



throughout the reserve shutdown period and will continue to do so on an ongoing basis. This maintenance just has not required, and does not currently require, any outage.

As a result of GREC's diligent maintenance and professional management of its Facility, GREC has remained available to supply energy to GRU on demand throughout the reserve shutdown period and has earned its Available Energy payments as contemplated by the parties in the agreement they signed in the PPA. Now, however, GRU seeks to force GREC into an unnecessary outage precisely to avoid its contractual promise to pay GREC for availability. That payment/billing dispute is what this arbitration is about. GRU has manufactured alleged "breaches" of the PPA and made materially inaccurate statements about GREC's supposed obligation to take an annual "Planned Maintenance" outage. There is no such PPA requirement. GRU falsely stated that GREC has not, and has not properly, maintained its Facility on an ongoing basis. In a very troubling development, GRU has also recently escalated the situation by sending similar misleading and inaccurate information to GREC's lenders and by threatening to "terminate" the 30-year PPA based on GRU's manufactured allegations of breach and false depictions of GREC's ongoing maintenance activities.

GRU's three asserted "counterclaims" are meritless. GRU's first counterclaim alleges that GREC anticipatorily breached §10.4.1(a) of the PPA by cancelling -- via GREC's October 14, 2015 notice letter to GRU -- a previously forecasted April 2016 outage and by refusing to perform a Planned Maintenance outage in 2016. Response at 33. This counterclaim fails for many reasons, several of which are noted here.

First, the October 2015 letter was not a "change" to GREC's written annual maintenance plan, it is that plan.

Second, GREC's notice made very clear that the reason GREC did not forecast an outage to perform Planned Maintenance was that, because GRU had ordered the Facility offline into "reserve shutdown" mode months earlier in August 2015, the Facility would not need any maintenance that would require an outage (again, we will refer to such maintenance as "**outage-maintenance**"). Through the present, that status and that fact has not changed: GRU continues to keep the Facility in reserve shutdown so the Facility does not need any outage-maintenance.

Third, GRU alleges that the PPA requires GREC to take a Planned Maintenance outage annually. Response at 32 (GREC "stated that it would cancel Planned Maintenance for 2016, which is ... a breach of the PPA's requirements for Planned Maintenance"). This is simply untrue. No PPA provision authorizes GRU to dictate GREC's maintenance or requires GREC to take an annual Planned Maintenance outage. GRU has manufactured this alleged "requirement" in an effort to force GREC to be unavailable so GRU can avoid paying Available Energy amounts due under the PPA. The undisputed purpose of the outage scheduling contemplated by the PPA provisions is to ensure cooperation in scheduling outages when such outages are needed, as determined by generators like GREC. GRU (and FRCC) need to coordinate when outages are to occur among different energy supply sources in order to avoid several taking outages at the same time and thus adversely affecting a reliable energy supply. No provision in the PPA allows GRU to require that GREC take an outage or allows GRU to deny GREC's right to cancel an outage that had at some early point been forecasted but that it turns out, based on subsequent Facility operations, is not needed. Cancellations simply do not interfere with GRU's supply of reliable energy. To the contrary, by not taking an unnecessary outage, GRU increases the Energy available to GRU and so increases reliability.

Fourth, even if GREC's October 2015 letter was construed as an effort to "change" the outage schedule (which it was not), GRU accepted that scheduling notice before GRU General Manager Ed Bielariski -- four months later -- attempted to change GRU's position.

Fifth, Section 10.4.1 provides only that the annual maintenance plan is to contain a "forecast" of Planned Maintenance. By definition, a forecast is not a commitment or requirement; it is only a statement of expectation or an estimation based upon the best information available at that time.

GRU's second counterclaim alleges that GREC breached the implied covenant of good faith and fair dealing by "refusing to perform annual Planned Maintenance" and failing to follow alleged scheduling prerequisites of the PPA. GRU's third counterclaim seeks declarations that (i) GREC materially breached the PPA by refusing to take the April 2016 outage; (ii) the October 2015 letter did not change the alleged June 15 outage forecast; and (iii) GREC is obligated by the PPA to perform annual Planned Maintenance. As just described, GRU's second and third counterclaims are contingent on and simply repeat the substantive allegations in its first counterclaim and fail for the reasons explained in the preceding paragraphs above.

Several other points are warranted here to address inaccuracies in the GRU Response.

1. GRU appears intentionally to conflate a duty to perform maintenance -- which duty GREC fulfills on an ongoing basis -- with a duty to take annual Planned Maintenance outages that make the Facility unavailable for dispatch -- a duty that does not exist under the PPA.
2. GRU repeatedly mischaracterizes GREC's October 2015 notice that GREC planned no 2016 Planned Maintenance outages (*e.g.*, no outages to perform outage-maintenance) as stating that GREC would not perform required ongoing maintenance (*e.g.*, maintenance that does not require an outage to perform). *See* Response ¶59 (alleging GREC is "[p]erforming no routine, regular, preventive maintenance for an entire year"); *id.* ¶59 (alleging GREC "refus[ed] to perform maintenance this year"); *id.* ¶103 (alleging GREC thwarted "GRU's reasonable contractual expectations that ... GREC would maintain a fully reliable power

generation facility in accordance with the PPA and Good Utility Practice”). These statements are meritless.<sup>2</sup>

3. GRU ignores the fact that GREC’s preliminary forecast (in June 2015) of a potential outage in April 2016 was premised on GRU’s projection at that time that the GREC Facility would run substantially in the ensuing months. This changed dramatically starting in late August 2015 when GRU essentially shut the GREC Facility down into reserve shutdown mode -- which status has continued through the present. It was GRU’s deliberate decision to shut GREC down that obviated any need for any outage-maintenance. There is no such need and GRU cannot manufacture one to force GREC into an outage in order to avoid GRU’s payment obligations. The communications that GRU and GREC exchanged in May and June were not the notice of a written annual maintenance plan contemplated by Section 10.4.1(a). Rather, they were informal, cooperative communications providing general forecasts pursuant to good utility practice. At no time prior to February 2016 and in this arbitration did GRU ever assert otherwise.
4. GRU claims that the setting and changing of operating schedules is an “amendment” to the PPA and “controlling” contract documents. This is an absurd claim. Scheduling is and always has been an operational issue that involves no contract amendment. GRU’s assertion has no support in the PPA, the parties’ course of dealing, logic, or good faith.
5. GRU makes repeated reference in the Response to GREC’s supposedly seeking a “windfall” and characterizes its own actions as an effort to benefit utility customers, as if a party can shirk its contractual obligations. This is a contract case. The parties negotiated the terms in 2009 and acted in reliance on them, including that GREC incurred all the risk in this venture and invested hundreds of millions of dollars to design, build, operate, and maintain the 102.5 megawatt Facility in Gainesville. The economics have now changed -- not as to the cost of energy from GREC, which has remained as projected, but because of the substantial drop in natural gas prices that resulted in cheaper energy sources being available to GRU (at least for the short term). Those changes, however, do not change the risk and investment incurred by GREC and do not change the fact that this is a case governed by contract and law.

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<sup>2</sup> GRU recently sent a default notice to GREC’s lender making similar inaccurate statements about GREC’s maintenance of the Facility. In that letter, GRU also asserts that GREC has defaulted under the PPA and threatens to terminate the PPA. *See* Exhibit 1 (March 31, 2016 Letter from GRU’s Counsel to Union Bank, N.A.). GRU’s action in doing so is reckless and irresponsible in its effort to damage GREC’s reputation in the energy industry and its financial relationships, including its rights regarding refinancing, which are explicitly recognized in the PPA, including in Article 20. GREC has sent GRU a letter giving it the opportunity to retract the default notice and withdraw its inaccurate allegations in an effort to prevent further harm caused by this improper GRU effort. *See* Exhibit 2 (April 11, 2016 Letter from J. Gordon to E. Bielarski).

**ANSWER TO THE NUMBERED ALLEGATIONS IN THE GRU RESPONSE**

**I. Preliminary Statement**

1. Denied except to admit that the parties entered into the PPA as of that date.
2. Denied.
3. Denied.
4. Denied.
5. Denied.
6. Denied.
7. Denied.
8. Denied.
9. Denied.

**II. Procedural Matters**

10. No response required.
11. The terms of the PPA speak for themselves.
12. The terms of the PPA speak for themselves.

**III. The Parties**

13. Admitted.
14. Admitted.

**IV. Relevant Factual Background**

15. Admitted that the parties entered into the PPA as of that date. The terms of the PPA speak for themselves.
16. The terms of the PPA speak for themselves.
17. The terms of the PPA speak for themselves.
18. Denied except to admit that the terms of the PPA speak for themselves.
19. Admitted.
20. Denied except to admit that the terms of the PPA speak for themselves.

21. The terms of the PPA speak for themselves.
22. The terms of the PPA speak for themselves.
23. The terms of the PPA speak for themselves.
24. The terms of the PPA speak for themselves.
25. The terms of the PPA speak for themselves.
26. The terms of the PPA speak for themselves.
27. The terms of the PPA speak for themselves.
28. Admitted.
29. Denied except to admit that the documents referred to speak for themselves and that GRU omits key communications from its chronology.
30. Denied.
31. Denied except to admit that GRU is a municipally owned public utility that, when it enters into a commercial contract, is treated as any other commercial entity and must comply with all its contractual obligations.
32. Admitted.
33. Denied.
34. Denied except to admit that the cited document speaks for itself and that GRU placed the Facility in standby status.
35. Denied.
36. GREC is without sufficient basis to admit or deny.
37. Denied except to admit that the cited documents speak for themselves.
38. Denied except to admit that the cited document speaks for itself.
39. GREC is without sufficient basis to admit or deny.
40. Denied except to admit that the cited documents speak for themselves.
41. Denied except to admit that the cited documents speak for themselves.
42. Denied except to admit that the cited documents speak for themselves.
43. Denied except to admit that the cited documents speak for themselves.

44. Denied except to admit that the cited document speaks for itself.
45. Denied except to admit that the cited document speaks for itself.
46. Denied except to admit that the cited document speaks for itself.
47. Denied except to admit that the cited document speaks for itself.
48. Denied.
49. Denied except to admit that the terms of the PPA speak for themselves.
50. The terms of the PPA speak for themselves.
51. The cited document speaks for itself.
52. Denied except to admit that the cited documents speak for themselves and that an expansion joint ruptured, GREC was in a brief forced outage, and that GREC performed necessary repairs and ran a successful capacity test.

**V. GRU's Responses to GREC's Claims**

53. Legal conclusions; otherwise denied.
54. Denied except to admit that the terms of the PPA speak for themselves.
55. Denied except to admit that the terms of the PPA and the cited document speak for themselves.
56. Denied except to admit that the cited document speaks for itself.
57. Denied except to admit that the terms of the PPA speak for themselves.
58. Denied except to admit that the terms of the PPA speak for themselves.
59. Denied.
60. Denied except to admit that the terms of the PPA speak for themselves.
61. Denied except to admit that the Demand speaks for itself.
62. Denied except to admit that the cited documents speak for themselves.
63. Denied except to admit that the cited documents speak for themselves.
64. Denied except to admit that the cited documents speak for themselves.
65. Denied except to admit that GREC conducts all required maintenance.
66. Denied except to admit that the cited documents speak for themselves.

67. Denied except to admit that the Demand speaks for itself.
68. Denied except to admit that the Demand speaks for itself.
69. Denied except to admit that the Demand speaks for itself.
70. Denied.
71. Denied except to admit that the Demand speaks for itself.
72. Denied except to admit that the Demand speaks for itself.
73. Denied except to admit that the cited documents speak for themselves.
74. Denied except to admit that the cited documents speak for themselves.
75. Denied except to admit that the Demand speaks for itself.
76. Denied except to admit that the documents cited speak for themselves.
77. Denied except to admit that the documents cited speak for themselves.
78. Denied except to admit that the documents cited speak for themselves.
79. Denied except to admit that the cited document speaks for itself.
80. Denied except to admit that the terms of the PPA speak for themselves.
81. Denied except to admit that the terms of the PPA speak for themselves.
82. Denied.

**VI. GRU's Further Allegations**

83. Denied except to admit that the Demand speaks for itself.
84. Denied except to admit that the terms of the PPA speak for themselves.
85. Denied except to admit that the cited document speaks for itself.
86. Denied except to admit that the terms of the PPA speak for themselves.
87. Denied except to admit that the terms of the PPA speak for themselves.
88. Denied except to admit that the Demand speaks for itself.
89. Denied except to admit that the cited documents speak for themselves.
90. Denied except to admit that the terms of the PPA speak for themselves.
91. Denied except to admit that the cited document speaks for itself.
92. Denied except to admit that the Demand speaks for itself.

- 93. Legal conclusions; otherwise denied.
- 94. Legal conclusions; otherwise denied.
- 95. Denied as GRU characterizations, not facts.

**VII. GRU Counterclaims**

**A. Anticipatory Breach**

- 96. GREC incorporates all its previous responses by reference.
- 97. Legal conclusions; otherwise denied.
- 98. Legal conclusions; otherwise denied.
- 99. Denied except to admit that the terms of the PPA and the cited documents speak for themselves.

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

- 100. GREC incorporates all its previous responses by reference.
- 101. Legal conclusions; otherwise denied.
- 102. Denied except to admit that the terms of the PPA speak for themselves.
- 103. Denied.

**C. Declaratory Judgment**

- 104. GREC incorporates all its previous responses by reference.
- 105. Legal conclusions.
- 106. Legal conclusions; otherwise denied.

**VIII. Relief Sought**

- 107. GREC denies that GRU is entitled to any of the relief it seeks.
- 108. GREC denies that GRU is entitled to any of the relief it seeks.

## **AFFIRMATIVE DEFENSES**

GREC asserts the following defenses in response to GRU's Counterclaims. By raising the following defenses, GREC does not assume the burden of proof for any claim where such burden is otherwise on GRU. Morgan Lewis expressly reserves the right to raise additional defenses, or to supplement or amend the following defenses, as this arbitration proceeds.

### **FIRST AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, because they fail to state a claim upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, because GREC acted within its contractual rights under the PPA.

### **THIRD AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, by the doctrine of unclean hands.

### **FOURTH AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, by the doctrines of waiver and estoppel.

### **FIFTH AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, because any recovery would unjustly enrich GRU.

### **SIXTH AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, because it has suffered no damages for which GREC is legally responsible.

### **SEVENTH AFFIRMATIVE DEFENSE**

GRU's Counterclaims are barred, in whole or in part, because GRU has breached its obligation of good faith and fair dealing.

**EIGHTH AFFIRMATIVE DEFENSE**

Unless specifically admitted above, GREC denies each and every allegation in GRU's Counterclaims and denies any liability to GRU.

**NINTH AFFIRMATIVE DEFENSE**

GRU failed to mitigate its damages, if any.

**GAINESVILLE RENEWABLE ENERGY  
CENTER, LLC**

By Its Attorneys,

*/s/ Andrew C. Phelan*

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Dated: April 13, 2016

**CERTIFICATE OF SERVICE**

I certify that on April 13, 2016, I caused a copy of the foregoing to be served by electronic mail and Federal Express overnight delivery on Paula W. Hinton, counsel for the City of Gainesville, d/b/a Gainesville Regional Utilities.

*/s/ Emma D. Hall*

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Emma D. Hall