PUERTO RICO ENERGY COMMISSION
COMMONWEALTH OF PUERTO RICO

IN RE: Review of Rates of the Puerto Rico Electric Power Authority	Case Number: CEPR-AP-2015-0001 Subject: Reconsideration of Final Order and Resolution

Motion for Reconsideration

COMES NOW, PVP Properties, Inc., Coto Laurel Solar Farm, Inc., Windmar PV Energy, Inc., and Windmar Renewable Energy, Inc. (collectively, "WindMar") , through the undersigned legal counsel, respectfully state and pray:

I. Background and Grounds Supporting this Motion

1. On January 10, 2017 the Puerto Rico Energy Commission (the "Commission") issued the Final Resolution and Order of the first Review of Rates of the Puerto Rico Electric Power Authority's ("PREPA") held before the Commission.

2. WindMar Group participated throughout the mentioned process and mostly agrees with the Commission's determinations and positive steps taken towards restructuring PREPA. Nevertheless, the determinations related to net metering made in the Final Resolution and Order of the first Review of Rates (the

"Resolution") adversely affect WindMar and the Renewable Energy Industry forcing the filing of this "Motion for Reconsideration".

3. As stated by the Resolution of the first Review of Rates of the Puerto Rico Electric Power Authority's ("PREPA"):

"Any party adversely affected by this Final Resolution and Order may file a motion for reconsideration before the Commission, pursuant to Section 11.01 of Regulation 8543 and the applicable provisions of Act No. 170 of August 12, 1988, as amended, known as the Uniform Administrative Procedure Act ("LPAU" for its Spanish acronym). Said motion must be filed within twenty (20) days from the date in which copy of the notice of this Final Resolution and Order is notified and such notice is filed in the case docket by the Commission's Clerk. Any motion for reconsideration must be filed at the Commission's Clerk's Office, located at the Lobby of 268 Munoz Rivera Ave., San Juan, PR 00918. Copy of the motion as filed must be sent by email to all the parties notified of this Final Resolution and Order within the twenty (20) days established herein."

II. Remedy Requested: Change of Determinations upon Net Metering

4. WindMar understands many of the Commission's determinations upon net metering customers have been made unlawfully and are the result of misinterpretation and hence, should be reconsidered.

5. To simplify the reading of this section, we will reference the determination requested to be reconsidered and succeed each determination with our arguments.

6. It is our understanding that the Commission erred when determining, on page 137 paragraph 393 of the Resolution, **"...that each net-metering customer should pay the same energy charges for inflow as other customers in its tariff class"** without making the proper exclusion that this cannot apply to grandfathered net metering customers nor the inflow offset by net metering customers outflow. Relevant to that determination, on page 141 of the Resolution and Order, paragraph 407, the Commission stated;

> "407. WindMar, Sunnova and ICSE-PR argue that the grandfathering clause prevents PREPA from billing any charge approved by the Commission under Section 4 of Act 114-2007 to grandfathered net-metering customers. This argument is incorrect, because it exempts certain net-metering customers from paying for the types of costs they currently bear and had historically borne."

This statement clearly illustrates that the Commission did not understand our arguments, despite our position having been discussed at the hearings and later put in writing. Since it was not previously understood, we want to make perfectly clear that our argument is that grandfathered net metering customers are protected from any *new* charges that may be proposed which is different than the Commission's understanding that our opposition is to "...prevent PREPA from billing *any* charge approved by the Commission...". If the charges were previously not included in those grandfathered customers' bills they cannot now be charged as a result of the Rate Review because of the protection under Section 4 of Act

114 of 2007, as amended ("Act 114"). If a proposed charge is determined to be just and reasonable it can only be charged to non-grandfathered net-metering customers and only if the criteria established under Section 4 of Act 114 is met.

To avoid misunderstanding we further clarify that if the charge was "bundled" within the previous charges it is allowed to be charged to the grandfathered customer. Our opposition is regarding applying *new* charges that these grandfathered customers have not previously paid.

Plainly put, because grandfathered customers are excluded from new charges under Act 114 the Commission erred when determining on page 137 "each net-metering customer should pay the same energy charges for inflow as other customers in its tariff class" without excluding grandfathered customers.

We request the Commission correct this error by distinguishing that grandfathered customers be exempt from any new charges on their inflow based on the grandfathering clause that prevents PREPA from billing any new charges approved by the Commission to grandfathered net-metering customers under Section 4 of Act 114. Next we will discuss the outflow and our opposition to a charge applying to those amounts of energy.

7. On page 137, paragraph 394, the Commission determined **"we find each grandfathered net-metering customer should be credited for outflow at the full energy charge applicable to its class, while a non-grandfathered net-metering customer should receive a somewhat lower credit, excluding certain non-by-passable charges."**

The "lower credit" to non-grandfathered net-metering customers imposed by the Commission is contrary to law. Charges to the total inflow or outflow altering the net-metering credit are not authorized under any legal disposition as part of the Rate Review. The only explicit authorization allowing a charge to be proposed upon net metering customers is under Section 6.25A in relation to the Transition Charge which is not applicable to the Rate Review Process. It is incorrect to conclude that the net metering credit can be changed without express legislation to that effect.

Evidently, once again, the Commission has misinterpreted the amendment of Section 4 of Act 114. As we have previously submitted in our legal briefs, the amendment allows new charges to non-grandfathered net-metering customers but does not allow changing/eliminating net metering. The "lower credit" determined by the Commission has the effect of eliminating net metering as established under Act 114 by not allowing customers to offset the total cost of power drawn from the utility.

Certainly, if Act 4 of 2016 intended to allow changing the manner in which net metering is credited it would be stated expressly within the law. PREPA proposes to measure the credit by determining "avoided costs" which is never mentioned within any legal disposition either. At this point in time, net metering is an essential instrument to promote renewables and any changes to it would be expressly stated and cannot emerge from the Commission's interpretation. Legal hermeneutics require any unclear legal disposition be interpreted in favor of the interested party

and therefore the Commission has acted beyond its powers with this determination.

We request the Commission correct this illegal interpretation of the law and deny PREPA's proposal to alter net metering's credit. As an alternative, we recommend the Commission consider a new charge separate from the net-metering credit to collect the amounts they pursue from the "lower credit".

8. On page 137, paragraph 395, the Commission stated **"395. Among the non-by-passable charges is the Transition Charge. The manner in which the Transition Charge is to be collected from all net-metering customers was decided and explained in the Transition Charge proceeding. Those dispositions remain unaltered."**

We must remind the Commission their own words included in the Restructuring Order of Docket No. CEPR-AP-2016-0001 of June 21, 2016 on pages 84-85 paragraph 327;

> "*We wish to stress, as emphatically as possible, that these two conclusions are not the Commission's final words* on this subject. In the pending rate case and in other proceedings, the Commission will explore, fully and deeply, all feasible ways to ensure that the maximum amount of cost-effective renewable energy is developed in Puerto Rico. And we will explore, just as fully and deeply, how to allocate the benefits and costs of that renewable energy consistently with elementary (and statutorily mandated) principles of economic efficiency, justness and reasonableness and nondiscrimination. For example, if distributed generation bears its fair share of infrastructure costs, it is entitled to consideration of the value it contributes (such as the "capacity value" created by reducing future load or producing output at peak periods). We look forward to inviting and assessing this type of analysis."

These words led renewables stakeholders to believe the Commission's determinations of the Transition Charge regarding net metering were not final. This represents a clear violation of legal due process guaranteed to all citizens by our Constitution.

Furthermore during the Rate Review proceedings the Commission emitted a Resolution and Order dated November 3, 2016 which, among many other determinations stated that concerns with the Cost of Service Study (COSS) made "...it infeasible for the Commission to make credible decisions ..." and listed the subjects to be excluded from the determinations to be made in this proceeding. Included as number seven (7) of its list was "Net metering and DER rates" hence excluding this topic. Adding to the confusion later the same Order, in its Section IV on pages 11-12, lists a number of questions regarding "specific areas the Commission will be addressing in its final resolution and order." and included questions on "DER and Renewable Issues".

The aforementioned words of the Commission lead to confusion regarding the Commission's intentions and whether determinations impacting net metering would or would not be made in this proceeding. The confusion led Intervenors to ask the Commission's Staff, Mr. Hempling in particular, to clarify what the scope of the Panel on net metering would be. No clear answer was given and Intervenors were further confused with the process. This is on the record of the Technical Hearing.

Now, further amplifying the confusion, the Resolution's paragraph 391 on page 136 states;

"391. Because the Commission will initiate a separate proceeding to examine rate design and net-metering, given the complexity of this rate case we address here a limited set of issues: treatment of credits, charges and exclusions for net-metering customers. As for all others raised by PREPA and intervenors, the statute does not require their resolution in this specific rate case; nor was there sufficient evidence or time to do so. We will address them in the upcoming rate design proceeding."

Given the "complexity of this rate case" there is no time to examine net metering but there is enough time to end grandfathering and apply a "lower credit"? The issues Intervenors and PREPA raised do "not require their resolution in this specific rate case" but the Commission can make these determinations without attending the issues raised by the stakeholders? If this is correct, then Intervenors have not been granted the right to defend themselves from the administrative determinations made in this proceeding as required under the Uniform Administrative Procedure Act.

The described confusion unequivocally affected all Intervenors' preparation for the hearings, affected all stakeholders' rights to a due process, and results in Intervenors right to question the Commission's determinations regarding net metering.

9. Paragraphs 397 and 398 on pages 137-138 of the Resolution detail the determinations with respect to the charges included and not included in the credit for non-grandfathered net metering customers;

> **"397. For outflow from non-grandfathered net-metering, the credit shall be the sum of the customer's base rate energy charge; the fuel charge; the purchased-power charge; and the subsidies for Hotel Discount, Downtown Commerce, Churches analog, rural aqueducts, GAS, Condominium Common Areas, and irrigation district; and the Act 73 Tax credit. These items**

are, or are akin, to normal utility costs (which net-metering customers are already allowed to avoid)."

"398. For outflow from non-grandfathered net-metering, the credit shall not include: CILT, the energy efficiency charge (when created), public lighting subsidy, the Energy Commission assessment, and all of the items denoted as "help to humans" during the technical hearing: life-preserving equipment, LRS Tariff, RH3 tariff, residential fuel subsidy, and the fixed public housing rate (RFR tariff). These items are mostly social commitments - things that benefit the public as a whole, including net-metering customers. Aslvrr. Chernick explained, net-metering customers are actual or potential beneficiaries of energy efficiency programs:

> **Energy-efficiency program costs are very different from the costs of traditional utility functions, in that a distributed generation customer can use energy efficiency services regardless of how much energy the customer takes from PREPA. While the power that flows out from the distributed generation customer to the delivery system can reduce PREPA's costs of generation, transmission and distribution, it does not affect the demand for energy efficiency services. Nor is the energy from distributed generation likely to reduce the extent to which a net-metering customer can participate in the energy-efficiency program."**

"399. For outflow from grandfathered net-metering, the credit shall be the sum of: Base Rate, fuel charge, purchased power charge, all items in the Subsidy Rider, CILT, and energy efficiency charge."

For the same reasons previously stated about paragraph 394 we request the Commission correct this mistaken interpretation of the law and not alter net metering's credit. As an alternative, we have recommended the Commission consider a new charge separate from the net-metering credit to collect the amounts they pursue from the "lower credit". This can be discussed in the future proceeding upon net metering mentioned in the Resolution.

III. Flaws in Legal Analysis Regarding Net Metering

On pages 139 through 146 of the Resolution the Commission provides its legal analysis determining: (i) the treatment that would apply to grandfathered net metering customers; (ii) the treatment that would apply to non-grandfathered net metering customers; and (iii) the requirements for determining whether applying a proposed charge to a net-metering customer is just and reasonable.

Our understanding is that the analysis does not consider our previously filed arguments and reaches conclusions without legal basis and in absence of any supporting evidence within the proceedings. Following we will detail the legal faults and misinterpretations of the law included throughout these pages on which we request the Commission reconsider its position.

Paragraphs 404 through 406 discuss both the original Sections 4 and 5 of Act 114 and the amendments made by Sections 29 and 30 of Act 4-2016. We understand the Commission's discussion within these paragraphs is correct. The errors are made in the application starting on paragraph 407 through 426.

The Resolution's errors mainly emerge from when Section 4 refers to "charges to its net metering customers" or "net metering customer charges". The Commission concludes this is an authorization to approve charges to the energy generated by the distributed generators ("DG"s) including self-consumption and "outflow". This is not the case. In essence, a charge to outflow is a charge on renewable energy

produced by the DG. There is no wording, either within those Sections or elsewhere in Act 4-2016, authorizing the Commission to alter net metering credits. The authorization included in Act 4 is exclusively as to PREPA being allowed to "...propose, as part of its rates, just and reasonable charges to its net metering customers." To assume this wording authorizes; altering the credits, *de facto* adding charges to the energy produced by the DG, and therefore changing the "offsetting" of energy inflow from PREPA to the client is a manipulation of the law.

We will discuss the application of these Sections in the same order they are expressed in the Resolution. It divides the application of the amended articles of Act 114 as follows; grandfathered net metering customers, non-grandfathered net-metering customers and the requirements for evaluating a proposed charge on non-grandfathered customers.

Regarding the grandfathered net metering customers, we agree with the Commission that there is no legislative intent to exempt these customers from those charges which have always been included in PREPA's rates and which are now simply being separated in each bill. As we previously explained the Commission misunderstood our argument and we have clarified our position.

As for non-grandfathered net metering customers, we do not agree with the Commission. The Commission rejects our argument that the allowed charges are limited to net inflow by simply stating that Act 4 does not authorize "unfair and destabilizing effect of allowing customers to shift their costs to others." This is an irrelevant argument which lacks legal basis. Equally the statute does not authorize changing credits to net metering customers and does not make any statement that

can be argued as so. Act 114 establishes an "incentive" for renewables which is structured as a credit which allows to offset energy inflow from the utility. Whether the Commission believes this is "unfair" or "destabilizing" is completely irrelevant, our legislature established its public policy and legislated for this Commission to enforce it. The fact the Commission bases its determination on this argument means they have taken establishing public policy into their own hands without the proper legislative delegation and therefore are acting beyond their legal authority.

The Resolution repeats their determination from the Restructuring Order on the Transition Charge while ignoring that Act 4 explicitly authorizes PREPA, in Section 6.25A, to propose the Transition Charge upon DG estimated load and such dispositions are not applicable to this Rate Review Process. If our Legislature's intention were to allow the Rate Review to eliminate net metering, it would be clearly stated as it was for the review of the Transition Charge detailed in Section 20 of the same Act.

On paragraphs 413 through 426 the Resolution discusses the requirements for evaluation of a proposed charge on non-grandfathered customers under Section 4 of Act 114. The discussion begins by repeating the mistaken determination that PREPA "...may impose charges on inflow of non-grandfathered net metering customers..." as the charge to which "four standards stated in Section 4 of Act 114 should be applied." Yet for an unknown reason, the Resolution limits this discussion to the interpretation of the four standards but does not evaluate the proposed charge by applying the two criteria mandated by law. In that sense the

law has been ignored by the Commission. We understand the charges approved by the Resolution do not meet the criteria of the law.

The first of the standards listed by the Resolution is "just" (without ever discussing "reasonable" which is as important within the Act's same sentence). WindMar has argued that "just" is referring to the charge being "just" to the net metering customer and not referring to all customers. In paragraph 415, the Commission reiterates its determination that "just" applies to all customers and not only net metering customers. Once again we differ, the applicable legal disposition never makes reference to any other customers than net metering customers. Furthermore the legal disposition must be interpreted within the context of Act 114 for it is not stated within the dispositions applying to Act 57's amendments. If it were meant to apply to Act 57 it would be stated within the sections amending Act 57 and describing the rate petition procedure as expressly done within the Transition Charge dispositions.

Even if "just" did refer to all customers, which it does not, how does the Commission know the charge it has approved within the Resolution is "just" to all customers? How has the Commission reached its conclusions without knowing the actual cost of its determination? At this point neither PREPA nor the Commission know what the final costs of its determination are. Also, were the benefits from solar net metering customers to other customers quantified and taken into account? No.

Paragraph 417 mentions public policy on renewables but justifies the fact the Commission is acting contrary to public policy by concluding;

> "...A charge which unduly shifts the burden from one customers to another, absent express legislative intent, such as in the case of a grandfathering clause, cannot result in "just and reasonable" rates."

This statement ignores that net metering is expressly established in Act 114, not merely as the referenced "legislative intent", and the fact that incentives by definition will cost someone or something while benefitting another. The same occurs with all subsidies yet the Commission has been prudent enough to not undermine those.

Paragraphs 418-421 discuss the legal requirement on costs related to the grid services received by net metering. Paragraph 418 expresses the Resolution's interpretation in a manner that reflects the Commission's misunderstanding of the letter of the law when it says;

> "418. The Commission must determine whether a charge is related to the grid services received by net-metering customers. We interpret this phrase to mean that net-metering customers should pay for the services they receive."

Here the Commission misinterpreted a pellucidly clear legal mandate limiting the charges to net metering customers into requiring them to "pay for the services they receive". The section is about "allowed charges" and not required charges as the Commission has interpreted it. It is concerning that the Commission believes it has been delegated powers to change the clear letter of law into what it feels is convenient to justify its determinations.

Then, in paragraph 421, the Resolution clearly states how it perceives net metering should be:

> "421. A coherent net-metering policy recognizes the benefits of net-metering and allows a customer to reduce its responsibility for costs directly associated with his or her consumption. PREPA's obligation to provide certain services, such as public lighting, will continue regardless of the number of net-metering customers. A customer's decision to net- meter does not reduce the benefits he or she receives from such services. Therefore, it would not be reasonable for non-grandfathered net-metering customers to avoid responsibility for costs which benefit them in equal proportion to non-net-metering customers, simply because they have a net-metering agreement."

We request this be reconsidered because it goes beyond the Commission's powers. To intend to change public policy by expressing what "a coherent net metering policy" should be in their opinion supersedes the Commissions faculties. Making public policy on renewables is a legal mandate that has not been delegated to the Commission, this opinion of what net metering should be is invalid and merely an opinion. An opinion as valid as anyone else's.

With respect to interpreting the word "excessive" used in Section 4 of Act 114, the Commission concludes in paragraph 422 that "...the Commission must determine whether a proposed charge (or the total amount thereof) would result in the customer paying beyond what is necessary to cover the costs incurred by PREPA in servicing that customer. A charge which recovers the proper share of costs from net metering customers cannot be considered excessive, merely because it is inconvenient." First of all, no intervenors or interested parties, have

argued that "excessive" should be interpreted as a mere inconvenience. The statute uses the word "excessive" in the following context;

> "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."

"Excessive", as any other term of a legal statute being interpreted, should be interpreted within the context in which it is expressed. The Commission's conclusion that a charge is not excessive "...if it does no more than recover costs legitimately applied to a customer." lacks coherence within the context of Act 114 and therefore should be reconsidered. It is obvious that the word "excessive" must be interpreted in relation to the rest of the sentence in which it is expressed and can only mean a proposed charge cannot exceed an amount that will constitute an obstacle to the implementation of renewable energy projects.

Last, the fourth standard the Commission addresses in the Resolution is the meaning of "obstacle" within the previous cited criteria in paragraphs 423 through 425. The Commission's expressions within these paragraphs illustrate lack of respect for the letter of the law when making determinations that impact net metering. The Resolution states if the cost is "justified" and "A charge that is the same for all customers cannot logically create an obstacle for net-metering customers." This is a misinterpretation of the law which ignores the words of the legal disposition of Act 4.

The disposition states that the charge cannot be "...an obstacle to the implementation of renewable energy projects". In the Commission's own words "An "obstacle" is "something that impedes progress or achievement."

WindMar, Sunnova, ICSE-PR and Aconer provided testimonies and legal briefs describing how the proposed charges would negatively impact the implementation of renewable energy projects. PREPA provided no evidence opposing intervenor's testimonies, and even agreed at the hearings that their proposed charges on net metering would eliminate the economic benefits of net metering (an obvious intent to eliminate what they have described as "competition"). Therefore, the administrative file lacks evidence to support the Commission's determination. The burden of proof lays upon PREPA.

The Resolution closes this topic by addressing WindMar and Aconer's arguments;

> "426. The problem with these arguments is that, taken literally, they would treat any charge as an obstacle because any charge could decrease profitability or slow the pace of investment. Accepting these arguments would require us to eliminate all charges on net-metering a result inconsistent with the legislative intent that we evaluate each of the four criteria separately."

This ignores the legal statute requiring the charges to not represent an obstacle. Neither does it address intervenor's evidence on file sustaining their arguments. The Commission's determination that their charge on outflow does not represent an obstacle upon renewable's integration is a classic example of an *ultra vires* determination made in absence of evidence on the record to sustain it.

IV. Conclusion

WindMar requests the Commission to reconsider and eliminate the determinations upon net metering included in the referenced Resolution. In summary we request the Commission reconsider and act on the following subjects; (1) that grandfathered customers be exempt from any new charges on their inflow, (2) correct its illegal interpretation of the law allowing charges on outflow and deny PREPA's proposal to alter net metering's credit, (3) Guarantee intervenor's right to a due process by eliminating the determinations on net metering and provide a future process without fragmenting determinations that impact net metering customers, and (4) correct the legal analysis of Section 4 of Act 114 as detailed in Section III of this Motion.

WHEREFORE, WindMar respectfully prays the Honorable Commission to grant this Motion and reconsider the Resolution in light of our aforementioned arguments.

WE HEREBY CERTIFY that the foregoing was notified via e-mail to the following persons: n-ayala@aeepr.com; n-vazquez@aeepr.com; c-aquino@aeepr.com; glenn.rippie@r3law.com; michael.guerra@r3law.com; john.ratnaswamy@r3Law.com; codiot@oipc.pr.gov; jperez@oipc.pr.gov; mmuntanerlaw@gmail.com; jfeliciano@constructorespr.net; abogados@fuerteslaw.com; jose.maeso@aae.pr.gov; edwin.quinones@aae.pr.gov; nydinmarie.watlington@cemex.com; aconer.pr@gmail.com; epenergypr@gmail.com; jorgehernandez@escopr.net;

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RESPECTFULLY SUBMITTED this 30th day of January, 2017, in San Juan, Puerto Rico.

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