

**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: Supplemental Motion
Submitting PV Renewable Energy
Draft Power Purchase And Operating
Agreements (PPOA's) As Well As
Energy Storage Service Agreements
(ESSA's) As Part Of PREPA's
Tranche 1 Renewable Generation
And Energy Storage Resources RFP
For Energy Bureau Evaluation And
Approval

**SUPPLEMENTAL MOTION SUBMITTING PV RENEWABLE ENERGY DRAFT
POWER PURCHASE AND OPERATING AGREEMENTS (PPOA's) AS WELL AS
ENERGY STORAGE SERVICE AGREEMENTS (ESSA's) AS PART OF PREPA'S
TRANCHE 1 RENEWABLE GENERATION AND ENERGY STORAGE RESOURCES
RFP FOR ENERGY BUREAU EVALUATION AND APPROVAL**

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:

On December 16, 2021, the Puerto Rico Electric Power Authority ("PREPA") submitted to the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau" or "PREB") document titled "*Motion Submitting 733 MW of PV Renewable Energy Draft Power Purchase and Operating Agreements Offered in Tranche 1 of PREPA's Renewable Generation and Energy Storage Resources RFP for Energy Bureau Evaluation and Approval*" (the December 16 motion"). In said motion, PREPA detailed the process it undertook to finalize Tranche 1 of the Renewable Energy RFP including the details and factors considered and evaluated during Phases

I-III¹. As part of the submittals, PREPA announced that it had made offers to fifteen (15) proposals for Solar PV projects with a capacity of 732.7 MW. Likewise, that it had effectively sought contracts for energy storage resources with a capacity of 220 MW. Since the December 16 filing PREPA received additional offers from proponents that met the price threshold previously determined by PREPA's Tranche1 RFP Evaluation Committee. These proponents had indicated their willingness to meet the price threshold but needed additional time to assess their proposals and confirm acceptance to PREPA. Given the importance to PREPA of acquiring as much renewable energy during this Tranche 1, the Evaluation Committee recommended these projects to continue in the Phase III evaluation process. With this determination, the total Solar PV capacity of Tranche 1 amounts to more than 800 MW. As anticipated in the December 16 motion, PREPA hereby submits the remaining Bespoke power purchase agreements ("Bespoke PPOAs") and three Bespoke Contracts for energy storage resources (each, a "Bespoke ESSA") as recommended by the Tranche 1 Evaluation Committee in its report and approved by PREPA's Governing Board. This submittal is intended for the evaluation and approval of the Energy Bureau in compliance with Joint Regulation 8815². See, **Attachment A**.

As with the December 16 motion submittals, the projects recommended for approval have the following features:

¹ Please refer to the December 16 motion for a detailed explanation and discussion of the procedural background and RFP Process including the analysis and calculations of the levelized cost of energy ("LCOE") and levelized cost of storage ("LCOS") for price threshold determination.

² Energy Bureau 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*, No. 8815 (November 9, 2016) ("Joint Regulation 8815").

	Common Feature in Subject Transactions
All-In Pricing	Pricing that includes (1) all energy or capacity or service provided under the respective agreement, as applicable, (2) all renewable energy credits or other environmental attributes derived from the project under current or future law, (3) any ancillary services capable of being provided under the approved design of the project.
MTRs	Compliance with MTRs prepared by PREPA and approved by LUMA.
Interconnection Facilities	Responsibility and cost of interconnection facilities allocated to the Proponent affiliate, which signs the bespoke Contract (the “ Resource Provider ”). For utility-scale projects, LUMA carries out works within PREPA’s active system pursuant to a construction contract with Resource Provider.
Take-or-Pay Liability	Payment by PREPA for energy, which Resource Provider makes available, but PREPA cannot take as a result of: <ol style="list-style-type: none"> 1. Force Majeure affecting PREPA in excess of 360 hours per year; 2. to the extent not due to a Force Majeure, curtailments or disconnections by PREPA in excess of 80 hours per year; or 3. breach by PREPA or LUMA (acting as PREPA’s agent) under a Contract.
Milestones, Delay LDs and Term	<ol style="list-style-type: none"> 1. Deadlines for Resource Provider to (i) obtain financing and permits and give full notice to proceed to its construction contractors (8 months); and (ii) achieve commercial operation date (“COD”) (24 months). 25-year term runs from COD.
	<ol style="list-style-type: none"> 2. Payment by Resource Provider of liquidated damages for delay due to its failure to achieve COD by the Guaranteed Commercial Operations Date (“GCOD”). 3. Payment by PREPA of liquidated damages for delay where Resource Provider fails to achieve COD by GCOD due to delays caused by PREPA or LUMA (e.g., through the testing & commissioning process or other breach of Contract).

	Common Feature in Subject Transactions
Performance Guarantees	(i) Guarantee by Resource Provider of key performance requirements of Energy Resource, and (ii) payment of liquidated damages by Resource Provider for Energy Resource’s failure to meet such requirements.
Performance Security	<p>Delivery and maintenance by Resource Provider of a Performance Security issued (i) in the form of an on-demand standby letter of credit by a financial institution that satisfies minimum credit rating requirements, and (ii) in the face amount equal to:</p> <ol style="list-style-type: none"> 1. prior to COD, \$50 per kW <i>multiplied by</i> the nameplate capacity of the Energy Resource; and 2. from COD, \$70 per kW <i>multiplied by</i> the nameplate capacity of the Energy Resource, <p>which secures Resource Provider’s performance obligations under a Contract.</p>
Parent Company Guarantee	For a Resource Provider with an unrestricted net worth of less than \$75,000,000, delivery and maintenance by Resource Provider of a Parent Guarantee by its parent company or other permitted guarantor, which satisfies the foregoing net worth requirement.
Equity Transfer	Restrictions on the ability of the project sponsor to transfer equity to third parties without PREPA’s consent, subject to exceptions for tax equity, affiliate transfers, financing considerations and minority share transfers.
Dispute Resolution & Governing Law	<p>Disputes resolved in arbitration before PREB, an untested process which represents some risk to both sides.</p> <p>Contract governed by the laws of the Commonwealth of Puerto Rico.</p>

Likewise, the Template Contracts allocate risk between PREPA and each Resource Provider as shown in the following table:

Event	Party Taking Risk Under Contract		Risk & Mitigation Comments
	Resource Provider	PREPA	
Permits and Authorizations	✓		Resource Provider has the obligation to obtain permits. Permit delays (with no fault of the counterparty) constitute Force Majeure granting extra time capped at a max 18-month extension, after which a party may terminate.
Financing	✓		Resource Provider must either secure debt financing or equity financing for its project. PREPA credit risk remains a major issue for debt financing.
Land Acquisition	✓		Resource Provider must acquire all land rights for its project and interconnection line.
Facility Design / Construction	✓		Resource Provider has responsibility for the design and construction of interconnection and project. PREPA reviews the design and can reject if not in accordance with the contract. Resource Provider bears risk of deficient design and construction through payment of liquidated damages and revenue reduction.
Changes to Technical Requirements	✓ (up to cost limit)	✓	PREPA has right to change certain technical requirements (<i>e.g.</i> , MTRs) and Resource Provider bears the cost of such changes up to a limit of 1% of project costs. PREPA must compensate Resource Provider for the cost of complying with such changes above such limit.
Construction of PREPA Interconnection Facilities & Network Upgrades	✓ (funding only)	✓	Resource Provider funds construction of Interconnection Facilities and Network Upgrades. As LUMA will take responsibility for the construction of these assets, PREPA bears the risk of delays caused by a deficient design and construction delays. We recommend that PREPA enter into a Direct Agreement with LUMA under which LUMA agrees to indemnify PREPA for such delays.

Event	Party Taking Risk Under Contract		Risk & Mitigation Comments
	Resource Provider	PREPA	
Maintenance and Repair of PREPA Interconnection Facilities		✓	PREPA bears the cost and responsibility for PREPA Interconnection Facility O&M through its relationship with LUMA.
PREPA Delays		✓	If PREPA delays COD beyond the Guaranteed Commercial Operation Date, PREPA must pay delay liquidated damages to Resource Provider as if COD occurred.
Resource Provider Delays	✓		If the COD does not occur by GCOD for any reason other than PREPA delay (see row above), Resource Provider must pay delay liquidated damages, and PREPA will hold security to cover this amount.
Offtake Risk – FM affecting PREPA	✓	✓	Resource Provider takes risk for first 360 operating hours, after which PREPA makes deemed energy or capacity payments.
Offtake Risk – other curtailment, dispatch instruction, emergencies, maintenance, grid constraints, new generation or lack of demand	✓	✓	Resource Provider takes risk for first 80 operating hours, after which PREPA makes deemed energy or capacity payments.
Offtake Risk – breach		✓	PREPA makes payments for any unexcused failure to take available energy and/or make use of available capacity.
Force Majeure Affecting Resource Provider	✓		Resource Provider receives no payment FM renders an Energy Resource unavailable.
Generation Risk (PPOA) – lack of solar irradiation	✓		Resource Provider receives no payment to the extent output reduced due to lack of irradiation.
Generation Risk (PPOA) – degradation	✓		Resource Provider receives reduced payment, and may be subject to liquidated damages, to the extent output reduced due to higher than expected degradation.

Event	Party Taking Risk Under Contract		Risk & Mitigation Comments
	Resource Provider	PREPA	
Puerto Rico Political Risk – Changes of Law and Project Condemnation / Eminent Domain		✓	PREPA must reimburse Resource Provider for additional costs resulting from Changes of Law in Puerto Rico.
Other Change in Law	✓	✓	Parties share risk of changes to non-Puerto Rico Taxes and Environmental Costs 50/50. PREPA initially pays 50% of increases in these costs, but recovers this during the final years of the contract.
PREPA Default		✓	PREPA faces general damages for breach. Such damages may include Resource Provider’s lost profit.
Resource Provider Default	✓		Resource Provider faces general damages for breach leading to termination. Resource has cap on maximum liability arising out of a Contract.

Additionally, as with the Template Contracts included in the December 16 motion, each Bespoke PPOA is subject to the finalization of the Integration Studies and shall only be effective and enter into full force and effect upon final approval from PREPA’s Executive Director, PREPA’s Governing Board, the Energy Bureau and the FOMB.

Lastly, the Template Contracts submitted as part of this motion are confidential in accordance with the dispositions of Joint Regulation 8815.

In general, the documents in possession of a corporation like PREPA are presumed public. However, access to public information is not absolute and there are various exemptions for access to public information. *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017) (emphasis added).

These exceptions are:

- (1) a law so declares;
- (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke;
- (3) revealing the

information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is ‘official information’ pursuant to Rule 514 of Evidence, 2009, 32 LPRA Ap. VI (formerly Rule 31 of Evidence 32 LPRA for. Ap. IV). *Colon Cabrera v. Caribbean Petroleum*, supra.

Id. at 83.

Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, provides that “any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]” Act 57 at Art. 6.15. “If the Energy [Bureau], after the appropriate evaluation, believes such information should be protected, it shall grant such protection in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure in which the allegedly confidential document is submitted.” *Id.* at Art. 6.15 (a). If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.” *Id.* at Art. 6.15 (c). “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.” *Id.* at Art. 6.15 (d).

In the exercise of its powers the Energy Bureau and PREPA approved Regulation 8815 which has force of law. *Id.* at Art. 6.3 (b)³ Pursuant to Section 4.2 of Regulation 8815, communications between the Energy Bureau and PREPA shall be maintained confidential while the administrative competitive procurement process is ongoing.

³ See also *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”) at Sec. 5 (“The regulations so adopted shall have the force of law once the provisions of Act No. 38-2017, the *Government of Puerto Rico Uniform Administrative Procedure Act*, are complied with.”)

Also, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*.⁴ Pursuant to Regulation 6285, documents including information related to the evaluation of offers or requests for bids are confidential while the evaluation, adjudication and award processes are still ongoing. *Id.* at Sec. V, ¶ 13.

As applicable to the submittal of the Template Contracts (Attachments A), the same are confidential given that the contracts have yet to be executed and could still be subject to additional changes depending on the result of the Interconnection Studies and the evaluation and approval process of both the Energy Bureau and the FOMB.

Pursuant to the above, PREPA respectfully requests confidential treatment of the Template Contracts (Attachments A) as these are part of a still ongoing deliberative process which is yet to result in executed contracts.

WHEREFORE, the Puerto Rico Electric Power Authority respectfully requests that the Energy Bureau Takes Notice of the present supplemental motion and that pursuant to the requirements of Joint Regulation 8815, the Energy Bureau evaluate and approve the Template Contracts submitted as part of **Attachment A**.

⁴ PREPA, *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”).

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23rd day of December 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 and laura.rozas@us.dlapiper.com.

In San Juan, Puerto Rico, this 23rd day of December 2021.

s/ Katuska Bolaños-Lugo
Katuska Bolaños-Lugo

Attachment A