

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT  
IN AND FOR ALACHUA COUNTY, FLORIDA

GAINESVILLE CITIZENS CARE, INC.,

Plaintiff,

v.

CASE NO.: 2012-CA-1346  
DIVISION: J

CITY OF GAINESVILLE, d/b/a  
GAINESVILLE REGIONAL UTILITIES,

Defendant,

and

GAINESVILLE RENEWABLE ENERGY  
CENTER, LLC,

Intervenor.

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CITY OF GAINESVILLE'S AND  
GAINESVILLE RENEWABLE ENERGY CENTER, LLC'S  
JOINT MOTION IN LIMINE

Defendant, City of Gainesville ("City"), and Intervenor, Gainesville Renewable Energy Center, LLC ("GREC LLC"), jointly submit this motion in limine and respectfully request the Court to enter an order prohibiting the Plaintiff, Gainesville Citizens CARE, Inc. ("GCC"), from introducing evidence, testimony, and argument at the trial in this case concerning whether certain terms of the power purchase agreement ("PPA") between the City and GREC LLC differ from the terms of the original proposal submitted to the City by Nacogdoches Power,

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LLC (GREC LLC's predecessor)<sup>1</sup> because any such differences are wholly irrelevant to the issues in this case.

In support of this motion, the City and GREC LLC say:

#### Background Facts

1. In 2003, the City began the process of exploring various options to meet the future power needs of its customers. This process included numerous public workshops and numerous discussions during Gainesville City Commission ("City Commission") meetings. Based on this extensive public input, the City determined that the best solution to meet its future power supply needs involved a combination of increased conservation efforts and building new generation.

2. Again, after extensive public input, in 2007, the City's efforts to build new renewable electric generation crystallized around a biomass-fueled electric generation facility. Accordingly, on October 15, 2007, Gainesville Regional Utilities ("GRU") issued a request for proposals for a biomass-fueled generation facility (the "RFP"). The RFP included a two-step process to encourage innovation and broad participation from prospective respondents: first, respondents

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<sup>1</sup> During the course of the PPA negotiations, Nacogdoches Power, LLC, transferred its interest to an affiliated entity, GREC LLC, and GREC LLC subsequently executed the PPA with the City. For simplicity, this motion in limine will refer to GREC LLC.

were requested to submit non-binding proposals to be evaluated by GRU; and second, GRU would select up to three respondents to submit "binding proposals"<sup>2</sup> to GRU.

3. On December 14, 2007, 11 respondents, including GREC LLC, submitted proposals in response to the RFP. GRU selected 3 of the 11 respondents (GREC LLC, Covanta Energy Corporation, and Sterling Planet) to submit binding proposals. On April 11, 2008, GREC LLC submitted its binding proposal to GRU (the "GREC LLC Proposal"). The other two respondents also submitted proposals to the City Commission.

4. At the April 28, 2008 meeting, the City Commission began, but did not complete its consideration of the three proposals. At the May 12, 2008 meeting, the City Commission completed its consideration of the three proposals and selected the GREC LLC Proposal. At the May 12, 2008 meeting, the City Commission expressly authorized GRU's General Manager for

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<sup>2</sup> While the RFP spoke in terms of the responders submitting "final binding proposals," Section 6.2 of the RFP made clear that after the Closing Date of December 14, 2007, changes could be made in the submitted proposal if they were not "prejudicial to the interest of the City." Moreover, and more fundamentally, Section 9.4 of the RFP stated that "[a]s a result of this RFP, the City seeks to negotiate and enter into a contract with the successful Proposer. The proposal will not constitute a contract but, rather, will supply provisions which will, if accepted, be incorporated by reference into the contract between the parties." (see Ex. 1 hereto, which consists of relevant pages from the RFP) (emphasis added).

Utilities, Robert Hunzinger ("Hunzinger") "to negotiate and execute a [PPA] contract" with GREC LLC.

5. For approximately the next twelve months, Hunzinger<sup>3</sup> and GREC LLC negotiated the terms of the PPA. On or about April 17, 2009, Hunzinger, on behalf of the City, and Jim Gordon, on behalf of GREC LLC, reached agreement regarding the terms of the PPA, and both executed the written PPA, which was dated April 29, 2009. Article 2.1 of the negotiated PPA expressly provided that the legal effectiveness of the PPA was subject to the approval of the City Commission.<sup>4</sup> On May 7, 2009, the City Commission unanimously approved the negotiated PPA at a properly noticed meeting.

6. Almost three years later, on April 4, 2012, GCC initiated this case by filing a one-count Complaint for Declaratory Judgment and Injunctive Relief. On April 18, 2012, GCC filed a one-count First Amended Complaint for Declaratory Judgment and Injunctive Relief ("Amended Complaint").

7. As framed by the Amended Complaint, the issue in this case is whether the City staff involved in negotiating the PPA

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<sup>3</sup> As explained in detail in the Amended Motion for Final Summary Judgment, Hunzinger was assisted in the PPA negotiations with GREC LLC by a negotiating team consisting primarily of GRU staff; however, Hunzinger retained and exercised the ultimate authority to negotiate and approve all terms of the PPA.

<sup>4</sup> The sworn Affidavits of Messrs. Gordon and Hunzinger that were filed with the Joint Amended Motion For Summary Judgment are incorporated herein by reference.

with GREC LLC constituted an "advisory committee" that was subject to the Sunshine Law.<sup>5</sup> An additional issue in this case is, if a Sunshine Law violation occurred, was the violation "cured" by the City?

8. The Amended Complaint also includes the following allegations:

The final terms of the PPA . . . were significantly changed from the original Binding Proposal that had been accepted by the City Commission in May of 2008. Those changes include a substantial increase in GRU's annual payments to GREC, lengthening the duration of the PPA from 20 to 30 years, and removal of a "back door out" or "termination for convenience clause" that the City Commission had directed to be included in the agreement.

\* \* \*

6. On or about May 12, 2008, the CITY OF GAINESVILLE directed Hunzinger to ensure that a "back door out", alternatively referred to as a "termination for convenience clause," be negotiated into the agreement. The termination for convenience clause would have allowed GRU to cancel the agreement up until a point after the site certification, before the commencement of construction.

\* \* \*

14. The agreement that was ultimately presented to Hunzinger for his signature on behalf of the CITY OF GAINESVILLE contained substantial changes from the binding

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<sup>5</sup> Article I, § 24b of the Florida Constitution and Section 286.011, Florida Statutes, are collectively referred to as the "Sunshine Law" in this motion in limine.

proposal. These changes were discussed privately with individual members of the City Commission by Hunzinger or by members of the advisory committee, and were then brought before the City Commission for ratification on May 7, 2009. Among the changes negotiated by the advisory committee, agreed to by Hunzinger and ratified by the City Commission were elimination of the termination for convenience clause, the addition of a provision prohibiting the public from viewing important aspects of the agreement until after 2043 and an increase [sic] the duration of the agreement by ten years. Some, but not all, of these changes were made known to the public prior to the City Commission crystallizing the decisions by ratification vote on May 7, 2009.

Amended Complaint at 2, 4, 6-7.

9. For the reasons set forth below, any differences between the terms of GREC LLC's Proposal and the terms of the PPA approved by the City Commission on May 7, 2009, are wholly irrelevant to the Sunshine Law issues in this case. Accordingly, GCC should be prohibited from introducing evidence, testimony, and argument concerning these differences.

#### Legal Standard for a Motion in Limine

10. The purpose of a motion in limine is to exclude irrelevant and immaterial matters from a trial. Devoe v. Western Auto Supply Company, 537 So. 2d 188, 189 (Fla. 2d DCA 1989). A trial court's ruling on a motion in limine will not be

disturbed absent an abuse of discretion. Ferere v. Shure, 65 So. 3d 1141, 1146-47 (Fla. 4th DCA 2011).

The City's and GREC LLC's Request for an Order Excluding  
Irrelevant Evidence, Testimony and Argument  
From the Trial

11. It is clear from the multiple references in the Amended Complaint that GCC intends to focus on differences between the terms of the GREC LLC Proposal and the terms of the negotiated PPA as a part of its proof in this case. Specifically, GCC has identified the three following differences between the GREC LLC Proposal and the negotiated PPA:

- a) The absence of a "back door out" or "termination for convenience clause" in the PPA;
- b) A change in duration of the PPA to 30 years; and
- c) A change in GRU's annual payments to GREC LLC under the PPA.

The City and GREC LLC assert that these identified differences, and any other differences, between the terms of the GREC LLC Project and the terms of the negotiated PPA are wholly irrelevant to the Sunshine Law issues in this case.

12. With regard to the "advisory committee" issue, it is completely irrelevant whether the PPA negotiations resulted in the deletion of a term included in the GREC LLC Proposal or the addition of a term that was not included in the GREC LLC

Proposal. The inclusion or exclusion of a term in the PPA has absolutely no bearing on whether the negotiations involved an "advisory committee" that was subject to the Sunshine Law.<sup>6</sup> The City Commission expressly instructed Hunzinger to negotiate the terms of the PPA with GREC LLC, and those negotiations obviously resulted in changes to the terms of the GREC LLC Proposal.<sup>7</sup> It is not the substance of the specific terms of the negotiated PPA that is relevant to the Sunshine Law analysis, it is the decision-making process involved in the PPA negotiations. Accordingly, differences between the terms of the GREC LLC Proposal and the terms of negotiated PPA are irrelevant to the issues in this case and should be excluded. See Devoe, 537 So. 2d at 199 (the purpose of a motion in limine is to exclude irrelevant matters from a trial).

13. Similarly, with regard to the "cure" issue, it is irrelevant whether the PPA negotiations resulted in differences between the terms of the GREC LLC Proposal and the terms of the negotiated PPA. The inclusion or exclusion of terms in the PPA has absolutely no bearing on whether the City Commission cured any alleged Sunshine Law violation by ratifying the PPA at the

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<sup>6</sup> As noted, the RFP itself expressly permitted changes to the "binding proposal" if agreed to by the City in the final, negotiated contract. (see Ex. 1 hereto, Section 9.4).

<sup>7</sup> In fact, the City and GREC LLC are willing to stipulate that there are differences between the terms of the GREC LLC Proposal and the terms of the negotiated PPA.



public meeting on May 7, 2009.<sup>8</sup> Under the Sunshine Law, the issue is whether the City Commission took independent, final action at a properly noticed public meeting when it ratified the PPA on May 7, 2009.<sup>9</sup>

14. The City and GREC LLC respectfully submit that granting this motion in limine will limit the introduction of irrelevant and immaterial evidence, testimony and argument at the trial and will allow the parties to more efficiently focus

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<sup>8</sup> The May 7, 2009 public hearing was a very robust one. Before voting to approve the PPA, the commission spent approximately one hour and forty minutes listening to an extensive factual presentation provided by GRU staff, hearing from GREC LLC's President, asking questions of GRU's personnel, making Commissioner comments as well, and entertaining public comment.

<sup>9</sup> Ironically, it appears that counsel for the Plaintiff actually agrees that such evidence is legally irrelevant in a Sunshine Law case such as this. When, at the deposition of Ms. Jo Beaty, who is one of Plaintiff's two directors, counsel for the City inquired into Ms. Beaty's contention that the removal of the "termination for convenience" clause from the PPA constituted a violation of the Sunshine Law, Plaintiff's counsel, objected, pointing out that whether any particular clause is in, or out, of the PPA is irrelevant. As the transcript reflects:

QUESTIONING BY MS. WARATUKE:

Q. But you will agree with me, Ms. Beaty, won't you, that that's what the minutes of the commission action reflect, was that he was to include in the negotiations a termination for convenience clause; correct?

MS. LAHART: The document speaks for itself, Ms. Waratuke. We're not here to debate whether or not a bio clause thing is a good thing or a bad thing. This is about government and the sunshine lawsuit.

(Beaty depo, pp. 49-50, Ex. 2 hereto).

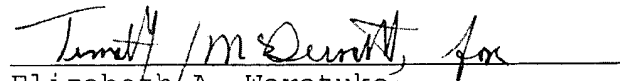
the presentation of evidence on the relevant Sunshine Law issues. If GCC is allowed to inject irrelevant issues into this case, the City and GREC LLC will be required to prepare countervailing arguments, or to object on a case-by-case basis, all of which will unnecessarily complicate and protract the trial.

WHEREFORE, the City and GREC LLC respectfully request the Court to enter an order prohibiting GCC from introducing any evidence, testimony, and argument at the trial in this case concerning any differences between the terms of the GREC LLC Proposal and the terms of the negotiated PPA approved by the Commission on May 7, 2009.

Respectfully submitted this 4<sup>th</sup> day of December, 2012.

Counsel for GREC LLC has authorized counsel for the City to sign this Joint Motion in Limine on behalf of GREC LLC.

FOR THE CITY OF GAINESVILLE


  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Marcy I. Lahart, PA ([marcy@floridaanimallawyer.com](mailto:marcy@floridaanimallawyer.com)) and ([marcyl@justice.com](mailto:marcyl@justice.com)), David Dee, Esquire ([ddee@gbwlegal.com](mailto:ddee@gbwlegal.com)) and John T. LaVia, III, Esquire ([jlavia@gbwlegal.com](mailto:jlavia@gbwlegal.com)) on this 4<sup>th</sup> day of December, 2012.

  
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Attorney