

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

NEPR

Received:

Feb 28, 2023

12:50 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: Informative Motion Regarding
Update on LUMA Interconnection Studies
Policy Change, Amendment to Closing Date,
T1 Project Permitting Process and Request for
Order Addressing Same

**INFORMATIVE MOTION REGARDING UPDATE ON LUMA INTERCONNECTION
STUDIES POLICY CHANGE, AMENDMENT TO CLOSING DATE, T1 PROJECT
PERMITTING PROCESS AND REQUEST FOR ORDER DIRECTING LUMA TO
TAKE SPECIFIED ACTIONS TO MINIMIZE FURTHER DELAYS**

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. On January 3, 2023, PREPA filed its *“Informative Motion in Compliance with the December 19, 2022, Order which Requested a Status Update on Contract Negotiations with BESS Projects”*¹(“January 3 Motion”). The January 3 Motion informed the Energy Bureau of the Public Service Regulatory Board (“Energy Bureau”) of the then-current status of the Tranche 1 RFP process as well as the status of the contract negotiations with certain BESS projects.
2. As part of the January 3 Motion, PREPA also informed the Energy Bureau of LUMA’s positions up to that time related to the responsibilities of LUMA as agent of PREPA (“PREPA/LUMA”) and project Proponents regarding construction of the

¹ For a detailed description of the process please see January 3 Motion.

PREPA Interconnection Facilities (e.g., PREPA’s assets at and around the Interconnection Point for a project, but not system upgrades further downstream).

3. After the filing of the January 3 Motion and as will be further detailed below, PREPA requested a conference with the Energy Bureau, which was held on January 30, 2023 (“January 30 Meeting”), for the purpose of informing the Energy Bureau of certain matters that could affect the Tranche 1 projects including (1) the need for Closing Date extensions, (2) pricing concerns from some Proponents resulting from supply chain and inflation issues, and (3) the effect of several LUMA policy changes regarding the allocation of responsibility for the construction of Interconnection Facilities.
4. With regards to the Closing Date, as PREPA discussed with the Energy Bureau, Proponents had requested additional time to comply with the conditions precedent set forth in the signed Power Purchase and Operating Agreements and Energy Storage Services Agreements. Completion of the conditions precedent has primarily been impaired by changes to the allocation of responsibility for the construction of the Interconnection Facilities (each of which required revisions to the agreements and Proponent coordination on scope changes with their contractors). At the January 30 Meeting, the Energy Bureau authorized PREPA to pursue 60-day extensions with Proponents. In furtherance of this request and with the purpose of allowing more of the Tranche 1 projects to come to fruition, PREPA offered to all Proponents, and has to date signed with some Proponents, an Amendment to extend the Closing Date by sixty (60) additional days. **Exhibit 1.**
5. Notwithstanding, after the January 30 Meeting, PREPA has received communications from Proponents regarding additional delays caused by other governmental entities related to the

project permitting process at the Puerto Rico and federal levels. This is of concern to all, given that it could jeopardize the Closing Date even as extended. In mid-2022, PREPA had supported Proponents in the permitting process by facilitating applications with the Financial Oversight and Management Board for Puerto Rico (“**FOMB**”), including pre-filling out relevant sections of the application form for Proponents’ benefit. PREPA has been informed by at least some Proponents that they did in fact apply for critical project designation, but that the FOMB has not yet acted on these applications.

6. With regard to pricing, PREPA has followed the guidance given by the Energy Bureau to not entertain price increases and to communicate that any further changes to the Tranche 1 agreements will require substantial evidence. Some Proponents have started to provide this evidence, and PREPA will submit it to the Energy Bureau in due course.
7. In terms of the LUMA policy changes applicable to the construction of the Interconnection Facilities, as the Energy Bureau may recall, the initial approach to the construction of the PREPA Interconnection Facilities outlined in the Tranche 1 RFP required Resource Providers to assume responsibility for those works. PREPA took this approach because it did not have the resources to guarantee completion of the PREPA Interconnection Facilities within the PREB-mandated timelines and did not believe it could implement these works cost-effectively.
8. When LUMA stepped in during mid-2021, LUMA required PREPA to amend the Tranche 1 RFP and all related documents to give LUMA/PREPA responsibility (with related risk) for all PREPA Interconnection Facilities construction works (“**First Policy Change**”). At the time, PREPA advised the LUMA RFP team that failure to complete their interconnection works on time could result in exposure to delay liquidated damages on the

part of PREPA/LUMA. The signed agreements approved by the Energy Bureau reflected the First Policy Change, and PREPA also highlighted the impact of this change to the Energy Bureau in a May 2022 discussion on lessons learned in the Tranche 1 process.

9. In June 2022, LUMA informed Resource Providers that its policy of having LUMA assume responsibility for the PREPA Interconnection Facilities construction works still required Resource Providers (i) to assume land acquisition responsibility for the expansion or construction of the PREPA Interconnection Facilities, and (ii) themselves to construct the PREPA Interconnection Facilities requiring sectionalizers. PREPA informed the LUMA team of its disagreement with these decisions; nevertheless, LUMA's shedding of this responsibility impacted several projects.
10. Around this time as well, PREPA advised the LUMA RFP team that failure to complete its RFP process for EPC contractors to take on the PREPA Interconnection Facilities works by December 2022 would negatively impact the Tranche 1 process, allowing Proponents potentially to walk away without liability. PREPA followed up regularly in 2022 on the status of the RFP process and the status of the interconnection agreement and related negotiations.
11. However, in August 2022, LUMA informed PREPA that it would revert to a preference for the original approach to the PREPA Interconnection Facilities of having Resource Providers take responsibility for their construction (the "**Second Policy Change**"). LUMA offered Resource Providers the option to assume primary responsibility for the construction of the PREPA Interconnection Facilities under LUMA supervision. Resource Providers responded by noting that they needed time to coordinate with their contractors and evaluate whether they could take over responsibility for the PREPA Interconnection Facilities.

LUMA met with all Resource Providers and (we understand) with the Energy Bureau to explain the benefits of the Second Policy Change. Once Resource Providers came back with their decisions, LUMA met with the Resource Providers that did not elect to take over responsibility for such facilities again to persuade them to do so. Material progress toward closing the signed agreements, and finalizing new BESS contracts, could not be made while LUMA and Resource Providers re-evaluated their respective responsibilities. PREPA informed the Energy Bureau of these issues in the Informative Motion filed on January 3rd, 2023.

12. Thereafter, in mid-January of 2023, and as PREPA informed the Energy Bureau at the January 30 Meeting, LUMA's RFP committee informed PREPA of a third change in policy for the PREPA Interconnection Facilities, which reverted to the allocation of responsibility outlined in the First Policy Change ("**Third Policy Change**").
13. However, to this date, LUMA has not formally advised PREPA in writing of the Third Policy Change nor of the timeline effects on the Tranche 1 projects that will result. On February 22nd, 2023, LUMA's RFP committee orally informed PREPA of the expected publication of LUMA's RFP for EPC contractors in mid-March and a tentative expectation of RFP completion in July 2023. (Previous indications had been that the RFP process would take six months from publication.) PREPA requested LUMA to provide a timeline of this to share with the Energy Bureau, but to date is awaiting this timeline. As PREPA informed the Energy Bureau in the January 30 Meeting, PREPA continues to understand that LUMA will provide a letter or motion to the Energy Bureau explaining the rationale for the Third Policy Change, its new expected timeline, and the impact on the Tranche 1 projects for which LUMA will take responsibility. PREPA has been informally told that the rationale

relates to cost savings to ratepayers, but PREPA does not have clear guidance on when the Energy Bureau can expect LUMA's letter or motion providing the new rationale.

14. As explained above, PREPA has worked through significant changes to the documentation, delays in the Tranche 1 RFP process, and impacts on bid pricing related to repeated LUMA-initiated changes. This has made it difficult to progress Tranche 1 contracts to closing given that, with the various policy changes, Resource Providers are now expected to assume risks not contemplated during the Tranche 1 RFP bidding process. Additionally, the LUMA-driven delays have prevented the closing of contracts during a period when inflation and interest rates have spiked, compounding the difficulty Proponents have faced in keeping their pricing.
15. While PREPA awaits clear guidance from LUMA on its EPC RFP timeline, the range of potential dates communicated by LUMA for completion of that process now spans from July to September 2023 (i.e., six months after RFP publication). LUMA says that it cannot compress this time frame earlier than July.
16. As PREPA has informed LUMA and the Energy Bureau previously, the closing of Tranche 1 projects contracts cannot occur until after the completion of the LUMA's Tranche 1 interconnection works RFP process. This is because the timelines for construction of the PREPA Interconnection Facilities and the solar projects run from the Closing Date in line with the Energy Bureau's order to allow no more than 24 months to construct the project and achieve Commercial Operation. PREPA notes that the executed Tranche 1 contracts provide a maximum of 18 months to complete the interconnection works, so that the interconnection works are available in time for testing and commissioning of the projects prior to the deadline for Commercial Operation. The LUMA

RFP team has also informed PREPA that the expected project timeline for most PREPA Interconnection Facilities is 18 months. If LUMA uses a significant part of the 18-month time period under the contracts to conduct the interconnection works RFP process (which LUMA should have completed by December 2022), then LUMA will not complete the projects on time. In PREPA's view, LUMA should have to bear the resulting Delay Liquidated Damages. PREPA anticipates that LUMA will resist this suggestion. In addition to LUMA's RFP timeline issue, PREPA notes that LUMA expects to sign the interconnection agreements (a condition precedent to the Closing Date) only after the completion of the EPC RFP process. The latter could represent further delays, if, after completing the EPC RFP process, LUMA proposes additional changes to the interconnection agreements.

17. All projects for which LUMA has interconnection responsibility under the Third Policy Change will thus:
 - a. Need extensions of the period to close beyond the initial two-month extension the Energy Bureau has previously authorized. LUMA and PREPA will need a period of time after the completion of LUMA's RFP to finalize the interconnection agreement and commercial contracts, respectively. Consequently, contracts likely cannot close earlier than Q3 2023.
 - b. Likely claim Delay Liquidated Damages from PREPA if LUMA fails to complete its responsibilities within the contracted timeline. The Operation and Management Agreement between PREPA and LUMA provides the primary contractual basis for their relationship and would inform the impact of these damages on LUMA. The Energy Bureau may also wish to consider ways to effectively incentivize LUMA

to execute responsibilities that it insists on taking on in a timely way.

18. From a high level, PREPA is concerned that, given the delays, cost increases and shifts in the allocation of responsibility for construction of transmission interconnections described above, many Tranche 1 RFP Proponents may be reconsidering their commitments to pursue their projects. PREPA is also concerned that the result could be significant erosion in the amount of renewable generation and energy storage capacity that will ultimately be constructed in response to the Tranche 1 RFP.
19. To minimize the risk that additional changes could lead some Proponents to decline to proceed with their projects, in PREPA's view, LUMA must not make any additional policy or non-policy changes that could further delay completion of the Tranche 1 RFP process and must find ways to support projects as expeditiously as possible. PREPA has directed LUMA that it must avoid any further delays to the Tranche 1 projects, including by initiating the LUMA interconnection works RFP as quickly as possible (even if LUMA may need to amend such EPC RFP process in the future due to project modifications or cancellations), and must obtain Energy Bureau authorization of the Third Policy Change to avoid further changes to the policy down the road.
20. In consideration of the above and in order to enable the parties to proceed with the Tranche 1 RFP process as contemplated, PREPA requests assistance from the Energy Bureau as follows:
 - i. Issuance of an ORDER directing LUMA to submit the letter or motion explaining the Third Policy Change (including the timeline needed and recognition of the potential for incurrence of delay liquidated damages and effects of delays in completion of the interconnection works), following by subsequent PREB approval or rejection of the Third Policy Change. PREPA informs that, in order to prevent further delays in LUMA's EPC procurement process, which would in turn further delay the completion of

the Tranche 1 RFP process, PREB's approval or rejection should be issued by **March 13, 2023**.

- ii. Issuance of an ORDER permitting PREPA to authorize further extensions to the time to close the Tranche 1 contracts in order to accommodate LUMA's interconnection works RFP process. PREPA would need this regardless of whether the Energy Bureau approves the Third Policy Change given that some Proponents never opted to take over the interconnection works themselves and would need to wait for such RFP even under the Second Policy Change.
- iii. Issuance of an ORDER directing LUMA to send PREPA the transmission works EPC timeline by **March 3, 2023** in order to afford PREPA sufficient time to communicate with Tranche 1 proponents on a plan for making any changes to deadlines or documents that may be required.
- iv. Issuance of an ORDER directing LUMA to support Resource Providers in acquiring any land to be transferred to PREPA for PREPA substations. LUMA should be directed to use all legal means available to ensure this land is acquired at a reasonable cost and as promptly as possible.
- v. Issuance of an ORDER reminding LUMA that the PREB has previously ordered it to bear the cost of System Upgrades associated with the interconnection and integration of all Tranche 1 projects. It should remind LUMA that it must continue to do as ordered, even to the extent of changes in the System Upgrade plans, so as not to overburden developers already penalized by LUMA's changing policies.

PREPA submits that, in order to enhance the prospects that Tranche 1 Proponents will maintain their commitments, the Energy Bureau should issue the requested orders as promptly as possible.

WHEREFORE, for the reasons stated above, PREPA respectfully requests that the Energy Bureau takes **NOTICE** of the information provided in this Informative Motion, act as it deems necessary and as promptly as possible, and moves the Energy Bureau to ORDER LUMA to proceed in a manner that does not further jeopardize the progress of the Tranche 1 RFP process.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 28th day of February 2023.

/s Maralíz Vázquez-Marrero

Maralíz Vázquez-Marrero

TSPR 16,187

mvazquez@diazvaz.law

f/ Joannely Marrero Cruz

Joannely Marrero Cruz

TSPR 20,014

jmarrero@diazvaz.law

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 28th day of February 2023.

f/ Joannely Marrero Cruz
Joannely Marrero Cruz

Exhibit 1

Amendment No. 1 to the Power Purchase and Operating Agreement Between [Resource Provider] and the Puerto Rico Electric Power Authority

**AMENDMENT NO. 1
TO THE
POWER PURCHASE AND OPERATING AGREEMENT
BETWEEN
[●]¹
AND
THE PUERTO RICO ELECTRIC POWER AUTHORITY**

This Amendment No. 1 to the Power Purchase and Operating Agreement (this “Amendment”) is entered into as of February __, 2023 (the “First Amendment Effective Date”), by and between the Puerto Rico Electric Power Authority (“PREPA”) and [●]² (the “Resource Provider”). PREPA and Resource Provider are herein individually referred to as a “Party” and collectively referred to as “Parties.” All capitalized terms used in this Amendment and not otherwise defined shall have the meaning given to them in the Agreement (defined below).

RECITALS

WHEREAS, the Parties entered into that certain Power Purchase and Operating Agreement, dated [●]³ (the “Agreement”), which provided two hundred forty (240) Days to reach the Closing Date; and

WHEREAS, the Parties now desire to amend certain provisions of the Agreement in accordance with the terms of this Amendment,

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements set forth herein and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Parties hereto, intending to be legally bound, hereby agree as follows:

SECTION A. Amendment to allow more time to achieve the Closing Date

Section 2.3(b) of the Agreement is hereby amended and restated in its entirety to read as follows:

If either (i) the Closing Date does not occur for any reason within three hundred (300) Days after the Agreement Date, or (ii) PREPA notifies Resource Provider of its intention either not to (A) accept the Best and Final Offer made by Resource Provider, or (B) issue a Best Interests Determination for the Project, in each case for any reason whatsoever, then, without limiting Section 15.2 (*No Discharge of Obligations*), this Agreement shall automatically terminate at midnight on such Day, provided that upon termination of this Agreement in accordance with this paragraph (b) of this Section 2.3, (i) neither Party shall incur any liability to the other Party, and (ii) PREPA shall return the Bid Security to Resource Provider unless Resource Provider has breached any of the Agreement Date Obligations in a material way and failed to cure such breach within ten (10) Business Days of the occurrence of such breach, in which case PREPA shall have the right to draw on the full face amount of the Bid Security.

¹ Note: Insert Resource Provider.

² Note: Insert Resource Provider.

³ Note: Insert Signing Date.

SECTION B. Representations and Warranties

1. PREPA hereby represents and warrants to Resource Provider that: (a) the execution and delivery by PREPA of this Amendment, and the Amendment itself, (i) have been duly authorized by PREB, PREPA's Governing Board, and any other applicable PREPA governing body in accordance with applicable law, (ii) do not and will not require any additional internal or external consent or approval and (iii) do not and will not violate any provision of Act No. 83 of May 2, 1941, as amended, or its regulations, or any material indenture, contract or agreement to which it is a party or by which its properties may be bound; and (b) this Amendment is a legal, valid, and binding obligation of PREPA, enforceable against PREPA in accordance with its terms, except as may be limited by applicable bankruptcy, insolvency or similar laws affecting the enforcement of rights generally.
2. Resource Provider hereby represents and warrants to PREPA that: (a) the execution, delivery, and performance by Resource Provider of this Amendment (i) have been duly authorized, (ii) do not and will not require any additional internal consent or approval of Resource Provider and (iii) do not and will not violate any provision of Resource Provider's certificate of formation or operating agreement, or any material indenture, contract or agreement to which it is a party or by which it or its properties may be bound, or any law, ordinance, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect; and (b) this Amendment is a legal, valid and binding obligation of Resource Provider, enforceable against Resource Provider in accordance with its terms, except as may be limited by applicable bankruptcy, insolvency or similar laws affecting the enforcement of rights generally.

SECTION C. Miscellaneous

1. Information for Controller's Office. PREPA will charge all payments that it owes under the Agreement, as amended by this Amendment, to PREPA's budget account number 01-4042-54710-050-668-0000 and estimates that its costs under the Agreement will not exceed [●]⁴. For the avoidance of doubt, the Parties have set out the expected account number and estimate of costs for informational purposes to satisfy the requirements of the Puerto Rico Controller. This paragraph does not bind the Parties or modify any other provision of the Agreement.
2. Headings. The headings in this Amendment are for reference only and do not affect the interpretation of this Amendment.
3. No Implied Waiver. This Amendment shall be limited precisely as written and does not modify any provisions of the Agreement except as specifically amended above. This Amendment shall not be deemed to be a consent granted pursuant to, or a waiver or modification of, any other term or condition of the Agreement, whether or not known to the Parties, or to prejudice any other right or rights which the Agreement may now have or have in the future.
4. Counterparts. This Amendment may be executed in any number of counterparts with the same effect as if both Parties had signed the same document. All counterparts shall be construed together and shall constitute one instrument.
5. Entire Agreement. The Parties intend the Agreement, as amended by this Amendment, as the final expression of their agreement and also as a complete and exclusive statement of the terms of their

⁴ Note: Align with Section 10.1 in the Agreement.

agreement with respect to the subject matter thereof that supersedes all prior written and oral understandings between the Parties with respect thereto.

6. Governing Law. This Amendment shall be governed by, construed, and enforced in accordance with the Laws of the Commonwealth of Puerto Rico without regard to any contrary result required under applicable conflicts of laws rules. The Parties herein agree that all Disputes arising hereunder shall be resolved pursuant to Article 21 (*Dispute Resolution*) of the Agreement.

[Signatures appear on the following page.]

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be duly executed by their respective officers as of the date first above written.

PUERTO RICO ELECTRIC POWER AUTHORITY

By: _____
Name:
Title:

[●]⁵

By: _____
Name:
Title:

⁵ Note: Insert Resource Provider.