GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU

IN RE: PUERTO RICO ELECTRIC POWER AUTHORITY INTEGRATED RESOURCE PLAN

CASE NO. CEPR-AP-2018-0001

SUBJECT: AES PUERTO RICO LP POST-HEARING REPLY BRIEF

AES PUERTO RICO'S POST-HEARING REPLY BRIEF

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

AES Puerto Rico L.P. ("AES-PR") submits this Post-Hearing Reply Brief:

INTRODUCTION

Every one of the post-hearing briefs confirms the same fundamental point: as a matter of both law and policy, Puerto Rico must complete an ambitious transition to a renewables-driven energy future. None calls into serious question the only conclusion supported by both the pre-filed and hearing testimony: that the IRP and Action Plan offer a robust framework for the island's move towards an energy mix that is not only lower cost, but also more reliable, resilient, and renewable.

For that reason, AES-PR supports the IRP's "no regrets" investments in solar energy and efficiency measures, and anticipates that the company will play a key role as the Bureau, PREPA, and other stakeholders manage a responsible energy transition in Puerto Rico. Two points have been clearly established with respect to AES-PR's place in that future generation mix:

First, the Bureau should approve PREPA's conclusion that AES-PR's two coal-fired electricity generating units should stay online through 2027, unless PREPA and AES-PR reach agreement on an earlier transition for the AES-PR facility to solar or natural gas. As AES-PR explained in its post-hearing brief, the AES-PR Guayama facility must keep operating if PREPA is to reliably meet demand during the period of transition to renewables. AES Puerto Rico Post-

Hearing Brief ("AES-PR Br.") at 6-8 (March 6, 2020). Moreover, continued operation of the facility is in the best interest of ratepayers, because AES-PR is the island's lowest-cost provider of baseload power. *Id.* at 9-12. In addition, AES-PR is one of the most reliable generators on the island, *id.* at 6-7, and one of the very few thermal plants in Puerto Rico that complies fully with the MATS regulation established by the Environmental Protection Agency. *See* Puerto Rico Integrated Resource Plan 2018-2019 at 4-24 to 4-26 (June 7, 2019) ("IRP").

Second, the Bureau should direct PREPA to work towards partnering with AES-PR to be part of the transition to renewables. To meet the aggressive renewables targets established by Puerto Rico law, the IRP provides for unprecedented investment in new solar generation that would replace much of PREPA's current fleet. Under the "Green Blend and Extend" structure AES-PR has outlined in this proceeding, AES-PR would support the responsible transformation of the Puerto Rican electric system by building new solar generation and storage infrastructure and enhancing operational flexibility of the coal plant under an amended Power Purchase and Operating Agreement ("PPOA"). It is in Puerto Rico's best interest to work with experienced and reliable partners in order to carry out its ambitious plans for utility scale solar generation, and AES-PR is one of the most experienced and reliable on the island. AES-PR Br. at 13-15.

Indeed, no party disputes that AES-PR is well-positioned to assist in building out Puerto Rico's solar capacity, or offers any evidence to suggest that either PREPA or the Bureau should exclude it from doing so. Nor can there be any reasonable dispute that PREPA can and should move ahead immediately with its essential "no regrets" investments in solar generation and energy efficiency—in other words, that it cannot and should not permit lingering disagreements over how much distributed generation will be available and the long-term role of natural gas to stall immediate action on the island's energy crisis. *Id.* at 15-17. The IRP provides flexibility for

adjustment over time, and those disputes should be resolved in the future rather than used to block Bureau approval today. *Id.*

However, one intervenor has belatedly raised two challenges to the IRP's determination that AES-PR's coal plant should continue operating through 2027. As explained below, those challenges fail both procedurally and on the merits.

ARGUMENT

For the first time in their post-hearing brief, the Local Environmental Organizations ("LEOs") complain that the IRP fails to consider water usage, air emissions, and coal combustion residuals associated with AES-PR's operations. Those arguments are untimely because the LEOs had multiple opportunities to present on those issues before and during the evidentiary hearing but did not do so. Having waived their chance to make these claims when AES-PR and PREPA had an opportunity to present evidence in response, the LEOs cannot raise those claims now, after the factual record has closed. But even if their arguments were timely—and they are not—the arguments should be rejected because they are clearly wrong. PREPA properly considered environmental impacts, and the LEOs have not offered any valid argument to reject the IRP.

The LEOs have likewise waived their claim that PREPA's ongoing bankruptcy would allow it to terminate the PPOA without paying damages to AES-PR. Although AES-PR and PREPA both presented testimony regarding those termination penalties, the LEOs offered no meaningful contrary evidence or argument before or during the hearing. But even if not waived, the argument provides no basis to reject the IRP. If PREPA could terminate the PPOA and owe no *contract damages*, doing so would still impose on PREPA and its ratepayers *economic* costs in the hundreds of millions of dollars—*and* significantly harm the resiliency and reliability of the Puerto Rico electrical grid during this transition period. In other words, it is clear that the Bureau need not reach the contract damages issue, as it should approve the IRP regardless.

In all events, the claim is plainly meritless. Because rejecting the PPOA would increase costs and decrease reliability, it would not actually benefit PREPA's business and would therefore not satisfy the test of rational business judgment by which contract rejections are evaluated in bankruptcy. And, even if PREPA *could* reject the PPOA, under the particular circumstances of the bankruptcy AES-PR would still be entitled to recover hundreds of millions of dollars in damages.

I. The LEOs' Arguments Regarding AES-PR's Environmental Impacts Are Untimely and Fail on the Merits.

The LEOs briefly suggest three challenges to the IRP's determination that AES-PR's coal-fired generation capacity should stay online through 2027. First, they argue that the IRP does not factor in AES-PR's water consumption. Local Environmental Organizations' Legal Brief ("LEO Br.") at 59-60 (March 6, 2020). Second, they argue that the IRP fails to account for the coal combustion residuals ("CCR") those operations will generate. *Id.* at 60. Third, they argue the IRP generally fails to account for the air emissions associated with PREPA plants, implying some issue with AES-PR's facility. *Id.* at 58, 62-64. None should be considered here, as the LEOs failed to raise the assertions before or during the hearing. Regardless, none of the contentions has any merit.

A. The LEOs have Waived Their Environmental Challenges By Failing to Raise Them At Any Time Before Post-Hearing Briefs.

Pursuant to its power to make rules for IRP review, *see* 2014 P.R. Laws Act 57, § 6.3(h), (mm), the Bureau has established procedures governing the orderly presentation of evidence and argument in this proceeding. Under those procedures, the LEOs' environmental challenges are plainly untimely because they were never presented at the evidentiary hearing.

The Bureau's rules repeatedly instruct the parties that post-hearing briefs may only address materials properly raised at the evidentiary hearing. Under its general regulation on adjudications, "[u]pon conclusion of the administrative hearing," the Bureau may "request the parties to submit

a brief." PREB Reg. 8543 § 9.06.[1] By that regulation's terms, post-hearing briefs are limited to discussing facts that were *already* "proven during proceedings." *Id.*

The Bureau's orders in this case leave no doubt on that score. The Bureau set up a specific procedure by which parties may introduce evidence (through pre-filed direct testimony) and by which parties may challenge evidence of other parties (through cross examination at the hearing). *Resolution and Order re: Initial Technical Hearing, Procedural Calendar and Parties Notification Mailing List* ("*Order re: Procedural Calendar*") at 5, Case No. CEPR-AP-2018-0001 (Aug. 21, 2019). The Bureau also repeatedly warned parties not to deviate from this designed schedule. *See, e.g., Resolution and Order re: PREPA's Motion for Extension of Time to Respond to LEO and Wartsila's ROIs*, Case No. CEPR-AP-2018-0001 (Sept. 30, 2019). The Bureau also directed that post-hearing briefs "shall be limited to the information presented during discovery and the Evidentiary Hearings. Therefore, the [post-hearing briefs] cannot introduce information and/or evidence that has not previously been filed before the Energy Bureau." *Resolution and Order re: Completeness Determination of PREPA's IRP Filing and Procedural Calendar* at 9, Case No. CEPR-AP-2018-0001 (July 3, 2019); *Order re: Procedural Calendar* at 5.

The LEOs' brief ignores that clear direction. Nothing in their multiple pre-hearing submissions—including the testimony of their environmental expert, Daniel Gutman—challenged the IRP's treatment of AES-PR's air emissions, CCR management, or water consumption. Nor did they raise the issues at the evidentiary hearing itself, where they cross-examined multiple witnesses on each Panel and had the opportunity to cross examine witnesses on this topic, including

[1] The Bureau's general rules for adjudications govern this proceeding, except to the extent they are superseded by inconsistent provisions of its rules applicable to IRP review specifically. PREB Reg. 9021 § 2.04(B). Those rules are silent with respect to the content of post-hearing briefs.

AES-PR's representative and PREPA officials. Instead, the LEOs chose not to ask a single question about any of these topics. The LEOs had multiple opportunities to raise these challenges before and at the evidentiary hearing. They did not. Puerto Rico law does not permit them to do so for the first time in a post-hearing brief.

The Bureau has already rejected one attempt by the LEOs to circumvent the usual order of these proceedings, holding that they could not demand post-hearing discovery from AES-PR on issues they had not raised at the hearing itself. It should do the same here for the same reasons:

> As part of the instant case, the Energy Bureau has been diligent in establishing a clear procedural calendar . . . in order to provide the parties and the Energy Bureau ample opportunity to gather all the necessary information for the parties to have an effective participation in the instant case and for the Energy Bureau to make an informed decision . . . . The Local Environmental Organizations did not cross-examine AES-PR's witnesses . . . during the Evidentiary Hearing, nor [did] they [otherwise] raise[] this issue."

Resolution re: Motion to Compel Complete Discovery Responses by AES-PR; AES Puerto Rico's Opposition to the LEOs' Motion to Compel Discovery Responses at 2-3, Case No. CEPR-AP-2018-0001 (Feb. 24, 2020). "[T]he Evidentiary Hearing has been held," and the LEOs' new arguments are therefore untimely. *Id.*

B. The LEOs' Untimely Environmental Challenges Also Fail On the Merits.

1. The IRP Fully Considers Environmental Issues Consistent With The Requirements of Puerto Rico Law.

Puerto Rico law directs the Bureau to evaluate the IRP for "full compliance with the public policy on energy of Puerto Rico." 2018 P.R. Laws Act 211, § 64 (amending 2014 P.R. Laws Act 57, § 6.23(c)) (to be codified at 22 L.P.R. § 1054v(c)). "Environmental considerations" are one part of that "comprehensive analysis." *Final Resolution and Order on the First Integrated Resource Plan of the Puerto Rico Electric Power Authority* at 18, No. CEPR-AP-2015-0002 (Sept. 23, 2016) ("First IRP Order"). Moreover, the Bureau has only limited jurisdiction to address those

considerations. As it explained in the first-ever IRP review, the Bureau is a utility regulator that does not "have the legal power to [directly] order solutions to health problems or environmental harms—matters for the Legislature to place with the appropriate [health or environmental] agencies." *Id.* at 16.

Accordingly, the Bureau has never required an IRP to include the sort of environmental analysis that would be appropriate in an environmental permitting proceeding. Rather, the Bureau has emphasized its focus on "the possible financial costs of environmental compliance," and "issued specific instructions to PREPA stating that it must comply with all applicable environmental requirements prior to commencing . . . development . . . including, but not limited to, seeking permits from the appropriate environment-related government agencies." *Id.* at 17-18. Those issues fall within the Bureau's jurisdiction because "[t]o the extent sellers of electricity behave in a manner that will subject them to fines and penalties, or shutdowns by environmental authorities, those events can affect the quality, reliability and cost of electric service." *Id.* at 17.

Here, it is beyond dispute that PREPA has properly addressed "environmental considerations" in the IRP. Indeed, the IRP is in all respects an extraordinary roadmap that is first and foremost designed to reduce the environmental impacts of the entire energy system of Puerto Rico. The first of three elements in the IRP Action Plan is the "Greening [of] the Supply" through unparalleled investment in new solar generation and battery storage, coupled with "retiring or converting all existing coal and heavy fuel oil generation." IRP at 10-1. This IRP calls for installing some 4000 MW of solar—which is more than the current capacity of the existing grid in Puerto Rico—and more energy storage than is currently installed in the entire continental United States. AES-PR Br. at 14. This Bureau need not look further to affirm that PREPA properly considered environmental concerns and reject the LEOs' contention.

In all events, PREPA undertook the review required of it under the law. Section 4.3 of the IRP considers "key [environmental] regulations" with which PREPA and its power providers will have to comply, their "applicability to PREPA's existing and future portfolio and the approach to incorporat[ing] [environmental] compliance into the IRP analysis." IRP at 4-17. In formulating that approach, PREPA considered not only air emissions and water quality standards, *id.* at 4-19 to -25, 4-26 to -27, 4-29, but also future carbon regulation and the requirements of Puerto Rico's ambitious Renewable Portfolio Standard, *id.* at 4-26 to -28. The LEOs' suggestion otherwise is nothing more than an attempt to relitigate legal issues that this Bureau already resolved in its First IRP Order.

2. The LEOs' Unfounded Assertions Regarding AES-PR's Environmental Impact Do Not Justify Rejecting the IRP.

Moreover, none of the LEOs' three environmental challenges are valid.

Water Consumption. Almost all of the water AES-PR uses to operate its plant is either treated wastewater that PRASA would otherwise discharge into the ocean,[2] or water from the Patillas Canal, a 100-year old conveyance carrying water for agricultural use that would otherwise go unused. Neither the PRASA wastewater or Patillas supply is, or could be, used as a source of drinking water. The LEOs briefly mention that AES-PR has a water franchise to use 87 million gallons of groundwater per year, and assert that PREPA should have considered that in its IRP. LEO Br. at 60. AES-PR does draw a small fraction (approximately 5%) of its water from groundwater, but the LEOs have not provided any basis to believe that the company's limited extraction—in contrast to the millions of gallons of groundwater extracted daily for other uses—

[2] *E.g.*, EPA Fact Sheet, National Pollutant Discharge Elimination System, Guayama Regional Wastewater Treatment Plant at 1 (Aug. 2019) (discharges effluent to the Caribbean and "supplies treated wastewater" to AES-PR), *available at* https://www.epa.gov/sites/production/files/2019-06/documents/guayama_rwwtp_fact_sheet_2019r.pdf.

poses any risk to the drinking water supply in Guayama or elsewhere. Issues of water management and water use are reserved for the Puerto Rico Department of Natural Resources ("DNER").[3]

Air Emissions. The LEOs make an offhand assertion that the AES-PR facility is a source of toxic emissions. LEO Br. at 58. The rest of the LEOs' assertions concerning hazardous air pollutants (HAPs) do not relate to AES-PR. *See* LEO Br. at 62-64. Nor could they, as AES-PR is in full compliance with the U.S. Environmental Protection Agency ("EPA") standards for HAPs, the federal Mercury and Air Toxics Standards. IRP at 4-24.

Moreover, any suggestion of any other air emissions concerns are groundless. AES-PR is fully permitted by both the EPA and DNER,[4] the expert agencies charged with ensuring the permitted level of air emissions from the facility are protective of human health and the environment. In fact, AES-PR has a combination of innovative, emission controls that "constitute the best available control technology" designed to provide an unprecedented "level of SO_2 control" that "is lower than the emission limits" at comparable facilities – and ensure the plant operates well within its particularly "stringent" emissions limits. *See In re AES Puerto Rico L.P.,* Order Denying Review, 8 E.A.D. 324, 332-334 (Envtl. Appeals Bd. 1999) (sustaining permit),[5] *aff'd sub nom Sur Contra La Contaminacion v. EPA,* 202 F. 3d 443, 450 (1st Cir. 2000) (upholding EPA's permit).

[3] In a single sentence, LEO Br. at 61, the LEOs also suggest that the IRP should be rejected in its current form today, because EPA asserted AES-PR violated the Clean Water Act in 2012 and 2015. Those provide no basis for rejecting the IRP. Those historical issues have been resolved with no finding of liability or fault.

[4] *E.g.,* AES-PR Title V Operating Permit, *available at* http://www.drna.pr.gov/wp-content/uploads/2020/01/AES-FINAL-Permit.pdf; AES-PR Prevention of Significant Deterioration Permit, *available at* https://www.epa.gov/sites/production/files/2015-08/documents/aes102920011.pdf.

[5] *Available at* https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Appeal~Number/B376AAD8920AD2AB85257069005F7CD4/$File/aespur.pdf.

Coal Combustion Residuals ("CCRs"). The LEOs' unsubstantiated, general statements about the "coal ash" stored at the AES-PR plant site are also misplaced. LEO Br. at 58, 60. AES-PR is responsibly managing its inventory of Agremax, a manufactured aggregate it produces from CCRs, in compliance with all federal and local laws. AES-PR has already reduced—and intends to continue to reduce—its Agremax inventory significantly by shipping (by barge) Agremax to the continental United States for disposal or beneficial use. AES-PR presently expects to reduce its on-site inventory to approximately 100,000 tons (or approximately 90 days of inventory) by the end of June 2020. *See Response of AES Puerto Rico L.P. to First Request of Information from Intervenor, Local Environmental Organizations to Intervenor, AES Puerto Rico L.P.* at 15 (Jan. 10, 2020) (excerpt attached as Exhibit 1).

In addition, AES-PR manages its Agremax inventory in accordance with the EPA's CCR Rule. *See* Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21301 (April 17, 2015). Although EPA has determined that CCRs are not hazardous waste, it adopted the Rule to ensure CCRs are managed or used properly. Following the CCR Rule, AES-PR has conducted groundwater monitoring immediately downgradient of its Agremax inventory.[6] Although those tests show elevated levels of three constituents, monitoring conducted further downgradient show those constituents have not migrated off of the AES-PR facility.[7] The LEOs are incorrect to state—without providing any evidence—that AES-PR has "contaminated" the South Coast Aquifer. *See* LEO Br. at 58. In fact, a study conducted by a leading expert concluded there is no impact from Agremax on drinking water or human health, as elevated measurements

[6] *See* Exhibit 1 at 13 (identifying groundwater monitoring reports available on AES-PR's website)

[7] Haley & Aldrich, *Report on Corrective Measures Assessment: AES Puerto Rico – Agremax Staging Area*, (November 8, 2018) at ii, available at https://aespuertorico.com/wp-content/uploads/2019/11/Corrective-Measures-Assessment-English.pdf.

are confined to waters underneath the plant-site, which are not used for drinking water or by PRASA. *See Summary of the Haley & Aldrich Groundwater Risk Evaluation for AES Puerto Rico in Guayama* (Mar. 13, 2019), available at https://www.aespuertorico.com/wp-content/uploads/2019/03/2019-0325_AES-PR_FactSheet_F.pdf.

Nevertheless, in accordance with the CCR Rule, AES-PR is committed to taking corrective measures to reduce the constituents found in groundwater on its site. AES-PR has proposed a number of options,[8] and engaged the public in that process through written comment and a public hearing. The company is in the process of evaluating that feedback before reaching its final decision on appropriate corrective measures and will continue to monitor groundwater even after those measures are implemented as may be directed by the CCR Rule.

II. The LEOs Argument that The PPOA May Be Rejected At Zero Cost In Bankruptcy Is Untimely and Fails on the Merits.

In addition to arguing that PREPA failed to take into account the environmental costs of continuing coal-fired generation through 2027, the LEOs also argue that PREPA overestimated the monetary costs of retiring AES-PR early. In short, they argue that PREPA's pending bankruptcy will permit it to reject the PPOA, rendering the contract's penalties for early termination unsecured and functionally unenforceable. LEO Br. at 72-73. That argument should be rejected for three reasons.

A. The LEOs Did Not Adequately Raise Rejection in Bankruptcy at the Evidentiary Hearing.

Like their environmental arguments, the LEOs were required to raise their bankruptcy argument before or during the evidentiary hearing. *See* Part I.A, *supra*. They failed to do so.

[8] *See generally* Haley & Aldrich, *Report on Corrective Measures Assessment: AES Puerto Rico – Agremax Staging Area* (November 8, 2018), available at https://aespuertorico.com/wp-content/uploads/2019/11/Corrective-Measures-Assessment-English.pdf.

As explained in more detail below, the LEOs' bankruptcy argument is far from a pure question of law. Rather, the claim that PREPA will be able to reject the PPOA under § 365 of the Bankruptcy Code—and not pay any termination penalties for doing so—depends on a range of facts about PREPA and the bankruptcy proceeding. *See* Part II.C, *infra*. The LEOs waived that claim by failing to proffer evidence of those facts in the evidentiary hearing, despite multiple opportunities to do so. Although both AES-PR and PREPA introduced written testimony regarding AES-PR's damages under the PPOA's early termination provisions, the LEOs did not present any rebuttal evidence. *E.g.*, Pre-Filed Direct Testimony of Ronald Moe for Intervenor AES Puerto Rico, L.P. at 30 (Oct. 23, 2019) ("Moe Direct Testimony"); Pre-Filed Supplemental Testimony of Ronald Moe for Intervenor AES Puerto Rico, L.P. at 9 (Dec. 11, 2019); Rebuttal Testimony of Nelson Bacalao, PhD. at 15 (Dec. 20, 2019). Nor did they cross-examine any witness on the issue, except to ask an outside counsel for PREPA whether executory contracts could be rejected in bankruptcy as a general matter of law. *See* Hearing Testimony of Mr. James Bowe, Panel B (Feb. 3, 2020).[9] That was plainly insufficient to preserve the issue.

B. Even if PREPA Could Reject The PPOA At Zero Cost in Bankruptcy, the IRP's Retention of Coal Generation Through 2027 Should Still Be Approved.

Even if the issue were not waived, the Bureau need not reach it, as the additional costs were not necessary to PREPA's determination to retain AES-PR through the life of the PPOA. Foremost, even aside from costs, as explained in AES-PR's post-hearing brief, AES-PR Br. at 6-8, the evidence conclusively shows that retaining coal capacity through 2027 is critical for resiliency and reliability during the island's transition to renewables. Hence, regardless of the exact cost, AES-PR is an essential provider of power to PREPA.

[9] Video of February 3 Evidentiary Hearing at 38:00-39:30, *available at* https://youtu.be/weJfs72YtvE?t=38.

As to costs, however, PREPA's analysis found the PPOA should continue through 2027 without even considering the additional damages AES-PR submits PREPA would incur by breaching the PPOA. PREPA determined, even without considering those *contract damages*, that AES-PR should not be retired because early retirement would "unequivocally" impose substantial additional *economic cost* on the ratepayers as AES-PR remained the lowest cost option. *See* AES-PR Br. at 9-12. Indeed, the unrebutted evidence demonstrates that forcing AES-PR to retire before 2027 would alone impose enormous costs on PREPA and its ratepayers even without the additional capacity payment damages. As Mr. Ronald Moe explained in his written testimony, PREPA's analysis showed that forcibly retiring AES-PR before 2027 will result in significantly higher power supply costs over the entire 20-year timespan of the IRP, ranging up to $580 million in net present value borne by PREPA and its customers. Moe Direct Testimony at 36. So even without considering the additional damages, PREPA was correct to regard those costs of retiring AES-PR as prohibitively high. Hence, the Bureau should approve the IRP, without reaching any of the underlying bankruptcy questions raised by the LEOs' claims.

C. If the Bureau Reaches the Bankruptcy Issue, It Should Reject the LEOs' Meritless Arguments.

The LEOs' arguments also fail as a matter of bankruptcy law. Under § 365(a) of the Bankruptcy Code, a debtor-in-possession (such as PREPA) may, subject to the court's approval, assume or reject any executory contract to which it is a party. 11 U.S.C. § 365(a). The LEOs incorrectly argue that PREPA could invoke § 365(a) to terminate the PPOA without paying damages.

The LEOs concede, as they must, that AES-PR would have a claim for damages if PREPA were to reject the PPOA. They argue, however, that AES-PR's claim would be unsecured and therefore "could receive as little as zero cents on the dollar in the plan of adjustment." LEO Br. at

73. In other words, the LEOs argue that even though AES-PR would have a claim for damages, as a practical matter that claim could be adjusted to zero in bankruptcy and AES-PR could recover nothing. That theory is wrong, and grossly underestimates the financial impact of rejecting the PPOA, for two reasons.

First, PREPA could not satisfy the basic requirements for rejecting a contract under § 365(a). Courts have applied two different frameworks in determining whether rejection is proper—the "public interest" standard and the "business judgment" standard. Under the heightened public interest standard a debtor may reject a contract upon a showing (i) that the contract burdens the debtor's estate, (ii) that after careful scrutiny, the equities balance in favor of rejection, and (iii) that rejection would further the successful rehabilitation of the debtor. *In re Mirant Corp.*, 378 F.3d 511, 515-16, 524-25 (5th Cir. 2004). Alternatively, a debtor subject to the ordinary business judgment standard may reject a contract if it can show that doing so is in the best interests of the debtor's estate. *See, e.g.*, *Butler v. Resident Care Innovation Corp.*, 241 B.R. 37, 45 (D.R.I. 1999); *In re Instituto Medico Del Norte, Inc.*, 76 B.R. 14, 15 (Bankr. D.P.R. 1987).

Under either standard, PREPA cannot reject the PPOA. Without a low-cost and reliable replacement power provider, rejection of the PPOA would inflict unnecessary harm on the public through more expensive and less reliable electricity provision. Rejection would also be an irrational decision that would benefit neither PREPA's estate nor its creditors. Not only would the loss of generation capacity lead to increased electricity costs for PREPA's customers, but PREPA's estate would be burdened by higher procurement costs, thereby hindering PREPA's rehabilitation. Indeed, PREPA itself has testified here to the essential need for AES-PR, AES-PR Br. at 7-8, hence rejection of the PPOA would be irrational because PREPA would have an immediate need to procure the power from AES-PR under some other contractual arrangement.

Further, the resultant rejection damages claim would dilute the recovery of other unsecured creditors without providing economic benefit to the estate.

Second, any bankruptcy plan under which AES-PR recovers nothing could not be confirmed under either PROMESA or the Bankruptcy Code. In order to be confirmed, PREPA's plan will have to meet a variety of requirements. For example, § 314(b)(6) of PROMESA requires that the plan must be "feasible and in the best interests of creditors." 48 U.S.C. § 2174(b)(6). That provision is similar to one in Chapter 9 of the Bankruptcy Code which has been interpreted as requiring that the debtor demonstrate a "reasonable prospect of success" that it will be able to meet its financial projections and provide governmental services. 11 U.S.C. § 943(b)(7); *see also In re Mt. Carbon Metro. Dist.*, 242 B.R. 18, 35 (Bankr. D. Colo. 1999). PREPA's plan of adjustment will also need to provide for proper classification of claims in accordance with section 1122 of the Bankruptcy Code. That section requires that claims in a given class under a plan be "substantially similar" to the other claims or interest in that class. 11 U.S.C. § 1122(a). A plan may not separately classify claims solely to obtain favorable votes. *See, e.g.*, *In re City of Detroit*, 524 B.R. 147, 245-46 (Bankr. E.D. Mich. 2014). Finally, under § 1129(b)(1) of the Bankruptcy Code a plan must not unfairly discriminate among similarly situated creditors.[10] In the chapter 9 context, determining fairness has been held to be "a matter of relying upon the judgment of conscience." *See, e.g.*, *City of Detroit*, 524 B.R. at 256.

Yet, a plan that unnecessarily forces the early retirement of AES-PR and provides no recoveries to unsecured creditors would not meet any of these plan confirmation requirements. The plan would not be feasible, as it would impose significant negative consequences on Puerto Rico's economy and harm the provision of governmental services. Moe Direct Testimony, *supra*

[10] Both § 1122 and § 1129(b)(1) are made applicable to PREPA by § 301 of PROMESA. 48 U.S.C. § 2161.

(documenting up to $580 million NPV economic cost to PREPA from early retirement); AES-PR Br. at 8-9 (lower cost of power from AES-PR operation has saved Puerto Rico's consumers $2 billion in energy costs). Indeed, as a practical matter, in order for a plan to be confirmed it must be accepted by at least one impaired class of creditors and must provide for similar recoveries for similarly-situated creditors. It is unlikely that any class of unsecured creditors would vote to accept the plan if it is offered nothing, as the LEOs assert.

CONCLUSION

For these reasons and as outlined in AES-PR's Post-Hearing Brief, the Bureau should reject these arguments and approve the IRP.

RESPECTFULLY SUBMITTED.

CERTIFICATE OF SERVICE

We certify that this Brief was submitted to the Puerto Rico Energy Bureau through its electronic filing tool at https://radicacion.energia.pr.gov, sent via email to wcordero@energia.pr.gov, secretaria@energia.pr.gov; legal@energia.pr.gov; sugarte@energia.pr.gov and viacaron@energia.pr.gov, and sent to the Puerto Rico Electric Power Authority through the following email addresses: Katiuska Bolaños (kbolanos@diazvaz.law); Nitza D. Vázquez Rodríguez (n-vazquez@aeepr.com); Carlos M. Aquino Ramos (c-aquino@prepa.com); Astrid I. Rodríguez Cruz (astrid.rodriguez@prepa.com); Jorge R. Ruíz Pabón (jorge.ruiz@prepa.com), and Maralíz Vázquez (mvazquez@diazvaz.law). We also certify that on this date we sent a copy of this Brief to: rtorbert@rmi.org; victorluisgonzalez@yahoo.com; corey.brady@weil.com; presidente@ciapr.org; secretaria@energia.pr.gov; csanchez@energia.pr.gov; ireyes@energia.pr.gov; asanz@energia.pr.gov; bmulero@energia.pr.gov; nnunez@energia.pr.gov; gmaldonado@energia.pr.gov; sierra@arctas.com; tonytorres2366@gmail.com; cfl@mcvpr.com; gnr@mcv.com; info@liga.coop; amaneser2020@gmail.com; hrivera@oipc.pr.gov; jrivera@cnslpr.com; carlos.reyes@ecoelectrica.com; ccf@tcmrslaw.com; manuelgabrielfernandez@gmail.com; acarbo@edf.org; rstgo2@gmail.com; larroyo@earthjustice.org; jluebkemann@earthjustice.org; acasellas@amgprlaw.com; loliver@amgprlaw.com; epo@amgprlaw.com; robert.berezin@weil.com; marcia.goldstein@weil.com; jonathan.polkes@weil.com; gregory.silbert@weil.com; agraitfe@agraitlawpr.com; maortiz@lvprlaw.com; rnegron@dnlawpr.com; pedrosaade5@gmail.com; rmurthy@earthjustice.org; castrodieppalaw@gmail.com; voxpopulix@gmail.com; paul.demoudt@shell.com; sproctor@huntonak.com; giacribbs@huntonak.com; javier.ruajovet@sunrun.com; escott@ferraiuoli.com; mgrpcorp@gmail.com, and aconer.pr@gmail.com.

In San Juan, Puerto Rico, on April 20, 2020.

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COMMONWEALTH OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU

IN RE:	**Case No.:** CEPR-AP-2018-0001
REVIEW OF THE PUERTO RICO ELECTRIC POWER AUTHORITY INTEGRATED RESOURCE PLAN	**SUBJECT:** RESPONSE OF AES PUERTO RICO, L.P. TO FIRST REQUEST OF INFORMATION FROM INTERVENOR, LOCAL ENVIRONMENTAL ORGANIZATIONS, TO INTERVENOR, AES PUERTO RICO L.P.

RESPONSE OF AES PUERTO RICO, L.P. TO FIRST REQUEST OF INFORMATION FROM INTERVENOR, LOCAL ENVIRONMENTAL ORGANIZATIONS, TO INTERVENOR, AES PUERTO RICO L.P.

Comes now Intervenor AES Puerto Rico, L.P. (AES-PR) in response to the First Request of Information from Intervenor, Local Environmental Organizations (Request):

General Objections – AES-PR objects to this Request as an overly broad set of 60 requests plus subparts that is unduly burdensome and seeks information irrelevant to the straightforward purpose of this proceeding: the Review of the Puerto Rico Electric Power Authority (PREPA) Integrated Resource Plan (IRP) by the Puerto Rico Energy Bureau (PREB). Further, AES-PR objects to this Request to the extent it seeks privileged and/or confidential information or documents protected by any and all privileges afforded under applicable Puerto Rico and federal law, including attorney client privilege, work product doctrine, settlement privilege, and protections for confidential information, such as confidential business information and trade secrets.

Objections to Instructions – AES-PR objects to the scope of the instructions here, as the instructions impose undue burdens well beyond the scope of reasonable discovery of an intervenor in this administrative proceeding including: to require documentation of privileges, which would be documented should there be motion practice (Instruction #2), to require a search for information

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states that it manages fugitive dust in accordance with applicable environmental regulations and requirements. AES-PR fugitive dust management practices are identified and described in the AES-PR Dust Control Plan available on the AES-PR CCR public website. https://aespuertorico.com/wp-content/uploads/2017/07/2017_03_Dust-Control-Plan_SOP-CCP-004.pdf

22. Has AES conducted testing of dust, soil, groundwater or surface water on or near its plant site? If so, please provide all data.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states that groundwater monitoring is conducted pursuant to the CCR Rule. The data are provided in reports available on the AES-PR CCR public website including the following:

https://aespuertorico.com/wp-content/uploads/2018/02/2017_01_31_AES_Groundwater-Monitoring-and-Corrective-Action_Annual-Report.pdf

https://aespuertorico.com/wp-content/uploads/2019/03/180161r_AES_2018_Groundwater_Monitoring_Report.pdf

https://aespuertorico.com/wp-content/uploads/2019/11/Corrective-Measures-Assessment-English.pdf

Storm water is sampled in accordance with the US EPA Multisector General Permit and is publicly available through EPA's Enforcement and Compliance History Online website for NPDES Permit Limit and Discharge Monitoring Reports. https://echo.epa.gov/tools/data-downloads/icis-npdes-dmr-and-limit-data-set. The data for AES-PR is available under External Permit Number PRR053093.

23. Has AES conducted air monitoring for CCR particulates on or near its plant and CCR pile? If so, please provide all data.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states: AES-PR has not conducted air monitoring. It has a dust control management program in place. *See* Response to No. 21.

24. Has AES conducted any air, water or soil testing near any deposits of AES CCRs or Agremax in Puerto Rico? If so, please provide all data.

AES-PR Response: AES-PR objects to the premise of this request that there are "deposits" of CCRs or Agremax. AES-PR further objects to this request as not relevant to the issues before the PREB in this proceeding.

25. Has AES or its agents generated or distributed promotional materials or other information related to the use of Agremax? Please produce all materials.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding.

26. Has AES generated a Material Safety Data Sheet for its CCR and Agremax? Please provide all MSDS used by AES for CCR and Agremax and indicate the source of the MSDS.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding.

27. What does AES propose to do about the CCR and/or Agremax pile at its plant site? Please provide a timeline for proposed activities.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states that

the government of Puerto Rico recently enacted PS 1221, which prohibits the disposal of CCRs, limits the beneficial uses of CCRs and imposes a limit of 180 days of storage of CCRs on the island of Puerto Rico. AES-PR has already reduced – and intends to continue to reduce – its Agremax inventory significantly by shipping (by barge) Agremax to the continental United States for disposal or beneficial use. The ability to deliver Agremax to locations over 1000 miles away is subject to the limited availability of Jones Act-qualified vessels, as well as interruption by weather and other disruptors. Subject to those limitations, AES-PR presently expects to reduce its on-site inventory to approximately 100,000 tons (or approximately 90 days of inventory) by the end of June 2020 by continuing to ship Agremax to the United States for disposal in subtitle D landfills or beneficial use. Some inventory will remain, because the Agremax needs adequate time to cure before delivery off-site for disposal or beneficial use.

28. Provide all documents related to groundwater monitoring at the AES plant site and any other site where AES CCRs or Agremax have been deposited.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states: *See* Response to Nos. 22, 24, *supra*.

29. Indicate what measures AES plans to take to remediate groundwater contamination at the AES plant site and provide documents.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states: In accordance with the federal Coal Combustion Residuals Rule at 40 CFR 257, Subpart D, AES-PR is currently evaluating potential corrective measures to address groundwater for the constituents present in groundwater at the AES-PR plant site at statistically significant levels above