

PIETRANTONI MENDEZ & ALVAREZ LLC

POPULAR CENTER-19TH FLOOR
208 PONCE DE LEON AVENUE
SAN JUAN, PUERTO RICO 00918
SWITCHBOARD: (787) 274-1212

DOIRA DÍAZ-RIVERA
COUNSEL

DDIAZ@PMALAW.COM
DIR: (787) 274-4908
FAX: (787) 274-1470

September 25, 2015

VIA E-MAIL: comentarios@energia.pr.gov

Agustín F. Carbó Lugo, Esq.
President
Puerto Rico Energy Commission
268 Muñoz Rivera Ave.
World Plaza Suite 400
San Juan, Puerto Rico 00918

RE: Comments to Puerto Rico Energy Commission's Regulation No. 8618 on Certifications, Annual Fees and Operational Plans of Electrical Service Companies Submitted on behalf of Sonnedix

Dear Mr. Carbó Lugo:

We hereby submit comments to the Regulation on Certifications, Annual Fees and Operational Plans of Electrical Service Companies in Puerto Rico, Department of State Regulation No. 8618, issued by the Puerto Rico Energy Commission (the "Commission") on July 10, 2015 (the "Regulation"), on behalf of our client Sonnedix.

Sonnedix currently owns various solar energy generating projects in Puerto Rico (the "Sonnedix Projects") that are subject to existing, long-term Power Purchase and Operating Agreements (collectively, the "PPOAs") with Puerto Rico Electric Power Authority ("PREPA") and are in varying stages of development, including our 10MW Horizon Energy project in Salinas, Puerto Rico, which is fully operational.

The existing PPOAs between the Sonnedix project companies and PREPA already govern, among other matters, the specific rates, technical requirements, and the resolution of disputes between the parties. Such existing PPOAs, and Sonnedix's rights and obligations thereunder, are covered by the constitutional protections of Article II, Section 7 of the Constitution of the Commonwealth of Puerto Rico and Article I, Section 10 of the Constitution of the United States of America with respect to protection against impairment to contractual obligations. The Puerto Rico Supreme Court has emphasized the importance of this precept of

Puerto Rico Energy Commission
September 25, 2015
Page 2

constitutional prominence. It has ruled that the certainty of the legal consequences is the rational basis of the protection against impairment of contractual obligations. See, Warner Lambert v. Tribunal Superior, 101 D.P.R. 378 (1973). To the extent that the Regulation or the Commission's actions thereunder would impair Sonnedix's and/or PREPA's rights and obligations under the PPOAs, the Regulation and/or the Commission's actions would be in violation of Sonnedix's rights under the Puerto Rico and United States Constitutions.

We note that the drafters of the Regulation included a specific reference to the Puerto Rico and United States Constitutions in Section 4.03(C)(1) of the Regulation in the context of reimbursement from or charge to PREPA of the expenses for the annual fee. We must infer then that the Commission acknowledges the relevance of this constitutional protection and its applicability when purporting to apply the Regulation. The Commission failed, however, in expressly distinguishing companies with executed agreements that limit the Commission's regulatory powers over them from other companies.

We suggest that the Regulation include an article exclusively applicable to companies with executed PPOAs with PREPA specifically listing the limited sections or duties of the Regulation that apply to them. This list of sections or duties must be based on the sections and duties addressed in the corresponding PPOAs. It must provide that the sections or duties addressed in the PPOAs are outside of the scope of the Regulation with respect to these companies.

We now make reference to specific subsections in the Regulation and provide comments or suggestions regarding such provisions.

Section 2.02 – Operational Report

Subsections 2.02(A)(3) - 2.02(A)(6) – These subsections require that the Electric Service Company provide confidential and proprietary information. This information does not further any necessary purpose of the Commission. While we may acknowledge the Commission's interest in confirming that a company is capable of providing the services it purports to provide, we contend that this concern is more appropriate for small-scale projects with off-takers who are consumers, not large scale projects with PREPA as its off-taker. This concern is further outweighed by the competitive disadvantage in which an Electric Service Company may be placed if such information is required. Specifically, we strongly oppose the Regulation's requirement of providing financial statements or any document of similar nature. Sonnedix and its affiliates are private companies and their financial statements are not, and need not be, a matter of public record.

In lieu of its financial statements, Sonnedix would be willing to submit to the Commission declarations similar to those required pursuant to Subsections 3.03(A)(9) and 3.03(A)(10) of the Regulation.

Puerto Rico Energy Commission
September 25, 2015
Page 3

Subsection 2.02(A)(11) – This subsection requires that the Electric Service Company provide “copies of all information the electric power company has submitted to any federal public entity or to any public entity of any state or local jurisdiction in the United States with regard to the provision of electric service by the company in Puerto Rico.” This requirement would not only be burdensome on the company, but also on the Commission, as it may be receiving countless communications that do not further any practical purpose and certainly not the purposes of the Act, which among others, are to reduce energy costs and foster economic competitive development. In addition, since the off-taker, PREPA, is a public entity, this requirement would require Sonnedix to provide all information to PREPA. This requirement would be unmanageable since Sonnedix and PREPA exchange information on a nearly daily basis.

In lieu of the abovementioned requirement, Sonnedix would be willing to provide to the Commission copies of final permits and authorizations issued by any federal or state agency or entity regarding the electrical services being provided by the Electrical Service Company in Puerto Rico. We remind the Commission that the documents required by this section are public records which it may request from the public entity at its convenience. Certainly, the requirement burdens any company, which in turn does not promote the reduction of energy costs nor foster economic competitive development as it increases the costs of doing business.

Section 4.03 – Amount of the Annual Fee

Subsection 2.02(A) – This subsection requires that the Commission shall calculate and collect from all electric power companies an annual fee equal to .25% of the gross revenue it has generated during each fiscal year.

The Commission seems to ignore the purpose of the fee. We refer you to Article 6.16 of Act 57-2014, which specifically provides that the purpose of the fee is to produce enough revenue to cover the operational and administrative costs of the Commission and the Independent Consumer Protection Office. As drafted, this charge is not related at all to operational and administrative costs. We therefore disagree with the amount of .25% amount provided in the Regulation and contend that this requirement is *ultra vires*.

Moreover, while Act 57-2014 also provides that the .25% amount is a maximum amount, it is not a precise requirement. Thus, this legal framework forces the conclusion that the fee shall be based on operational and administrative costs and that once such calculation is made, in the end it shall not exceed .25% of the entities’ gross revenues. The Commission has failed to meet the first prong of this legal requirement as it cannot justify how the .25% amount does not surpass by far the revenues that are enough to cover the statutorily prescribed costs.

As discussed above, the level of intervention between the Commission and Sonnedix and similarly situated companies with existing PPOAs is minimal because the companies are already

Puerto Rico Energy Commission
September 25, 2015
Page 4

subject to contractual obligations that are constitutionally protected, which makes it unjustifiable to base the fee on .25% of a company's gross revenues.

We suggest that this percentage requirement be substituted by a fixed fee, such as the fees for certifications, and take into consideration and differentiate among the companies that already have executed long-term PPOAs with PREPA.

Section 4.02 – Duty to Inform Gross Revenue

Subsections 2.02(A) – 2.02(C) – These subsections provide the requirements for the reporting of gross revenues. Consistent with our comments to Section 4.03 above, we submit that inasmuch as the annual fee should be based on a fixed fee, the request for the gross revenues becomes moot, at least for companies that have executed agreements long-term power purchase agreements with PREPA.

We suggest that Section 4.02 be deleted in its entirety along with any reference in the Regulation requiring a company to report its gross revenues.

We thank you for the opportunity to submit these comments. We are available to clarify any doubt the Commission may have.

Cordially,



Doira Díaz Rivera