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Sent: Tuesday, January 21, 2025 9:51 PM
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Subject: APER comments, REGULATION ON EVALUATION AND APPROVAL OF AGREEMENTS BETWEEN ELECTRIC SERVICE COMPANIES

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

IN RE: REGULATION ON EVALUATION AND APPROVAL OF AGREEMENTS BETWEEN ELECTRIC SERVICE COMPANIES ASOCIACION DE PRODUCTORES DE ENERGIA RENOVABLE (APER) Commenter	CASE NO.: NEPR-MI-2020-0014 SUBJECT: Comments on Proposed Regulation

APER'S COMMENTS ON THE PROPOSED REGULATION FOR THE EVALUATION AND APPROVAL OF AGREEMENTS BETWEEN ELECTRIC SERVICE COMPANIES

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW, Asociacion de Productores de Energia Renovable (APER), to respectfully submit its comments to the proposed Regulation for the Evaluation and Approval of Agreements with Electric Power Service Companies (hereinafter, the "Proposed Regulation") of the Puerto Rico Energy Bureau of the Public Service Regulatory Board of Puerto Rico (the "Energy Bureau").

1.APER is a non-for-profit organization, established by renewable energy producers and other relevant leaders of the energy sector, working to formulate public policies and market-driven strategies to help Puerto Rico strengthen is renewable industry, in a diversified and inclusive way, providing economic stability, resiliency and wide opportunities for the market.

2.On October 19, 2020, the Energy Bureau issued a Resolution, presenting a preliminary draft of the Regulation for the Evaluation and Approval of Agreements between Electric Service Companies (the "Proposed Regulation") in compliance with Act No. 57-2014 and Act No. 17 of 2019. On March 18, 2021, the Energy Bureau initiated the formal process for adopting the Proposed Regulation.

3. APER hereby submits comments on the Proposed Regulation. This submission is made in accordance with the Resolution of the Energy Bureau, granting an extension of the deadline for the submission of public comments to January 21, 2025.

4. **General Comments.**

APER strongly believes that contracts between large-scale industrial and commercial customers, entering into power purchase agreements with independent power producers, should not be subject to the level of review and requirements for approval that would be established in the Proposed Regulation. Essentially, our organization opposes the proposed regulation and hereby submits the following concerns which demonstrate that the proposed regulation is not consistent with the energy public policy established under Act 17 of April 11, 2019, known as the "Puerto Rico Energy Public Policy Act" ("Act 17-2019").

For industrial and commercial entities, seeking to provide electric services above the 5 MW threshold, Article 3 through Article 9 of the Proposed Regulation establish new regulatory compliance hurdles that will result in higher operational and administrative costs because of the ongoing oversight and extensive filing requirements.

Additionally, the process for contract negotiation would become more lengthy and rigid, as the PREB's review and approval process may cause delays or mandate changes. This could also place these companies at a competitive disadvantage, as they might be restricted in crafting innovative or cost-effective agreements that PREB deems inconsistent with energy policy. The discretionary nature of PREB's authority to approve or reject modifications further introduces uncertainty, complicating long-term planning and investment.

While PREB's intent may be to centralize oversight, address inefficiencies in Puerto Rico's energy sector, and align contracts with energy public policy objectives, these additional regulatory burdens may present an outcome in which private investment could be deterred and could disproportionately impact smaller or resource-limited companies.

As stated in the November 22, 2024 Resolution and Order, the Energy Bureau proposes to review the qualifications of electric power service companies, including their financial and technical abilities, to guarantee that the services described in the relevant contract are provided at just and reasonable rates. Nevertheless, these agreements would be negotiated between the commercial and legal teams of the parties involved, and respond to the specific circumstances of such entities, and should be confidential. In this regard, it should be up to the parties, with the support of their respective technical and legal resources, to strike a cost per kilowatt-hour that they mutually agree upon. However, and in contrast to the foregoing, we understand that the determination of the applicable charges for the wheeling services, that would be offered by the transmission and distribution operator, is entirely within the purview of the Energy Bureau.

5. Specific comments

a. Section 10.02(A)(9)

Section 10.02(A)(9) of the Regulation provides that any contract executed between the Puerto Rico Electric Power Authority ("PREPA") and any person pursuant to the Regulation, shall include a provision allowing the Energy Bureau to "review the cost per kilowatt-hour in the proposed Contract and determine if the proposed cost is just and reasonable". Additionally, the Section states that in reaching its decision, the Energy Bureau "shall consider whether the rates are the lower of average cost or marginal cost consistent with system stability".

The Energy Bureau's potential intervention in pricing determined, pursuant to arms-length negotiations is, by itself, an issue. Moreover, Section 10.02(A)(9) is vague and subjective, as it allows the Energy Bureau to decide if the cost per kilowatt-hour in a contract is "just and reasonable", without clear guidelines on how this decision will be made. The Section only states the Energy Bureau should consider whether the rates are the "lower of average cost or marginal cost", but it does not explain how this will be determined or what factors will be considered.

Our organization is opposed to the Energy Bureau's intervention in pricing negotiations. In the alternative, the Regulation should incorporate clear, objective parameters and a defined procedure for the Energy Bureau's evaluation and approval of such pricing, in order to ensure its decision-making is consistent, predictable, objective, fair and transparent.

b.Section 3.03(A)(2)

Section 3.03(A)(2) of the Regulation provides that Power Purchase Agreements ("PPAs") with PREPA, electric power service companies, microgrids, energy cooperatives, municipal ventures or community solar projects, shall include a "description of any mechanism for taking advantage of price reductions in the market and passing on the cost savings to Customers".

The inclusion of price reduction provisions should be a matter for negotiation between the parties, rather than a mandatory requirement, especially considering that Section 3.03(A)(2) would also apply to agreements between private parties. APER supports market driven pricing and oppose every attempt of pricing determination by the Energy Bureau, which disincentivize serious market participants from considering an investment in Puerto Rico.

In the event of such pricing intervention, the Energy Bureau should categorize PPAs on the basis of the various types of contracting parties and limit intervention to instances involving individual consumers, small businesses or other similarly situated purchasers, where the protection of such parties may be justified.

c.Article 9

Article 9 of the Regulation states that "[PPAs] negotiated between an Electric Power Service Company and a commercial or industrial Customer shall be presumed to result from arms-length

bargaining in a competitive market and shall not be subject to an initial review by the Energy Bureau. However, notwithstanding the foregoing, the Energy Bureau reserves the right to exercise its authority regarding these Agreements at its discretion if complaints arise regarding these Agreements".[1]

The second sentence in this provision should be deleted.

Aside from its role in licensing and ensuring legal and regulatory compliance, the Energy Bureau should not interfere with or intervene in private contracts between consenting parties, particularly when both parties are similarly resourceful market participants. Allowing the Energy Bureau to review and potentially modify a privately negotiated PPA, at its discretion, exceeds the reasonable scope of its authority, could lead to arbitrary or improper interference, and would exacerbate current market uncertainty and a perception of higher risk, all of which translates to higher costs and, ultimately, harms end-users.

References in the Regulation should be reviewed and updated as warranted (e.g. references to Act No. 73-2008 should be updated to add Act No. 60-2019, known as the "Puerto Rico Incentives Code" (Act No. 60 of July 1, 2019, as amended), as applicable).

The Regulation contains non-standard or informal language that is improper for use in statutory and regulatory provisions. Additionally, the Regulation includes inconsistent and duplicated terms, such as "Energy Generation Company" vs. "Electric Power Generation Company" and "Independent Energy Producer" vs. "Independent Power Producer", among others. The draft Regulation should be generally and thoroughly reviewed and revised, as to form and substance.

At the same time, article 9 of the Proposed Regulation has been revised to address the concerns initially raised by the entities that previously submitted comments,[2] with respect to the overreach into contractual agreements between private parties (specifically for industrial and commercial customers). Besides, Section 1.04(C) of the Proposed Regulation provides that the regulation applies to "industrial and commercial consumers," while Section 1.04(D) exempts PPAs with a capacity of less than 5 MW from regulation, except as otherwise provided in Article 8[3].

Additionally, Section 2.01(A)(4) of the Proposed Regulation provides that "Large scale industrial and commercial Consumers[4] or Electric Cooperatives that enter into PPAs directly with EPSCs" are contracts subject to the PREB's review and approval. An integral review of these

[1] It should be noted that most commercial and industrial agreements provide a dispute resolution procedure which typically involves arbitration.

[2] These comments were made by entities such as Sunnova Energy Corporation, Windmar Group, Horizon Energy, LLC, AES Puerto Rico, Renewable Energy Coalition, Oriana Energy, Puerto Rico Chamber of Commerce, SESA, Puerto Rico Electric Power Authority, LP, Dupont, FMC And Bristol Myers.

[3] The reference to Article 8 appears to be a typo, as we expect the correct reference is to Article 9.

[4] The term "Large scale industrial and commercial consumers" is not defined by the Proposed Regulation.

provisions indicates that PPAs involving industrial and commercial customers for systems with a capacity in excess of 5 MW, would be subject to the Proposed Regulation. As noted above, we believe that this level of review is unnecessary.

d. Art. 4

Article 4 of the Proposed Regulation could add further complexity to the approval process for utility-scale contracts, which are already subject to PREB's review and approval. Among others, the Proposed Regulation addresses Energy Compliance Certification and would require the filing of the "Partnership Committee Report" with the PREB. This report, prepared by the Partnership Committee, under Article 9(g) of Act 29-2009 (the Public-Private Partnerships Act), evaluates a PREPA transaction and outlines the terms and conditions of the contract.

The Public-Private Partnerships Authority ("P3A") has previously determined that contracts subject to PREPA's request for proposals are considered PREPA Transactions under Act 120.[5] While in Tranche 1, the P3A allowed PREPA to proceed with the procurement processes, mentioned in the referenced communication, contingent on providing updates and notices, the P3A also reserved the right to make different decisions regarding future projects or transactions. Respectfully, the provisions of Article 4 should only apply to public private partnership agreements, not to contracts which result from PREPA's procurement processes, and the provisions of the Proposed Regulation should clearly reflect this.

e. Section 1.09 (18)

Section 1.09(18) of the Proposed Regulation defines "**Electric Service**" to encompass, "**but is not limited to**, all those activities related to the generation, transmission, distribution, electric energy resale, ancillary services, commercialization, billing, storage, wheeling of electrical energy and any other service that an Electric Power Service Company may provide". (emphasis added) The use of the phrase "**but is not limited to**" could lead to an overly broad interpretation of what constitutes an "**electric service**," creating potential confusion. Moreover, the wide scope of this definition may have implications for determining whether a business qualifies as an Electric Power Service Company ("EPSC"), as Section 1.09 (17) defines an EPSC as "any person or entity, natural or legal, including energy cooperatives and municipalities, dedicated to offering **Electric Service**". (emphasis added) We recommend removing this broad language from Section 1.09 (18) in the Proposed Regulation.

f. Section 3.02.

Section 3.02 of the Proposed Regulation is titled "Additional Documents to be Included in Applications for Approval of Agreements with Microgrids, Energy Cooperatives, Municipal Ventures and Community Solar Projects". However, the first paragraph states that this section also applies to PPAs with EPSCs and PREPA. This creates confusion, as to the applicability of Section

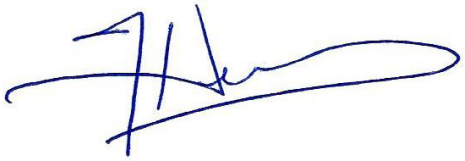
[5] See letter from Fermín E. Fontanés Gómez, Executive Director, to Suheil M. Acevedo Serrano, Chairperson, RFP Evaluation Committee, of February 11, 2022.

3.02 to ESPCs and PREPA because they are not mentioned in its title, while in Section 3.03 EPSCs are mentioned in the title and first paragraph of the section.

RESPECTFULLY SUBMITTED,

In San Juan, Puerto Rico this 21st day of December 2025.

We hereby certify that APER has proceeded with the filing to the Puerto Rico Energy Bureau by electronic mail to: comentarios@jrsp.pr.gov.



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