

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

<b>NEPR</b>  <b>Received:</b>  <b>Oct 19, 2021</b>  <b>4:55 PM</b>
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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

**MOTION TO SUPPLEMENT ATTACHMENT A OF “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 15, 2021, the Puerto Rico Electric Power Authority’s (“PREPA’s”) filed with the Energy Bureau of the Puerto Rico Public Service Regulatory Board (the “Energy Bureau”) *“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”* (“Motion”).

2. Through said Motion, PREPA sought to respond to, and clarify certain statements made by the Energy Bureau in the Resolution and Order entered into on October 12, 2021 (the “October 12 Resolution”).

3. Additionally, as part of the Motion, PREPA included Attachment A which contained a summary of the communications PREPA has received from Proponents related to their concerns on the timeline and RFP requirements.

4. Since the October 15, 2021 filing, PREPA has received additional communications from Proponents and hereby submits a Supplement to Attachment A which incorporates the updated summary of additional communications received.

WHEREFORE, PREPA respectfully requests the Energy Bureau to TAKE NOTICE of the Supplement to Attachment A and deemed incorporated to the October 15, 2021 Motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 19<sup>th</sup> day of October 2021.

s/ Maralíz Vázquez-Marrero

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## 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](mailto:margarita.mercado@us.dlapiper.com) and [laura.rozas@us.dlapiper.com](mailto:laura.rozas@us.dlapiper.com).

In San Juan, Puerto Rico, this 19<sup>th</sup> day of October 2021.

*s/ Maralíz Vázquez-Marrero*  
Maralíz Vázquez-Marrero

## Supplement to Attachment A

### Updated Summary of Communications<sup>1</sup>

- (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.

Proponent proposes that PREPA reconsider the requirement for contracts to be signed prior the issuance of Best Interest Determinations (and only execute such contracts for projects that receive the favorable determination). This approach will also allow PREPA more flexibility to reflect the outcomes of the various feasibility studies that are pending.

As currently presented, the Power Purchase and Operating Agreement ("PPOA") is not fully effective when executed. See Section 2.3. The Parties must jointly sign a certificate confirming the satisfaction or waiver of certain Conditions Precedent ("Closing Date") in Appendix C, which include the completion of the Feasibility Study, System Impact Study and Facility Study. These studies, in turn, may have a material effect on the cost of the PREPA Interconnection Facilities and ultimately on the Contract Rate. The PPOA terminates automatically if the Closing Date does not occur within 180 Days of the Agreement Date, PREPA does not accept the Best and Final Offer made by Resource Provider, or if PREPA does not issue a Best Interests Determination for the Project. The net effect of these provisions is that Resource Provider will be in a state of "legal limbo" prior to the Closing Date, prevented from undertaking major investments, executing procurement contracts, or undertaking the design of the Interconnection Facilities until all Conditions Precedent have been satisfied. A better structure for the PPOA would involve eliminating the Closing Date concept and requiring the satisfaction of the Conditions Precedent prior to the execution of the Agreement.

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<sup>1</sup> This Supplement to Attachment A contains the communications PREPA received from Proponents as of the date of the Supplement. Furthermore, in addition to the communications reflected in this Attachment A, several of the Proponents provided issues lists for discussion, which in each case included references to the issues identified herein.

As presented, the Power Purchase and Operating Agreement ("PPOA") is not fully effective on the Agreement Date. Certain Conditions Precedent must be achieved in order for the Closing Date to occur, when full effectiveness of the agreement takes hold. The Closing Date, however, must await the conclusion of the System Impact Study and Facility Study, and after that the Best Interests Determination by PREPA. Such studies could prescribe or require material modifications to the Interconnection Facilities, the cost of which would not have been contemplated when the PPOA was originally executed. Realistically, these activities will be completed sometime next year, before which all Resource Providers will be on shaky ground while they try to advance development without actually making definitive contractual commitments which need to await the Closing Date. Respectfully, the logical and coherent approach would be for PPOA to be executed after these studies have been completed. The Best Interests Determination would be a subsequent step - should PREPA decide to keep the current structure of the PPOA - but there should not be a significant delay between the Agreement Date and the Closing Date.

*(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 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.

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.

As the PPOA is currently drafted, the Guaranteed Commercial Operation Date milestone runs from the Agreement Date, whereas other Milestones run from the Closing Date. As explained above, there is no certainty about the occurrence or the date of the Closing Date. Therefore, all Milestones should run from the Closing Date.

The draft requires the Guaranteed Commercial Operation to occur within 24 months from the Agreement Date (See Definition), which is the date that PREPA countersigns the PPA but before there is a Best Interests Determination and Closing. This would require the Resource Provider to commit millions of dollars to equipment and construction contracts before Resource Provider knows it has a binding contract with PREPA. In addition, the delay between the Agreement Date and the Closing Date can be another 180 days or more. The Resource Provider should not have an obligation to take steps to incur construction costs until there is a binding commitment by PREPA. Therefore, the Guaranteed Commercial Operation Date deadline should be tied to the Closing Date, not the Agreement Date.

The Guaranteed Commercial Operation Date is the second anniversary from the Agreement Date, adjusted for extensions of time under Section 3.4. Other milestones, however, run from the Closing Date. In this regard, the Construction Start milestone is 240 Days after the Closing Date, while Initial Synchronization must occur within 540 Days from the Closing Date. The Resource Provider has no control over the key conditions that must occur prior to the Closing Date, most notably LUMA's performance of the Feasibility Study, System Impact Study and Facility Study. These studies must precede the Best Interests Determination (see definition of Best Interests Determination) . . . . [A] better structure for the PPOA would be for all milestones to run from the same date and for all Conditions Precedent to be satisfied prior to the execution of the Agreement.

The PPOA requires a commercial operation date 24 months from the agreement date of the contract. Unfortunately, several activities must be completed by PREPA before proponents have certainty their project will be fully approved and before many of the contract elements enter into force at the "Closing Date". The most significant of these is the Best Interest Determination regarding transmission system interconnection, which will be made following the detailed interconnections studies by LUMA. PREPA indicated in our initial meeting to discuss contract changes that these studies could take at least five months to complete, which is at least 3 months following the expected contract agreement date. It is neither prudent nor possible to begin substantive development activities until our project receives the Best Interest Determination and PREPA satisfies the required elements for the contract "Closing Date". Thus, the time to construct the project is effectively 21 months (or less if the interconnection studies are delayed). This is an impossible schedule to achieve for our project. [Proponent] encourages PREPA to modify the contract to require commercial operation within 24 months of the Closing Date of the contract.

The RFP initially established a period of up to 30 months for the development and construction of the projects (24-month preference, 30 month acceptable). However, it is now reported that this period has been reduced to 24 months from the Effective Date of the contract, which DOES NOT coincide with the final approval date of the contract. Said otherwise, this framework is requiring that one party fully commit to its obligations while the other may take months to obtain its Best Interest Determination (“BID”) approval. This asymmetric construct significantly increases the risk to the Resource Provider in paying liquidated damages due to a delay in COD. An 18-month development timeframe tied to a 12-month construction and commissioning timeframe is more realistic as well as aligning the signature of the PPOA with the actual BID approval, thereby avoiding potential conflicts and necessary amendments at that time.

Anchoring the 2-year period for Proponent to achieve Commercial Operations to the “Agreement Date” rather than the effectiveness of the agreement (i.e., the “Closing Date”) creates for Proponent risk and uncertainty that is uncharacteristic of these types of projects given that satisfaction of at least one of the CPs is subject to PREPA’s discretion (i.e., issuance of a Best Interest Determination). Further, the Best Interest Determination is not expected until at least 1Q of 2022 according to PREPA. Proponent proposes to anchor the 2-year period to the “Closing Date” to allow proponents the full period of time contemplated for execution of the project. Note that the other critical milestones (Construction Start and Initial Synchronization) are adequately anchored to the Closing Date already.

[A]ccording to the provisions of the Contract, the Guaranteed Commercial Operation Date (the “GCOD”) shall occur not later than 2 years from the Agreement Date, which means from the signing of the Contract by the Resource Provider. We would like to formally request PREPA to modify this provision, so the GCOD occurs two years after Closing, and not after the Agreement Date. The main reasons behind our proposal are: we will count with two complete years from Closing to complete the development, construction and commissioning phases, which is a reasonable period of time; and once Closing has occur[red], it means the Projects will already count with a Best Interest Determination and PREPA will have also signed the Contract, which will put us in a better position to secure financing for the Projects.

*(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.

If Force Majeure events occur, the contract prohibits extensions of time greater than 10% in aggregate for such events without prior approval from the PREB. We believe that PREPA should grant such extensions without prior approval from the PREB. Such a requirement will divert resources from project completion to a potentially protracted discussion with PREPA and PREB. We believe a better approach is for PREPA to notify PREB if an extension exceeds the 10% aggregate limit. Force Majeure events are unforeseeable and uncontrollable by the project proponent and could exceed the 10% limit.

The PPOA limits any extension of the Guaranteed Commercial Operation date to a little over 2 months, in the event of force majeure or a PREPA Risk Event. (See Section 3.4). Since these events are entirely out of the control of Resource Provider, Resource Provider must be allowed an extension to the extent caused by a force majeure event or PREPA Risk Event. The general force majeure provision (Article 14) does not establish a time limit for a force majeure event. No exception should be provided here either.

Even when PREPA taking more than 90 Days to render a Best Interests Determination would constitute a PREPA Risk Event, which would entitle the Resource Provider to an extension of time under Section 3.4, such extension (together with any others) would be capped at 10% of the period allocated for the completion or occurrence of the Milestone (i.e., 2.4 months or 72 Days for the Guaranteed Commercial Operation Date) after which period, it would be necessary to seek the prior written approval of the Puerto Rico Energy Bureau. In other words, for a PREPA Risk Event to occur with respect to the Best Interests Determination, PREPA would first need to obtain the PREB's approval. The approval of PREB cannot be presumed. Again, a better structure for the PPOA would be for all milestones to run from the same date and for all Conditions Precedent to be satisfied prior to the execution of the Agreement.

Section 3.4 of the Draft PPOA requires a written approval from the Puerto Rico Energy Bureau ("PREB") regarding any extension of time of the COD milestone schedule in excess of 10%. This



provision is contradictory to industry practice and redundant with contract compliance obligations creating an unnecessary burden on Resource Providers having to obtain multiple approvals with such frequency. Such a provision is likely to render the projects non financeable and we suggest removing this provision.

Schedule relief to account for occurrence of Force Majeure or a PREPA Risk Event (i.e., all events outside the control of the Proponent) is effectively capped at 10% of the time allotted for achievement of a Milestone without PREB's. Timing and outcome of a PREB approval is uncertain. This mechanism is uncharacteristic for these types of projects. The proposed restriction on time extensions for otherwise excusable delays imposes undue risk on the projects and its proponents. Eliminating the restriction is the cleanest approach, which is also consistent with the market for any infrastructure project.

[A]ccording to clause 3.4 "Extension of time" of the Contract, with respect to any extension of the Milestone for Commercial Operation, such extensions shall not exceed, in the aggregate ten percent (10%) of the period allocated for the time for completion of the Projects. We would like to formally request PREPA to modify this provision so the extensions of time shall not exceed, in aggregate twenty percent (20%) of the period since the Projects risks associated, primarily, with meteorological conditions such as hurricanes, etc., are considerable high.

The occurrence of a PREPA Risk Event entitles the Resource Provider to an extension of time to achieve any Milestone or deadline, but such extension is limited to 10% of the applicable period. Longer extensions require the approval of the PREB. It is unclear to us what would happen if, despite the occurrence of such PREPA Risk Event, the PREB were to deny an extension on such account. The matter is further complicated by the imposition of Resource Provider Delay Liquidated Damages for failing to meet the Guaranteed Commercial Operation Date.