

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

<p>NEPR</p> <p>Received:</p> <p>Aug 22, 2023</p> <p>3:23 PM</p>

IN RE: THE IMPLEMENTATION OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY INTEGRATED RESOURCE
PLAN AND MODIFIED ACTION PLAN

CASE NO.: NEPR-MI-2020-0012

SUBJECT: Motion to Submit N-1-P
Proponent Best and Final Offer Information

**MOTION TO SUBMIT N-1-P PROPONENT BEST AND FINAL OFFER
INFORMATION**

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 February 2, 2022, the Energy Bureau of the Puerto Rico Public Service Regulatory Board (“Energy Bureau” or “PREB”) approved eighteen (18) power purchase and operating agreements (“PPOAs”) for the Solar PV projects for Tranche 1 that were signed between June and August 2022 (“Executed PPOAs”). Out of the eighteen (18) Executed PPOAs, nine (9) PPOAs were signed on June 30, 2022 (the “June 30 PPOAs”) and the remainder by the end of August 2022 (the “August PPOAs”).
2. As per Section 2.3(b) of the Executed PPOAs the date to achieve closing before triggering the automatic termination of the June 30 PPOAs was February 25, 2023. However, on January 30, 2023, the Energy Bureau authorized PREPA to grant a sixty (60) day extension for the automatic termination provided in the referenced Section 2.3 of the Executed PPOAs. Therefore, the termination dates for the June 30 PPOAs were established as April 26, 2023, and for the August PPOAs at various dates from May to June 2023.

3. Thereafter, on March 10, 2023, the Energy Bureau issued a *Resolution and Order* ("March 10 Order") through which it encouraged PREPA to evaluate any pending Conditions Precedent that could be waived to achieve the Closing Date as established.

4. In response, on March 31, 2023, PREPA submitted to PREB 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"). Through the March 31 Motion, PREPA indicated, among other things, that the Tranche 1 PV proponents were requesting extensions of deadlines in the agreements to achieve the Closing Date. PREPA further stated that the Resource Providers' requests were justified and reasonable if they had material concerns regarding timelines and pricing because the Closing Date triggers the 24-month clock to complete the projects. For the reasons brought up by Resource Providers PREPA requested an extension to closing until September 30, 2023.

5. On April 4, 2023, the Energy Bureau, upon review of the March 31 Motion, issued two (2) Resolution and Orders ("April 4 Orders") through which it stated and ordered the following:

- a. Denied extension of the Closing Date under the PPOAs, specifically stating that 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...";
- b. Ordered PREPA to close on any PPOAs which do not have any identified issues;
- c. Ordered PREPA to negotiate with proponents any necessary amendments to the PPOAs to appropriately address duly demonstrated and proven issues, and resubmit such amendments to the Bureau before the Closing Date;
- d. Ordered PREPA to require proponents to present – within three (3) Business Days – their "Best and Final Offer" ("BFO") based on the most recent interconnection cost estimates provided by LUMA. The Energy Bureau indicated that any price discrepancy between the interconnection costs used for the BFO and the final cost (established after LUMA conducts Requests for Proposals for the subject interconnection works), which could potentially reach tens of million in the aggregate (assuming 20% upside

variability in the class 3 estimates), would not be assumed by the proponents. Any price decrease would be noted and reduced accordingly.

e. Determined that any delays in achieving the Commercial Operation Date not caused by the Resource Provider would be addressed by the Energy Bureau, assuring that any delay in the completion of interconnection works would not be held against Resource Provider; and

f. Required PREPA to complete PPOA negotiations before the end of the 60-day extension previously granted by the Energy Bureau, namely before April 26, 2023.

6. PREPA proceeded to do as ordered and continued diligently working with the Resource Providers on the required amendments to the PPOAs to comply with the Energy Bureau's April 4 Orders. Subsequently, on April 17, 2023, the Energy Bureau issued a *Resolution and Order* ("April 17 Order") determining that in order for the Energy Bureau to consider authorizing any extension to the Closing Date of the June 30 PPOAs, PREPA had to submit the BFO of each proponent received during the month of April 2023 by April 19, 2023.

7. In response, on April 19, 2023, PREPA submitted its *Motion in Compliance with Order Regarding Submittal of Proponent's Best and Final Offers Information* in compliance with the April 17 Order ("April 19 Motion"). The April 19 Motion included information on the levelized cost of energy ("LCOE") and levelized cost of storage ("LCOS") for solar PV and battery energy storage projects previously approved by the Energy Bureau as aligned with the Modified Action Plan. PREPA also informed the Energy Bureau that it had been working with the Resource Providers of the June 30 PPOAs to meet the April 26, 2023 Closing Date deadline and allow some of the projects to move forward.

8. On April 24, 2023, the Energy Bureau issued a *Resolution and Order* ("April 24 Order") in which, among other things, it found that because the parties to the Executed PPOAs alleged that they are still negotiating, an extension to the automatic termination date of the June 30 PPOAs was

warranted. Therefore, the Energy Bureau authorized PREPA to extend the April 26, 2023, automatic termination date until May 31, 2023.

9. On April 26, 2023, PREPA submitted to the Energy Bureau a documents titled *Motion to Submit Amended June 30 PPOAs* (“April 26 Motion”) through which PREPA notified that it had executed amendments to the June 30 PPOAs that extended the time to achieve the Closing Date from April 26, 2023, to May 31, 2023, the referenced amendments were identified as the Second Amendments.

10. As part of the April 26 Motion, PREPA informed the Energy Bureau that while PREPA had essentially satisfied or stood ready to satisfy its conditions precedent by April 26, 2023, Resource Providers for the June 30 PPOAs stated they needed the material modifications to move forward. Notwithstanding, PREPA also informed that it had reached amendment agreements with six of the nine June 30 PPOAs Resource Providers, representing seven of the nine projects. The referenced amended PPOAs were submitted as the Third Amendments with the April 26 Motion.

11. The amendments to the June 30 PPOAs accomplished the following (i) deemed the Closing Date to have occurred, (ii) converted certain conditions precedent to conditions subsequent, (iii) addressed pricing, timeline, capacity increases and other Resource Provider requirements to close the PPOAs, (iv) aligned a few, select provisions with points under discussion with the Department of Energy, and (v) for two projects, addressed a change in responsibility related to the construction of sectionalizers. PREPA implemented similar amendments for the August PPOAs.

12. As to the Energy Service Storage Agreements (“ESSA’s”), on April 28, 2022, PREPA submitted to the Puerto Rico Energy Bureau of the Public Service Regulatory Board (“Energy Bureau” or “PREB”) a document titled *Memorandum of Law in Support of Request for Confidential Treatment of Attachment A* and as Attachment A submitted under seal was a

document titled *Informative Motion and Responses to Resolution and Order Issued on April 11, 2022* (“April 28 Informative Motion”).

13. Through the April 28 Informative Motion, PREPA recommended for approval four (4) utility-scale Battery Energy Storage System (BESS) projects totaling 240 MW of capacity with a 4-hour duration, and a 17 MW Virtual Power Plant (VPP) project. The April 28 Informative Motion also contained information on six (6) additional utility-scale BESS resource proposals totaling 275 MW and a 150 MW VPP proposal. Furthermore, in the April 28 Informative Motion PREPA’s explained its rationale for recommending the four utility-scale BESS projects and one of the two proposed VPPs, and its rationale for not recommending the remaining six utility-scale BESS projects and the other VPP.

14. On May 12, 2023, PREPA submitted with the Energy Bureau *Motion to Submit Additional Energy Storage Service Agreements (ESSAs)* (“May 12 Motion”) which informed that PREPA had continued to work with Resource Providers, and after considerable effort, to resolve many issues, PREPA had reached agreements with three additional ESSAs totaling 150 MW of capacity with a 4-hour duration. PREPA also informed the Energy Bureau that it continued negotiations with the remaining Resource Providers to provide additional ESSAs in the coming weeks on similar terms and that it would submit those within the required time period once agreements were reached.

15. Thereafter, on May 16, 2023, PREPA presented to the Energy Bureau with a document titled *Motion to Submit Additional Amended June 30 PPOA’s* (“May 16 Motion”) which informed that PREPA had reached amendment agreements with two additional June 30 PPOAs Resource Providers and submitted the same as the Third Amendment for another two of the June 30 PPOAs.

16. Further, on May 25, 2023, PREPA filed *Motion to Submit Second Amendments for Two Executed PPOA's* (“May 25 Motion”) whereby PREPA informed the Energy Bureau it had reached agreements with two additional PPOA Resource Providers.

17. Subsequently, on May 25, 2023, the Energy Bureau entered a *Resolution and Order* making various determinations related to a subset of the Tranche 1 Solar PV Projects (“May 25 Order”) and in response to PREPA’s April 26 Motion. Among other matters, the Energy Bureau determined that it had independently confirmed the LCOE values presented by PREPA for the seven (7) utility-scale solar PV projects in the April 26 Motion and that the proposed price amendments to six (6) projects reflect a reasonable cost for Puerto Rico ratepayers and is in line with the Modified Action Plan of the IRP. For the remaining project (“identified as AS-1-P”), the Energy Bureau determined the Service Provider did not submit a credible best and final offer.

18. Through the May 25 Order the Energy Bureau also made the following determinations:

(i) APPROVES the Third Amendment to the five (5) PPOAs identified as: AD-1-P; AE-1-P; AQ-1-P; AI-1-P; and AK-1-P for a total of 315.1 MW of Solar PV utility scale nameplate capacity.

(ii) AUTHORIZES PREPA to continue negotiating with Service Providers of projects identified as: 1-1-P and AS-1-P, to achieve terms and conditions consistent with the guidance provided in Part II and ATTACHMENT B of this Resolution and Order.

(iii) GRANTS an extension to achieve a closing date, until June 30, 2023, to all remaining PPOAs which automatic termination date expires before June 30, 2023. The PPOAs with automatic termination dates that presently expire on a date beyond June 30, 2023, shall maintain such date.

19. For the project identified as I-1-P, the previous amendment to the PPOA filed with the Energy Bureau provided, as a condition subsequent to the PPOA, the Energy Bureau approval of

Resource Provider's three ESSAs. The Energy Bureau rejected the approval of project I-1-P for listing that condition. PREPA has now removed that condition from the latest amendment to the PPOA for the I-1-P project. As a result of the removal of that condition from the PPOA, the Resource Provider has provided increased pricing to reflect reduced economies of scale. Nevertheless, if the Energy Bureau does approve the remaining three battery projects before the signing of the PPOA amendment, PREPA would require the Resource Provider to honor the prior pricing.

20. For the project identified as AS-1-P, the previous amendment to the PPOA filed with the Energy Bureau (1) provided the Resource Provider with an option to terminate the PPOA if Resource Provider's affiliate was not awarded a PPOA under Tranche 2 of the RFP and (2) allowed the Resource Provider the ability to find an alternate location for the development of the facility if the Energy Bureau and FOMB approved a capacity increase requested for the proposed project. The Energy Bureau rejected the approval of project AS-1-P because the amendment had both conditions therein. PREPA has now removed both conditions from the latest amendment to the PPOA. As a result of the removal of both conditions from the PPOA amendment, the Resource Provider has provided increased pricing to reflect reduced economies of scale.

21. On June 15, 2023, PREPA in compliance with the directives in the May 26 Order, as well as the representations made by PREPA in the May 12 Motion submitted to the Energy Bureau, amendments for the two (2) remaining August PPOAs, the two (2) Executed ESSAs, as well as the two (2) June 30 PPOAs that the Energy Bureau previously rejected (i.e., I-1-P and AS-1-P).

22. In response, on June 30, 2023, the Energy Bureau issued a *Resolution and Order* ("June 30 Order") making various determinations related to a subset of the Tranche 1 Projects and in

response to PREPA's July 15 Motion. Among other matters, the Energy Bureau made the following determinations:

(i) APPROVES the three (3) ESSAs for projects identified as: L-3-E, M-3-E, and H-3-E, for 150 MW of 4-hour duration battery energy storage nameplate capacity.

(ii) APPROVES the Third Amendments to two (2) ESSAs for projects identified as: A-2-E, and C-2-E, for 200 MW of 4-hour duration battery energy storage nameplate capacity.

(iii) APPROVES amendments to six (6) PPOAs for projects identified as: W-3-P, AT-1-P, I-1-P, and C-1-P, for 515 MW of Solar PV utility scale nameplate capacity.

(iv) GRANTS and extension until July 10, 2023 to sign the PPOAs and ESSAs, and, thus, to achieve closing date, to all the projects identified in paragraphs (i), (ii) and (iii) above.

(v) DENIES PREPA's request for authorization to amend the PPOAs for the projects identified as: AB-1-P and N-1-P.

23. For the project identified as N-1-P, the previous amendment to the PPOA filed was rejected by the Energy Bureau due to the proposed price increase that the proponent reflected is not aligned with price assumptions in the Approved IRP threshold levels, as adjusted for prevailing market conditions and the latest Lazard LCOE for PV, as discussed in the May 25 Order.

24. PREPA hereby submits, as **Annex A**, N-1-P proponent BFO which PREPA has received.

25. Given that the information contained in Annex A is part of a deliberative process, incorporates trade or business secrets that are deemed confidential pursuant to applicable law and have been requested by Resource Providers to be maintained in a confidential manner, PREPA hereby requests that the information in **Annex A** be maintained confidential. Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, provides that "any person who is required to submit information to the Energy [Bureau] believes that the information to be

submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]” Act 57 at Art. 6.15. “If the Energy [Bureau], after the appropriate evaluation, believes such information should be protected, it shall grant such protection in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure in which the allegedly confidential document is submitted.” *Id.* at Art. 6.15 (a). If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.” *Id.* at Art. 6.15 (c). “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.” *Id.* at Art. 6.15 (d).

26. In the exercise of its powers the Energy Bureau and PREPA approved Regulation 8815 which has force of law. *Id.* at Art. 6.3 (b)¹. Regulation 8815 includes language in Art. 10.2 which protects confidential information in those competitive bidding processes contemplated in the regulation. In its pertinent part, it states that “[o]nce the Contract has been executed, the Authority shall make public the report of the Project Committee which shall contain the information related to the procurement, evaluation, scoring, selection and negotiation process, and the information contained in the Proposal as required by law, except trade secrets, proprietary or privileged information of the Proponent clearly identified as such by the Proponent, or information that must otherwise be protected from publication according to law, unless otherwise ordered by a court order, in each case, if the Authority determines that the protection of such information is

¹ See also *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”) at Sec. 5 (“The regulations so adopted shall have the force of law once the provisions of Act No. 38-2017, the *Government of Puerto Rico Uniform Administrative Procedure Act*, are complied with.”)

appropriate.” As stated before, the information provided by Proponent in the BFO comprises business and trade secrets which Proponent have specifically requested be maintained in a confidential manner. Accordingly, PREPA respectfully request that the Energy Bureau find that these documents and information are confidential and thus order they be maintained under seal.

WHEREFORE, for the reasons stated above, PREPA respectfully requests that the Energy Bureau take **NOTICE** of this Motion, **FIND** PREPA in compliance with the submittal of the BFO and **GRANT** PREPA’s petition for confidentiality ordering that the documents included as Annex A be kept under seal.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 22nd day of August 2023.

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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 22nd day of August 2023.

/s Joannely Marrero Cruz
Joannely Marrero Cruz

Annex A

Best and Final Offer

[Submitted Under Seal]