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

**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:** Motion in Compliance with the  
December 28 Order Submitting 167 MW of  
VPP Resources and Reiterating Request for  
Confidential Meeting and Extension of Time

**MOTION IN COMPLIANCE WITH THE DECEMBER 28 ORDER SUBMITTING  
167 MW OF VPP RESOURCES AND REITERATING REQUEST FOR  
CONFIDENTIAL MEETING AND EXTENSION OF TIME**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

**COMES NOW** the Puerto Rico Electric Power Authority (“PREPA”), through its counsel of record, and respectfully submits and prays as follows:

**I. RELEVANT PROCEDURAL BACKGROUND<sup>1</sup>**

On December 16, 2021, PREPA submitted the *Motion Submitting Draft Power Purchase and Operating Agreements Offered in Tranche 1 of PREPA’s Renewable Generation and Energy Storage Resources RFP for Energy Bureau Evaluation* (the “December 16 Motion”). With the December 16 Motion, PREPA tendered the Tranche 1 Report and Bespoke Contracts and asked the Energy Bureau to evaluate and approve them. In the December 16 Motion, PREPA informed the Energy Bureau that it had finalized Phase III of the Tranche 1 RFP with an offer to fifteen (15) proposals for Solar PV projects that comprise a capacity of 732.7 MW and that it had effectively

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<sup>1</sup> PREPA adopts by reference the recitals and definitions to capitalized terms included in the *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* and the *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* and the *Request For Clarification, Partial Reconsideration Of The December 28 Order, Confidential Meeting, And For Extension of Time* filed by PREPA on December 16 and December 23, 2021 and January 6, 2022, respectively. Capitalized terms not defined in these three motions shall be ascribed the meaning provided to them in this motion.

sought contracts for energy storage resources that encompass a capacity of 220 MW. PREPA also informed that the evaluation of VPP resource proposals remains ongoing.<sup>2</sup>

On December 23, 2021, PREPA submitted the *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* (the "December 23 Motion"). PREPA explained to the Energy Bureau that since the December 16 Motion had been submitted, PREPA had received additional offers from Proponents that met the LCOE and LCOS thresholds previously determined by the Tranche 1 Committee and that these projects represent an additional 112.1 MW of capacity, to continue in the Phase III evaluation process. With this determination, the total Solar PV capacity of Tranche 1 amounts to 844 MW.

That same day PREPA submitted the *Informative Motion Providing Update on Status and Timing of Selection of Virtual Power Plant Resources in Relation to the Tranche 1 RFP* (the "VPP December 23 Motion") through which PREPA informed the Energy Bureau of the status of the VPP negotiations and the pending issues that could affect the finalization of GSAs with VPP proponents.

On December 28, 2021, the Energy Bureau entered a *Resolution and Order* (the "December 28 Order") in which the Energy Bureau resolved "that additional information is needed from PREPA to allow for a more thorough Phase III evaluation of respondent offerings for both solar

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<sup>2</sup> [REDACTED]



[REDACTED]

**II. REITERATING REQUEST FOR CONFIDENTIAL MEETING**

[REDACTED]

[REDACTED]

Therefore, PREPA respectfully requests the Honorable Energy Bureau to grant a



The VPP resource projects and corresponding GSAs recommended for approval have the following features:

	<b>Common Feature in Subject Transactions</b>
<b>All-In Pricing</b>	Pricing that includes (1) all grid services provided under the respective agreement, (2) all renewable energy credits or other environmental attributes derived from energy delivered by the VPP to PREPA under current or future law, (3) any ancillary services capable of being provided under the approved design of the project as required by the MTRs.
<b>MTRs</b>	Compliance with MTRs prepared by PREPA and approved by LUMA.
<b>Interconnection of Participant Resources at Distribution Level</b>	Addressed outside of the GSA in accordance with existing regulation and Participant Resource Agreements to be approved by the PREB.
<b>Testing &amp; Commissioning of Grid Service Delivery System (“GSDS”)</b>	Provisions setting out a framework for design, testing and commissioning of the GSDS ( <i>i.e.</i> , the communication system aggregating and coordinating dispatch of Participant Resources).
<b>Take-or-Pay Liability</b>	Payment by PREPA for the capacity of Demand Build Service and Demand Reduction Service, which Resource Provider makes available but PREPA cannot take as a result of: <ol style="list-style-type: none"> <li>1. Force Majeure affecting PREPA in excess of 720 hours per year;</li> <li>2. to the extent not due to a Force Majeure, curtailments or disconnections by PREPA resulting from grid system events in excess of 80 hours per year; or</li> <li>3. breach by PREPA or LUMA (acting as PREPA’s agent) under a Contract.</li> </ol>
<b>Milestones, Delay LDs and Term</b>	1. Deadlines for Resource Provider to achieve full commercial operation (“COD”) of the contracted capacity of Demand Build Service and Demand Reduction Services (24 months), as well as

	<b>Common Feature in Subject Transactions</b>
	<p>interim milestones for percentages of the full capacity, and a 10-year term running from COD.</p> <ol style="list-style-type: none"> <li>2. Payment by Resource Provider of liquidated damages for delay due to its failure to achieve COD by the Guaranteed Commercial Operations Date (“GCOD”).</li> <li>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 &amp; commissioning process or other breach of GSA).</li> </ol>
<b>Performance Guarantees</b>	(i) Guarantees by Resource Provider of key performance requirements for the VPP, and (ii) payment of liquidated damages by Resource Provider for VPP’s failure to meet such requirements.
<b>Performance Security</b>	<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"> <li>1. prior to COD, \$50 per kW <i>multiplied by</i> the guaranteed capacity of the VPP; and</li> <li>2. from COD, \$70 per kW <i>multiplied by</i> the guaranteed capacity of the VPP,</li> </ol> <p>which secures Resource Provider’s performance obligations under the GSA.</p>
<b>Parent Company Guarantee</b>	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.
<b>Equity Transfer</b>	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, minority share transfers and reasonableness on such consent.
<b>Dispute Resolution &amp; Governing Law</b>	<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 GSAs allocate risk between PREPA and each Resource Provider as shown in the following table:

Event	Party Taking Risk Under GSA		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 (if any).
Facility Design / Participant Enrollment	✓		Resource Provider has responsibility for the design of project and enrollment of Participants. PREPA reviews the design and can reject if not in accordance with the contract. Resource Provider bears risk of deficient design and lack of enrollment 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.

Event	Party Taking Risk Under GSA		Risk & Mitigation Comments
	Resource Provider	PREPA	
Construction of PREPA Network Upgrades		✓	As LUMA would take responsibility for the construction of these assets (if any is required), PREPA technically bears the risk. However, since the parties expect most Participant Resources to comprise existing, connected assets, they do not contemplate that material network upgrades will be necessary to accommodate the VPP projects.
Maintenance and Repair of Distribution System		✓	PREPA bears the cost and responsibility for operation and maintenance of distribution system through its relationship with LUMA, and will bear the risk of inability of Participant Resources to make Demand Build or Demand Reduction Services available due to distribution level issues.
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 720 operating hours, after which PREPA makes capacity payments.
Offtake Risk – other emergencies or grid constraints	✓	✓	Resource Provider takes risk for first 80 operating hours, after which PREPA makes capacity payments.
Offtake Risk – breach		✓	PREPA makes payments for any unexcused failure to take available energy and/or make use of available capacity.

Event	Party Taking Risk Under GSA		Risk & Mitigation Comments
	Resource Provider	PREPA	
Force Majeure Affecting Resource Provider	✓		Resource Provider receives no payment if its FM renders a VPP unavailable.
Generation Risk	✓		Resource Provider receives no payment to the extent aggregate service capability reduced due to lack of irradiation, fuel or other generation issues
Degradation	✓		Resource Provider receives reduced payment, and may be subject to liquidated damages, to the extent aggregate service capability is reduced due to higher than expected solar panel or battery degradation.
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 year 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.


  

  

  

  


[REDACTED]

**IV. REQUEST FOR CONFIDENTIAL TREATMENT OF MOTION AND ATTACHMENTS THERETO**

PREPA respectfully submits that the contents of this motion, as well as Attachment A, are confidential, and thus, should remain under seal until the Tranche 1 RFP process is finalized. Granting confidential information to this motion and the attachment hereto is of paramount importance to maintain the integrity of the ongoing process and negotiations that are not yet final.

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).<sup>4</sup> 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.

Lastly, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*.<sup>5</sup> 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.

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<sup>4</sup> 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.”)

<sup>5</sup> PREPA, *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”).

[REDACTED]

Pursuant to the above, PREPA respectfully requests confidential treatment to this motion as well as Attachment A.

**V. CONCLUSION**

WHEREFORE, for the reasons stated above, PREPA respectfully requests that the Energy Bureau:

- a. determine that PREPA has complied with the December 28 Order;
- b. grant a confidential meeting with the Tranche 1 Committee [REDACTED]  
[REDACTED]  
[REDACTED]
- c. grant the extension of time requested in the January 6 Motion of ten (10) additional business days, that is until January 25, 2022, to provide the requested information; and
- d. grant confidential treatment to this motion and Attachment A.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 12<sup>th</sup> day of January 2022.

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**Attachment A**