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

IN RE: PREPA'S 10-YEAR PLAN
COMPETITIVE INFRASTRUCTURE
PROCUREMENT PROCESS

CASE NO.: NEPR-MI-2022-0005

SUBJECT:

PREPA's Response to Resolution and Order entered on May 8, 2023, Regarding Genera-PR's Intervention in Ongoing Public Procurement Process

**PREPA'S RESPONSE TO RESOLUTION AND ORDER ENTERED ON MAY 8, 2023,
REGARDING GENERA-PR'S INTERVENTION IN ONGOING PUBLIC
PROCUREMENT PROCESS**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority (PREPA) through the undersigned legal representation and respectfully submits and requests as follows:

I. Introduction

By way of a Resolution and Order entered on May 8, 2023, the Puerto Rico Energy Bureau of the Public Service Regulatory Board ("Energy Bureau") seeks to allow for the intervention of a private entity in a public procurement process contrary to the current legal framework that regulates public competitive bidding processes in Puerto Rico. Genera PR LLC ("Genera") will start providing services to PREPA beginning on July 1, 2023, pursuant to the LG OMA¹, not before. As will be discussed below, nothing in either the LG OMA or Puerto Rico's legal structure would allow a private entity to have decisional making authority over an ongoing public competitive bidding process commenced by PREPA. Once Genera begins providing services to PREPA on July 1, 2023, it will have the opportunity to pursue those competitive bidding processes

¹ *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement, between PREPA, the Puerto Rico Public-Private Partnerships Authority ("P3") and Genera PR, LLC, January 24, 2023 ("LG OMA").*

allowed by the LG OMA and pursuant to its own procurement manual. To be certain, PREPA is wholeheartedly in agreement with allowing the Genera team to provide guidance, suggestions and jointly engage with “PREPA in the RFP process to promote a cooperative working relationship intended to ensure an efficient and orderly transfer of care, custody and control of the Legacy Generation Assets between both parties.”² Notwithstanding, PREPA is in disagreement with allowing any substantial change of this ongoing request for proposal (“RFP”) process at this advanced stage of the proceedings and much less permit Genera to have any decision making authority in this public process.

II. Procedural Background

1. On August 24, 2020, the Energy Bureau issued the IRP Order³, regarding the Integrated Resource Plan (“IRP”) of PREPA. The IRP Order approved a Modified Action Plan that included allowance for replacing a part of PREPA’s older gas turbine peaking resources, up to 81 MW, subject to competitive procurement. The Modified Action Plan further indicated that PREPA should place such peaking resources at locations with zero or only one remaining older peaking unit (i.e., Costa Sur, Aguirre, and Yabucoa); and that the design of such procurement should define services to be provided such as black start, rather than specific technologies.⁴

2. On March 19, 2021, PREPA filed a document titled *Motion Submitting March 2021 Revised 10-Year Infrastructure Plan* (“March 19 Motion”). Through the March 19 Motion, PREPA filed a new updated version of the plan (“March 2021 Revised 10-Year Plan”) which included new black start units at Aguirre and Costa Sur.

² April 14, 2023, Resolution and Order

³ See, Final Resolution and Order on the Puerto Rico Electric Power Authority's Integrated Resource Plan, *In re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*, Case No. CEPR-AP-2018- 0001, August 24, 2020 (“IRP Order”).

⁴ IRP Order, pp. 275-276 ¶ 885.

3. On March 26, 2021 (“March 26 Order”), in alignment with the IRP Order and the Modified Action Plan, the Energy Bureau, approved PREPA’s request for black start units at Aguirre and Costa Sur.⁵

4. On April 14, 2021, PREPA filed a document titled *Motion in Compliance with the Resolution and Order Entered on March 26, 2021* (“April 14 Motion”), which included a list of projects under the categories of transmission, distribution, and substations.

5. Thereafter, on April 22, 2021, the Energy Bureau issued a Resolution and Order requesting additional information for each project in the April 14 Motion under the different project categories, including but not limited to Transmission Line Projects, Transmission and Distribution Substation Projects, and Distribution System Projects (“April 22 Order”).

6. On July 6, 2021, PREPA and LUMA Energy, LLC and LUMA Energy ServCo, LLC (collectively, “LUMA”) filed a document titled *Joint Motion Submitting Updated 10-Year Infrastructure Work Plan* through which it filed an updated version of the 10-Year Infrastructure Plan, which included the Costa Sur and Aguirre Black Start Projects (“10-Year Infrastructure Plan, June 2021 Update”)⁶ and subsequently, on September 7, 2021, PREPA filed a document titled *Motion to Submit Second Group of Generation Projects Initial SOWS* (“September 7 Motion”). In the September 7 Motion, PREPA requested approval to substitute the Aguirre Black Start Project for the Yabucoa Black Start Project which the Energy Bureau approved on September 28, 2021.⁷

7. In response, on August 2, 2022, PREPA filed before the Energy Bureau a document titled *Motion to Inform Reallocation of FEMA 404 HMGP Funds and Request for Approval of*

⁵ See, Resolution and Order, *In re: Review of the Puerto Rico Electric Power Authority's 10-year Infrastructure Plan December 2020*, Case No. NEPR-MI-2021-0002, March 26, 2021 ("March 26 Order").

⁶ See, *In re: Review of the Puerto Rico Electric Power Authority's 10 year Infrastructure Plan December 2020*, Case No. NEPR-MI-2021-0002, *Joint Motion Submitting Updated 10-Year Infrastructure Work Plan*, July 6, 2021 (“July 6 Motion”)

⁷ See, Resolution and Order, *In re: Review of the Puerto Rico Electric Power Authority's 10 year Infrastructure Plan December 2020*, Case No. NEPR-MI-2021-0002, September 28, 2021 ("September 28 Order").

Generation Projects (“August 2 Motion”). Through the August 2 Motion, PREPA notified the Energy Bureau its determination to allocate Hazard Mitigation Grant Program Funds (“404 HMGP Funds”) in part to cover an updated cost estimate of \$190 million for the Costa Sur and Yabucoa Black-Start Units. PREPA asserted that the substantive price increase from the original \$90.4 million to the updated estimate was due to the recent disruption in the supply chain and inflation.

8. On August 18, 2022, the Energy Bureau issued a Resolution and Order (“August 18 Order”) containing questions for PREPA to address, including the reasons for the about \$100,000,000.00 cost increase of the black start units compared to initial estimates. In compliance with the above, on September 7, 2022, PREPA filed a document titled *Motion to Submit Responses to Requests for Information Ordered in the August 18 Order* (“August 18 Order Response”) in which PREPA responded to the August 18 Order. Regarding the Black Start Units, PREPA indicated among other rationale, that the delay was caused by selecting Yabucoa as a better site and the engineering services to complete the studies and specifications required for the draft RFP submitted by Sargent & Lundy in March of 2022.⁸ The Energy Bureau approved the \$100 million increase on September 15, 2022 (“September 15 Resolution”).

9. To commence the procurement process, on November 10, 2022, PREPA filed under seal a confidential letter to the Chairman of the Energy Bureau, seeking approval of the Energy Bureau for the launch of a RFP for black start generation units at Yabucoa and Costa Sur (“November 10 Request”). Included in the filing was a draft RFP for the black start units, separate technical specifications for an EPC (“Engineering, Procurement, and Construction”) contract, and draft contract forms for each of the Yabucoa and Costa Sur location (“November 10 Confidential

⁸ See, *Resolution and Order, In re: Review of the Puerto Rico Electric Power Authority's 10 year Infrastructure Plan December 2020*, Case No. NEPR-MI-2021-0002, September 28, 2021 (“September 28 Order”).

Documents”). The Energy Bureau, through Resolution and Order issued on December 5, 2022 (“December 5 Order”), approved PREPA’s request for an RFP process for the procurement of black start systems at Costa Sur and Yabucoa. The December 5 Order had specific conditions on the capacity of the resource to be procured and the types of resources eligible to participate in the solicitation and provide black start service.

10. Thereafter, on January 23, 2023, the Energy Bureau issued a *Resolution and Order* (“January 23 Order”) through which it conditionally approved PREPA’s RFP process for the procurement of emergency generation at Jobos, Daguao, and Palo Seco subject to various conditions, including that PREPA would report to the Energy Bureau on the status of emergency generation and black start generation procurement.

11. In compliance with the January 23 Order, on March 16, 2023, PREPA filed before the Energy Bureau a document titled *Motion to Inform Status Report on the Emergency Generation and Black Start Generation Procurement in Compliance with the January 23, 2023 Order* (“March 16 Motion”). Regarding the blackstart generation procurement process, PREPA included as Annex A to the March 16 Motion a status report titled *RFP 3784, Power Advocate Event 138790 New Black Start Units Yabucoa and Costa Sur Power Stations* (“RFP 3784 Status Report”). As Annex B, and regarding the emergency generation procurement, PREPA included a status report titled *RFP 3800, Power Advocate Event 139303 New Peaker Units for the Daguao, Jobos, and Palo Seco Power Stations* (“RFP 3800 Status Report”). PREPA also requested that the Energy Bureau determine that the status reports included as annexes A and B be maintained confidential and under seal until the competitive procurement process is completed.

12. On April 14, 2023, the Energy Bureau issued a *Resolution* (“April 14 Resolution”) taking notice of the March 16 Motion and granting confidential designation and treatment to

annexes A and B of the March 16 Motion. The April 14 Resolution also stated that, since the generation units being procured in RFP 3784 and RFP 3800 shall eventually be under the operation and maintenance of Genera as per the LG OMA, the Energy Bureau encouraged Genera to assume, an active role and jointly engage with PREPA in the RFP process to promote a cooperative working relationship intended to ensure an efficient and orderly transfer of care, custody and control of the Legacy Generation Assets between both parties.

13. Thereafter, and completely unexpected by PREPA, on May 8, 2023 the Energy Bureau on its own accord issued a *Resolution and Order* (“May 8 Order”) where **it determined that Genera had to immediately assume an active role in administration of these Request for Proposals (“RFP”) processes, and to provide formal input into those processes to ensure the procurement of the black start units at Costa Sur and Yabucoa and the emergency generation units at Daguao, Jobos, and Palo Seco are being completed efficiently, and allow for efficient and low-cost procurement and future operations of such generation units.**

14. Additionally, the Energy Bureau ordered Genera to, on or before five (5) business days from the notification of the May 8 Order, **file any suggested revisions to PREPA's RFP 3784 and RFP 3899 processes, including any suggested changes to the RFP documents and bid schedules,** to outline a plan for transitioning administration of those RFPs from PREPA to Genera, and to outline a proposed process for implementing its suggested changes and administration of the RFPs for black start and emergency generation resources.

III. Discussion

15. First and foremost, PREPA would like to state for the record that it has no issue with sharing with Genera the status of the process and allowing the Genera team to provide guidance, suggestions and jointly engage with “PREPA in the RFP process to promote a cooperative working

relationship intended to ensure an efficient and orderly transfer of care, custody and control of the Legacy Generation Assets between both parties.” That is the nature of the transition process and PREPA is fully on board with this encouragement by the Energy Bureau. PREPA has in fact been sharing information with Genera regarding these RFP’s and has made Genera privy of the details of the process. Notwithstanding, PREPA wholeheartedly disagrees with the extent of the May 8 Order issued by this Energy Bureau, given that it goes beyond what is allowed during an open, ongoing procurement process by a public entity. Additionally, such an uncalled-for intervention by a private party in a public process when that party has yet to start its Service Commencement Date is not legally supportable. Lastly, the May 8 determination is an extremely drastic one that would further delay the proceedings that this Bureau has unfairly criticized PREPA so much for.

16. It is one thing for this Energy Bureau to empower Genera to request that it take an active role and, together with PREPA, participate in the RFP process to promote a cooperative working relationship and ensure that legacy generation assets are transferred appropriately, **but it is another thing altogether, to order Genera, out of the blue, in a short period of time and without any basis** to file any suggested revisions to PREPA's RFP 3784 and RFP 3899 processes, including any suggested changes to the RFP documents and bid schedules, to outline a plan for transitioning administration of those RFPs from PREPA to GENERA, and to outline a proposed process for implementing its suggested changes and administration of the RFPs for black start and emergency generation resources **without even reaching the "Service Commencement Date" of the LG OMA.**

17. One of the essential provisions of the LG OMA is the Service Commencement Date, which as of now has been rescheduled for July 1, 2023. This is the date when Genera will start providing services in operation and maintenance of thermal generation facilities. Until that date, Genera

cannot formally engage in any proceedings, much less have any type of decision-making authority that would give them an unfair advantage over other interested parties or violate the terms of the agreement.

18. LG OMA in *Section 5.1 Services Generally* specifically states the following:

Commencing on the Service Commencement Date, and in exchange for Owner's payment to Operator of all amounts owing to Operator under this Agreement, Operator shall (i) provide **management, operation, maintenance, repair, restoration, replacement and other related services for the Legacy Generation Assets, as well as any optimization** (including fuel and efficiency) approved by PREB, in each case that are customary and appropriate, or as required by Applicable Law, including the services set forth in this Article 5 (O&M Services) and Annex IX (Scope of Services), and (ii) establish policies, programs and procedures with respect thereto, to the extent not already established in the Services Documentation (all such services, the "O&M Services"), in each case, in accordance with the Contract Standards and Applicable Law. It is the Parties' intent that except for the rights and responsibilities reserved to Owner and Administrator as set forth in Article 6 (Rights and Responsibilities of Owner and Administrator) or as may otherwise be expressly provided in this Agreement, Operator shall (A) be entitled to exercise all of the rights and perform the responsibilities of Owner in providing the O&M Services, and (B) have the autonomy and responsibility to operate and maintain the Legacy Generation Assets and establish the related plans, policies, procedures and programs with respect thereto as provided in this Agreement. In providing such O&M Services, Operator must comply with all requirements of Applicable Law, including the requirements of the Consent Decree.

19. The purpose of this provision is to ensure that all parties involved have a clear understating of each other's roles and rights during the different LG OMA stages. By adhering to these rules, the RFP's can be completed successfully, within the bounds of the law and with all parties benefiting from the partnership. Any action contrary to these clear contractual terms jeopardizes the orderly transition of the legacy assets operations as well as the legality of the RFP processes.

20. Genera **should not have any type of decisional authority in proceedings before the Service Commencement Date and must not be allowed to change the current RFP** because it could lead to a public procurement process beyond the bounds of what would be legal. Nothing in Puerto Rico's legal framework would allow a private party to be involved and/or make decisions

in what is public procurement process, much less change it. Further, nothing in Act 83-1941⁹, Act 120-2018¹⁰, Act 29-2009¹¹ or any other legal authority supports a proposition whereby a private actor takes any type of binding decision in a public competitive bidding process.

21. Upon the Service Commencement Date begins nothing will impede Genera from pursuing its own competitive bidding process within the confines of its own procurement manual and within the bounds of what is allowed pursuant to the LG OMA, until then PREPA is the entity in charge of conducting its own procurement processes.

22. This is not the time for the Energy Bureau to be going beyond its authority and giving rights to a private entity outside of what is allowed in the law. Further, these RFP processes have been conducted pursuant to Joint Regulation 8815¹². Regulation 8815 dictates the parameters and requirements both PREPA and the Energy Bureau must adhere to in relation to a **public** procurement process. As relevant to this motion, the Energy Bureau's role in a procurement process dictated by Regulation 8815 is limited to those interventions strictly contemplated in such process, including approving the RFP content¹³ and approving the contracts¹⁴ once the RFP has been awarded. Nothing in said regulation would allow the Energy Bureau to actively intervene in an open and running procurement process without a clear amendment to Regulation 8815, much less to allow a private party to have decision making authority when such granting of authority has no precedent in law.

23. The RFPs are already at an advanced stage and proposals are expected as soon as May 20,

⁹Act No. 83 of May 12, 1941, as amended "Puerto Rico Electric Power Authority Act"

¹⁰ Act. No. 120 of June 21, 2018, as amended Puerto Rico Electric Power System Transformation Act

¹¹ Act No. 29 of June 8, 2009, as amended "Public-Private Partnership Authority Act"

¹² *"Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet"*

¹³ Article 4.2 of Joint Regulation 8815

¹⁴ Article 7.1 of Joint Regulation 8815

2023. PREPA's Evaluation Committee, the public servants' entity with authority over the RFP process, will adhere to the approved RFP to ensure the fairness and transparency of the process, complying with their fiduciary duty. By maintaining the highest standards of transparency in the procurement process, **PREPA can ensure** that the intended benefits of its programs would **be far-reaching and sustainable, as has been tirelessly requested by this Energy Bureau.**

24. PREPA's RFPs processes are bound and approved by the Energy Bureau. Once the Energy Bureau approves the competitive RFP process, it has relinquished its jurisdiction and authority over any alteration to the process that PREPA pursues and unless requested by PREPA it cannot be changed. Jurisdiction and oversight are key elements in the regulatory process. Once the RFP has been approved, any significant change to the contents would require starting the process anew, negating the benefits of the previous approval and adjudication. While the Energy Bureau has the authority to review and approve the RFP content before publication and later approve the contracts of the RFP awards, it does not have the authority to amend an ongoing RFP process and much less at the behest of a private party which has not decisional rights in this process. The Energy Bureau must seek to maintain a stable, comprehensive regulatory framework to ensure the uninterrupted supply of electricity to the island in an impartial and reliable fashion. Once an organized transition to the private operator ensues that private operator will have the ability to conduct its own competitive bidding processes within the bounds of the LG OMA, its procurement manual and the law.

WHEREFORE, for the reasons stated above, PREPA respectfully requests the Energy Bureau to (i) take notice of the arguments outlined above, (ii) clarify its May 8 Order to not allow for any changes to the ongoing RFP processes in the best interests of transparency and legal framework that regulates competitive bidding processes as well as (iii) allow the RFPs proceedings

to continue as they have been carried out to date.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 11th day of May 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>.

In San Juan, Puerto Rico, this 11th day of May 2023.

s/ Joannely Marrero Cruz
Joannely Marrero Cruz