AMERICAN ARBITRATION ASSOCIATION

THE CITY OF GAINESVILLE, FLORIDA, d/b/a GAINESVILLE REGIONAL UTILITIES, **v.** **GAINESVILLE RENEWABLE ENERGY CENTER, LLC, AMERICAN RENEWABLES, LLC, TYR ENERGY, LLC, TYR ENERGY, INC., ENERGY MANAGEMENT, INC., BAYCORP HOLDINGS LTD., STARWOOD ENERGY GROUP GLOBAL, LLC, STARWOOD ENERGY GROUP GLOBAL, INC., RON FAGEN, DIANE FAGEN, AND JOHN DOES NOS. 1-25.**	**ICDR Case No. 50 198 T 00953 12**

CLAIMANT GAINESVILLE REGIONAL UTILITIES' OPPOSITION TO REQUEST FOR DISMISSAL BY RESPONDENT GAINESVILLE RENEWABLE ENERGY CENTER LLC

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Claimant the City of Gainesville, Florida, d/b/a Gainesville Regional Utilities ("GRU"), by its undersigned attorneys, submits its opposition to Request for Dismissal (the "Request") by Respondent Gainesville Renewable Energy Center, LLC's ("GREC").

I. PRELIMINARY STATEMENT

In December 2011 GREC breached its obligation to provide GRU with its contractual "right of first offer" to purchase the biomass electric power facility at issue in the parties' electric power purchase agreement. GRU's right is triggered by a prospective "change of control" in GREC. The parties agree that "change of control" here can include the ability to control GREC by an aggregate of minority owners that together hold greater than 50% ownership interest in GREC. GREC explains that two such minority owners have "the ability to vote in accordance with their respective membership interests," and such ability gives them "operating control of GREC by way of its representation and votes on the Board of Managers." See Request at 19. As of December 31, 2011, with no right of first offer extended to GRU, 58% of the ownership interests in GREC (including the rights to a 58% voting majority on GREC's Board) had been transferred to two new owners. This was in breach of GRU's rights. GREC's Request for Dismissal relies on procedural ploys that are barred by Florida law and misapprehensions of the contract terms that are belied by the record facts.

In April 2009, GRU and GREC entered into a 30-year electric power purchase agreement ("PPA"), pursuant to which GREC agreed to construct and operate a 100 megawatt biomass fueled electric power plant (the "Facility"), and in turn, GRU agreed to purchase all the electric output from the Facility. The Facility is now 95% complete at a cost approaching $500 million.[1]

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[1] A photograph of the Facility during construction is annexed as Exhibit 2 to the accompanying Affidavit of GRU's General Manager, Robert E. Hunzinger, dated July 1, 2013 ("Hunzinger Aff.").

The Facility is expected to provide renewable electricity to some 70,000 GRU customers, and GRU's total purchases under the PPA over the life of the contract could exceed $3 billion.

The PPA gives GRU a right of first offer ("ROFO") to purchase the Facility before GREC pursues certain actions. Under Section 27.3, GREC "may not sell the Facility, either directly or indirectly through a change of control of [GREC]," unless GREC first gives notice to GRU, after which GRU has 60 days to make an offer to buy the Facility and GREC must negotiate exclusively with GRU toward a potential sale. When the PPA was signed in 2009, there were three (indirect) owners of GREC. In 2011, however, two new stakeholders indirectly acquired 58% of the ownership shares of GREC through two separate transactions. GRU was not given the 60-day notice as to either of the transactions, nor was GRU given the opportunity to purchase the Facility in accordance with GRU's rights under the ROFO.

Instead, on December 27, 2011 – three days before the second transaction – while GRU's General Manager, Robert Hunzinger, was on holiday vacation, GREC's CEO, Jim Gordon, called Mr. Hunzinger on his cell phone, told him of the imminent transaction and tried to obtain GRU's acquiescence that the transaction would not trigger a "change of control" for purposes of the ROFO. Mr. Gordon followed up by email, again seeking a snap acknowledgement from GRU. Mr. Hunzinger did not acquiesce in GREC's view of the transaction. Rather, GRU was concerned that a change of control had occurred. It thereafter sought more detailed information from GREC about its ownership structure to assess whether GREC's assertion that no change of control had merit. To date, GREC has refused to provide the requested information.

GREC's Request for Dismissal is completely baseless. Its primary argument is based on the erroneous assumption that the limited liability provision in Section 26.1 of the PPA bars the equitable remedy that GRU seeks: namely, specific performance of the ROFO and an order

directing sale. GREC overlooks that Section 26.1's limitation of liability to damages applies only where the breached PPA provision does not provide an express remedy (or specify damages). Because the Facility is a unique asset, GRU can only be made whole by specific performance of the right of which it was wrongly deprived. The ROFO itself is thus ipso facto the express remedy for breach. If the limitation of liability operated to deprive GRU of the right to seek specific performance of the ROFO, then GREC's obligations under the ROFO would be illusory. Under long-standing Florida law (which governs the PPA), a limited liability provision that renders a party's contractual obligations illusory is not enforceable. Section 26.1 therefore may not be enforced so as to permit GREC to escape responsibility for its breach of the ROFO.

GREC next contends that the ROFO was never triggered, based on the confused argument that the ROFO applies only when GREC plans a one-time sale, to a single third party of either 100% of the Facility or 100% of GREC. This simply misreads the PPA. Under Section 27.3, the ROFO is triggered before GREC offers the Facility for sale, which "sale" is defined as either: (i) "directly" through an asset sale, or (ii) as occurred here, "indirectly through a change of control of [GREC]." At the time the PPA was executed, no single owner held a majority share in GREC. Accordingly, a "change of control" in GREC sufficient to trigger the ROFO does not require transfer of 100% (or even greater than 50%) of ownership to a single third party. Indeed, GREC concedes elsewhere in its Request that two minority holders aggregating greater than 50% have the "ability to vote in accordance with their respective membership interests," (emphasis added) and therefore have "operating control of GREC." See Request at 19. GRU agrees that that is how the parties intended "change of control" to be applied. And such a prospective "change of control" occurred in December 2011 with the of 58% of indirect interest in GREC into new hands, thereby triggering GRU's ROFO.

As Mr. Hunzinger, GRU's negotiator of the PPA attests, the intent and purpose of the ROFO was to provide GRU an opportunity to purchase the Facility in the event GREC planned a substantial change in ownership. See Hunzinger Aff. ¶ 7. GRU negotiated for this opportunity because it knew from the outset that GREC's original owners are power plant developers, not long-term operators and that they would likely seek to sell some or all of their interests before or shortly after the Facility becomes operational. Id. ¶¶ 7-8. As to GREC's argument that the first of the 2011 equity ownership transfers constituted "construction financing," that falls within the scope of the ROFO carve-out for such financing, Mr. Hunzinger explains GREC is simply wrong. Id. ¶ 10-11. The parties never intended for such an equity ownership stake to fall within the carve-out. Id.

Finally, GREC makes a faint objection that it was not provided with 30-days notice before GRU filed for arbitration. The objection rings hollow and provides no basis for dismissal. Following GREC's unsuccessful attempt to catch Mr. Hunzinger unaware on vacation and relinquish GRU's ROFO, GRU raised the ROFO issue with GREC repeatedly in 2012 and sought information from GREC about its ownership structure. GREC to this day refuses to provide the information. Any lack of formal written notice is immaterial because (i) GREC has known of GRU's ROFO claim since early 2012, (ii) GREC would never have cured its breach even if it had 30-days notice before GRU filed this proceeding, and (iii) as a result there is no prejudice to GREC.

With no legitimate defense to GRU's claims, GREC attempts to cloud the real issues with heated rhetoric and allegations that GRU has no true interest in purchasing the Facility, and that it brought this arbitration to force GREC to renegotiate the PPA. Aside from being false, these

allegations do not form any basis for dismissal, especially in response to a preliminary motion, where all reasonable inferences must be drawn in GRU's favor.

II. PERTINENT FACTS

A. GRU's Power Purchase Agreement with GREC

GRU is a multi-service public utility owned by the City of Gainesville. It is the fifth largest municipal electric utility in Florida, supplying some 93,000 retail and wholesale customers with electric, natural gas, water, wastewater, and telecommunications services. GRU invests in renewable energy sources in order to provide its customers with safe and reliable utility services in an environmentally responsible manner. See Hunzinger Aff. ¶ 3.

GREC is a Delaware limited liability company that was formed and exists for the sole purposes of constructing and operating the Facility. Under the PPA, GRU agreed to purchase all of the Facility's renewable energy supply for 30 years. See Hunzinger Aff. ¶ 5. According to GREC, its costs of construction of the Facility when complete will total nearly $500 million. Id. The Facility is approximately 95% completed and is scheduled to be operational in November 2013. Id. When operational, GREC estimates the Facility will supply enough renewable power for approximately 70,000 homes. Id. Over the 30-year term of the PPA, GRU's total purchases of electricity and other services could exceed $3 billion. Id. ¶ 6.

B. Background and Purpose of GREC's Right of First Offer in the PPA

The PPA grants GRU a right of first offer to purchase the Facility. Section 27.3 of the PPA provides, in pertinent part:

> Right of First Offer. [GREC] may not sell the Facility, either directly or indirectly through a change of control of [GREC], during the term of this Agreement unless [GREC] shall have complied with the following: prior to selling the Facility, [GREC] shall give notice to [GRU] of [GREC's] intent to sell the Facility and [GRU] shall have sixty (60) days from such notice to prepare an offer (the "First Offer") to purchase the Facility. [GREC] shall

> negotiate in good faith exclusively with [GRU] for a minimum of thirty (30) days from receipt of the First Offer to attempt to reach agreement on the terms of a purchase... Notwithstanding anything herein to the contrary, a construction financing or tax equity financing with respect to the Facility shall not be deemed to be a change of control for purposes of this Section 27.3.

Request, Ex. 1 (Section 27.3) (emphasis added). The ROFO thus gives GRU the right to make an offer for the Facility and an exclusive 60-day negotiation period, before GREC may sell the Facility either (i) directly, or (ii) "indirectly through a change of control."

The intent and purpose of the ROFO was to give GRU the opportunity to purchase the Facility in the event that GREC contemplated a substantial change in ownership. Hunzinger Aff. ¶ 7. GRU negotiated for this clause because (among other reasons) it believed at the time it entered into the PPA that GREC's then (indirect) owners, BayCorp Holdings Ltd. ("BayCorp"), Energy Management, Ltd. ("EMI") and Tyr Energy, LLC and Tyr Energy, Inc. (together "Tyr"), typically acted as developers of energy projects and treated them as short-term investments. Id. GRU understood that once the Facility became operational, if not before (as turned out to be the case here), some or all of these original owners would likely seek to monetize their investments by selling the Facility or their interests in it. Id. ¶ 8. As GRU's negotiator on the PPA, Mr. Hunzinger, explains in his affidavit, it was in contemplation of such transfers of ownership that the "change of control" provision was intended to apply to prospective transfers of partial interests in GREC. Id. In the event that the aggregate effect of one or more such transfers would result in a substantial change of ownership (and thus a change of control for purposes of Section 27.3), GRU first wanted the opportunity to review the circumstances and determine whether it wished to offer to purchase the Facility. Id.

The ROFO clause carves out "construction financing" transactions from the types of transactions that can trigger a "change of control." See Section 27.3. The term "construction

financing" in Section 27.3 was intended by the parties to apply only to bank credit facilities (or the like) extended by lenders to GREC, with repayment to such lenders required at some point after completion. Hunzinger Aff. ¶ 10. Accordingly, Section 20 of the PPA addresses "Covenants Relating to Construction Financing" and contemplates only debt financing by lenders. In section 20.1, GRU expressly "recognizes that [GREC] may seek to obtain debt financing for the Facility." See Request, Ex. 1 (Section 20.1) (emphasis added). Section 20.1 requires GRU to cooperate with GREC's construction financing "lenders" and to timely provide "such consents and related documents as are reasonably requested by the lenders." Id. (emphasis added).

The "construction financing" carve-out was in recognition of, and to accommodate, that in extending construction debt financing of the size and complexity involved in the Facility, GREC's lenders would obtain security in the Facility as collateral for the loans. Hunzinger Aff. ¶ 10. The lenders' security protections would include significant rights over GREC, and thus over the Facility, in the event GREC defaulted under its credit facilities. Id. GRU believed that such lender rights might include, inter alia, the right to oversee GREC's development and construction of the Facility and the right to foreclose on the Facility, or on the equity ownership interests in GREC, in the event of a loan default. Id. Based on these rights, GREC's lenders could be in a position to exercise control over their collateral, i.e. GREC and the Facility. Because obtaining construction financing loans from lenders is standard in such projects, and because the significant lender rights that could lead to control are standard terms of such credit facilities, the parties carved such credit facilities out of the "change of control" trigger of the ROFO. Id. The term "construction financing," however, was not intended to apply to an equity capital contribution paid in exchange for a permanent ownership interest in GREC -- regardless

of whether GREC was required to utilize some or all of such equity capital to develop the Facility.[2] Id. ¶ 11.

C. GREC's Original Three-Owner Structure at the Time of the PPA

At the time GRU and GREC entered into the PPA, GREC was a wholly-owned subsidiary of American Renewables, a Delaware Limited Liability Company ("American Renewables"). American Renewables was owned by three stakeholders. The first stakeholder, Respondent Tyr, owned 49%; the second, Respondent EMI, owned 25.5%; and the third, Respondent BayCorp, owned 25.5%. The (indirect) ownership of GREC at that time is depicted as follows:

Percent Ownership	Owner
49.0%	Tyr
25.5%	EMI
25.5%	BayCorp
100.0%	

Although none of the original owners held greater than 50%, GREC states in its Request for Dismissal that, "operating control of GREC by way of its representation and votes on the [GREC] Board of Managers" resided in EMI and BayCorp. See Request at 19. GREC explains this was so because EMI and BayCorp had "the ability to vote in accordance with their respective membership interests." Id.

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[2] GREC's Request refers to alleged "Press coverage" of the "construction financing" in June 2011. See Request at 12. What GREC refers to as "press coverage," however, is really GREC's own Press Release, reprinted verbatim on an industry website. Compare Request at 12 & Ex. 4 thereto with Affidavit of John Ansbro, dated July 1, 2013 ("Ansbro Aff."), Ex. 2.

D. 2011: New Owners Acquire 58% of GREC

1. June 2011: Ronald and Diane Fagen Acquire 17.7% of GREC

At some time before June 30, 2011, without notice to GRU, American Renewables was replaced as the owner of GREC by GREC Holdings LLC, but Tyr, EMI, and BayCorp maintained their respective ownership interests in the new entity. Then, Tyr, EMI, and BayCorp each made a transfer of shares to bring a fourth stakeholder into the GREC ownership structure. 17.706% of the interest in GREC Holdings, LLC, was transferred to Respondents Ronald and Diane Fagen (together, "Fagen"). As a result, as of June 30, 2011, GREC was indirectly owned as follows:

Percent Ownership	Owner
17.706%	Fagen (new owner as of June 30, 2011)
40.324%	Tyr
20.985%	EMI
20.985%	BayCorp
100.000%	

GREC Holdings LLC's Amended and Restated Limited Liability Company Agreement (Request, Ex. 5), reflects that Fagen acquired its interest in GREC as an equity investment. See Request, Ex. 5 at Art. 3.1. Fagen made a capital contribution and, in exchange, received 17.706% of Class A Membership Interests in GREC Holdings LLC. Id. at Schedule 1. With one temporary exception, this put Fagen on the same equity ownership footing as GREC's other then owners, Tyr, BayCorp and EMI, which also hold their interests as Class A Membership Interests. Id.

The temporary difference between Fagen's Class A ownership rights from the other Class A shareholders is that the June 2011 equity transfer to Fagen was structured so as to make Fagen's right to appoint its representative to the Board of Managers conditional upon Fagen completing construction of the Facility and the Facility going operational. See Request, Ex. 5 at

Art. 4.1(c)(iv). Fagen is expected to meet those conditions four months from now, in November 2013. When that occurs, Fagen's right (acquired in June 2011) to appoint a Board member and vote its proportional 17.7 interest in GREC will be effective. Id. at Art. 4.1(b)-(c)(iv).

2. Without Prior Notice, GREC Attempts to Obtain Last-Second Acquiescence from GRU That an Imminent 40% Transfer of GREC Will Not Trigger a "Change of Control" Under the ROFO

On December 27, 2011, in the middle of the Christmas/New Year holiday week, Jim Gordon, CEO of EMI and a representative of GREC's Board of Directors, called Mr. Hunzinger who was then on vacation. Hunzinger Aff. Ex. 12. Mr. Gordon advised Mr. Hunzinger of a pending year-end transfer of Tyr's 40.324% ownership interest to Respondent Starwood Energy Group Global, LLC ("Starwood"). Id. On that December 27 call, Mr. Gordon stated that he did not consider the sale of Tyr's ownership interest to Starwood to constitute a change of control of GREC, as contemplated by Section 27.3 of the PPA. Id. Mr. Gordon sought GRU's acquiescence and agreement by return e-mail that no change of control would result from the sale. Mr. Gordon's December 28 e-mail asserts:

> Because it [the Tyr to Starwood transfer] is a transfer of a minority interest in GREC, this transaction does not trigger GRU's Right of First Offer for the Facility under Section 27.3 of our PPA between GREC and GRU. Can you please confirm this back to me by return email? Thank you and I hope all is well. Hope you are enjoying your vacation and best wishes for the new year.

See Hunzinger Aff. Ex. 3 (emphasis added). Contrary to GREC's assertion now, the parties reached no "understanding" (Request at 14) on that December 27 call. Hunzinger Aff. ¶ 13. GRU did not provide requested acquiescence either on that call or in response to GREC's December 28 e-mail. Id. Nor has GRU done so since. Id.

3. The Fagen and Starwood Transfers Result in 58% New Ownership in GREC, as of December 30, 2011

According to Respondent Starwood's press release and an industry press report, on December 30, 2011 Tyr transferred its remaining indirect 40.324% ownership to Starwood. Together with the 17.706% Fagen share, the Tyr to Starwood transfer resulted in a total of 58.03% of new ownership in GREC since the execution of the PPA, as follows:

Percent Ownership	Owner
40.324%	Starwood (new owner as of Dec. 30, 2011)
17.706%	Fagen (new owner as of June 30, 2011)
58.030%	Sub-total of New Owners' Interests
20.985%	EMI
20.985%	BayCorp
41.970%	Sub-total of Original Owners' Shares
100.000%	Grand Total

E. GREC Refuses to Provide GRU with Details About Its Ownership Structure

Without benefit of citation, GREC proclaims in support of its Request: "Indeed, in early 2012, a GRU spokesperson said that GRU believed there was no 'anticipated impact' from the sale of Tyr's minority interest to Starwood." Request at 21. Upon investigation it appears that GREC's source was a January 17, 2012 news article in The Gainesville Sun. The full sentence from the article reads as follows:

> Gainesville Regional Utilities spokeswoman Kim Jamerson said the utility believed there was "no anticipated impact" from the sale but added that GRU's attorney was reviewing paperwork to be sure.

Ansbro Aff. Ex. 1 (emphasis added). GREC's Request omits the above underscored text. As GREC knows, GRU soon followed up in order to determine whether there had been a change of control in GREC for purposes of the ROFO in the PPA.

Beginning in January 2012, GRU repeatedly requested additional documentation and information from GREC about its ownership structure. Hunzinger Aff. ¶ 14. GREC provided cursory information by letter dated January 13, 2012. Id. Ex. 4. GRU provided a more detailed draft letter a month later, but GREC refused to finalize and sign the letter. Id. Ex. 5. Thereafter, GRU representatives continued to request ownership information and raise the change of control issue. In response, GREC denied any change of control, but to date it has not provided the requested materials and information. Id.

F. The Gainesville City Commission Unanimously Approved This Arbitration

In the event of an unresolved dispute, the PPA calls for binding arbitration under the AAA Rules in respect of "any controversy, dispute or claim between Seller and Purchaser arising out of or relating to this Agreement, or the breach thereof." Request, Ex.1 (Section 24.2). On December 20, 2012, Mr. Hunzinger and attorneys representing GRU appeared at a public hearing before the Gainesville City Commission. Hunzinger Aff. ¶ 16. Mr. Hunzinger explained to the City Commission that GRU considers that its right of first offer was triggered by a change of control in GREC. He and counsel also explained that Florida has a one-year statute of limitations for actions in equity seeking specific performance, and the limitations period was to expire in ten days, on December 30, 2012. Accordingly, Mr. Hunzinger requested the City Commission's authorization to submit the claim to arbitration. Id. GREC was represented by counsel at the public session and addressed the City Commission. GREC denied that the proposed claim by GRU had merit, but the Commission voted 7-0 in favor of arbitration. Id.

G. GRU's Claims in Arbitration

On December 21, 2012, GRU filed a Demand for Arbitration with the AAA (the "Original Demand"), naming GREC and its current and former owners as Respondents.[3] GRU's Original Demand alleged a breach of contract against GREC for its failure to give GRU notice of a pending change of control and afford GRU its right of first offer. It further alleged that Tyr, EMI and Baycorp directed, aided and abetted GREC in its breach of the PPA, and that Starwood and Fagen have unlawfully received and currently hold their ownership interests in GREC. Because the Facility is a unique asset and monetary damages would be insufficient to render GRU whole, the Original Demand sought specific performance of GRU's right of first offer.

Thereafter, on April 15, 2013, GRU filed its Supplemental Demand, in which GRU amended its request for relief to include an order that GREC sell the Facility to GRU for a price to be determined based on value of the Facility established by the sale to Starwood. A mere grant of the opportunity to make an offer for the Facility would not place GRU in the position it would have been had GREC not breached its obligations under the ROFO Clause.

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[3] GREC's current owners, Respondents BayCorp, EMI, Starwood and Fagen, have not appeared in this proceeding. On February 1, 2013 they brought an action against GRU in the Northern District of Florida, entitled BayCorp Holdings, Ltd. et al. v. City of Gainesville, Florida d/b/a Gainesville Regional Utilities, No. 1:13-cv-00024-MW-GRJ, in which they seek to enjoin GRU from proceeding with the AAA Arbitration as to them. The court denied Plaintiffs' motion for a temporary restraining order by order dated February 15, 2013. Plaintiffs motion for a preliminary injunction was fully briefed on March 22, 2013. The court has not decided the preliminary injunction and set no hearing. Instead, on April 30, 2013, the court issued an Initial Scheduling Order directing parties, inter alia, to confer pursuant to Rule 26 and exchange Initial Disclosures, which the parties did on June 13, 2013. On June 17, 2013, the court issued a Scheduling and Mediation Order, which set deadlines for completion of discovery and mediation in October 2013, summary judgment motions in November 2013, and trial in February 2014.

H. GREC Asserts that, to Date, Minority Holders EMI and BayCorp, When Aggregated Together, Retain "Operating Control" of GREC

In its Request for Dismissal, GREC states that the transfers of 17.7% interest in GREC to Fagen and of 40% to Starwood did not "impact the majority control over GREC." See Request at 3. Specifically, GREC asserts:

> [T]here was no majority change in the nature of voting rights in GREC. Neither Fagen's nor Starwood's interests in GREC have changed "control" of GREC in terms of votes on GREC's Board of Managers. Two out of three members on GREC's Board of Managers continue to be individuals appointed from the same two entities, EMI and BayCorp . . . with the ability to vote in accordance with their respective membership interests. As discussed above, Tyr's previous right to appoint one individual to Grec's Board of Managers was transferred to Starwood. The operating control of GREC by way of its representation and votes on the Board of Manager has always been, and continues to be, in EMI and ByCorp.

Request at 19 (emphasis added). It appears that GREC's above assertion is based upon the fact Fagen's right to vote its 17% has not yet accrued.

However, when Fagen's right to vote accrues, which is expected this November, new owners Fagen and Starwood will have the "ability to vote in accordance with their respective membership interests" totaling 58%, and thus will assume "operating control over GREC by way of its representation and votes on the Board of Managers."

III. ARGUMENT

GREC requests a dismissal of this arbitration on a preliminary motion and without the benefit of a full evidentiary hearing. Its request is therefore akin to a motion to dismiss and should be treated as such. Under Florida law, "[a] motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues[; thus], the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party." The Florida Bar v. Greene, 926 So. 2d 1195, 1199 (Fla. 2006). Accordingly,

in deciding GREC's Request for Dismissal, the Arbitrator should accept all of GRU's allegations as true and construe all reasonable inferences in GRU's favor.

A. GRU is Entitled to Specific Performance

Specific performance is the appropriate remedy where, as here, monetary damages are insufficient to compensate the aggrieved party for a breach of contract. See Nw. Nat. Ins. Co. v. Greenspun, 330 So. 2d 561, 563 (Fla. Dist. Ct. App. 1976) (noting that specific performance decree is appropriate when "damages ... would be inadequate"). Here, a monetary award in GRU's favor would not properly remedy GREC's breach of the ROFO provision, because under that clause GRU was entitled to make an offer for a unique asset, i.e. the Facility. See Bermont Lakes, LLC v. Rooney, 980 So. 2d 580, 586 (Fla. Dist. Ct. App. 2008) (recognizing that money damages for breach of contract to purchase a unique asset (such as land) are inadequate and specific performance is the appropriate remedy); Smurfit Stone v. Zion, 52 So. 3d 55 (Fla. Dist. Ct. App. 2010) (acknowledging availability of specific performance as remedy for violation of right of first offer); Protean Investors v. Travel Etc., 499 So. 2d 49 (Fla. Dist. Ct. App. 1986) (affirming an order of specific performance of a right of first refusal); Whyhopen v. Via, 404 So. 2d 851 (Fla. Dist. Ct. App. 1981) (holding that holder of first refusal right was entitled to specific performance of that right).

Florida law further recognizes that "[i]n actions for breach of contract, the aim is ... to place the plaintiff in the position he would be in if [no breach had occurred] and the contract had been fulfilled." Ashland Oil, Inc. v. Pickard, 269 So. 2d 714, 723 (Fla. Dist. Ct. App. 1972). Accordingly, GRU filed a Supplemental Demand, in which it amended its request for relief seeking an order that GREC sell the Facility to GRU for a price based on the value of the Tyr-Starwood transaction. See, e.g., Walker v. Benton, 407 So. 2d 305, 307 (Fla. Dist. Ct. App. 1981) (noting that in ordering specific performance courts "will adjust the equities of the parties

by placing them as far as possible in the same position which they would have occupied had the agreement been completed at the prescribed day"). Had GREC notified GRU back in December 2011 of the impending sale of the Facility through "a change of control," GRU would have been in a position to make an acceptable offer to GREC. Through its amended request for relief, GRU now seeks to place itself in the same position it would have occupied had GREC honored GRU's rights under the ROFO.

B. The Limitation on Liability Clause in the PPA Does Not Bar Specific Performance as the Remedy for GREC's Breach of the ROFO

GREC's main argument in support of its Request for Dismissal is that Section 26.1 of the PPA bars GRU from seeking specific performance, focusing on the following language:

> If no remedy or measure of damages is expressly provided herein, the obligor's liability shall be limited to direct actual damages only, such direct actual damages shall be the sole and exclusive remedy and all other remedies or damages at law or in equity are waived.

Request Ex. 1 (Section 26.1). GREC argues that GRU may not obtain specific performance of its ROFO, because (i) the ROFO clause does not "expressly provide" for any remedy or measure of damages in the event of a breach by GREC; and (ii) Section 26.1 otherwise limits GRU's damages to "direct actual damages," to the exclusion of the equitable remedy of specific performance. GREC is wrong on both fronts.

First, contrary to GREC's argument, the ROFO clause does provide a remedy. While it may not be expressly delineated as "specific performance" or even as a "remedy," the ROFO nevertheless is itself the remedy, because only by specific performance of that right can GRU be placed in as good a position as it would have been absent a breach. The reason is that the Facility is a unique asset. The only remedy that can right the wrong here is enforcement of the ROFO and sale of the Facility to GRU. See Bermont Lakes, 980 So. 2d at 586; George Vining

& Sons, Inc. v. Jones, 498 So .2d 695, 697 (Fla. Dist. Ct. App. 1986) ("Specific performance of a contract is limited to those involving a unique subject matter...").

Second, if, as GREC would have it, Section 26.1 were to be applied so as to bar GRU's remedy of specific performance, that section would be unenforceable. While Florida law permits parties to contractually limit the remedies available in the event of a breach, in order to be enforced, such limitations must be reasonable and must provide a mutuality of obligation. Maguire v. South Homes of Palm Beach, L.L.C., 591 F. Supp. 2d 1263, 1269 (S.D. Fla. 2008); see Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333 (Fla. Dist. Ct. App. 1985) ("Persons may limit their liability by contract, but such provisions must be reasonable to be enforced."). In particular, a limited liability provision that denies the aggrieved party the only remedy available to enforce its rights, results in illusory obligations and "subverts the contract by permitting one party to breach with impunity." Blue Lakes Apartments, Ltd. v. George Gowing, Inc., 464 So. 2d 705, 709 (Fla. Dist. Ct. App. 1985). Here, breaching with impunity is precisely what GREC asks this Arbitrator to permit GREC to do.

Applying Section 26.1 so as to bar GRU from the equitable remedy of specific performance would render GREC's ROFO obligations illusory and leave GRU without a remedy. Florida law does not permit such an unfair result. Florida courts refuse to enforce limited liability provisions, such as Section 26.1, that render a party's contractual obligations illusory. See, e.g., Port Largo Club, Inc., 476 So. 2d at 1333 (declining to enforce a limited liability provision, where such provision "render[ed] the seller's obligation wholly illusory"); Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo, 463 So. 2d 437, 439 (Fla. Dist. Ct. App. 1985) (affirming lower court's ruling ordering specific performance despite a limited

liability provision in the contract). The same result should obtain here. PPA Section 26.1 must not be construed to bar GREC's requests for equitable relief.[4]

Indeed, by GREC's tortured application, the limitation of liability in Section 26.1 would bar both parties from seeking equitable relief in respect of numerous potential breaches by either party, leading to absurd results. For example, Sections 20.1 and 20.2 of the PPA call for GRU to cooperate with GREC when it seeks construction debt financing, including timely providing GREC's lenders with requested consents and related documents. Section 22.3 requires GREC to permit GRU personnel access to the Facility "for any purposes reasonably connected with" the PPA, such as to verify compliance with performance standards. Section 29.15 addresses confidentiality and calls for the parties to keep certain designated materials confidential, including trade secrets. In each of these examples, GREC's reading of the limitations of liability in Section 26.1 would prevent either party from seeking appropriate injunctive relief in the event of a breach or threatened breach of these commonplace contractual obligations. Such result is absurd, and surely is not what either party intended.

Finally, GREC's argument runs afoul of basic Florida law that requires contract provisions to be interpreted so as to give a reasonable, lawful and effective meaning to all contractual terms. See City of Homestead v. Johnson, 760 So. 2d 80, 84 (Fla. 2000); Intercoastal

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[4]. The logic of GREC's argument that specific performance is unavailable because the ROFO in Section 27.3 does not state expressly that as the "remedy," leads to two PPA provisions that do provide for express remedies. One is termination of the PPA; the other is damages. Section 25.1.1 defines a "Seller Event of Default" to include GREC's "defaults in any respect in the observance or performance of any material obligation hereunder." Request, Ex.1 (Section 25.1) (emphasis added). Upon any uncured Seller Event of Default, GRU "may terminate this agreement" under Section 25.2. The other remedy is damages under Section 26.1. While there can be no dispute that GREC's breach of the ROFO is a default of a "material obligation" under the PPA, GRU has pursued the remedy that it believes is specified in the contract, i.e., specific performance. But absent specific performance, GRU cannot be left without a remedy, leaving termination or substantial damages.

Realty, Inc. v. Tracy, 706 F. Supp. 2d 1325 (S.D. Fla. 2010) (interpreting Florida law). Again, GREC's proffered application of Section 26.1 would strip the ROFO clause of effect, because the enforceability of the ROFO depends on specific performance being available. Basic Florida law of contract interpretation compels the Arbitrator to reject GREC's argument.

C. The ROFO Was Triggered Through a Sale of the Facility that Occurred "Indirectly Through a Change of Control" of GREC

Recognizing that "change of control" is not defined in the PPA, GREC offers several definitions by which it says the term should be "properly interpreted." Request at 18-21. But GREC offers no evidence that the parties intended those meanings, which they did not. GREC next presses its argument that transfers of minority interests in GREC cannot trigger the ROFO, but the terms of the contract, the facts, and common sense dictate otherwise. In the end, however, GREC concedes that "change of control" can mean the ability to control GREC by an aggregate of minority shareholders that together hold more than 50% of GREC. Thus GREC concedes that when Fagen's right to appoint a Board member and vote its 17% interest matures, Fagen and Starwood together will have a 58% majority of Board voting rights in GREC, thus giving them, in GREC's own words "operating control of GREC." See Request at 19. Because it is irrelevant that Fagen's voting rights are delayed, it follows that the ROFO was triggered when GREC contemplated the Starwood transaction, and its failure to afford GRU the ROFO constitutes breach, as a matter of law.

1. "Change of Control" Applies to a Substantial Change in Ownership of GREC

The ROFO Clause gives GRU the right make an offer to purchase the Facility prior to a sale of the Facility, which sale is defined to be either direct, or "indirectly through a change of control" of GREC. Thus, the terms of Section 27.3 trigger GRU's ROFO when a "change of control" would result from a contemplated transaction. "Change of control" is undefined in the

PPA (except that it excludes "construction financing"). Florida law dictates that where contract terms are undefined, their meaning should be ascertained based on the intent of the parties. See, e.g., Tanglewood Mobile Sales, Inc. v. Hachem, 805 So. 2d 54, 56 (Fla. Dist. Ct. App. 2001) (noting that where a contract term "is not defined in the agreement, an ambiguity exists that must be resolved by a factual determination of the parties' intent").

In conclusory fashion, GREC proffers several meanings for "change of control." First, GREC contends that the term is "properly interpreted" to mean a "change of at least a majority organizational control." Request at 21. But elsewhere GREC suggests that "change of control" contemplates "a majority change in the nature of voting rights in GREC," and/or a change in the "day-to-day management and operational control of the Facility." Id. at 19. GREC offers no support for any of these purported definitions, and in any event, none of them articulate the parties' intent.

As Mr. Hunzinger explains, the ROFO and its "change of control" language was intended to provide GRU the opportunity to buy the Facility and avoid any significant turnover in GREC's ownership. See Hunzinger Aff. ¶ 7. GRU knew from the outset of the PPA that GREC's original owners typically invest in and develop energy projects on a short-term basis, then often turn around and sell the projects to other investors. Id. ¶ 8. The "change of control" provision was sought and obtained by GRU so as to assure the opportunity to purchase the Facility rather than have GREC transfer a substantial share of its ownership interests to new parties, who would be strangers to GRU and to the PPA. And that is what happened here, when 58% of GREC changed hands within six months in 2011, thus triggering the ROFO.

2. "Change of Control" May Take Place Through Multiple Transfers of Partial Ownership Interests in GREC

GREC next makes the illogical and counter-factual argument that a change of control for purposes of Section 27.3 cannot occur through multiple transfers of minority interests in GREC. See Request at 19. GREC essentially argues that than an "indirect" "change in control" requires a one-time sale of 100% of the ownership interests in GREC, to one person or entity. But the contract says nothing of the sort, and the facts of the case belie GREC's argument. The PPA contemplates a "change" in control, but a "change" from what? At the time the PPA was signed in April 2009, no one member held greater than 49% in GREC. By GREC's logic, each of the three original owners could sell their respective interests in three separate transactions to three different third parties, resulting in 100% new ownership, without triggering the ROFO. Such result is absurd, and simply is not what the contract says and not what parties intended. See Hunzinger Aff. ¶¶ 7-8.

Or, for example, if on December 30, 2011, 10% interests in GREC's ownership had been transferred in 10 separate transactions to 10 separate but new stakeholders, no "change of control" would have occurred. According to GREC, despite a 100% change in ownership of GREC, it would not have triggered GRU's ROFO right to make an offer for the Facility. This reasoning defies the plain meaning and intent of Section 27.3.

Indeed, GREC's own actions on the eve of the Tyr/Starwood transaction demonstrate that GREC has long understood that change of control can occur through multiple transfers of minority interests in GREC. It was then, on December 27 and 28, 2011 with Mr. Hunzinger on vacation and only two days before the Tyr/Starwood transaction, that GREC tried to get a hurried consent from GRU that no change of control took place because the Tyr/Starwood transfer involved a "minority interest" in GREC. If, as GREC now contends, nothing in either the Fagen

or the subsequent Tyr-Starwood transactions had any impact on the ROFO, there would have been no reason for Mr. Gordon to try and obtain a concession from GRU on this very point. That December 27, 2011 cell phone call shows that, in fact, GREC clearly understood that "a change of control" under Section 27.3 could occur through multiple minority transfers.

3. The ROFO Was Triggered When GREC Contemplated the Fagen and Starwood Transfers that Constituted a Sale of the Facility "Indirectly Through a Change of Control" of GREC

When GREC's own definitions are applied to the ROFO, it is indisputable that the ROFO was triggered by the Tyr/Starwood transaction. The key is GREC's assertion that "change of control" includes the ability to control GREC by an aggregate of minority owners, which together hold greater than 50% of the ownership interests. Request at 19. As GREC explains:

> Two out of three members on GREC's Board of Managers continue to be individuals appointed from the same two entities, EMI and BayCorp . . . with the ability to vote in accordance with their respective membership interests. As discussed above, Tyr's previous right to appoint one individual to GREC's Board of Managers was transferred to Starwood. The operating control of GREC by way of its representation on the Board of Managers has always been, and continues to be, in EMI and BayCorp.

Id. (emphasis added). It follows that come November 2013 when the Facility is expected to go operational and Fagen gets its Board seat and voting rights -- by GREC's own reasoning -- Starwood and Fagen will have the "ability" to control GREC through their collective 58% membership interests. The fatal problem for GREC is that Fagen acquired the right to its Board seat in June 2011, and the delayed timing for that right to accrue is irrelevant. Given Fagen's then existing (albeit contingent) right to a Board vote, the contemplated Starwood deal foretold a "change in control" on December 30, 2011. GREC's Request omits the final, inevitable step in its analysis, which is that the moment Fagen gets its Board vote, EMI and BayCorp, will no

longer have the "ability" to control GREC. That ability will have passed to the new owners, Fagen and Starwood.

The ROFO is not triggered when Fagen's voting right matures. The ROFO is triggered before GREC sells the Facility "indirectly through a change of control." See Request, Ex. 1 (Section 27.3) ("Seller may not sell the Facility, either directly or indirectly through a change of control of seller . . . unless Seller shall have complied with the following: prior to selling the Facility, Seller shall give notice to Purchaser of Seller's intent to sell the Facility....") (emphasis added). The ROFO was thus triggered with the Tyr/Starwood transaction.

D. The Fagen June 2011 Equity Investment in GREC Does Not Constitute "Construction Financing" Under The ROFO Carve Out

GREC argues that the Fagen equity investment that gave Fagen a 17% ownership stake in the company may not be considered as part of the "change of control" analysis under Section 27.3, because that investment was "construction financing," which is expressly carved out from constituting a "change of control." GREC is wrong.

As noted above, Section 20 of the PPA contemplates that GREC would seek to obtain construction financing, which the PPA expressly identifies will be "debt financing," in connection with which GRU is obligated to timely cooperate with GREC's "lenders." See Request, Ex. 1 (Sections 20.1 & 20.2). That is consistent with the parties' intent that "construction financing" be excluded from change of control to cover lenders who took security collateral interests in the Facility in the event of a borrower default by GREC. Such lender security rights typically include the significant rights, such as foreclosure on the Facility. See Hunzinger Aff. ¶ 10. Thus the construction financing carve-out had a narrow purpose to accommodate lender security rights without triggering the ROFO. That the PPA contemplates construction "debt financing," and that the parties' intended for the ROFO carve-out to apply

only to debt financing is also consistent with the way "construction financing" is typically understood in the industry. See, e.g., Steven G.M. Stein, Construction Law, Chapter 14, Section 14.01 (Matthew Bender) (noting that "[t]he paradigmatic format of construction financing ... is the construction loan in tandem with a permanent loan commitment").

By contrast, Fagen acquired an indirect Class A equity ownership interest in GREC, akin to all the other GREC stakeholders. The fact that GREC was required to use Fagen's equity capital contribution for construction purposes does nothing to convert Fagen's equity investment into "construction financing" under the ROFO carve-out. Each of the other stakeholders' equity investments in GREC were also used to develop and construct the Facility. An equity investment such as the one made by Fagen was never intended to fall within the scope of the "construction financing" exclusion because Fagen is not a lender to GREC. See Hunzinger Aff. ¶ 11. The equity interest Fagen received was a permanent interest that never matures and does not have any fixed value and is not assured of any return. Fagen can only receive a return of its investment over an extended period of time through distributions, or through a sale of its interests in GREC, or a sale or liquidation of GREC. This is not "construction financing." Id.

E. GRU Can Purchase the Facility Without Loss of the US Treasure Grant

GREC protests loudly, but incorrectly, that a purchase of the Facility by GRU would be "impractical and nonsensical," thus illustrating "GRU's ulterior motive for filing its Amended Demand..." Request at 22. In particular, GREC contends that GRU owning the Facility "would make no sense from an economic perspective," purportedly because GRU's status as a governmental entity would disqualify the Facility from receiving a substantial U.S. Treasury cash grant. Id. at 22-23. GREC is incorrect, and its overheated rhetoric alleging improper motives is completely misplaced because it ignores that GRU has developed several deal structures whereby it could acquire the Facility without losing the federal grant.

F. GREC's Complaint About Lack of Notice Warrants No Dismissal of GRU's Claims

GREC complains, albeit faintly, that GRU failed to provide GREC with a 30-day notice under the dispute resolution clause (Section 24.1) of the PPA. The lack of formal written notice, however, provides no basis for dismissal because GREC had actual notice of GRU's claim and did not intend to cure it, and there is no prejudice to GREC. The notice serves a dual purpose: notify a party of the other party's claims, and afford the allegedly breaching party an opportunity to cure. Providing GREC with the written notice would not have advanced either purpose. GREC has been aware of the substance of GRU's claim (and has denied it) since January 2012, when GRU raised the change of control issue with GREC and requested information from GREC regarding its ownership structure to assess GREC's claim that no change of control had occurred. GREC also cannot credibly argue that it would have attempted to cure, because the only cure was to acknowledge its ROFO breach and to sell the Facility to GRU at the Tyr/Starwood price, neither of which GREC was (nor is) prepared to do.

G. The Issue Whether GREC's Owners Are Necessary Parties Will Be Decided in the District Court Action, Not This Proceeding

Finally, GREC's argument that GRU improperly named GREC's owners as respondents in this arbitration is misplaced. The question of whether the non-GREC respondents are proper parties in is before the District Court in Northern District of Florida in BayCorp Holdings (supra at 13, fn. 3) and will be resolved in that forum, not in this arbitration. It is also irrelevant to GREC's dismissal request.

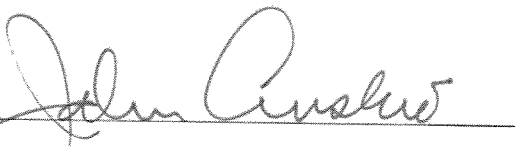
IV. CONCLUSION

For the reasons and upon the authorities set forth above, GRU respectfully requests that the Arbitrator deny GREC's request for dismissal, in its entirety.

July 1, 2013

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

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