

**From:** [Bielarski, Edward J](#)  
**To:** [citycomm](#)  
**Cc:** [DL Utility Advisory Board](#); [DL GRU ExecutiveTeam](#); [DL GRU LeadershipTeam](#)  
**Subject:** Answer to Chair Cook's escrow amount question  
**Date:** Thursday, August 17, 2017 10:50:49 AM

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Mayor, Commissioners and UAB members,

I was asked by the Chair of the UAB, Darin Cook to construct the "calculation" behind the escrow amount negotiated in the APA. What follows is my reasoning for agreeing to the \$ 18.750 million.

The amount of the Escrowed amount (\$ 18.750 million) was the result of the overall negotiation and consideration of a number of factors, including but not limited to:

- First, the risk associated with GREC's failure to fulfill the Seller Surviving Representations and Warranties set forth in Section 4.1(b), Section 4.1(e), Section 4.1(f), Section 4.2(a), Section 4.2(g), Section 4.2(h), Section 4.2(i) and Section 4.2(j).

- o Section 4.1(b) relates to GREC having the authority to enter into the Transaction. Given the magnitude of the limited partner interests (i.e. Starwood) it would be difficult to imagine that GREC doesn't have the authority to transact. Also it is hard to imagine that GREC's banking interests haven't been consulted. VERY LOW RISK.

- o Section 4.1(e) relates to GREC's performance on the APA doesn't violate its charter, any assigned or other contract in the Transaction. VERY LOW RISK.

- o Section 4.1(f) relates to GREC's representation that there are no actions, suits or legal, mediation or arbitration proceedings pending that challenges the validity of or seeks to enjoin the transaction or would be a Material Adverse Effect. In my opinion GREC would already need to covenant this with its own banks, so we would simply be piggybacking on an existing remote condition. The City Attorney's office will perform due diligence on this issue. VERY LOW RISK.

- o Section 4.2(a) relates to GREC having good and valid title to the assets being sold. GREC in its original financing would have had to represent good and valid title and the banks would have done their due diligence. The City Attorney's office will perform the same due diligence. VERY LOW RISK.

- o Section 4.2 (g) relates to GREC's representation that there are no actions, suits or legal, mediation or arbitration proceedings pending with respect to the Purchased Assets which reasonably be expected to have a Material Adverse Effect. In my opinion GREC would already need to covenant this with its own banks, so we would simply be piggybacking on an existing remote condition. Again the City Attorney's office will perform due diligence on this issue. VERY LOW RISK.

- o Section 4.2(h) relates to GREC's adherence to all tax matters (i.e. filing all material tax returns, etc.). In particular they represent that GRU will not be responsible "for any payment required to be made to the extent relating to or arising out of any recapture of any portion of any

Cash Grant....” I am comfortable that GRU will not be “on the hook” for the 1603 Grant or any of GREC’s tax matters. NO RISK.

o Section 4.2(i) relates to GREC’s environmental responsibilities for Hazardous Materials releases, Environmental Approvals, pending Environmental Claims or orders, decrees or judgements in connection with Environmental Rule or Environmental Approval. GREC has similar covenants in its bank covenants and again, the City Attorney’s office will perform due diligence on this issue. Also the IE has performed due diligence on this issue. VERY LOW RISK.

o Section 4.2(j) is GREC’s representation that they aren’t aware of any defects which would cause a Material Adverse Effect. THE IE has performed due diligence on this issue. GREC’s run of over 90 days straight earlier in 2017 is a quasi-performance test of its ability to run for reliability purposes and they passed. VERY LOW RISK.

• Secondly, I used the framework which Winston and Strawn, as well as the City Auditor viewed as customary for this type of transaction (power asset sale). Depending on the associated risk 5 to 10% of the asset purchase price is customary. Overall I deemed GREC’s failure to conform to its reps and warranties to be a VERY LOW RISK. As such I used the lower escrow percentage (5%). However, I applied the percentage against the value of the plant (\$ 375 million), in that the differential (\$ 375 million) represented a pure PPA buyout cost, for which Section 4.2(j) did not apply. Hence 5% of a plant value of \$ 375 million is \$ 18,750,000.

• In addition, the amount of the escrow can’t be detached from the remainder of the APA. Each element of the APA was negotiated within the fabric of the entire agreement. There was give and take on multiple issues. Overall, GRU kept the price (\$750 million) as was stated in the MOU. GRU also received an additional \$ 5.2 million of spare parts and fuel inventory. We also received a buyer financing contingency, an interest rate contingency, a no-defects representation and an ability to allow due diligence to occur prior to the Mayor’s signing of the APA. These GREC “gives” factored into the final escrow amount as well as the deductible on the indemnification claims.

My philosophy in this negotiation with GREC is best spoken by Howard Baker, one of America’s high profile politicians and diplomats. He said, “The most difficult thing in any negotiation almost is making sure you strip it of emotion and deal with the facts.” That was what I returned to each time I was met with decision points. What are the facts?

Secondly, I understood that there had to be a give and take. As a Finnish diplomat, Harri Holcheri said, “If you come to a negotiation table saying you have the final truth that you know nothing but the truth and that is final you will get nothing. In the final APA, GRU got a whole lot of something (\$ 700 million of savings at a minimum).

I hope this answers the question Chairman Cook asked.

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