

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

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IN RE: THE IMPLEMENTATION OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY INTEGRATED RESOURCE
PLAN AND MODIFIED ACTION PLAN

CASE NO.: NEPR-MI-2020-0012

SUBJECT: Response to, and Motion
for Clarification of, Energy Bureau
Resolution and Order of October 12,
2021 Addressing Target Date for
Issuance of Tranche 2 RFP and Other
Matters

**RESPONSE TO, AND MOTION FOR CLARIFICATION OF, OCTOBER 12, 2021
RESOLUTION AND ORDER ADDRESSING THE TARGET DATE FOR ISSUANCE OF
THE TRANCHE 2 RFP AND OTHER MATTERS**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority, through its counsel of record,
and respectfully submits and prays as follows:

1. On October 12, 2021, the Energy Bureau of the Puerto Rico Public Service Regulatory Board (the “Energy Bureau”) issued a Resolution and Order in the captioned case (the “October 12 Resolution”) in which, on its own motion, it rescheduled the target date for the Puerto Rico Electric Power Authority’s (“PREPA’s”) issuance of its Tranche 2 Request for Proposals (“RFP”) for renewable generation and energy storage resources from October 15, 2021 to October 31, 2021. In that October 12 Resolution, the Energy Bureau also granted PREPA’s motion, submitted on September 20, 2021, for confidential designation of information submitted by proponents in the Tranche 1 RFP process which PREPA shared with the Energy Bureau on that date.

2. In the October 12 Resolution, the Energy Bureau determines that PREPA has failed to comply fully with its August 26, 2021 Resolution and Order directing PREPA to submit to the Energy Bureau information on pricing per technology group presented in proposals made in

response to the Tranche 1 RFP.¹ In addition, the Energy Bureau complains of “a pattern of delays on PREPA’s completion of the Tranche 1 RFP process”² and, stressing “the importance of completing the renewable energy procurement in a timely manner” in light of “the dire state of the PREPA generation fleet,” goes on to caution PREPA that “it is actively considering the possibility of conducting the RFP process for the remaining procurement tranches, including Tranche 2.”³ PREPA believes it necessary to respond to each of these statements, and to seek clarification of the Energy Bureau’s determination that PREPA has failed to comply with its directives. PREPA also asks the Energy Bureau to grant it flexibility to respond to two timing-related concerns many Tranche 1 Proponents have identified.

3. PREPA disagrees with the Energy Bureau’s determination that it has failed to submit pricing information per technology group as required by the August 26 Order. In fact, PREPA representatives provided that pricing information to members of the Energy Bureau on September 16, 2021,⁴ in a meeting PREPA and the Energy Bureau organized for the purpose of engaging in good faith discussions with the Energy Bureau on best practices and PREPA’s concerns about Energy Bureau requirements for the Tranche 1 process. PREPA provided per technology group pricing information in this manner in order to abide by the process contemplated in the RFP, to protect the confidentiality of RFP responses and to maintain the integrity of the RFP process, while keeping the Energy Bureau abreast of the information requested. Thus, PREPA *has* provided the Energy Bureau with the evaluation of pricing per technology group which the Energy Bureau takes it to task for not having provided as part of PREPA’s September 20 Motion,

¹ October 12 Resolution at 2.

² *Id.*

³³ *Id.*

⁴ This was the second meeting of its kind, the first having been held on September 3, 2021.

and the Energy Bureau has had that information in its possession since September 16, 2021. This constitutes substantial compliance with the requirements of the August 26 Order. Accordingly, PREPA respectfully requests the Energy Bureau to clarify its October 12 Resolution to retract its determination that PREPA has not fully complied with the August 26 Order.

4. PREPA also disagrees with the suggestion in the October 12 Resolution that PREPA, and PREPA alone, has been responsible for “a pattern of delays in [its] completion of the Tranche 1 RFP process,” and the related suggestion that this could be cause for the Energy Bureau to take on the task of conducting the RFP process for the remaining procurement tranches, including Tranche 2.⁵ While PREPA acknowledges that it has had to seek additional time to complete some of the many tasks required to evaluate proposals submitted in response to the Tranche 1 RFP, this did not result from a lack of diligence or commitment on PREPA’s part. The RFP process – the first of its kind ever undertaken in Puerto Rico and the most ambitious of any currently underway in the United States – is inherently complex and time consuming. Utilities around the world typically spend significant time on the technical analysis and preparation required to connect major power projects to a grid system; failing to do so poses significant long-term risks in terms of reliability and cost. PREPA acknowledges the current situation and is working every day with other stakeholders to move renewables, storage and transmission projects forward. That PREPA has struggled at times to comply with the Energy Bureau requirement that it complete the RFP process in a timeframe that is substantially compressed not only relative to standard market practice in the United States, but also relative to the procurement regulations that generally apply

⁵ October 12 Resolution at 2.

to generation resource procurements in Puerto Rico, does not establish a pattern or practice of delay on PREPA's part.⁶

5. Additionally, the need to resolve or correct inconsistencies and gaps in information submitted (or in some cases not submitted) in support of many of the Tranche 1 proposals, to divert resources to responding to ongoing requests for information and to adjust the process to implement Energy Bureau requests, has further complicated the process. At the September 16 meeting referred to above, the Energy Bureau suggested that PREPA allow the third phase of evaluations to be inclusive of more Proponents. Implementing the Energy Bureau's directives that PREPA maximize the number of Tranche 1 proposals advanced to the Phase III evaluation, that PREPA not disqualify proponents whose projects PREPA had found deficient or technically infeasible, and that PREPA analyze interconnection scenarios which PREPA had initially found cost-prohibitive required additional time and resources, which for PREPA are in short supply.

6. PREPA thus rejects characterizations of its approach to the renewables and storage procurement process as having involved "foot dragging" or inadequate effort. PREPA and its advisors have dedicated and are continuing to dedicate their full time and attention to the achievement of the objectives of the RFP – the selection of a mix of renewable generation and energy storage resources that can best advance Puerto Rico toward its goal of displacing existing fossil generation with cleaner and cost-effective sustainable resources.

7. PREPA is not alone in having found the Tranche 1 RFP process, including the timelines imposed by the Energy Bureau, difficult. A number of Tranche 1 Proponents with whom PREPA

⁶ See generally Resolution and Order (Ruling on Motion titled *Motion for Reconsideration of the Resolution and Order on the Evaluation of Puerto Rico Electric Power Authority's Draft Procurement Plan*), Case No. NEPR-MI-2020-0012 (Jan. 7, 2021) (the "January 7 Resolution") at p. 5 (extending the time period for RFP evaluation from the initially specified 45 days to 75 days, which is accelerated from the applicable Regulation 8815 timelines (which are 90 days)).

has engaged in Phase III discussions have raised substantial concerns with the unconventional and off-market timelines the RFP prescribes for contract finalization, project construction and commercial operation which the Energy Bureau has imposed on the RFP process. Among these, three stand out:

- a. Because the Energy Bureau’s overall timeline requires contract finalization prior to completion of the System Impact and Facility Studies that identify required network upgrades and other interconnection works feeding into contract pricing, Proponents of utility-scale Energy Resources selected in Phase III must finalize a contract several months before they know what the final contract price will be. LUMA will conduct the System Impact Study and Facility Study on the Phase III proposals over the next few months, and the final pricing will not become evident until their completion. Proponents have concerns that, because such studies typically take at least five (5) months to complete, not the 75 day time period the Energy Bureau seems to have assumed is adequate,⁷ the establishment of the final contract price is likely to be delayed and the price itself may be suspect.
- b. Proponents must achieve commercial operation within twenty-four (24) months of the signing of a contract,⁸ even though (i) the Proponents will not have a legally binding contract with PREPA until the parties satisfy all conditions for the closing date under the contract *after signing*, and (ii) Proponents do not have control of

⁷ January 7 Resolution at Section III, Paragraph 2 (“The Energy Bureau **CLARIFIES** that it expects PREPA to evaluate responses to the RFP and identify an initial set of respondent proposals that can proceed to the contract negotiation stage (Phase III) within the 75 day timeline for evaluation of the responses to the RFP.”) (emphasis in original).

⁸ Resolution and Order (Evaluation of Procurement Plan), Case No. NEPR-MI-2020-0012 (Dec. 8, 2020) (“December 8 Resolution”) at Section IV. A. 3. A, p. 8 (“PREPA **SHALL** establish in the RFP that commercial operation commencement date should not exceed twenty-four (24) months from signing of the contract.”) (emphasis in original); *see also* December 8 Resolution, Appendix A, Section III, Paragraph 3.

when the date of such closing will occur. The Energy Bureau's approach to the timeline for Commercial Operation is fundamentally inconsistent with the standard and customary approach adopted by utilities and other off-takers both inside and outside of the United States for transactions of this type. A better approach would have the 24-month period to complete the Project anchored to the Closing Date.

- c. Based on Energy Bureau requirements for other renewable energy projects, PREPA understands that it cannot grant a time extension for the achievement of the commercial operation date under a contract once the aggregate time extensions exceed ten percent (10 %) of the 24-month construction period without first seeking approval from the Energy Bureau. Proponents have concerns that the Energy Bureau would decline to approve a valid time extension claim, leaving them exposed to the risk of incurring penalties under their agreements.

Some Tranche 1 Proponents have raised the possibility that they may be unwilling to commit to achieving the milestones the Energy Bureau has established unless they are granted additional flexibility. PREPA includes with this Motion as **Attachment A** summary of the communications PREPA has received from Proponents to date on this subject. This summary, PREPA submits, demonstrates that it is inaccurate and unfair to assign to PREPA all responsibility for delays that have been experienced in Tranche 1. The process itself is a major reason why the Tranche 1 RFP has taken longer than anticipated to be completed. PREPA was not the only, or even the primary, architect of the timeline for this process.

8. PREPA has submitted the Tranche 2 RFP to the Energy Bureau for its review today, October 15, 2021. This is the date the Energy Bureau had previously established for issuance of

the RFP before modifying it, on its own motion, in the October 12 Resolution. PREPA wishes to issue the Tranche 2 RFP as soon as possible after presenting it to the Energy Bureau October 15, in the interest of moving ahead as promptly as possible with the next round of renewable generation and energy storage resource procurement. PREPA is hopeful that the Energy Bureau will quickly complete its review of the Tranche 2 RFP and will authorize its issuance before October 31, 2021.

9. As the Energy Bureau is aware, PREPA has been tasked by the Public-Private Partnerships Authority (“P3A”), in accordance with Act No. 120-2018, as amended, Act No. 17-2019, as amended, Act No. 29-2009, as amended and Act No. 83-1941, as amended, to continue the renewable generation and energy storage procurement process through Tranche 2.⁹ PREPA is dedicated to continuing to manage the Tranche 2 process, taking advantage of the lessons it has learned in managing Tranche 1. PREPA respectfully submits that under applicable law and given the P3A’s delegation, the Energy Bureau may not insert itself in PREPA’s place as the entity responsible for the conduct of the Tranche 2 process. In any event, it would be legally indefensible for the governmental agency charged with responsibility for approving contracts arising from the procurement process¹⁰ to assume the role of the entity conducting the RFPs intended to result in such contracts. PREPA respectfully requests the Energy Bureau to clarify the October 12 Resolution and confirm that PREPA will remain responsible for the Tranche 2 process.

⁹ See Letter from Fermín Fontanés Gómez, Esq., Executive Director, Puerto Rico Public-Private Partnerships Authority to Efran Paredes-Maisonet, Executive Director, Puerto Rico Electric Power Authority re: PREPA Renewable Energy and Battery Energy Storage System Procurement and Tranche 2 (Sept. 10, 2021).

¹⁰ See *generally* PREB and PREPA, 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 No. 8815 (Nov. 9, 2016).

WHEREFORE, the Puerto Rico Electric Power Authority respectfully requests that the Energy Bureau (i) conclude that PREPA has substantially complied with the Energy Bureau's directives concerning submission of pricing information per technology group; (ii) retract its determination that PREPA has not fully complied with the August 26 Order in this regard; (iii) clarify its October 12 Resolution to confirm that PREPA will remain responsible for the Tranche 2 RFP process, and (iv) grant PREPA flexibility to (1) anchor the 24-month timeline to achieve Commercial Operations to the Closing Date under the contracts, rather than the date of signing (see paragraph 7(b) above), and (2) agree to extensions of the project development timelines for force majeure and PREPA-caused events (i.e., PREPA Risk Events) without requiring PREB approval in each case (see paragraph 7(c) above).

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15th day of October 2021.

s/ Maralíz Vázquez-Marrero

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Attachment A

Summary of Communications¹

- (a) *Proponent's comments regarding requirement that Proponents sign a contract before final contract pricing can be established.*

The requirement to finalize the contracts well before final contract pricing is known is likely unrealistic, given the number of sponsors participating and that, in this first round of the procurement program, it's critical to get the contracts to a point that they're technically and commercially viable and financeable, to ensure the projects will ultimately be constructed and to attract participation in subsequent rounds of RFPs.

The timeline presents a challenge with the uncertainty of the final rate decision paid to the Resource Provider until an unknown future date ... that may have dire consequences on the approved projects. While we appreciate that PREPA is moving forward with a timeline to execute contracts, this additional calculation of pricing given to us after the signing is not a normal market procedure. While it may expedite the pace of the execution of documents, it will not quicken the pace of development as the final determination of pricing determines our cost of financing.

- (b) *Proponent's comments regarding requirement that Proponents achieve commercial operation within 24 months of the signing of a contract.*

The Guaranteed Commercial Operation Date is defined as occurring on the second anniversary of the Agreement Date, which is the date upon which both PREPA and Proponent execute the PPOA. However, the Closing Date will occur after the Agreement Date, and there is no guaranty precisely when it will occur. Any significant delays to the Closing Date, which could occur due to circumstances entirely outside of Proponent's control and within the control of PREPA, could cause Proponent to miss the Guaranteed Commercial Operation Date and subject it to financial penalties. In order to address this unwarranted risk and make the PPOA more in line with market terms and conditions for renewable energy project PPOAs, Proponent requests that the Guaranteed Commercial Operation Date occur on the second anniversary of the Closing Date, rather than the second anniversary of the Agreement Date.

The overall timelines imposed in the RFP process and in the PPOA/ESSA contracts are impractical and may be unachievable. In particular, the Guaranteed Commercial Operation Date should be a date at least two years from the Closing Date (the date that certain closing conditions are met under the agreement) rather than the Agreement Date (the execution date of the agreement). Ideally, the Guaranteed Commercial Operation Date would be an even later date to better ensure an efficient and deliberate development and construction process. Without assurance that PREPA will ratify the contracts until its Best Interest Determinations have been

¹ This Attachment A contains the communications PREPA received from Proponents as of the date of the Motion. In addition to the communications reflected in this Attachment A, several of the Proponents have provided issues lists for discussion, which in each case included references to the issues identified herein.

rendered, it is inappropriate to expect sponsors to incur major capital exposures to advance development prior to the Closing Date, which may include large equipment deposits given global supply constraints and procurement lead times for top-tier solar panels and battery systems.

It no longer makes sense to tie the Guaranteed Commercial Operation Date to the Agreement Date. As originally conceived, the amount of time between the Agreement Date and the Closing Date was minimal. That is no longer the case. Consequently, the Guaranteed Commercial Operation Date should now be tied to the Closing Date as the Resource Provider should not be penalized for delays beyond its control.

(c) Proponent's comments regarding restriction on PREPA's ability to grant extensions of time once the aggregate time extensions exceed ten percent (10 %) of the 24-month construction period without first seeking approval from the Energy Bureau.

It is also important for the Puerto Rico Energy Bureau to confirm here at the outset that extensions of time for Force Majeure or PREPA Risk Events can continue beyond 2.4 months, rather than waiting until later to decide, which would place undue uncertainty over the projects' development.

We would like to request that the 10% cap being used for extension to timeline be given more thought and leniency due to the fact that we are still uncertain of an exact date for final pricing.

Currently, Section 3.4 of the PPOA effectively states that even if Proponent has the right to extend the Commercial Operation Date due to a Force Majeure event, "such extensions shall not exceed, in the aggregate ten percent (10%) of the period allocated for the time for completion or occurrence on the Agreement Date without the prior written approval of PREB [i.e. 2.4 months]." Given current challenges related to global supply chains, ongoing impacts of COVID-19, and trade tensions between the United States and China (including an active proceeding in which an anonymous group of U.S. solar manufacturers is requesting that the U.S. Department of Commerce launch anti-circumvention inquiries into imports of certain solar products from companies in Vietnam, Malaysia and Thailand that may be evading trade restrictions applicable to China) it is likely that following the execution of the PPOA, Proponent could be subject to Force Majeure events that could cause delays to the Facility's Commercial Operation Date. While any resulting delays to the Commercial Operation Date less than 2.4 months would not subject Proponent to delay liquidated damages, delays greater than 2.4 months would result in Proponent incurring Delay Liquidated Damages, even if such delays are due to Force Majeure events. It is commercially unreasonable to subject Proponent to financial penalties when the delays to the Facility's Commercial Operation Date are the result of Force Majeure events. This provision, as written, is out of line with market terms and conditions in PPOAs for renewable energy projects and presents an unwarranted and unreasonable commercial risk to Proponent. Accordingly, Proponent requests that PREPA eliminate the requirement that PREB needs to approve of any aggregate delays to the Commercial Operation Date when such delays are due to Force Majeure events or are otherwise excusable under the PPOA.

CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and a courtesy copy of the filing was sent to LUMA through its legal representatives at margarita.mercado@us.dlapiper.com and laura.rozas@us.dlapiper.com.

In San Juan, Puerto Rico, this 15th day of October 2021.

s/ Maralíz Vázquez-Marrero
Maralíz Vázquez-Marrero