

GRU and GREC struck a deal back in 2009 in which GRU agreed to purchase all the capacity, power and environmental attributes generated by a new 100-megawatt biomass power facility (the “Facility”) to be developed, financed, built and operated by GREC. This agreement will provide long-term benefits to the City of Gainesville for thirty years, including stable power pricing, a hedge against future carbon regulation, insulation from volatile fossil fuel prices, and sustainable economic development utilizing an abundant renewable resource while creating hundreds of new construction and permanent jobs. The contractually bargained for pricing and terms in this agreement were specifically relied on not only by GREC, but by third party lenders and investors. Those terms cannot now be altered just because politics or a lowering of natural gas prices has now created a desire by certain factions of the City of Gainesville to renegotiate near-term rates (even though the benefits to GRU remain in place for 30 years).

Contracts are legally binding agreements and their terms must be honored if entered into in good faith and based on arm’s length negotiations among sophisticated parties, who, in this case, had an abundance of outside professional advice and counsel.² GRU’s effort to seize upon a contract provision (a Right of First Offer) that clearly was intended for another purpose, and to contort it into a contrived claim for “specific performance” in order to create a dispute and leverage where none should exist, is misguided and wrong and should be rejected by the Arbitrator. Notably, if GRU were to acquire any ownership interest in the Facility, thereby causing the Facility to be ineligible to receive certain federal incentives, there would be a marked increase in the rates charged to GRU pursuant to the terms of the PPA, resulting in increased costs to GRU of approximately \$197 million over the life of the agreement.

Even setting aside GRU’s improper motives in initiating this arbitration against GREC, the Demand is flawed both procedurally and substantively based on the clear language of the

² Individuals advising GRU on the PPA included not only executives at GRU who are power industry veterans (both with municipal utilities as well as with investor owned utilities) with decades of experience, but also the international law firm of Orrick, Herrington & Sutcliffe LLP, with vast experience in the power industry, as well as other outside experts and consultants including The Energy Authority (a non-profit corporation in Jacksonville that provides public power utilities access to dedicated resources and advanced technology systems).

parties' contract, including what would trigger GRU's Right of First Offer and what GRU can seek as a remedy. These flaws are manifest in the plain language of the PPA and preclude GRU's Demand:

- First, and as set forth in detail below, Section 26.1 of the PPA expressly precludes specific performance and any other equitable remedies. (And yet, this is the sole remedy GRU seeks in its Demand.)
- Second, Section 26.3 of the PPA precludes GRU from suing owners of interests in GREC. (And yet again, GRU disregarded this provision and sued the member entities and/or their affiliates individually and has refused to dismiss such claims.)³
- Third, Section 24.1 of the PPA precludes GRU from bringing its claim in arbitration until it provides written notice of any claim to GREC and allows a 30 day opportunity for GREC to negotiate the claim or cure any alleged breach. (Once again, GRU ignores this clear, bargained-for procedural obligation.)
- Finally, GRU ignores the plain language and intent of Section 27.3 which gives it a Right of First Offer ("ROFO") "to purchase the Facility" only before GREC enters into a sale of "the Facility, either directly or indirectly through a change of control" of GREC (which there was not), as opposed to mere unrelated transfers of indirect, minority interests in GREC occurring at different times which did not impact the majority control over GREC, which did not represent (and were not in lieu of) a sale of the Facility and which also left the day-to-day management in the hands of the same parties as before. No fair reading of the PPA would interpret its provisions to allow for unrelated transfers of minority interests over time to be aggregated and considered the equivalent of a sale of the Facility. Under GRU's tortured logic, any unrelated transfer of a minority interest which, when aggregated with all previous unrelated transfers of minority interests, would represent more than 50% of the interests in GREC (even if including transfers that are part of construction financings and therefore expressly excluded under Section 27.3 of the PPA), would be deemed to constitute a sale of the entire Facility, thus triggering a ROFO with respect to the entire ownership of the Facility. Had the parties intended a ROFO for GRU on unrelated transfers of minority interests over time, the PPA would have so provided and, absent such provision, such intent cannot be inferred under Florida law, which narrowly construes restraints on alienation and requires such restraints to be clearly stated. GRU's claims represent an ongoing slander of GREC's title to the Facility and of GREC's members' title to their interests in GREC.

³ GREC is aware that the other Respondents, who were not signatories to the PPA, do not believe that they can properly be made parties to this arbitration proceeding. Those other Respondents have filed an action to enjoin the arbitration as to them. A copy of the Complaint that the other Respondents filed is attached hereto as *Exhibit 6*.

The overwhelming weight of these flaws is clearly fatal to GRU's Demand and warrants no action by the Arbitrator other than dismissal and an award of costs and attorney's fees to GREC. GRU's desire to change the terms of the PPA, several years after signing the PPA and after GREC and third parties have relied on its terms to their detriment, simply cannot justify subjecting GREC to arbitrate a baseless claim.

II. FACTUAL BACKGROUND

A. GRU, a Leading Proponent of Renewable Energy, Issues Request for Proposals for Biomass-Fueled Generation Facility.

GRU is a multi-service utility in Gainesville, Florida, providing electric, natural gas, water, wastewater and telecommunications services to approximately 93,000 retail and wholesale customers. GRU is Florida's leading utility in encouraging the development of renewable energy and in establishing long-term energy efficiency goals. GRU's renewable energy portfolio includes solar power and an aggressive conservation program.

After conducting a nearly five year energy planning process, in October 2007, as part of its efforts to promote renewable energy and diversify its energy sources, GRU issued a request for proposals ("RFP") for the development of a biomass-fueled generation facility. GRU designed the RFP to solicit proposals that would be able to capture federal stimulus money available to encourage the immediate creation of domestic jobs, increase the diversity of our nation's energy resources, and reduce dependence on foreign oil. GRU chose to purchase the power via a PPA, rather than build and own a facility itself, because of its desire that the Facility receive certain federal incentives (and hence that the rates to be charged to GRU reflect this benefit), and due to a desire by the City of Gainesville to not add additional debt to its balance sheet.

Eleven entities submitted proposals in response to GRU's RFP. After an extensive review and evaluation of each proposal, GRU invited the top three ranked submissions to present proposals. In May 2008, GRU and the Gainesville City Commission selected the proposal by an entity which subsequently transferred its interest to American Renewables, LLC ("American

Renewables”). American Renewables created GREC, a wholly-owned subsidiary, for the proposed project.

B. GRU and GREC Negotiate the Terms of a Thirty-Year Power Purchase Agreement.

Once the selection process was complete, the parties began to negotiate the terms of a complex agreement for GREC to build, own, operate and maintain the Facility, a 100-megawatt biomass power generation facility in Alachua County, Florida, in exchange for GRU’s commitment to purchase all the energy production from the Facility for the next thirty years. When operational, the Facility is expected to supply enough renewable power for approximately 70,000 homes and create more than 700 direct and indirect permanent jobs.

GRU and GREC, each working closely with a multitude of outside professional advisors, negotiated the terms of the PPA over the course of almost an entire year. A copy of the PPA, executed by GRU (subject to approval by the City Commission) and GREC on April 29, 2009, is attached as *Exhibit 1*. After executing the PPA, GRU presented the agreement to the City Commission for its approval. GRU’s detailed presentation to the City Commission described the key terms of the PPA and highlighted changes since the original proposal. *See Contract For Biomass-Fueled Generation: Presentation to the Gainesville City Commission, May 7, 2009* (attached as *Exhibit 2*). During the several-hour public hearing, the Commissioners asked representatives of both GRU and GREC numerous questions about the project. The Commissioners then voted unanimously to approve the PPA. *See Gainesville Regional Utilities, GRU and American Renewables Partner to Bring Biomass Energy to Gainesville* (May 7, 2009) (attached as *Exhibit 3*).

GRU’s goals in negotiating the PPA included achieving greater fuel diversity (as it is approximately 85% dependent on fossil fuels), meeting certain self-imposed carbon reduction targets, providing a stable long-term rate structure, and providing a hedge against future carbon regulation. As GRU publicly promoted the benefits of the Facility: “By using biomass materials, a local renewable resource, this facility will promote our energy independence, add diversity to

our fuel supply and shield customers from anticipated increasing fossil-fuel prices.” See *Exhibit 3*.

When negotiating the terms of the PPA, the parties and their advisors made efforts to structure it in a way to best position the Facility to be eligible for certain benefits under the federal American Recovery and Reinvestment Tax Act of 2009 (the “Recovery Act”), including: (a) a cash grant from the U.S. Treasury Department equal to 30% of the eligible capital cost of the project; (b) a 30% investment tax credit; and (c) production tax credits (collectively, the “federal incentives”). See *Exhibit 2* (listing “Takes Advantage Of New Stimulus Bill Grant Opportunity - January 1, 2014 deadline” among project benefits).

GRU knew that GREC would be engaging in a structured financing of the Facility with third party lenders and investors based on the Facility’s expected eligibility for these federal incentives and the resulting benefits to the City in terms of the long-term cost of energy, and in fact GRU executed an agreement with a syndicate of banks that lent hundreds of millions of dollars for the construction of the Facility, consenting to such financing. GREC in fact did share information about the expected federal incentives related to the Facility with third parties, including potential lenders and investors. GRU also knew that if it (a public, tax-exempt entity) were to acquire an ownership interest in the Facility prior to the expiration of the recapture period (as defined in the Internal Revenue Code), that interest could render the Facility ineligible for the federal incentives, deprive the Facility of the benefit of the stimulus money, increase the cost of the Facility, and increase the corresponding cost of the energy it produced and the price GRU would pay. In fact, if the Facility were to become ineligible to receive the federal incentives, the rates charged under the PPA would increase significantly, resulting in an approximately \$197 million increase in cost to GRU over the life of the agreement. This was a key consideration in structuring the transaction as a PPA, rather than GRU building and owning the Facility itself.

GREC and GRU devoted significant time negotiating a number of provisions in the PPA to govern potential future disputes related to the Facility. Of particular relevance to this

arbitration are: (1) an arbitration clause for certain disputes solely between the parties to the PPA; (2) a process for submitting notice of disputes prior to pursuing a claim to arbitration; (3) a limitation on available remedies; and (4) a waiver and release of claims by GRU against entities other than GREC itself.

1. Arbitration Clause (PPA § 24.2)

Section 24.2 of the PPA provides that “[a]ny controversy, dispute or claim between [GREC] and [GRU] arising out of or relating to [the PPA], 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.” *See* PPA § 24.2.

2. Notice Requirement (PPA §§ 24.1, 23.1)

Section 24.1 of the PPA requires each party to provide the other with written notice of a claim “including a detailed description” at least 30 days prior to submitting the claim to arbitration:

Dispute Resolution Process. If either Seller or Purchaser believes it has a claim under this Agreement, the designated representative of the claimant shall initiate a claim by submitting such claim in writing, including a detailed description, to the designated representative of the other party, who shall review the claim and shall respond in writing of his findings and recommendations concerning the claim within a reasonable time period not to exceed thirty (30) days. If the claim is not resolved within such thirty (30) day period, the claimant may further pursue the claim by submitting the claim to arbitration pursuant to the Arbitration Procedure.

See PPA § 24.1.

Notice is governed by Section 23.1 of the PPA, which requires GRU to send all notices under the PPA to Jim Gordon, the President of GREC.

3. Limitations On Remedies (PPA § 26.1)

GREC and GRU agreed in Section 26.1 of the PPA to limit each of their respective remedies to “direct actual damages only” unless another remedy or measure of damages is **expressly** provided in the PPA:

. . . 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. . . .

See PPA § 26.1.

4. Waiver of Claims Against Entities Other Than GREC (PPA § 26.3)

The negotiations as to the terms of the PPA also included significant limitations on GRU's right to seek recourse under the PPA against any entity or individual other than GREC. Given the multiple entities involved (including the owners of interests in GREC), this provision was of critical importance to GREC and was fully accepted by GRU in exchange for other benefits under the PPA. Thus, Section 26.3 of the PPA provides:

No Recourse; Limited Liability. No recourse under or upon any obligation contained in this Agreement shall be had against BayCorp Holdings, Ltd., Energy Management, Inc., BayCorp Nacogdoches, LLC, EMI Nacogdoches, LLC, Tyr Energy, Inc., Tyr Biomass, LLC or any partner, member, manager, stockholder, director, officer or employee of Seller. Purchaser expressly waives and releases all right to assert liability under this Agreement against, or to satisfy any claim arising hereunder or thereunder against, any such person.

See PPA § 26.3.

C. The Parties Negotiate GRU's Right of First Offer to Purchase the Facility.

GRU recognized that the owners of GREC were not bound to hold their interests in the Facility for the duration of the thirty-year agreement. In order to give GRU the opportunity to purchase the Facility itself, GRU negotiated for a "Right of First Offer" (or "ROFO") to purchase the Facility in advance of any sale of the Facility by GREC.

Section 27.3 of the PPA provides:

Right of First Offer. **Seller [GREC] may not sell the Facility, either directly or indirectly through a change of control of Seller, during the term of this Agreement** unless Seller shall have complied with the following: prior to selling the Facility, Seller shall give notice to Purchaser [GRU] of Seller's intent to sell the Facility and Purchaser shall have sixty (60) days from such notice to prepare an offer (the "First Offer") to purchase the Facility. Seller shall negotiate in good faith exclusively with Purchaser for a minimum of thirty (30) days from receipt of the First Offer

to attempt to reach agreement on the terms of a purchase. If the Parties cannot reach an agreement on sale terms within the thirty (30) days of receipt of the First Offer then Seller shall have three hundred sixty (360) days from the date of Purchaser delivering the First Offer to close on a sale of the Facility to an unaffiliated third party for a price and for terms that are no less than the price and no more onerous than the terms in the First Offer. If Seller cannot close on the sale within such three hundred sixty (360)-day period, it must make another offer and again comply with the terms of this Section before selling the Facility. In any case, Seller may not sell the Facility (directly or indirectly) unless the purchaser of the Facility assumes in writing Seller's obligations hereunder. **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.**

See PPA § 27.3 (emphasis added).

Thus, before GREC may sell the Facility, either directly or indirectly through a change of control of GREC:

1. GREC shall give notice to GRU of GREC's intent to sell the Facility;
2. GRU shall have sixty (60) days from such notice to prepare an offer (the "First Offer") to purchase the Facility;
3. 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;
4. If the parties cannot reach an agreement on sale terms within the thirty (30) days of receipt of the First Offer, then GREC shall have three hundred sixty (360) days from the date of GRU delivering the First Offer to close on a sale of the Facility to an unaffiliated third party for a price and for terms that are no less than the price and no more onerous than the terms in the First Offer; and
5. If GREC cannot close on the sale within such three hundred sixty (360)-day period, it must again comply with the terms of this Section before selling the Facility.

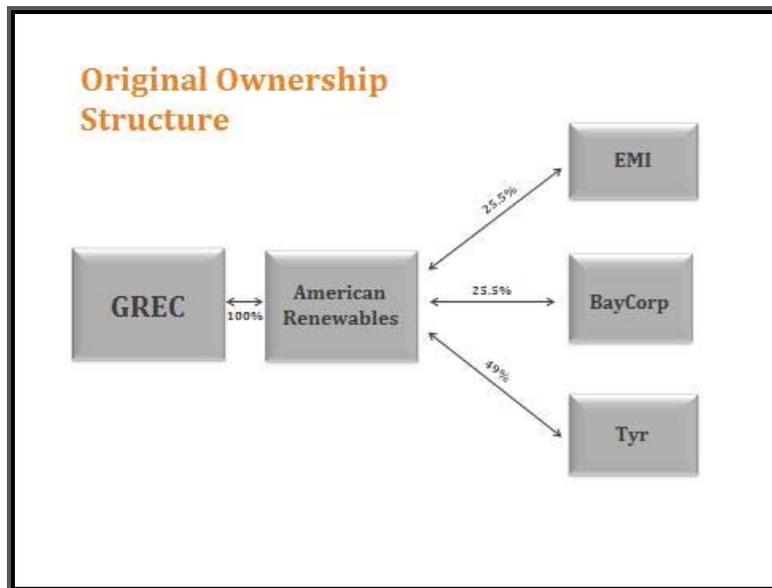
Consistent with the parties' intent, and as is manifest throughout Section 27.3, GRU's right to make a First Offer only arises in connection with a sale of the entire Facility, whether directly or indirectly through a change of control of GREC. Section 27.3 is not applicable to transfers of minority interests in GREC.

In addition, since GREC and GRU knew that GREC would need to obtain substantial funding through construction financing, GREC specifically requested -- and GRU agreed to include -- an express carve-out excluding construction financing and tax equity financing from any “change of control” that could trigger GRU’s Right of First Offer under Section 27.3.

D. Several Changes Among the Minority Owners Modify the Ownership Structure of GREC.

When GREC and GRU executed the PPA on April 29, 2009, GREC was owned by three entities, BayCorp Nacogdoches, LLC (“BayCorp”) (25.5%), EMI Nacogdoches, LLC (“EMI”) (25.5%) and Tyr Biomass, LLC (“Tyr”) (49%), all through American Renewables, LLC. BayCorp, EMI, and Tyr each appointed one individual to GREC’s three-member Board of Managers with the ability to vote pro rata according to their respective membership interests.

By way of diagram, the ownership structure of GREC as of April 29, 2009 was as follows:



1. Modifications to GREC’s Ownership Structure as a Result of Construction Financing

On June 30, 2011, GREC issued a press release announcing that it had raised nearly \$500 million in construction financing. See *Biomass Magazine*, “Gainesville Biomass Plant

Completes Construction Financing,” June 30, 2011 (attached as *Exhibit 4*). One new outside entity, Fagen Power LLC, became a minority owner of GREC in connection with the construction financing.

Ron Fagen is an individual who owns Fagen, Inc., a respected green energy design-builder in the United States. Fagen, Inc. is the contractor responsible for all engineering, procurement and construction activities of the Facility. Ron Fagen and his wife together own Fagen Power LLC (“Fagen”).

In May 2011, Fagen participated in a construction financing for the Facility, contributing capital in exchange for newly issued interests in a special purpose entity (“SPE”) called GREC Holdings, LLC, which was created to hold GREC in connection with the construction financing. As a result of Fagen’s capital contributions to the Facility, Fagen received a newly-issued 17.706% interest in GREC Holdings on June 30, 2011, the date of construction financing closing. Following the project completion date (but not before then), Fagen has the right to appoint an additional individual to the Board of Managers of GREC.

Also in connection with the construction financing, in exchange for construction equity commitments, EMI GREC, LLC (an affiliate of EMI Nacogdoches, LLC, collectively “EMI”), Tyr GREC Holdings, LLC (an affiliate of Tyr Biomass, LLC, collectively “Tyr”) and BayCorp GREC, LLC (an affiliate of BayCorp Nacogdoches, LLC, collectively “BayCorp”) were admitted to GREC Holdings as members. In addition, the membership interests in GREC Holdings held by American Renewables were distributed to its members EMI, BayCorp and Tyr, effectively removing American Renewables as the entity holding GREC Holdings.

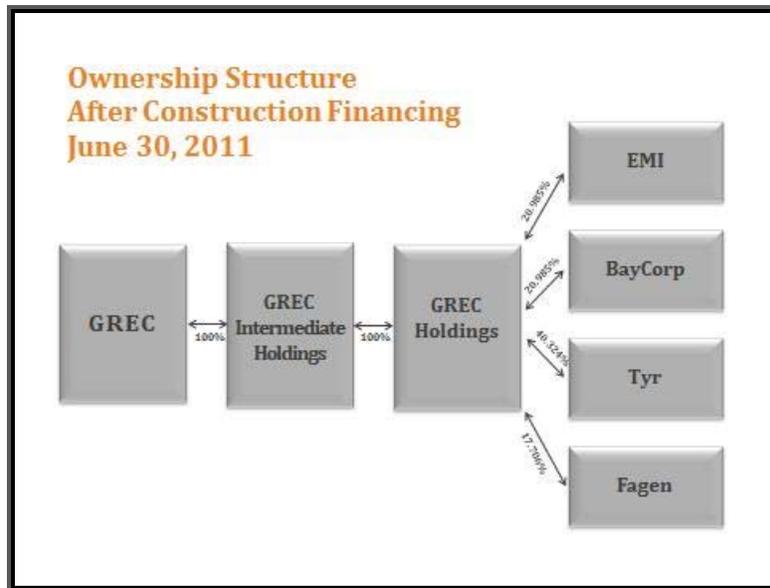
The result of these transactions is that the top-tier owners of GREC remained exactly as they were, with only the addition of one new owner, Fagen, acquiring a newly-issued 17.706% interest in connection with a construction financing (and the other owners’ interests being diluted pro rata).

Press coverage of the construction financing in June 2011 quoted GREC’s President Jim Gordon who noted the significance of reaching this milestone: “Completion of construction

financing allows GREC to move forward without delay, ensuring that the Gainesville community will receive the many environmental and economic benefits of this renewable energy facility.”

See *Exhibit 4*.

The ownership structure of GREC as of June 30, 2011 was as follows:



Neither the construction financing nor the resulting changes in the minority ownership structure of GREC constituted a sale of the Facility, either directly or indirectly through a change of control of GREC, under Section 27.3 of the PPA.

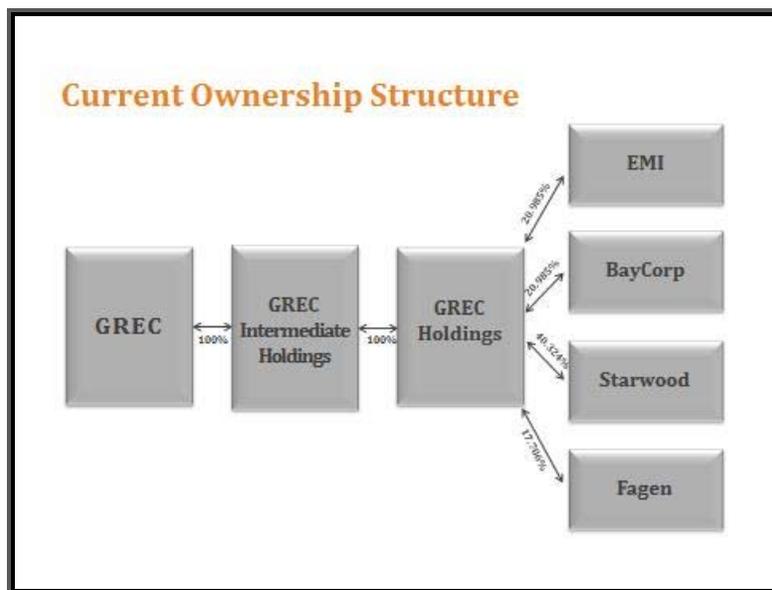
2. Tyr’s Transfer of its Minority Interest To Starwood With Notice To, And No Objection From, GRU

In December 2011, Tyr decided to transfer its indirect, minority interest in GREC by the end of the calendar year. On December 27, 2011, Mr. Gordon made a call to GRU’s General Manager, Robert Hunzinger, to inform Mr. Hunzinger of GREC’s understanding that Tyr intended to sell its indirect, minority interest in GREC to Starwood Energy GREC Investments LLC (“Starwood”) before the end of 2011. Mr. Gordon explained that the transfer of Tyr’s minority interest in GREC to Starwood would not involve the sale of the Facility, directly or indirectly through a change of control of GREC and, therefore, would not trigger GRU’s Right of First Offer for the Facility under Section 27.3 of the PPA. Mr. Hunzinger asserted no

objection to Tyr's proposed transfer of its minority interest in GREC, did not challenge GREC's view that such a transfer would not trigger Section 27.3, and did not indicate that GRU had any interest in making an offer to purchase the Facility.

Mr. Gordon emailed Mr. Hunzinger on December 28, 2011, to confirm their previous conversation and the parties' understanding that the proposed transfer of this minority interest in GREC would not trigger the ROFO provision of the PPA. While Mr. Hunzinger did not reply directly to this email, neither he nor anyone else from GRU challenged or objected to the transfer (let alone indicate an interest in making an offer to purchase the Facility) at that time.

Since December 30, 2011, the ownership structure of GREC has remained:



Two of the three seats on GREC's Board of Managers continue to be held by EMI and BayCorp, with the only change in management being that Starwood (rather than Tyr) now holds the third seat on the Board (with each member able to vote in accordance with its respective membership interests). The same entities, and in fact the very same individuals, control daily operational management today as when GRU and GREC executed the PPA.

E. GRU Attempts to Renegotiate the Terms of the PPA and, Unable to Extract Unwarranted and Unreasonable Concessions from GREC, Resorts to Arbitration.

In the years after the parties entered into the PPA, certain factions in the City of Gainesville began increasing their questions and criticism of the Facility and the terms of the PPA. These critics often focus on current natural gas prices (and the resulting spot market prices for power) as compared to the early-year rates (which are stable for 30 years) of the renewable energy under the PPA. Representatives of the City of Gainesville, including City Commissioners and other individuals seeking election to public office in Gainesville, have publicly demanded that GREC renegotiate the terms of the PPA with GRU. This is the case even though the elected officials of the City of Gainesville and the management of GRU were well aware that the early-year rates under the PPA might be higher than market prices (but that the flat rate structure would likely result in lower-than-market pricing after approximately five years), as such information was presented to the City Commission by GRU at its May 7, 2009 City Commission meeting at which the City Commission authorized GRU to execute the PPA.

After the PPA had been executed and delivered, construction financing and equity capitalization for the Facility had been committed and funded and the Facility was under construction, GREC and GRU did engage in some discussions regarding potential ways to reduce GRU's costs including a so-called "pre-pay option," which might have generated capital cost savings. GREC had these discussions with GRU, and expended resources to do so, despite having no legal obligation to renegotiate the agreed-to terms within the PPA.

Only after discussions regarding the pre-pay option fell through did GRU file its Demand. Significantly, the Demand, which purports to challenge GREC's failure to provide GRU with a Right of First Offer before certain unrelated changes in minority interests in GREC, comes nearly twelve months after Tyr transferred its interest to Starwood without any objection by GRU.

GRU filed its Demand disregarding several controlling provisions of the PPA, including:

- GRU did not attempt to comply with the dispute resolution procedure set forth in Section 24.1 of the PPA prior to bringing its claim in arbitration, failing to send any notice of its claim to GREC.
- In addition to naming GREC, the Demand improperly attempts to name as respondents entities for which GRU expressly waived and released all right to assert liability under the PPA or to satisfy any claim arising under the PPA pursuant to Section 26.3.
- GRU seeks specific performance despite the parties' waiver of this remedy in Section 26.1 of the PPA.
- The Demand relies exclusively on GRU's inaccurate articulation of the parties' rights and obligations under Section 27.3 of the PPA.

III. ARGUMENT

A. The PPA Precludes Specific Performance, the Remedy GRU Seeks.

Section 26.1 of the PPA precludes specific performance as a remedy:

. . . 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. . . .

See PPA § 26.1.

Section 27.3, the provision GRU relies on for its claim that it was entitled to a Right of First Offer, does not “expressly provide[]” for any remedy or measure of damages in the event of a breach. Absent another remedy or measure of damages expressly provided, Section 26.1 of the PPA clearly limits GREC's liability for any alleged breach to “direct actual damages only.” GRU has waived “all other remedies or damages at law or in equity.” Specific performance is an equitable remedy. *LaGorce Palace Condo Assoc., Inc. v. QBE Ins. Corp.*, 733 F. Supp. 2d 1332, 1334 (S.D. Fla. 2010) (“Specific performance is an equitable remedy as opposed to a legal cause

of action.”). For this reason, GRU’s Demand seeking specific performance is fatally flawed and the Arbitrator should dismiss it in its entirety.

B. There Has Been No Sale of the Facility, Directly or Indirectly Through a “Change Of Control” of GREC.

Setting aside GRU’s failure to comply with the notice requirement and request for an impermissible remedy, GRU fails to assert any basis for liability against GREC because GREC has not breached Section 27.3, nor any other section, of the PPA. GRU contends that GREC breached Section 27.3 of the PPA when it failed to provide GRU with an opportunity to make a “First Offer” before certain unrelated changes in minority ownership interests in GREC. GRU’s assertion lacks a critical predicate: GREC first must have had an obligation to provide GRU with a ROFO. The ROFO provision is only applicable in advance of a sale of “the Facility, either directly or indirectly through a change of control of GREC.” *See* PPA § 27.3.

It is undisputed that GREC never sold the Facility directly. GRU’s only argument is that GREC somehow breached the ROFO provision when it “transferred control of GREC from the original indirect owners . . . to a new ownership group.” Demand at ¶ 23. The crux of GRU’s Demand is that the changes in indirect, minority ownership of GREC in unrelated transactions occurring over a significant period of time resulted in a “change of control” of GREC -- even though one of those changes was part of a construction financing and, therefore, expressly excluded under Section 27.3. *Id.*

1. Changes of Minority Ownership Interests in GREC Did Not Result in a “Change of Control” of GREC under Section 27.3

The PPA does not define “control” or “change of control.” In addition, the PPA excludes “a construction financing or tax equity financing with respect to the Facility” from being a “change of control” for purposes of triggering GREC’s ROFO. *See* PPA § 27.3. Instruction for proper interpretation of “change of control” can be found in the parties’ expressed and implied understanding of what the ROFO was meant to cover and when it would be triggered.

As described above, the purpose of the ROFO was to give GRU a right to make an offer

to purchase the Facility before GREC sold it to another entity. As is clear from the plain language of Section 27.3, the ROFO is triggered only by a “sale of the Facility” and *not* by a mere change of indirect, minority ownership interests in unrelated transactions over time, as occurred here.

For example, the ROFO provision makes numerous references to another “Offer” and establishes a standard “to close on a sale of the Facility . . . for a price and for terms that are no less than the price and no more onerous than the terms in the First Offer . . .” *See* PPA § 27.3. This clause would make no sense if a simple change in indirect, minority ownership triggered a ROFO.

Again, the purpose of the ROFO provision was to afford GRU an opportunity to acquire the *entire* Facility, after the realization of federal incentives, after completion and commissioning of the Facility, as distinct from the intermediate transfer of partial ownership interests in unrelated transactions. GRU’s right to make an offer under Section 27.3 is limited to an offer “to purchase the Facility.” The parties did not intend, and did not agree, for GRU to have a right to purchase anything short of the Facility itself, and certainly not minority ownership interests in GREC. The deal negotiation documents and emails among the parties make this contemplation clear.

Moreover, there 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 (and in fact, continue to be the very same two individuals), with the ability to vote in accordance with their respective membership interests which to date have not changed. 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 Managers has always been, and continues to be, in EMI and BayCorp. In addition, there has been no change in the day-to-day management and operational control of the Facility.

2. Fagen Acquired its Interest in GREC as Part of a Construction Financing, Which is Expressly Excluded From ROFO Eligibility Under Section 27.3

GRU argues that respondents breached Section 27.3 of the PPA by transferring interests in GREC to the Fagens. Independent of the clear requirement of a “sale of the Facility” under Section 27.3, the express carve-out for construction financing precludes any argument that GRU had a Right of First Offer to purchase the interests in GREC acquired by Fagen. Section 27.3 specifically carves out “a construction financing or tax equity financing with respect to the Facility” from being deemed a “change of control” for purposes of the ROFO. GREC requested, and GRU accepted, this carve-out to cover precisely this eventuality.

As Fagen obtained its interests in GREC as a result of a construction financing through which Fagen contributed equity to the Facility, GRU’s argument that the transaction somehow violated Section 27.3 is meritless. *See* GREC Holdings, LLC's Amended and Restated LLC Agreement, dated June 30, 2011 (attached as *Exhibit 5*).⁴

⁴ Schedule 3 of the GREC Holdings LLC Agreement limits GREC’s use of the Fagen’s initial capital contribution to four construction-related purposes:

(a) pay the Metso NTP milestone payment on or before May 16, 2011 (approximately \$10.7 million) due under the Amended and Restated Contract for the Engineering, Design, Supply, Procurement, Construction and Installation of a Bubbling Fluidized Bed Boiler and Associated Equipment for a Biomass-Fired Power Production Facility, dated as of April 19, 2011, by and between the Project Company and Metso Paper USA, Inc., including the Limited Notice to Proceed issued March 16, 2011; (b) pay the Siemens 2 and 3 milestone payments on or before May 31, 2011, and July 1, 2011 respectively (each approximately \$1.1 million) due under the Contract for the Engineering, Design and Supply of a Steam Turbine Generator and Associated Equipment for a Biomass-Fired Power Production Facility, dated as of August 14, 2010, by and between the Project Company and Siemens Energy, Inc., including the Limited Notice to Proceed issued September 15, 2010, and the Notice to Proceed issued March 16, 2011; (c) pay the Fagen, Inc. LNTP-1 and LNTP-2 milestone payments on May 16, 2011 and July 1, 2011 respectively (each approximately \$6 million) due under the Amended and Restated Turnkey Contract for the Engineering, Procurement, Construction and Installation of a Biomass-Fired Power Production Facility, dated as of April 20, 2011, by and between the Project Company and Fagen, Inc., including the Limited Notice to Proceed issued March 16, 2011; and (d) to the extent additional funds are available following the satisfaction in full of the above payments, pay such costs and expenses of the Company as the Board of Managers deems necessary in connection with the development of the Project in its commercially reasonable discretion.

3. The Transfer of Tyr’s Interest to Starwood Did Not Constitute A “Change Of Control”

Nor did the transfer of Tyr’s interest in GREC to Starwood constitute an indirect sale of the Facility through a change of control in GREC. Tyr transferred only a 40.324% interest in GREC to Starwood, along with one of three seats on GREC’s Board of Managers. As discussed above, “change of control” is properly interpreted to mean a change of at least a “majority organizational control,” which requires more than a 40.324% interest and one of three Board members.

C. GRU Has Suffered No Harm.

Even assuming *arguendo* that (1) there had been a sale of the Facility indirectly through a change of control of GREC, which triggered a ROFO, and (2) GRU had complied with the notice of claim provision of Section 24.1, which it did not, GRU has suffered no damages. GRU has not -- and cannot -- articulate how it has been harmed from any alleged change of minority ownership interests in GREC, given that operational control and organizational governance by majority vote of the members remains the same. 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.

D. Specific Performance Would Be Impractical And Nonsensical Under The Circumstances.

Despite GRU’s complaints about an alleged failure of GREC to provide it with a Right of First Offer, GRU never has asserted any interest in and ability to make an offer to purchase all or even a portion of GREC, let alone an offer to purchase the Facility in its entirety as is contemplated under Section 27.3. Rather, such a purchase by GRU would defy economic sense based the risk of losing certain federal tax incentives if GRU or the City obtains an ownership interest in the Facility. According to the terms of the PPA, if the Facility is not eligible to receive the federal incentives, GRU’s power purchase price would increase by \$8.35/Mwh, or approximately \$197 million over the life of the contract. Even if GRU had not expressly waived

the right to equitable remedies such as specific performance, it is impractical and nonsensical under the circumstances, further illustrating that GRU's ulterior motive for filing its Demand is simply to force GREC to re-negotiate the terms of the PPA.

1. GRU Has Not Indicated Any Interest in Obtaining the Remedy It Seeks

GRU and the City have not demonstrated any interest in purchasing the Facility. City Commissioners repeatedly disclaim any interest in purchasing the Facility. In fact, the City has stated repeatedly that it does not want to encumber its books with more debt that would be required to effect such a purchase, or to pay higher rates as provided under the PPA if the Facility were to become ineligible to receive the federal incentives.

2. Specific Performance Could Lead To A Loss Of The Facility's Eligibility For Federal Incentives

From the standpoint of the economics of the PPA, it would defy all logic for GRU to purchase an ownership interest in the Facility due to potential restrictions on eligibility for certain federal incentives, including the expected cash grant and investment credit under the federal Recovery Act. This issue was well known to, and considered by, the parties when structuring the PPA, and resulted in the inclusion of provisions in the PPA resulting in significant rate increases to GRU if the federal incentives were not realized.

For example, the Facility would become ineligible for the 30% investment credit if the Facility is owned or leased by a tax-exempt organization or governmental agency. In addition, a government agency and/or tax-exempt entity's interest in a project would also make the Facility ineligible for a federal cash grant equal to 30% of the eligible capital cost of the project. Consistent with the shared goal of GREC, GRU, and potential lenders and investors of keeping the Facility eligible for these federal stimulus benefits, GREC and GRU previously were advised of the importance of making certain that the PPA was not treated as a lease to GRU since GRU is a governmental agency.

IV. AFFIRMATIVE DEFENSES

First Affirmative Defense

The Demand fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Unless specifically admitted above, GREC denies each and every allegation of the Demand and denies any liability to GRU.

Third Affirmative Defense

GRU suffered no damages by reason of the acts complained of in the Demand, or by any acts or omissions of GREC.

Fourth Affirmative Defense

GRU has suffered no damages for which GREC is legally responsible.

Fifth Affirmative Defense

GRU's alleged damages, if any, are speculative, hypothetical, unsupported by any reasonable methodology, and are not cognizable as a matter of law.

Sixth Affirmative Defense

GRU's alleged losses, if any, were caused by its own actions and inaction and, therefore, it is precluded from recovery.

Seventh Affirmative Defense

GRU failed to mitigate its damages, if any.

Eighth Affirmative Defense

GRU is barred from recovery by the doctrines of laches, waiver, ratification and/or estoppel.

Ninth Affirmative Defense

GREC is not liable to GRU in any amount because, at all times relevant herein, GREC acted properly and in good faith with respect to GRU.

Tenth Affirmative Defense

GRU's claim is barred by the applicable statutes of limitations.

Eleventh Affirmative Defense

GRU's claim is barred, in whole or in part, by PPA § 24.1, which requires a party who believes it has a claim under the PPA to first submit the claim in writing to the other party for its review prior to commencing arbitration. GRU never complied with this provision prior to filing its Demand.

Twelfth Affirmative Defense

GRU's claim is barred, in whole or in part, by PPA § 26.1, which contractually limits GRU's remedies for disputes involving the PPA. PPA § 26.1 prohibits equitable remedies, which includes specific performance.

Thirteenth Affirmative Defense

GRU's claim is barred, in whole or in part, by PPA § 26.3 because there was no change of control of GREC and no sale of the Facility.

Fourteenth Affirmative Defense

GRU's claim is barred, in whole or part, pursuant to § 8.1(b) of GREC Holdings, LLC's Amended and Restated Limited Liability Company Agreement because GRU's ownership in GREC might impair the renewable energy tax advantages GREC enjoys.

V. COUNTERCLAIM

As discussed in GREC's Answering Statement to GRU's Demand, GRU has no valid grounds to bring this arbitration seeking specific performance. GRU has no basis to allege that GREC failed to comply with the Right of First Offer provision in the PPA due to there having

been no sale of the Facility (directly or indirectly through a “change of control” of GREC) to trigger that provision.

As a result, this claim is brought solely in an effort to wring contractual concessions to which GRU is not entitled and which GRU explicitly bargained away in arm’s length negotiations among sophisticated parties. GRU’s back-door effort to obtain that which it is denied by contract, cannot be allowed to continue at GREC’s expense. GRU must be held accountable for the damages GREC has sustained as a result of the baseless Demand.

Indeed, members of the City Commission have been openly vocal about their desire to force a renegotiation of the economics of GRU’s agreement with GREC, and GRU brings this arbitration solely as a leveraging device to force GREC back to the bargaining table despite its prior valid agreement. Demonstrating the lack of actual concern about a ROFO, GRU never has asserted that it is interested in, or believes it has a basis for, making an offer to have any ownership interest in GREC or to purchase the Facility.⁵

Any short-term disadvantages GRU believes it has or will suffer under the PPA are due to volatile natural gas prices and lower-than-expected demand for power, and other factors that GREC does not control. Rather, GREC now has been and continues to suffer damages from GRU’s improper actions, including but not limited to costs and fees in defending itself from GRU’s groundless claim, harm to GREC’s reputation, potentially causing third parties to perceive a potential cloud of title on the Facility, and damages from confidential, proprietary trade secrets documents becoming public once produced in discovery due to Florida’s Sunshine law.

The Arbitrator should prohibit GRU’s attempt to force GREC to defend itself in a groundless arbitration proceeding for the purpose of GRU changing the terms of a deal into which it chose to enter. This especially is the case where this arbitration adversely affects or can affect GREC’s relationships with third parties and risks unnecessary public exposure of

⁵ As recently as mid-January, after the Demand was filed, one member of the Commission openly admitted to a witness that the City’s true purpose is to “renegotiate” the PPA as opposed to buy the Facility.

confidential, proprietary documents, in addition to monetary and reputational damage. For these reasons, and the reasons outlined below, GRU is liable for abuse of process.

Count I: Abuse of Process

1. GREC repeats and re-alleges the allegations contained in all the proceeding paragraphs.

2. On or about April 29, 2009, GREC entered into a written agreement with GRU regarding the purchase of all of the energy production from the Facility for the next thirty years (the “Power Purchase Agreement” or “PPA”).

3. GRU agreed in the PPA, among other things, to purchase electricity from GREC for the next thirty years.

4. GREC and GRU’s negotiations concerning the PPA and its agreed-to terms occurred at a time when natural gas prices were extremely high and unstable.

5. After executing the PPA, GREC relied on the contractual terms to its detriment, including, for example, arranging a nearly \$500 million construction financing, in transactions consented to by GRU, based on the existing terms of the PPA.

6. After executing the PPA, GRU was questioned and criticized for the Facility and/or the terms of the PPA due in part to a decrease in natural gas prices.

7. After executing the PPA, GRU sought to renegotiate and/or change the terms of the PPA.

8. GRU discussed its interest in renegotiating and/or changing the terms of the PPA with GREC.

9. GREC had no legal obligation to renegotiate and/or change the terms of the PPA with GRU.

10. GRU and GREC were unable to mutually agree on any revision to the terms of the PPA.

11. GRU filed a demand for arbitration seeking specific performance of Section 27.3 of the PPA (the “Demand”).

12. GRU filed its Demand against GREC for the purpose of making GREC renegotiate and/or change the terms of the PPA.

13. GRU did not file its Demand with any interest in, or reasonable belief that it was entitled to, specific performance.

14. Pressuring GREC to renegotiate and/or change the terms of the PPA by being named a respondent in an arbitration proceeding is an improper purpose or motive for filing an arbitration demand.

15. Since the filing of the Demand, GRU and/or its employees, agents, and/or representatives, including but not limited to City Commissioners, have made public statements about wanting to utilize the arbitration to coerce renegotiation of the terms of the PPA with GREC.

16. GRU knew that it was required to comply with certain notice provisions prior to filing a claim in arbitration.

17. GRU knew that it failed to comply with the PPA’s notice provisions when it filed its Demand.

18. GRU knew that its Demand, including its request for specific performance, was groundless under the terms of the PPA.

19. GRU knew that its Demand, including its naming of entities other than GREC, was groundless under the terms of the PPA.

20. GRU knew that its Demand, including its assertions that there had been a “change of control” were groundless when it filed its Demand.

21. At the time it filed its Demand, GRU knew that Section 27.3 of the PPA was not triggered due to the lack of any change of control or potential sale of the Facility.

22. GRU’s attempt to aggregate unrelated transfers of minority interests in GREC over time to be the equivalent of a sale of the Facility, and its assertion of ROFO rights in respect

of the entire ownership of the Facility due to the occurrence of such unrelated transfers of minority interests over time constitutes an unlawful slander of GREC's title to the Facility and of GREC's members' interests in GREC under Florida law, which requires that restraints on alienation be narrowly construed and clearly stated. The continuance of such unlawful claims represents an ongoing and continuing slander that is materially and adversely interfering with GREC's and its members' ownership rights.

23. As a direct and proximate result of GRU's actions and inactions in filing the Demand and in subsequent dealings with GREC, GREC suffered, and continues to suffer, damages in an amount to be determined at hearing.

VI. CONCLUSION

For the reasons discussed above, GRU's Demand is baseless and without merit. GREC respectfully requests that the Arbitrator:

1. Issue an award dismissing the Demand against GREC and providing that GRU recovers nothing;
2. Issue an award in favor of GREC on its Counterclaim;
3. Award damages, including attorney's fees and costs, to GREC in an amount to be determined at hearing; and
4. Grant GREC such other, further and different relief as the Arbitrator may deem appropriate.

**GAINESVILLE RENEWABLE ENERGY
CENTER, LLC,**

By its attorneys,



Mark E. Robinson

Siobhan E. Mee

Josephine Deang Chin

BINGHAM McCUTCHEN LLP

One Federal Street

Boston, MA 02110-1726

617.951.8000

Dated: February 1, 2013

CERTIFICATE OF SERVICE

I, Josephine Deang Chin, certify that on this 1st day of February 2013, I caused a copy of the foregoing Answering Statement to be served by electronic mail and U.S. Mail upon Claimant's counsel:

J. Peter Coll, Jr.
John Ansbro
Melissa K. DePetris
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019



Josephine Deang Chin