PUERTO RICO ENERGY COMMISSION
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IN RE: PETITION FOR APPROVAL OF TRANSITION ORDER FILED BY THE PREPA REVITALIZATION CORPORATION

CASE NO: CEPR-AP-2016-0001

WindMar Group and ICSE-PR Comments to the Restructuring Order Draft filed on June 15, 2016

COME NOW PVP Properties, Inc., Coto Laurel Solar Farm, Inc., Windmar PV Energy, Inc., and Windmar Renewable Energy, Inc. (collectively, "WindMar Group") and comes the Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico (ICSE-PR), through the undersigned legal counsels, respectfully state and pray:

On June 15, 2016 the Puerto Rico Energy Commission (the "Commission") issued a draft Restructuring Order ("the Order") and grated all parties the opportunity to comment. WindMar Group and ICSE-PR have reviewed the mentioned draft together in an effort to provide the Commission with valuable comments on such short notice.

Having read and analyzed the Order, we strongly advise the Commission to not sign the Order. Our opinion is that the Order contains innumerable conclusions that lack support of any evidence and furthermore includes determinations that surpass the Commission's

powers delegated by law. We believe it is not the Commission's intention to eliminate renewables integration or limit Puerto Rico's sustainable economic development and issuing this Order as currently drafted would do just that.

WindMar Group and ICSE-PR Comments

Section IA. What is the Transition Charge? intends to establish that the Transition Charge is something it is not. At the end of page 4 through page 5 it erroneously states;

> "...Without this restructuring, it is likely that PREPA would be unable to access new capital funds. Without the ability to access these funds, system repairs would become less frequent, the probability of outages would increase, and rates would need to rise more rapidly (to pay upfront for the system upgrades that otherwise would be funded through long-term debt). PREPA would have less ability to build new infrastructure to accommodate more renewable energy, increase generation efficiency and transition into a modern utility. The Transition Charge, therefore, is more than a mechanism for ensuring payment to bondholders; it is an essential part of the path toward a modern, reliable electric system."

The Transition Charge is clearly about repaying past debt that is currently under default of its original terms. We understand the Transition Charge's function is to ensure past debt repayment but has nothing to do with being part of a "path toward a modern, reliable electric system", certainly in its current form which excludes the Integrated Resource Plan, the proposed tariff and any supporting evidence. Even less true is the statement that it helps the "to build new infrastructure to accommodate more renewable energy" when, as currently drafted it creates a huge obstacle for integrating renewable energy.

Section IB. What is Commission is approving and what is it not approving? has a poorly written title which reflects the overall work involved in the drafting of the Order. This Section begins by stating;

"A commission's powers are defined and limited by statute. In this proceeding, the relevant statute is Section 6.25A… "

This statement is completely incorrect, in this proceeding and any other held by this Commission, the statute that delegates its powers is Act 57-2014 as amended by Act 4-2016 in their totality and cannot be seen as limited to just one section of Act 57. We do not mean to limit the importance of Section 6.25A in this proceeding but interpreting that it is the only relevant statute is completely contrary to law and intends to exclude the relevance of other statutes as are those of the rest of the Revitalization Act including Section 29 regarding Act 114-2007.

Next Section IB reads;

> *"Section 6.25A does not require the Corporation to prove that the Transition Charge is as low as possible, or that PREPA obtained the maximum possible savings from its bondholders. Conversely, Section 6.25A does not allow the Commission to reject the Petition merely because the Commission believes PREPA could have obtained greater savings from bondholders so as to produce a lower Transition Charge."*

Section 6.25A may not "require the Corporation to prove that the Transition Charge is as low as possible" but as mentioned in our previous statement, the totality of Act 57 applies to this proceeding. Act 57 establishes that PREPA must provide electricity to customers at the "lowest cost possible" in its Statement of Motives. Certainly this motive does not exclude the Transition Charge. The Transition Charge may technically be treated as being different from the new proposed rate but it is unmistakably an integral part of the new proposed tariff. The Puerto Rico Electric Power Authority ("PREPA") itself addresses their relation on Section 2, pages 3 and 4 of the *Executive Summary and Background*

recently submitted to the Commission when it stablishes: "Those figures together yield a shortfall of about 4.2 cents per kilowatt hour ("kWh"), of which about 2.9 cents is associated with the Transition Charges..."and in Section 12, pages 9 and 10 of the *Executive Summary and Background* it proposes to "*Establish rates that coordinate with Transition Charges supporting PREPA's restructuring and avoid any duplicate or over-recovery of debt cost*".

Section IB then goes on to establish limitations to the powers of the Commission within the current proceeding, once again under the erroneous statement that Section 6.25A exclusively applies to this proceeding. The Order then states the Commission's powers as being limited to a list of enumerated questions. This list fails to include questions related to crucial substantive legal requirements such as the fundamental question, and of uttermost importance, that should be addressed by the Commission. These questions being; Is the proposed Transition Charge economically viable for Puerto Rico within the context of both the current fiscal situation and what can be foreseen to occur throughout the next 25 years? Can the Commission approve a plan which is not viable and will unravel if the current situation continues or deteriorates further as has been shared in testimony?

These questions are not addressed because the Corporation knows they have failed to consider such compliance and can only answer with shallow unfounded statements. Whether the Order recognizes it or not, the Commission has been created by Act 57 to serve a much larger purpose than exclusively that mandated by Section 6.25A and we expect our Commissioners to execute their judgement within the full context of the applicable law.

Section IB's list of questions includes, on page 7, three questions regarding "*Treatment of Net Metering Customers*". The questions are the following;

> 1. Is the Corporation's election to apply the Transition Charge to net-metering customers consistent with Section 29 of the Revitalization Act?
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> 2. For Customers who are net metered or have other "behind the meter" generation, is it consistent with the Revitalization Act, and with the criteria in Article 4 of Act 114-2007, as amended by Article 29 of the Revitalization Act, when distributing Financing Costs among Customer classes and calculating those Transition Charges that are based on kWh usage, to calculate customer load based on estimated total electric consumption?
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> 3. If the Corporation elects to use the "estimated load served by net metering or distributed generation" when calculating customer usage, is "the methodology for such inclusion ... practical to administer," and will it "ensure the full and timely payment of the Restructuring Bonds in accordance with their terms and other Ongoing Financing Costs," as required by Article 6.25A(d)(4) of Act 57-2014?

As stated in WindMar Group's final brief, no matter how many empty conclusions and hollow deceiving comments the Corporation has constructed, the answer to all three questions is NO. Because WindMar Group and ICSE-PR understand the Commission is clear on our positions regarding these questions we will not repeat WindMar Group's arguments here and rather refer you to the final brief.

Section IIE (5) of the Order regarding *Calculation Methodology Criterion Five: Methodology for Determining Estimated Load Served by Net Metering or Distributed Generation* refers to Article 6.25A(d)(ii)(4) of the Revitalization Act.

This part of the Petition regarding behind the meter generation and net metering is incomplete and falls short of meeting Article 6.25A of the Revitalization Act's requirements.

The language is clear. The Corporation must comply with the requirements to provide the analysis and the data it used to support its reasons for including behind the meter generation in the Transition Charge. Neither an acceptable explanation has been provided nor were any studies undertaken to support the Corporation's determination.

Starting on page 26 the Order cites the aforementioned Article;

> *"(4) When calculating Customer's energy usage under paragraphs (1) and (2) of this subsection (d), the Corporation **may choose** to include the estimated load served by net metering or distributed generation ('behind the meter'), **if** the methodology for such an inclusion is **practical to administer, and would ensure the full and timely payment of the Restructuring Bonds** in accordance with the terms thereof and other Ongoing Financing Cost."*

The Order fails to demonstrate the methodology as being "practical to administer" and admits it is *not* currently practical but "As it becomes practicable, and as meter data measuring the output of the distributed generation itself becomes available…". During the Technical Hearing Dr. Quintana's made an effort to explain how behind the meter load could be read or estimated by the Authority. Even he, the Authority's Executive Director, struggled to provide an adequate answer. The Commission can only conclude this is not "practicable".

On page 27 of the Order, it states that not charging customers on behind the meter generation would transfer those charges "inequitably" to other Customers. This statement should not be made on behalf of the Commission because public policy has determined to encourage renewable energy integration through incentives ranging from net-metering to cash rebates and renewable energy certificates, all of which represent a cost to one sector and an incentive to renewables. State policy has been legislated and the State Office on Public Policy has expressed itself on the subject during these proceedings. **In**

our opinion, this honorable Commission should respect both our legislature's legal mandates and the powers delegated to the State Office on Public Policy and reject all language provided in this order regarding behind the meter generation and net-metering.

Following on page 27 the Order quotes Article 35(i) of the Revitalization Act followed by a statement. Following is a verbatim copy of both copied from the Order;

> *"For so long as Restructuring Bonds are outstanding, and the Approved Restructuring Costs (including, any payments that have or are to become due under Ancillary Agreements) have not been paid in full, the Transition Charges authorized and imposed by this Act shall be obligatory, Non-bypassable and shall apply to all Customers.*

First, Article 35(i) is clearly misinterpreted by the Corporation. They intend to persuade the Commission away from the importance of Section 4 of Act 114-2007 as amended by Art.29 of the Revitalization Act and impose a misinterpretation of Article 35(i) of the same Act. This Article reads "*...the Transition Charges authorized and imposed by this Act shall be obligatory, Non-bypassable and shall apply to all Customers.*" Clearly it states that the charges that are "Non-bypassible" and shall "*apply to all Customers*" is limited to the Transition Charges that are "*authorized and imposed*". This is the letter of the law rather than meaning all customers must pay the charge and it not being possible to exclude behind the meter generation and/or net-metering customers, as the Corporation misinterprets. If net-metering clients could not be excluded why does Section 6.25A request the determination be made by the Corporation under certain substantive legal requirements? And why does Article 4 of Act 114 list criteria under which the Commission

must evaluate its potential impact on net metering customers and renewables implementation?

Also Mr. Zarumba's testimony is taken out of context. On record he stated that he thought including behind the meter generation was required and not a determination he was making. Using his testimony to justify the Corporations determination is incorrect.

On page 29 the Corporation requests that the Commission accept their proposal that "*...Customers (other than Grandfathered Net Metered Customers) who are net metered or have other "behind the meter" generation,* ***be based on estimated total electric consumption***". The Corporation has failed to demonstrate that this is practical to administer and therefore accepting this would be contrary to law. How would PREPA estimate this? One can only expect the worst coming from a bankrupt monopoly with no demonstrable interest or capacity in promoting competitively priced renewables for any sector in any form.

Section III D(2)(a) of the Order on page 69 addresses Treatment of non-grandfathered net-metering customers and begins by quoting Section 29 of the Revitalization Act;

> *"The Electric Power Authority may propose, as part of its rates, just and reasonable charges to its net metering customers. The Energy Commission shall evaluate said charges as part of the rate proposal of the Authority.*
>
> *The Energy Commission shall evaluate and determine which charges shall apply to net metering customers, such as the Contribution In Lieu of Taxes, Securitization, Subsidies, and Grants. Both the Authority and the Commission shall take into account the following criteria when proposing and evaluating the net metering customer charges:*
>
> > *i. The charge to be billed shall be just and shall have the purpose of covering the operating and administrative expenses of the grid services that receives any customer that entered into a Net Metering Agreement. The grid services*

received by a net metering customer shall be clearly differentiated from the services that the Authority bills on a regular basis to all of its customers.

ii. The charge shall never be excessive or established in such a manner as to constitute an obstacle to the implementation of renewable energy projects."

The next paragraph beginning on page 70 incorrectly states "*the first quoted paragraph applies to "charges" imposed by the "Electric Power Authority," i.e., PREPA. Since the Transition Charge is imposed by the Corporation, not PREPA, this first paragraph does not apply here.*". This statement is incorrect. Section 29 amends Act 114-2007 where; in the first place the "Corporation" is not defined and therefore could not be referred to unless the definitions were also amended and secondly; the Corporation is an alter ego of PREPA. The Corporation may claim to be a separate entity but as openly expressed throughout these proceedings the Corporation is a special purpose instrument with no address or telephone number. Its sole purpose is to restructure debt and is undeniably acting on PREPA's behalf. The Commission cannot ignore this fact by adopting this statement as its own.

Section III D(2)(b) on page 70 titled "**Applying the Charge is "just"—to net-metering customers and to all customers**" declares "*the better interpretation of this provision is that the term "just" applies to all customers, not only net-metering customers. To apply the term "just" only to the net-metering customers would mean that the other customers are subject to some standard other than "just." But that result makes no sense. In utility regulation there is no hierarchy of "justness," with some customers receiving treatment somehow more or less "just" than others.*" WindMar Group's testimony is referred to on the same subject within the Order. WindMar Group and ICSE-PR reaffirm that the *only*

possible legal interpretation of the word "just" in this context is that it refers to net-metering customers exclusively. This because it is extracted from Act 114- 2007 which states its applicability as being for those with renewable energy systems that are interconnected to the grid and have decided to participate in the net-metering program. Act 114 does not apply to other customers.

Then the Order ignores the fact that Section 29 (i) requires that the charge must "*have the purpose of covering the operating and administrative expenses of the grid services that receives any customer that entered into a Net Metering Agreement*". This is ignored by the Corporation because it is impossible for legacy debt to meet this requirement. Therefore applying this charge on net-metering customers is unlawful, past debt does not cover the net-metering customers grid services in any way.

Possibly the best part of the Order follows where the Corporation tries to address its largest challenge when insisting on including private net-metering generation in the Transition Charge. In an attempt to comply with Section 29 (ii) which states "*The charge shall never be excessive or established in such a manner as to constitute an obstacle to the implementation of renewable energy projects*" the Order states;

"c. The charge is not "excessive"

> The term "excessive" means "going beyond what is usual, normal, or proper." A charge is not "excessive" if it does no more than recover costs legitimately applied to a customer. As already explained, the Transition Charge reduces, then recovers, legacy costs caused by, or incurred for the benefit of, all customers including net-metering customers. These costs are usual, normal and proper because they are the type of costs typically recovered from all customers. They do not suddenly become excessive merely because they are recovered through a Transition Charge—especially when the effect of the Transition Charge is to reduce the cost burden.

d. The charge is not an "obstacle"

An "obstacle" is "something that impedes progress or achievement.". One must understand the term "obstacle" in context. An obstacle is a change to what is normal—a barrier that impedes normal progress. It is a change to the *status quo* that makes progress more difficult than before. The Transition Charge reduces legacy debt costs. Requiring the customer to continue to bear those reduced costs is not an obstacle. If such a cost could be an "obstacle" to net-metering, a traffic light an "obstacle" to driving to the office, the driver's test an "obstacle" to getting a license, and an electric rate an "obstacle" to receiving service. No one uses the term "obstacle" to refer to the normal costs of interacting with society. And that is all that the Transition Charge is: a means of recovering from all customers those costs legitimately and equitably allocated to all customers.

If the Commission were imposing on net-metering customers a new, unjustified cost, that would be an obstacle. The Transition Charge is not a new cost; it is a mechanism for reducing costs for which all customers, including net-metering customers, would otherwise be responsible. A charge whose purpose is to reduce costs cannot logically be viewed as increasing costs. And a charge that is the same for all customers cannot logically create an obstacle for net-metering customers. It takes nothing away from the good cause of renewable energy to reject this reasoning."

ICSE-PR and the WindMar Group are confident that the Puerto Rico Energy Commission will never adopt such words as its own. In the first place, within the context of Act 114-2007 Article 4 (ii) "excessive" can only refer to being over imposing on renewables integration and surpassing acceptable economic charges. Then it attempts to establish that the charge is not an "obstacle" to the implementation of renewable energy projects. But it is an excessive obstacle. The fact they use a superficial analogy of a "traffic light" and "test" for a driver's license is absurd. Both their traffic light and test are poor analogies because they are examples of temporary "obstacles". The Transition Rate would impose anywhere up from $0.03, depending on the adjustment mechanism, on each kWh generated by solar or wind facilities for the next 27 years. This will terminate renewable's competitiveness when being compared to the utility's kWh rate. This price hike would completely dis-incentivize customers from making the choice of shifting to

renewable energy. Do you believe PREPA would pay the Transition Charge upon the kWhs generated under their PPOA solar farms? PREPA has publicly stated, on repeated occasions, that their PPOAs signed at $0.185 per kWh are excessively expensive. Surely they would not sign a PPOA at $0.22 per kWh if it were to include the Transition Charge. The Corporation now expects the Commission to believe that the general public will have no problem paying the $0.22 price on renewable energy that PREPA would never pay.

Lastly we will comment the first paragraph on page 73 under Section Section III D(2)(f) where the Order states that intervenor's failed to distinguish between "*economical and uneconomical actions*". This distinction is not required from intervenors. First of all, that determination was made by Puerto Rico's Legislature under Act 114, as amended, when they decided which projects can participate in net-metering. This is neither PREPA's, the Corporation's, the Commission's nor the intervenor's obligation. Secondly, the Order states that intervenor's "*failed to offer any boundary between projects that deserved an exemption and projects that did not. The Commission finds these arguments unpersuasive*." The Commission's interpretation as stated on the Order is flawed, since it is not the intervenor's obligation or responsibility to demonstrate or provide proof, since the burden of the proof is on the Corporation with respect to its Petition complying with applicable law. In addition, the decision on where to draw the line has been dictated by the Revitalization Act when it states the charge would have to "*have the purpose of covering the operating and administrative expenses of the grid services*" and shall never be "*established in such a manner as to constitute an obstacle to the implementation of renewable energy projects*". The law also states that the burden of proof lies upon the

Petitioner, who failed to provide any substantial evidence on the administrative record to support their determination upon net-metering customers.

The WindMar Group, ICSE-PR and the Puerto Rico State Office of Energy Policy have clearly stated and documented on record that approving the Transition Charge upon behind the meter generation would be detrimental to renewable energy distributed generation.

Approving the Transition Charge for net-metering customers and behind the meter generation would be unlawful.

WindMar Group and ICSE-PR respectfully request this honorable Commission's to reject the proposed Restructuring Order based on it not meeting the necessary legal requirements.

We hereby certify that this Motion was notified on this date via email to the following:

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Respectfully submitted, by email as requested by this Honorable Commission, this 17th day of June, 2016.

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