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



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| **IN RE: REQUEST FOR APPROVAL OF AMENDED AND RESTATED POWER PURCHASE AND OPERATION AGREEMENT WITH ECOELÉCTRICA AND GAS SALE AND PURCHASE AGREEMENT WITH NATURGY APROVISIONAMIENTOS, SA** | **CASE NO.: NEPR-AP-2019-0001**<br><br>**SUBJECT:** MOTION FOR RECONSIDERATION AND PETITION FOR INTERVENTION |

**MOTION FOR RECONSIDERATION AND PETITION FOR INTERVENTION**

**TO THE HONORABLE PUERTO RICO ENERGY BUREAU:**

**COME NOW** Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc. - Enlace Latino de Acción Climática, Comité Yabucoeño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club and its Puerto Rico chapter, Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., Campamento Contra las Cenizas en Peñuelas, Inc., CAMBIO Puerto Rico, and Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER"), (collectively, "Petitioners"), and respectfully request that the Energy Bureau reconsider the March 11, 2020 Order in this case, pursuant to Section 3.15 of Act No. 38-2017, and petitions this Honorable Bureau for leave to intervene in the above-captioned proceeding, pursuant to Section 3.5 of Act No. 38-2017, as amended, known as the "Uniform Administrative Procedure Act of the Government of Puerto Rico."

## I. INTRODUCTION

Petitioners respectfully request that the Puerto Rico Energy Bureau ("Energy Bureau") reconsider the March 11, 2020 Order approving the Amended and Restated Power Purchase and Operation Agreement ("ECO PPOA") between the Puerto Rico Electric Power Authority ("PREPA") and Ecoeléctrica L.P. ("Ecoeléctrica") and the Amended and Restated Gas Sale and

Purchase Agreement ("Naturgy GSPA") between PREPA and Naturgy Aprovisionamientos, S.A. ("Naturgy") (collectively, the "Amended and Restated Agreements" or "ARAs") to re-examine critical questions, with input from UTIER, local environmental organizations, and the public at large.

Petitioner requests reconsideration of the March 11, 2020 Order, and, ultimately deny the approval of the ARAs, for the following reasons: (1) Contrary to the Energy Bureau's determination, the ARAs are not amended contracts, they are new contracts that should be subject to the same requirements as any new contract; (2) Therefore, the ARAs are invalid due to the absence of a competitive bidding process; (3) Furthermore, if PREPA is to be believed, the ARAs violate antitrust law; (4) In the alternative, the ARAs are inconsistent with PREPA's Renewable Portfolio Standard ("RPS") and the Integrated Resource Plan ("IRP"); (4) Moreover, the ARAs are not appropriate, reasonable or in the public interest.

## II. PROCEDURAL BACKGROUND

On November 5, 2019, PREPA submitted to the Energy Bureau its initial request for approval of the ARAs, invoking Section 7.1 of Regulation 8815. Via a Resolution and Order dated November 27, 2019, the Energy Bureau determined that the request for approval of the ARAs was contrary to the public interest based on section 6.32 of Act No. 57-2014, because it could not determine at that time if the ARAs were consistent with the IRP. Thus, the Energy Bureau denied approval of the ARAs without prejudice. Afterward, PREPA submitted a request for reconsideration, on December 9, 2019. On December 13, 2019, the Energy Bureau issued Request for Information 10 ("ROI 10") related to the evaluation of the ARAs in the IRP case. Subsequently, EcoEléctrica requested intervenor status, on December 16, 2019.

On December 18, 2019, the Energy Bureau agreed to consider PREPA's request for reconsideration pursuant to Section 3.15 of the *Uniform Administrative Procedure Act*, Act No. 38-2017, P.R. Laws ann. tit. 3 §§ 2101 et seq. ("LPAU" for its Spanish acronym), on adjudicatory proceedings. PREPA later submitted a request for confidential treatment of the relevant documents and a motion attaching the approval of the ARAs by the FOMB, on December 19 and 26, respectively. The Energy Bureau, on January 17, 2020, granted a request for a technical hearing scheduled for February 14, 2020.

In the interim, PREPA submitted responses to ROI 10, on January 22, and supplemented the answers, on January 29, 2020. On January 28, 2020, the Energy Bureau issued a Resolution allowing Ecoeléctrica to participate in this case, including the ability to submit comments and provide testimony. On February 17, 2020, after the technical conference, PREPA filed a motion in compliance with a bench order. Pursuant to section 3.15 of the LPAU, on March 9, 2020, the Energy Bureau extended the 90-day period to address PREPA's request for reconsideration. On March 11, 2020, the Energy Bureau reversed its previous decision and approved the ARAs.

## III. REQUEST FOR RECONSIDERATION

### A. The ARAs are not amendments to previously executed contracts, they are new contracts.

In its original request, PREPA cited Section 7.1 of Regulation 8815. After that request was denied, PREPA requested reconsideration pursuant to Art. 6.32 of Act No. 57-2014 and Act No. 17-2019. In its March 11, 2020 Order, the Energy Bureau determined that the requirements of Regulation 8815 do not apply to these ARAs:

> When examining the totality of the administrative record of the instant case in light of the Proposed Agreements, *it is clear that the Energy Bureau has before it a petition to review amendments and extensions of agreements that were executed prior to the approval of Act. 57-2014*. Therefore, as discussed in detail below, such agreements shall be evaluated pursuant to the provisions of Article 6.32 of Act 57-2014. (emphasis added).

The validity of the ARA's hinge on whether the agreements are viewed as mere amendments or extensions of the original PPOA and GSPA or new contracts. A review of the key provisions of the ARAs clearly reveal that they embody new contractual relationships.

The ECO PPOA changes every major term in the original PPOA between Ecoeléctrica and PREPA.[1] The ECO PPOA changes the expiration of the supply term from March 2022 to ten years later in September 2032. It alters Ecoeléctrica's generation capacity from 507 MW to 530 MW. The responsibility for fuel procurement under the ARAs shifts a significant burden from Ecoeléctrica to PREPA. The commercial model on which the original PPOA is based, where PREPA made capacity and energy payments, including fuel passthrough, is modified to a capacity payment for operating expenses, capital expenditures, and "other related items".[2] The amount of the capacity payment changes from approximately $230 M per year at 507 MW to about $128 M per year for 530 MW but is subject to an upward or downward adjustment depending on the availability of the Ecoeléctrica Facility, adding greater variability and less certainty in PREPA's contractual obligations. [Exhibit 1: Declaration of Engineer Agustín Irizarry Rivera].

In addition, the capacity payment reduction is partially offset by an increase in the cost of fuel in the Naturgy GSPA. The current energy payment average of 5.6 cents/kWh per year which is pegged to the price of fuel oil #6 when Ecoeléctrica operates at or above 76% capacity factor is discarded and substituted by an increase in the fuel cost in the Naturgy GSPA of an estimated at 7.1 cents/kWh. The availability adjustment based on penalties and bonuses for low and high Ecoeléctrica availability are altered in the ECO PPOA to a higher bonus potential, such that the

[1] See *PREPA's Urgent Motion for Entry of an Order Authorizing PREPA to Assume Certain Contracts with Ecoeléctrica, L.P. and Gas Natural Aprovisionamientos Sdg, S.A.,* Case No. 17-BK-4780-LTS (D.P.R. 2017) at Docket No. 1951 at 7-9.
[2] Id. at 7.

bonus is 0% at 93% Equivalent Availability Factor ("EAF") of Ecoeléctrica and increases a whopping 29% at 95% EAF or above. For any period in which the EAF exceeds 93%, Ecoeléctrica will obtain a bonus payment, which will be based on a percentage of the fixed capacity payment. The dispatch limits in the current PPOA range between 54 % and 76 % of dependable capacity. Under the ECO PPOA, the minimum dispatch level is based on testing and a maximum dispatch level set at 100% of dependable capacity with the possibility of dispatching above 100% pre-approved by Ecoeléctrica, thus, encouraging higher generation factors at the Ecoeléctrica plant and displacing the potential for renewables. The maximum start-ups are doubled from 50 per unit per year to 100 per unit per year. This change in the agreement fails to consider the additional air emissions related to each start-up process. Id. at 5. The ECO PPOA adds the Condition Precedent that PREPA assumes the contract in the PROMESA Title III case.

Similarly, the Naturgy GSPA adds twelve (12) years to the term of the current GSPA from December 2020 to September 2032. Significantly, the power plant facilities covered in the Naturgy GSPA include Costa Sur and extend to Ecoeléctrica and *potentially other power plants throughout Puerto Rico*. Certainly, servicing entirely different facilities is not consistent with mere amendments or extensions. Id.

The current GSPA contains a pricing hedge to No. 6 fuel oil which is eliminated in the Naturgy GSPA and substituted with a price pegged to the New York Mercantile Exchange's Henry Hub natural gas futures contracts price ("HH"), with a fixed premium. The pricing formula in the Naturgy GSPA eliminates the current fuel oil hedge. The minimum annual contract quantity under the Naturgy GSPA increases from 45 TBtu for the Costa Sur Generation Facility only to 55 TBtu adding the Ecoeléctrica fuel procurement responsibilities imposed on PREPA for both generation facilities, subject to reduction in the event of the retirement of the Costa Sur plant. The original

and current Naturgy GSPA were entered it for fuel supply for Costa Sur. The alleged "amendments" envision cessation of fuel supply to Costa Sur in the event of closure and continuation of the agreement for fuel supply to other plants. Id.

The maximum annual contract quantities in the Naturgy GSPA increase from 72 TBtu to 106 TBtu, unless a reduction of the minimum annual contract quantity occurs, in which case the maximum will be 120% of the new minimum annual contract quantity. The Take-or-Pay ("TOP") obligations imposed on PREPA are altered from 75% of the monthly minimum quantity and 90% of the quarterly minimum quantity, and an overall take-or-pay contract quantity in the original GSPA to 75% of the monthly *adjusted* required quantity and 90% of the quarterly *adjusted* required quantity, with no overall contract quantity in the Naturgy GSPA. Thus, adding more variability and uncertainty for PREPA. Id. at 6. The Naturgy GSPA imposes as Conditions Precedent that PREPA assume *both* Contracts in Title III, thus establishing an illegal tying violation of the Sherman Act as discussed in another section of this Petition.

The ECO PPOA clearly states that it, "amends and restates the Pre-Restatement PPOA *in its entirety, by among other things,* providing for the purchase and Sale of Dependable Capacity and providing PREPA with greater flexibility in the procurement of fuel by *adopting an energy conversion structure* under which PREPA will deliver to Seller all the natural gas required for the production of Net Electrical Output." ARA Recital E, at 2 (emphasis added). When entire agreements are amended and adopt new structures and commercial models, they are legally, new contracts.

Under Puerto Rico contract law, pervasive "amendments" such as those described above, result in extinctive novation, even if it is not expressed in those terms. See Web Serv. Group, Ltd.

v. Ramallo Bros. Printing, Inc., 336 F. Supp. 2d 179, 182 (D.P.R. 2004).[3] See, also, Ballester Hermanos, Inc. v. Campbell Soup Co., 797 F. Supp. 103 (D.P.R. 1992). Under this concept, "[o]ne of the criteria utilized to determine whether there is incompatibility is to determine whether the alterations to the object of the contract are qualitative or quantitative. An alteration is deemed qualitative *when the obligation is substituted by another of a different nature*." Las Brisas, S.E. v. Dept. of Agric. Farmer's Home Admin. (U.S.), 8 F. Supp. 2d 141, 146 (D.P.R. 1998)(emphasis added).

The ECO PPOA radically alters the nature of the contractual relationship between PREPA and Ecoeléctrica. The original agreement between PREPA and Ecoeléctrica was a traditional power purchase and operation agreement. The ECO PPOA is a power purchase, operation and *tolling agreement*. This is a structural change to the agreement, which gives PREPA new responsibilities and obligations. Under the current contract, Ecoeléctrica charges for energy generated and for auxiliary services, i.e. capacity, frequency control, etc. The cost of fuel is included in the cost of energy.

The ECO PPOA embodies a new arrangement, under which PREPA is responsible for *buying and supplying* fuel to Ecoeléctrica, while paying for capacity and ancillary services. This departure from the previous terms puts PREPA in an unprecedented position in the utility industry. Moreover, it is an unusual agreement where PREPA must acquire fuel in order to supply Ecoeléctrica, so that Ecoeléctrica can provide it power. PREPA takes on and Ecoeléctrica relieves itself of certain determinative burdens.

[3] "An extinctive novation *extinguishes the old obligation and creates a new one* . . . In the absence of an express declaration, novation is appropriate only when the two obligations are absolutely incompatible. In other words, there must be a radical change in the nature between the new and old obligation so as to make them mutually exclusive." (citations and quotation marks omitted)(emphasis added).

Furthermore, the Naturgy GSPA is altered as a direct consequence of the ECO PPOA. Because of the change in the ECO PPOA, PREPA has to purchase fuel for Costa Sur *and* Ecoeléctrica and possibly other plants throughout Puerto Rico. (See Figure 1) Although this kind of agreement, with increased volume, should significantly decrease the fuel cost, here it does not. The pricing formula adopted in the Naturgy GSPA is substantially different from the previous contract. The result is a loss of flexibility and savings for PREPA.

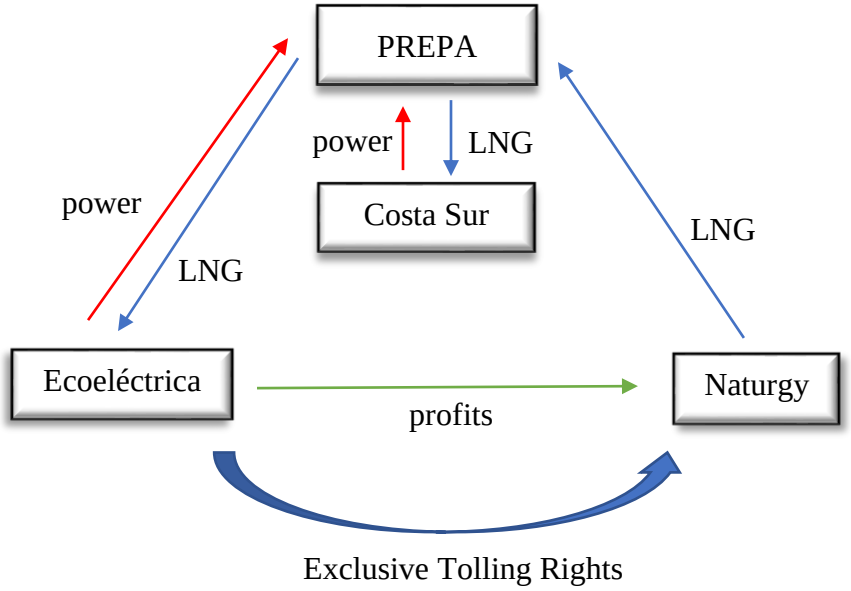


*Figure 1*

Moreover, when comparing the ECO PPOA with its previous versions, there are various instances where the ARAs are far less favorable to PREPA, in ways that alter its position in the contract. For example, the original power purchase and operation agreement contains a provision that allows PREPA gas supply access and use of Ecoeléctrica's dock at low rates, in case of a fuel emergency. See 1995 Ecoeléctrica PPOA, section 13.5. This provision is absent in the ECO PPOA. Another example is a provision in the original contract where PREPA had the option to purchase the facilities, among other reasons, because it "is no longer economic" according to an evaluation by an independent consulting firm. See 1995 Ecoeléctrica PPOA, section15.2(b). This provision

is also missing from the ARAs, which only allows for purchase of the facility in case of total abandonment. See ECO PPOA, Section 15.

In addition, Clause 9 of the Naturgy GSPA limits the indemnity in the event Naturgy fails to deliver LNG to 15% for damages. See clauses 9.2- 9.5. Furthermore, PREPA contractually obligated itself to supply LNG to Ecoeléctrica without back-to-back indemnity for lost power if Naturgy fails to deliver the LNG. The force majeure (FM) provisions in the new Naturgy GSPA to deliver gas for PREPA, and in the new Ecoeléctrica PPOA do not match, even though they were drafted at the same time. Naturgy has many more excuses not to deliver LNG. Under certain circumstances, Naturgy can fail to supply LNG but PREPA would not be excused from supplying LNG to Ecoeléctrica. PREPA would then be required to make capacity payments but have no power from Ecoeléctrica, and/ or no methane gas at Costa Sur, with no recourse and no capacity payment refund.

Because each shipment includes LNG supplies for several weeks, if Naturgy invokes the more expansive FM clause this would have multi-million-dollar consequences for PREPA and its ratepayers. Under the original ECO PPOA, the FM clause for not delivering power was much narrower. Ecoeléctrica and PREPA failed to disclose these differences to the Energy Bureau. The new contracts could have provided, that any FM event in one is automatically a FM event under both agreements. And, that any event of LNG non-delivery that was not a FM under the original contract, was not an FM under the new contracts and was deemed to be Naturgy's responsibility, which would entitle PREPA to get a pro rata capacity payment refund.

The GSPA FM clause allows Naturgy to evade liability not only for FM at Ecoeléctrica, but also for the LNG ship delivering the LNG-transportation and FM at the LNG source-the liquefaction plant where the methane gas is turned into LNG – which could entail a higher risk of

FM beyond natural events, e.g. "industrial disturbance" that would be grounds for a FM allegation under the GSPA, relieving Naturgy of liability, but would not constitute a FM event for PREPA for failure to supply LNG under the new ECO PPOA.

Also, the "extension" of the ARAs, with these radically different terms, is in fact a new contract until the year 2032. An extension by definition is the "continuation of the same contract for a specified period." *Extension*, Black's Law Dictionary (11th ed. 2019). See, also, P.D.C.M. Assoc. v. Najul Bez, 174 P.R. Dec. 716, 727 (2008).[4]

The wide-ranging changes in the ARAs are substantial enough to make them new contracts, the ARAs are not extensions or amendments of previously executed contracts, but rather contracts that would be executed for the first time this year. Thus, they should be subject to all the regulatory and legal requirements that apply to new contractual obligations with PREPA.

**B. The ARAs should not be approved because they did not comply with competitive bidding requirements nor with an RFP process.**

As new contracts, the ARAs should not be approved because they were not subjected to any competitive process, such as is required in Puerto Rico. It is known that "[p]ublic bidding statutes exist for the benefit of the taxpayers and should be construed solely with reference to the public good." Borough of Princeton v. Bd. of Chosen Freeholders of County of Mercer, 755 A.2d 637, 646 (N.J. Super. App. Div. 2000). For a government, "good administration is a virtue of democracy, and part of a good administration implies carrying out its functions as a buyer with efficiency, honesty and correctness *in order to protect the interests and monies of the people such*

[4] "We have recognized, also, that a change in the duration of a contract implies a modificative novation, as it does not comport a variation in the essence of the obligation." (translation supplied).

*government represents*." Cecort Realty Dev. Inc. v. Llompart-Zeno, 100 F. Supp. 3d 145, 158 (D.P.R. 2015)(citations omitted)(emphasis added).

The object of the bidding process is to assure equal footing between bidders, avoid corruption and minimize risks. Puma Energy Caribe v. Autoridad de Energía Eléctrica, 2019 WL 2267117, KLRA201900113, at *8 (P.R. App. 2019)(citing Carreteras v, CD Builders, Inc., 177 P.R. Dec. 398, 404 (2009)). The Puerto Rico Supreme Court itself has described such laws that regulate the economic relationships between private entities and government agencies as *vested with great public interest*. AEE v. Maxon, 163 P.R. Dec. 434, 438-39 (2004)(referring to bidding requirements).[5]

As a public utility, PREPA is subject to legal requirements, which include complying with competitive bidding procedures for procurement of goods and services. Specifically, PREPA's organic charter, Act No. 83-1941, requires that "all purchases and contracts for supplies or services . . . shall be made by calling for bids with sufficient time before the date the bids are open so that [PREPA] can guarantee proper knowledge and appearance of competitive bidders." P.R. Laws ann. tit. 22 § 205(1)(a). Only after due consideration of the proposals should PREPA adjudicate the contract. Id. Nevertheless, PREPA did not conduct a competitive bidding process to obtain the

[5] Puerto Rico public policy promotes competitive acquisitions in the interest of transparency and efficient use of public monies. See, for instance, the *Uniform Procurement Standards Act of the Government of Puerto Rico*, Act No. 111-2000:

> *The public policy of the Government of Puerto Rico is uniform in its processes for acquisition of goods, works and non-professional services, so as to promote competition among the largest number of bidders*; to acquire the highest quality at the lowest possible cost; to guarantee the maximum performance of public money; to carry out this process fairly, impartially, with total openness, ensuring that a written record is kept of all management, kept for a fixed period and accessible to the public.
>
> The purchasing standards established in this Act shall govern the agencies in their processes of acquiring goods, works and non-professional services and shall provide uniformity to the purchasing process of the Government of Puerto Rico. (translation provided)(emphasis added).

best possible prices for PREPA ratepayers. Instead, PREPA seems to argue that Naturgy has a *de facto* monopoly, which would entitle it to the sole source exception. See Id. § 205(2)(e).[6]

The sole source exception provides that "[c]ompetitive bidding shall not be necessary . . . [w]henever prices are noncompetitive because there is only one supply source or because the prices of the goods or profit margin of such goods are regulated by law." Id. However, Naturgy's supposed monopoly is unrelated to the availability of competing suppliers, and, instead, refers to its exclusive control over the LNG terminal, due to contractual tolling rights recently agreed upon and contrived in the September 2019 Tolling Agreement between Naturgy and its affiliate, Ecoeléctrica. Therefore, the sole source exception is inapplicable, and PREPA simply failed to comply with the competitive bidding requirement in the ARAs.

The alternative mechanism to public bidding is the Request for Proposal ("RFP") which is usually used when the goods or services are specialized and involve highly technical and complex issues, as well as few competitors. See R & B Power v. ELA, 170 P.R. Dec. 606, 623-24 (2007). Unlike public biding, this process allows for direct negotiation between the agency and the bidder but is subject to similar restrictions as the bidding process in other respects. Id. For example, it is subject to public notice requirements, as well, as reconsideration and judicial review, as contained in Puerto Rico's uniform administrative procedure law. Puma, 2019 WL 2267117 at *10. It is equally vested with great public interest in the protection of public funds and the guarantee of transparency. Id. at *9.

For PREPA, RFPs are regulated by the *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the*

[6] PREPA is still alleging, in the Title III proceedings under Section 365 of the Bankruptcy Code, that this exception is applicable. See *Puerto Rico Electric Power Authority*, Case No. 17-BK-4780-LTS (D.P.R. 2017) at Docket No. 1951.

*Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet* ("Regulation 8815"). Before awarding a contract, this process requires the selection of a project committee which submits the project proposal to the Energy Bureau for approval. Id. at Art. 4.1, 4.2. Then, the committee must issue a request for proposals "by means of public notice[.]" Id. at Art. 4.4. The project committee subjects submitted proposals to a three-part evaluation: (1) quality control review; (2) review and recommendations; (3) Negotiations. Id. at Art. 5.11.

Among other things, this process requires a report describing said procedure including the project committee's *detailed evaluation of each step in the competitive procurement process*. Id. at Art. 7.1. To underscore the competitive nature of this process, it has a "non-collusion obligation." Id. at Art. 4.14. Proponents "are prohibited from undertaking any activities of a collusive nature." Id. This includes "any consultation, communications or agreements among Proponents that aim to restrict competition or impact the Project price during the process." Id.

Because the ARAs fail to comply with any competitive process, which according to Puerto Rico public policy is essential and vested with great public interest, they should not be approved by the Energy Bureau. For this reason, the Energy Bureau should reconsider its March 11, 2020 Order and deny the approval, so that PREPA abides by the designated regulatory process, including the submission of information on the parameters to determine profit margins and price escalators for the procurement.[7] Furthermore, PREPA's Fiscal Plan emphasizes that fuel costs

[7] Regulation 8815, Article 4.5(k): "[T]he parameters approved by the Energy Commission before issuance of the RFP in connection with profit margins and pricing escalators that will be allowed under the Contract as provided in Section 4.2 of this Regulation. These pricing escalators and profit margins will be based on ranges of acceptable profitability for similar projects in the industry, taking into account approximate construction costs, required returns for third parties and PREPA, and factoring in potential risk premiums reflecting PREPA's unique credit situation. PREPA will make Proponent profitability estimates based on known contract terms, utilizing approximate project costs and escalations based on industry benchmarks and similar customary indicators. The parametric ranges for each specific RFP will be reviewed upfront by the Energy Commission and their approval is subject to the result of the evaluation conducted by the Energy Commission."

constitute the major component of PREPA's rates and fuel procurement should entail an RFP process. [8]

### C. The ARAs constitute monopolistic schemes that should not be approved or authorized by the Energy Bureau.

In its filings in this case, PREPA alleges that the ARAs with Ecoeléctrica/Naturgy were *the only viable option* going forward. PREPA's reason seems to hinge on the following facts: First, Ecoeléctrica owns the only available liquefied natural gas ("LNG" or "methane gas") terminal. Second, Naturgy, which happens to be a 50% shareholder of Ecoeléctrica, [9] has exclusive control over Ecoeléctrica's LNG terminal as a result of a September 2019 tolling agreement between the affiliated entities. Third, Naturgy's exclusive control over the only available LNG terminal is a monopolistic situation, owned and controlled by to the Ecoeléctrica/Naturgy conglomerate. As a result, PREPA contends that it had no other option than to purchase all its LNG/methane gas exclusively from Naturgy for both the Ecoeléctrica and Costa Sur power plants and potentially other plants throughout Puerto Rico. Petitioners are concerned that, if this is true, PREPA is asking the Energy Bureau to validate an illegal tying arrangement, violating anti-trust law.

The Sherman Act provides, in pertinent part, that:

> *Every contract*, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States, or with foreign nations, *is declared to be illegal*. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. 15 U.S.C. § 1 (emphasis added).

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[8] 2019 Fiscal Plan for the Puerto Rico Electric Power Authority, at 101 (*available in* https://aeepr.com/es-pr/Documents/Exhibit%201%20-%202019%20Fiscal_Plan_for_PREPA_Certified_FOMB%20on_June_27_2019.pdf).

[9] See *History in Puerto Rico*, NATURGY, http://www.naturgy.com.pr/en/about+us/the+company/our+company/1297289606902/history+in+puerto+rico.html (last visited April 6, 2020).

> *Every person who shall monopolize, or attempt to monopolize*, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. Id. § 2 (emphasis added).

On the other hand, Puerto Rico law also prohibits acts to restrict trade:

> *Any contract, combination* in the form of a trust or otherwise, *or conspiracy to unreasonably restrict business or commerce in the Commonwealth of Puerto Rico* or in any sector thereof, is hereby declared illegal and any person who makes such contracts or engages in such combinations or conspiracies will incur a misdemeanor. 10 LPRA § 258. (translation provided)(emphasis added).

Furthermore, courts interpret the Puerto Rico antitrust law as incorporating the relevant federal jurisprudence. Caribe BMW v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 754 (1st Cir. 1994).

***1. Tying Arrangements***

Petitioners are concerned that the described schemes constitute a tying arrangement. Specifically, "[a] tying arrangement is an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Eastman Kodak Co. v. Image Tech. Services, Inc., 504 U.S. 451, 462 (1992)(citations omitted).

> There are essentially four elements to a *per se* tying claim: (1) the tying and the tied products are actually two distinct products; (2) there is an agreement of condition, *express or implied*, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

Borschow Hosp. and Med. Supplies, Inc. v. Cesar Castillo Inc., 96 F.3d 10, 17 (1st Cir. 1996)(citations omitted)(emphasis added). Such an arrangement violates the Sherman Act, if the seller has "appreciable economic power" in the tying product market and if the arrangement affects

a substantial volume of commerce in the tied market. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969).

In the present case, and according to PREPA's contentions, there are two distinct products being tied together: (1) the power that Ecoeléctrica provides and (2) the LNG that Naturgy supplies. These two products are tied with respect to PREPA because it cannot purchase power from Ecoeléctrica unless it supplies fuel which it must purchase from Naturgy. Ecoeléctrica has sufficient economic power in the market to distort PREPA's choices because it has the only LNG terminal available. As a result, the market is foreclosed to other LNG providers. Thus, all the elements of the tying arrangement are present here. PREPA needs both the terminal and the power, and Ecoeléctrica/Naturgy have exclusive control and ownership of both. Naturgy and Ecoeléctrica are illegally conditioning the terminal and plant services to the forced purchase of LNG/gas from Naturgy.

***2. Essential Facilities Doctrine***

In the alternative, the LNG terminal is an essential facility and Ecoeléctrica and Naturgy have contrived exclusive control over it. The essential facilities doctrine "aims to prevent a firm with monopoly power from extending that power from one stage of production to another, and from one market into another." Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987)(citations omitted). "When a monopolist denies a competitor access to a facility it needs to compete, the denial is at least arguably unreasonable or exclusionary in the antitrust sense, and therefore unlawful." Id. (citations omitted). Under this doctrine, "a facility is essential only if it is otherwise unavailable and cannot be reasonably or practically replicated." MetroNet Services Corp. v. Qwest Corp., 383 F.3d 1124, 1129–30 (9th Cir. 2004)(citations, emphasis and quotations marks omitted).

> The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. MCI Commun. Corp. v. Am. Tel. and Tel. Co., 708 F.2d 1081, 1132–33 (7th Cir. 1983).

The Ecoeléctrica LNG terminal is an essential facility, as it is the only one available. Without access to the LNG terminal, there is no other way to move the methane gas supply. That LNG terminal is under the exclusive control of Naturgy, who denies access to competitors. Furthermore, it would be unreasonable and impracticable to ask a competitor of Naturgy's to duplicate the facility in order to compete, especially given the terms of the ARAs. Naturgy and Ecoeléctrica would bare comparably little inconvenience in granting other access to the LNG terminal, other than the possible diminution of their profits if those others proved to have more competitive prices.

The Tolling Agreement between Ecoeléctrica and Naturgy, granted the latter exclusive tolling rights for the entire terminal. This contract is a contrivance. As noted in the competitive bidding section of this Petition, the LNG purchases for Costa Sur, and for Ecoeléctrica as well, should have been subject to competitive bidding, since the original contracts were expiring. However, Ecoeléctrica and Naturgy created a sham structure, presumably either to avoid fuel import taxes, by providing that PREPA is responsible for buying and importing the fuel, or to reinforce a *de facto monopoly* argument and avoid competitive bidding.

**D. The ARAs are inconsistent with PREPA's IRP and Puerto Rico's RPS.**

***1. Renewable Portfolio Standard***

One of the most important goals of the energy public policy is the reduction, and eventually elimination, of Puerto Rico's use of fossil fuels. "For such purpose, a [RPS] is established in order to achieve a minimum of forty percent (40%) on or before 2025; sixty percent (60%) on or before

2040; and one hundred percent (100%) on or before 2050." Section 1.6(7) Act No. 17-2019. The new public policy establishes a duty to aggressively reduce the use of fossil fuels, to address the dangers of climate change, Section 1.5(6)(b) Act 17-2019, as well as a duty to promote transparency and public participation. Section 1.5(10) Act 17-2019. However, PREPA's historical bias in favor of large, centralized fossil fuel plants, and against renewables and distributed generation is well documented. [10]

PREPA's bias against renewable distributed generation, that has several resiliency advantages over the central station fossil fuel generation, is perpetuated in the ARAs. The ARAs will tie PREPA to methane gas use until 2032, hindering its ability to meet the renewable energy policy, especially considering the current percentage of renewable energy which stands at a disappointing two-point three percent (2.3%).[11] Furthermore, the ARAs contain detailed provisions for the supply of LNG to other ports and places throughout Puerto Rico. Thus, these ARAs contravene Puerto Rico's energy public policy, hinder its transformation towards renewables and substantially divert efforts from these worthy objectives.

Moreover, Regulation 8815 requires that PREPA facilitate the "modernization and upgrade" of the grid. Through Act No. 17-2019, it has been made clear that "modernization and upgrade" of the island's grid requires PREPA to "maximize the use of renewable energy", and at

[10] Here are just a few examples of this bias from the Integrated Resource Plan: (1) PREPA raised renewable energy curtailment limitations while failing to consider issues of fossil fuel stranded assets/investments; (2) PREPA and Siemens overestimated costs of distributed generation by 50%; (3) PREPA and Siemens overestimated costs of utility-scale solar by 30%; (4) PREPA and Siemens underestimated costs of methane; (5) PREPA and Siemens underestimated costs of CCGTs; (6) PREPA and Siemens wrongly assumed that only thermal resources, and not renewables, could serve critical loads after a major event, when the earthquake showed that the opposite was true; (7) PREPA and Siemens failed to incorporate battery storage capability to replace thermal reserve; (8) PREPA and Siemens failed to reveal that using distributed generation instead of new gas-fired plants could save billions in planned transmission spending; and (9) PREPA and Siemens failed to analyze the climate, environmental, health and safety impacts from gas-fired generation. Local Environmental Organizations' Final Substantive and Legal Brief, CEPR-AP-2018-0001.

[11] *Puerto Rico Territory Energy Profile*, U.S. ENERGY INFORMATION ADMINISTRATION (November 21, 2019) https://www.eia.gov/state/print.php?sid=RQ#29.

the same time "aggressively reduce the use of fossil fuels" and "minimiz[e] greenhouse gas emissions . . . ." Act No. 17-2019 Section 1.5(6)(b), Section 1.11(d).

***2. Integrated Resource Plan***

The IRP sets forth financial and operational requirements in order for renewal of the Ecoeléctrica contract to be beneficial for PREPA and its ratepayers. The ARAs fail to meet any of these requirements.

Firstly, financially, the IRP explains that ratepayers only benefit from the extension of the Ecoeléctrica PPOA, if PREPA can deliver a 60% reduction in the fixed costs. This finding is confirmed by the Siemen's Aurora modeling. See IRP Section 1.2. The Energy Bureau based its approval on consistency with the IRP. In response to PREB's Request Of Information 10, PREPA acknowledges that the proposed agreement fails to deliver the required savings. The current fixed capacity payment is $230M/year; the proposed amended contract only reduces that by 44%, to $128M/year. Thus, the ARAs fail to deliver the required savings, as they only reduce the fixed capacity payment by 44%. See the Sargent & Lundy Report, Table 2-2.

Second, the contract increases capacity from 507 MW to 530 MW; this increase was neither anticipated nor modeled in the IRP, and therefore cannot be said to be consistent with the IRP. Even if we accept Sargent & Lundy's estimation for a hypothetical increased capacity payment under the current contract for 530 MW, the proposed amended contract still only reduces the capacity payment by 44%, far below the 60% necessary to make renewal beneficial for PREPA.

Third, PREPA and Siemens also set forth several upgrades that Ecoeléctrica would have to make for the facility "to remain competitive and viable in this future system."[12] However, the

[12] (1) "[I]t would have to be modified so it could be turned off during daytime (e.g. after 6:00 to 7:00 am) and turned back on in the evening (after 4:00 to 5:00 pm) to supply the night load." (2) "EcoEléctrica would need to keep its [heat recovery steam generators] [in] warm / hot conditions . . . ." (3) Ecoeléctrica may need to "improve its controls and equipment to manage the thermal stresses." (4) Ecoeléctrica would need to modify the facility to lower downtime to

Sargent & Lundy report makes only vague references to increasing the number of startups, nothing close to ensuring that Ecoeléctrica will carry out all of the necessary upgrades.

**E. The ARAs are not appropriate, reasonable or in the public interest.**

***1. The ARAs lack proper consideration of financial and economic impact.***

As noted in the previous sections, the ARAs price tags are disproportionate, excessive and unreasonable. Sources such as Poten & Partners ("Poten"), a top worldwide LNG advisory services firm provide market-based analysis of LNG pricing. Poten's analysis shows that the cost for U.S. liquefaction and freight to Europe, which has higher transport costs, is on the order of $3-3.50. This compares with the $5.60-$5.80 adder in the Naturgy GSPA, which is over $2-$2.50 higher. The Naturgy GSPA reduces the adder by $1, in the event of a Jones Act waiver, which would allow for U.S. LNG to be delivered to Puerto Rico. Even then, the Naturgy GSPA adder would be $4.60-$4.80; still $1-$1.50 higher than Poten's estimate. Each extra $1paid in the Naturgy Adder represents about $30 million per year in additional Ecoeléctrica fuel costs, if operating at 85% capacity factor as PREPA assumes. So, for the new 10-year PPOA term, each $1 in the adder represents $290 million in additional payments to Naturgy. As indicated by Poten, low futures prices continue through 2026 (that is as far out as futures prices go, which is 6 of the 10 years in the Naturgy GSPA). Poten's presentation shows that in the years through 2026 the pricing is in the $5 range, with some seasonal variation. The $5 includes the commodity cost (the 1.15 x HH), which is around $2 in the Poten presentation. This means that the futures pricing indicates the adder through 2026 will be in the $3 range. Again, this is much lower than the $5.50 adder in the Naturgy GSPA; even with a lower $4.50 adder in the event of a Jones Act waiver, the

2 hours and uptime to 2 hours; the facility was initially modeled with a minimum of 5 days of uptime. See IRP Sections 4.2.1.5, 8.3.

difference is $1.50, which would mean $435 million ($290 million x 1.5) in additional ECO PPOA fuel payments over the 10-year period of the ARAs. [13]

In fact, the ARAs will cost Puerto Rico ratepayers hundreds of millions of dollars in excess of market rates. This will include a significant profit margin for foreign companies providing fossil fuels and fossil fuel infrastructure. Furthermore, the substantial amount of investment necessary for the ARAs will affect the other options in the IRP and the rights of intervenors. The opportunity cost of the excessive prices in the ARAs displaces the possibility of on-site solar and renewables that would help to achieve the RPS, through the implementation of least cost customer-sited generation.

The draft IRP prepared by Siemens Industry, Inc. for PREPA indicates that the costs of customer alternatives are lower than the final all-in Energy System Modernization ("ESM") and S4S2 plans generation portfolio rates.[14] The cost of customer-sited generation is significantly lower than the total rate even before the non-bypassable component is added. The Petitioners emphasize that the amount of the investment is such that it will or could affect the IRP and, thus, the rights of intervenors and energy stakeholders.

The Energy Bureau notes that the modeling runs accompanying ROI 10 indicate that the benefits of the ARAs are greater than the costs of not approving the ARAs. Nonetheless, this statement was conditioned by the acknowledgement that two modeling scenarios, those with no solar energy limits, contradicted the finding of greater costs without the ARAs. Having failed to show that the ARAs were the least cost scenario, PREPA then proceeded to perform a "storage

[13] *Between LNG and a Hard Price Floor: Europe Sends Shut-in Signals | April 15 Webinar*, POTEN & PARTNERS http://energy.poten.com/webinar/europe-lng-markets-april-15 (last visited April 23, 2020).
[14] See Pages 8-40 and 8-59 of the IRP, third draft dated 06/07/2019.

refined post processing analysis of the model runs", apparently to address solar curtailment, which not surprisingly, resulted in the ARAs reflecting lower costs for consumers (ratepayers).

Also, the Bureau, in its March 11 Order, notes that the ARAs must pass a consistency test with respect to the IRP but that the terms of the ARAs are not anticipated in the currently approved, September 2016 IRP. Nonetheless, the Energy Bureau determined that the terms of the ARAs, "are more attractive" than replacement with new combined cycle units. However, the fact that the ARAs arguably allow for minimal and questionable savings compared to new combined cycle units surely cannot be the yardstick to determine whether the ARAs are in the public interest.

Furthermore, in the March 11 Order, the Bureau notes that the IRP modeling excludes take or pay provisions such as those in the ARAs. Those take or pay provisions result in an estimated $100 million negative impact, in the terms of the ARAs. Notwithstanding the take or pay obligation in the ARAs, the Bureau erroneously determined that the ARAs "could be considered consistent with the approved IRP" when it approved the ARAs. The ARAs are not appropriate, reasonable or in the public interest.

***2. The ARAs lack realistic consideration of essential factors.***

On January 6 and 7, 2020, Puerto Rico experienced two major seismic events. The area most affected was the south of the island. These seismic events damaged the Costa Sur gas-fired plant, the Ecoeléctrica gas-fired plant, and also the gasport that provides fuel to these two plants.[15] As a result, PREPA's April 1st assessment determined that Costa Sur would be back online in approximately 12 weeks. However, PREPA's savings projections and other contentions do not appropriately consider how the different scenarios regarding Costa Sur will factor into the performance of the ARAs, which is necessary in order to determine if the new contracts are indeed

[15] However, PREPA noted no damage to the island's renewable resources or distributed generation. PREPA January 20, 2020 Presentation, Slide 20.

beneficial. Nor does PREPA mention the damages to EcoEléctrica's facility after the earthquake, which resulted in an order by the Federal Energy Regulatory Commission ("FERC") requiring EcoEléctrica to limit its operations. [16] Section 19.1 (a) of the new ECO PPOA between PREPA and Ecoeléctrica provides that if the Equivalent Availability Factor of the Ecoeléctrica plant is less than 60% for any period of 12 consecutive months that would constitute a breach of the agreement by Ecoeléctrica. Therefore, PREPA should first determine the status of the Ecoeléctrica facilities prior to proceeding with the ARAs. Moreover, PREPA does not even mention Puerto Rico's decaying infrastructure nor its current economic crisis as the result of the natural disasters, and, more recently, the COVID-19 health pandemic in its reasoning. Recent developments cannot be ignored in these determinations.

***3. The ARAs lack expert consultation.***

In the March 11 Order, the Energy Bureau indicated that the ARAs must comply with the parameters normally used by the industry of an appropriate and reasonable price. However, Petitioners note that PREPA has not submitted any evidence of having consulted with an LNG market expert. In fact, in the ARAs transaction, PREPA failed to consult an LNG market expert at all. Although Sargent & Lundy were consulted on the matter of the ARAs, according to their webpage, Sargent & Lundy's expertise is in engineering, not in LNG markets, GSPAs or PPOAs.[17] While Sargent & Lundy finds the ARAs to be a reasonable alternative, as seen in the IRP proceedings, the expert opinion of Arctas Capital Group is that the ARAs prices are excessive.[18]

[16] According to FERC's Order, until further notice, EcoEléctrica can only fill its LNG storage tank up to 63 feet. See *Remedial Order*, 170 FERC ¶ 61,260, Docket No. CP95-35-000 (March 26, 2020).
[17] *Technical Expertise*, SARGENT & LUNDY https://sargentlundy.com/about/technical-expertise/ (last visited April 13, 2020).
[18] See *ARCTAS FINAL SUBSTANTIVE AND LEGAL BRIEF*, Case No. CEPR-AP-2018-0001.

Thus, Petitioners request that the Energy Bureau reconsider its decision and allow for further expert opinions on the ARAs.

***4. The ARAs were not negotiated with the help of conflict-free advisors.***

During the IRP proceeding, intervenors also pointed out that PREPA was advancing plans for gas-fired resources without the benefit of competent and conflict-free advisors. Essentially, PREPA defers to King & Spalding on transactions involving gas and gas-fired equipment, but King & Spalding has a vested interest in having PREPA purchase gas, equipment and services from Naturgy and Fortress Investment Group and its subsidiaries, since these companies are clients of King & Spalding.[19] King & Spalding's webpage indicates the following involvement with Ecoeléctrica/Naturgy:

> Advising Tractebel LNG North America in connection with its involvement in the Ecoeléctrica LNG receiving terminal in Puerto Rico. • Advising on a $ 185 MM stock sale of 47.5 % indirect equity interest in a 507 MW power plant and LNG import terminal in Peñuelas, Puerto Rico and certain related assets. • Advising an international company in relation to the development, construction, financing, risk management, conditions of port use and power purchase agreement management activities in connection with an integrated power plant and LNG import terminal in Peñuelas, Puerto Rico.

***5. The ARAs terms are unreasonable.***

If allowed to proceed, the ARAs would have the combined effect of granting Naturgy the exclusive right to sell LNG to PREPA for both the Ecoeléctrica and the Costa Sur plants without a competitive bidding process and converting the Ecoeléctrica PPOA into a tolling agreement where PREPA would be required to source the LNG exclusively from Naturgy. Also, PREPA would be required to make capacity payments under the take or pay provisions of the ARAs even if Naturgy fails to produce methane gas supplies.

[19] Local Environmental Organizations' Final Substantive & Legal Brief, CEPR-AP-2018-0001, p. 68.

It should also be noted, in terms of reasonableness, that the capital investment for the Ecoeléctrica Facilities has been recovered by Ecoeléctrica. This is a critical consideration that is diminished by the fact that the reduction in capacity payments are substantially eliminated. Given the recovery of the capital investment over the past 20 years or so, the capacity payments in these ARAs should be lower.

***6. PREPA misconstrues the effect of rejecting the ARAs in the Title III proceeding.***

PREPA alludes to the *Public Utility Regulatory Policies Act ("PURPA")* obligations that, presumably, influenced the decision to accept the unconscionable-monopolistic terms of the ARAs. The alleged PURPA obligations in this case are not substantiated. For example, the avoided costs are not published. PREPA's underlying assumption in this case is that if the PPOA is not assumed, PURPA would require the payment by PREPA to Ecoeléctrica of hundreds of millions of dollars. However, the United States Bankruptcy Code provides for the rejection of executory contracts like the PPOA.

Subject to court approval, a debtor-in-possession can assume or reject and executory contract, such as the current contracts between PREPA and Ecoeléctrica/Naturgy. 11 U.S.C. § 365(a). This latitude allows the debtor in possession an opportunity to determine which of the prepetition executory contracts are beneficial to the estate and which should be assumed or rejected. If the contract is rejected, the contract is deemed breached on the date immediately before the date of the filing of the petition, Id. § 365(g)(1), and the non-debtor party has a prepetition *general unsecured claim* for breach of contract damages, *one not entitled to administrative priority*. Id. § 502(g). The current contracts are subject to rejection in the Title III court, in which case, Ecoeléctrica/Naturgy's claims under the PPOA and the GSPA would be an unsecured debt that could receive as little as zero cents on the dollar in the plan of adjustment.

## F. Conclusion

In conclusion, the Energy Bureau should reconsider its decision to approve the ARAs for the following reasons: (1) Contrary to the Energy Bureau's determination, the ARAs are not amended contracts, they are new contracts that should be subject to the same requirements as any new contract; (2) Therefore, the ARAs are invalid due to the absence of a competitive bidding process; (3) Furthermore, the ARAs violate antitrust law; (4) In the alternative, the ARAs are inconsistent with PREPA's Renewable Portfolio Standard ("RPS") and the Integrated Resource Plan ("IRP"); (4) Moreover, the ARAs are not appropriate, reasonable or in public interest.

## IV. PETITION TO INTERVENE

The Petitioners respectfully seek leave of the Energy Bureau to intervene in this proceeding. The Petitioners comprise the following eleven groups, the missions and membership of which will be substantially affected by the excess costs that are ultimately expended if the Energy Bureau does not reconsider its determination approving the priced-gauging ARAs:

1. Comité Diálogo Ambiental, Inc. ("CDA") is a community environmental group composed of residents of the Municipality of Salinas and the Guayama Region.[20] CDA promotes the general welfare of the communities it serves through education and citizen capacity building, focused on the adverse impacts of human activities on the ecologic balance of natural systems and the importance of restoring the environment. CDA works to promote conditions under which humans and the environment can exist in harmony to fulfill the economic, social, and other needs of present and future generations. The Energy Bureau granted CDA's Petition to Intervene in various dockets, including the last two Integrated

[20] Organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 1997.

Resource Planning proceeding. Energy Bureau Dockets CEPR-AP-2015-0002 and CEPR-AP-2018-0001.

2. El Puente de Williamsburg, Inc. - Enlace Latino de Acción Climática ("El Puente – ELAC") is a group whose members are Puerto Rico residents concerned about the impacts of climate change on the Island.[21] El Puente -ELAC promotes multisector discussion on the predictable effects of climate change in Puerto Rico; disseminates studies and information on climate change scenarios; generates discussion of mitigation and adaptation alternatives and their viability for Puerto Rico, and determines optimal parameters for planning for climate change, sea level rise, food security, water availability, and the impacts of power generation on climate change. The Energy Bureau granted El Puente – ELAC's Petition to Intervene in various dockets, including the last two Integrated Resource Planning proceeding. Energy Bureau Dockets CEPR-AP-2015-0002 and CEPR-AP-2018-0001.
3. Comité Yabucoeño Pro-Calidad de Vida, Inc. ("YUCAE") is a non-profit community-based group that ensures Yabucoa residents enjoy a sustainable development where economic development, social equity and the conservation of ecosystems are integrated.[22] YUCAE's view is to achieve an effective commitment of diverse civic groups, religious and educational institutions, whose active participation promotes the empowerment of the community, and the search for solutions to the main environmental, economic and social problems faced by Yabucoa's communities.

[21] Organized as a nonprofit corporation since 1982 and authorized under the laws of the Commonwealth of Puerto Rico since 2015.
[22] Created in 1988 and organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 1989.

4. Alianza Comunitaria Ambientalista del Sureste, Inc. ("ACASE") is a non-profit environmental organization whose members are from Humacao, Yabucoa, Las Piedras, Caguas, and Patillas. ACASE was created in response to the disposal of coal ash in the Humacao landfill.[23] ACASE raises awareness in the communities of Humacao and neighboring towns of the health impacts from coal combustion and coal ash. ACASE also offers talks and conferences on renewable energy, seed harvesting, and the public debt of Puerto Rico.
5. Sierra Club Puerto Rico, Inc. ("Sierra Club PR") is the local chapter of the biggest, oldest, and most influential environmental organization in the United States. Founded in 1892, the Sierra Club has more than three million members and followers, all inspired by the marvels of nature. Sierra Club's mission is to explore, enjoy, and protect natural treasures. Sierra Club's Puerto Rico chapter was founded in 2005. Since its beginning, the chapter has collaborated with different communities and community-based organizations to protect natural areas, promote public policies that protect the public health and environment, mobilize communities to resist pollution projects such as a proposed methane gas pipeline and waste incinerators, among other victories. After Hurricane Maria, the chapter has been helping develop sustainable and self-sufficient projects in communities around the island.
6. Mayagüezanos por la Salud y el Ambiente, Inc. ("MSA") is a community and environmental organization. MSA's volunteers offer educational, organizational, research and participatory services aimed at the defense and protection of natural resources, mainly

[23] Created in 2015 and organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 2019.

in the western area of Puerto Rico.[24] MSA is the co-manager of the Caño Boquilla Natural Reserve. MSA focuses on the Reserve, renewable energy, and the quality and protection of coastal waters and the rivers that nourish them.

7. Coalición de Organizaciones Anti Incineración, Inc. ("COAI") is a coalition of citizens and more than 35 organizations concerned about waste incinerators in Puerto Rico, especially the solid waste incinerator proposed by Energy Answer-Arecibo, LLC, in Arecibo.[25] COAI promotes clean energy and opposes the generation of energy with incineration.

8. Amigos del Río Guaynabo, Inc. ("ARG") is an environmental and community organization created for the defense of the natural resources of Puerto Rico, especially water resources.[26]

9. Campamento Contra las Cenizas en Peñuelas, Inc. is a community and environmental non-profit organization dedicated to the fight against combustion residue from fossil fuel energy generation, especially the deposit of toxic coal ash from the AES coal plant in Guayama. Its mission is to raise community awareness about the dangers from toxic col ash and the urgency of ending coal combustion in Puerto Rico as soon as possible.

10. CAMBIO PR, Inc. ("CAMBIO") is a not-for-profit organization committed to promoting sustainable and responsible actions for Puerto Rico.[27] CAMBIO concentrates its efforts on research, design, promotion, education and implementation of responsible policies and strategies that contribute to the construction of a fairer society with greater opportunities,

[24] Established in 1989 and organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 1990.
[25] Organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 2017.
[26] Organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 2004.
[27] Organized as a nonprofit under the laws of the Commonwealth of Puerto Rico since 2015.

capacities, and resources. Work focuses on pressing social, environmental and energy matters.

11. Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER") was founded in the early 1940´s and it is one of four labor unions that represent Puerto Rico Power Authority's ("PREPA") employees. Its members are responsible for the operation and conservation aspect of PREPA, and for the repairs, renovations, and improvements of PREPA's property. UTIER's job is to protect and defend PREPA's workers, as well as negotiate collective bargaining agreements on their behalf.[3] UTIER also represents the branch of its retirees.

12. To the extent that these Amended Restated Agreements ("ARAs") may have a negative effect on PREPA, the intrinsic relationship between PREPA and UTIER give it standing to question them.

13. The ECO PPOA establishes that PREPA's Capacity Payment will cover operating expenses, among other costs. [Docket No. 1951 at 7] PREPA's operating expenses include labor costs, including compensation to UTIER's membership, PREPA's workers. Thus, the ARAs affect UTIER's members' property rights.

14. Furthermore, UTIER is cognizant and supportive of the *Puerto Rico Energy Public Policy Act,* Act No. 17-2019 provision that establishes a 100% renewable energy goal by 2050. The ARAs will impair PREPA's capacity to comply with the Renewable Portfolio Standard ("RPS"). Therefore, UTIER's interests are directly affected by the assumption of the ARAs.

15. UTIER's members are also ratepayers of PREPA.

[3] Collective Bargaining Agreement ("CBA"), Art. III, § 1, 3.

16. These organizations are active stakeholders on energy issues in Puerto Rico. Their members are concerned citizens that promote the development of renewable energy in Puerto Rico and are impacted by pollution from fossil fuel power plants in Puerto Rico. Their members are also customers of PREPA, subject to PREPA's billing for electric power service. For all of these reasons, these organizations and their members will be substantially affected by the economic, social, and environmental consequences of the ARAs.

The majority of the Petitioners' members are laypersons that strongly prefer to read in Spanish. Therefore, the Petitioners will make every effort to provide summaries, in Spanish of the core concepts of their presentations to nontechnical audiences, using visual elements where appropriate.

**A. The Petition to Intervene complies with all applicable substantive requirements and should be granted.**

Puerto Rico law emphasizes "[t]ransparency and citizen participation in every process related to electric power service." 22 LPRA §§ 1051(o), 1051a(hh). Consistent with the stated importance of public involvement, Puerto Rico law directs agencies to construe this statute "liberally" in order to "facilitate" public participation. 3 LPRA § 9645; Comisión Ciudadanos v. G.P. Real Property, 173 D.P.R. 998, 1011 (2008)("Agencies are obliged to facilitate the participation of such citizens whose interests may be affected by the administrative action, to avoid applying [agency] expertise to information that does not reflect the real situation of said citizens.") (translation provided). The Petitioners meet the substantive and procedural requirements for intervention, especially considering the mandate on agencies to facilitate public participation. Therefore, this Honorable Bureau must grant the Petition to Intervene.

### *1. Petitioners have legitimate interest in this proceeding that would allow PREPA to move forward with the ARAs.*

Any person with a *legitimate interest* in an adjudicatory procedure before an agency may seek to intervene in that proceeding through a duly grounded application to that agency. 3 LPRA § 9645. The Puerto Rico Supreme Court has determined that a legitimate interest in an administrative proceeding, is no the constitutional standing requirement, and instead embraces a wider spectrum of possibilities including social, economic and even environmental interests. San Antonio Maritime v. P.R. Cement Co., 153 D.P.R. 374, 392-93 (2001).

The Petitioners have several legitimate environmental, social, and economic interests in the resources to be procured through the ARAs. First, the Petitioners and their members have a significant interest in ensuring that PREPA provides safe, affordable, and disaster-resilient power to the people of Puerto Rico, as required by Act No. 57-2014 and Act No. 17-2019. Second, some of Petitioners' members live and work close to the fossil fuel plants and infrastructure to which the ARAs apply. These members will be exposed to contaminants from fossil fuel combustion. Finally, the Petitioners have an interest in the wider impacts on emissions of disaster-intensifying greenhouse gases and the pollution of Puerto Rico's air, soil, and water. These environmental impacts will be imposed on the citizens of Puerto Rico for generations. The legitimate interests of Petitioners and their members merit full intervention in this proceeding.

### *2. The Petitioners meet all seven factors for intervention.*

Where a party seeking intervention has demonstrated a legitimate interest, Act 38-2017 identifies seven factors the agency must consider when evaluating whether to grant a petition for intervention, including:

> (a) Whether the petitioner's interests may be adversely affected by the adjudicatory procedure.
> (b) Whether there are no other legal means for the petitioner to adequately protect his interests.

> (c) Whether the petitioner's interests are already adequately represented by the parties to the procedure.
> (d) Whether the petitioner's participation may help, within reason, to prepare a more complete record of the procedure.
> (e) Whether the petitioner's participation may extend or delay the procedure excessively.
> (f) Whether the petitioner represents or is the spokesperson of other groups or entities in the community.
> (g) Whether the petitioner can contribute information, expertise, specialized knowledge or technical advice which is otherwise not available in the procedure. 3 LPRA § 9645.

These criteria are meant to be applied liberally. Id. Furthermore, the Puerto Rico Supreme Court has held that this statute requires agencies "to facilitate the participation of such citizens whose interests may be affected by administrative action." Comisión Ciudadanos v. G.P. Real Property, 173 D.P.R. 998, 1011 (2008)(translation provided). The factors for evaluating petitions for intervention in an adjudicative proceeding strongly support granting the petition, particularly considering the legislative, judicial, and regulatory mandates under Puerto Rico law to ensure public involvement in this proceeding.

*a. Petitioners' interests will be adversely affected by the Energy Bureau's decision not to reconsider the approval of the ARAs.*

Petitioners represent Puerto Rican citizens and communities who will be subject to the full weight of the environmental, social, and economic consequences of the over-priced ARAs. Any outcome which does not address the Petitioners' interests, testimony and arguments will have a harmful economic and environmental impact on the Petitioners, and on Puerto Rico.

*b. There are no other legal means for the Petitioners to adequately protect their interests.*

Petitioners have no other legal means to fully protect their interests in the ARAs approved in this proceeding. Participating in this proceeding is the only means for Petitioners to protect their interests in assuring that ARAs that are ultimately approved are consistent with the transformation

to an affordable, disaster-resilient grid powered entirely by renewable energy. This transition is necessary to achieve energy independence and is required by Act No. 17-2019.

*c. The Petitioners interests are not already adequately represented by the parties to this proceeding.*

Petitioners have longstanding and unique interests on several relevant issues in this proceeding. Those interests are not adequately represented by any other party, as the only recognized party thus far is PREPA, upon whom Petitioners cannot rely for the reasons that have been stated in the previous sections.

*d. The Petitioners' participation is reasonably likely to help prepare a more complete record in this proceeding.*

Because Petitioners encompass numerous community and citizen groups, their full participation as intervenors will lead to a significantly better representation of public input in the final record. By providing an independent analysis, Petitioners will enrich the record and enhance this Bureau's capacity to approve ARAs that fully comply with the policies of Acts No. 57-2014, 38-2017, and 17-2019, and the public interest.

*e. The Petitioners' participation will not excessively extend or delay the proceeding.*

Petitioners have legal representation, are organized, and are prepared to proceed in compliance with all schedules and rulings made by the Energy Bureau. Petitioners will work with all parties to ensure an efficient process and avoid duplication of efforts, confusion or any delays. In response to the COVID-19 pandemic, Governor Wanda Vázquez, ordered "the closure of all governmental operations" starting on May 15, 2020 until March 30, 2020. Administrative Bulletin No. OE-2020-023 § 4. This order was later extended on March 31, 2020 until April 12, 2020. Administrative Bulletin No. OE-2020-029 § 4 and recently to May 3, 2020.

*f. The Petitioners represent other groups or entities in the community.*

Petitioners represent a broad coalition of citizens, labor groups, and communities spanning Puerto Rico and are firmly committed to protecting the interests of the general public in this proceeding.

*g. The Petitioners can contribute information, expertise, specialized knowledge and technical advice which is otherwise not available in the procedure.*

Petitioners have been actively involved in energy and environmental issues in Puerto Rico for years, if not decades. Many of Petitioners' members live close to Puerto Rico's existing fossil fuel plants and infrastructure and, therefore, can provide the Bureau with first-hand descriptions of the impacts of these plants. Petitioners will contribute information, expertise, knowledge and advice essential for the Bureau to determine whether the ARAs need to be informed by a competitive bidding process. Taken together, these seven factors strongly support intervention by the Petitioners.

**B. The Petitioners' Motion is timely.**

In response to the COVID-19 pandemic, Governor Wanda Vázquez, ordered "the closure of all governmental operations" until March 30, 2020. Administrative Bulletin No. OE-2020-023 § 4. This order was later extended on March 31, 2020 until April 12, 2020. Administrative Bulletin No. OE-2020-029 § 4 and recently to May 3, 2020.

The Energy Bureau issued its Order on March 11, 2020. Act No. 38-2017, Section 3.15 allows entities twenty days to file a motion requesting that the Energy Bureau reconsider the order. That would put the deadline at March 23rd. On March 16th, the Energy Bureau issued an Order tolling all deadlines to March 31st and later extended the deadlines again to April 12, 2020 which was a Sunday and automatically tolls the deadline to the following working day. On April 13, 2020, the Bureau announced further tolling of the deadline until May 3rd, consistent with the

Administrative Bulletin. Because May 3rd is Sunday, the deadline automatically tolls to the following working day. Thus, Petitioner's request is timely.

## V. CONCLUSION

For the foregoing reasons, the Energy Bureau should grant intervention into this proceeding, in order for UTIER, local environmental organizations, and the public at large to provide input on these critical issues. Also, the Energy Bureau should reconsider the approval of the ARAs to re-examine critical questions, with the input of Petitioners. After this analysis, the Energy Bureau should ultimately reject the ARAs, for the reasons stated herein.

**RESPECTFULLY SUBMITTED** this 27th day of April 2020, in San Juan, Puerto Rico.


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## CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, we have filed this Motion via the Energy Bureau's online filing system, and sent to the Puerto Rico Energy Bureau Clerk and legal counsel to: secretaria@energia.pr.gov, astrid.rodriguez@prepa.com, jorge.ruiz@prepa.com, n-vazquez@aeepr.com, c-aquino@prepa.com, kbolanos@diazvaz.law adiaz@diazvaz.law, mvazquez@diazvaz.law and ccf@tcm.law.

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