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

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** **SUBJECT:** MOTION FOR RECONSIDERATION AND PETITION FOR INTERVENTION

REPLY TO PREPA'S OPPOSITION TO PETITIONERS' 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"), represented by the undersigned counsel and respectfully request that the Honorable Energy Bureau deny the Puerto Rico Electric Power Authority's ("PREPA") Opposition to Petitioners' Motion for Reconsideration and Petition for Intervention and reconsider the March 11, 2020 Order in this case, pursuant to Section 3.15 of Act No. 38-2017, as amended, known as the "Uniform Administrative Procedure Act of the Government of Puerto Rico." and reiterates its petition for leave to intervene in the above-captioned proceeding, pursuant to Section 3.5 of Act No. 38-2017.

INTRODUCTION

Initially, when the Honorable Puerto Rico Energy Bureau ("Energy Bureau") correctly denied the Puerto Rico Electric Power Authority's ("PREPA") request for approval of the Power Purchase and Operations Agreement with EcoEléctrica L.P. ("EcoEléctrica") and the Natural Gas

Sale and Purchase Agreement with Gas Natural Aprovisionamientos SDG, S.A. ("Naturgy") (collectively the "ARAs"), the Bureau asserted that the ARAs were contrary to public interest. The Energy Bureau reached that decision because it could not determine whether the ARAs were in accordance with the Integrated Resource Plan ("IRP"), as the Energy Bureau had not yet made a final decision in the IRP process. See November 27 2019 Order. The Energy Bureau granted PREPA "leave to refile its Petition *after the Energy Bureau issues a Final Resolution regarding the proposed [IRP]* that is pending approval." Id. at 2 (bold omitted and emphasis added).

However, contrary to the initial Energy Bureau determination, PREPA convinced the Energy Bureau to reconsider its decision and approve the ARAs *without having issued the final determination in the IRP process*. The Energy Bureau decided that the ARAs "could be considered consistent with the Approved IRP[,]" March 11, 2020 Order at 12, although the IRP process is still pending before the Honorable Energy Bureau.

Petitioners had a reasonable expectation, based on the Energy Bureau's prior ruling that the decision on the ARAs would be made as part of the determination in the IRP process and not before. The Energy Bureau's issuance in the IRP docket of Request of Information 10 (ROI #10) dated December 13, 2019 was indicative that the ARAs and the future role of the EcoEléctrica plant in the Puerto Rico electric system would be determined in the IRP case. The approval of the ARAs was precipitated by PREPA's second petition in this separate case and set forth an entirely different legal foundation. PREPA's filing, on December 9, 2019, was actually a new petition which was followed by a technical hearing and other procedural incidents. The Honorable Bureau, in its first decision, denied approval of the contracts "without prejudice", that is, without prejudice to resubmitting a new and different petition, which is what PREPA did. In other words, PREPA's second petition is actually a new case.

The IRP Process will undoubtedly be affected by the continuing seismic activity in Southern Puerto Rico, by the lock-downs and the economic trauma caused by the Covid-19 pandemic, and potentially by the upcoming hurricane season. Those factors need to be considered and the analysis surrounding the ARAs should not be exempt from that consideration, merely because PREPA managed to obtain a decision on the ARAs prior to the Energy Bureau's ruling on the IRP.

Historically, PREPA has made huge outlays of funds, up to three billion dollars per year for fossil fuel purchases and payments under power purchase (and operation) agreements. The oil, coal and methane (natural) gas burned by PREPA and the two private fossil energy plants in Puerto Rico is sourced from wells and mines far from the Island, which increases the cost of energy generation. The operation of all fossil fuel plants in Puerto Rico emit multiple contaminants that adversely impact public health and the environment. The main electric plants: the Aguirre Power Complex and Costa Sur and the plants with which PREPA has power purchase agreements, AES Puerto Rico, L.P. and EcoEléctrica are located in southern Puerto Rico and require an elaborate, costly and now, weakened transmission system to deliver power to the load centers in the north, particularly to the San Juan metropolitan area. This configuration makes Puerto Rico especially vulnerable to hurricanes, storms, earthquakes and other risks. Approval of the ARAs serve to perpetuate these and other risks.

Taking into account that access to these proceedings is limited by the highly technical nature of the issues, language barriers and the present COVID-19 crisis, to name a few obstacles, Petitioners urge the Energy Bureau to grant them leave to intervene in this case, in the interest of public participation, government transparency and the public interest. PREPA's actions and

decisions have real and direct implications for Puerto Rico's citizens and communities. Their voices should be heard.

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 denied approval of the ARAs without prejudice. On December 9, 2019, PREPA submitted a request for reconsideration ("November 27 2019 Order").

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 §§ 9601 et seq. ("LPAU" for its Spanish acronym). The Energy Bureau, on January 17, 2020, granted a request for a technical hearing scheduled for February 14, 2020. On January 28, 2020, the Energy Bureau issued a Resolution allowing Ecoeléctrica L.P. to participate in this case, including the ability to submit comments and provide testimony. On March 9, 2020, pursuant to section 3.15 of the LPAU, 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 ("March 11, 2020 Order").

On April 27, 2020, Petitioners filed a Motion for Reconsideration and Petition for Intervention ("Motion"). In their filing, the Petitioners requested the reconsideration of the Energy Bureau's approval of the ARAs based on multiple arguments, more fully laid out in the Motion. Petitioners also requested the right to intervene in the process and provide valuable input on the effect of the ARAs.[1] On May 5, 2020, PREPA filed its Opposition To Joint Petition For

[1] On this same date, Arctas Capital Group, L.P. filed a Motion for Reconsideration of the Approval of the Agreements.

Intervention And Request For Reconsideration To Be Stricken From The Record ("Opposition"). In sum, PREPA argues that the Energy Bureau should deny the Motion because (1) granting intervention is "inconsistent with the non-adjudicative nature of this proceeding[,]" and (2) in the alternative, "there is no right to a reconsideration of the order and the only available vehicle as a matter of law is for the party affected by the order, PREPA, to seek judicial review from the determination." Opposition at 3-4. Petitioners hereby seek to respond to PREPA's erroneous arguments.

LEGAL ARGUMENTS

I. PREPA does not cite legal authority to support its argument that Petitioners cannot request a second reconsideration.

In its motion, PREPA alleges that the Petitioners' Motion must be denied, arguing that this case is not a quasi-judicial procedure. PREPA urges the Honorable Bureau to deny the Petitioners' request "at the present stage of the proceedings", that it is late and that a second reconsideration is not permissible. PREPA is wrong on all counts.

PREPA's unsubstantiated argument that a second motion for reconsideration by a different party is impermissible cites no authority for the proposition that second requests for reconsiderations are not permissible. Although a second motion for reconsideration might be barred for the same party, that is not the situation in this case. Petitioners were never part of the separate proceeding for the approval of the ARAs.

In this case, the initial Energy Bureau decision, dated November 27, 2019, was substantially modified by its subsequent order, dated March 11, 2020. There is legal authority for the proposition that presentation of a second motion for reconsideration is permissible where the initial opinion is modified as a result of the first motion for reconsideration.

The Puerto Rico Supreme Court has ruled on the issue of the permissibility and the effect of a second request for reconsideration. In *Colón Burgos v. Marrero Torres*, , the high court determined that:

> [A] motion for reconsideration of this type tolls the term to appeal to the Court of Appeals when: (1) the contested opinion is one that is substantially altered as a result of a previous reconsideration, regardless of who filed it, and (2) meets the criteria of specificity and particularity of Rule 47 of the Rules of Civil Procedure. That is, for a subsequent reconsideration to toll the term to file before the Court of Appeals it must set forth the facts or the law to reconsider, as well as the substantial alterations resulting from a first reconsideration or the new determinations of facts or conclusions of law for which reconsideration is requested. [With this standard established by the court], we prevent the indefinite extension of the term to seek judicial review by filing subsequent frivolous reconsideration motions based on the same grounds. 201 P.R. Dec. 330, 341-42 (2018)(our translation).

The Energy Bureau's *Regulation on Adjudicative Proceedings, Notices of Non-Compliance, Rate Reviews and Investigative Proceedings* ("Regulation 8543") applies to the current adjudicative case. The intervention contemplated and allowed by Regulation 8543 is compatible with Act No. 57-2014 and the procedure before the Energy Bureau. Indeed, the Energy Bureau warned of the right to reconsider its resolutions pursuant to Regulation 8543. Section 1.6 of Regulation 8543 provides that when a specific procedure has not been foreseen in the regulations, the process may be conducted in a manner consistent with Act No. 57-2014. Intervention is consistent with the determinations of the Energy Bureau applying Regulation 8543 and is also necessary to allow the participation and protection of rights in the processes to implement the energy transformation mandated by law in Puerto Rico.

Regulation 8543, Section 11.01 references Act No. 170 of August 12, 1988, which is now Act No. 38-2017, LPAU. Section 3.15 of LPAU grants a party adversely affected by a partial or final resolution or order twenty (20) days from date of notification of an order to move for

reconsideration. P.R. Laws ann. tit. 3 § 9655. Section 1.3(b) of LPAU defines "Adjudication" as a "statement whereby an agency determines the rights, obligations or privileges that correspond to a party." Id. § 2102(b). Section 3.2. on Adjudicative Procedure, provides in pertinent part that:

> Except when otherwise established by law, the adjudicative procedure before an agency, may be initiated by the agency itself or by the presentation of a complaint, application or petition, in person or in writing, within the term established by law or regulations, with regard to a matter that is under the jurisdiction of the agency. Id. § 9642.

Even if we were to accept, for argument's sake, that the current proceeding is *ex parte* in nature, section 3.2 of LPAU clearly provides that adjudicative procedures can take the form of petitions or requests. Id. The statutory language is not limited to complaint proceedings between different parties. On the contrary, Section 1.4., which verses on applicability provides that: "This chapter shall apply to all administrative procedures conducted before all the agencies that are not expressly excepted by this chapter." P.R. Laws ann. tit. 3 § 9604. The statutory language clearly indicates that the LPAU applies to all administrative procedures unless a procedure is expressly excluded. PREPA does not, and cannot argue, that the proceeding for approval of the ARAs is a rulemaking procedure. Thus, as an administrative procedure covered under LPAU, because it has not been specifically excluded via legislation, the process for approval or consideration of the ARAs is an adjudicative process.

II. In the alternative, following the Energy Bureau's determination regarding the approval of the ARAs, this is an adjudicative proceeding subject to LPAU, where the provisions on reconsideration and intervention apply.

In its Opposition, PREPA argues that the nature of this proceeding is non-adjudicative. Opposition at 3-6. However, once the Energy Bureau issued a determination of PREPA's initial request for approval of the ARAs, this proceeding took on an adjudicative nature. Therefore, the LPAU provisions apply.

A. The LPAU provides for informal and formal adjudicative proceedings.

According to LPAU, certain procedures "shall be deemed informal non-quasi judicial procedures, and therefore, shall not be subject to [Chapter III on adjudicative proceedings]." P.R. Laws ann. tit. 3 § 9641. The difference between informal and formaL adjudicative proceedings is the applicability of Chapter III of LPAU provisions. This includes, for example, the provisions on intervenors. Id. § 9465.

However, "[a]ny person who has been denied the granting of a license, franchise, permit, endorsement, authorization, *or similar matter shall have the right* to question the agency's determination *through an adjudicatory process* as established in the special law involved *and* in [Chapter III on adjudicative proceedings]." Id. § 9681 (emphasis added). Thus, even when a proceeding is informal, and considered essentially non-adjudicative for purposes of LPAU, it can be converted into an adjudicative proceeding, after the agency has made a determination on the initial request. See, for example, San Antonio Maritime v. P.R. Cement Co., 153 P.R. Dec. 374, 390 (2001)("That is, in case of disagreement with the administrative determination regarding the granting of the license or permit, *the L.P.A.U. refers us to the adjudication procedure.*"(emphasis added)(our translation)); IRR Gas Station Corporation v. T & B Petroleum Corp., 2020 TSPR 14, 2020 WL 1288565 at *8, 12 (2020)(sentence).

Thus, after a determination to the effect of denying or granting approval in an informal process, an adjudicative process may emerge. "As a result, *the adjudication process is not an alien one from the granting* of licenses, franchises, permits, endorsements and *similar procedures, but one closely related*." San Antonio Maritime, 153 P.R. Dec. at 390 (emphasis added)(our translation). "Faced with such a scheme, *and the interest of the licensing and permitting process*

being one established in order to protect the public, it is appropriate that we recognize the right to intervene in said process." Id. (emphasis added)(our translation).

Thus, the subsequent adjudicative proceeding is amenable to intervention. See, also, IRR Gas, 2020 WL 1288565 at *9 (sentence)("[A] person affected by the determination of an agency, be it an applicant who was denied said authorization *or third-person-opponents who were interested in contesting its concession*, had at their disposal the right to intervene in the process of challenge of an administrative decision. *This right to intervene arises once the procedure becomes adjudicative after the agency grants or denies a permit*."(emphasis added)(citations omitted)(our translation)). Furthermore, under those informal proceedings, reconsideration is governed by the same provisions as an adjudicative proceeding. See P.R. Laws ann. tit. 3 § 9641, 9655.

B. The informal nature of the proceeding to approve a Power Purchase Agreement and the adjudicative nature of the present case, after the Energy Bureau's November 27 2019 and March 11, 2020 Orders.

PREPA contends that under Act No. 57-2014, Art. 6.32 "regulates certain procurement processes submitted by PREPA to the Energy Bureau and is thus more akin to a process regulating *ex-parte* procedures of PREPA than the adjudication of rights which would allow Petitioners to request intervention." Opposition at 6. Thus, PREPA considers that the regulatory framework in place favors the position that this is a non-adjudicative procedure, i.e. an informal procedure. PREPA also argues that "*arguendo* that Petitioners have a right to intervene or for limited participation in this case, there is no right to a reconsideration of the order and the only available vehicle as a matter of law is for the party affected by the order, PREPA, to seek judicial review from such determination." Id. at 4.

The Honorable Energy Bureau, in its March 11, 2020 Order, explained the delegation made to it regarding the approval of power purchase agreements, which stems from Article 6.3 of Act No. 57-2014. Id. at 5 (citing March 11, 2020 Order at 7). It also explained:

> On the other hand, Article 6.32 of Act 57-2014 provides a comprehensive statutory framework for the evaluation and approval of power purchase agreements, as well as other transactions involving electric power services companies, such as PREPA and EcoEléctrica. It reiterates the Energy Bureau's authority to adopt the necessary regulations and regulatory actions that govern the process of evaluation and approval of power purchase agreements and other transactions involving electric power services companies. As explained before, Paragraph (b) of Article 6.32 expressly states that any extension of, or amendment to, a power purchase agreement executed prior to the approval of Act 57-2014 shall comply with the Puerto Rico Energy Public Policy Act and shall be subject to the approval of the Energy Bureau. March 11, 2020 Order at 8.

As previously mentioned, LPAU applies to informal procedures to an extent. See P.R. Laws ann. tit. 3 §§ 9641, 9681-9684. "The primary purpose of this process is to assure the public that only qualified and trained individuals will perform certain activities regulated by a particular agency." San Antonio Maritime, 153 P.R. Dec. at 389 (our translation). These procedures are not the same as a formal adjudication, where the rights and obligations of parties are determined. They are procedures where a party seeks the agency's approval to execute a determined course of action. The agency follows the criteria available in laws and regulations to make a determination.

The process before the Energy Bureau is akin to the informal administrative proceedings described in LPAU and should be subjected to the same standard. PREPA, alone, came before the Energy Bureau to ask for the approval of the ARAs, based on the criteria established in the corresponding laws and regulations. This, however, does not dispose of the Petitioners' Motion.

After the Energy Bureau issued the November 27, 2019 Order,—which denied the requested authorization to assume the ARAs— and then the March 11, 2020 Order,—which granted the requested authorization— the proceeding took on an adjudicative nature. See P.R.

Laws ann. tit. 3 § 9684; San Antonio Maritime, 153 P.R. Dec. at 390. As such, the adjudicative proceeding provisions apply. Thus, it is appropriate to grant Petitioners the right to intervene. San Antonio Maritime, 153 P.R. Dec. at 390; IRR Gas, 2020 WL 1288565 at *9.

C. The inapplicability of stare decisis to this case.

PREPA argues *stare decisis* and contends that the Energy Bureau should deny Petitioners' intervention because it has already denied an intervention, in this case, to EcoEléctrica. Opposition at 7. "But *stare decisis* has never been treated as an inexorable command." Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020)(citations omitted).

> [T]he doctrine of *stare decisis* establishes that, as a general rule, a court must follow its decisions in subsequent cases. This doctrine is based on the need to achieve stability and legal certainty. However, that doctrine does not go so far as to declare that the opinion of a court has the scope of a dogma that must be followed blindly even if the court is subsequently convinced that its previous decision is erroneous. Pueblo v. Díaz de León, 176 P.R. Dec. 913, 921 (2009)(citations and brackets omitted)(our translation).

"Therefore, to revoke a rule, the following factors must be weighed: (1) if the previous decision was clearly wrong; (2) if its effects on the rest of the law are adverse; and (3) if the number of people who put their trust in it is limited." Id. at 922 (citations and quotation marks omitted)(our translation).

As we have argued above, to the extent that the previous decision to deny intervention was based on the fact that this is a non-adjudicative procedure, the Energy Bureau's decision was incorrect. Although the process to approve the ARAs is akin to an informal proceeding under LPAU, once the Energy Bureau issued a decision, it became an adjudicative proceeding. If followed, the decision to deny intervention in all processes of this kind would have the adverse effect of depriving future litigants of their right to intervene in such cases. Furthermore, the

decision is so recent, and so limited, that the number of people who trusted that decision are extremely limited.

While we have made the legal arguments that should put the *stare decisis* argument to rest, we would be remiss to ignore that EcoEléctrica's participation would not provide the Energy Bureau with the same input as Petitioners' participation. While EcoEléctrica may have experience and expertise, its interests are exactly aligned with PREPA's request for approval of the ARAs. Petitioners offer a different opinion and put their expertise to work for the interests of the community and public policy concerns, thus, the Petitioners should be allowed to intervene in the current proceeding.

III. The LPAU factors for intervention weigh in favor of Petitioners' intervention in this process.

PREPA contends that "if this forum were to derail from what is clear precedent on the matter of intervention and decided to evaluate Petitioners request on the merits, it is PREPA's position that the factors set for intervention by section 3.5 of [LPAU] are not met . . . ." Opposition at 8. On that point, Petitioners wholeheartedly disagree.

> The *principle of liberality* that the LPAU includes when regulating the intervention mechanism responds to the duty of administrative agencies to recognize and consider the needs of citizens who may be affected by the exercise of delegated administrative powers. The agencies *are obliged to facilitate the participation* of those citizens whose interests may be affected by administrative action, to avoid applying their expertise to information that does not reflect the real situation of said citizens. Comisión Ciudadanos v. G.P. Real Property, 173 D.P.R. 998, 1011 (2008)(emphasis added)(our translation).

LPAU provides a simple mechanism for intervention. See P.R. Laws ann. tit. 3 § 9645. Any person can intervene if it has a legitimate interest in an adjudicative procedure. Id. LPAU provides agencies with seven factors. It should be noted that these are not requirements to be met, but factors to be considered. PREPA believes that "[t]he Petitioners must [sic] show that their intervention

will not extend or delay the process excessively." Opposition at 10 f.n. 29. In truth, the Energy Bureau should consider "[*w]hether* the petitioner's participation may extend or delay the procedure *excessively*." P.R. Laws ann. tit. 3 § 9645 (emphasis added). But it is not Petitioner's burden to prove that it will not cause a delay. It is a factor to consider.

Petitioners disagree with PREPA's contention that *intervention* will cause *excessive* delay. PREPA bases that argument on the allegation that "it is a fact that Petitioners' participation would return this process, a process that has a final determination, to square one." Opposition at 10. We disagree with PREPA's characterization. It is not Petitioners' *intervention* that will cause a delay, but the Energy Bureau's decision to grant *reconsideration*.

Petitioners have legal representation, are organized, and are prepared to proceed in compliance with all schedules and rulings issued by the Energy Bureau. Petitioners will work with all parties to ensure an efficient process and avoid duplication of efforts, confusion or any delays. This is what the Energy Bureau should consider regarding Petitioners' intervention and whether it will cause excessive delay. If the Energy Bureau grants reconsideration, preventing PREPA from calling the end of the process, *it is not a delay resulting from Petitioners' intervention*. It is the natural effect of an agency's decision to reconsider a previous determination, when provided with new information. In fact, if the Energy Bureau decided *motu proprio* to reconsider its decision, the delay would be the same.[2]

[2] Additionally, any potential delay could hardly be deemed excessive, as the ARAs cannot enter effect until the Title III Court approves their assumption, anyway. Petitioners request that the Honorable Bureau take official administrative notice of the fact that the ARAs are currently pending consideration before the United States Bankruptcy Court and the substantial arguments that the Petitioners have raised concerning lack of competitive bidding, the monopolistic practices embodied in the ARAs and noncompliance with the IRP and RPS, among others, merit a reexamination of the ARAs by the Honorable Bureau. See Case No. 17-BK-4780-LTS (D.P.R. 2017) at Docket No. 1974. [Exhibit 1:

Furthermore, other factors weigh in favor of Petitioners' intervention. As argued in the Motion, 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. Also, Petitioners have no other legal means to fully protect their interests in the ARAs, if they are finally approved in this proceeding.

Additionally, Petitioners have longstanding and unique interests on several relevant issues in this proceeding, that are not adequately represented by any other party, as the only recognized party thus far is PREPA, upon whom Petitioners cannot rely. Also, Petitioners encompass numerous community and citizen groups, whose full participation will lead to a significantly better representation of public input in the final record and enrich the administrative proceeding. Furthermore, Petitioners have been actively involved in energy and environmental issues in Puerto Rico for years, if not decades. Petitioners will contribute information, expertise, knowledge and advice essential for the Energy Bureau's decision.[3] Upon careful evaluation, the ARAs place millions of dollars at stake, an issue not properly brought by PREPA before the Energy Bureau's attention. Petitioners, through intervention in these proceedings, are able and willing to make a significant contribution to cutting costs for PREPA and the people of Puerto Rico.

Motion in Opposition to 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.]

[3] In the alternative, the Honorable Bureau should grant Petitioners some participation as it has done previously, when it allowed participation in the case to EcoEléctrica. The law of this case is that participation by a party in interest is permissible. Furthermore, in the temporary generation case, the Honorable Bureau granted Petitioners' *de jure* and *de facto* participation. See Case No. NEPR-AP-2020-001.

IV. The Energy Bureau should reconsider its March 11, 2020 decision approving the ARAs because they do not comply with the applicable regulation.

The approval of the ARAs should be reconsidered because, among other flaws discussed in Petitioners' Motion, the ARAs do not comply with the *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation, and Award of Contracts for the Purchase of Energy and the Procurement, Evaluation, Selection, Negotiation, and Award Process for the Modernization of the Generation Fleet* ("Regulation 8815"). Article 4.2 of Regulation 8815 requires PREPA to notify the former Energy Commission, now Energy Bureau, prior to commencing the procurement process. The notification to the Energy Bureau must include information on the proposed project, parameters to determine the profit margin, consistency with the IRP, compliance by PREPA with Regulation 8815, the statutory authority and other laws and regulations related to procurement processes. The profit margins and price escalators for the project must be based on industry costs and profitability benchmarks in accordance with the nature of the project. PREPA must provide a "detailed narrative, with specific examples, regarding how the proposed project and terms of the contract as described in the proposed RFP and approved by the Board complies [sic] with the IRP". Article 4.2 Regulation 8815. The ARAs fail this test.

CONCLUSION

In view of the foregoing, the Energy Bureau should dismiss PREPA's Opposition, because this is an adjudicative procedure. In the alternative, the November 27, 2019 and/or March 11, 2020 Orders rendered this process an adjudicative one. After than conversion, the rights to intervene and seek reconsideration were activated. Furthermore, the factors to be considered in this case weigh in favor of Petitioners' intervention. Thus, the Energy Bureau should grant Petitioners leave

to intervene. Lastly, the Energy Bureau should grant Petitioners' Motion and reconsider the March 11, 2020 Order, for all the reasons stated in this Reply and in said Motion.

RESPECTFULLY SUBMITTED this 19th day of May 2020, in San Juan, Puerto Rico.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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 , ccf@tcm.law, tonytorres2336@gmail.com and sierra@arctas.com.

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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, as representative of THE COMMONWEALTH OF PUERTO RICO, *et al.* Debtors.[1]	PROMESA Title III Case No. 17 BK 3283-LTS (Jointly Administered)
In re: THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO as representative of PUERTO RICO ELECTRIC POWER AUTHORITY, Debtor.	PROMESA Title III Case No. 17 BK 4780-LTS

MOTION IN OPPOSITION TO 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.

[1] The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations.)

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Other Authorities

TO THE HONORABLE DISTRICT COURT:

COME NOW Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"), 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 P.R., (collectively "Opposing Parties") as creditors and parties in interest pursuant to 11 U.S.C. §1109(b) and Rule 2018(a) of Federal Bankruptcy Procedure and respectfully submit this *Motion in Opposition to 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.* [Docket No. 1951] ("Objection"). In support of this Objection, the Opposing Parties state as follows:

OPPOSING PARTIES

1. 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.
2. 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.

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

3. 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.
4. 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.
5. Moreover, as a creditor, UTIER has an interest in the restructuring of PREPA's debt and the assumption of the ARAs will impair PREPA's ability to restructure its debt.
6. UTIER's members are also ratepayers of PREPA.
7. Comité Diálogo Ambiental, Inc. ("CDA") is a community environmental group composed of residents of the Municipality of Salinas and the Guayama Region.[2] 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 Puerto Rico Energy Bureau granted CDA'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.
8. 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

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

change on the Island.[3] 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 Puerto Rico 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.

9. 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.[4] 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.

10. 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.[5] ACASE raises awareness in the communities of Humacao and neighboring towns of the health impacts from coal combustion and coal ash. ACASE also

[3] Organized as a nonprofit corporation since 1982 and authorized under the laws of the Commonwealth of Puerto Rico since 2015.
[4] Created in 1988 and organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 1989.
[5] Created in 2015 and organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 2019.

offers talks and conferences on renewable energy, seed harvesting, and the public debt of Puerto Rico.

11. 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.

12. 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 in the western area of Puerto Rico.[6] 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.

13. 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

[6] Established in 1989 and organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 1990.

solid waste incinerator proposed by Energy Answer-Arecibo, LLC, in Arecibo.[7] COAI promotes clean energy and opposes the generation of energy with incineration.

14. 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.[8]

15. 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 coal ash and the urgency of ending coal combustion in Puerto Rico as soon as possible.

16. CAMBIO PR, Inc. ("CAMBIO") is a not-for-profit organization committed to promoting sustainable and responsible actions for Puerto Rico.[9] 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, capacities, and resources. Work focuses on pressing social, environmental and energy matters.

17. These organizations and their members are active stakeholders on energy issues in Puerto Rico. They are full supporters and advocates of the Renewable Portfolio Standard goals of Act No. 17-2019. As such, they are actively participating in many public and educational activities regarding the achievement of those goals including administrative and judicial proceedings related to PREPA's infrastructure and operational investments.[10]

[7] Organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 2017.
[8] Organized as a nonprofit corporation under the laws of the Commonwealth of Puerto Rico since 2004.
[9] Organized as a nonprofit under the laws of the Commonwealth of Puerto Rico since 2015.
[10] CAMBIO PR Inc. v. Autoridad de Energía Eléctrica, Case No. SJ2019-CV-04901 (First Instance/Sup. Ct. 2019), PR Energy Bureau Dockets CEPR-AP-2015-0002 (2015), CEPR-AP-2018-0001 (2018).

18. Their members are concerned and affected citizens that promote the development of distributed renewable energy and other alternatives to central station fossil fuel generation, such as energy efficiency and demand response programs, and whose health, environment and pecuniary interests[11] are directly impacted by air, soil and water pollution from fossil fuel power plants in Puerto Rico.

19. All members of the community and environmental organizations are Puerto Rico residents and PREPA ratepayers. As ratepayers, the members of the community and environmental organizations have a legitimate interest in the excessive prices that are included in the ARAs which would be passed through to PREPA customers by virtue of PREPAs rate structure.

20. Some members of the community and environmental organizations live close to the power plants at issue in the ARAs and would be impacted by the continued operation of the fossil fuel generation plants.

21. In addition, since the ARAs provide for the potential supply of LNG to other ports or plants throughout Puerto Rico, the environmental organizations have a legitimate interest in this proceeding.

To the extent the above organizations and their members are substantially and directly impacted by the economic, social, and environmental consequences of the ARAs, they have standing to question the same.

PRELIMINARY STATEMENT

22. In the midst of the COVID crisis, and with total disregard for the continually deteriorating economic climate in Puerto Rico, the Financial Oversight and Management Board

[11] Pecuniary interests encompass medical expenses, loss of income and opportunities due to health reasons and other direct costs resulting from the economic externalities of pollution.

("FOMB"), on behalf of the PREPA submitted an urgent motion to assume the ARAs for Natural Gas supply and services.

23. These ARAs have been negotiated behind closed doors and without the benefit of public scrutiny or competitive bidding. The ARAs are not supported by any market analysis and do not benefit PREPA's restructuring and operational expenses, and consequently fail to benefit ratepayers and Puerto Rico's economic stability and energy needs. In fact, the implementation of these ARAs would be detrimental to the sustainable transformation of PREPA.

24. Thus, the Opposing Parties, object to the summary approval of the ARAs, urge the Honorable Court to exercise greater scrutiny and a heightened standard of review and ultimate rejection of the ARAs as discussed later in this Objection.

25. In addition, the Opposing Parties posit that the Court does not have jurisdiction at this time.

JURISDICTION AND VENUE

26. The United States District Court for the District of Puerto Rico has subject matter jurisdiction over this Motion pursuant to Section 306(a) of PROMESA. 48 U.S.C. §2166(a).

27. Venue is proper pursuant to Section 307(a) of PROMESA. 48 U.S.C. §2167(a).

BACKGROUND

28. On April 1, 2020, the FOMB filed *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* ("Motion"), on behalf of PREPA. [Docket No. 1951]

29. Through this motion, pursuant to the *Procedures for the Assumption of Power Purchase and Operating Agreements*, PREPA is requesting authorization from this Honorable Court to

assume two executory contracts: (1) the Amended and Restated Power Purchase and Operating Agreement with Ecoeléctrica, dated March 27, 2020 ("ECO PPOA") and (2) the Amended and Restated Natural Gas Sale and Purchase Agreement with Gas Natural Aprovisionamientos SDG, S.A. ("Naturgy"), dated March 23, 2020 ("Naturgy GSPA") (together the "ARAs"). [Docket No. 1951 at 1-2]

30. The ECO PPOA constitutes a new Power Purchase and Operation Agreement ("PPOA") with Ecoeléctrica, although the title of the agreement indicates that it is an amendment of the 1995 PPOA which is set to expire in 2022. The GSPA constitutes a new Natural Gas Sale and Purchase Agreement ("GSPA") with Naturgy, although the title of the agreement indicates that it is an amendment of the 2012 GSPA which is set to expire in 2020. The ARAs would extend the contractual relations between PREPA and Ecoeléctrica and Naturgy until 2032. [Docket No. 1951 at 1-2]

31. The ARAs have the combined general effect of granting Naturgy the right to monopolize the imports of liquified natural gas ("LNG") into Ecoeléctrica's LNG terminal and require PREPA to purchase LNG exclusively from Naturgy. PREPA in turn takes title of and responsibility for the LNG and Natural Gas to be delivered to both Ecoeléctrica and Costa Sur. [Docket No. 1951 at Exhibits B-1 & B-2] (See Figure 1).

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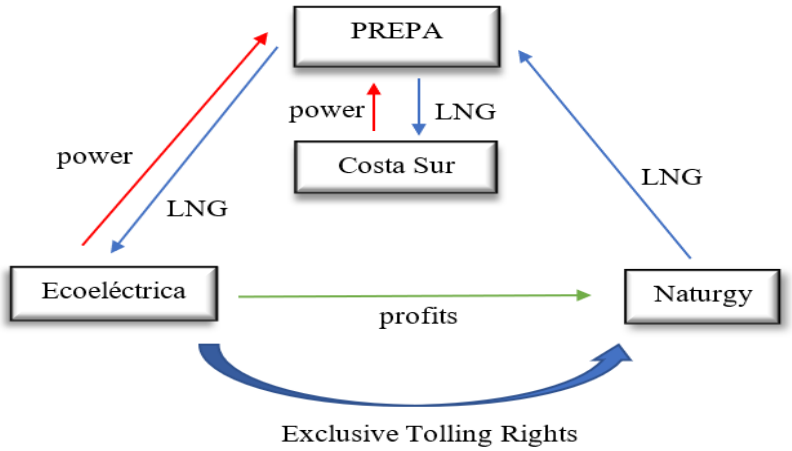

Figure 1

32. On April 2, 2020, this Court entered an order setting the deadline for parties to respond to PREPA's Motion for April 8, 2020 at 4:00pm. [Docket No. 1956]

33. On April 7, 2020, the FOMB submitted an *Urgent Motion To Extend Certain Briefing Deadlines And The Hearing In Connection With 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.* [Docket No. 1957].[12]

34. On April 8, 2020, the Court granted that motion and extended the deadlines. [Docket No. 1960]

35. Now, the Opposing Parties respectfully request that the Honorable Court deny PREPA's Motion, for the reasons stated herein.

36. Although, the Opposing Parties issued interrogatories and requests for production of documents and a 30(b)(6) deposition, on April 14, 2020, PREPA has yet to respond. PREPA

[12] In this motion, UTIER explicitly reserved the right to serve discovery.

is still within the time period to respond and the Opposing Parties reserve the right to amend their pleading based on the results of discovery.

STANDARD OF REVIEW

37. Generally, "[u]nder a motion to assume or reject an executory contract, the only issue properly before a court is whether assumption or rejection of the subject contract is based upon a debtor's business judgment." In re BankVest Capital Corp., 290 B.R. 443, 447 (B.A.P. 1st Cir. 2003)(citations omitted).

38. Thus, "[t]o satisfy the business judgment test, the debtor must show that the proposed course of action will be advantageous to the estate and the decision is based on sound business judgment." In re TM Vill., Ltd., 598 B.R. 851, 859 (Bankr. N.D. Tex. 2019)(citations omitted).

39. Therefore, under this standard, "the bankruptcy court should not interfere with [that] business judgment[,] except on a finding of bad faith or gross abuse of their business discretion." In re Noranda Aluminum, Inc., 549 B.R. 725, 728 (Bankr. E.D. Mo. 2016)(quotation marks and citations omitted).

40. However, the court may interfere "[i]f Debtor cannot show a benefit to the estate, [and] does not need to make a finding of bad faith or gross abuse of discretion." In re Crystalin, L.L.C., 293 B.R. 455, 464 (B.A.P. 8th Cir. 2003).

41. Furthermore, "[t]he court must ensure the decision-making process used by a debtor in possession in exercising its powers under the Code is a sensible one." In re Pilgrim's Pride Corp., 403 B.R. 413, 427 (Bankr. N.D. Tex. 2009)(citations omitted).

42. Although business judgment is the *general* standard to assume or reject executory contracts in bankruptcy, the courts have carved out an exceptional standard for unique contracts. See,

for example, N.L.R.B. v. Bildisco, 465 U.S. 513 (1984)(on collective-bargaining agreements) *superseded by statute*; In re Mirant Corp., 378 F.3d 511 (5th Cir. 2004)(on power purchase agreements).

43. In these cases, the appropriate standard is a balance of equities, not business judgment. See Bildisco, 465 U.S. at 527; Mirant, 378 F.3d at 525. See, also, In re FirstEnergy Solutions Corp., 945 F.3d 431, 453-54 (6th Cir. 2019).

44. Therefore, in unique cases such as PREPA's, the appropriate standard is the balance of equities, which takes into account the many competing interests affected by the proposed assumption of contracts.

45. When the debtor is an energy provider, these include the interests of the debtor, the creditors, the ratepayers, the environment and the public interest, in general. See, also, In re FirstEnergy Solutions Corp., 945 F.3d at 453-54.

46. PREPA is the main energy provider and exclusive distributor of energy in Puerto Rico, which is an essential service. Thus, it has a unique role in Puerto Rico's economic development. Therefore, the balance of equities standard requires greater scrutiny of the ARAs in controversy. The balance of interests in this case is not comparable to the usual corporate or commercial bankruptcy, because this case has direct implications for the entire population of Puerto Rico.

47. As the Opposing Parties will show in this motion, under the balance of equities standard, the motion to assume should be denied.

ARGUMENTS

I. This Court does not have jurisdiction to grant PREPA's motion for assumption, because it is premature given that the assumption procedure requirements are not met.

48. Regardless of the merits of PREPA's Motion, this Court should deny the Motion as premature, in consideration to the ripeness doctrine, because the Puerto Rico Energy Bureau's ("PREB") determination approving the ARAs is not final.

49. The ripeness doctrine "has roots in both the Article III case or controversy and in prudential considerations. The basic rationale of the ripeness inquiry is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Roman Catholic Bishop of SPG v. City of Springfield, 724 F.3d 78, 89 (1st Cir. (2013)(citations and quotation marks omitted).

50. The *Procedures for the Assumption of Power Purchase and Operating Agreements* [Docket No. 1199], approved by this Honorable Court on April 22, 2019, require PREPA to obtain consent or approval of the Oversight Board and the PREB before filing an assumption notice in the Title III court.

51. On March 11, 2020, PREB issued a resolution and order approving the ARAs, as PREPA alleges. [Docket No. 1951 ¶ 12] However, this decision is not final, as deadlines have been extended due to the COVID-19 emergency.

52. In response to COVID-19, Governor Wanda Vázquez, among other measures, ordered "the closure of all governmental operations" starting on March 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. The latest order extended these deadlines to May 3rd.

53. That said, the Opposing Parties have opportunely challenged the PREB's order approving the ARAs. [Exhibit 1: Motion of Reconsideration before the Puerto Rico Energy Bureau]

54. Because PREB's decision is not final, PREPA's request is premature, as it has not met the requirements for the procedures for PREPA's assumption of power purchase and operating agreements.

55. Allowing this motion to go forward, before PREB's decision is final, would be wasteful of the limited resources of both PREPA and the Opposing Parties and raise judicial economy concerns. See Judicial Economy, Black's Law Dictionary (11th ed. 2019)(Judicial economy requires "the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources.") See, also, Colorado River Water Conservation Dist. v. U. S., 424 U.S. 800, 817 (1976)(""[T]here are principles . . . which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.")

II. This Court does not have jurisdiction to approve the assumption of the ARAs, because they are not executory contracts, but rather new contracts not subject to assumption or rejection.

56. PREPA has presented the ARAs as executory contracts that have been amended. However, the substance of these "amendments" so radically alters the nature of the original contracts, that they are actually new contracts.

57. Section 365 of the Bankruptcy Code, "allows the trustee in bankruptcy—or, [in other cases], the debtor-in-possession—to assume or reject any *pre-petition executory contract* or unexpired lease, subject to the approval of the bankruptcy court." In re BankVest Capital Corp., 360 F.3d 291, 295 (1st Cir. 2004)(citations omitted, and emphasis added).

58. For this purpose, "[a] contract is executory if performance remains due to some extent on both sides." Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019).

59. Thus, an executory contract for Section 365 is a contract that was entered into pre-petition, where the parties have yet to complete performance post-petition.

60. Evidently, "[c]ontracts that do not exist at the time the petition is filed cannot be executory contracts." In re Gen. Homes Corp., 199 B.R. 148, 150 (S.D. Tex. 1996).

61. Nonetheless, the ARAs that PREPA offers up for court approval are not the same contracts that were entered into pre-petition. The effect of the so-called amendments to the ECO PPOA and Naturgy GSPA is, in fact, the birth of new contractual obligations.

62. It is a reiterated principle that bankruptcy legal framework operates in conjunction with state law. That is why "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligations . . . ." Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 20 (2000). Specifically, "[*t]he basic federal rule in bankruptcy is that state law governs the substance of claims*." Id. (emphasis added). Therefore, in the present case Puerto Rico's contracts law is controlling.

63. Under Puerto Rico contract law, some amendments may result in extinctive novation, even if it is not expressed in those terms. This is called a tacit novation. See Web Serv. Group, Ltd. v. Ramallo Bros. Printing, Inc., 336 F. Supp. 2d 179, 182 (D.P.R. 2004):

> [E]xtinctive 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). See, also, Entact Services, LLC v. Rimco, Inc., 526 F. Supp. 2d 213, 222–23 (D.P.R. 2007).

64. 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).

65. The ECO PPOA changes every major term in the original PPOA between Ecoeléctrica and PREPA.[13]

66. First, 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".[14] 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 2: Declaration of Engineer Agustín A. Irizarry Rivera at 3-4].

67. 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 No. 6 when Ecoeléctrica operates at or above 76%

[13] 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.
[14] Id. at 7.

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 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. The ECO PPOA adds the Condition Precedent that PREPA assumes the contract in the PROMESA Title III case. Id. at 4-5.

68. 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. at 5.

69. 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 into 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.

70. 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* ARAs in this Title III proceeding, thus establishing an illegal tying violation of the Sherman Act as discussed in another section of this Objection.

71. 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." [Docket No. 1951, Exhibit B-1, Recital E, at 2] (emphasis added). When entire agreements are amended and adopt new structures and commercial models, they are legally new contracts. These are qualitative changes, where "the obligation is substituted by another of a different nature." Las Brisas, S.E., 8 F. Supp. 2d at 146.

72. Although the ARAs state that they are amended restatements, this language does not preclude tacit novation. See Ballester Hermanos, Inc. v. Campbell Soup Co., 797 F. Supp. 103, 108 (D.P.R. 1992)(finding that "language in the latter agreement regarding its purpose to continue, to reconfirm, and to update the existing relationship of the parties" did not "indicate an express will *not* to novate. As a result, the language does not preclude a finding of tacit novation." (emphasis added)).[15]

73. Under Puerto Rico contract law, radical "amendments" such as those described above, result in tacit extinctive novation, even if not expressed in those terms. See Web Serv., 336 F. Supp. at 182.

74. The ECO PPOA embodies a new arrangement, under which PREPA is obligated to buy fuel exclusively from Naturgy and assume the legal responsibility of 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 and force PREPA into a completely different relationship with Ecoeléctrica and Naturgy.

75. Moreover, it is an unusual agreement where PREPA must acquire fuel from Naturgy in order to supply Ecoeléctrica, so that Ecoeléctrica can provide it power. PREPA takes on a new and

[15] It is a well-established axiom of Puerto Rico jurisprudence that "the name does not make the thing," which is to say that using a title or classification for a contract does not relieve the court of interpreting its substance to determine what it is. See, for example, Comisionado de Seguros v. Corp. Para La Defensa del Poseedor de Licencia de Armas de P.R., 202 P.R. Dec. 842, 880 (2019); Mun. Rincon v. Velázquez Muñiz, 192 P.R. Dec. 989, 1002 (2015).

seemingly unnecessary burden. Generally, these tolling agreements are used when companies such as Ecoeléctrica are not in the best position to negotiate fuel supply. This is not the case here, particularly when Naturgy owns 50% of Ecoeléctrica's stock and,[16] therefore, is in a great position to negotiate.

76. 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. 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 current contract. The result is a loss of flexibility and savings for PREPA.

77. 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.

78. Moreover, these are not "extensions" of the ARAs. 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).[17] With these radically different terms, they are in fact new contracts with periods that are until the year 2032.

79. For the foregoing reasons, this Court does not have jurisdiction to approve them under Section 365. Therefore, the Court should deny and dismiss PREPA's motion.

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[16] 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).

[17] "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).

III. In the alternative, due to the pressing public policy and interest concerns surrounding PREPA's bankruptcy, its assumption or rejection of ARAs should be held to the balance of equities standard.

A. Balance of Equities Standard

80. If the Court decides to treat the ARAs as executory contracts, it should apply the balance of equities standard rather than the business judgment standard, because of the special nature of the ARAs.

81. In *Bildisco,* the Supreme Court considered that collective-bargaining contracts had a "special nature" and, therefore, "a somewhat stricter standard should govern . . . ." 465 U.S. at 525.

82. Building on that, in *Mirant*, the Fifth Circuit determined that "[t]he nature of a contract for the interstate sale of electricity at wholesale is also unique." 378 F.3d at 525. Therefore, the court determined, the "[u]se of the business standard would be inappropriate in this case because it would not account for *the public interest inherent in the transmission and sale of electricity*." Id. (emphasis added).

83. In both cases, the underlying purposes of Chapter 11 were central to the analysis. Meaning that the result of applying the standard had to further the goal of Chapter 11, which is essentially "the successful rehabilitation of debtors." Id. See, also, Bildisco, 465 U.S. at 527 ("Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action.").

84. The test that replaces "business judgment" in these cases is a "balance of equities". In *Bildisco*, the Supreme Court instructs a balance between "the interests of the affected parties-the debtor, creditors and employees. . . . Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities." 465 U.S. at 527.

85. In *Mirant*, on the other hand, the Fifth Circuit incorporates the impact on the public interest and the possibility of disruption in electricity service, as equities to be balanced. 378 F.3d at 525. See, also, In re FirstEnergy Solutions Corp., 945 F.3d 431, 453-54 (6th Cir. 2019).

86. The public interest analysis, in these cases, should include factors such as "impact on consumers" as well as "environmental management" for the balance of equities. FirstEnergy, 945 F.3d at 454.

87. Applying this test to PREPA's case, the equities in balance would be: (1) PREPA's business interests, (2) the interests of Title III creditors, (3) the interests of the consumers and ratepayers, (4) the environmental impact of the ARAs and, of course, (5) the public interest, including Puerto Rico's economic stability, which is the goal of PROMESA.

88. PREPA's Motion does not provide enough information for the Court to make a determination under the balance of equities standard based on these interests. Therefore, the Court should deny the Motion.

B. The application of the Balance of Equities Public Interest Standard to PREPA's assumption of the ARAs warrants its rejection.

89. As explained above, in this case, a "higher standard [is] appropriate because of the public interest in availability and cost to the public of electric power." In re Pilgrim's Pride Corp., 403 B.R. at 423 (citations omitted).

90. It is important to consider, in this matter, that PREPA's bankruptcy is as *sui generis* as Title III itself. PREPA is not your average business, nor even your average energy provider.

91. PREPA is the main provider and sole distributor of energy for the entire island of Puerto Rico and, as such, an integral part of Puerto Rico's overall economy. Therefore, its business interests, and this request in particular, should be seen in that context, as well as in the context of Puerto Rico's interests.

92. In contrast with Chapter 11 debtors, whose only goal is rehabilitation for their own sake, PREPA's rehabilitation and future are essential to Puerto Rico's stability and development. See 48 U.S.C.A. § 2121 ("The purpose of the Oversight Board is to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.") Thus, the ARAs must contribute to the goal of fiscal responsibility, which is to say the efficient and conscious management of its resources. To achieve fiscal responsibility, PREPA should comply with all the rules and regulations that govern such contracts, and perform long term analysis of the effect of the ARAs on its overall fiscal health.

93. To address this balance of equities, this Court would need to view the proposed assumption, first, in terms of the benefits to PREPA's economic interests and sustainability. Second, the Court should consider the effect of these assumptions on PREPA's other creditors, particularly if assumption would result in losses or an inability to pay certain types of creditors, including its employees and retirees.

94. Third, it is essential that the Court view the ARAs in terms of their lasting effect on PREPA's ratepayers. The assumptions that PREPA engages in throughout the Title III bankruptcy have short, medium, and long-term repercussions, not just for its own rehabilitation, but for the Puerto Rican people who depend on its service and electric rates.

95. Fourth, and in keeping with public policy, the ARAs should be evaluated for environmental impact and cost including externalities, given the imminent threat of climate change, the effects of the climate crisis currently being experienced with more frequent and intense hurricanes, sea level rise and warming, and the need for cleaner renewable sources of energy. This point is essential, as documented in the *Puerto Rico Energy Public Policy Act*, which states in no uncertain terms that PREPA needs to transition to more renewable resources

because it "is highly polluting as a result of poor energy diversification, the hindering of the integration of distributed generation and renewable energy sources, and high fossil fuel dependency." Statement of Motives, Act No. 17-2019.

96. Finally, PREPA's request should be seen in that context and as part of the overall goal of PROMESA, which is to stabilize the economy of Puerto Rico and facilitate its access to the bond markets.

97. Thus, sound business judgment is not enough. PREPA's decisions have direct repercussions on all of its stakeholders in terms of electric rates, stability and continuity of electric service. Many of the deaths attributed to Hurricane Maria were related to the lack of electric service to power life-saving equipment and medication.

98. For the foregoing reasons, this Court should hold PREPA's request to the standard of balance of the equities and require a showing of the impact of PREPA's decision to assume the ARAs on all its stakeholders and its effect on the public interest in general, Mirant, 378 F.3d at 525; FirstEnergy, 945 F.3d at 453-54, rather than the deferential business judgment standard, which is a rule that was created for corporate litigation and adopted in bankruptcy.

99. Based on the balance of equities, PREPA's assumption should be denied, as the ARAs pose a threat to most of the equities in balance, rather than a benefit.

The ARAs do not favor PREPA's interests.

100. First, the terms of the ARAs are not beneficial to PREPA. The terms of the ARAs put PREPA in a more vulnerable position than their current versions and represent a step back in the path toward renewable energy transformation.

101. PREPA argues that the ARAs will benefit PREPA because their terms are more favorable than the previous terms with the same parties. [Docket No. 1951 ¶ 16]

102. Yet, in addition to the changes discussed in the previous sections, which change the nature of the ARAs entirely and disfavor PREPA greatly, 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.

103. Most notably, in the general scheme of things, the ARAs make PREPA responsible for acquiring and delivering the LNG to Ecoeléctrica and Costa Sur, with Naturgy as the exclusive provider, without any provisions to protect PREPA from liability and losses if Naturgy fails to deliver the product.

104. Moreover, the 1995 Ecoeléctrica contract had a provision for gas supply in a fuel emergency and use of its dock at the lowest rate. See 1995 Ecoeléctrica PPOA, section 13.5. This provision is missing from the ECO PPOA.

105. Also, the 1995 Ecoeléctrica contract contained a provision 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 ARA, which only allows for purchase of the facility in case of total abandonment. [Docket No. 1951-2, Exhibit B-1, Section 15]

106. The GSPA also includes natural gas prices that are more expensive than they should be, which is shown by comparing the formula to the import price of natural gas from Trinidad to the U.S. 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 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. [18] [Exhibit 2: Declaration of Engineer Agustín A. Irizarry Rivera at 7-8].

107. On the other hand, PREPA has failed to show in its Motion *how* the savings that are alleged will be achieved.

108. Furthermore, the original fuel pricing formula was based on the *lesser* of 0.97 * (No. 6 Fuel Oil Price+ $1.29) *or* 0.97 * [50% * (No. 6 Fuel Oil Price + $1.125) + 50% * (115% HH + $5.95)], where the No. 6 Fuel Oil Price is converted from $/BBL to $/MMBTU by dividing by 6.03. Because the price of oil is down, the new formula, based solely on Henry Hub

[18] *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).

("HH"), increases the price. Thus, the new contract eliminates a very useful clause. [Exhibit 2: Declaration of Engineer Agustín A. Irizarry Rivera at 6].

109. In addition, the interaction between the ECO PPOA and the Naturgy GSPA puts PREPA at a disadvantage.

110. First of all, 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.

111. However, 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.

112. 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.

113. 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, including "industrial disturbance". A broad set of circumstances would be grounds for an FM allegation under the GSPA, relieving Naturgy of liability, but would not constitute an FM event for PREPA for failure to supply LNG under the new ECO PPOA.

114. Because each shipment includes LNG supplies for several weeks, if Naturgy invokes the more expansive FM clause, the lack of back-to-back indemnity would have multi-million-dollar consequences for PREPA and its ratepayers.

115. Therefore, and as further discovery may confirm, in the strictest sense, PREPA has not shown the benefits of the ARAs.

The ARAs do not favor PREPA's creditors.

116. Second, the assumption of these contracts will adversely affect PREPA's creditors' position in the bankruptcy. Because the assumption of executory contracts automatically grants the non-debtor party's claims administrative expense priority, by assuming the ARAs, PREPA is putting the rest of its creditors in a disadvantageous position.

117. This is especially true of the ARAs PREPA is proposing for assumption, in contrast with the original contracts with Ecoeléctrica and Naturgy, as these drastically increase PREPA's liabilities and extend them for twelve years.

The ARAs do not benefit PREPA's ratepayers.

118. Third, PREPA has not provided any information on the effect of the ARAs on the ratepayers.

119. However, comparing the ARAs with the Integrated Resource Plan ("IRP") reveals that the ARAs' terms will not yield any benefits to ratepayers. 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 ARAs do not deliver that reduction.

120. Furthermore, according to the PREPA Fiscal Plan, certified in June 2019, PREPA must use the Request for Proposal ("RFP") method in fuel procurement, which was not done here, and which is the most significant component of PREPA's rates.[19]

121. Therefore, by ignoring the public bidding requirements, further discussed below, PREPA is directly affecting the ratepayers.

The ARAs do not benefit PREPA's public policy goals.

122. Fourth, the ARAs commit PREPA to a decade of natural gas generation and fossil fuel purchase, distancing PREPA from its renewable energy goals, which conflicts with its public policy and stubbornly hinders its advancement.

123. PREPA has the option to allow the original PPOA and GSPA to run their course and decide from a stronger and more flexible position what to do.

124. The *Puerto Rico Energy Public Policy Act* was created, among other things, "for the purposes of establishing the Puerto Rico public policy on energy in order to set the parameters for a resilient, reliable, and robust energy system with just and reasonable rates for all class of customers[.]" Act No. 17-2019.[20]

125. 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

[19] 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).

[20] (*available at* https://energia.pr.gov/wp-content/uploads/2019/05/Act-17-2019.pdf (last visited April 6, 2020)).

percent (60%) on or before 2040; and one hundred percent (100%) on or before 2050." Section 1.6(7) Act No. 17-2019.

126. 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 No. 17-2019, as well as a duty to promote transparency and public participation. Section 1.5(10) Act No. 17-2019.

127. Notwithstanding, the ARAs PREPA wants to assume will commit PREPA to use natural gas until 2032, hindering its ability to meet its renewable energy policy, especially considering the current percentage of renewable energy which stands at a disappointing two-point three percent (2.3%).[21] Renewable energy prices are foreseen to continue decreasing dramatically in the upcoming years and, thus, it is essential for utilities to maintain flexibility in order to harness the benefit of such price reductions which they can pass on to ratepayers.[22]

128. Moreover, the *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet* ("Regulation 8815") requires that PREPA facilitate the "modernization and upgrade" of the grid. Through Act No. 17-2019, it is clear that "modernization and upgrade" of the island's

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

[22] See *Falling Renewable Power Costs Open Door to Greater Climate Ambition*, IRENA (May 29, 2019) https://www.irena.org/newsroom/pressreleases/2019/May/Falling-Renewable-Power-Costs-Open-Door-to-Greater-Climate-Ambition. See, also, RECOMMENDATIONS FROM IRENA'S GLOBAL ENERGY REPORT: THE REMAP TRANSITION PATHWAY (2019) https://irena.org/-/media/Files/IRENA/Agency/Publication/2019/Apr/IRENA_GET_REmap_pathway_2019.pdf. The recommendations include: (1) Ensure that investments do not lock in additional fossil fuel infrastructure. Investments in long-term assets, such as in fossil-fuel infrastructure and inefficient buildings stock, are still taking place. These types of investments are not just locking in emissions, they are also adding significant liability and the potential for stranded assets to the balance sheets of energy companies, utilities, investors and property owners. (2) Develop finance innovations to transform the cash flow from fossil fuel consumption expenditure over time into upfront capital for renewable energy projects.

grid requires PREPA to "maximize the use of renewable energy", and at 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).

129. Thus, these ARAs directly and blatantly contravene Puerto Rico's energy public policy, hinder its progress and substantially divert efforts from those worthy objectives.

The ARAs do not consider PREPA's role in Puerto Rico's economic stability.

130. Finally, PREPA has not considered the role of its restructuring in the big picture process of Puerto Rico's economic rehabilitation nor the effect that Puerto Rico's decaying infrastructure, economy and other factors will affect the parties' ability to execute the ARAs.

131. Just as the underlying purposes of Chapter 11 are central to the analysis of Section 365 motions in said chapter, see Mirant, 378 F.3d at 525, so should the underlying purposes of PROMESA be central to the analysis in Title III. See 48 U.S.C.A. § 2121. Therefore, the Court should also consider the effect of the ARAs on Puerto Rico's overall progress.

132. The Court should consider that there is no information in PREPA's Motion regarding this interest, of the role of PREPA's restructuring process in the economic stability of Puerto Rico.

133. On the other hand, PREPA's extractive model, fully dependent on the purchase of fossil fuel resources not available on the Island, has proven to be a flawed model that has debilitated the utility's capacity to adjust to the demands and needs of Puerto Rico's economy. These ARAs perpetuate such failed model.

134. All the equities in balance are against the approval of the ARAs. Thus, the Court should deny PREPA's Motion.

IV. In the alternative, PREPA has not met the business judgment standard.

A. PREPA has not shown that the ARAs are the result of its sound business judgment, but instead demonstrates that it was strong-armed into negotiating the ARAs.

135. PREPA's own allegations lead to the inevitable conclusion that the assumption of the ARAs was not the result of its business judgment at all.

136. When "applying the business judgment rule in deciding whether to grant a debtor's motion to [assume] a contract a court *is not adjured to blindly accept*, but rather only to show *proper* deference to the business judgment of the debtor's management." Pilgrim's Pride, 403 B.R. at 426 (citations omitted)(emphasis added).

137. Therefore, "[t]he court must ensure the decision-making process used by a debtor in possession in exercising its powers under the Code *is a sensible one*." Id. at 427 (emphasis added).

138. When a decision is based on business judgment, it is the product of "informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." See In re GSC, Inc., 453 B.R. 132, 174 (Bankr. S.D.N.Y. 2011).

139. Thus, sound business judgment requires the voluntary and reasonable consideration of an arm's-length transaction, which presupposes that the parties have roughly equal bargaining power. See *Arm's-Length*, Black's Law Dictionary (11th ed. 2019).

140. In the present case, PREPA reiterates in its motion that assuming these ARAs with Ecoeléctrica and Naturgy *was its only viable option* going forward. [Docket No. 1951 ¶ 16, 22] This begs the question, how can PREPA allege a choice made with sound business judgment if it did not have alternatives?

141. If PREPA feels that it was strong-armed into accepting these ARAs, it contradicts the contention that the ARAs are being assumed through sound business judgment and arm's length negotiation.

142. PREPA's rush to assume these contracts, particularly when the original GSPA expires in two years, further weakens PREPA's contention that there is arm's length negotiation here. Clearly, Naturgy wants to bundle the ARAs to ensure the continuation of Ecoeléctrica's operation, because negotiation the ECO PPOA as a standalone contract would put Naturgy at a disadvantage.

143. This is further aggravated by the fact that Ecoeléctrica and Naturgy have created a self-serving corporate LNG framework that strongarms PREPA into accepting their terms. As PREPA's own motion demonstrates, first, Naturgy has *exclusive* control over the *sole* LNG terminal through a Tolling Agreement with Ecoeléctrica. [Docket No. 1951 ¶ 24] Second, for that same reason, Naturgy is PREPA's sole gas provider. Third, Naturgy is also a major shareholder in Ecoeléctrica, owning 50% of Ecoeléctrica.

144. This combination of circumstances defeats PREPA's claims to sound business judgment, as there is little to no voluntariness in these ARAs. Thus, through its own admission, PREPA does not meet the business judgment standard. Furthermore, in this respect, the ARAs present potential anti-trust violations, because if PREPA has been strong-armed by it, this scheme could constitute an illegal tying arrangement.

145. "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).

> 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).

146. 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).

147. 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, PREPA is barred from acquiring LNG at competitive prices from other LNG providers.

148. Thus, all the elements of the tying arrangement are present here. PREPA indicates the need for 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.

149. On the other hand, this arrangement could render the LNG terminal an essential facility within the definition of the essential facilities doctrine, which "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).

150. "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).

> 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).

151. 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 competitor suppliers.

152. Furthermore, it would be unreasonable and impracticable to ask a competitor of Naturgy's to build another facility in order to compete, especially given the terms of the ARAs. Naturgy and Ecoeléctrica would bare comparably little inconvenience in granting others access to the LNG terminal, other than the possible diminution of their profits if those others proved to have more competitive prices.

153. 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 Objection, the LNG purchases for Costa Sur, and for Ecoeléctrica as well, should have complied with 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.

154. Ecoeléctrica and Naturgy, by imposing the terms of the ARAs, have nullified any possible business judgment allegation.

B. PREPA has not shown that the ARAs are beneficial to PREPA's restructuring.

155. Even under the business judgment standard, this process requires the debtor to establish the benefit of the proposed assumption for its restructuring. If debtor does not establish said benefit, then the business judgment standard is not met, and the assumption should be denied. See TM Vill., 598 B.R. at 859.

156. If the Court viewed this case under the business judgment standard, the motion should still be denied, as PREPA has not established that the ARAs' assumption is beneficial to PREPA's restructuring.

157. In this process, the Court should also "consider the risks of the proposed transaction, the available alternatives, and *the danger of prejudice to the objecting parties*." Pilgrim's Pride, 403 B.R. at 427 (emphasis added)(citations and quotation marks omitted).

158. Moreover, "[i]f [assumption] would lead to *a third party benefitting substantially at the expense of unsecured creditors*, the [assumption] cannot be approved." In re PG&E Corporation, 603 B.R.471, 489 (Bankr. N.D. Cal. 2019)(citing In re Chi-Feng Huang, 23 B.R. 798, 801 (9th Cir. B.A.P. 1982))(emphasis added).

159. In the present case, by assuming the ARAs, PREPA is not just assuming the executory contracts that are set to expire within the next two years. It is also assuming brand new obligations that extend up to the year 2032.

160. This will adversely affect PREPA's creditors, because "[t]he assumption of an executory contract by the debtor-in-possession results in an administrative expense priority claim for *all obligations under that contract, regardless of whether the expenses arose postpetition or prepetition.*" In re U.S. Metalsource Corp., 163 B.R. 260 (Bankr. W.D. Penn.

1993)(emphasis added)(citing Bildisco, 465 U.S. at 531). See, also, In re BankVest Capital Corp., 360 F.3d 291 (1st Cir. 2004).

161. By assuming the ARAs, all of PREPA's present and future obligations with Ecoeléctrica and Naturgy will be granted priority. So, not only are the terms of the ARAs disadvantageous for PREPA, they will also be disadvantageous for its creditors, like UTIER, that are already in peril, given PREPA's current financial condition.

C. The ARAs do not meet the competitive adjudication requirements of PREPA contracts and, therefore, PREPA is assuming them in bad faith and with abuse of discretion.

162. PREPA has not shown that the ARAs are beneficial, and this precludes the need to make a finding of bad faith for this Court to intervene in the assumption. Crystalin, 293 B.R. at 464. However, in the alternative, PREPA has acted in bad faith and with abuse of business discretion. Therefore, PREPA is owed no deference. See Noranda, 549 B.R. at 728.

163. As a public utility service, PREPA's contracts are subject to legal requirements, which include adjudicating contracts through a competitive process.

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

165. 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).[23]

166. 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.

167. 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).

168. Nevertheless, PREPA, in order to avoid these requirements, rather than call the ARAs new contracts decided to treat them as amendments. PREPA did not conduct any competitive process to obtain the best possible prices for PREPA ratepayers.

[23] 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).

169. The Puerto Rico Energy Bureau overlooked this requirement, based on the incorrect premise that the ARAs are amendments rather than new contracts.[24] Nonetheless, the Bureau's order is *not final*, given the deadline extensions due to the Covid-19 emergency. Also, the determination was erroneous, and, on this day, the Opposing Parties presented a Motion for Intervention and Reconsideration to challenge the approval of the ARAs.

170. Thus, PREPA is acting in bad faith. Therefore, this Court does not owe it deference under the business judgment standard and should deny the proposed assumption of the ARAs.

V. PREPA has not provided enough information for the Court nor its creditors to make a judgment on these contracts without full discovery.

171. The assumption of the ARAs will have an adverse effect on PREPA's restructuring, as well as on the multiple interests that surround it. As such, this Court and PREPA's creditors need . To do this, there must be discovery.

172. As a matter of law, "[a] proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014." Fed. R. Bankr. P. 6006(a). This incorporation includes Rule 7026, 7030 and 7034. See, also, In re Khachikyan, 355 B.R. 121, 126 (9th Cir. B.A.P. 2005).

173. Rule 9014 "designates certain adversary-proceeding rules that *automatically* apply to 'contested matters.'" Gentry v. Siegel, 668 F.3d 83, 88 (4th Cir. 2012)(emphasis added). That is, they apply unless the court directs otherwise. F. R. Bankr. P. 9014(c).

174. Creditors, and other parties in interest, need to gather information if they wish to see their interests represented in the outcome of the bankruptcy. Bankruptcy procedure provides them with multiple avenues to exercise their right to examine and discover.

[24] Case No. NEPR-AP-2019-0001 (*available in* https://energia.pr.gov/numero_orden/nepr-ap-2019-0001/).

175. Given the special nature of the ARAs, to consider the balance of equities, the Court and creditors inquiring "must have great latitude to *consider any type of evidence relevant to this issue*." Bildisco, 465 U.S. at 527 (emphasis added); In re City of Vallejo, CA, 432 B.R. 262, 275 (Bankr. E.D. Cal. 2010).

176. That said, the Opposing Parties are concerned with the lack of information in the record with which to analyze the ARAs and their potential benefits, issues which should be subject to discovery. This includes, but is not limited to the following:

a. Specifically, regarding the ECO PPOA, there is no public data that will allow the creditors or the Court to evaluate whether it is a beneficial negotiation. The avoided costs are not published. This information would enable us to judge investments such as the Costa Sur repairs, efficiency measures, renewable generation or other investments that may lead to cheaper generation than the ARAs provide.

b. Furthermore, PREPA's savings projections are based on multiple presumptions, for which it provides little support. For example, many of PREPA's projections paradoxically depend on the continued existence, and the retirement, of the Costa Sur Generation Facility. [Docket No. 1951 ¶ 10, 24, f.n. 5] PREPA does not explain how the different scenarios regarding Costa Sur will factor into the performance of these ARAs, which is necessary in order to determine if the new contracts are indeed beneficial.

c. 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, health pandemic in its reasoning. Recent developments cannot be ignored in these determinations.

d. 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") which requires EcoEléctrica to limit its operations. See *Remedial Order*, 170 FERC ¶ 61,260, Docket No. CP95-35-000 (March 26, 2020). 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.

e. Furthermore, PREPA has not shown that it explored *any* alternatives with which to compare the ARAs. Instead of comparing Ecoeléctrica or Naturgy with other LNG providers or with other alternatives such as efficiency measures, renewable generation and/or storage PREPA compares the ARAs to their previous versions.

f. PREPA has also failed to show *how* the changes of the ARAs will result in $100 million in savings.

177. Additionally, PREPA does not support its motion with expert testimony, nor does it allude to any expert consultation. Instead, PREPA attached an affidavit by Fernando M. Padilla, the Administrator of the Program Management Office of Restructuring and Fiscal Affairs with PREPA, [Case No. 17-03283-LTS, Docket No. 12580] who is decidedly not an expert on LNG markets.

178. As previously stated, the Opposing Parties served discovery upon PREPA that is currently pending and reserve all rights to amend this Motion with the results of the discovery.

179. Approving these ARAs without the benefit of discovery, in such a particular and important proceeding as Title III restructuring, where interests of utmost importance are at stake, would be a violation of procedural due process. See Gorman v. U. of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988)("Due process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation.").

180. Thus, the proposed assumption of the ARAs should not be approved without the benefit of proper discovery.

CONCLUSION

In view of the foregoing, the Opposing Parties respectfully request that this Honorable Court deny PREPA's urgent motion to assume the ARAs, because (1) PREPA's motion is premature, as the procedure before the Puerto Rico Energy Bureau is not final; (2) the ARAs are not executory contracts as required under Section 365; and (3) the ARAs do not meet even the most deferential standard for assumption, much less the higher standard that applies to unique situations like this.

Dated: April 27, 2020.

Respectfully submitted,

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WE HEREBY CERTIFY that on this same date we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all participants and Standard Parties. Paper copies have been mailed pursuant to Section II of the *Eleventh Amended Notice, Case Management and Administrative Procedures* to:

(i) Chambers of the Honorable Laura Taylor Swain (two copies shall be delivered to the chambers):
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St., Suite No. 3212
New York, New York 10007-1312;

(ii) Office of the United States Trustee for Region 21
Edificio Ochoa, 500 Tanca Street, Suite 301
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