COMMONWEALTH OF PUERTO RICO
PUERTO RICO ENERGY BUREAU

IN RE: REGULATION FOR THE EVALUATION AND APPROVAL OF AGREEMENTS BETWEEN ELECTRIC SERVICE COMPANIES DUPONT ELECTRONICS MICROCIRCUITS INDUSTRIES, LTD.; FMC AGRICULTURAL CARIBE INDUSTRIES, LTD.; AND BRISTOL-MYERS SQUIBB HOLDINGS PHARMA LTD. LIABILITY COMPANY Commenters	CASE NO.: NEPR-MI-2020-0014 SUBJECT: Notice of Proposed Regulation and Request for Public Comments

COMMENTS ON PROPOSED REGULATION FOR THE EVALUATION AND APPROVAL OF AGREEMENTS BETWEEN ELECTRIC SERVICE COMPANIES

COMES NOW DuPont Electronics Microcircuits Industries, Ltd., FMC Agricultural Caribe Industries, Ltd., and Bristol-Myers Squibb Holdings Pharma Ltd. Liability Company (hereinafter, jointly, "Commenters"), represented by the undersigned legal counsel, and very respectfully state and pray:

1. On October 19, 2020, the Energy Bureau issued a Resolution wherein it notified the publication of the Proposed Regulation for the Evaluation and Approval of Agreements Between Electric Service Companies ("Proposed Regulation").

2. On November 13, 2020, the Commenters filed a Request for Extension to Submit Comments.

3. On November 17, 2020, the Energy Bureau issued an extension to submit comments until December 3, 2020.

4. Within the extension granted by the Energy Bureau, the Commenters herein submit their comments to the Proposed Regulation. Such comments focus on the potential applicability of the proposed regulation to "large scale" industrial and commercial consumers, energy cooperatives, or other demand aggregator structures that enter into power purchase

agreements directly with an independent power producer. See Section 1.04(B) of Proposed Regulation.

5. First, the Commenters note that the term “large scale industrial and commercial consumers” is not defined in either the Proposed Regulation or the law. Though the Proposed Regulation states that it “shall apply to the provision of energy from any single generator that is equal to or greater than one megawatt,” which appears is the threshold that the Energy Bureau is considering, clarification as to the phrase “large scale industrial and commercial consumers” is necessary.

6. The Commenters would also like to note that the title of the Proposed Regulation is somewhat misleading in that it only addresses contracts between electric service companies when, as explained below, a substantial portion of the of the Proposed Regulation appears to address other contractual relationships.

7. As noted above, the comments presented in this document concern commercial and industrial generation and consumption projects. Commercial and industrial-scale distributed generation projects have been developed and constructed in Puerto Rico for many years. The Commenters believe that the Proposed Regulation should be revised to clarify that **it does not apply** to these types of projects on the grounds of policy contained in Act 57-2014, and Act 17-2019, as amended. In general, the parties involved in such projects invest hundreds of thousands to millions of dollars in the negotiation of contracts, design, permitting, construction and operation of systems planned for commercial or industrial facilities. The parties to such agreements are sophisticated and well advised in all things technical, legal and financial, often times by specialized professionals. In many cases, the selection of the provider is the result of a private request for proposals. In other situations, the agreement is the result of direct negotiation. Contractual terms, such as those related to pricing, duration, guarantees and

others, are heavily negotiated by each party. In short, given the stakes and the resources of the suppliers and the consumers, relative equity is maintained between contracting parties.

8. To date, the entire negotiation and contractual phase for commercial and industrial projects has been performed without government intervention. The Commenters are not aware of any major legal or regulatory obstacles to this process between private parties, who are generally experienced or ably advised with respect to such types of agreements. However, the Proposed Regulation has been drafted in a way that could force parties like the Commenters into complying with burdensome and intricate requirements that could derail or hinder the development of commercial and industrial projects.

9. Act 57-2014, as amended, does grant the Energy Bureau broad powers to approve, review and modify, as necessary, rates and charges by electric service companies (see e.g. Section 6.3(n)); to evaluate and approve all contracts between electric service companies, including independent power producers, prior the execution of such contracts (see Section 6.32(a)); to approve regulations establishing the standards and requirements which electric service companies must comply with, which regulation must include terms and conditions to be included in any power purchase agreement, interconnection agreement, and reasonable rates based on generation technologies, and others (See Section 6.32(c)); and ensure that rates, fees and charges paid to independent power producers are fair and reasonable and protect the public interest (see Section 6.32(g)).

10. Notably, however, no provision of Act 57-2014 specifically addresses the regulation by the Energy Bureau of contracts in the context of private, onsite distributed generation projects. The foregoing notwithstanding, if we assume that the Energy Bureau has been delegated the power to regulate such contracts, the Commenters are of the opinion that evaluation and approval of power purchase agreements for commercial or industrial facilities at the level of detail that would be required under the Proposed Regulation may constitute an overreach on

the part of the Energy Bureau. If in fact the Bureau were authorized under Act 57-2014 to intervene in the contractual minutiae between private parties, only one of which is an electrical service company (e.g. one party an electric service company and the other a commercial or industrial facility), such intervention – we respectfully submit – would be an undue encroachment. As further explained below, the Energy Bureau's intervention in commercial or industrial agreements of this nature would be contrary to Act 57-2014, which generally provides for the establishment of options in the energy sector in the form of electric service companies and reasonable competition between them.

11. The Commenters foresee that, if approved as published, the Proposed Regulation may discourage private parties from entering into energy supply agreements, and therefore cause significant disruption and harm to this business sector. Under Section 3.01 of the Proposed Regulation, the contracts are required to contain specific provisions, some of which the parties may not need or wish to include, such as procedures and rules for amending the contract; circumstances under which the contract may be modified to maintain a "financial balance" between the parties; a bond or security to ensure compliance with the contract; the inclusion of "[a]ny provision required by law or agreed by the parties to protect the best interests of PREPA, the Commonwealth of Puerto Rico, and the clients," which language is ambiguous and troublesome (see more below); a provision regarding the assignment of the agreement; and an indemnity clause, among others.

12. Under Section 3.03 of the Proposed Regulation, the Energy Bureau would review the proposed cost per kilowatt-hour ("kWh") and determine if it is just and reasonable. The Commenters respectfully submit that the Energy Bureau should not intervene with the economic decisions of sophisticated parties in the context of commercial and industrial contracts. The cost of energy per kWh, as well as other commercial terms, will be specific to the circumstances and needs of the contracting parties.

13. Section 7.01 of the Proposed Regulation would require the publication of the power purchase agreement approved by the Energy Bureau, which is something the contracting parties may want to keep confidential. Parties are also unlikely to want to publish a redacted version of the agreement.

14. Other requirements of the Proposed Regulation may constitute an excessive regulatory burden for contracting parties. Section 2.02(A), which lists documents to be included with the application for review and approval of a power purchase agreement, requires that a statement that the electric service company has been certified by the Energy Bureau under Regulation 8701 and a copy of that certificate (see subsection 2). The statement, the Commenters believe, is unnecessary if the electric service company is certified, which certification should already be on file with the Energy Bureau. Section 2.02(A)(3) requires submittal of a copy of the proposed contract in electronic searchable form. As stated above, parties may not wish to submit a proposed or draft version of an agreement. Furthermore, Section 2.02(A)(6) requires the filing of a statement of compliance with Act 17-2019, with a sworn statement by each applicant avowing that it has read the legislation, understands the requirements and obligations and agrees to comply with all laws and regulations. In the Commenters' view, both the statement of compliance and the sworn statement are burdensome and unnecessary. In addition, Section 2.02(A)(8) requires the filing of a statement that the applicant will make itself available within forty-eight hours to meet with the Energy Bureau either in person or through a telecommunications or electronic means, as appropriate, to provide further information in accordance with the Energy Bureau's directives. This statement is unnecessary, and availability should be as per the directives of the Bureau.

15. Section 2.03 in general deals with Supplementary Studies and technical evaluations to be conducted by PREPA. Specifically, when required, PREPA would have to complete and issue such Supplementary Study within ninety (90) days of the presentation of the

interconnection evaluation to PREPA (see subsection B); certify that such study is not needed (if such is the case) within forty-five (45) days of the filing of the interconnection evaluation (see subsection C); and submit to the Energy Bureau the results or certification of such study within five (5) days from issuance thereof (see subsection D). In general, the Commenters do not object to the foregoing requirements, since they would establish time limitations for PREPA's evaluation of proposed interconnections. The Proposed Regulation would also provide a remedy in subsection E, which would penalize PREPA for failing to comply with the above requirements and would have the Energy Public Policy Office make recommendations instead.

16. Despite the foregoing, in the balance of things, these provisions would not aid the private parties. First, the Proposed Regulation would make technical evaluations and Supplementary Studies by PREPA a pre-requisite to the review and approval of contracts. As noted above, the Commenters respectfully submit that the Energy Bureau should not extensively regulate, if at all, agreements between electric service companies and commercial or industrial counterparties. Second, the 90-day term and the 45-day term described above are too long. If such period lapses, the Energy Public Policy Office may then take an undefined amount of time to make recommendations. In the context of commercial and industrial projects, these periods would be excessive. The Commenters respectfully submit that the Energy Bureau should include language stating that, if after certain period PREPA does not make a determination regarding the technical evaluation or Supplementary Study, it shall be deemed approved. We believe forty-five (45) days from the filing of the interconnection evaluation is reasonable.

17. Section 2.04(B) requires a slew of documents regarding an applicant's managerial capabilities and experience. The Commenters believe that, in general, the entire section is too burdensome, and that its core requirements would be more reasonably included in an electrical service company's certification application and in its Operational Report. For example, subsection 6 requires the disclosure of conviction of felonies or revocation of other licenses.

This requirement may be reasonable when contracting with the government but unnecessary for the execution between two private parties. That is, even the Request for Certification Form and the Personal Information Form under the Energy Bureau's electric service companies' regulation do not require this level of detail. A reasonable alternative may be that, in case the energy provider is not an electric service company certified by the Energy Bureau, said provider must be certified as electric service company or file the information required to be certified as an electric service company.

18. Section 2.04(C), in turn, requires the filing of a set of documents related to the financial capability and experience of an applicant. The Commenters likewise believe the entire section can be stricken off, since the most essential information can be reasonably ascertained with the annual Gross Revenues and Financial Statements Form and attachments thereto, all of which are required under the Bureau's electric service companies' regulation. Again, a reasonable alternative may be that, in case the energy provider is not an electric service company certified by the Energy Bureau, such energy provider must be certified as an electric service company and file the Gross Revenues and Financial Statements Form.

19. Section 2.04(D) requires the presentation of details related to the technical capability of the applicant. As with the provisions indicated above, this section is too burdensome, and the most important information would be generally provided in the application for certification as an electric service company or in the Operational Report that is required of electric service companies. In addition, Section 2.04(D)(3) requires the submittal of references from previous clients for similar projects, which information would include name, position, company or agency and project details. The foregoing may be problematic, as prior clients may object to disclosing such information. An alternative can be, likewise, that the energy provider be certified as electric service company.

20. Section 2.04(E) requires the submittal of information related to compliance with regulations and orders. Section 2.04(E)(1), which requires the filing of proof that the applicant is authorized to do business in Puerto Rico, is unnecessary, as such proof is filed for an electric service company's certification application. Section 2.04(E)(4), which requires a plan for complying with all environmental and other laws and regulations of the government of Puerto Rico and the federal government of the United States, and Section 2.04(E)(5), which requires an affirmation that, at a minimum, the applicant will adhere to all statutes and regulations involving consumer rights and protections[1] are unnecessary and excessively burdensome. The Energy Bureau can assume applicants will follow applicable laws and regulations without applicants having to provide self-serving documents or prepare broad-scope plans that will likely require significant work and expense. For instance, requiring a plan for complying with all environmental and other US and Puerto Rico laws and regulations is vague and burdensome, as it can include **all** applicable laws and regulations. Section 2.04(E)(8), which requires the submittal of a plan addressing disputes with customers regarding billing or payment and a plan for offering payment plans that provide customers with a reasonable opportunity to pay arrears to avoid disconnection of service is something that, for commercial and industrial projects, is generally agreed to by the parties and may be unnecessary.

21. Section 2.04(G) relates to information on operation and maintenance of assets. The general core of this information is either provided in the Operational Report (see subsection 1, which requires information on plans to achieve efficiencies in operations along with any plans to share cost savings with customers), may be too burdensome, or even something that the

[1] Including but not limited to information on deposits, billing, payment arrangements and disconnection of service as applicable and provide any plans that are different from these regulations, in which case these plans would be required to exceed the requirements under existing regulations.

applicant may not wish to share (see subsection 2, which requires the filing of a copy of all insurance plans, including but not limited to corporate or asset insurance).

22. Other issues that the Commenters have regarding the Proposed Regulation are summarized below:

> Section 2.05(A)
> Subsection 1, which requires an applicant to affirm it will comply with all Energy Bureau regulations and orders, is unnecessary. As mentioned above, we believe the Energy Bureau can assume compliance of the law by applicants.
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> Subsection 2, which requires "Applicant's affirmation that it will timely file a complete Integrated Resource Plan and/or Integrated Distribution Plan, in accordance with the Energy Bureau's regulations thereon" is vague, as the Integrated Resource Plan is a government instrument and not something that private parties prepare.
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> Section 2.05(B) (regarding operations, maintenance and improvements of the transmission and distribution system)
> These sections are too cumbersome for private applicants and seems geared towards the concessionaire of PREPA's transmission and distribution system.
>
> Section 2.05(C) (regarding system operation responsibilities)
> These sections are too cumbersome for private applicants and seems geared towards the concessionaire of PREPA's transmission and distribution system.
>
> Section 2.05(D) (regarding integration of renewables and distributed energy resources (DER) into the grid
> These sections are too cumbersome for private applicants and seems geared towards the concessionaire of PREPA's transmission and distribution system.
>
> Section 2.06(A) (regarding additional requirements for applications that provide generation services)
> Subsection 2, which requires an affirmation by applicants that they will comply with all Energy Bureau regulations and orders is unnecessary, as we believe the Energy Bureau can assume applicants will obey all applicable laws and regulations.
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> Subsection 3, which requires an affirmation that the applicant will comply with all Energy Bureau regulations and orders on Integrated Resource Planning,[2] is unnecessary, as we

[2] Including filing all necessary information to the Transmission and Distribution Provider as it requires and as required by the Energy Bureau on a timely basis to facilitate the filing of a complete IRP on time and to

believe the Energy Bureau can assume applicants will obey all applicable laws and regulations.

Section 3.01(A) (regarding required terms and conditions, in general)
Subsection 7, which requires including in agreements "[t]he obligation to comply with applicable federal and local laws" is unnecessary for the same reasons stated above.

Subsection 17, which requires including in agreements "[a]ny provision required by law or agreed by the parties to protect the best interests of PREPA, the Commonwealth of Puerto Rico and the clients" is too broad and/or vague, as the parties would have to seek and include any and all possibly applicable provisions. To state the obvious, neither PREPA, nor the Commonwealth of Puerto Rico, nor PREPA's customers would be parties to private commercial or industrial energy supply agreements. This requirement would constitute an improper intervention by the Energy Bureau, in that it would require private parties to include contractual clauses favorable to third parties, namely PREPA, the Commonwealth of Puerto Rico, and/or PREPA's customer base.

Section 4.02(A) (regarding the timeline for the Energy Bureau's review and approval of PPAs)
As noted above, the Commenters believe that the Energy Bureau should not regulate private agreements between energy suppliers and commercial or industrial customers. Subsection 4, which provides for the extension by the Energy Bureau of the time to review and approve a contract from the original thirty (30) days to ninety (90) days, is too long a period. If promulgated as proposed, the proposed provision would create yet another hurdle and cause for delay in commercial and industrial projects which would be prejudicial to the contracting parties.

Section 5.02 (regarding documents to be included with the application for review and approval of the Energy Compliance Certification)
Subsection (F), which requires a statement recognizing that the thirty-day review period (see above) will commence when the Energy Bureau determines that the application is complete, is unnecessary, as the Energy Bureau can assume applicants will abide by the text of the regulation that is promulgated.

Subsection (H), which requires a statement from the applicant that it will make itself available within forty-eight hours to meet with the Energy Bureau, as appropriate, to provide the information in accordance with the Energy Bureau's directives, is

allow electrical energy to be provided reliably, cleanly, efficiently, resiliently and affordably thereby contributing to the general well-being and sustainable development of the people of Puerto Rico.

unnecessary and cumbersome, as the Energy Bureau can assume applicants will make themselves available.

Subsection (l), which requires a statement that the applicant will promptly furnish any further written documentation that the Energy Bureau requires, is likewise unnecessary.

WHEREFORE, DuPont Electronics Microcircuits Industries, Ltd., FMC Agricultural Caribe Industries, Ltd., and Bristol-Myers Squibb Holdings Pharma Ltd. Liability Company respectfully request that the foregoing comments be considered by the Puerto Rico Energy Bureau.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, December 3, 2020.

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