

From: Michael Selvester
To: Utility Advisory Board, GRU Customers
Re: Sovereign immunity and GRU's Power Purchase Agreement
Date: 10/12/16

Question

Can GRU breach the Power Purchase Agreement (PPA) with Gainesville Renewable Energy Center (GREC) and use the doctrine of sovereign immunity to escape liability?

Short Answer

No, sovereign immunity will not protect GRU from liability for breach of contract. The doctrine does not apply to contract disputes in Florida because of provisions of the Florida Constitution and Florida statute § 163.01.

Analysis

Sovereign immunity is an ancient doctrine with roots in the common law. It was codified in Florida in [Fla. Stat. § 11.066](#). The statute states, in part: "Neither the state nor any of its agencies shall pay or be required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law." City governments typically fall under this blanket protection as well. Historically, in the event a judgment was rendered by any court against the government, the only way to enforce the judgment was to ask the legislature to appropriate the money by law. Pursuant to the power granted in [Article X, Section 13](#) of the Florida Constitution, the legislature waived sovereign immunity in the case of tort actions and set limits on the amount a litigant could recover against the state without further appropriation from the legislature. [Fla. Stat. § 768.28](#).

However, Florida's Supreme Court has ruled, in a case regarding a contract signed by the Kissimmee Utility Authority, that municipalities are liable for the contracts they sign. [Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459 \(Fla. 2005\)](#). [Article VIII, Section § 2\(b\)](#) of the Florida Constitution grants municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services." In addition, Florida's Municipal Home Rules Power Act recognizes these same powers. [Fla. Stat. § 166.021\(1\)](#). In light of this evidence, Florida's Supreme Court ruled that "[i]n executing contracts municipalities are presumed to be acting within the broad scope of their authority. Therefore... municipalities already [are] authorized to execute contracts and [are] liable for their breach." [Am. Home, 908 So. 2d 459 at 475](#).

Lastly, Florida's Supreme Court acknowledged that the legislature has limited sovereign immunity specifically in the case of municipal utilities and their contracts. [Fla. Stat. § 163.01\(k\)](#) states:

“The limitations on waiver in the provisions of § 768.28 or any other law to the contrary notwithstanding... any such legal entity or any public agency of this state that participates in any electric project waives its sovereign immunity to:

...

2. Any person in any manner contracting with a legal entity of which any such public agency is a member, with relation to:

...

b. The supplying or purchasing of services, output, capacity, energy, or any combination thereof.”

This statute functions as both permission for municipal utilities to sign contracts and a legal obligation for them to honor those contracts. It states clearly that the legislature has waived sovereign immunity for public agencies when they contract for purchasing energy. In other words, Municipal utilities cannot use sovereign immunity as a defense if they breach their contracts. This is the exact situation GRU finds itself in regarding the PPA.

Municipalities and their agencies, such as utilities, are empowered by Florida’s Constitution and existing statutes to exercise broad powers at the local level. This includes corporate powers such as executing contracts. However, those powers come with obligations and municipalities in Florida are obligated by law to honor the contracts they sign. As a result, the doctrine of sovereign immunity will not protect GRU in a suit based on a breach of contract.