

AMERICAN ARBITRATION ASSOCIATION

Gainesville Renewable Energy Center, LLC,

Claimant,

v.

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

Respondent/Counterclaimant.

AAA Case No. 01-16-0000-8157

**GRU'S RESPONSE AND AMENDED COUNTERCLAIM TO
GREC'S AMENDED ARBITRATION DEMAND**

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**GRU’S RESPONSE AND AMENDED COUNTERCLAIM TO
GREC’S AMENDED ARBITRATION DEMAND**

Pursuant to R-5 of the American Arbitration Association’s (the “AAA”) Rules for Commercial Arbitration and Procedural Order No. 1 in this case, Respondent/Counterclaimant The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities (“GRU”) hereby submits this Response and Amended Counterclaim (“Response”) to Claimant Gainesville Renewable Energy Center, LLC’s (“GREC”) Amended Arbitration Demand filed on June 7, 2016 (the “Amended Demand”).

I. Preliminary Statement

1. GRU and GREC (the “Parties”) entered into the Power Purchase Agreement for the Supply of Dependable Capacity, Energy and Environmental Attributes from a Biomass-Fired Power Production Facility dated April 29, 2009 (the “PPA”). The Facility began commercial operations in December 2013. The current dispute regards (i) GREC’s refusal to comply with the PPA’s requirement that GREC perform annual maintenance work at GREC’s biomass-fueled electric power production facility (defined in the PPA as the “Facility”), and (ii) GREC’s misreporting of the Facility’s availability to produce and deliver 100% of its seasonal Dependable Capacity under the PPA.¹ The PPA requires GREC to conduct maintenance at the Facility annually to ensure the Facility’s reliable long-term and safe operation (defined in the PPA as “Planned Maintenance”). By refusing to conduct Planned Maintenance in 2016, GREC has defaulted in its material obligations under the PPA. Section 8 of the PPA also requires that GREC must accurately report its availability to produce and deliver Energy to GRU, and accurately represent in its invoices for Available Energy the quantity of MWh that the Facility actually could have produced during each monthly billing period. On information and belief,

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

GRU may have overpaid for Available Energy on account of GREC's misreporting of the Facility's availability.

2. GREC's default under the PPA has deprived GRU of its reasonable expectation that GREC would conduct Planned Maintenance during a twenty-one day period in 2016² – from April 9th through April 29th – in accordance with the PPA's requirements in Section 10.4.1 and the written annual maintenance plan that GREC and GRU agreed to in June 2015. Based on that written annual maintenance plan, GRU understood that GREC would take a twenty-one day outage at the Facility to conduct Planned Maintenance as required by the PPA. In accordance with the PPA's pricing and payment provisions, GRU understood that it would not owe any payments to GREC for Available Energy during the twenty-one day outage. *See* PPA § 15.2, Ex. R1, at 17. In accordance with GRU's annual ratemaking procedures, which set customer rates in July for the following fiscal year commencing on October 1st, GRU designed its customer rates for the 2016 fiscal year based on that expectation.

3. In October 2015, GREC attempted to cancel its Planned Maintenance for 2016. GREC's unilateral cancellation violates (i) GREC's material obligation under the PPA to conduct annual Planned Maintenance at the Facility, (ii) the PPA's requirement for obtaining GRU's agreement to any change to the agreed upon written annual maintenance plan, and (iii) the requirement of Section 29.11 of the PPA that any modifications to the PPA must be in writing and agreed by the Parties.

4. GREC's breach of the PPA also results in its efforts to realize an improper financial windfall by demanding that GRU make payments to GREC that are not owed for the

² In a letter dated March 3, 2016, GREC has also indicated that it "does not plan to take a planned maintenance outage in calendar year 2017." Fagan Letter to Brown (Mar. 3, 2016), Ex. R29. GREC's intended plan would result the Facility not undergoing Planned Maintenance for two full calendar years.

period when GREC was required to conduct Planned Maintenance in accordance with its written annual maintenance plan. This financial windfall is in excess of \$4,000,000 (21 days of cancelled outage at \$194,709 per day).

5. Based on the written annual maintenance plan that was agreed to in June 2015, GRU is not required to pay GREC the \$4,000,000 that GREC now demands. That amount therefore is not included in GRU's current electric and fuel rates, which were set and became effective October 1, 2015, for fiscal year 2016. Allowing GREC to extract a \$4,000,000 windfall would boost GREC's profits under the PPA, at the direct expense of GRU's public utility customers.

6. Under the PPA, GRU pays GREC nearly \$200,000 each day in Available Energy payments. These payments are made pursuant to GREC's representations that the Facility is "available" to produce and deliver Energy upon dispatch from GRU at 100% of its seasonal Dependable Capacity level; however, counsel for GREC, in a Preliminary Hearing held on June 2, 2016, indicated that GREC has performed "thousands of work orders" while the Facility has been in standby. Moreover, GREC's Amended Demand indicates that GREC has performed "thousands" of maintenance tasks such that "no outage-maintenance is currently required." Amended Demand ¶¶ 89, 115. Despite all of this alleged maintenance conducted while the Facility has been in standby, GREC has reported only one period of decreased availability, and has sent monthly invoices demanding payment for Available Energy that report the Facility as having been capable of producing Energy at its full Dependable Capacity for every hour of every day. Thus, on information and belief, GREC has failed to accurately report the Facility's availability under the PPA, and has misrepresented the Facility's actual capability to generate

Energy in its invoices to GRU. GREC's misreporting under the PPA has harmed GRU in an as yet undetermined amount.

7. Throughout the Amended Demand, GREC also alleges that GRU has "engaged in a series of actions designed to interfere with GREC's rights under the PPA in order to exert leverage to force GREC to renegotiate the PPA's terms or to sell the Facility to the City for less than its market value." *See, e.g.*, Amended Demand, at 1. GREC's allegations in this regard are fundamentally flawed and legally irrelevant. As a party to the PPA, GRU cannot interfere with GREC's rights under the PPA. *See Jarzynka v. St. Thomas Univ. of Law*, 310 F. Supp. 2d 1256, 1267 (S.D. Fla. 2004) (citing *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. 3rd DCA)) ("It is well-settled Florida law that a cause of action for interference does not exist against one who is himself a party to the contract allegedly interfered with."). To the contrary, because GRU employed no improper methods, GRU's "activities taken to safeguard or promote [its] own financial, and contractual interests are entirely non-actionable." *Ethyl Corp.*, 386 So. 2d at 1225. GREC's allegations are merely inflammatory rhetoric meant to distract from GREC's breach of the PPA in its failure to schedule Planned Maintenance.

8. GREC's Amended Demand also adds a claim for intentional interference with business relations, alleging that GRU "intentionally and without justification" interfered with GREC's relationship with Union Bank, N.A. by notifying Union Bank that GREC had defaulted under a material obligation of the PPA by refusing to perform Planned Maintenance in 2016. GREC alleges sensational damages "in excess of \$100 million" (Amended Demand, ¶ 182); however, GREC ignores the plain language of the PPA and the Consent and Agreement ("Consent") between GRU, GREC, and Union Bank. The PPA and Consent clearly dictate GRU's *contractual obligation* to provide the Notice Letter to Union Bank before GRU could

exercise the remedies it seeks in this action. *See, e.g.*, PPA, Consent § 4, Ex. R1. Moreover, GREC's allegations ignore the limitation of liability in the PPA (*see* PPA § 26.1) and basic tenets of Florida's sovereign immunity laws (*see* FLA. STAT. § 768.28(5)).

9. In sum, GREC's asserted claims in the Amended Demand are contrary to the PPA and without merit. As explained below, GRU has acted in accordance with its right to require GREC to perform Planned Maintenance on an annual basis in accordance with the PPA. Through this Response, GRU requests that the Arbitrator issue an interim award that dismisses GREC's claims with prejudice. Through this Response, GRU also submits counterclaims and requests an award that declares GREC to be (1) in default of a material obligation under the PPA; (2) liable to GRU for any and all Available Energy payments made to GREC while the Facility was in fact not fully available and capable of generating and delivering Energy in the amounts reported in GREC's invoices; and, (3) in breach of its implied covenant of good faith and fair dealing. GRU requests an award of damages and intends to exercise its contractual remedies in respect to GREC's default, including, but not limited to, potentially exercising its right to terminate the PPA.

10. Throughout the Amended Demand, GREC repeatedly introduces extraneous discussion of previous disputes between the Parties and other alleged facts that bear no relation to the current dispute. GREC also levies repeated ad hominem attacks against GRU's General Manager, Ed Bielarski. GREC attempts to cast a prejudicial shade on Mr. Bielarski's legitimate business decisions by using such inflammatory terms as "mug-a-nug," by alleging that GRU and Mr. Bielarski engaged in "improper" leveraging efforts, and by alleging that Mr. Bielarski and members of Gainesville's City Commission harbored a desire to "break" the Facility. GREC has

eschewed reliance on facts and actual occurrences in favor of sensational and irrelevant rhetoric.³ GREC's excessive vituperative invective lacks any substantive value in the current dispute. Indeed, it appears as though GREC has taken advantage of the more open pleading standards of arbitration in an attempt to distract and prejudice the Arbitrator against GRU and Mr. Bielarski. This Response will only address relevant facts and avoid any unnecessary, unhelpful, and irrelevant commentary on GREC and its executives, employees, and allies.

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

12. Finally, GREC's Amended Demand continues to cite to, and even quote from, documents and correspondence that GREC has not attached as exhibits to the Amended Demand. *See, e.g.*, Amended Demand ¶¶ 39, 45–50, 56, 106–109. GREC's failure to supply the documents on which it relies is extremely prejudicial. In many other instances, GREC relies solely on citations to the affidavit of a former GRU employee, Mr. John Stanton. Amended Demand, Ex. 34. Mr. Stanton and GRU are engaged in an ongoing dispute regarding his termination, the fact and circumstances of which align Mr. Stanton's personal interests with those of GREC. GRU will endeavor to supply the Arbitrator with a complete and reliable record.

³ In fact, GREC goes so far as to twice insinuate that GRU is in violation of federal laws designed to protect critical infrastructures from threats of terrorism. In its second footnote, GREC quotes extensively from a Presidential Policy Directive that was codified in the USA Patriot Act of 2001, at 42 U.S.C. § 5195c. *See* Amended Demand at 2 n.2. Later, GREC brazenly alleges that GRU planned, acted, or conspired to physically damage or incapacitate a major electric generation facility and thereby raised "serious issues of violation of applicable laws." *Id.* ¶ 44. Aside from being unfounded, outrageous, and extremely offensive, GREC's allegations appear to be an improper attempt to threaten criminal charges in an attempt to obtain an advantage in a civil action.

II. Procedural Matters

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

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

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

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

III. The Parties

A. Claimant GREC

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

B. Respondent/Counterclaimant GRU

17. The City of Gainesville, Florida, is a municipal corporation created by and existing under the laws of the State of Florida. Under the business name “Gainesville Regional Utilities,” the City provides a number of utility services to customers inside and outside its corporate limits, including electric, water, wastewater collection, gas, and telecommunications services. GRU owns and operates several power generating facilities and provides electric services to approximately 93,000 retail and wholesale customers in Gainesville and the surrounding areas.

IV. Relevant Factual Background

18. On April 29, 2009, GRU and GREC entered into the PPA, attached as Ex. R1. The PPA requires GREC to “build, operate and maintain” the Facility at a site located in Alachua County, Florida, and to sell and deliver Products (consisting of Dependable Capacity, Energy, and Environmental Attributes) to GRU at the specified Delivery Point. PPA Recitals, §§ 1.2, 6.1, Ex. R1 at 1, 7. Dependable Capacity is a measure of power-generating capacity of the Facility and is determined through testing in accordance with Appendix IX of the PPA. The Facility’s current Dependable Capacity is 102.5 megawatts (“MW”). The PPA allows GRU to dispatch and schedule the Facility to deliver Energy and requires GRU to pay GREC the Contract Prices specified in Appendix III for all Products produced by the Facility and delivered to the Delivery Point during the Delivery Term. *Id.* §§ 10.1, 10.5, 3.1.2.

A. Pricing and Payment Provisions of the PPA

19. The PPA requires GRU to pay GREC two separate charges for every megawatt-hour (“MWh”) of Available Energy. The two charges are a Non-Fuel Energy Charge of \$56.15 per MWh and a Fixed O&M Charge of \$23.00 per MWh, for a total charge of \$79.15 per MWh. *See* PPA, Appendix III, Ex. R1.

20. Available Energy, as defined in the PPA, has three components that are measured in MWh and added together to calculate the total Available Energy that is subject to the \$79.15 per MWh charge each month: (i) each MWh of Energy generated by the Facility and delivered to the Delivery Point (this quantity is also defined separately as “Delivered Energy”); (ii) for each hour in which GRU dispatches the Facility at less than 100% of the seasonal Dependable Capacity, each MWh of Energy that could have been generated by the Facility and delivered to the Delivery Point had the Facility been dispatched at 100% of the seasonal Dependable Capacity, but that was not generated by the Facility due to dispatch instructions from GRU; and (iii) for each hour during which GREC would have been capable of producing and delivering Energy but was prevented from doing so due to a constraint or fault in GRU’s facilities, but only if that was not caused by a constraint or fault of facilities owned by third parties, each MWh of Energy that could have been generated by the Facility and delivered to the Delivery Point had the Facility been dispatched at 100% of the seasonal Dependable Capacity, but that was not generated by the Facility due to the constraint or fault. *See* PPA Schedule 1, Ex. R1 (providing the full definition of Available Energy).

21. The second category of Available Energy – the category specified in subpart (ii) of the definition – is particularly relevant to this dispute. Available Energy under subpart (ii) is the amount of Energy that the Facility could produce, but did not produce, due to GRU’s election not to dispatch the Facility at its full seasonal Dependable Capacity level. The effect of subpart (ii) is that GRU pays GREC a substantial payment – equal to \$194,709 per day, or \$5,841,270 per month⁴ – for GREC to maintain the Facility in a state of readiness such that the Facility is available to produce Energy when called upon by GRU. Based on the calculation of

⁴ This is the payment for a month with 30 days when the Facility is fully available each day to produce Energy up to the seasonal Dependable Capacity level of 102.5 MW.

Available Energy, the payment is due even if GRU does not actually require Energy from the Facility. As long as the Facility is capable of producing Energy at its full seasonal Dependable Capacity level, GRU pays GREC for all Energy that the Facility is capable of providing as if the Facility were dispatched at its full Dependable Capacity, at a price of \$79.15 per MWh. If the Facility is not capable of producing Energy at its full seasonal Dependable Capacity, the definition of Available Energy obligates GREC to discount the amount it invoices to GRU. *See* PPA, Schedule 1, Ex. R1.

22. For months when the Facility reports being available to generate Energy at its full Dependable Capacity level (currently 102.5 MW) but is not dispatched by GRU at all, the payment owed for the Non-Fuel Energy Charge and the Fixed O&M Charge (i.e., the \$79.15 per MWh charge) is \$5,841,270.⁵ For months when the Facility is fully available but dispatched at a level lower than its full seasonal Dependable Capacity, GRU pays the Non-Fuel Energy Charge and the Fixed O&M Charge (i.e., the \$79.15 per MWh charge) for the combined quantity of Delivered Energy and Available Energy attributable to the Energy that could have been delivered, but was not delivered, due to GRU's partial dispatch of the Facility. If the Facility is delivering Delivered Energy in every hour and is also fully capable of delivering incremental Energy in each hour up to the full amount of its Dependable Capacity, then GREC would be entitled to payment of the same \$5,841,270 for that month.

23. In addition to the payment for Available Energy each month, GRU pays GREC variable charges for Delivered Energy (i.e., Energy that is actually produced and delivered by the Facility). These charges are the Variable O&M Charge and the Fuel Charge, as specified in Appendix III of the PPA. These amounts are designed to compensate GREC for variable costs

⁵ See previous footnote.

that GREC incurs to operate the Facility, including the cost of fuel. *See* PPA, Appendix III, Ex. R1. The effect is that GREC receives substantial payments every month to keep the Facility available and ready to operate, regardless of whether GRU dispatches the Facility to generate Energy, and GREC receives additional payments for Delivered Energy that compensate GREC for the additional costs incurred to operate the Facility when it is dispatched.

24. Under the definition of Available Energy, GREC is not paid for Energy that the Facility is not capable of generating and delivering to the Delivery Point. If the Facility experiences a forced or planned outage, there is no Available Energy during the period the Facility is down and therefore no payment obligation for the outage hours under the PPA. Similarly, if the Facility is unable to operate at its full Dependable Capacity, but is available to operate at a reduced capacity level (referred to as a “derate”), the amount of Available Energy during the hours when the derate occurs would be reduced to the level of actual availability to operate. This structure is built into the definition of Available Energy and Appendix III. In addition, Section 15.2 of the PPA provides that GRU “shall not be obligated to purchase Products that cannot be delivered due to disruptions, breakdowns, electrical system failures and/or mechanical failures, *maintenance* or repair.” PPA, Ex. R1, at 17 (emphasis added). Thus, during periods when the Facility is derated or experiences an outage, whether planned or forced, the payment owed for Available Energy under the PPA is reduced, potentially to zero.

B. The PPA’s Requirements for Planned Maintenance

25. In the Recitals to the PPA, GREC stated its “inten[tion] to build, operate and maintain” the Facility. PPA Recitals, Ex. R1, at 1. As explained above, the PPA requires GRU to pay for all Available Energy, and such payments compensate GREC for maintaining the Facility in a state of readiness to produce and deliver Energy to the Delivery Point. The PPA allows GRU to schedule and dispatch the Facility to produce Energy, and requires GREC to

provide periodic schedules and forecasts to GRU regarding the Facility’s capabilities and outages. *See generally id.* § 10, Ex. R1, at 10–14. For example, Section 10.3.2 requires an annual forecast as follows:

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

Id. at 11 (emphasis added).

26. Section 10.4 of the PPA is titled “Outages” and, as its name implies, contemplates a variety of situations in which the Facility will undergo outages. *See generally id.* § 10.4, Ex. R1, at 11–13. The schedule of “Planned Maintenance” referred to in Section 10.3.2 above is governed by Section 10.4.1, which imposes the following material obligations in subpart (a):

[GREC] shall submit *a written annual maintenance plan* containing its forecast of Planned Maintenance for the coming year no later than sixty (60) days prior to . . . the start of *each calendar year*. *Any and all changes to such plan shall be mutually agreeable* to [GREC], [GRU], and to FRCC

Id. at 12 (emphasis added). Thus, Section 10.4.1 calls for a written annual maintenance plan for an annual Planned Maintenance outage as contemplated by Section 10.4 “Outages” generally.

The PPA defines “Planned Maintenance” as:

[T]he occurrence of reduced or suspended operation of the Facility *for the purpose of performing routine or regular maintenance in accordance with Good Utility Practice*. Planned Maintenance is distinguished from Forced Outages and Maintenance Outages in that the duration and timing of Planned Maintenance has been *established during the prior business year*.”

Id. at Schedule 1 (emphasis added). Thus, every year, the PPA requires a written annual maintenance plan specifying the following year’s Planned Maintenance.

27. The definition of Planned Maintenance specifies that routine or regular maintenance must be performed in accordance with “Good Utility Practice,” which is also defined in the PPA. The definition of Good Utility Practice specifies that “[w]ith respect to the

Facility, Good Utility Practice includes but is not limited to taking reasonable steps to ensure the following: . . . (iii) That preventative, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation.” *Id.* at Schedule 1.

28. The PPA specifies that GREC cannot change its written annual maintenance plan unless GRU agrees. Section 10.4.1(a) requires that “[a]ny and all changes to such plan shall be ***mutually agreeable*** to [GREC], [GRU], and to FRCC and promptly communicated to [GRU] ***in writing*** as soon as practicable.” PPA § 10.4.1(a), Ex. R1, at 12 (emphasis added). Thus, GRU, GREC, and the Florida Reliability Coordinating Council, Inc. (“the FRCC”)⁶ must all agree on any proposed change to the Planned Maintenance schedule.

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

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

Id. at 11. The PPA places similar restrictions on efforts to schedule Planned Maintenance outages. Section 10.4.1(d) requires:

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

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

⁶ The FRCC is a not-for-profit organization designed to regulate the reliability, adequacy, and security of bulk electricity supply in Florida. For more information, *see* <https://www.frcc.com/AboutUs/SitePages/Home.aspx>.

C. The 2016 Planned Maintenance Schedule

30. Pursuant to Section 10.4.1(a), GRU maintains a “10 Year Outage Schedule” and a “Rolling 12 Month Outage Schedule” (collectively, “the Outage Schedules”). These Outage Schedules are generated with input from all the power generation facilities in GRU’s system, including GREC. With the aid of the Outage Schedules, GRU is able to stagger maintenance outages for its various production facilities to ensure a safe and reliable supply of electricity. Since the inception of both the PPA and GRU’s business relationship with GREC, the Outage Schedules have been used to schedule annual Planned Maintenance outages for the Facility. *See* Amended Demand ¶ 81 (indicating that GREC has provided information to assist in the preparation of the Outage Schedules “ever since GREC began operations”).

31. On May 1, 2015, GRU circulated a revised 10 Year Outage Schedule, which prompted GREC to request a Planned Maintenance outage from April 2nd through April 22nd of 2016. Abel Email to Demopoulos (May 1, 2015), Ex. R2a. On June 17, 2015, GRU replied inquiring of GREC: “Would it be possible for you to reschedule your outage to April 9th – 29th?” Demopoulos Email to Abel (June 17, 2015), Ex. R2b. In response to GRU’s request, GREC replied the following day simply: “April 9th to April 29th will work for us.” Abel Email to Demopoulos (June 18, 2015), Ex. R2c. GRU further commemorated this agreement on October 21, 2015, when it circulated revised Outage Schedules confirming that GREC’s annual Planned Maintenance outage would occur in April 2016 between the 9th and the 29th. Demopoulos Email (Oct. 21, 2015), Ex. R3.

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

D. Standby Status of the Facility

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

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

35. The Facility experienced a Forced Outage under Section 10.4.3 of the PPA on August 7, 2015, and was forced to shut down. At that time, GRU exercised its right under the PPA to issue a dispatch instruction for the Facility to remain in standby status, rather than dispatch the Facility to produce and deliver Energy. While the Facility is in standby status, GRU pays GREC \$79.15 per MWh for Available Energy (i.e., each MWh of Energy that the Facility reports being capable of generating and delivering, but is not generating or delivering because of GRU's dispatch instructions). This means that for months when the Facility has reported being available to generate Energy at its full Dependable Capacity level, GRU pays GREC the monthly payment that is described above, regardless of whether any Energy is actually produced and delivered.

36. By not dispatching the Facility for Energy, however, GRU is able to save the variable charges applicable to Delivered Energy. In an August 17, 2015 Letter to GREC, Ed Bielarski, GRU's General Manager, explained that even at a reduced minimum dispatch level, "GREC's variable pricing would still cost more than GRU's other options." Bielarski Letter to Gordon (Aug. 17, 2015), Ex. R4. Thus, the Facility was placed, and remains, in standby status.

37. GRU continues to comply with its contractual obligation to pay GREC under the PPA for all Available Energy, which applies even when the Facility is not dispatched. To obtain a savings for GRU customers, GRU has exercised its right under the PPA not to dispatch the Facility, which at least saves the additional Variable O&M Charge and the Fuel Charge that apply to Delivered Energy. GRU still pays the fixed daily rate of \$194,709 for Available Energy by paying GREC \$5,841,270 each month for Available Energy that is not delivered to GRU.⁷

E. John Stanton

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

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

In the meantime, please be aware that my AGM of Energy Supply, John Stanton, is not authorized to make changes to the four corners of the Power Purchase Agreement or other controlling documents. In the future, please direct communications related to those changes to me for GRU's official position and ability to renegotiate.

Bielarski Letter to Gordon (Aug. 17, 2015), Ex. R4. Then, again, in a separate email to Albert Morales, GREC's CFO, Mr. Bielarski reiterated:

⁷ As explained above, this is the payment owed for a month that has 30 days if the Facility is actually available and capable of generating and delivering Energy at its full Dependable Capacity of 102.5 MW in every hour of the month.

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

Bielarski Email to Morales (Sept. 13, 2015), Ex. R5. Through these two communications, roughly one month apart, GRU unequivocally informed GREC that any and all proposed changes to the PPA or any controlling documents must be directed to and approved by Mr. Bielarski.⁸ In addition to the explicit notice provided by Mr. Bielarski, Section 29.11 of the PPA requires that any modification to the PPA must be in writing and agreed to by the Parties.

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

40. Despite being indisputably aware that any and all changes to controlling documents were to be directed to Mr. Bielarski,⁹ on October 14, 2015, GREC sent a letter (the “October Letter”) to Mr. Stanton purporting to cancel its Planned Maintenance for 2016. Fagan Letter to Stanton (Oct. 14, 2015), Ex. R6. GREC’s October Letter provides, in its substantive entirety:

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

⁸ For its Amended Demand, GREC obtained an affidavit from Mr. Stanton. Amended Demand, Ex. 34. As with GREC’s Amended Demand, Mr. Stanton’s affidavit relies heavily on inflammatory allegations, all of which are irrelevant to the contract interpretation issues in this case. Mr. Stanton’s affidavit is rife with hindsight bias and reflects the obvious self-interest resulting from his ongoing personnel dispute. It focuses largely upon justifying why Mr. Stanton should not have been dismissed from his job. The Stanton affidavit appears to be little more than another attempt to prejudice the Arbitrator against GRU. Moreover, the Stanton affidavit includes improper statements violating the parol evidence rule. Mr. Stanton impermissibly undertakes his own interpretation of the PPA, including purporting to disclose the intent behind the Planned Maintenance provision (a purported intent that is inconsistent with the plain language of the rest of the agreement). Despite the largely superfluous nature of his affidavit, it is worth noting that Mr. Stanton does acknowledge that GRU dispatched GREC into standby mode “[f]or economic reasons.” Amended Demand, Ex. 34 ¶ 22.

⁹ GREC was also indisputably aware that any modification to the PPA, such as the amendment of Section 10.4.1 to eliminate the requirement for annual Planned Maintenance, must be in writing and agreed to by the Parties. PPA § 29.11, Ex. R1, at 37. Moreover, GREC is also aware that approval of amendments to the PPA requires a majority vote of the Gainesville City Commission.

Id. (emphasis added). Without asking whether GRU would agree to cancel the Planned Maintenance for 2016, the October Letter simply informed Mr. Stanton that “GREC plans no Maintenance or Planned outages in 2016.” *Id.* The October Letter was not sent or copied to Mr. Bielarski. Nor did GREC satisfy the requirements of Section 29.11 by seeking, in writing, an amendment to eliminate the requirement for annual Planned Maintenance outage in Section 10.4.1 of PPA.

41. Further, Mr. Stanton did not adequately distribute the October Letter (or the information contained therein) within GRU. On October 21, 2015, one week after Mr. Stanton received the October Letter, George Demopoulos, GRU’s Major Maintenance Leader, circulated revised Outage Schedules that included GREC’s Planned Maintenance outage from April 9th through April 29th. Demopoulos Email (Oct. 21, 2015), Ex. R3. Mr. Demopoulos is responsible for maintaining the annual maintenance plans for all of GRU’s power generation facilities. The revised Outage Schedules attached to Mr. Demopoulos’ email were consistent with the agreed upon written annual maintenance plan of June 2015, which called for a Planned Maintenance outage in April 2016.

42. The Amended Demand claims that GREC confirmed its cancellation of the annual Planned Maintenance in an email on December 10, 2015. *See* Amended Demand ¶ 109. The correspondence to which GREC refers was addressed solely to Mr. Stanton. *See* Fagan Email to Stanton (Dec. 10, 2015), Ex. R7. Thus, GREC once again failed to inform Mr. Bielarski, the one person with authority to agree to such changes on GRU’s behalf. Further, there is no record that Mr. Stanton ever replied to GREC’s December 10th email to provide the “confirmation” GREC alleges. Further, it is undisputed that no revision was made to the PPA altering the plain language of Section 10.4.1.

43. As yet another indication that GRU was effectively unaware of GREC's unilateral actions, on February 3, 2016, George Demopoulos reached out to GREC and asked for "any *new* updates" that he should add to the Outage Schedules. Demopoulos Email to Abel (Feb. 3, 2016), Ex. R8 (emphasis added). In response, Russell Abel, GREC's Plant Manager, stated simply: "There are no changes at this time." Abel Email #1 to Demopoulos (Feb. 3, 2016), Ex. R8. Then, in an immediately subsequent email, Mr. Abel purported to "remind" Mr. Demopoulos that "we have *cancelled* our April 2016 planned outage."¹⁰ Abel Email #2 to Demopoulos (Feb. 3, 2016), Ex. R9 (emphasis added). The following day, February 4th, Mr. Demopoulos circulated revised Outage Schedules reflecting GREC's unilateral cancellation of the annual Planned Maintenance outage, which had not been agreed to by GRU. Demopoulos Email (Feb. 4, 2016), Ex. R10.

44. Also on February 3, 2016, Mr. Stanton's opinion that he had approved GREC's unilateral cancellation of the 2016 Planned Maintenance came to the attention of Ed Bielarski (i.e., the only person with the authority to agree to a change in the written annual maintenance plan). In a letter to GREC the following day, Mr. Bielarski gave formal notice that, pursuant to Section 10.4.1(a) of the PPA, "GREC's proposed change to the Planned Maintenance schedule is not agreeable to GRU." Bielarski Letter to Gordon (Feb. 4, 2016), Ex. R11. In a further confirmation that GREC must comply with its material obligation to conduct Planned Maintenance under the PPA, Mr. Bielarski also informed GREC that, regardless of whether

¹⁰ Not only do these emails indicate that Mr. Demopoulos, as well as the rest of GRU, were unaware of GREC's intention to forego its April Planned Maintenance, GREC's statement: "we have *cancelled* our April 2016 planned outage," also contains a tacit admission that the April outage was in fact already a part of the written annual maintenance plan. This further shows that the October Letter was an attempt to change the written annual maintenance plan for 2016 that the Parties had previously agreed upon in June of 2015.

GREC performs the agreed upon maintenance, GRU would not pay Available Energy charges during the agreed upon period between April 9th and April 29th. *Id.*

45. On February 8, 2016, Mr. Demopoulos recirculated corrected Outage Schedules that once again reflected GREC's Planned Maintenance outage during the period from April 9th through April 29th, consistent with the written annual maintenance plan that was previously agreed upon in June 2015. Demopoulos Email (Feb. 8, 2016), Ex. R12.

46. Also on February 8th, GREC issued a formal notice of dispute resolution under Section 24(a) of the PPA, alleging that GRU would be in breach of the PPA if it failed to pay for Available Energy during the time period in April during which Planned Maintenance was to occur. Gordon Letter to Bielarski (Feb. 8, 2016), Ex. R13.

47. The following day, Mr. Bielarski responded by providing assurance that GRU did not intend to breach the PPA, and stated his belief that GREC's formal notice of dispute was premature. Bielarski Letter to Gordon (Feb. 9, 2016), Ex. R14.

48. GREC replied on February 17, 2016, demanding that GRU acknowledge (i) that GREC would not conduct Planned Maintenance during the previously approved April 2016 Planned Maintenance outage, and (ii) that GREC would receive full-freight Available Energy payments for the entire month of April. Gordon Letter to Bielarski (Feb. 17, 2016), Ex. R15.

49. On February 23, 2016, Mr. Bielarski responded by plainly laying out the history of the April Planned Maintenance plan as agreed upon by the Parties in May and June of 2015 (see *supra* Part IV.B). Bielarski Letter to Gordon (Feb. 23, 2016), Ex. R16. Mr. Bielarski then once again informed GREC that its proposal to cancel Planned Maintenance was not agreeable to GRU. *Id.*

50. Finally, on February 29, 2016, Mr. Bielarski was forced to provide formal notice that GRU would consider GREC in breach of Section 10.4.1(a) if it failed to perform the April 2016 Planned Maintenance on the Facility as agreed upon by the Parties in June of 2015. Bielarski Letter to Gordon (Feb. 29, 2016), Ex. R17.¹¹

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

52. As of the filing of GRU's Response and Counterclaim to GREC's Amended Arbitration Demand, GREC has neither taken a Planned Maintenance outage nor performed any Planned Maintenance in 2016. The originally agreed upon period for the 2016 Planned Maintenance outage, April 9th to 29th, passed without the occurrence of Planned Maintenance or the Planned Maintenance outage provided for in Section 10.4.1 of the PPA.

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

53. As described above in Part IV.A, under the PPA the amount owed for Available Energy under subpart (ii) of the definition is determined by the Energy that could be generated and delivered if the Facility were dispatched at its full seasonal "Dependable Capacity." *See* PPA Schedule 1, Ex. R1 (definition of Available Energy). Dependable Capacity is a measure of the Facility's capability to generate Energy, whereas Energy is a measure of electric energy generated by the Facility.

54. Dependable Capacity is determined from time to time through testing conducted in accordance with Appendix IX of the PPA, which allows for changes to the Dependable

¹¹ As explained in GRU's Reply to Additional Arguments in GREC's April 13, 2016 Filing (filed Apr. 27, 2016), incorporated herein in its entirety, on March 31, 2016, GRU notified GREC's Collateral Agent, Union Bank N.A., of GREC's Seller Event of Default that occurred on March 30, 2016. *See* Ex. R22.

Capacity to account for changes in the Facility’s operational capabilities. Appendix IX of the PPA provides a method by which GRU may order Dependable Capacity tests requiring GREC to demonstrate the Facility’s capability to generate Energy. *See id.* at Appendix IX (permitting GRU to order an Dependable Capacity test once per Demonstration Period). GRU exercised its right to order a Dependable Capacity test during the winter Demonstration Period and issued the order on March 6 of 2016. De Leo Email (Mar. 6, 2016), Ex. R18.¹²

55. On March 7, 2016, prior to achieving a successful start of the Dependable Capacity test, as the Facility was stabilizing or warming up, GREC reported that “[a] primary air fan duct expansion joint ruptured, and we will not be able to start the test at 10 am as planned. We will let you know when we will be able to test as soon as we have an estimate.” Abel Email to De Leo (Mar. 7, 2016), Ex. R18. Due to this failure, GREC failed to perform the Dependable Capacity test and failed to meet the operating level specified by GRU at the times required by GRU. The Facility experienced a Forced Outage, lasting nearly three days, during which time GREC presumably conducted necessary repairs. GREC later restarted the Facility to conduct another test and operated for six hours at 102.5 MW, thereby completing a Dependable Capacity test days behind the schedule requested by GRU.

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

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

56. Two basic principles of contract interpretation govern this dispute. First, “[u]nder Florida law, the basic rule of contract interpretation is that the intention of the parties is to be

¹² GREC refers to this and other Dependable Capacity tests ordered by GRU as “surprise” tests, and alleges that they failed to comply with PPA § 23.4 because they were not ordered “a reasonable amount of time in advance.” In fact, in each instance, GRU gave GREC 35 hours to come up to minimum load. *See* De Leo Email (Mar. 6, 2016), Ex. R18. This is the time for a return to service from a cold standby of longer than 21 days that GREC established for itself in 2015. Fagan Letter to Stanton (Sept. 3, 2015), Ex. R31. GRU simply requested that GREC meet the timeline set by GREC—this is not unreasonable.

determined from a consideration of the whole agreement.” *Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1292 (M.D. Fla. 2012). Second, “[i]nterpretation of a contract begins with its plain language. As a general rule, evidence outside the contract language, which is known as parol evidence, may be considered only when the contract language contains a latent ambiguity.” *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. Dist. Ct. App. 2011) (citation omitted). When considered as a part of the whole PPA, the plain language of Section 10.4.1(a) indicates the Parties’ intent that Planned Maintenance is to be performed on an annual basis. Further, the PPA’s requirement for annual Planned Maintenance is not ambiguous, and as such, GREC’s reliance on Mr. Stanton’s parol evidence regarding the drafters’ intent is improper.

57. First, Section 10.4 of the PPA is titled “Outages” and has three subsections, each contemplating a different type of outage the Facility may experience. Section 10.4.1, which is instructively titled “Planned Maintenance,” unambiguously states that GREC “*shall* submit a written *annual* maintenance plan containing its forecast of Planned Maintenance *for the coming year* no later than sixty (60) days prior to . . . the start of *each calendar year*.” PPA § 10.4.1(a), Ex. R1, at 12. This instruction does not permit GREC to unilaterally opt out of performing Planned Maintenance for any given year. To the contrary, it plainly dictates that GREC “shall” schedule and perform Planned Maintenance “each calendar year.”

58. The PPA’s definition of Planned Maintenance further supports GRU’s position. Specifically, the PPA distinguishes Planned Maintenance from other outages in that “the duration and timing of Planned Maintenance has been established during the prior business year.” PPA Schedule 1, Ex. R1. This distinction focuses on the annual nature of Planned Maintenance and is consistent with the remainder of the PPA’s intention that Planned Maintenance be performed each year. Further, the distinction relies on the “duration” and

“timing” of Planned Maintenance as aspects that are determined “during the prior business year.” The distinction does not say that GREC may opt out of conducting Planned Maintenance.

59. As previously stated, Planned Maintenance is to be conducted in accordance with Good Utility Practice. With respect to the Facility, Good Utility Practice includes, but is not limited to, taking reasonable steps to ensure “[t]hat preventative, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation.” PPA Schedule 1, Ex. R1. 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.¹³ This is particularly true due to the Facility being in its first few years of operation and having known design problems. *See Wood Resource Recovery, LLC v. Gainesville Renewable Energy Center, LLC*, No. 2015-CA-1218, at 7 (Fla. Cir. Ct. June 23, 2016) (finding “design problems” with the Facility’s fuel handling system such that (1) the Facility “was not designed and/or constructed in a manner to efficiently or consistently handle the ground biomass, within contract the specifications” and (2) the Facility was “routinely getting plugged up on ordinary material that meets the spec”), Ex. R28.

60. GREC’s failure to perform routine, regular, preventative maintenance in accordance with Good Utility Practice creates risks that the Facility will not start when needed by GRU, will not be able to perform reliably to meet GRU’s requirements for Energy, and/or will fail to operate reliably on a long-term basis. GREC’s inability to perform the March Dependable Capacity test in accordance with GRU’s instructions underscores the serious concerns in this regard. These concerns are heightened if Planned Maintenance work is not

¹³ Now, GREC has also indicated that it will not perform Planned Maintenance for two full calendar years. Fagan Letter to Brown (Mar. 3, 2016), Ex. R29 (“GREC does not plan to take a planned maintenance outage in calendar year 2017 . . .”).

performed for the entire 2016 calendar year. GREC's failure of the test, and its refusal to perform Planned Maintenance this year, call into question its ongoing eligibility to collect payments for Available Energy, because it is not clear that the Facility is actually available to generate Energy at 100% of its seasonal Dependable Capacity in each hour of each month.

61. Other sections of the PPA also indicate that the Parties intended Planned Maintenance to occur every year. For example Section 22.1 provides:

[GREC] *shall submit* to [GRU] an *annual written report*, which report shall include, at a minimum, a description of the operation of the Facility and *planned maintenance*, unplanned maintenance and upgrades to the Facility, and an evaluation of problems and deficiencies and a description of any planned corrective action with respect thereto.

Thus, the PPA requires an annual report, and one of the principal components of that annual report is a description of the annual Planned Maintenance. Further, Section 12.3 of the PPA establishes Unavailability Factors for the Summer and Winter Periods. The Unavailability Factor represents the percentage of time the Facility may be unavailable without incurring a penalty. The Unavailability Factor is calculated in the same way for both the Summer and Winter Periods. The calculation involves totaling the hours spent on Planned Maintenance, Maintenance Outages, and Forced Outages; however, the Unavailability Factor for the Winter Period is more than double the Unavailability Factor for the Summer Period. *Id.* § 12.3, Schedule 1, Ex. R1. Common sense dictates that the time spent on Maintenance and Forced Outages is the same in the summer and the winter, meaning that the increase in allowed unavailability during each winter is due to the Parties' understanding that Planned Maintenance would occur every Winter Period. Thus, considering the PPA as a whole, as required by Florida law, reveals the Parties' intent that Planned Maintenance be conducted annually.

62. From the outset of their dealings, the Parties have contemplated that Planned Maintenance would occur every year. In fact, in response to GRU's original 2007 Request for

Proposal, GREC's predecessor in interest, Nacogdoches Power, LLC, confirmed that the Facility would require an annual outage to conduct work constituting Planned Maintenance as now defined. *See* Excerpts of GREC's Response to GRU RFP, 61–62 (Apr. 11, 2008), Ex. R26. In a section of its binding response titled “Reliability of the Proposed Technology,” Nacogdoches Power asserted that “[t]he Project will require one 10-14 day planned outage per year, which will be scheduled in conjunction with GRU.” *Id.* at 61. The RFP response then proposed a “Reliability Summary” indicating 311 “Scheduled outage hours per year.” *Id.* at 62. Thus, the Parties' preliminary positions, which would ultimately be memorialized in the PPA terms, reflect the necessity and expectation of annual Planned Maintenance.

63. The Parties further confirmed the plain meaning of Section 10.4.1(a) in October of 2012. John Stanton emailed Leonard Fagan, GREC's Vice President of Engineering, and Russell Abel instructing them that GRU “needed to get [GREC's] 10 year outage plan, 2014 thru 2023.” Stanton Email to Fagan (Oct. 4, 2012), Ex. R19. Mr. Stanton further explained: “For 2014 and 2015 we need durations and target dates. For the later years I believe duration and expected month will be sufficient at this time.” *Id.* Clearly, Mr. Stanton understood in 2012 that Planned Maintenance was to occur every year under the PPA. Consistent with Section 10.4.1(a), Mr. Stanton required a maintenance plan for every year, and critically, did not offer GREC the option to forego annual Planned Maintenance.

64. Mr. Fagan shared Mr. Stanton's understanding. In his response, Mr. Fagan set forth GREC's expectations for Planned Maintenance, and in no uncertain terms, Mr. Fagan confirmed that GREC would take annual maintenance outages. *See* Fagan Email to Stanton (Oct. 4, 2012), Ex. R19. Mr. Fagan said: “Since the facility will be completed in the fall (October or November)of [sic] 2013 we had been looking at annual outage's [sic] in that time

frame. The first being for a warranty inspection and then in 12 month intervals.” *Id.* Mr. Fagan explicitly stated GREC’s intention to take “annual” outages “in 12 month intervals.” *Id.* This pledge is consistent with the plain language of the PPA and undermines GREC’s claims.¹⁴ GREC’s most recent Planned Maintenance outage took place last year between April 25 and May 8, 2015. *See* Amended Demand ¶ 111.

65. Nevertheless, GREC argues in this case that it has the option to unilaterally decide whether Planned Maintenance is required for any given year. In reaching this lopsided conclusion, GREC claims that “[t]he most significant determinant of whether and when a Planned Maintenance outage is needed -- e.g. when outage-maintenance is required -- is the number of hours that a facility has actually been run.” Amended Demand ¶ 90. On this theory, GREC claims that Planned Maintenance is not needed because the Facility has been in standby status since it experienced a Forced Outage in August of 2015. *Id.* ¶ 97. GREC’s theory and position are demonstrably false.

66. First, GREC likens performing maintenance on the Facility to changing the oil in a car. *See* Amended Demand ¶ 90. GREC attempted to soften the language of this oil change analogy in its Amended Demand, but the analogy remains both entirely irrelevant to complex, power generation facilities and also factually inaccurate. In fact, a car that is not being operated needs additional maintenance to remain fully reliable. Kelley Blue Book recommends that

¹⁴ Recent testimony from a GREC representative further confirms the Parties’ understanding that Planned Maintenance is to occur every year. GREC recently lost a separate litigation against a fuel supplier for the Facility, Wood Resource Recovery, LLC. During trial in that case, GREC’s fuel manager, Richard Schroeder, testified that “Short-term outages occur at a regular basis, *maintenance outages at least once a year.*” Excerpts of WRR v. GREC Trial Testimony (May 9, 2016), *Ex. R27*, at 1 (emphasis added). Mr. Schroeder went on to also testify: “Q. I know you are not operator of the plant, but what is your understanding of why there are outages? A. We have them scheduled with the utility. Two a year generally, that last 15 to 20 days and they’re to cool down the boiler and go in and fix anything that needs fixing. Maintenance, like bringing in your car for 100,000 miles. Q. It is scheduled so you know when it is going to come, right? A. Yes.” *Id.* at 2–3. Both of these statements constitute admissions that GREC takes Planned Maintenance outages at least once a year.

drivers who only take their cars on short trips (i.e., cars that do not cover extensive mileages over the course of a year) should “have the oil changed every three months.” *When to Change Your Oil*, KELLY BLUE BOOK, <http://www.kbb.com/car-advice/articles/when-to-change-your-oil/> (last visited July 15, 2016), Ex. R32.

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

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

Morales Email to Bielarski (Sept. 14, 2015), Ex. R20. In its Amended Demand, GREC ignores the requirement for such operational preservation efforts of which it was previously aware from its own “background in the utility industry and by prudent operation practice.”¹⁵

68. GREC has also revealed an intent to rely on Mr. Stanton’s recent statements regarding the PPA drafters’ intent in Section 10.4.1(a). *See, e.g.*, Amended Demand ¶ 119 (quoting Mr. Stanton as saying “[t]he [PPA] language about outages and their approval was drafted by me so I absolutely know the intent”). As stated herein, Section 10.4.1(a) is not ambiguous. Thus, GREC’s attempt to use Mr. Stanton’s statements to alter the plain meaning of that Section violates the parol evidence rule, which “precludes consideration of such evidence to contradict, vary, defeat, or modify a complete and unambiguous written instrument, or to change,

¹⁵ GREC also misrepresents the length of time the Facility has operated since its most recent Planned Maintenance outage. In Paragraph 112 of the Amended Demand, GREC claims that the Facility only ran for ten weeks after the Planned Maintenance outage that concluded on May 8, 2015. In fact, the Facility ran for thirteen weeks between May 8th and August 7th of 2015. Moreover, the Facility also ran for one week in November of 2015, and has run for almost another whole week during the Dependable Capacity tests.

add to, or subtract from it, or affect its construction.” *Duval Motors*, 73 So. 3d at 265 (quotation omitted). Mr. Stanton’s attempts to rewrite the PPA, nearly seven years after its execution, are irrelevant and inadmissible. Not only are Mr. Stanton’s recent interpretations inconsistent with his own statements to Len Fagan in 2012 (*see Ex. R19*), they also exhibit a blatant self-interest in light of Mr. Stanton’s ongoing 2016 personnel action.

69. Relying on Mr. Stanton’s self-serving logic, GREC argues that by not taking a Planned Maintenance outage in 2016, the Facility actually “improves GRU’s ability to provide reliable energy” because the Facility’s Energy remains “available for GRU to dispatch and deliver if and when needed.” Amended Demand ¶¶ 78, 130; Ex. 34 ¶ 33. This theory is indicative of GREC’s short-sighted approach to annual Planned Maintenance. It strains credibility to argue that a biomass-fired power generation facility that undergoes no annual Planned Maintenance will be more reliable than one that does. GRU’s concerns for the long-term viability of the Facility have been further heightened by a letter dated March 3, 2016, in which GREC indicated that it “does not plan to take a planned maintenance outage in calendar year 2017.” Fagan Letter to Brown (Mar. 3, 2016), Ex. R29. It is apparently now GREC’s position that failing to perform Planned Maintenance for two consecutive years conforms with Good Utility Practice.

70. Finally, the inaccuracy of GREC’s argument is further highlighted by the Facility’s recent failure during a routine Dependable Capacity test. *See* Abel Email to De Leo (Mar. 7, 2016), Ex. R18. The expansion joint demonstrated a failure mode indicative of standby status. This type of failure discredits GREC’s argument that a standby period obviates the need for Planned Maintenance. In any event, GREC is being paid \$194,709 per day to maintain the Facility in a state of readiness to deliver Energy when dispatched by GRU. To continue to

qualify for those payments, GREC must conduct Planned Maintenance work to ensure the Facility's reliable and safe operation.

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

71. As described *supra* in Part IV.C, GRU and GREC have the established practice of using a “10 Year Outage Schedule” and a “Rolling 12 Month Outage Schedule” (collectively, “the Outage Schedules”) to determine the Planned Maintenance outage schedule according to Section 10 of the PPA. In accordance with this practice and as required by the PPA, in May 2015 GREC provided its written annual maintenance plan for 2016, and the Parties agreed in June 2015 that Planned Maintenance would occur during the period from April 9th through April 29th. *See* Demopoulos Email (Oct. 21, 2015), Ex. R3 (depicting the Parties' agreement to take a Planned Maintenance outage from April 9 to April 29).

72. GREC argues that the Outage Schedules are “informal and non-contractual” and claims: “No provision in the Power Purchase Agreement mentions these two forecasting schedules or requires GREC to submit forecasts of outages for the 12 Month Outage Schedule or the 10 Year Outage Schedule.” Amended Demand ¶ 81. GREC's assertion ignores and contradicts the plain language of Section 10 of the PPA, including Section 10.4.1(a).

73. GREC's original Demand acknowledged that “GRU asks each facility to provide forecasts on a continuing basis in order to update and revise these two schedules, and GRU periodically distributes updated versions to the Facilities.” Original Demand ¶ 71. Perhaps recognizing the obvious parallels between its statement and Section 10.3.2, which provides that “[GREC] shall provide to [GRU] [GREC]'s generation forecast for the upcoming calendar year,” GREC has removed this paragraph from its Amended Demand.

74. Moreover, GREC's Amended Demand also acknowledges that "Early in 2015, GRU asked GREC to provide its informal forecast of its anticipated outage schedule for the next 12 months and 10 years[, and] GREC informed GRU by email that at that time it forecasted Planned Maintenance outages in April 2016 and April 2017." Amended Demand ¶ 91. GREC again fails to see the parallels between its admission and the language of Section 10.4.1(a), which requires GREC to "submit a written annual maintenance plan containing its forecast of Planned Maintenance for the coming year." Indeed, GREC acknowledges that "ever since GREC began operations, GRU has requested, and GREC has provided in good faith, [] information about planned outages and updates for purposes of these coordinating and forecasting schedules." Amended Demand ¶ 81.

75. Nevertheless, GREC argues that dates submitted to GRU and included in the Outage Schedules are "not requirements." Amended Demand ¶ 76. Rather, GREC notes that the dates of outages may be "periodically revised" to ensure GRU's ability to provide reliable energy. *Id.* GREC does not allege that it may unilaterally make these revisions. GREC fails to realize that the revisions it acknowledges are the very same changes to the written annual maintenance plan contemplated by PPA § 10.4.1(a), and by the plain language of the PPA. Any such change requires GRU's approval.

76. Moreover, GREC does not address what will inevitably occur in the event that the "forecasted" dates are not revised. That is, a Planned Maintenance outage that is scheduled in the Outage Schedules is expected to eventually take place on the "forecasted" dates. GREC does not allege that there are subsequent communications to satisfy the requirements of PPA § 10.4.1(a), and any emails exchanged in the weeks or days leading up to a Planned Maintenance outage cannot suffice as they will not have been provided "no later than sixty (60) days prior" to

the start of the calendar year. PPA § 10.4.1(a), Ex. R1, at 12. Thus, while GREC goes to great lengths to describe the dates provided for GRU’s Outage Schedules as “informal and non-contractual,” the truth is, until these dates are changed in a manner that satisfies the requirements of the PPA, they are the dates of the Planned Maintenance outage, and therefore they are the written annual maintenance plan contemplated by PPA § 10.4.1(a).

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

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

78. Despite their obvious application to the requirements of Section “10.4 Outages” of the PPA, GREC ignores the May and June Outage Schedules and instead focuses on the October Letter to John Stanton.

79. GREC claims that the October Letter constitutes its “written annual maintenance plan containing its forecast of Planned Maintenance for the coming year” as required by Section 10.4.1(a) of the PPA. Simply put, GREC’s repeated claims are in error – the October Letter is not a “written annual maintenance plan.”¹⁶

80. Multiple objective factors indicate that the October Letter is not the written annual maintenance plan GREC claims it to be. First, the October Letter represents the first time GREC has sent any such letter, rendering it far from an annual occurrence. Further, the October Letter contains no “forecast of Planned Maintenance for the coming year.” In fact, it contains quite the opposite: GREC’s unequivocal intention to forego its contractually required annual maintenance. Third, the October Letter lacks all of the characteristics of the Outage Schedules that make those

¹⁶ Nor is it a written modification of the PPA in accordance with the requirements of Section 29.11 of the PPA.

documents valuable and effective embodiments of the requirements of Section 10 of the PPA. The October Letter's inadequacies are revealed by a comparison to the Outage Schedules of June 2015. *Compare* Fagan Letter to Stanton (Oct. 14, 2015), Ex. R6, with Demopoulos Email (Oct. 21, 2015), Ex. R3.

81. Because the October Letter is not an "annual maintenance plan," it is necessarily an attempt to change (i.e., cancel) the written annual maintenance plan approved in June 2015.¹⁷ However, by failing to comply with Section 10.4.1(a) of the PPA, GREC rendered the October Letter ineffective.

82. GREC claims that GRU does not have the power to prevent GREC from cancelling an outage. *See* Amended Demand ¶ 152. GREC's interpretation is at odds with the plain language of Section 10.4.1(a), which requires that any and all changes be mutually agreeable to GREC, GRU, and the FRCC. GREC did not adequately seek, and most certainly did not obtain, the agreement of any entity other than itself.¹⁸

83. GREC relies entirely on the alleged approval of John Stanton; however, as explicitly stated in Ed Bielarski's August 17, 2015 letter to Jim Gordon (Ex. R4) and in his September 13, 2015 email to Albert Morales (Ex. R5), Mr. Stanton did not have authority "to make changes to the PPA or any of the controlling documents," including the June 2015 Outage Schedules. Mr. Bielarski further requested that any such changes or proposals be directed to him so that he could provide "GRU's official position." Bielarski Letter to Gordon (Aug. 17, 2015), Ex. R4.

¹⁷ Both John Stanton (Amended Demand, Ex. 21) and Russell Abel (Ex. R9) have acknowledged that the October Letter was a cancellation of a previously established written annual maintenance plan that called for Planned Maintenance in April 2016.

¹⁸ Moreover, GREC does not contend that an amendment was made to the PPA in compliance with Section 29.11 of the PPA.

84. Aware of Mr. Bielarski's request and Mr. Stanton's lack of authority, GREC nevertheless directed its improper attempt to cancel the 2016 Planned Maintenance to Mr. Stanton. Notably, GREC did not include Mr. Bielarski on this communication; however, after Mr. Bielarski was made aware of the October Letter and its purported changes to the written annual maintenance plan, he contacted GREC and voiced GRU's disagreement with those changes. *See* Bielarski Letter to Gordon (Feb. 4, 2016), Ex. R11. Thus, the October Letter does not satisfy the plain language of Section 10.4.1(a) because GRU did not agree to it.¹⁹

85. GREC relies on the statement that Mr. Stanton "acknowledged receipt" of the October Letter. *See, e.g.*, Amended Demand ¶ 119. However, Mr. Stanton's acknowledgement that the October Letter was sent and received bears no relation to whether Mr. Bielarski (or even Mr. Stanton, for that matter) granted GRU's agreement to the proposed changes. In fact, in its Original Demand, GREC admitted that "[n]o one from GRU responded to that notice" until Mr. Bielarski became aware of GREC's efforts to unilaterally change the written annual maintenance plan and promptly voiced GRU's disagreement. Original Demand, at 5. GRU's October 21st, 2015 Outage Schedules, which continued to call for the Planned Maintenance outage in April 2016 despite being generated one week after GREC sent the October Letter, further indicate that GRU never agreed to GREC's proposed change.²⁰

86. In sum, the October Letter is not the written annual maintenance plan GREC claims it to be. Instead, the October Letter is merely GREC's attempted unilateral cancellation of the Parties' agreed written annual maintenance plan. GREC's efforts are designed, in part, to

¹⁹ Similarly, the October Letter does not satisfy the requirements for an amendment or modification of the PPA under Section 29.11 of the PPA.

²⁰ None of the GRU's subsequent internal correspondence is sufficient to ratify GREC's unilateral actions. Specifically, Mr. Stanton's February emails do not change the fact that he lacked authority to agree to the change on which GREC must now rely. In fact, Mr. Bielarski's responses to these emails indicate that Mr. Stanton acted without authority. *See* Amended Demand, Ex. 21.

overreach and to overcharge GRU in retaliation for GRU's proper exercise of its dispatch rights under the PPA in the most cost effective manner for its customers.

D. The Parties' Reasonable Expectations Under the PPA

87. As previously discussed, when GREC takes an outage and performs Planned Maintenance in accordance with the PPA, there is no Available Energy and thus no payments are due for Available Energy during the outage. The expectation that Available Energy payments are not due during annual Planned Maintenance outages is part of the consideration agreed upon in the PPA. GRU included expected Planned Maintenance outages in its calculation of the Available Energy payments that will be owed to GREC for fiscal year 2016 under the PPA and applied the resulting amounts when calculating electric rates for fiscal year 2016. In September 2015, the City of Gainesville's Commission approved electric rates for fiscal year 2016, and those electric rates were calculated based on the written annual maintenance plan agreed to by the Parties in June 2015. Rates thus were calculated based on the expectation that GREC would take a Planned Maintenance outage from April 9th through April 29th of 2016, which meant that Available Energy payments would not be owed for the twenty-one day outage period. GREC's attempted actions impact directly the rates reasonably calculated to be charged to GRU's customers. Now, as a result of GREC's actions and GRU's reasonable expectation, the \$4,000,000 financial windfall that GREC seeks to collect through its Amended Demand is not included in current GRU electric rates.

88. Conversely, GREC's reasonable expectation under the PPA is that it will receive Available Energy payments from GRU only during periods when the Facility is available to operate. GREC must reasonably expect that it will not receive Available Energy payments for periods when it performs annual Planned Maintenance. Thus, like any reasonable negotiating party, GREC assuredly accounted for expected Planned Maintenance outages by bargaining for a

price per MWh that accounts for expected outage periods when there will be no Available Energy. *See* Excerpts of GREC’s Response to GRU RFP, 61–62 (Apr. 11, 2008), Ex. R26 (indicating that the Facility would take annual outages). Furthermore, when the Parties agreed to the written annual maintenance plan in June 2015, GREC did not expect to be paid for Available Energy during the period from April 9th through April 29th in 2016. GREC’s Amended Demand thus seeks a financial windfall that was not expected when the PPA was negotiated and the prices were set, and that was not expected as recently as June 2015 when the written annual maintenance plan for 2016 was established. GREC will receive this unfair financial windfall if it is permitted to cancel its required annual Planned Maintenance in order to boost its revenues under the PPA.

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

E. GRU’s Notice Letter to GREC’s Collateral Agent

90. As GREC notes, on March 31, 2016, GRU sent a Notice of a Seller Event of Default (“Notice Letter”) to Union Bank, N.A. in its role as the “Collateral Agent” for GREC’s lenders. *See* Cottle Letter to Gindraux (Mar. 31, 2106), Ex. R22. The Notice Letter was sent as required by Section 4(c) of the Consent and Agreement (“Consent”) between GRU, GREC, and the Collateral Agent, and was intended merely to comply with the plain terms of the Consent. *See* PPA, Consent and Agreement § 4, Ex. R1. Ignoring the plain language of the Consent mandating that GRU provide the Notice Letter, Jim Gordon, President of GREC, sent two separate letters to Mr. Bielarski accusing GRU of bad faith and demanding that GRU retract the Notice Letter (collectively, the “Gordon Letters”). *See* Gordon Letter to Bielarski (April 11, 2016), Ex. R23; Gordon Letter to Bielarski (April 18, 2016), Ex. R24. Counsel for GRU

responded to the Gordon Letters on April 25, 2016, respectfully declining to retract the Notice Letter and explaining how GRU's actions were in accordance with GRU's contractual obligations. *See* Hinton Letter to Phelan (April 25, 2016), Ex. R25. Now, in its Amended Demand, GREC is once again unable to resist the call of invective, describing the Notice Letter as "another deliberate, frivolous, and reckless effort by GRU to exert improper 'leverage' over GREC." Amended Demand ¶ 150. Mr. Gordon's demands were ill-founded, and GREC's accusations are misplaced. GRU was merely complying with the requirements of the Consent.

91. As explained in GRU's response to the Gordon Letters, in issuing the Notice Letter, GRU acted according to its obligations under the Consent. *See* Hinton Letter to Phelan (April 25, 2016), Ex. R25. GREC is the "Seller" as defined in the PPA, and Section 25.1.1 of the PPA provides that a Seller Event of Default occurs when:

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

92. GREC is in default under Section 10.4.1(a) of the PPA as a result of (i) GREC's unilateral cancellation of the written annual maintenance plan that was required by the PPA and was agreed to in June 2015 (as to 2016), and that provided for GREC to perform Planned Maintenance at the Facility during the period from April 9th through April 29th, 2016, and (ii) GREC's refusal to perform Planned Maintenance in 2016. On February 29, 2016, GRU provided GREC with written notice of that default. *See* Ex. R17; *see also* Amended Demand ¶ 145 (acknowledging GRU's February 29 notice). Thirty days from that notice elapsed without

GREC curing or commencing reasonable efforts to cure its default, and thus, a Seller Event of Default occurred on March 30, 2016. *See* Cottle Letter to Gindraux (Mar. 31, 2106), Ex. R22.

93. GREC alleges that the obligations it has failed to meet are not “material” under the PPA; however, GREC misreads Section 25 of the PPA. *See* Amended Demand ¶¶ 151–55. As quoted above, Section 25.1.1 specifies that a Seller Event of Default occurs when “Seller defaults in any material respect in the observance or performance of any material obligation hereunder.” Thus, a material default of “any material obligation” in the PPA is a Seller Event of Default under Section 25.1.1. Section 25.1.1 then lists several examples in the “including but not limited to clause,” namely “failure to make a payment when due, failure by Seller to provide adequate security, or breach by Seller of a representation or warranty.” However, these are only examples, and the phrase “including but not limited to” expressly confirms that the examples do not limit the definition of Seller Event of Default.

94. In arguing that “[t]he April outage dispute does not remotely satisfy the ‘materiality’ requirement of Section 25.1.1,” GREC mistakenly references the additional Seller Events of Default that are defined separately in Section 25. These separate Seller Events of Default have no relation to the definition in Section 25.1.1, and no bearing on the materiality standard that applies to Section 25.1.1. *See* Amended Demand ¶¶ 151, 154 (citing to Seller Events of Default from PPA §§ 25.1.3, 25.1.6, 25.1.7). To the extent GREC suggests that only the separately defined Seller Events of Default are “material,” such a reading is erroneous because it renders section 25.1.1 superfluous. Further, Section 25.1.1 defines the circumstances under which GREC’s breach or failure to comply with the PPA results in a Seller Event of Default. In contrast, the other Seller Events of Default in Section 25 are triggered by events and circumstances that—with the exception of Sections 25.1.3 and 25.1.4 addressing GREC’s

obligation to start construction and achieve commercial operation of the Facility by specified deadlines—are not tied to GREC’s performance of its obligations under the PPA. Those other events and circumstances do not in any way define the meaning of “material obligation” for purposes of Section 25.1.1.

95. Notwithstanding GREC’s misinterpretation of the PPA, GREC also misapprehends the materiality of the obligations contemplated by Section 10.4.1 of the PPA. The obligations of Section 10.4.1, which call for the performance of annual Planned Maintenance, dictate the annual expenditure of thousands of man-hours and millions of dollars, in ensuring “reliable long-term and safe operation” of the Facility. *See* PPA Schedule 1, Ex. R1 (definition of Good Utility Practice). Thus, consistent with Section 25.1.1’s examples such as a breach of any of GREC’s representations or warranties, the obligations of Section 10.4.1 satisfy the “materiality” requirement, and GREC’s default under the obligations of Section 10.4.1 constitutes a Seller Event of Default under the PPA.

96. Section 4(c) of the Consent dictates that GRU “shall deliver” a notice of a Seller Event of Default to the Collateral Agent:²¹

Purchaser *shall deliver* to the Collateral Agent . . . 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.

PPA, Consent and Agreement § 4(c), Ex. R1 (emphasis added). Moreover, Section 4(b) of the Consent requires GRU to provide at least 30 days for the Collateral Agent or its designee to cure GREC’s default (upon the commencement of good faith efforts to cure the default within 30 days of the Notice Letter, the Collateral Agent receives an additional 30 days to complete the cure)

²¹ Notably, notwithstanding GREC’s misplaced argument that its failure to perform annual Planned Maintenance was not an Event of Default, the Consent and Agreement required notice of material breaches as well. PPA, Consent and Agreement § 4(c), Ex. R1. Thus, the label is unimportant—whether an event of default or a material breach, GRU was obligated to notify the Collateral Agent. *See id.*

before GRU may exercise any of its rights to cancel, terminate or suspend performance under the PPA. *Id.* § 4(b). GRU has expressly requested that the Arbitrator declare GREC in default of a material obligation under the PPA and thereby grant GRU authority to exercise its right to terminate the PPA. Thus, far from bad faith, the Notice Letter reflects GRU’s continued adherence to its contractual duties.

97. The Gordon Letters and the Amended Demand attempt to hold GRU liable for any “financial damages” suffered by GREC as a result of the Notice Letter. GREC’s threats are baseless and contrary to Article 26 of the PPA, which clearly limits GRU’s liability “for any incidental, consequential, punitive, exemplary or indirect damages, lost profits or other business interruption damages” PPA § 26.1, Ex. R1, at 32. Any financial harm suffered by GREC is the direct result of GREC’s default under its material obligations of the PPA, and as such, GRU denies that it may properly be held responsible for the foreseeable results of GREC’s unilateral actions and inactions. Moreover, GREC does not allege any facts showing actual harm—there are no concrete allegations regarding GREC’s alleged financing or refinancing issues, but rather only conclusory assertions and speculative damages. *See* Amended Demand ¶ 171 (“ . . . in a manner that *could* result in damages . . .”) (emphasis added).

VI. GREC’s Asserted Claims Are Without Merit.

98. Unless specifically admitted herein, GRU denies each and every allegation in GREC’s Amended Demand, filed June 7, 2016, and denies any liability to GREC.

A. GREC’s Count 1: Breach of the PPA—Outage

99. GREC claims that GRU is in breach of the PPA with regards to the Planned Maintenance outage GREC failed to take in 2016. Specifically, GREC alleges GRU has violated the PPA by: (1) trying to force GREC to take a maintenance outage; (2) refusing to recognize GREC’s October 14, 2015 “written annual maintenance plan” in which GREC cancelled the

maintenance outage in April; (3) refusing to recognize GREC's alleged contractual right to determine whether and when to take a maintenance outage; (4) asserting that it would consider GREC in an outage during the agreed period and would not make Available Energy payments regardless of whether GREC actually took an outage; and (5) not making Available Energy payments to GREC for the 21-day period between April 9th and April 29th of 2016. Amended Demand ¶ 164. GREC's allegations are without merit for the following reasons.

100. First, under the express terms of the PPA, GRU has every right to require GREC to abide by the written annual maintenance plan that was agreed to in June of 2015. Any change to that schedule must be agreeable to GRU, and GREC failed to acquire the agreement of any individual authorized to provide the necessary agreement on account of Mr. Bielarski's repeated and explicit instructions that Mr. Stanton did not have authority to change any "controlling documents." Nor did GREC seek or obtain an amendment pursuant to Section 29.11 of the PPA to eliminate the Planned Maintenance outage requirement provided in Section 10.4.1 of the PPA. Thus, GREC was not relieved of its contractual duty to take an annual Planned Maintenance outage in April of 2016.

101. Second, the October Letter is not a "written annual maintenance plan" as GREC claims. In fact, it is an attempted change to the written annual maintenance plan first set in place in May of 2015 and then modified by agreement of the Parties in June of 2015. GRU is under no contractual obligation to recognize the October Letter as anything more than it is. Indeed, GRU has acted squarely within the bounds of the PPA by timely stating its disagreement with GREC's unilateral change when Mr. Bielarski, the only person with authority to grant GRU's agreement to any such change in the PPA or in any controlling documents, informed GREC that its proposal

to forego Planned Maintenance was unacceptable. Bielarski Letter to Gordon (Feb. 4, 2016), Ex. R11.

102. Third, GREC is incorrect that it does not owe an annual duty to perform Planned Maintenance. The PPA, when read as whole, plainly illustrates the Parties' intent that Planned Maintenance would occur annually. *See supra* Part V.A. For example, Section 10.4.1(a) states that GREC *shall* submit a written annual maintenance plan for *each calendar year*. Moreover, under Section 22.1, GREC is obligated to submit an *annual report*, which *shall* include a description of GREC's planned maintenance, and Section 12.3 affords GREC additional unavailability during each Winter Period to account for annual Planned Maintenance outages. Indeed, annual Planned Maintenance fully accords with the PPA's definitions, which require routine, non-routine, regular, and preventative maintenance in accordance with Good Utility Practice, and to ensure reliable long-term and safe operation of the Facility. Finally, GREC's binding response to GRU's Request For Proposal confirmed that GREC would conduct annual Planned Maintenance during annual outages at the Facility. *See* Excerpts of GREC's Response to GRU RFP, 61–62 (Apr. 11, 2008), Ex. R26. Moreover, GREC's Vice President of Engineering confirmed the annual Planned Maintenance requirement in October of 2012. *See* Fagan Email to Stanton (Oct. 4, 2012), Ex. R19. GREC cannot unilaterally decline to perform this material contractual obligation.

103. Fourth, GREC is required to conduct annual Planned Maintenance and to engage in mutually agreeable annual Planned Maintenance scheduling. Indeed, GREC initially satisfied its contractual obligations in May and June of 2015 when it scheduled a Planned Maintenance outage in April of 2016. If GREC would like to alter an agreed upon schedule, GREC is contractually obligated to satisfy the requirements of Section 10.4.1(a) by acquiring the

agreement of both GRU and the FRCC. GREC did not meet these requirements, and as a consequence, GREC had no contractual right to forego the Planned Maintenance outage scheduled for April. In the absence of an effective change to the agreed upon Planned Maintenance schedule, GREC remains obligated to perform its Planned Maintenance in April of 2016. Part and parcel to that Planned Maintenance is an outage, which is necessary to conduct the work, and which also relieves GRU of its obligation to pay for Available Energy during the period of the outage. GREC cannot unilaterally abandon the agreed upon Planned Maintenance schedule and then force GRU to pay for Available Energy over a period for which GRU reasonably expected not to incur such charges. Nor can GREC unilaterally modify the terms of Section 10.4.1 of the PPA to eliminate the requirement of annual Planned Maintenance. Thus, GRU was well within its contractual rights to deem GREC unavailable and withhold Available Energy payments for that period. Simply put, GRU has not breached the PPA as alleged by GREC in its first count.

104. Ultimately, GREC is in default of the PPA, as evidenced by its failure to conduct Planned Maintenance in 2016. GREC plainly stated that it “is not taking a Planned Maintenance outage in April 2016” (Gordon Letter to Bielarski (February 17, 2016), Ex. R15), and GREC has since confirmed that it is “not requesting a scheduled outage period within calendar year 2016” (Abel Email to Brown (March 30, 2016), Ex. R21). Now, the period of Planned Maintenance has passed and GREC has not performed under the PPA. As a consequence, GREC is in default under Section 25 of the PPA.

B. GREC’s Count 2: Breach of the PPA—Financing and Refinancing

105. GREC claims that GRU has breached Section 20 of the PPA by interfering with GREC’s financing and refinancing efforts. Specifically, GREC alleges breach of contract on account of: (1) GRU’s involvement in the resolved Construction Cost Adjuster (“CCA”) dispute;

(2) GRU's enforcement of its contractual right to withhold Available Energy payments for the 21-day period in April during which GREC was to take its Planned Maintenance outage; (3) GRU's Notice Letter to GREC's Collateral Agent; and (4) GRU's refusal to retract said Notice Letter. Amended Demand ¶ 170. GREC's allegations are without merit for the following reasons.

106. First, GREC has not explained how the resolved CCA dispute bears any relation to GREC's current allegations that GRU has breached the PPA. GREC has not even alleged that the Collateral Agent has any knowledge of the CCA dispute, and as such, the relevance of the CCA dispute to this breach of contract claim is unsubstantiated and entirely speculative. Moreover, the CCA dispute took place long before GRU was made aware of any of GREC's alleged refinancing efforts. Section 20 of the PPA does not relate to the facts of this dispute. Section 20.1 provides:

Purchaser recognizes that Seller may seek to obtain debt financing for the Facility and Purchaser hereby agrees to cooperate reasonably with Seller's efforts to secure such financing, and to provide Seller 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.

PPA § 20, Ex. R1, at 25. This Section requires GRU "to cooperate reasonably with Seller's efforts to secure" debt financing. As of the time of the CCA dispute, GREC had requested no such cooperation. Thus, GREC's reliance on the CCA dispute to support its allegations that GRU has violated its alleged obligation to "cooperate in GREC's efforts to secure financing and refinancing" is misplaced.

107. Second, as with the CCA dispute, GREC has not explained how GRU's enforcement of its contractual right to consider GREC unavailable during the April Planned Maintenance dates bears any relation to GREC's allegation that GRU has breached any obligation related to GREC's financing efforts. As explained above in Part VI.A, all of GRU's

actions regarding the Facility's 2016 Planned Maintenance were taken in compliance with the PPA. Moreover, GRU explained it did not agree with GREC's unilateral cancellation of the 2016 Planned Maintenance long before GRU was made aware of any of GREC's alleged refinancing efforts. Thus, again, this allegation does not support GREC's second breach of contract claim.

108. Third, as explained above in Part V.E, all of GRU's actions in connection with the Notice Letter to GREC's Collateral Agent were taken in strict compliance with GRU's contractual rights and obligations under the PPA and Parties' Consent and Agreement. Thus, GRU's sending the Notice Letter and subsequent refusal to retract the Notice Letter cannot constitute a breach of contract. Moreover, GREC is and has been in default of the PPA, relieving GRU of its obligations under Section 20 of the PPA. Under Florida law, "a breach of contract by anticipatory repudiation allows the nonbreaching party to terminate his own performance and bring litigation for damages." *Southeastern Integrated Med., P.L. v. North Fla. Women's Physicians, P.A.*, 50 So. 3d 21, 23 (Fla. Dist. Ct. App. 2010). GREC anticipatorily breached the PPA when it plainly stated that it "is not taking a Planned Maintenance outage in April 2016." Gordon Letter to Bielarski (February 17, 2016), Ex. R15. Now that the period of Planned Maintenance has passed and GREC has not performed under the PPA, GREC is in actual breach of section 10.4.1 of the PPA and in default under Section 25 of the PPA.²² Because of GREC's default under the PPA, GRU's actions cannot constitute a breach of contract. *See Ryan v. Landsource Holding Co., LLC*, 127 So. 3d 764, 767 (Fla. Dist. Ct. App. 2013) ("If one party to an agreement has breached the agreement, the other party's failure to continue with the

²² In a footnote, GREC alleges that GRU's position on GREC's breach has "shifted" when, in reality, the time for GREC's performance has simply passed and GRU's anticipatory breach claim has matured into a claim for actual breach of contract. *See* Amended Demand at 3 n.3. GRU has consistently held that GREC is obligated to perform Planned Maintenance in 2016.

agreement is not considered a default of the contract.” (quotation omitted)). Thus, even if GRU’s actions in connection with the Notice Letter to GREC’s Collateral Agent were a breach of GRU’s contractual obligations, which they are not, they still could not support GREC’s claim for breach of contract on account of GREC’s own, prior breach of the PPA.

C. GREC’s Count 3: Beach of the Covenant of Good Faith and Fair Dealing

109. GREC claims that GRU has breached the implied covenant of good faith and fair dealing. Specifically, GREC alleges that GRU breached this implied covenant by: (1) making statements such as “break” the Facility and “make things as painful for GREC as possible”; and (2) on account of the facts regarding the alleged breaches identified in GREC’s Counts 1 and 2. See Amended Demand ¶ 175. GREC’s allegations are without merit for the following reasons.

110. GREC’s first allegation is insufficient to state a claim for breach of the covenant of good faith and fair dealing. GREC asserts that statements allegedly made by Mr. Bielarski and Gainesville City Commissioners have somehow resulted in a breach of GRU’s covenant of good faith and fair dealing; however, the “duty of good faith must relate to performance of an *express term* of the contract and is not an abstract and independent term of a contract.” *Flagship Resort Dev. Corp. v. Interval Int’l, Inc.*, 28 So. 3d 915, 924 (Fla. Dist. Ct. App. 2010) (emphasis added & quotations omitted). “Rather than serving as an independent term within a contract, the implied covenant attaches to the performance of a specific contractual obligation.” *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001) (quotation omitted). The PPA contains no provision forbidding elected officials of the City of Gainesville from expressing dissatisfaction with the terms of the contract.²³ Indeed, GRU does not operate the Facility—NAES, who is under contract with GREC, operates the Facility. Because GRU is two degrees

²³ Indeed, such a provision would likely be an unconstitutional restriction on public speech and potentially invoke Florida’s anti-SLAPP legislation given GRU’s status as a public utility.

removed from actually operating the Facility, GREC's allegations that GRU could "break" the Facility even if it wanted to have no basis in reality. Thus, any statements made by GRU or city officials cannot constitute a breach of GRU's implied covenant of good faith and fair dealing.

111. GREC's Amended Demand attempts to further premise this first allegation on statements regarding "mug-a-nug" practices and discussions of "cycling" the Facility; however, none of the facts indicate that any of these practices were ever implemented. As stated above, simply making such statements cannot constitute a breach of the implied covenant of good faith and fair dealing, and indeed, GREC never once alleges that GRU has cycled the Facility or attempted to "mug" GREC in any way. To the contrary, all of GRU's actions have been taken in complete compliance with the Parties' various agreements. GRU may be displeased with GREC and with the PPA, but, under Florida law, "it is irrelevant whether the person who takes authorized steps to protect his own interests does so while also harboring some personal malice or ill-will towards the plaintiff." *Ethyl Corp.*, 386 So. 2d at 1225 ("[S]o long as improper means are not employed, activities taken to safeguard or promote one's own financial, and contractual interests are entirely non-actionable."). GREC has not alleged, and, to be sure, GRU has not employed, any improper means under the PPA in connection with this dispute. As such, GREC has failed to state a claim for breach of the implied covenant of good faith and fair dealing.

112. To the extent that GREC's second allegation of GRU's breach of the covenant of good faith and fair dealing is derived from either of its first two claims for breach of the PPA, that allegation fails for the same reasons set forth previously. *See supra* Part VI.A–B.

D. GREC's Count 4: Intentional Interference with Business Relations

113. GREC claims that GRU has committed the tort of intentional interference with business relations. Specifically, GREC alleges that GRU has committed this tort by: (1) sending the Notice Letter to GREC's Collateral Agent; (2) claiming that GREC is in default of a material

obligation under the PPA; and (3) identifying its contractual right to terminate the PPA on account of the Seller Event of Default by GREC. *See* Amended Complaint ¶ 181. GREC's allegations are without merit for the following reasons.

114. As discussed above in Part V.E, GREC cannot satisfy the elements of its alleged tort. 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 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) (quotation omitted). GREC has not shown and cannot show that GRU acted intentionally and without justification to interfere with any relationship between GREC and the Collateral Agent. All of GRU's actions have been taken in accordance with the plain language of the Parties' various agreements to protect GRU's own financial and contractual interests and not for any improper purpose.

115. GRU's Notice Letter was sent to GREC's Collateral Agent pursuant to the plain language of Section 4(c) of the Parties' Consent and Agreement. *See* Hinton Letter to Phelan and Mee (April 25, 2016), Ex. R25. As repeatedly expressed herein, GREC's refusal and subsequent failure to conduct Planned Maintenance in 2016 constitute a Seller Event of Default under the PPA, entitling GRU to invoke the contractual remedies of Section 25.2 of the PPA, which clearly include the right to terminate the PPA. *Id.* Thus, regardless of any damage suffered by GREC, all of GRU's actions have been justified. GREC's claim for intentional interference with business relations must therefore fail.

E. GREC's Count 5: Declaratory Judgment

116. GRU strongly disagrees with the allegations in GREC's Amended Demand, *see supra* Part VI.A–D; however, GRU agrees with GREC that a declaratory judgment is an appropriate remedy to the Parties' dispute.

VII. GRU's Affirmative Defenses

117. GRU asserts the following affirmative defenses in response to GREC's asserted claims. GRU incorporates here the allegations contained in all preceding paragraphs as well as the allegations in GRU's Counterclaims, to the extent that any such allegation can be construed to constitute an affirmative defense. By raising the following defenses, GRU does not assume the burden of proof for any claim where such burden is otherwise on GREC. GRU expressly reserves the right to raise additional defenses, or to supplement or amend the following defenses, as this arbitration proceeds.

A. Failure to State a Claim

118. As explained above in Part VI, GREC has failed to state any claims upon which relief can be granted. GREC has failed to state an essential element for each of its causes of action. With respect to GREC's allegations that GRU has breached the PPA, GREC has failed to state any way in which GRU has violated the PPA. With respect to GREC's allegation that GRU has breached the covenant of good faith and fair dealing, GREC has failed to allege that GRU's performance, or alleged lack thereof, of any specific contractual obligation has caused GREC to forfeit any reasonable contractual expectation under the PPA or suffer any alleged harm. With respect to GREC's allegation that GRU intentionally interfered with GREC's business relations, GREC has failed to allege that GRU's actions were intentional and without justification and therefore fails to satisfy the elements of tortious interference under Florida law.

B. Breach by GREC

119. As explained above in Parts I, IV.F, and V, and below in Part VIII, GREC is in default of the PPA for failing to comply with its contractual obligations under the PPA. As a result, GRU is relieved of its obligation to perform under the agreement.

C. No Breach by GRU

120. As explained above in Parts IV.A, IV.D, V.A, V.D., and VI, GRU has performed all duties owed by it under the PPA, including paying GREC \$194,709 a day for Available Energy while the Facility has been in standby (i.e., not delivering any Energy to GRU). Moreover, GRU is not obligated under the PPA to pay for Available Energy while the Facility is undergoing an annual Planned Maintenance outage. Therefore, GRU has never breached the PPA.

D. Unjust Enrichment

121. As explained above in Parts I, IV.A, and V.D, at the time when the PPA was negotiated and the pricing terms were established, GREC confirmed that it would take an outage every year to conduct annual Planned Maintenance, and upon information and belief, GREC calculated its dollar per MWh prices under the PPA based on the expectation of an annual outage and the associated pause in Available Energy payments. GREC is now seeking a declaratory judgment that it is not contractually obligated to conduct annual Planned Maintenance, which would result in GREC's unjust enrichment.

E. No Damages

122. As explained above in Parts I, IV.A, IV.D, V.A, V.D, and VI, even if all of GREC's other allegations are true, GREC has suffered no damages for which GRU is legally responsible. Under the PPA, GREC is not owed payments for Available Energy during the annual Planned Maintenance outage.

F. Waiver

123. As explained above in Parts IV.B, V.A, V.B, and V.D, GREC has a history of taking annual Planned Maintenance outages and made representations to GRU that it would also take a Planned Maintenance outage in 2016. Through these representations and actions, GREC has therefore waived its right to sue and cannot sustain this action.

G. Estoppel

124. As explained above in Parts I, IV.C, V.B, and V.D, in June 2015 GREC represented that it would take a Planned Maintenance outage from April 9th through April 29th of 2016. To its detriment, GRU reasonably relied on GREC's representation by setting customer rates for 2016 that accounted for GREC's outage and the associated savings in Available Energy payments. GREC should be estopped from arguing that it did not commit to taking a Planned Maintenance outage in 2016.

H. Doctrine of Unclean Hands

125. As explained above in Parts I, IV.F, and V, GREC has committed a wrongdoing by failing to comply with its contractual obligations under the PPA. GREC should not be permitted to benefit from its wrongdoing.

I. Covenant of Good Faith and Fair Dealing

126. As explained in Parts I, IV.A, V.D, and VIII.C, GREC breached the express terms of the PPA and thereby thwarted GRU's reasonable contractual expectations. In doing so, GREC breached its covenant of good faith and fair dealing.

J. Parol Evidence Rule

127. As explained above in Part V.A, the PPA was intended to be the full agreement between the Parties, and now GREC cannot present evidence outside the language of the PPA to alter or give meaning to any terms of the PPA. Additionally, under Section 29.11 of the PPA,

any amendments to or modifications of the PPA must be in writing. GREC has not presented any evidence of written amendments or modifications.

K. Statute of Frauds

128. As explained above in Parts I, IV.F, and V.C, to the extent GREC alleges the existence of any oral agreement to change the terms of the PPA or any of the controlling documents, or otherwise contract around the PPA, GREC's alleged oral contract is unenforceable because, as a purported agreement that will last for longer than one year, it is required to be in writing pursuant to FLA. STAT. § 725.01.

L. Lack of Consideration

129. As explained above in Parts I, IV.F, and V.C, to the extent GREC alleges the Parties agreed to change the terms of the PPA or any of the controlling documents, or otherwise contract around the PPA, GREC's alleged contract is invalid for lack of consideration in that GRU was not adequately, or at all, compensated for any such contract.

M. Failure of Condition Subsequent

130. As explained above in Parts I, IV.B, IV.E, IV.F, V.C, and V.D, any change to the PPA or any of the controlling documents including the written annual maintenance plan must be mutually agreeable to GREC, GRU, and FRCC. *See, e.g.*, PPA, §§ 10.4.1(a), 29.11, Ex. R1. GREC has been explicitly instructed to contact Mr. Bielarski to obtain his approval on behalf of GRU for any such changes. GREC failed to satisfy this condition of the PPA and therefore failed to alter the Parties' agreement that GREC would take a Planned Maintenance outage in April 2016. *See* PPA, § 10.4.1(a), Ex. R1.

N. Failure to Mitigate Damages

131. As explained in Parts I, IV.F, V.D, and VIII.A, to the extent that GREC has suffered any damages, GREC has failed to take reasonable steps to reduce or minimize the

damages experienced. Specifically, GREC failed to take a Planned Maintenance outage or conduct any Planned Maintenance between April 9th and 29th. Additionally, GREC has failed to take any steps to mitigate its purported (speculative) damages relating to its Collateral Agent, including, but not limited to, seeking alternate sources of financing.

O. Course of Performance

132. During the performance of the PPA, prior to 2016, GREC scheduled and performed annual Planned Maintenance every year since the Facility came online in December 2013. GREC's allegations now that an annual Planned Maintenance outage is not required under the PPA are inconsistent with the parties' course of performance in the past.

P. Justification

133. As explained in Parts I, IV.F, V.E, and VI.D GREC has not shown and cannot show that GRU acted intentionally and without justification to interfere with any relationship between GREC and the Collateral Agent. All of GRU's actions have been taken in accordance with the plain language of the Parties' various agreements to protect GRU's own financial and contractual interests and not for any improper purpose. Thus, regardless of any damage suffered by GREC, all of GRU's actions have been justified, and GREC's claim for intentional interference with business relations must fail.

Q. Contractual Limitation of Liability

134. PPA § 26.1 places limitations on the Parties' liabilities under the PPA. Specifically, Section 26.1 provides "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" Thus, GREC's claims for incidental, consequential,

or indirect damages, or for lost profits or other business interruption damages may not be brought under the PPA. Specifically, Counts 2 and 4 of GREC's Amended Demand are void.

R. Sovereign Immunity

135. Under FLA. STAT. § 768.28(5), GRU's liability for any tort claims alleged by GREC cannot exceed \$200,000.

S. Speculative Damages

136. GREC has failed to allege sufficiently certain damages or causation. The "damages in excess of \$100 million" GREC alleges in its Counts 2 and 4 is entirely too speculative to be recoverable. GREC does not allege that GRU's actions caused GREC to lose \$100 million that was already in GREC's possession or otherwise reasonably secured by GREC. Instead, GREC alleges that GRU's actions *could have* cost GREC the opportunity to engage in some fictional future transaction, which, if all factors fell in GREC's favor, could possibly have resulted in savings in excess of \$100 million. These savings do not yet exist, nor are they the inevitable product of some ongoing transaction. These savings are entirely speculative and thus insufficient to form the basis of a damages award. *See* Phelan Letter to Hinton (June 20, 2016), Ex. R30 (asserting that the loss of nondescript "*benefits*" results in compensable damages (emphasis in original)).

VIII. Counterclaims

A. Counts 1 and 2: Declaratory Judgment

137. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

138. Under Florida's declaratory judgment statutes, Fla. Stat. §§ 86.011–111, a petitioner pursuing a declaratory judgment claim must show the following:

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

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

139. Here, there is a bona fide, actual, present practical need for a declaration. GRU and GREC need a declaration to clarify their rights and responsibilities under the PPA. The requested declaration would deal with a present controversy as to an ascertained state of facts. More specifically, GRU seeks a declaration that: (i) GREC's refusal to perform annual Planned Maintenance in 2016 as agreed to by the Parties in June of 2015 constitutes a *default* in the observance of a material obligation of the PPA that entitles GRU, at its discretion, to terminate the PPA in accordance with Section 25.2(a), and that GREC's October Letter to Mr. Stanton did not comply with the requirements of the PPA and therefore cannot effectuate a change to the agreed upon written annual maintenance plan established in June 2015; and (ii) under Section 10.4.1(a) of the PPA, GREC is obligated to perform annual Planned Maintenance of the Facility. The powers, privileges, and rights of GRU under the PPA are dependent upon the facts presented herein. GREC has an actual, present, adverse, and antagonistic interest in the scope of GRU's rights under the PPA. GREC is before the Arbitrator by proper process. And finally, the relief sought is not merely legal advice or the answer to questions propounded from curiosity, rather an actual controversy exists. For these reasons, declaratory judgment is an appropriate remedy to the Parties' dispute.

**1. Count 1: Declaratory Judgment of Default Under the PPA—
Planned Maintenance**

140. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

141. In the Recitals to the PPA, GREC stated its “inten[tion] to build, operate and *maintain* a 100 MW (net) biomass-fired power production facility.” PPA Recitals, Ex. R1, at 1 (emphasis added). Under Section 10.4.1(a) of the PPA, the Parties agreed in writing in June of 2015 that GREC would perform its annual Planned Maintenance between April 9th and 29th of 2016. In October of 2015, GREC unilaterally stated that it would cancel Planned Maintenance for 2016, which was both a breach of the PPA’s requirements for Planned Maintenance and a change to the June 2015 written annual maintenance plan that was not agreeable to GRU. Furthermore, GREC repeatedly and unequivocally stated that it “is not taking a Planned Maintenance outage in April 2016.” Gordon Letter to Bielarski (February 17, 2016), Ex. R15; *see also* Abel Email to Brown (March 30, 2016), Ex. R21 (confirming that GREC is “not requesting a scheduled outage period within calendar year 2016”).

142. GREC relies upon purported acknowledgement of receipt of its October 2015 letter by John Stanton to excuse its failure to perform annual Planned Maintenance. However, GREC’s October 2015 letter to Mr. Stanton did not comply with the requirements of the PPA. Mr. Stanton was not authorized to effect a change to the previously agreed upon April 2016 Planned, as Mr. Bielarski had previously informed GREC that Mr. Stanton did not have authority to change or accept changes to the PPA or any controlling documents. Section 10.4.1(a) of the PPA requires that any and all changes to the written annual maintenance plan must be mutually agreeable to the GREC, GRU, and the FRCC. GRU did not consent to GREC’s change to the written annual maintenance plan.

143. As explained above in Section V.E,²⁴ Section 25.1.1 of the PPA provides that a “Seller Event of Default” occurs if the “Seller defaults in any respect in the observance or performance of any material obligation hereunder” Now, the period for performance has passed, and GREC has failed to perform its contractually required Planned Maintenance. The requirement for Planned Maintenance is a material obligation under the PPA. GREC has defaulted in performance of its material obligations and has failed to cure that failure.

144. Pursuant to the Consent and Agreement (“Consent”) between GRU, GREC, and Union Bank, N.A. in its role as the “Collateral Agent” for GREC’s lenders, GRU was required to notify the Collateral Agent and provide the Collateral Agent the opportunity to cure GREC’s default before GRU may exercise any right to terminate the PPA. PPA Consent § 4(b), Ex. R1. In accordance with this requirement, GRU notified the Collateral Agent of GREC’s Seller Event of Default on March 31, 2016. *See* Ex. R22. Thirty days elapsed from GRU’s Notice Letter without any response from the Collateral Agent or any indication that the Collateral Agent had commenced good faith efforts to cure GREC’s Seller Event of Default. Accordingly, GRU has satisfied all conditions precedent for exercising its rights under the PPA.

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

²⁴ The explanation of GREC’s Seller Event of Default is also contained in GRU’s Reply to Additional Arguments in GREC’s April 13, 2016 Filing (filed Apr. 27, 2016), which is incorporated herein in its entirety.

146. By failing to satisfy the annual Planned Maintenance requirements of Section 10.4.1 of the PPA, GREC has defaulted in the observation and performance of a material obligation under the PPA. GRU has satisfied all of its contractual notice requirements, and as such, GRU's right to terminate the PPA pursuant to Section 25.2 of the PPA is now ripe. This filing serves as further notice to GREC and the Collateral Agent of GRU's position first stated in Mr. Bielarski's Letter of February 29, Ex. R17.

147. Accordingly, GRU seeks a declaration that GREC's refusal to perform annual Planned Maintenance in 2016 as agreed to by the Parties in June of 2015 constitutes a *default* in the observance of a material obligation of the PPA and that GRU may *terminate the PPA upon its election*.

2. Count 2: Declaratory Judgment of Requirement to Perform Annual Planned Maintenance Under the PPA

148. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

149. Under the Recitals to the PPA, GREC affirmed its intention to *maintain* the Facility. Ex. R1, at 1. Under the PPA, in Section 10.4 termed "Outages," the parties agreed that GREC "shall submit a written annual maintenance plan containing its forecast of Planned Maintenance." *Id.* § 10.4.1. The schedule for Planned Maintenance under the PPA must also be integrated into generation forecasts for the upcoming calendar year. *Id.* § 10.3.2. Similarly, consistent with the express requirements for annual Planned Maintenance, the PPA defines Good Utility Practice to require that reasonable steps are taken 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 . . ." Ex. R1, Schedule 1, Definitions, at v.

150. The PPA defines Planned Maintenance in accordance with the understanding of Good Utility Practice as “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” and explicitly distinguishes it from Forced Outages and Maintenance Outages “in that the duration and timing of Planned Maintenance has been established during the prior business year.” Ex. R1, Schedule 1, Definitions, at vii. The reporting requirements of the PPA also underscore that Planned Maintenance is an annual obligation, as Section 22.1 requires GREC to submit an “annual written report” that includes, at a minimum, “a description of the operation of the Facility and planned maintenance . . .” *Id.* § 22.1.

151. In all previous years since the Facility came online in 2013, GREC performed annual Planned Maintenance as required by the PPA. Moreover, in responding to GRU’s Request for Proposal in 2008, GREC’s predecessor in interest asserted that the Project [Facility] would “require one 10-14 day planned outage per year.” Excerpts of GREC’s Response to GRU RFP, at 61, Ex. R26. The Parties’ course of dealing since the Facility came online reinforces that Planned Maintenance is a required annual obligation under the PPA.

152. Failure to perform annual Planned Maintenance frustrates the parties’ intent that the Facility be available to perform reliably to meet GRU’s requirements for Energy under the PPA. Consideration of the PPA as a whole establishes that the parties intended that GREC take an outage and perform Planned Maintenance on an annual basis.

153. Accordingly, GRU seeks a declaration that *performance by GREC of annual Planned Maintenance is a material obligation under the PPA.*

B. Count 3: Breach of Contract—Failure to Perform Annual Planned Maintenance in 2016

154. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

155. GRU and GREC are parties to the PPA. Ex. R1. As explained above and incorporated herein, the PPA requires GREC to schedule and perform annual Planned Maintenance. *See, e.g.*, PPA, §§ 10.3.2, 10.4.1, Ex. R1. On June 18, 2015, GREC agreed to schedule an annual Planned Maintenance outage for 2016 between April 9, 2016 and April 29, 2016. Abel Email to Demopoulos, Ex. R2. All changes to the annual Planned Maintenance plan must be agreeable to GREC, GRU, and FRCC. PPA, § 10.4.1(a), Ex. R1. In October 2015, GREC purported to cancel its previously scheduled and agreed to Planned Maintenance for 2016. Fagan Letter to Stanton, Ex. R6. GRU did not consent to the cancellation of the 2016 annual Planned Maintenance outage. The time for performance under the approved written annual maintenance plan (April 9, 2016 to April 29, 2016), has come and gone. GREC has failed to perform annual Planned Maintenance for 2016. GREC's failure to perform annual Planned Maintenance for 2016 is a breach of a material obligation under the PPA.

156. As of April 30, 2016, GREC's failure to conduct Planned Maintenance has deprived GRU of the contracted for benefit of its bargain in the PPA. Pursuant to the terms of the PPA, GRU continues to pay GREC \$194,709 per day for Available Energy for days when the Facility is not dispatched but GREC claims it is fully available; however, because GREC has not performed Planned Maintenance in 2016, GRU has not received its bargained for consideration and has no reasonable assurance that the Available Energy it continues to buy is in fact available for delivery if called upon by GRU. Stated another way, GRU has no reasonable assurance that GREC's products satisfy the definition of Available Energy GRU bargained for in the PPA.

Indeed, the Facility's failure during the March Dependable Capacity test indicates that GRU is receiving less value than it is paying for. As such, GRU has been, and continues to be, damaged in an amount up to \$194,709 per day for each day since the Planned Maintenance should have been performed.

C. Count 4: Breach of Contract—Misreporting of Available Energy

157. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

158. Pursuant to the terms of the PPA, GRU pays GREC \$194,709 per day for every day when the Facility is not dispatched and GREC reports availability to produce and deliver 100% of the Facility's 102.5 MW Dependable Capacity upon dispatch from GRU. According to the PPA's definition of Available Energy, the Facility's availability is to be calculated "for each hour in which Purchaser dispatches the Facility at less than 100% of the seasonal Dependable Capacity" by "subtracting the actual capacity level in MW for such hour from the seasonal Dependable Capacity." PPA Schedule 1, Ex. R1. Thus, under the PPA, if the Facility's actual capacity level is less than 100% of seasonal Dependable Capacity for any given hour, then GREC should report that decrease in actual availability, and GRU's Available Energy payment should decrease.

159. During the Preliminary Hearing held on June 2, 2016, Counsel for GREC indicated that GREC has performed "thousands of work orders" while the Facility has been in standby. Further, GREC's Amended Demand indicates that GREC has performed "thousands" of maintenance tasks such that "no outage-maintenance is currently required." Amended Demand ¶¶ 89, 115. Despite all of this alleged maintenance conducted while the Facility has been in standby, GREC has reported only a single period of decreased availability, and otherwise has invoiced GRU for Available Energy based on GREC's representation that the Facility was

available and had capacity of producing and delivering Energy at its full seasonal Dependable Capacity in every hour of every day.

160. On information and belief, during GREC's purported performance of "thousands of work orders," the Facility has not been available to produce Energy at 100% of its seasonal Dependable Capacity for every hour of every day, as GREC has previously reported. On information and belief, because the Facility was not available to produce Energy at 100% of seasonal Dependable Capacity on numerous occasions due to the performance of "thousands of work orders," which invariably affect the capacity to produce Available Energy, GREC has breached the PPA by failing to accurately report the Facility's availability and capability to produce and deliver Energy under the PPA. Because GREC has failed to accurately report the Facility's availability and capability to produce and delivery Energy under the PPA, its invoices to GRU have overstated Available Energy, and GRU has been overcharged for Available Energy.

161. GRU has been damaged by this breach of the PPA because any misreporting of the Facility's availability has caused GRU to overpay for Available Energy under the PPA. GRU has issued discovery requests for GREC's work orders, operations logs, invoices, and other related documents to determine whether there are any periods of time that GREC inaccurately reported 100% availability to generate and deliver Energy at its full seasonal Dependable Capacity such that the invoices to GRU may have been incorrect.²⁵

²⁵ If GREC is not forthcoming in responding to GRU's discovery requests, then GRU will likely request that the Arbitrator appoint a special master pursuant to Fla. R. Civ. P. 1.490 to obtain and audit GREC's relevant records and calculate monies owed by GREC to GRU due to misreporting of availability.

D. Count 5: Breach of the Covenant of Good Faith and Fair Dealing

162. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

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

164. Here, Section 10.3.5 of the PPA expressly obligates GREC to coordinate with GRU in good faith to establish forecasts and schedules and to utilize Good Utility Practice in developing and preparing the forecasts and schedules. Section 10.4.1(a) requires GREC to conduct Planned Maintenance on an annual basis. Section 10.4.1(d) of the PPA expressly obligates GREC to work with GRU to schedule Planned Maintenance in a manner that minimizes the economic cost to GRU of such outages and to comply with FRCC operating procedures. Section 8.2 of the PPA requires GREC to accurately report its Available Energy for each hour the Facility is dispatched at less than 100% its seasonal Dependable Capacity. By (i) refusing to perform annual Planned Maintenance, (ii) conducting scheduling activities that do not comply with the requirements of the PPA, and (iii) misrepresenting the Facility’s available Energy in its invoices to GRU, GREC has breached each of these express terms of the PPA.

165. As a result of GREC’s breach, GREC has thwarted GRU’s reasonable contractual expectations that: (i) GREC would maintain a fully reliable power generation facility in accordance with the PPA and Good Utility Practice; (ii) GRU would not pay for Available

Energy during the scheduled Planned Maintenance outage in April 2016; and (iii) GRU would make Available Energy payments that reflect the Facility's actual availability. GREC seeks to extract a financial windfall at the direct expense of GRU's customers and the citizens of the City of Gainesville. Accordingly, GREC has breached its covenant of good faith and fair dealing, and GRU has been commensurately harmed by that breach.

E. Count 6: Action for Specific Performance by Counterclaimant GRU Against Counterrespondent GREC

166. GRU incorporates by reference the allegations and statements contained in all preceding paragraphs as if they were expressly recited herein.

167. Under Florida law, GRU is entitled to a decree of specific performance under the PPA. Specifically, under the PPA, GRU is clearly entitled to a decree requiring GREC to conduct Planned Maintenance annually for the remainder of the PPA's term.

168. As explained above, the parties have entered into the PPA, and GRU has paid adequate consideration under the PPA, and the PPA was just—in return for payment for Available Energy, GRU has bargained for long term reliability and safety of the Facility, as well as the availability of Energy to be delivered. GRU has satisfied its obligations under the PPA.

169. However, GREC has failed to perform annual Planned Maintenance for 2016, and has now prospectively announced its refusal to take an outage for annual Planned Maintenance in 2017. In a letter dated March 3, 2016, GREC indicated that it “does not plan to take a planned maintenance outage in calendar year 2017.” Fagan Letter to Brown (Mar. 3, 2016), Ex. R29. Because the decree would be prospective in nature and any monetary damages resulting from GREC's failure to perform under the PPA in the future are difficult to ascertain, GRU has no adequate remedy at law. Thus, justice requires that the Arbitrator also issue the requested decree

of specific performance. *See Invego Auto Parts, Inc. v. Rodriguez*, 34 So. 3d 103, 104 (Fla. Dist. Ct. App. 2010).

IX. Relief Sought

170. In connection with GREC's claims against GRU, GRU respectfully requests that the Arbitrator issue an interim award, at the earliest possible date, that dismisses GREC's Claims against GRU with prejudice.

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

- a. Enters a declaratory judgment that, pursuant to Section 10.4.1(a) of the PPA, Planned Maintenance is required annually;
- b. Enters a declaratory judgment that the performance of annual Planned Maintenance is a material obligation under the PPA;
- c. Enters a declaratory judgment that GREC is in material default of the PPA due to its failure to perform annual Planned Maintenance for 2016;
- d. Enters a declaratory judgment that, because GREC is in default, GRU is contractually entitled to terminate the PPA;
- e. Enters a judgment finding that GREC is in breach of the PPA with respect to its failure to perform annual Planned Maintenance for 2016;
- f. Enters a judgment finding that GREC is in breach of the PPA with respect to its failure to accurately report Available Energy and its consequential failure to invoice GRU accurately for Available Energy;
- g. Enters a judgment finding that GREC is in breach of its implied covenant of good faith and fair dealing;

- h. Awards GRU all damages sustained as a result of GREC's breach of the PPA through its failure to perform annual Planned Maintenance for 2016;
- i. Awards GRU all damages sustained as a result of GREC's failure to accurately report and invoice for Available Energy;
- j. Awards GRU interest as applicable at law or under the PPA from all damages;
- k. Issues a decree of specific performance requiring GREC to conduct Planned Maintenance annually for the remainder of the term of the PPA;
- l. Awards GRU its attorneys' fees, expenses, and costs incurred in this arbitration;
and
- m. Grants GRU such other, further, and different relief as the Arbitrator deems just and proper under the circumstances.

Date: July 15, 2016

Respectfully submitted,

/s/ Paula W. Hinton
Paula W. Hinton

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record are being served this 15th day of July 2016, with a copy of the foregoing document via electronic mail.

/s/ Paula W. Hinton
Paula W. Hinton