

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

NEPR

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IN RE: REVIEW OF LUMA’S INITIAL BUDGETS

CASE NO.: NEPR-MI-2021-0004

SUBJECT: Motion Requesting Order on PREPA Request to Amend the Modified Budget for FY2023 for the Purpose of Adequately Complying with the April 4 Resolutions and Orders on Tranche 1 Closing Date

MOTION REQUESTING ORDER ON PREPA REQUEST TO AMEND THE MODIFIED BUDGET FOR FY2023 FOR THE PURPOSE OF COMPLYING WITH THE APRIL 4 RESOLUTIONS AND ORDERS ON TRANCHE 1 CLOSING DATE

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 Puerto Rico 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 PREPA

¹ For a detailed description of the process please see January 3 Motion filed in case NEPR-MI-2020-0012 *In Re: The Implementation Of The Puerto Rico Electric Power Authority Integrated Resource Plan And Modified Action Plan.*

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 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. During the January 30 meeting with the Energy Bureau Commissioners, and in the documents provided to the Energy Bureau in connection with the meeting, PREPA management as well as PREPA consultants impressed upon the Energy Bureau the feedback from proponents regarding their request for (1) price increases given inflation and supply chain issues (including requesting guidance from the Energy Bureau on the range of acceptable price increases up to but not exceeding Tranche 2 pricing, and sharing with the Energy Bureau a request from a solar developer for a 30% price increase with potential for less of an increase if DOE support for the project could be attained), (2) time extensions for closing dates (specifying the need for extensions until Q3 2023 for most projects), (3) capacity increases to mitigate price increases as well as (4) LUMA interconnection issues. At the time the Energy Bureau indicated it would not entertain any price increases without supporting evidence from proponents and only authorized 60-day extensions of the closing date.

5. Thereafter, on February 28, 2023, PREPA filed with the Energy Bureau

Informative Motion 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 (“February 28 Motion”). Through the February 28 Motion, PREPA informed the Energy Bureau its concerns related to amendments to the Closing Date, T1 Project Permitting Process and LUMA interconnection process and pricing. As to pricing, PREPA informed the Energy Bureau that “[it] ha[d] followed the guidance given by the Energy Bureau to not entertain price increases and [had communicated to proponents] that any further changes to the Tranche 1 agreements [would] require substantial evidence.” PREPA further informed the Energy Bureau that “[s]ome Proponents ha[d] started to provide this evidence, and PREPA [would] submit it to the Energy Bureau in due course.”

6. After explaining various situations related to the Tranche 1 process, PREPA requested assistance from the Energy Bureau: (i) directing LUMA to submit a letter or motion explaining the Third Policy Change; (ii) allowing PREPA to authorize further extensions to the time to close the Tranche 1 contracts to accommodate LUMA's interconnection works RFP process; (iii) directing LUMA to send PREPA the transmission works EPC timeline by March 3, 2023 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) directing LUMA to support Resource Providers in acquiring land to be transferred to PREPA for PREPA substations; and (v) issuing an order reminding LUMA that the Energy Bureau has ordered it to pay for System Upgrades associated with the interconnection and integration of all Tranche 1 projects.

7. In response, on March 10, 2023, the Energy Bureau issued a Resolution and Order (“March 10 Order”) through which, among other matters, encouraged PREPA to evaluate any

pending Conditions Precedent that may be waived to achieve the Closing Date as established in PPOAs covering each of the eighteen (18) PV projects approved as part of Tranche 1 RFP; not authorizing further modifications to Section 2.3 of the signed PPOAs regarding the Closing Date, at the time; and ordering interconnection works to be performed pursuant to the Agreements.

8. Thereafter, on March 17, 2023, PREPA filed a document titled *Motion in Compliance with Order and to Inform and Clarify March 10, 2023 Resolution and Order as Applicable to Sectionalizer Projects* (“March 17 Motion”). PREPA stated, in the March 17 Motion, that the projects requiring the construction of sectionalizers should be constructed by the Resource Provider and not LUMA. Through that motion, PREPA informed the Energy Bureau that none of the Tranche 1 Proponents had signed the *Conditions Precedent Certificate* and that PREPA would continue the closing process within the 300 days provided under the executed agreements, as amended.

9. Subsequently, on March 31, 2023, PREPA filed a document titled *Motion Requesting Approval of Amendments and Informing on Status of Project Development Timeline for Tranche 1 Utility-Scale Project Agreement* (“March 31 Motion”) [this, in accordance with the oral request of Energy Bureau commissioners who had requested that any price request amendment had to be substantiated and presented to the PREB]. Through the March 31 Motion, PREPA reiterated the issues initially presented to the Energy Bureau in January 2023, when the Energy Bureau had declined to accommodate any price changes or adequate time extensions, including that the Tranche 1 PV proponents were continuing to request (1) price increases to accommodate alleged inflation and interest rate increases after the PPOAs were signed, as well as (2) extensions of deadlines in the agreements to achieve the *Closing Date*. PREPA stated that the Resource Providers’ requests

were justified and reasonable if they have material concerns regarding timelines and pricing because the *Closing Date* triggers the 24-month clock to complete the projects. PREPA also informed the Energy Bureau that the average increases ranged between approximately 26% and 21% on simple and capacity-weighted bases, respectively, and that more Tranche 1 Resource Providers had, as of March 2023, started to raise DOE support for their project as important to mitigate further price increases.

10. As part of the March 31 Motion PREPA requested that the Energy Bureau (i) extend the Closing Date of all Tranche 1 PPOAs contracts no later than the end of September 2023; (ii) grant reasonable price increases, with guidance on acceptable pricing and approach for Tranche 1 projects; (iii) accommodate DOE-LPO required amendments to the Tranche 1 RFP contracts, following consultation with the Energy Bureau once such terms are known; and (iv) authorize capacity increases of the Tranche 1 RFP projects following completion of necessary interconnection studies by LUMA and no additional costs for PREPA. PREPA emphasized in the March 31 Motion that it believed the best path for the success of the renewables energy program in Puerto Rico would be to take seriously the Resource Provider concerns and find a way to accommodate these requests.

11. As a result of the March 31 Motion, on April 4, 2023, the Energy Bureau entered two Resolutions and Orders (“April 4 Orders”) stating, among other things, that “PREPA is clearly and indisputably the entity responsible for the handling of Tranche 1. [That] PREPA’s protracted management of Tranche 1 is resulting in adverse consequences for the public interest: delaying Tranche 2², putting at risk the timely compliance with public policy; endangering the critically

² Tranche 2 has been handled by the Energy Bureau since the beginning in October 2021. PREPA does not understand why the Energy Bureau is blaming PREPA for the delays of Tranche 2 as well.

needed transition to renewable energy³ and is delaying the advancement of Puerto Rico's socioeconomic sustainable development.”

12. PREPA wholeheartedly disagrees with this unfair portrayal of PREPA's role in the Tranche 1 process, its effects on Tranche 2 or the delay in transitioning Puerto Rico to renewable energy. Such a statement is both unfair and factually inaccurate and it inappropriately oversimplifies matters reducing complex reality to simple binaries in a decision making process in which multiples parties in addition to the Energy Bureau *are* involved, including the Fiscal Financial Oversight and Management Board for Puerto Rico (“FOMB”), LUMA Energy LLC (“LUMA”), the Department of Energy (“DOE”), and other governmental permitting entities. PREPA is far from the only actor in the Tranche 1 RFP process the Energy Bureau characterizes as unduly protracted.

13. If it is the Energy Bureau's goal to discharge its obligation to promote the public interest and to advance the goals of transforming the Puerto Rico electric system, the Energy Bureau cannot simply turn a blind eye to the global economic, geopolitics and public health matters that have snarled supply chains around the world, contributing to shipping backlogs, product shortages and the fastest inflation in decades which are undeniably beyond the control of PREPA (or of the Tranche 1 Proponents).

14. Further, the Energy Bureau cannot deny the fact that many federal and state governmental entities have had a role in the cadence of the Tranche 1 process. As had been previously discussed with the Energy Bureau, the March 31 Motion had the intent of bringing forth substantial evidence of Tranche 1 proponents concerns with the Tranche 1 process that will affect the closing of Tranche

³ As the Energy Bureau is aware, 443MW of shovel ready projects for renewable energy were denied by the FOMB after both approval by PREPA and the Energy Bureau. See, *NEPR-AP-2020-0003 In Re: Enmiendas a Contratos de Compraventa de Energía Renovables: Proyectos No-Operacionales*.

1 projects and which are beyond PREPA's control. It was intended to put the Energy Bureau in a position to better understand the factors that are affecting the final decisions of Tranche 1 Proponents – which are *private* entities under no obligation to proceed with the projects they have proposed. At the end of the day neither the Energy Bureau nor PREPA can force a private party to enter into an agreement with a governmental entity if that private party does not accept the terms and conditions of that agreement.

15. PREPA expected a response from the Energy Bureau that focused on finding ways to allow the Tranche 1 projects to move forward. Failing to find productive solutions to seek a common goal, turning a blind eye to developer concerns and real-world experience, ignoring the complex reality of developers that require myriad factors coming together to succeed and merely choosing to blame PREPA without contemplating the nature of the parties involved and the issues beyond PREPA's control would be counterproductive.

16. With that said, the Energy Bureau's April 4 Orders determined and ordered the following:

(1) the Energy Bureau **ORDERS** PREPA to immediately (i) close any PPOA which project does not have the identified issues; and (ii) negotiate with the project developers any necessary amendments to the PPOAs to appropriately address any duly demonstrated and proven issues **within the LCOE parameters established by the Energy Bureau and in the public interest.**

(2) The Energy Bureau **ORDERS** PREPA to resubmit any amendments to the approved and signed PPOAs before the respective closing dates.

(3) The Energy Bureau **DETERMINES** not to extend deadlines to achieve the *Closing Date*.

(4) The Energy Bureau **ORDERS** PREPA to require proponents to utilize the most recent interconnection costs estimates, provided by LUMA, to present their Best and Final Offer ("BFO"). The proponents shall present their BFO to PREPA three (3) business days from the notification of this Resolution and Order. Any price discrepancy between the interconnection costs used for the BFO and the final interconnection cost (established by LUMA through the interconnection RFP) **SHALL NOT** be assumed by the proponents. Any price decrease shall be noted and the BFO reduced accordingly.

(5) The Energy Bureau **DETERMINES** that any delay of the COD, not

caused by the proponent, shall be properly address by the Energy Bureau assuring that any delay in the completion of interconnection works shall not be adjudicated against the Resource Provider in achieving the COD in the required 24-months from the *Closing Date*.

(6) The Energy Bureau **SHALL NOT** grant any extension to the *Closing Date* and PREPA must complete these negotiations on or before the expiration of the 60-day extension provided by the Energy Bureau as per Section 2.3 of the signed Agreements.

17. The 60-day extension to the Closing Date for the first nine (9) Tranche 1 projects expires on April 26, 2023. As per the April 4 Orders, the Energy Bureau requires that PREPA accept best and final offers from Resource Providers, negotiate final pricing and draft amended agreements to change the closing process, file the amended PPOAs, and actually sign price-related amendments by April 26 before having legally required approval from the FOMB to keep the PPOAs from automatically expiring. Because the FOMB will not have approved these required price amendments when signed by PREPA, the amendments and underlying agreements will need to be structured to fall away if the FOMB denies the price increase. This will in turn negatively impact the Resource Provider timeline under the agreements, leaving them with less than 24 months to reach project completion, and may present challenges to Resource Providers.

18. For its part, PREPA has every intention of complying with the directives of the Energy Bureau as detailed in the April 4 Orders. However, PREPA needs the immediate attention of the Energy Bureau to approve the Modified FY2023 Budget Amended Request for Implementation of FOMB Certified Fiscal Plan Transformation Initiatives and in Compliance with the March 25 Order (“Modified Budget Amended Request”) filed on April 2, 2023⁴. As the Energy Bureau is

⁴ On March 14, 2023 PREPA had filed *Request to Amend FY2023 PREPA Budget for Implementation of FOMB Certified Fiscal Plan Transformation Initiatives* (“March 14 Request”). Thereafter, on March 24, 2023, PREPA submitted to the Energy Bureau a motion titled *Renewed and Reiterated Urgent Request to Amend FY2023 PREPA Budget for Implementation of FOMB Certified Fiscal Plan Transformation Initiatives* (“March 24 Motion”). Through the both the March 14 Request and March 24 Motion PREPA had informed the Energy Bureau of its urgent need to amend its fiscal year 2022-2023 (“FY2023”) budget to be able to address the Genera PR LLC (“Genera PR”) Mobilization Service Fee, monies for necessary operations, repairs and maintenance works under the PREPA fiscal plan, and the continuance of payments to its pension system.

aware, PREPA has a budget request before the Energy Bureau related to one of the law firms that is primarily involved with the work PREPA must complete related to the Tranche 1 process, including direct negotiation with proponents and PPOA draft and amendments.

19. Through the March 14 Request, March 24 Motion and Modified Budget Amended Request filed on April 2 (the “FY2023 Budget Amendment Motions”), PREPA had emphasized to the Energy Bureau that PREPA required approximately \$3.3 million of operating expenses necessary to continue executing tasks related to compliance with Energy Bureau directives, and ongoing legal responsibilities. Through the FY2023 Budget Amendment Motions, PREPA had presented to the Energy Bureau examples of responsibilities that would be affected if it did not have access to enough funds to conduct the corresponding tasks. PREPA had informed the Energy Bureau that one of the tasks that would be affected for lack of funds would be the Tranche 1 process. Specifically, PREPA stated (emphasis added):

Renewable Generation Procurement: PREPA still has significant PREB regulatory requirements for oversight and reporting to fulfill for executed Tranche 1 renewable contracts, in addition to other responsibilities in the current Tranche 2 request for proposals (“RFP”) process. PREPA filed motions with PREB most recently on February 28, 2023, to inform on key proponent communications regarding delays which could jeopardize the already delayed Closing Date and on a third policy change by LUMA Energy LLC (“LUMA”) for the PREPA Interconnection Facilities. Regarding the Tranche 2 RFP process, in the Resolution and Order issued by the PREB on June 9, 2022, the Energy Bureau established that, among other roles and responsibilities, PREPA shall provide legal advice and resources in ensuring the RFP documents, including the power purchase and operating agreements (“PPOAs”) to be included as part of the RFP and final contracts execution. To comply with the regulatory requirements that are part of the renewables’ integration processes, PREPA mostly requires the services of law firms. For example, *currently PREPA cannot assign more tasks to one of these law firms, King & Spalding LLP (“K&S”), as the expenditures has reached almost the maximum amount of PREPA’s contract with them. In light of this situation, PREPA is not able to move forward with the completion of its duties in the integration of renewable*

energy, which are required by the Puerto Rico public energy policy mandated by law. Without the requested FY2023 budget amendment, PREPA could incur in non-compliance with the Energy Bureau's Orders and scheduling.

20. As the Energy Bureau is aware, PREPA has a substantially reduced work force and most of the work related to the Tranche 1 process is consequently carried out by outside consultants. As relevant to this request, King & Spalding (“K&S”) is the principal law firm working directly with proponents in the Tranche 1 process, and PREPA is currently without funds to compensate K&S and has been short on funds for over six weeks to permit K&S to continue working. Accordingly, to enable PREPA to adequately move forward with the Energy Bureau directives as detailed in the April 4 Orders, it is of paramount importance that the Energy Bureau approve the Modified Budget Amended Request and release the necessary funds, so that PREPA can continue with the necessary maintenance and operational work necessary for the transition and transformation of PREPA including contracting K&S to continue with the Tranche 1 work necessary to comply with the Energy Bureau directives.

WHEREFORE, for the reasons stated above, PREPA respectfully **REQUESTS** the Energy Bureau to **TAKE NOTICE** of the above and **APPROVE** the Modified Budget Amended Request as soon as possible so that PREPA may be able to continue with the necessary maintenance and operational work necessary for the transition and transformation of PREPA including the Tranche 1 process.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 5th day of April 2023.

/s Maralíz Vázquez-Marrero

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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and a courtesy copy of the filing was sent to LUMA through its legal representatives at margarita.mercado@us.dlapiper.com and laura.rozas@us.dlapiper.com.

In San Juan, Puerto Rico, on this 5th day of April 2023.

/s Joannely Marrero Cruz
Joannely Marrero Cruz