

AMERICAN ARBITRATION ASSOCIATION

Gainesville Renewable Energy Center, LLC,

Claimant,

v.

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

Respondent.

AAA Case No. 01-16-0000-8157

**THE CITY OF GAINESVILLE, FLORIDA, D/B/A GAINESVILLE REGIONAL
UTILITIES FIRST AMENDED RESPONSE AND COUNTERCLAIM TO
GREC ARBITRATION DEMAND**

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**THE CITY OF GAINESVILLE, FLORIDA, D/B/A GAINESVILLE REGIONAL
UTILITIES FIRST AMENDED RESPONSE AND COUNTERCLAIM TO
GREC ARBITRATION DEMAND**

Pursuant to R-5 of the American Arbitration Association’s (the “AAA”) Rules for Commercial Arbitration, Respondent The City of Gainesville, Florida, d/b/a Gainesville Regional Utilities (“GRU”) hereby submits this First Amended Response and Counterclaim (“Response”) to Claimant Gainesville Renewable Energy Center, LLC’s (“GREC”) Arbitration Demand (the “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 current dispute solely regards 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”).¹ The PPA requires GREC to conduct maintenance at the Facility each year 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.

2. GREC’s default under the PPA deprives GRU of its reasonable expectation that GREC would conduct Planned Maintenance during a twenty-one day period in 2016 – from April 9th through April 29th – in accordance with the PPA’s requirements 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

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

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. 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, and (ii) the PPA's requirement for obtaining GRU's agreement to any change to the agreed upon written annual maintenance plan.

4. GREC now seeks to realize an improper financial windfall by demanding that GRU make payments to GREC that are not owed for the period when GREC was required to conduct Planned Maintenance in accordance with its written annual maintenance plan. This financial windfall could be in excess of \$4,000,000.

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. GREC's asserted claims in the 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 in default under the PPA and 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.

7. Throughout the 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" and by alleging that GRU and Mr. Bielarski engaged in "improper" leveraging efforts. 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 and unhelpful commentary on GREC and its executives and employees.

8. 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.

9. Finally, GREC's Demand also repeatedly cites to, and even quotes from, documents and correspondence that it has not attached as exhibits to the Demand. GREC's

failure to supply the documents on which it relies is extremely prejudicial. GRU will endeavor to supply the arbitrator with a complete record.

II. Procedural Matters

10. 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.

11. 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.

12. 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

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

B. Respondent GRU

14. 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

15. 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

16. 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, Ex. R1, Appendix III.

17. 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, Ex. R1, Schedule 1 (providing the full definition of Available Energy).

18. 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 month² – 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 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.

19. For the last several months, when the Facility has reported being available to generate Energy at its full Dependable Capacity level but not dispatched by GRU at all, GRU's monthly payment to GREC has been \$5,841,270.³ For months when the Facility was available but dispatched at a level lower than its full seasonal Dependable Capacity level, the monthly payment was the same, because GREC is paid for the combined 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.

20. 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 that GREC incurs to operate the Facility, including the cost of fuel. *See* PPA, Ex. R1, at Appendix III. 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

² 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.

³ See previous footnote.

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.

21. 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

22. 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).

23. The schedule of “Planned Maintenance” referred to in section 10.3.2 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). 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, vii (emphasis added). Thus, every year, the PPA requires a written annual maintenance plan specifying the following year’s Planned Maintenance.

24. 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.

25. 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”)⁴ must all agree on any proposed change to the Planned Maintenance schedule.

26. 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. 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.*

C. The 2016 Planned Maintenance Schedule

27. 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

⁴ 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>.

annual Planned Maintenance outages for the Facility. *See* Demand ¶ 77 (indicating that GREC has provided information to assist in the preparation of the Outage Schedules “ever since GREC began operations”).

28. 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. R2. 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. R2. 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. R2. 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.

29. 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

30. 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.

31. 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.

32. The Facility experienced a Forced Outage 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 is 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.

33. 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.

34. 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 and fuel charges 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.

E. John Stanton

35. 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 for his actions in connection with the events that led to the current dispute between GRU and GREC.

36. 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:

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.

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

37. Despite being indisputably aware that any and all changes to controlling documents were to be directed to Mr. Bielarski, 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.

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.

38. 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.

39. The Demand claims that GREC confirmed its cancellation of the annual Planned Maintenance in an email on December 10, 2015. *See* 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.

40. 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."⁵ Abel Email #2 to Demopoulos (Feb. 3, 2016), Ex. R9. 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.

41. Also on February 3, 2016, the fact that GREC was under the impression that the annual Planned Maintenance had been cancelled 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 GREC performs the agreed upon maintenance, GRU will not pay Available Energy charges during the agreed upon period between April 9th and April 29th. *Id.*

⁵ 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.

42. 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.

43. Also on February 8th, GREC issued a formal notice of dispute resolution under section 24(a) of the PPA, alleging that GRU will be in breach of the PPA if it fails 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.

44. 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.

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

46. 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 is not agreeable to GRU. *Id.*

47. Finally, on February 29, 2016, Mr. Bielarski was forced to provide formal notice that GRU will consider GREC in breach of section 10.4.1(a) if it fails 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. R17.⁶

48. 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.

49. As of the filing of GRU's First Amended Response and Counterclaim, 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.

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

50. 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, Ex. R1, at Schedule 1 (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.

51. 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 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

⁶ 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.

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.

52. 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. GREC experienced a Forced Outage during which time it 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.

53. 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 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 call 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.

54. First, section 10.4.1(a) of the PPA, 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*." 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."

55. The PPA's definition of Planned Maintenance provides further support to 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, Ex. R1, at Schedule 1. 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.

56. 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, Ex. R1, at Schedule 1. 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.

57. 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 recent failure to perform the Dependable Capacity test in accordance with GRU's instructions raises serious concerns in this regard. These concerns are heightened if maintenance work is not 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 in each hour of each month.

58. 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. Considering the PPA as a whole, as required by Florida law, reveals the Parties' intent that Planned Maintenance be conducted annually.

59. 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.

60. 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.

61. 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. (emphasis

added). 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.⁷

62. 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 is the number of hours that a facility has actually been operated or run." Demand ¶ 83. 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.* at 3. GREC's theory and position are demonstrably false.

63. First, GREC likens performing maintenance on the Facility to changing the oil in a car. *See* Demand ¶ 83. Not only is GREC's oil change analogy entirely irrelevant to complex, power generation facilities, is it also factually inaccurate. In fact, a car that is not being operated needs additional maintenance to remain fully reliable. Kelley Blue Book recommends that 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/>.

⁷ Recent testimony from a GREC representative further confirms the Parties' understanding that Planned Maintenance is to occur every year. GREC is currently engaged in 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. 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.

64. 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 Demand, GREC has apparently forgotten the lessons learned via its "background in the utility industry and by prudent operation practice."

65. 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.*, 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, add to, or subtract from it, or affect its construction." *Duval Motors*, 73 So. 3d at 265 (quotation omitted). Even accounting for the more lax evidentiary standard of arbitration, Mr. Stanton's attempts to rewrite the PPA, nearly seven years after its execution, are irrelevant. 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 2016 personnel action.

66. 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. It is entirely possible that the joint would not have failed if the Facility had operated more often or more continuously since August 2015. 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 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.

67. 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 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).

68. GREC argues that the Outage Schedules are “informal and non-contractual” and claims: (i) “There is no PPA provision that mentions these two forecasting schedules or the outage coordination process,” and (ii) “There is no PPA provision that requires GREC to submit forecasts of outages for the Rolling 12 Month Outage Schedule or the 10-Year Outage Schedule.” Demand ¶¶ 75–77. GREC's assertions ignore and contradict the plain language of section 10 of the PPA, including section 10.4.1(a).

69. GREC's Demand acknowledges 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.” Demand ¶ 71. Yet, GREC fails to recognize the obvious parallels between its statement and section 10.3.2, which provides: “[GREC] shall provide to [GRU] [GREC]’s generation forecast for the upcoming calendar year.”

70. Moreover, GREC’s Demand acknowledges that “[b]ased on the information that GREC had as of May and June 2015, and specifically in response to email requests from GRU regarding its 10 Year Outage Schedule and Rolling 12 Month Outage Schedule, GREC informed GRU by email that it forecasted the need to take maintenance outages over specific periods in April 2016 and April 2017.” Demand ¶ 84. GREC again fails to see the parallels between this statement 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.”

71. 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.

72. Despite their obvious application to the requirements of section 10 of the PPA, GREC ignores the May and June Outage Schedules and instead focuses on the October Letter to John Stanton.

73. 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.”

74. 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 consists of a single, brief paragraph. It is plainly inadequate to serve as a “plan.” The October Letter lacks all of the characteristics of the Outage Schedules that make those 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.

75. Because the October Letter is not an “annual maintenance plan,” it is necessarily an attempt to change the written annual maintenance plan approved in June 2015. However, by failing to comply with section 10.4.1(a) of the PPA, GREC rendered the October Letter ineffective.

76. GREC claims that GRU, and particularly, Mr. Bielarski, does not have the power to approve or reject the proposal of the October Letter. *See* Demand, at 4, 25. 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.

77. 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.

78. 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, as soon as Mr. Bielarski was made aware of the October Letter and its purported changes to the written annual maintenance plan, he immediately 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.

79. GREC repeatedly relies on the statement that Mr. Stanton “acknowledged receipt” of the October Letter. *See, e.g.*, Demand, at 4, 5, 22. 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, GREC admits 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. 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.⁸

80. 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

⁸ 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.

of the Parties' agreed written annual maintenance plan. GREC's efforts are designed 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

81. 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. As a result of that reasonable expectation, the \$4,000,000 financial windfall that GREC seeks to collect through its Demand is not included in current GRU electric rates.

82. 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 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.

83. 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.

VI. GREC’s Asserted Claims Are Without Merit.

84. Unless specifically admitted herein, GRU denies each and every allegation in GREC’s Demand and GREC’s Answer to Counterclaims in GRU Response, filed April 13, 2016, and denies any liability to GREC.

A. Breach of the PPA

85. GREC claims that GRU is in breach of the PPA, alleging: (1) GRU is trying to force GREC to take a maintenance outage; (2) GRU refuses to recognize GREC’s October 14, 2015 “written annual maintenance plan” in which GREC cancelled the maintenance outage in April; and (3) GRU refuses to recognize GREC’s contractual right to not take a maintenance outage. GREC’s allegations are without merit for the following reasons.

86. 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." Thus, GREC is not relieved of its contractual duty to take an annual Planned Maintenance outage in April of 2016.

87. 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 in June of 2015. GRU timely stated its disagreement with GREC's proposed change when Mr. Bielarski, the only person with authority to grant GRU's agreement to any such change, informed GREC that its proposal to forego Planned Maintenance was unacceptable. Bielarski Letter to Gordon (Feb. 4, 2016), Ex. R11.

88. 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. 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. Indeed, GREC's binding response to GRU's RFP 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. Finally, 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. GREC cannot unilaterally decline to perform this material contractual obligation.

89. GREC is required to conduct annual Planned Maintenance and to engage in mutually agreeable annual Planned Maintenance scheduling. Indeed, GREC 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 thus, GREC has no contractual right to forego the Planned Maintenance outage scheduled for April.

B. Anticipatory Breach of the PPA

90. GREC claims that GRU has committed anticipatory breach of the PPA, alleging: (i) GRU has refused to acknowledge GREC's "timely Annual Maintenance Plan;" (ii) GRU has declared that it will not pay GREC for Available Energy during the April Planned Maintenance period; and (iii) GRU has threatened to deem GREC in anticipatory breach of the PPA if GREC does not take the April outage. GREC's allegations are without merit for the following reasons.

91. First, as previously stated in Part VI.A above, GREC's October Letter to Mr. Stanton does not constitute a "written annual maintenance plan" as required by section 10.4.1(a) of the PPA. Instead, the October Letter clearly represents a request to change the written annual maintenance plan established by GREC and GRU 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 refusing to agree to GREC's unilateral cancellation of the agreed Planned Maintenance.

92. Second, 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.

93. Third, 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. 21). 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.

C. Breach of the Covenant of Good Faith and Fair Dealing

94. GREC claims that GRU has breached the implied covenant of good faith and fair dealing, alleging: (i) GRU’s actions and omissions unfairly interfered with GREC’s receipt of benefits under the PPA; and (ii) GRU’s conduct did not comport with GREC’s reasonable contractual expectations under the PPA. GREC’s allegations are without merit for the following reasons.

95. First, these allegations are insufficient to state a claim for breach of the covenant of good faith and fair dealing. Under Florida law, 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). GREC has failed to allege that GRU’s performance, or alleged lack thereof, of any specific contractual obligation has caused GREC to suffer to any alleged harm. As such GREC has failed to state a claim for breach of the implied covenant of good faith and fair dealing.

96. To the extent that GREC’s allegations of GRU’s breach of the covenant of good faith and fair dealing are derived from either of its first two claims for breach and/or anticipatory breach of the PPA, those allegations fail for the same reasons set forth previously. *See supra* Part VI.A–B.

D. Declaratory Judgment

97. Although GRU strongly disagrees with the allegations in GREC’s Demand, *see supra* Part VI.A–C, GRU agrees with GREC that a declaratory judgment is an appropriate remedy to the Parties’ dispute.

VII. GRU’s Affirmative Defenses

98. 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

99. 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 allegation 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 anticipatorily breached the PPA, GREC has failed to state any instance in which GRU indicated that it would not perform under the terms of 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.

B. No Breach by GRU

100. 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.

C. Unjust Enrichment

101. 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.

D. No Damages

102. 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.

E. Waiver

103. 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.

F. Estoppel

104. 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.

G. Doctrine of Unclean Hands

105. 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.

H. Covenant of Good Faith and Fair Dealing

106. As explained in Parts I, IV.A, V.D, and VIII.B, 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.

I. Parol Evidence Rule

107. 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.

J. Statute of Frauds

108. 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.

K. Lack of Consideration

109. 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.

L. Failure of Condition Subsequent

110. 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. 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.

M. Failure to Mitigate Damages

111. 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.

VIII. Counterclaims

A. Default Under the PPA

112. GRU incorporates here the allegations contained in all preceding paragraphs.

113. 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.” 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 will cancel Planned Maintenance for 2016, which is both a breach of the PPA's requirements for Planned Maintenance and a change to the June 2015 written annual maintenance plan that is 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”). Now, the period of performance has passed, and GREC has failed to perform its contractually required Planned Maintenance.

114. 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, 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” 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.

115. 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 is 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 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.

116. 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.

117. As of April 30, 2016, GREC's failure to conduct Planned Maintenance has deprived GRU of its contracted for benefit of the bargain in the PPA. Pursuant to the terms of the PPA, GRU continues to pay GREC \$194,709 per day for Available Energy; 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.

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

118. GRU incorporates here the allegations contained in all preceding paragraphs.

119. 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.

120. 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. By (i) refusing to perform annual Planned Maintenance, and (ii) conducting scheduling activities that do not comply with the requirements of the PPA, GREC has breached each of these express terms of the PPA.

121. As a result of GREC's breach, 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, and (ii) GRU would not pay for Available Energy during the scheduled Planned Maintenance outage in April 2016, have been thwarted. GREC seeks to extract a financial windfall at the direct expense of GRU's customers and the citizens of the City of Gainesville. GRU has been commensurately harmed by GREC's breach of its covenant of good faith and fair dealing.

C. Declaratory Judgment

122. GRU incorporates here the allegations contained in all preceding paragraphs.

123. 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).

124. 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, (ii) 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 (iii) 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.

D. Specific Performance

125. 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. 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

126. 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.

127. 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 and breach of the PPA;
- d. Enters a declaratory judgment that GRU is contractually entitled to terminate the PPA;
- e. Enters a declaratory judgment that GREC is in breach of its implied covenant of good faith and fair dealing;
- f. Awards GRU all damages sustained on account of GREC's actions;
- g. Awards GRU interest as applicable at law or under the PPA;
- h. Issues a decree of specific performance requiring GREC to conduct Planned Maintenance annually for the remainder of the term of the PPA;
- i. Awards GRU its attorneys' fees, expenses, and costs incurred in this arbitration; and
- j. Grants GRU such other, further, and different relief as the arbitrator deems just and proper under the circumstances.

Date: May 27, 2016

Respectfully submitted,

/s/ Paula W. Hinton
Paula W. Hinton

CERTIFICATE OF SERVICE

I hereby certify that the all counsel of record are being served this 27th day of May 2016, with a copy of the foregoing document via electronic mail.

/s/ Paula W. Hinton
Paula W. Hinton