direct damages—rather, GREC's allegations of the inability to refinance seek consequential damages. GREC's alleged damages rely upon dealings with third parties and third party agreements, circumstances which other courts have classified as indirect or consequential. *See Hardwick*, 711 So. 2d at 40; *Continental Holdings*, 132 S.W.3d at 475; *Airlink Commc'ns*, 2011 WL 4376123, at *3.

In fact, numerous courts have described damages stemming from an inability to refinance, or the imposition of financing costs to be classified as consequential damages. *See Texas Capital Bank, N.A. v. Dallas Roadster, Ltd.*, No. 4:13-cv-625, 2015 WL 1025207, at *8 (E.D. Tex. Mar. 4, 2015) ("In addition, to the extent that DR seeks either damages for loss of credit or credit damage and inability to obtain refinancing, such damages are consequential damages and are excluded by DR's contract with TCB."); *Byrum v. Wells Fargo Bank, N.A.*, Civ. No. 14-cv-00227, 2015 WL 4575084, at *6 (D. Colo. July 30, 2015) (characterizing damages from inability to refinance a loan as "consequential damages"); *Bair v. A.E.G.I.S. Corp.*, 523 So. 2d 1186, 1189 (Fla. 2d DCA 1988) (referring to costs of financing as "consequential damages"); *Bartram, LLC v. C.B. Contractors, LLC*, Civ. No. 1:09-cv-00254-SPM/GRJ, 2011 WL 1299856, at *3 (N.D. Fla. Mar. 31, 2011) ("Under generally recognized canons of construction, increased financing costs are included in the waiver [of consequential damages] because they are substantially similar to losses of financing. Furthermore, interest and finance costs are generally considered to be consequential damages under Florida law."). Just as in these cases, GREC's attempt to obtain damages for lost

opportunities to refinance are not only speculative, but are also consequential, meaning that they are impermissible under Section 26.1 of the PPA.

Moreover, section 26.1 specifically limits liability to ***direct actual damages***. Actual damages require a "proven injury or loss," or "actual losses." BLACK'S LAW DICTIONARY (10th ed. 2014). By requiring ***actual*** damages, the PPA forbids claims for speculative damages such as those asserted here in Count 2 and in Count 4. *Cf. Lutz v. Protective Life Ins. Co.*, 951 So. 2d 884, 887 (Fla. 4th DCA 2007) (contrasting "actual and direct damages" as distinct from "merely hypothetical, speculative or potential ones"). GREC's damages are mere speculation:

- The alleged interference ***could result in damages***. GREC Amended Demand, at ¶ 182;
- The alleged interference may result in GREC's inability ***to refinance in the future***. *Id.*; and
- GREC even alleges that GRU's alleged interference may "delay[] and now halt[] GRU's efforts to refinance," but fails to allege any established relationship with legal rights, or any actual breach of a relationship. *Id.*

In its Motion to Bifurcate, GREC has ***admitted*** that it has no evidence of damages to support its tortious interference claim. Specifically, GREC argues that it needs a liability determination first so that it can seek refinancing so that it can have evidence of damages. *See* Bifurcation Motion, **Exhibit M49**, at 11 ("After liability is determined, GREC can seek refinancing, the facts as to which will provide evidence relevant to the damage caused by GRU's interference."). Because GREC's alleged damages are indirect and speculative, rather than direct and actual, as required by Section 26.1 of the PPA, the Tribunal should grant GRU's motion for partial summary judgment of no liability as to Counts 2 and 4.

I. Motion for Partial Summary Judgment of No Liability Regarding Section 26.1 and Florida Law Prohibiting Assertion of a Contractual Claim as a Tort

GREC's Count 4 is little more than an attempt to restate Count 2 as a tort claim, also in violation of Section 26.1 of the PPA. As explained above, Section 26.1 prohibits claims for indirect or consequential damages (or the like), whether they are brought as contract claims or as tort claims, and without regard to the cause or causes. GREC's Count 4 runs afoul of this prohibition. Similarly, Florida state law prohibits propounding a tort claim on the basis of a breach of contract claim. Notably, in Count 4, GREC complains of the exact same behavior that it terms a breach of contract in Count 2. Neither Section 26.1's broad language nor Florida law allows the repackaging of contract claims into tort claims to skirt contractual limitations on liability or to avoid the bargained for remedies in a contract. Accordingly, GRU moves for partial summary judgment of no liability and dismissal of GREC's Count 4 on the basis that both Section 26.1 of the PPA and Florida state law prohibit GREC's assertion of a contractual claim as a tort.

Count 4 simply asserts alternate "tort" liability premised upon an alleged breach of the PPA. Count 4 in GREC's Amended Demand identifies as the alleged source of the intentional interference with business relations GRU's sending of the Default Notice to Union Bank, N.A. *See* Amended Demand, ¶ 181. GREC confirms that as the alleged source of interference in its sworn response to GRU's Interrogatory No. 7: "GREC has been harmed by GRU's intentional interference with its refinancing efforts, including by GRU's actions in deliberately providing inaccurate information to GREC's lender, Union Bank, N.A., in a purported Default Notice dated March 31, 2016." **Exhibit M46**, at 9. GREC complains that the Default Notice wrongfully claimed a material breach by GREC and that GRU threatened in the Default Notice to terminate the PPA. *See* Amended Demand, ¶ 181. GREC alleges that sending the Default Notice delayed and halted GREC's efforts to refinance. *See id.* at ¶ 182. GREC alleges that it ***could be*** damaged

in excess of $100 million. *See id.* Yet, GREC describes the same action as being a breach of contract. In Count 2, which alleges a breach of Section 20 of the PPA, GREC states, "GRU's actions in breach of its contractual obligations include . . . GRU's sending an alleged notice of Seller Event of Default to GREC's lender, and GRU's refusal to retract that notice upon the several requests made by GREC." *Id.* at ¶ 170. GREC goes on to allege that, "[b]y these and other actions, GRU has breached the PPA." *Id.* at ¶ 171.

Although GREC fails to actually plead further allegations in support of its Count 4, in response to GRU's Rule 33 Letter, GREC attempted to bolster its failing claim of intentional interference with business relations and to work its way around the statutory cap on tort damages (*see infra* Section IV.J) by citing to other alleged breaches of contract:

> The other allegations of GREC include other specific actions by GRU that GREC alleges were meritless and designed to exert "leverage" against GREC, including, for example, with regard to the Planned Maintenance outage (Count 1) [*a breach of contract claim*], the Construction Cost Adjuster (GREC Amended Demand ¶¶51-63) [*a breach of contract claim previously settled between GREC and GRU*], several failures to pay availability charges during ramp up [*a breach of contract claim asserted as Count 7*], the improper levy of several Shutdown Charges [*a breach of contract claim asserted as Count 6*], and the improper levy of Payment Decrease under §12.4.1 [*a breach of contract claim asserted as Count 8*]. Second Amendment to GREC's Arbitration Demand (Counts 6-8). If discovery reveals that these actions were taken in order to interfere with GREC's financing and refinancing relationships, they would constitute separate "incidents or occurrences" under Florida law . . . .

Exhibit M43, at 5. Each of these additional allegations is predicated upon an alleged breach of contract. Nevertheless, and having failed to actually plead them in its tort claim, GREC attempts to shoehorn these allegations into its tort claim to make an end run around GRU's motion for summary judgment regarding the statutory cap on damages under Florida's limited waiver of sovereign immunity.

The basic premise of GREC's Count 4 is that, by GRU's alleged breaches of various, independent provisions of the contract, GRU has committed the tort of intentional interference

with business relations. GREC's apparently believes that it should not be constrained to the remedies outlined in the PPA for breaches of contract when it can simply restate those alleged breaches of contract claims as a tort. This is impermissible. *See Douglas v. Braman Porsche Audi, Inc.*, 451 So. 2d 1038, 1039 (Fla. 3d DCA 1984) ("Stated otherwise, an action in tort is inappropriate where the claim is based on a breach of contract."). GREC's attempt to expand the remedies available to it under the PPA by pleading alleged contractual breaches as torts runs afoul of Florida law. A tort claim is properly dismissed when a tort claim is based "solely on the breach of contract claim." *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So. 2d 518, 519 (Fla. 3d DCA 1986). Rather, to state a valid claim for a tort, the breach of contract claim must be attended by some additional conduct. *Id.* However, "[a] breach of contract cannot be converted into a tort merely by allegations of malice." *Id.* Similarly, the fact that a defendant allegedly "acted intentionally, willfully, and outrageously as to the breach of contract does not by itself create a tort where a tort otherwise does not exist." *Lewis v. Guthartz*, 428 So. 2d 222, 224 (Fla. 1982).

When a claimant fails "to allege or prove a tort . . . which was distinguishable from or independent of [the defendant's] breach of contract," there is no tort liability. *See id.*; *Elec. Sec.*, 482 So. 2d at 519. Here, that is the case. GREC complains of the same actions that it alleges are a breach of the contract. Those alleged breaches cannot be magically transformed from breach of contract to tort simply for GREC's convenience. GREC's attempt to convert breach of contract claims into a tort claim runs afoul of the notion that the parties already specifically negotiated remedies in the PPA for breaches of contract. GREC's attempt to reach outside of the PPA to find a tort claim for intentional interference with business relations, when the complained of behavior is alleged to be a breach of contract and governed by the terms of the contract, impermissibly seeks to undermine the benefit of the bargain struck by the parties in the PPA. Florida law prohibits

GREC's transparent scheme. For these reasons, GRU's motion for partial summary judgment should be granted and GREC's Count 4 should be dismissed.

GREC's end-around is also prohibited in the PPA. Section 26.1 operates to prohibit taking a breach of contract claim and refashioning it as a tort claim in order to obtain indirect or speculative damages. Section 26.1 specifically prohibits seeking indirect damages, whether in tort or contract: "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***, by statute, ***in tort or contract***, under any indemnity provision or otherwise . . . ." PPA, **Exhibit M1**, § 26.1 (emphasis added). The PPA also specifically states that damages will be so limited without regard to the cause of action: "Unless expressly herein provided, and subject to the provisions of Section 17 (Indemnities), it is the intent of the parties that the limitations herein imposed on remedies and ***the measure of damages be without regard to the cause or causes related thereto, including the negligence of any party, whether such negligence be sole, joint or concurrent, or active or passive***." *Id.* (emphasis added). Accordingly, the parties prohibited using tort claims, whether intentional or based on negligence, to skirt the limitation on liabilities in the PPA. *See id.* (limiting damages without regard to the cause of action, and whether in negligence, or active or passive). Moreover, the parties expressly agreed to be limited to direct actual damages: "If no remedy or measure of damages is expressly provided herein, ***the obligor's liability shall be limited to direct actual damages only, such direct actual damages shall be the sole and exclusive remedy and all other remedies or damages at law or in equity are waived***. . . ." *Id.* (emphasis added). Section 26.1 also affirms that the remedies and measures of damages satisfy the essential purposes of the PPA: "The Parties further confirm

that the express remedies and measure of damages provided by this Agreement satisfy the essential purposes of the Agreement." *Id.*

The damages that GREC seeks as to Count 4 are clearly consequential or indirect damages, not direct, actual damages as permitted by the PPA. As explained above, consequential damages are those that arise not from the immediate relationship at issue, but rather from losses incurred in dealings with third parties as a proximate result. *Hardwick*, 711 So. 2d at 40. GREC seeks in its Count 4 damages arising from exceedingly attenuated conduct. Indeed, GREC's damages theory relies upon a veritable butterfly effect. In an effort to avoid the PPA's prohibition on seeking consequential damages in a contract claim, GREC repurposes the allegations of Count 2 as a tort in Count 4. But, the PPA's prohibition extends to causes of action sounding in tort, whatever the cause of action, whether active or passive. *See* PPA, **Exhibit M1**, § 26.1. GREC cannot take the same cause of action that would be prohibited as a contract claim and simply reassert it as a tort claim to work its way around Section 26.1. Accordingly, the Tribunal should grant GRU's motion for summary judgment dismissing GREC's Count 4 as impermissibly restating a contract claim as a tort claim in violation of Florida law and Section 26.1 of the PPA.

J. Motion for Partial Summary Judgment Regarding Statutory Cap on Damages Under Florida's Limited Statutory Waiver of Sovereign Immunity

GREC's Count 4 ostensibly seeks damages well in excess of the statutory cap imposed by Florida state law for tort claims against the government. The State of Florida has only waived sovereign immunity to a limited extent. FLA. STAT. § 768.28(1) ("In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies and subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act."). Section 768.28(5) expressly places a cap on allowable tort damages:

> The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but

> liability shall not include punitive damages or interest for the period before judgment. ***Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,000 or any claim or judgment***, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $300,000.

FLA. STAT. § 768.28(5) (emphasis added). Accordingly, while GREC seeks $100 million in damages for Count 4, in this arbitration, it may recover no more than $200,000 for this individual tort claim. *See id.* Although the Tribunal may render a judgment in excess of $200,000, GRU could only be liable for up to $200,000 in this arbitration—any excess amount may be paid only by an act of the Florida Legislature. FLA. STAT. § 768.28(5). Accordingly, GRU moves for summary judgment that GRU is only liable for up to $200,000 in this arbitration, absent action by the Legislature for any award in excess of that amount.

GREC alleges a single tort claim—a tortious interference claim predicated upon the sending of GRU's Seller Event of Default Notice Letter to GREC's collateral agent. GREC alleges only a single business relationship with a lender: Union Bank, N.A. GREC Amended Demand, at ¶ 179. GREC alleges a single incident as interfering with its financing or refinancing: "GRU intentionally and without justification interfered with GREC's business relations with its lenders and prospective lenders under a refinancing, including by sending the false and misleading Default Notice to Union Bank, N.A., by wrongfully claiming that GREC materially breached the PPA, and by threatening to terminate the PPA." GREC Amended Demand, at ¶ 181; *see also id.* at ¶ 159 ("GREC sent another letter to GRU dated April 18, 2016, notifying GRU that its Default Notice and threats to terminate the PPA have prevented GREC's refinancing from proceeding."); *id.* at ¶¶ 148-160 (pointing to the Default Notice as the origin of GREC's purported claim for intentional interference with business relations).

GRU also asked GREC in an interrogatory to "Explain in detail how GREC alleges it was harmed by the actions that GREC alleges in support of its Count 4 for Intentional Interference with Business Relations, including by identifying specific instances, specific persons or entities involved, and specific harms and damages, including, but not limited to, identifying specific refinancing agreements or arrangements that would have been completed or consummated if GRU had not allegedly interfered." **Exhibit M46**, at 9. In relevant part, GREC replied that "GREC has been harmed by GRU's intentional interference with its refinancing efforts, including by GRU's actions in deliberately providing inaccurate information to GREC's lender, Union Bank, N.A., in a purported Default Notice dated March 31, 2016." *Id.* In sum, GREC relies solely upon the sending of the notice letter.

In a situation such as the one here, where the plaintiff alleges a single cause of action, Florida courts have adopted the plain meaning of the Florida statute—that, for a single claim, there is a statutory cap of $200,000. *See Comer v. City of Palm Bay*, 147 F. Supp. 2d 1292, 1299 (M.D. Fla. 2001) (a single claim was limited to the statutory cap, even where several discrete incidents and occurrences underlay the single claim); *State Department of Health and Rehabilitative Servs. v. T.R. ex rel. Shapiro*, 847 So. 2d 981, 981-85 (Fla. 3d DCA 2002) (single claim of negligence, even with multiple actions, resulted in the cap being applied for a single cause of action). Of course, statutory construction is a question of law, making it appropriate for summary judgment. *See Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 23 (Fla. 2004) ("[C]onstruction of a statute is an issue of law . . . .").

GREC alleges a single tort claim against GRU, and relies upon the sending of a single letter to support its tort claim. Florida state law limits GREC's recovery in such an instance to $200,000, absent action by the State Legislature. Accordingly, the Tribunal should grant summary judgment

that damages recovery in the arbitration is limited to the statutory cap corresponding to Florida's limited statutory waiver of sovereign immunity.

V. CONCLUSION

For all of the reasons identified herein, GRU respectfully requests the Tribunal enter summary judgments in its favor.

Date: December 16, 2016 */s/ Paula W. Hinton*

Paula W. Hinton
Lisa A. Cottle
Richard T. McCarty
Matthew D. Tanner
Winston & Strawn LLP
1111 Louisiana Street, 25th Floor
Houston, Texas 77002
Tel: 713-651-2600
Fax: 713-651-2700
phinton@winston.com
lcottle@winston.com
rmccarty@winston.com
mtanner@winston.com

Counsel for The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities

CERTIFICATE OF SERVICE

I hereby certify that the all counsel of record are being served this 16th day of December 2016, with a copy of the foregoing document via electronic mail.

/s/ Paula W. Hinton
Paula W. Hinton