

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

IN RE: REQUEST FOR CERTIFICATION
PUERTO RICO ELECTRIC POWER
AUTHORITY.

CASE NO.: CEPR-CT-2016-0018

SUBJECT: Resolution and Order on PREPA's
Petition for Approval of Subsidiaries and
the PREPA-GenCo-HydroCo

RESOLUTION AND ORDER

I. Introduction

Since the creation of the Puerto Rico Electric Power Authority ("PREPA") through Act No. 83 of May 12, 1941, as amended.¹ Puerto Rico's Electrical System has been vertically integrated, with PREPA controlling the entire production sequence, that is, generation,² transmission, and distribution of electric power.³ However, due to lack of infrastructure maintenance, inadequate distribution of generation *vis-à-vis* demand, absence of the necessary modernization of the electrical system to adjust it to new technologies, energy theft, and reduction of PREPA's personnel, electric power services in Puerto Rico became inefficient, unreliable, and unreasonably costly to residential, commercial, and industrial customers despite a monopolistic structure.⁴ The critical financial conditions transformed PREPA into an unsustainable burden for the people of Puerto Rico.⁵ Consequently, the Government of Puerto Rico developed and implemented a plan intended to transform Puerto Rico's energy sector and PREPA.

As part of PREPA's transformation, Act No. 120-2018 was enacted to authorize the legal framework required for the sale, disposition, and/or transfer of PREPA's assets, operations, functions, and services; establish the safeguards to ensure a fair and transparent process; provide for the applicability of Act No. 29-2009⁶ and amend certain provisions of Act 83. The legal framework adopted through Act 120-2018 enabled PREPA to undergo a transformation process through the creation of Public-Private Partnerships⁷ pursuant to the procedures established.⁸ Act 120-2018 explicitly empowered PREPA to sell its assets related to electric power generation and transfer or delegate any of its operations, functions, or services.

On April 11, 2019, Act 17-2019 was enacted to establish the Puerto Rico energy public policy to set the parameters for a resilient, reliable, and robust energy system with just and reasonable rates for all class of customers; make it possible for energy system users to produce and participate in energy generation; facilitate the interconnection of distributed generation systems and microgrids; unbundle and transform the electrical power system into an open system; and amend several laws to further the new Puerto Rico energy public policy. Among other things, and pertinent to this case, Act 17-2019 specifically states that PREPA shall not have exclusive rights to generate, transmit, distribute, and commercialize

¹ Known as *Puerto Rico Electric Power Authority Act*, as amended ("Act-83").

² PREPA generates its electricity through a diverse source of assets that utilizes residual fuel, diesel, natural gas, and other sources.

³ See, *Puerto Rico Electric Power System Transformation Act*, as amended ("Act 120-2018"), *Statements of Motives*.

⁴ See, *Puerto Rico Energy Public Policy Act* ("Act-17-2019"), *Statement of Motives*.

⁵ *Id.*

⁶ Known as *Public-Private Partnership Act*, as amended ("Act 29-2009").

⁷ Except as otherwise provided, capitalized terms used but not defined in this Resolution and Order have the meaning ascribed to them in Act 120-2018, Act 17-2019, the T&D OMA and/or the Petition, as applicable.





⁸ Act 120-2018, *Statement of Motives*.



the electric power supply.⁹ Rather, it states that the Government of Puerto Rico, by itself or through PREPA or another public corporation affiliated to PREPA, shall maintain ownership of the transmission and distribution assets and may maintain ownership of the Legacy Power Generation Assets.¹⁰ Moreover, Act 17-2019 orders PREPA to delegate or transfer the operating, administrative, and/or maintenance functions for the electric power generation, transmission and distribution, commercialization, and operation of the electric power system through contracts awarded and executed pursuant to Act 17-2019, Act 120-2018, and Act 29-2009.¹¹

II. Relevant Procedural Background

On September 14, 2022, PREPA filed a document titled *Petition for Leave to Create Subsidiaries and for Approval of the Puerto Rico PREPA – GenCo – HydroCo Operating Agreement* (“Petition”). PREPA attached various documents to its Petition, which are identified as Exhibits A through G:

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- Exhibit A:** *Resolution 4939, Approval for the Creation of the PREPA GenCo, LLC Subsidiary*, issued by PREPA’s Governing Board on December 15, 2021 (“Resolution 4939”).
- Exhibit B:** *PREPA GenCo, LLC Limited Liability Company Agreement and Single Member Declaration* (“GenCo Agreement”).
- Exhibit C:** *Resolution 4940, Approval for the Creation of the PREPA HydroCo, LLC Subsidiary*, issued by PREPA’s Governing Board on December 15, 2021 (“Resolution 4940”).
- Exhibit D:** *PREPA HydroCo, LLC Limited Liability Company Agreement and Single Member Declaration* (“HydroCo Agreement”).
- Exhibit E:** *Resolution 4941, Approval for the Creation of the PREPA PropertyCo, LLC Subsidiary*, issued by PREPA’s Governing Board on December 15, 2021 (“Resolution 4941”).
- Exhibit F:** *PREPA PropertyCo, LLC Limited Liability Company Agreement and Single Member Declaration* (“PropertyCo Agreement”).
- Exhibit G:** *Puerto Rico PREPA-Genco-HydroCo Operating Agreement* (the “PGHOA”), by and among PREPA as Owner of the T&D System, PREPA Genco, LLC as Owner of the Legacy Generation Assets, PREPA HydroCo, LLC as Owner of the Hydropower Assets, LUMA ServCo as the T&D Operator, and the Puerto Rico Public-Private Partnerships Authority (“P3 Authority”) as Administrator.

Through the Petition, PREPA requests the Energy Bureau to: (i) grant leave to continue with the steps required to create PREPA Genco, LLC (“GenCo”), PREPA HydroCo, LLC (“HydroCo”), and PREPA PropertyCo, LLC (“PropertyCo”) and, consequently, the transformation of PREPA; and (ii) approve the PGHOA, in compliance with the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* (“T&D OMA”).

On December 22, 2022, PREPA filed a document titled *Urgent Motion to Reiterate PREPA’s Petition for Leave to Create Subsidiaries and for Approval of the Operating Agreements* (“December 22 Motion”) through which it requests the Energy Bureau to grant the Petition. PREPA argues in the December 22 Motion it urgently requires the approval of its Petition so it may engage in the organizational efforts in relation to the inception and statutory compliance of GenCo, HydroCo and PropertyCo (collectively, the “New Subsidiaries”).

⁹ Act 17-2019, Section 1.3.

¹⁰ Act 17-2019, Section 1.7.

¹¹ *Id.*



III. Discussion

A. The T&D OMA

Consistent with the legal framework described in Part I of this Resolution and Order, on June 22, 2020, PREPA as Owner, the P3 Authority as Administrator and both LUMA Energy ServCo, LLC and LUMA Energy, LLC (collectively, "LUMA") as Operator, executed the T&D OMA. Pursuant to the T&D OMA, LUMA is the operator of PREPA's transmission and distribution system ("T&D System"). As part of the T&D OMA, PREPA, LUMA, and the P3 Authority agreed there would be certain conditions precedent to the T&D OMA's Service Commencement Date ("SCD").¹² One of such conditions, established by Section 4.5(q) of the T&D OMA, was that "[a] final plan for the reorganization of PREPA into GenCo and GridCo shall have been approved by the applicable Governmental Bodies, and the GridCo-GenCo PPOA shall have become effective." The "GridCo-GenCo PPOA" refers to a power purchase and operating agreement between GridCo¹³ and GenCo¹⁴ providing for expense reimbursement, power delivery and other services related to the generation, sale and purchase of Power and Electricity from the Legacy Power Generation Assets and the operation and maintenance thereof ("GridCo-GenCo PPOA").¹⁵ As stated in Section 1.1 of Exhibit G to the T&D OMA, the GridCo-GenCo PPOA would include the owner of the T&D System (GridCo) as buyer, the owner of the Legacy Power Generation Assets (GenCo) as seller, the P3 Authority as contract Administrator, and the operator of the T&D System (LUMA) as agent of GridCo and dispatch manager.

Despite the foregoing, recognizing the failure to complete the aforementioned documents, the Parties to the T&D OMA executed a *Limited Waiver* (the "Limited Waiver"), by which they expressly accepted the lack of certain documentary conditions precedent to the provision of the O&M Services.¹⁶ However, through the Limited Waiver, the Parties to the T&D OMA agreed that: (i) such conditions did not prevent LUMA from providing the O&M Services pursuant to the STA;¹⁷ and (ii) the Interim Period Service Commencement Date¹⁸ would be the date to enable LUMA to implement its emergency response plan for the T&D System at the beginning of the hurricane season.¹⁹

Among the conditions waived through the Limited Waiver was the completion of a final plan for reorganizing PREPA into GenCo and GridCo and the completion and approval of the GridCo-GenCo PPOA.²⁰ Regarding such conditions, the Parties to the T&D OMA further agreed that: (i) a final plan for PREPA Reorganization shall be approved by the applicable

¹² The SCD is defined in Section 4.7(b) of the T&D OMA as the date on which a handover to LUMA of the O&M Services occurs, which shall be (i) the first (1st) Business Day of a calendar month that is at least three (3) Business Days following the date on which Administrator delivers a certificate to Operator confirming that all Service Commencement Date Conditions have been met or (ii) such other date as the Parties may agree. The satisfaction or waiver of all the Service Commencement Date Conditions is required for the achievement of the Service Commencement Date.

¹³ As defined by Section 1.1 of the T&D OMA, "GridCo" means the entity, which may be directly or indirectly owned by PREPA or an Affiliate of PREPA, that acquires or obtains ownership of the T&D System after the reorganization of PREPA.

¹⁴ As defined by Section 1.1 of the T&D OMA, "GenCo" means the entity, which may be directly or indirectly owned by PREPA or an Affiliate of PREPA, that acquires or obtains ownership of the Legacy Generation Assets after the reorganization of PREPA.

¹⁵ See, T&D OMA, Section 1.1.

¹⁶ As defined by Section 5.1 of the T&D OMA.

¹⁷ *Puerto Rico Transmission and Distribution System Supplemental Terms Agreement*, as of June 22, 2020, by and among PREPA, P3 Authority and LUMA ("STA").

¹⁸ As defined by Section 2.3 of the STA.

¹⁹ See, Limited Waiver, *Preliminary Statements* (C).

²⁰ Limited Waiver, Section 1(d).



Governmental Bodies and implemented pursuant to the plan of reorganization in Exhibit A²¹ attached to the Limited Waiver before and as a condition to the SCD; and (ii) the GridCo-GenCo PPOA shall become effective upon completing the PREPA Reorganization and receipt of any approvals required under applicable law before and as a condition to the SCD, it being further understood that before the effectiveness of the GridCo-GenCo PPOA, Owner and Operator shall abide by the guidelines in Exhibit B²² attached to the Limited Waiver.²³

B. PREPA's Petition

In its Petition, PREPA states that the request to create the New Subsidiaries is made following the Puerto Rico energy public policy, Fiscal Plans approved by the FOMB,²⁴ and the T&D OMA.²⁵ Accordingly, PREPA proposes to complete the initial step by creating three (3) new subsidiaries: GenCo, HydroCo, and PropertyCo which are described below.

1. The Creation of GenCo

Through Resolution 4939, the PREPA Governing Board approved the creation of GenCo as a limited liability company under the laws of Puerto Rico. The Petition includes the proposed limited liability company operating agreement for GenCo (*i.e.*, the Genco Agreement). However, although PREPA refers in the Genco Agreement to the *Certificate of Formation of GenCo* (which is required for the formation of a limited liability company under the Act 164-2009²⁶) it does not provide a copy as part of the Petition.²⁷

Pursuant to Section 1.4 of the GenCo Agreement, GenCo is to own and operate, or delegate the operation of, PREPA's legacy thermal generation assets and to engage in any lawful activities for which limited liability companies may be organized under Act 164-2009, including, without limitation, the sale or disposition of PREPA's legacy thermal generation assets, subject to the limitations of Act 83..

Section 2.2. of the GenCo Agreement states that GenCo will be capitalized by PREPA through its contribution to GenCo, as set forth in Exhibit A to the GenCo Agreement. PREPA will contribute specific capital to GenCo, including the thermal generation assets, employees, vehicles, software, and contracts.²⁸ Pursuant to Section 1 of the *Capital Contribution Agreement PREPA GenCo LLC* ("GenCo Capital Contribution Agreement") attached to the GenCo Agreement, Schedule II to the GenCo Capital Contribution Agreement provides a list of all the GenCo Assets²⁹ identified by PREPA. However, Section 1 of the GenCo Capital Contribution Agreement establishes that the intent of PREPA and GenCo is that all facilities, equipment, and other tangible and intangible assets used only in connection with the Generation Facilities (*i.e.*, the GenCo Assets) be contributed to GenCo, despite whether they are identified in Schedule II thereto. Section 1 of the GenCo Capital Contribution Agreement

²¹ Titled *Plan of Reorganization*.

²² Titled *GridCo-GenCo Guidelines*.

²³ Limited Waiver, Section 1(d).

²⁴ The Financial Oversight and Management Board for Puerto Rico ("FOMB") created through the *Puerto Rico Oversight, Management and Economic Stability Act*, enacted by the United States Congress ("PROMESA").

²⁵ Petition, Exhibit A.

²⁶ Known as *Puerto Rico General Corporations Act* ("Act 164-2009").

²⁷ Petition, Exhibit B (GenCo Agreement), Sections 3.8, and 7.6.

²⁸ Petition, p. 13.

²⁹ "GenCo Assets" are defined in the GenCo Capital Contribution Agreement as the Generation Facilities and related facilities, equipment and other tangible and intangible assets used solely in connection with Generation Facilities. Petition, Exhibit B, GenCo Capital Contribution Agreement, *Whereas*. In turn, "Generation Facilities" are defined as the thermal power plants identified in Schedule I to the GenCo Capital Contribution Agreement. *Id.*



clarifies that any assets used with the T&D System and the legacy thermal generation assets shall remain under PREPA and will not be transferred to GenCo unless PREPA and GenCo determine, after the date of the GenCo Capital Contribution Agreement, that any such assets shall be transferred through a written instrument executed by PREPA and GenCo.

In accordance with Section 3.2 of the GenCo Agreement, GenCo shall have as members of its Board of Managers the members of PREPA Governing Board. Sections 3.3 and 3.4 of the GenCo Agreement state that the Chairman and Vice Chairman of the GenCo Board of Managers will be the Chairman and Vice Chairman of the PREPA Governing Board. Also, GenCo shall have an Executive Director, who will be the Executive Director of PREPA, unless otherwise determined by the GenCo Board of Managers.³⁰ Moreover, GenCo may have a Sub-Director of Operations, who will be appointed by the GenCo Board of Managers, provided that, if PREPA has a Sub-Director of Operations, then GenCo's Sub-Director of Operations shall be the same as PREPA's.³¹

2. The Creation of HydroCo

Through Resolution 4940, the PREPA Governing Board approved the creation of HydroCo as a limited liability company under the laws of Puerto Rico. The Petition includes the proposed limited liability company operating agreement for HydroCo (*i.e.*, the HydroCo Agreement). However, although PREPA refers in the HydroCo Agreement to the Certificate of Formation of HydroCo (which is required for the formation of a limited liability company under the Act 164-2009) it does not provide a copy as part of the Petition.³²

Pursuant to Section 1.4 of the HydroCo Agreement, the purpose of HydroCo will be to own and operate, or delegate the operation of, PREPA's legacy hydroelectric generation and irrigation assets, and to engage in any lawful activities for which limited liability companies may be organized under Act 164-2009, including, without limitation, the sale or disposition of PREPA's legacy hydroelectric generation and irrigation assets, subject to the limitations of Act 83. PREPA's hydroelectric and irrigation assets, employees, vehicles, software, and contracts and assets related to them are collectively referred to in the Petition as the "Hydropower Assets."

Section 2.2. of the HydroCo Agreement states that HydroCo will be capitalized by PREPA through its contribution to HydroCo, as set forth in Exhibit A to the HydroCo Agreement. PREPA will contribute specific capital to HydroCo, including the Hydropower Assets.³³ Pursuant to Section 1 of the Capital Contribution Agreement PREPA HydroCo LLC ("HydroCo Capital Contribution Agreement") attached to the HydroCo Agreement, Schedule II to the HydroCo Capital Contribution Agreement provides a list of all the HydroCo Assets³⁴ identified by PREPA. However, Section 1 of the HydroCo Capital Contribution Agreement establishes that the intent of PREPA and HydroCo is that all facilities, equipment, and other tangible and intangible assets used only in connection with the HydroCo Facilities be contributed to HydroCo, irrespective of whether they are identified in Schedule II thereto. Section 1 of the HydroCo Capital Contribution Agreement clarifies that any assets used with the T&D System and the HydroCo Facilities shall remain under PREPA and will not be transferred to HydroCo unless PREPA and HydroCo determine after the date of the HydroCo Capital Contribution Agreement that any such assets shall be transferred through a written instrument executed by PREPA and HydroCo.

³⁰ GenCo Agreement, Section 5.3.

³¹ *Id.*, Section 5.4.

³² Petition, Exhibit D (HydroCo Agreement), Sections 3.8, and 7.6.

³³ Petition, p. 14.

³⁴ "HydroCo Assets" are defined in the HydroCo Capital Contribution Agreement as the HydroCo Facilities and related facilities, dams and reservoirs, equipment and other tangible and intangible assets used solely in connection with the HydroCo Facilities. Petition, Exhibit D, HydroCo Capital Contribution Agreement, *Whereas*. In turn, "HydroCo Facilities" are referred to in the HydroCo Capital Contribution Agreement as the hydroelectric generation plants and public irrigation facilities identified in Schedule I thereto. *Id*



In accordance with Section 3.2 of the HydroCo Agreement, HydroCo shall have as members of its Board of Managers the PREPA Governing Board. Sections 3.3 and 3.4 of the HydroCo Agreement state that the Chairman and Vice Chairman of the HydroCo Board of Managers will be the Chairman and Vice Chairman of the PREPA Governing Board. Also, HydroCo shall have an Executive Director, who will be the Executive Director of PREPA, unless otherwise determined by the HydroCo Board of Managers. HydroCo may have a Sub-Director of Operations, who will be appointed by the HydroCo Board of Managers, provided that, if PREPA has a Sub-Director of Operations, then HydroCo's Sub-Director of Operations shall be the same as PREPA's.

3. *The Creation of PropertyCo*

Through Resolution 4941, the PREPA Governing Board approved the creation of PropertyCo as a limited liability company under the laws of Puerto Rico. The Petition includes the proposed limited liability company operating agreement for PropertyCo (i.e., the PropertyCo Agreement). However, although PREPA refers in the PropertyCo Agreement to the Certificate of Formation of PropertyCo (which is required for the formation of a limited liability company under the Act 164-2009) it does not provide a copy as part of the Petition.³⁵

Pursuant to Section 1.4 of the PropertyCo Agreement, the purpose of PropertyCo will be to own and operate, or delegate the operation of, certain of PREPA's assets not related to the T&D System or the legacy generation and irrigation facilities, and to engage in any lawful activities for which limited liability companies may be organized under Act 164-2009, including, without limitation, the sale or disposition of PREPA's legacy thermal generation assets, subject to the limitations of Act 83.

Section 2.2. of the PropertyCo Agreement states that PropertyCo will be capitalized by PREPA through its contribution to PropertyCo, as set forth in Exhibit A to the PropertyCo Agreement. Pursuant to Section 1 of the Capital Contribution Agreement PREPA PropertyCo LLC ("PropertyCo Capital Contribution Agreement") attached to the PropertyCo Agreement, Schedule I to the PropertyCo Capital Contribution Agreement provides a list of all the PropertyCo Assets³⁶ identified by PREPA. However, Section 1 of the PropertyCo Capital Contribution Agreement establishes that the intent of PREPA and PropertyCo is that any assets not directly related to the T&D System and the Generation Assets or the HydroCo Assets, be transferred to PropertyCo, despite whether they are identified in Schedule I thereto.

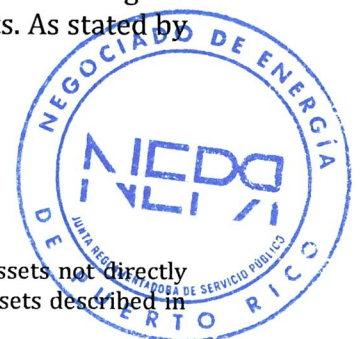
In accordance with Section 3.2 of the PropertyCo Agreement, PropertyCo shall have as members of its Board of Managers the PREPA Governing Board. Sections 3.3 and 3.4 of the PropertyCo Agreement state that the Chairman and Vice Chairman of the PropertyCo Board of Managers will be the Chairman and Vice Chairman of the PREPA Governing Board. PropertyCo shall have an Executive Director which will be the Executive Director of PREPA, unless otherwise determined by the PropertyCo Board of Managers. Also, PropertyCo may have a Sub-Director of Administration, who will be appointed by the Board of Managers, provided that, if PREPA has a Sub-Director of Administration, then PropertyCo's Sub-Director of Administration shall be the same as PREPA's.

4. *The PGHOA*

LUMA, PREPA, and the P3 Authority, as parties to the T&D OMA, together with GenCo and HydroCo, have agreed to enter into the PGHOA to coordinate certain matters concerning the Legacy Generation Assets, the Hydropower Assets, and the T&D System assets. As stated by PREPA through its Petition, the PGHOA includes mainly the following:

³⁵ Petition, Exhibit F (PropertyCo Agreement), Sections 3.8, and 7.6.

³⁶ "PropertyCo Assets" are defined in the PropertyCo Capital Contribution Agreement as assets not directly related to the T&D System, the Generation Facilities or the HydroCo Facilities, including assets described in Schedule I thereto. Petition, Exhibit F, PropertyCo Capital Contribution Agreement, *Whereas*.



1. the steps and process to be followed by the Parties, GenCo, and HydroCo to prepare and amend each of the parties' budgets;
2. how each of the T&D Operator, GenCo, and HydroCo's accounts will be funded;
3. the form of Interconnection Agreement to be entered into on or about the effective date between PREPA and GenCo concerning the interconnection of the T&D System and the legacy generation assets;³⁷
4. the *Agreed Operating Procedures*;³⁸
5. the interconnection facilities operations and maintenance procedure;
6. dispatch;
7. metering of the electricity delivered or provided by GenCo or HydroCo; and
8. decommissioning of the Legacy Thermal Generation Assets.

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According to PREPA, the PGHOA submitted for the Energy Bureau's review and approval has been reviewed and approved by the PREPA Governing Board in accordance with Resolution 4995, *Authorize the Executive Director to Execute the Puerto Rico PREPA - GenCo - HydroCo Operating Agreement, the Agreed Operating Procedures and the Interconnection Agreement*, issued on July 20, 2022 ("Resolution 4995").³⁹ The PGHOA shall become effective once the Energy Bureau approves the creation of GenCo and HydroCo; it approves the PGHOA and its annexes; and the P3 Authority's Board of Directors authorizes the execution, delivery, and performance by P3 Authority under the PGHOA and the transactions contemplated.

The PGHOA includes the draft *Agreed Operating Procedures* ("AOP")⁴⁰ which, according to PREPA, is intended as a set of procedures to assist GenCo, as owner and operator of the Legacy Thermal Generation Assets (i.e., the GenCo Assets), and T&D Operator, according to the T&D OMA, in the day-to-day management of each generation facility, including scheduling and dispatch. Therefore, the AOP attached to the PGHOA shall serve as a template that will be evaluated with the relevant GenCo and T&D Operator after being approved and adapted to each of the generating facilities. Also annexed to the PGHOA is the draft *Legacy Generation Assets Interconnection Agreement* ("LGA Interconnection Agreement").⁴¹ PREPA states that once PREPA and GenCo, as the interconnection customer, enter into the LGA Interconnection Agreement, it will govern the terms and conditions under which the LGA interconnect with and operate in parallel with the T&D System. According to the T&D OMA, the T&D Operator will act as an agent of PREPA under the LGA Interconnection Agreement. Once the Generation O&M is executed and becomes effective, Genco Operator will serve as the agent for Genco under the LGA Interconnection Agreement in accordance with the Generation O&M Agreement.

C. *Applicable Law*

Due to the dire conditions of the Electrical System, the Government of Puerto Rico recognized the need to transform it into a modern, sustainable, reliable, efficient, cost-

³⁷ PGHOA, Annex I.

³⁸ PGHOA, Annex II.

³⁹ Pursuant to the provisions of Resolution 4995, on August 31, 2022, the Executive Director of PREPA, with the consent of the Chairman of the PREPA Governing Board, approved the submittal of the attached draft PGHOA for the consideration and approval of the Energy Bureau.

⁴⁰ PGHOA, Annex II.

⁴¹ PGHOA, Annex I.



effective, and resilient one.⁴² As stated in Act 120-2018, although PREPA operates as a Government monopoly, it lacks the conditions to offer an efficient service at a reasonable cost for residential, commercial, and industrial customers.⁴³ Accordingly, Act 120-2018 was enacted to set the legal framework to transform PREPA's vertically integrated monopolistic structure. Act 120-2018 empowers PREPA to sell its assets related to electric power generation and transfer or delegate any of its operations, functions, or services.⁴⁴ It also empowers PREPA and the P3 Authority to carry out the processes through which such *transactions* will be executed.⁴⁵

As defined by Section 2(m) of Act 120-2018 and Section 1.2(t) of Act 17-2019,⁴⁶ a PREPA Transaction consists of a transaction executed in accordance with Act 29-2009 and Act 120-2018, whereby PREPA or the Government of Puerto Rico, (1) establishes one or more Partnerships and enters one or more Partnership Contracts in connection with any of PREPA's functions, services, or facilities, or (2) executes a Sales Contract in connection with PREPA Assets devoted to electric power generation.⁴⁷

Section 4 of Act 120-2018 orders that PREPA Transactions will be executed pursuant to Act 29-2009. Section 5 of Act 120-2018 states that the P3 Authority shall be the sole Government Entity authorized to and responsible for: (i) implementing the public policy on PREPA Transactions conducted in accordance with Act 120-2018; (ii) determining the Functions, Services, or Facilities for which such Partnerships shall be established, subject to the priorities, objectives, and principles established in the energy policy and the regulatory framework to be developed pursuant to Section 9 of Act 120-2018; and (iii) determining which PREPA Assets related to electric power generation shall be sold or transferred through Sales Contracts. Additionally, Section 5 of Act 120-2018 states that PREPA may only sell and dispose of PREPA Assets related to electric power generation⁴⁸ through the process established in Act 120-2018 and may only conduct transactions related to electric power generation, distribution, and transmission, metering, and any other PREPA function, service, or facility through Partnership Contracts.

In accordance with Act 120-2018, Act 17-2019 orders the unbundling and transformation of the electrical system. Section 1.8(a) of Act 17-2019 states that Puerto Rico's electrical system shall not be a vertical monopoly, and that a horizontal monopoly regarding power generation may not be established either. Section 1.8(a) mandates PREPA to transfer the operating, administrative, and/or maintenance functions with the Legacy Power Generation Assets on or before December 31, 2020. Section 1.8(b) of Act 17-2019 establishes that by December 31, 2019, or the closest date thereto, PREPA shall execute one or various Partnership Contracts, in accordance with Act 17-2019, Act 120-2018, Act 29-2009 and the regulations, through which it shall transfer the transmission and distribution functions, the sale of electric power, the operation of the Energy Control Center, and all those activities related to such functions.

To further the above, Section 5(u) of Act 83 states that PREPA shall have and exercise, among other powers and upon approval of the Energy Bureau, the power to create, whether in Puerto Rico or in a different jurisdiction, or contract with companies, partnerships, or subsidiary corporations, whether for profit or nonprofit, affiliated or associated, in order to, among others: (i) separate or divide into one or more subsidiaries the PREPA's generation,

⁴² Act 120-2018, *Statements of Motives*.

⁴³ *Id.*

⁴⁴ *Id.*; see also, Section 5(a) of Act 120-2018. 22 L.P.R.A. § 1115(a).

⁴⁵ *Id.*

⁴⁶ Known as *Puerto Rico Energy Public Policy Act* ("Act 17-2019").

⁴⁷ 22 L.P.R.A. § 1112(m); 22 L.P.R.A. § 1141a(t).

⁴⁸ In accordance with Section 5, Section 3 of Act 120-2018 establishes that it is the intent and the policy of the Legislative Assembly to, among other things, sell PREPA's power generation assets, thus placing such assets in the private hands of those who show a fair balance between the commercial interests and the sense of social responsibility.



transmission, and distribution functions, (ii) participate in Public-Private Partnerships in accordance with Act 29-2009, as amended, and Act 120-2018. Therefore, PREPA's enabling law empowers PREPA to carry out the actions for which it requests approval through the Petition. Likewise, Act 83 reiterates the Energy Bureau's authority to consider the merits of PREPA's Petition.

Also, the 2022 Certified Fiscal Plan for PREPA ("2022 Fiscal Plan"), as approved by the FOMB, establishes that, to further the unbundling of the electric system into one in which roles and responsibilities are reallocated across multiple entities and are operated by different parties, PREPA would focus on (i) creating the approved subsidiaries (PREPA GenCo, PREPA GridCo, PREPA HydroCo, and PREPA PropertyCo); and (ii) assigning separate PREPA's assets, roles, and responsibilities into each subsidiary.⁴⁹ Accordingly, the 2022 Fiscal Plan contemplates the creation of the subsidiaries mentioned in PREPA's Petition. The 2022 Fiscal Plan is consistent with the energy public policy and legal framework established by Act 17-2019 and Act 120-2018, as well as other laws in relation thereto. The 2022 Fiscal Plan also conforms to the powers vested to PREPA by Act 83.

D. Conditional Approval of New Subsidiaries

In consideration of the foregoing discussion, the Energy Bureau **DETERMINES** that the creation of GenCo, HydroCo, and PropertyCo is consistent with the implementation of the Puerto Rico Energy Public Policy. The Energy Bureau considers that such actions are aligned with the legal framework that establishes PREPA's transformation through, among other actions, the unbundling of its assets and the delegation of its operations. Notwithstanding the above, in reviewing the constitutive documents of GenCo, HydroCo and PropertyCo, the Energy Bureau identified certain deficiencies which need to be addressed by PREPA, as further discussed below.

(1) New Subsidiaries Potential Lack of Independence from PREPA

PREPA proposes to create three (3) allegedly independent subsidiaries, however, each subsidiary will be controlled by PREPA. Notably, the members of the Board of Managers of each of the three (3) subsidiaries are the same members of PREPA's Governing Board. Likewise, the principal officers of the subsidiaries (Executive Director and Director of Operations or Director of Administration) will be the same as of PREPA's. Therefore, the governance structures of GenCo, HydroCo, and PropertyCo would have no effective independence from PREPA.

(2) Potential for Self-Dealing Between New Subsidiaries and PREPA

As discussed before, PREPA proposes the creation of PropertyCo to transfer assets not part of GenCo, HydroCo, or operated by LUMA under the T&D OMA. The PGHOA does not provide specific safeguards to prevent objectionable transactions between PREPA and the New Subsidiaries or among the New Subsidiaries. Therefore, to prevent the risk of objectionable self-dealing transactions, adequate safeguards need to be established.

To address the Energy Bureau's concern regarding the New Subsidiaries' lack of independence from PREPA and the potential for self-dealing between the PREPA and the New Subsidiaries and among the New Subsidiaries, as described above, the Energy Bureau **ORDERS** PREPA and its New Subsidiaries (i.e., GenCo, HydroCo, and PropertyCo) to submit

⁴⁹ See, 2022 Fiscal Plan, p. 46 ¶1. Specifically, the 2022 Fiscal Plan establishes the following:

1. *Reorganization of PREPA: One of the key tenets and requirements of previous Certified Fiscal Plans and Commonwealth energy policy for transformation is the unbundling of the electric system from a vertically integrated monopoly structure into one in which roles and responsibilities are reallocated across multiple entities and are operated by different parties. To that end, the T&D OMA among PREPA, P3A and LUMA was executed on June 22, 2020. On June 1, 2021, LUMA took over operations. In December 2021, the PREPA Governing Board approved the legal creation of PREPA's planned subsidiaries. The focus in the coming months will be to: (i) create the approved subsidiaries (PREPA GenCo, PREPA GridCo, PREPA HydroCo, and PREPA PropertyCo); and (ii) assign separate PREPA's assets, roles, and responsibilities into each of the subsidiaries.*



monthly reports detailing all transactions between affiliated entities. The reports shall describe the purpose of the transaction, amount paid to affiliate, and all attempts to seek a competitive alternative to the affiliate transaction.

(3) *Allocation of Certain Real Property*

From the documents provided PropertyCo will retain real property, (a) formerly used to operate certain PREPA's commercial offices (not currently in use) and (b) vacant parcels of land. Still, PREPA also recognizes that it has not reached an agreement with LUMA on who should keep the title (PREPA or PropertyCo) of those parcels of land which comprise office buildings (currently not in use) and electrical substations (currently in use by LUMA).⁵⁰ Given the lack of determination concerning the transfer of the category of assets, the Energy Bureau **ORDERS** PREPA to, (i) keep the title of those assets as part of the reorganization proposed through the Petition, and (ii) submit within the next ninety (90) days a plan to transfer the portion of such assets not used as part of the operation of the T&D System to PropertyCo.

(4) *Required Modifications to the Genco Agreement, the HydroCo Agreement, and the PropertyCo Agreement*

The Genco Agreement, the HydroCo Agreement, and the PropertyCo Agreement are substantially identical, therefore, the following modifications will be equally applicable to each agreement, unless otherwise is expressly stated:

- (i) Section 1.1 (*Rights and Obligations of the Member*) of Article I (*Formation of the Company*) shall be modified to clarify that the rights, liabilities, and obligations of the Member (PREPA) with respect of the Company (Genco, HydroCo or PropertyCo) shall be determined pursuant to the Corporations Act and the Agreement, to the extent not otherwise provided by applicable laws and regulations, including without limitation, Act 83, Act 57-2014, and Act 17-2019.
- (ii) Section 1.4 (*Purposes of the Company*) of Article I (*Formation of the Company*) shall be modified to limit the activities that the Company can engage into as a subsidiary of PREPA and an Electric Service Company. It must be clarified that the sale or disposition of the PREPA's Legacy Power Generation Assets, shall be subject to the limitations established in Act 120-2018 and Act 29-2009.⁵¹
- (iii) Section 3.6 (*Liability of Managers*) of Article III (*Management*) shall be modified to be consistent with the liability limitations attributable to PREPA's Governing Board members, officials, agents, or employees established in Article 4(g) of Act 83.
- (iv) Section 3.7 (*Regular Meetings*) of Article III (*Management*) shall be modified to be consistent with the PREPA's Governing Board meetings requirements established in Article 4(b) of Act 83.
- (v) Section 3.14 (*Books and Records*) of Article III (*Management*) shall be modified to be consistent with Article 12 of Act 83, which allows certain examination of the books and records of PREPA by the Puerto Rico's Secretary of the Department of the Treasury.
- (vi) Section 5.6 (*Vacancies*) of Article V (*Officers of the Company*) shall be modified to be consistent with Article 4 of Act 83 and Section 3.2 of the Agreement. The


⁵⁰ Petition, Exhibit F (PropertyCo Capital Contribution Agreement), Schedule II-A.

⁵¹ This modification requirement does not apply to PropertyCo.




majority of the entire Members of the Board of the Company are not entitled to fill a vacancy in the Board of Managers.


- (vii) Section 6.1 (Loans) of Article VI (*Financial Affairs*) shall be modified to clarify that, under certain circumstances, the issuance of debt by the Company requires the authorization of the Energy Bureau.
- (viii) Section 7.1 (Third Party Actions) of Article VII (*Indemnification*) shall be modified to be consistent with the liability limitations established in Article 4(g) of Act 83.
- (ix) Section 9.1 (*Winding Up*) of Article IX (*Winding Up*) shall be modified to clarify that the sale or disposition of the PREPA's Legacy Power Generation Assets, shall be subject to the limitations established in Act 120-2018 and Act 29-2009.⁵²

 If PREPA understands that it is unnecessary to modify the above-mentioned provisions of the GenCo, HydroCo, and PropertyCo Agreements, it must explain the grounds that justify its reasoning.

E. Conditional Approval of the PGHOA

 For the same reasons stated above, the Energy Bureau **DETERMINES** that the approval of the PGHOA is consistent with the implementation of the Puerto Rico Energy Public Policy. However, upon comprehensively evaluating the PGHOA, the Energy Bureau determines that certain safeguards need to be taken to guarantee that its implementation responds to the applicable legislative and regulatory directives.

(1) Potential Misalignment with the Energy Bureau's Annual Budget Review Process

 Act 57-2014⁵³ establishes procedures and standards for the Energy Bureau to evaluate and establish electric rates to be charged by PREPA.⁵⁴ To carry out Act 57-2014's requirements, the Energy Bureau approved Regulation 8720,⁵⁵ establishing the information requirements with which PREPA had to comply when submitting its petition for new rates.

In accordance with Act 57-2014 and Regulation 8720, on January 10, 2017, the Energy Bureau issued a Final Resolution and Order in *In Re: Revisión de Tarifas de la Autoridad de Energía Eléctrica de Puerto Rico*, Case No. CEPR-AP-2015-0001 ("2017 Rate Order"). Section III of Part Four of the 2017 Rate Order specifically provides that the Energy Bureau will adopt, among others, an annual budget examination procedure designed to impose discipline on PREPA's spending.⁵⁶ The 2017 Rate Order outlines there will be a series of one-year budget examinations that occur between each three-year rate case.⁵⁷

Pursuant to the 2017 Rate Order, as part of LUMA's obligations as the Operator of the T&D System, the Energy Bureau established certain parameters regarding the review of LUMA's budgets, specifically, reviewing, and approving, denying, or proposing modifications thereto. To review and approve the components of LUMA's Initial Budgets, upon LUMA's filing of the required documents, the Energy Bureau opened the docket in *In re: Review of LUMA's Initial Budgets*, Case No. NEPR-MI-2021-0004 ("LUMA's Initial Budgets Case"). Through LUMA's

⁵² This modification requirement does not apply to PropertyCo.

⁵³ Known as *Puerto Rico Energy Transformation and RELIEF Act*, as amended ("Act 57-2014").

⁵⁴ Act 57-2014, Section 6.25(b).

⁵⁵ Known as *New Regulation on Rate Filing Requirement for the Puerto Rico Electric Power Authority's First Rate Case* ("Regulation 8720").

⁵⁶ See, 2017 Rate Order, p. 149.

⁵⁷ *Id.*



Initial Budgets Case, the Energy Bureau approved the FY2022 Initial Budgets proposed by LUMA, subject certain conditions established.⁵⁸

Pursuant to the legal and regulatory requirements established by the abovementioned provisions, the PGHOA is subject to the parameters established in the 2017 Rate Order and LUMA's Initial Budgets Case. However, upon evaluation of Article 3 of the PGHOA, the Energy Bureau deems that it does not seem fully consistent with such parameters. Article 3 of the PGHOA does not seem to provide a process and appropriate time, to comply with the 2017 Rate Order's clear mandate that Energy Bureau will review budgets and spending annually. Specifically, the 2017 Rate Order set procedures for reviewing PREPA's proposed annual budgets and expect that the Energy Bureau would receive proposed budgets on a timeline to support establishing a just and reasonable revenue requirement for the upcoming fiscal year beginning on July 1.⁵⁹ The timelines in the PGHOA under Section 3.1 (b) (*Budget Allocation Meeting*) and Section 3.1 (e) (*PREB Rate Proceedings*) appear to compress the timeframe that the Energy Bureau must review any requests and challenge the ability to establish a just and reasonable revenue requirement on the timeline provided in the 2017 Rate Order.

The Energy Bureau notes that Section 3.1 (e)(iv) of the PGHOA contains language reinforcing that any *Rate Order Modification Request*, "shall be prepared and undertaken in accordance with the relevant requirements set forth under Applicable Law." The Energy Bureau is concerned, nevertheless that the current timelines for developing and submitting requests to increase or amend budgets will not allow enough time for the due diligence required to meet the goals of disciplined spending and improved performance established in the 2017 Rate Order.⁶⁰

To address the PGHOA's potential misalignment with the Energy Bureau's annual budget review process described above, the Energy Bureau emphasizes that the 2017 Rate Order and the LUMA's Initial Budgets Case set the procedures for establishing the annual budgets for PREPA, LUMA, and the New Subsidiaries. The parties to the PGHOA shall follow the timelines for the annual budget cycle outlined as part of the budgeting process of the Energy Bureau every year. The Energy Bureau reiterates that, notwithstanding Article 3 of the PGHOA, compliance with the budget allocation process will be completed by the Energy Bureau consistent with current timelines for the annual budget cycle set by the Energy Bureau.

The Energy Bureau also recognizes that to ease the preparation of an integrated budget for all the components of PREPA (*i.e.*, Generation, T&D System, etc.), the PGHOA provides a mechanism to proportionally allocate the forecasted annual income of PREPA among its different components (*i.e.*, Generation, T&D System, etc.).⁶¹ According to the PGHOA, such allocation will be established using the then prevailing Rate Order.⁶² The Energy Bureau clarifies that the procedure in the PGHOA to develop the proposed PREPA's budget for the Energy Bureau's evaluation and approval is not binding for the Energy Bureau. The Energy Bureau will determine PREPA's annual budget based on the fundamental tenet that requires PREPA's rate to be just and reasonable and consistent with sound fiscal and operational practices which result in a reliable service at the lowest reasonable cost.

IV. Conclusion

A. Approval of Proposed Creation of New Subsidiaries and the PGHOA

The Energy Bureau **APPROVES** PREPA's proposed creation of GenCo, HydroCo, and PropertyCo, as well as the PGHOA, subject to the conditions and/or required modifications

⁵⁸ See, LUMA's Initial Budgets Case, Resolution and Order, May 31, 2021, p. 35.

⁵⁹ 2017 Rate Order, pp. 147-155.

⁶⁰ 2017 Rate Order, p. 147.

⁶¹ See, in general, Article III of the PGHOA.

⁶² *Id.*



established in Part III (D and E) of this Resolution and Order and the clarifications established in Part IV (B) of this Resolution and Order.

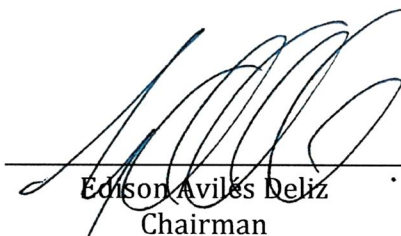
B. No Limitation on Jurisdiction or Authority; Rule of Construction; Other Matters

The Energy Bureau **CLARIFIES** that the scope of its evaluation of each document submitted by PREPA through its Petition is limited to determining compliance with Puerto Rico's Energy Public Policy and the current legal framework. Therefore Resolution 4939, Resolution 4940, Resolution 4941, the Genco Agreement, the HydroCo Agreement, the PropertyCo Agreement, the GenCo Capital Contribution Agreement, the HydroCo Capital Contribution Agreement, the PropertyCo Capital Contribution Agreement, and the PGHOA, impose no obligation and/or duty to the Energy Bureau. No provision of such documents shall be interpreted, construed, or deemed to limit, restrict, supersede, supplant, or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to the Energy Bureau under applicable laws and regulations.

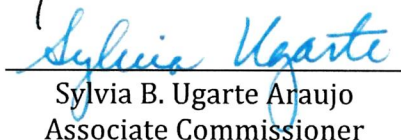
Considering the foregoing Energy Bureau further **CLARIFIES** that the issuance of this Resolution and Order:

- (1) Shall not be construed, in any way whatsoever, as to impair, restrict, relinquish, or abridge the scope of the Energy Bureau's: (a) administrative powers; (b) statutory and regulatory jurisdiction and/or authority; (c) statutory and regulatory oversight and enforcement powers; (d) rights; (e) duties; or (f) obligations, all in accordance with the applicable laws and regulations.
- (2) Shall not be construed, in any way whatsoever, as a waiver and/or release of any applicable statutory or regulatory requirement nor any related regulatory action applicable to the LGA, the T&D System, the Hydropower Assets or any other assets in connection to PREPA or the Puerto Rico electrical system, their operators, PREPA (or their successor owners or operators).
- (3) Anything in Resolution 4939, Resolution 4940, Resolution 4941, the Genco Agreement, the HydroCo Agreement, the PropertyCo Agreement, the GenCo Capital Contribution Agreement, the HydroCo Capital Contribution Agreement, the PropertyCo Capital Contribution Agreement, or the PGHOA contrary to the applicable laws, regulations, or the Energy Bureau's orders, shall be deemed unenforceable.

Be it notified and published.


Edison Aviles Deliz
Chairman


Lillian Mateo Santos
Associate Commissioner


Sylvia B. Ugarte Araujo
Associate Commissioner

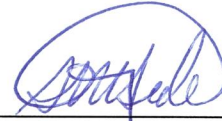

Antonio Torres Miranda
Associate Commissioner



CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on December 29, 2022. Associate Commissioner Ferdinand A. Ramos Soegaard did not intervene. I also certify that on December 29, 2022 a copy of this Resolution was notified by electronic mail to kbolanos@diazvaz.law and jmarrero@diazvaz.law; and I have proceeded with the filing of the Resolution issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today December 29, 2022.



Sonia Seda Gaztambide
Clerk

