

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

NEPR Received: Aug 4, 2022 7:12 PM

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 to Submit Additional
PPOAs in Compliance with July 8 Resolution
and Order

**MOTION TO SUBMIT ADDITIONAL PPOAS IN COMPLIANCE
WITH JULY 8 RESOLUTION AND ORDER**

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:

1. The IRP Final Order, issued by the Energy Bureau of the Public Service Regulatory Board of Puerto Rico (the “Energy Bureau”) on August 24, 2020, places significant renewable energy production requirements on PREPA, including a requirement that, by 2025, PREPA source at least 40% of the energy production connected to PREPA’s transmission and distribution system (the “T&D System”) from renewable energy generation.

2. As part of the IRP Final Order, the Energy Bureau approved a Modified Preferred Resource Plan that included a plan for six (6) tranches of procurement of renewable energy and battery storage resources. To guide the procurement, the Energy Bureau established a schedule for acquiring minimum quantities of renewable and energy storage resources through Request for Proposals (“RFP”) processes. Specifically, the Energy Bureau required PREPA to seek to procure at least 1,000 MW of solar PV (or energy-equivalent renewable resource) and at least 500 MW (2,000 MWh or equivalent) battery energy storage in the first RFP tranche (“Tranche 1”).

3. In compliance with the above, on October 23, 2020, PREPA submitted the first version of

a draft procurement plan, which PREPA subsequently amended in compliance with the Energy Bureau's directives. After the review¹ of the procurement plan by the Energy Bureau and other procedural incidents, on January 26, 2021, the Energy Bureau issued a *Resolution and Order* ("January 26 Resolution") through which, among other things, it ordered PREPA to issue the RFP for Tranche 1 as soon as possible.

4. On February 22, 2021, PREPA issued *Request for Proposals 112648 for Renewable Energy Generation and Energy Storage Resources Tranche 1 of 6* ("Tranche 1 RFP"), soliciting proposals for renewable energy, energy storage, and virtual power plant resources.

5. After various procedural incidents and the finalization of various Tranche 1 RFP-related milestones, on December 16, 2021, PREPA submitted to the Energy Bureau a document titled *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* ("December 16 Motion"). Through the December 16 Motion, PREPA identified fifteen (15) solar PV projects totaling 732.7 MW as candidates for the execution of agreements and submitted draft template power purchase and operating agreements ("PPOAs") for those projects.

6. On December 23, 2021, PREPA submitted a document titled *Supplemental Motion Submitting PV Renewable Energy Draft Power Purchase and Operating Agreements (PPOAs) As Well As Energy Storage Service Agreements (ESSAs) As Part of PREPA's Tranche 1 Renewable Generation and Energy Storage Resources RFP For Energy Bureau Evaluation and Approval* ("December 23 Motion"). In the December 23 Motion, PREPA submitted three (3) additional bespoke power purchase agreements ("Bespoke PPOAs") and three (3) bespoke contracts for energy storage resources (each, a "Bespoke ESSA") totaling 220 MW. The combined solar PV

¹ See resolution and orders entered on December 8, 2020, and January 5, 2021.

resource procurements for which PREPA sought authorization were at that point approximately 844 MW.

7. On February 2, 2022, the Energy Bureau issued a *Resolution and Order* determining that the eighteen (18) solar PV projects submitted by PREPA were aligned with the Modified Action Plan (“February 2 Resolution”). It accordingly approved eighteen (18) solar PV PPOAs having an aggregate capacity of approximately 844 MW. Still, the February 2 Resolution stated that pending evaluation of additional information, the Energy Bureau would issue a final determination regarding the projects.

8. After further procedural events, clarifications, and requests for information, on April 27, 2022, the Energy Bureau issued a further *Resolution and Order* addressing the execution of PPOAs it had previously approved (“April 27 Resolution”). Through the April 27 Resolution, the Energy Bureau, among other things, ordered PREPA to file the execution copies of the eighteen (18) authorized PPOAs by June 30, 2022.

9. In compliance with the April 27 Resolution, on June 30, 2022, PREPA filed a motion titled *Motion to Submit Execution Copies of PPOAs in Compliance with the April 27 and June 13 Orders, Request for Additional Time to Submit Certain PPOAs and Memorandum of Law Requesting Confidential Treatment of PPOAs and Exhibits* (“June 30 Motion”).

10. As part of the June 30 Motion, PREPA informed the Energy Bureau that it included for its approval as Attachment A nine (9) solar PV executed PPOAs for resource projects totaling 430.1 MW. These projects represented a subset of the eighteen (18) solar PV projects approved by the Energy Bureau in the February 2 Resolution.

11. PREPA also submitted information to the Energy Bureau regarding additional PPOAs in anticipation of completing contract finalization for up to five projects, in addition to the nine (9)

executed PPOAs filed, for an additional 305.91 MW. PREPA requested an extension of time to execute and submit these PPOAs and submitted to the Energy Bureau additional information regarding the status and negotiations of these five projects in attachments B through E to its filing, which were provided under seal. PREPA also informed the Energy Bureau that two (2) of these five (5) projects' proposals were associated with integrated storage resources.

12. Through the June 30 Motion and attachments B through E, PREPA explained that the rationale for requesting an extension to potentially finalize contract terms for these five (5) proposals was based primarily on the need for respondents to confirm specific details in the final PPOA's, including an understanding of the effect of interconnection costs on the PPOA.

13. Considering the above, on July 8, 2022, the Energy Bureau approved the nine (9) PPOAs and granted PREPA's request for an extension to file PPOAs for these five proposals by July 29, 2022.

14. Thereafter, on July 18, 2022, and through the filing of a *Motion for Extension of Time to Submit Execution Copies of Additional PPOAs in Compliance with the July 8 Resolution and Order* ("July 18 Motion"), PREPA informed the Energy Bureau that it needed additional time to finalize the Tranche RFP 1 processes and negotiations with proponents given that PREPA's external consultants Sargent & Lundy Puerto Rico (S&L) and King & Spalding, LLP (K&S), who were essential in the process providing technical expertise as well as essential experience and knowledge in the negotiations of PPOA's did not have a contract with PREPA. PREPA further informed the Energy Bureau that even though PREPA had submitted the S&L and K&S contracts for the approval of the Fiscal Oversight and Management Board (FOMB) on June 7, 2022, as of July 18, 2022, PREPA had not received such approval and thus was impeded from engaging S&L and K&S to continue with the Tranche 1 negotiation process. Consequently, PREPA requested the Energy

Bureau ten (10) business days from the date of FOMB's approval to finalize contract terms for the proposals mentioned above. On July 19, 2022, PREPA received FOMB's approval of the K&S and S&L contracts, and those contracts were executed on June 22, 2022.

15. Since then, PREPA, S&L and K&S have engaged proponents in continued negotiations related to their projects. These negotiations have resulted in the execution of four (4) additional PPOAs for a total of 109.37 MW. PREPA herewith submits as **Exhibit A** execution copies of these PPOAs.

16. At this time, PREPA is still engaged in negotiations with two other proponents. One of these proponents recently re-engaged in pricing discussions after initially indicating it could not meet the LCOE targets. The other continues to assess interconnection, pricing and related BESS project issues. PREPA has continued to engage with these proponents (while ensuring fair treatment of proponents who have already signed) because it understands the need for, and desires, additional renewable energy generation capacity, and views the economies of scale offered by portfolios of projects as beneficial for ratepayers. Given the ongoing nature of these negotiations, the redacted information contained in **Exhibit A**, under applicable law and regulation, is confidential until the adjudication and award process is final. Therefore, PREPA hereby requests the Energy Bureau to determine that the redacted information in the documents included as **Exhibit A** to this motion is confidential, and thus, the unredacted copies shall remain under seal.

17. PREPA submits to the Energy Bureau that the information redacted in the public versions of **Exhibit A** should be maintained confidential not only because it currently affects the deliberative process of the Tranche 1 RFP given continued negotiations with proponents, but also because there is information that is considered critical energy infrastructure information ("CEII") that cannot be disclosed to the public. To protect such confidentiality, PREPA has redacted the

transmitting utility maps and diagrams schematics from the PPOA's and requests the Energy Bureau to determine that such information is CEII and thus, confidential and to maintain the public files with the redaction already provided and the unredacted versions under seal.

18. Applicable laws and regulations support the confidentiality request herein made. 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' under 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.

19. Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*² 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,

² *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056 ("Act 57").

“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).

20. In exercising its powers, the Energy Bureau and PREPA approved Regulation 8815, which has the force of law. *Id.* at Art. 6.3(b); see also Act 83³ 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.”). Pursuant to Section 4.2 of Regulation 8815, communications between the Energy Bureau and PREPA shall remain confidential while the administrative competitive procurement process is ongoing.

21. Lastly, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”). Pursuant to Regulation 6285, documents, including information on evaluating offers or bids requests, are confidential while the evaluation, adjudication, and award processes are still ongoing. *Id.* at Sec. V, ¶ 13.

22. Federal and Puerto Rico laws protect the confidentiality of CEII, the public disclosure of which may pose a security threat in that the information could be useful to a person or group planning an attack on critical infrastructure. *See, e.g.*, 18 C.F.R. § 388.113, as amended by Federal Energy Regulatory Commission (“FERC”) Order No. 683, *Critical Energy Infrastructure Information* (issued September 21, 2006); *USA Patriot Act of 2001*, § 1016, creating the *Critical Infrastructures Protection Act of 2001*, including 42 U.S.C. § 5195c(e) (defining Critical

³ *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”).

Infrastructure). FERC regulations subject such information to limitations on use and disclosure to “ensure that information deemed CEII stays out of the possession of terrorists.” 18 C.F.R. § 388.113(d)(4). *Off. of People's Counsel v. Pub. Serv. Comm'n.*, 21 A.3d 985, 991, Util. L. Rep. P 27157, 2011 WL 2473405 (D.C. App. 2011).

23. Under the Critical Infrastructures Protection Act of 2001, the term “critical infrastructure” means “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” 42 U.S.C. § 5195c(e). In 2006, FERC Order no. 683 amended the regulations for gaining access to CEII and simplified procedures for obtaining access to CEII without increasing the vulnerability of the energy infrastructure and ensuring that access to CEII does not facilitate acts of terrorism.

24. A utility is not required to obtain FERC or other federal government approval to designate information as CEII. For example, information required by FERC’s Annual Transmission Planning and Evaluation Report, Form No. 715 (“FERC No. 715”) is *de facto* considered CEII and is automatically afforded heightened protections. FERC No. 715 requires that any transmitting utility that operates integrated (non-radial) transmission facilities at or above 100 kV must annually submit information including but not limited to: Power Flow Base Cases, Transmitting Utility Maps and Diagrams, Transmission Planning Reliability Criteria, Transmission Planning Assessment Practices, and Evaluation of Transmission System Performance. Any utility that submits the required transmission information under FERC No. 715 does so with the knowledge that, as stated in the Form’s Instructions, FERC “considers the information collected by this report to be CEII and will treat it as such.” *See also* 18 C.F.R. § 141.300(d) relating to the Form and CEII.

25. Mainland regulators typically do not require a utility that designates material as CEII to follow any process before the federal government to make or support such a designation, and, further, that the regulator, in its informed discretion, can establish limits on how information that it considers CEII can be accessed.

26. It is respectfully submitted that the transmitting utility maps and diagrams schematics in the PPOA's qualifies as CEII and thus, should remain redacted. Furthermore, it is asserted that the redactions made are the manner that least affects the public interest, transparency, and the rights of the public. *See*, Act 57-2014 at Sec. 6.15(a).

27. As stated above, the information that has been redacted from the execution copies of PPOAs attached as **Exhibit A** is confidential and, thus, under the applicable laws and regulations, and the part that is not CEII should remain confidential until the adjudication and award process of RFP Tranche 1 is final. The CEII shall remain under seal even after the finalization of the Tranche 1 process.

WHEREFORE, for the reasons stated above, PREPA respectfully requests that the Energy Bureau **NOTE** PREPA's filing of additional executed PPOA's in compliance with the April 27, June 13 and July 8 orders, determine that the unredacted execution copies of the PPOAs contained in **Exhibit A** are confidential, enter an order directing the Clerk of the Energy Bureau to maintain the unredacted copies under seal and disclose for public use the redacted copies of **Exhibit A**.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, this 4th day of August 2022.

/s Maralíz Vázquez-Marrero

Maralíz Vázquez-Marrero

mvazquez@diazvaz.law

TSPR 16,187

/s Katuska Bolaños-Lugo

Katuska Bolaños-Lugo

kbolanos@diazvaz.law

TSPR 18,888

DÍAZ & VÁZQUEZ LAW FIRM, P.S.C.

290 Jesús T. Piñero Ave.

Oriental Tower, Suite 803

San Juan, PR 00918

Tel.: (787) 395-7133

Fax. (787) 497-9664

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, on this 4th day of August 2022.

/s Maralíz Vázquez-Marrero
Maralíz Vázquez-Marrero

Exhibit A

https://diazvaz-my.sharepoint.com/personal/jmarrero_diazvaz_law/layouts/15/onedrive.aspx?id=%2Fpersonal%2Fjmarrero%5Fdiazvaz%5Flaw%2FDocuments%2F08%2D04%2D22%20REDACTED%20PPOAS%20TRANCHE%201&ga=1