



Legislation Text

File #: 120641., **Version:** 2

Update on GREC Mediation and Arbitration (B)

At its meeting on December 20, 2012, the City Commission considered an agenda item titled “Request for Authorization to Submit a Claim to Arbitration with GREC” (Legistar #120641). In summary, GRU staff and outside legal counsel explained to the Commission that on December 30, 2011, GREC transferred a controlling ownership interest in GREC, as contemplated in Section 27.3 of the Power Purchase Agreement (“PPA”); that GREC did so without first giving GRU proper notice and the opportunity to prepare an offer to purchase the facility as required by Section 27.3 of the PPA; the same constituted a breach of Section 27.3; and recommended that GRU seek specific performance of the PPA (i.e., directing GREC do what it should have done under the contract, which is giving GRU the opportunity to make an offer to purchase). Section 24 of the PPA requires disputes to be settled by binding arbitration. The City Commission approved, by a vote of 7-0, the GRU staff recommendation to “(1) authorize the General Manager for Utilities, or his designee, to submit the claim to arbitration; and (2) authorize the General Manager or his designee, during the pendency of the arbitration, to negotiate with GREC a potential commercial resolution of the claim on terms mutually agreeable to the parties, subject to final approval of the City Commission and subject to City Attorney’s opinion as to form and legality.”

The General Manager retained outside counsel to represent the City in the arbitration. On December 21, 2012, the City’s outside counsel filed a Demand for Arbitration. The Demand recites the pertinent facts and states the relief sought pursuant to the PPA, namely that “GRU seeks relief against Respondents as follows: a) finding that Respondents have breached Section 27.3 of the PPA by failing to provide GRU with a Right of First Offer to purchase the Facility; b) ordering specific performance of the Right of First Offer, specifically to include providing GRU with the opportunity to make an offer to purchase the Facility; and c) awarding such other and further relief, both in equity and at law, to put GRU in the position it would have been had the Respondents not breached the PPA.”

After GRU obtained more information about the transfers of ownership in GREC, on April 15, 2013, outside counsel filed a Supplemental and Amended Demand for Arbitration to further refine the relief GRU seeks as “b) ordering GREC to sell the Facility to GRU for a price to be determined based on the price paid by Starwood Energy for Tyr’s 40.324% ownership interest in GREC.”

In summary, the claim for arbitration and the relief sought by GRU is that which is available under the PPA and applicable law. The position of the City is that GREC failed to provide a Right of First Offer as required by Section 27.3 of the PPA. The essence of the Right of First Offer is that before GREC sells the facility (either directly or indirectly through a change of control of GREC), GRU must be given the opportunity to make an offer to purchase the facility, and if no sale to GRU is agreed upon, then GREC could not thereafter sell the facility for less than the terms offered by GRU. The position of the City is that GREC committed a material breach of Section 27.3 of the PPA when it failed to allow GRU to make an offer as required by that section and that GREC failed to cure the breach. Under contract law, a “cure” is intended to give the non-breaching party what it was deprived of by virtue of the breach.

GREC responded to the City’s Demand for Arbitration by denying that a breach occurred and asserting there

was no majority change of ownership and no change of control under Section 27.3 of the PPA. In its Answering Statement and Request for Dismissal filed on May 3, 2013, GREC also assert counterclaims against the City. The counterclaims allege that the City filed the Demand for Arbitration in bad faith and for improper motives, namely that the City is suffering from buyer's remorse and that the true purpose of bringing the arbitration is to force GREC to renegotiate the PPA, not to force a sale of the facility to GRU. GREC asserts that the City has suffered no harm. In support of its defenses and counterclaims, GREC cites to specific statements made by members of the City Commission as evidence of the City's improper motives. GREC alleges that it has suffered damages in excess of \$50 million as a result of the City's bad faith filing and GREC seeks an award of damages, attorneys fees and costs. In a separate federal court action, the non-GREC parties who were named in the City's Demand for Arbitration seek to be dismissed from the arbitration.

Section 25 of the PPA provides that the City may terminate the PPA in certain circumstances. However, termination is not a cure for a breach, it is the ultimate relief if a breach is not or cannot be cured. All possible variations of relief are embodied in the third prong of relief requested by the City, which asks the arbitrator to "[award] such other and further relief, both in equity and at law, to put GRU in the position it would have been had the Respondents not breached the PPA."

Acting pursuant to the authority granted by the City Commission on December 20, 2012, the General Manager for Utilities will participate in a voluntary mediation with GREC on June 4, 2013. If the mediation leads to a potential commercial resolution of the claim, that potential resolution will be presented to the City Commission and will be subject to approval by the City Commission and by the City Attorney, as to form and legality.

If the parties do not reach a potential commercial resolution of the claim through mediation, then the dispute will proceed to arbitration, the results of which will be binding pursuant to Section 24 of the PPA.

City Commission 1) hear an update from GRU staff and outside counsel; 2) receive citizen comment concerning the mediation and arbitration; and 3) direct staff to provide periodic updates on the status of the mediation and arbitration at future City Commission meetings or workshops.