

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

IN RE: AMENDMENT TO POWER PURCHASE OPERATING AGREEMENT BETWEEN PREPA AND AES PUERTO RICO, L.P.

NEPR

Received:

Nov 7, 2023

8:06 PM

CASE NO.: NEPR-AP-2023-0005

SUBJECT: Petition for Approval of Third Amendment to Power Purchase and Operating Agreement Between the Puerto Rico Electric Power Authority and AES Puerto Rico, L.P.

PETITION FOR APPROVAL OF THIRD AMENDMENT TO POWER PURCHASE OPERATING AGREEMENT BETWEEN THE PUERTO RICO ELECTRIC POWER AUTHORITY AND AES PUERTO RICO, L.P.

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:

I. INTRODUCTION

As Puerto Rico transitions to renewable energy sources, it needs to maintain existing thermal generation in the short- and medium-term for Island-wide energy security, while encouraging the rapid development of solar generation and battery storage. In connection with such efforts, PREPA hereby presents to the Puerto Rico Energy Bureau of the Public Service Regulatory Board (the “Energy Bureau”) this request to amend that certain *Power Purchase and Operating Agreement between AES Puerto Rico, L.P. and Puerto Rico Electric Power Authority* dated October 11, 1994 (as amended or supplemented, the “PPOA”).

The AES Puerto Rico, L.P. (“AES-PR”) plant currently generates approximately 450 megawatts (“MW”) of reliable low-cost energy that is essential for Puerto Rico energy stability. As further detailed below, PREPA and AES-PR negotiated the third amendment to the PPOA (the

“Proposed Amendment”) in good faith (i) to accelerate green energy adoption through a commitment by AES-PR to additional green energy sources in compliance with the *Puerto Rico Energy Public Policy Act*¹ and Puerto Rico energy policy, in parallel with the ongoing renewable energy procurement processes being led by the Energy Bureau established under the *Final Resolution and Order on PREPA’s Integrated Resource Plan*,² (ii) to further environmental compliance and remediation at the AES-PR facility, in accordance with public policy and federal and Puerto Rico law; and (iii) to support ongoing, near-term, and uninterrupted operations of a reliable, low-cost generation facility, while Puerto Rico transitions to renewable energy generation.

On November 3, 2023, PREPA’s governing board approved a resolution authorizing the PPOA Amendment, subject to approval of the Energy Bureau and the Financial Oversight & Management Board for Puerto Rico (the “Oversight Board”).

Wherefore, in compliance with Act 57-2014³ § 6.32(b), PREPA respectfully requests that the Energy Bureau approve the Proposed Amendment.

II. RELEVANT FACTS

A. The AES-PR Facility and Proposed Amendment to PPOA

AES-PR operates a 454.3 MW qualifying cogeneration facility consisting of two circulating fluidized bed boilers, two steam turbine generators, and its respective interconnection

¹ Act No. 17 of April 11, 2019 (as amended, “Act 17-2019”), 22 L.P.R.A. § 1141 *et seq.*

² *Final Resolution and Order on the Puerto Rico Electric Power Authority Integrated Resource Plan* entered in case no. CEPR-AP-2018-0001, *In re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*.

³ Act No. 57 of May 27, 2014 (as amended, “Act 57-2014”), 22 L.P.R.A. § 1051 *et seq.*

facilities around Guayama, Puerto Rico (the “Facility”). The Facility is critical to the Puerto Rico energy system’s stability, providing up to 25% of the electric energy generated in Puerto Rico—historically at the lowest variable and total cost supplied to the system (as detailed in the charts in section III.B. below).

PREPA and AES-PR entered into the initial PPOA on October 11, 1994, which was subsequently amended through a first amendment on November 16, 1999, and a second amendment on July 17, 2015. The PPOA’s term runs twenty-five years from the Facility’s Commercial Operation Date, which occurred on November 29, 2002. The Proposed Amendment does not extend the PPOA’s term.

B. Puerto Rico Energy Public Policy

The Government of Puerto Rico’s public policy, as codified in Act 17-2019, prohibits the use of coal burning as a power generation source after January 1, 2028. For purposes of eliminating the use of coal by January 1, 2028, the existing coal-fired power capacity may be replaced by power generation capacity from other sources that are compliant with Act 17-2019 by extending contracts and/or renewing existing permits based on the new generation source.⁴

In addition, the Facility’s environmental compliance and the reduction of coal combustion residuals (“CCR”) and/or CCR-based products (combustion waste, by-product, manufactured aggregate or Agremax) produced by the Facility’s operations are key priorities of the Government of Puerto Rico. Pursuant to Act 5-2020,⁵ combustion waste or by-product produced by the

⁴ Act 17-2019 at Art. 4.11.

⁵ Act No. 5 of January 2, 2020 (as amended, “Act 5-2020”), 12 L.P.R.A. § 8191 *et seq.*

operation of the Facility is prohibited from being stored anywhere in Puerto Rico for a period in excess of one hundred and eighty (180) days or disposed of anywhere in Puerto Rico or its neighboring waters.

C. The Proposed Amendment

A confidential copy of the Proposed Amendment is attached as **Exhibit B**. The Proposed Amendment will facilitate a transition to green energy and safeguard the availability of dependable and cost-efficient baseload generation by keeping the Facility financially viable in the interim.⁶ The parties agreed to economic terms in the Proposed Amendment, effective December 1, 2023. The Proposed Amendment will only be executed upon final consideration and approval from both the Energy Bureau and the Oversight Board. PREPA is contemporaneously submitting the Proposed Amendment to the Oversight Board.

III. ARGUMENT AND REQUEST

As Puerto Rico transitions to renewable energy generation, approval of the Proposed Amendment will foster such transition, while preventing an abrupt Facility shutdown or drawn-out bankruptcy process for the Facility that would likely result in frequent and substantial service disruptions, including brownouts or blackouts as the available energy will diminish substantially. In addition, higher energy rates for Puerto Rico customers would be inevitable, as the cost of the Facility's energy generation is lower than other available sources of energy.

⁶ AES-PR is experiencing severe financial difficulties that impact its ability to maintain operations through the end of the PPOA's term. On June 1, 2023, this caused AES-PR to default in payment of its bonds issued pursuant to the trust agreement, dated as of May 15, 2000, by and among Puerto Rico Industrial, Tourist, Educational, Medical and Environmental Control Facilities Financing Authority, as issuer, and Bankers Trust Company (succeeded in interest by Deutsche Bank Trust Company Americas and UMB Bank, N.A.), as bond trustee. The bonds have remained in default and under forbearance since that time. AES-PR's restructuring is dependent on the PPOA Amendment.

The Energy Bureau has the power to take regulatory actions necessary to *guarantee* the capacity, reliability, safety, and efficiency of energy availability, as well as to address the costs of the Puerto Rico electric system. Act 57-2014 at § 6.3 (emphasis added).⁷ Such guarantees may be accomplished through the approval of the execution or amendment of power purchase agreements entered into by PREPA to purchase power and storage capacity.

In this instance, the Proposed Amendment helps guarantee that Puerto Rico's electric system will maintain adequate capacity at the lowest cost to serve Puerto Rico in a safe and dependable manner, consistent with both the IRP (defined below) and Act 17-2019. It ensures that sufficient reserve capacity remains available and electric energy is provided reliably, while new renewable generation and battery storage capacity is brought on line. This will allow for a smooth transition as Puerto Rico realizes its energy policy objectives. Accordingly, for the reasons detailed below, PREPA respectfully requests that the Energy Bureau thoroughly consider and approve the Proposed Amendment before the December 1, 2023, to avoid further risk of Facility outages or shut down and the unpredictable and costly renegotiation of agreed terms.

A. In Compliance with the IRP, the Proposed Amendment will Accelerate Puerto Rico's Transition to Green Energy

As the Energy Bureau is aware, PREPA's Integrated Resource Plan (the "IRP"), as approved by the Energy Bureau in Docket No. CEPR-AP-2018-0001, envisions, among other things, a transformation of Puerto Rico's energy sector by significantly increasing renewable

⁷ While Energy Bureau evaluation and approval of power purchase agreements that have been entered into by PREPA prior to the approval of Act 57-2014 is not required, any amendment to a power purchase agreement executed prior to the approval of Act 57-2014 is subject to Energy Bureau approval. Act 57-2014 at § 6.32(b), as amended by Act 17-2019 at § 5.28.

generation and storage capacity and retiring all (i) coal-fired generation by 2028, and (ii) remaining heavy fuel oil and steam generation by 2030. The majority of PREPA’s generating assets are heavily reliant on energy commodities with a high degree of price volatility that directly, unpredictably, and significantly influence customer electricity rates. While the Facility is not a part of Puerto Rico’s long-term energy future, it does represent a core component of the near-term reserve capacity and low-cost generation needed to allow for an orderly transition to new, renewable, and zero-carbon energy sources. The Energy Bureau’s approved IRP and the Oversight Board-certified PREPA fiscal plan both include the Facility in the capacity expansion plan until its contractual retirement date of November 28, 2027, to meet the reliability constraints recognized therein.

Consistent with the IRP’s core objectives, under the Proposed Amendment, AES-PR has agreed to responsibly retire the coal-fired Facility by the time contemplated in the IRP. Increasing the share of renewable generation and storage in Puerto Rico and responsibly retiring or converting existing coal generation are among the Energy Bureau’s approved IRP’s foremost objectives. The Proposed Amendment fulfills and supports these objectives, and therefore should be approved as consistent with the approved IRP.

B. Consistent with Act 17-2019, the Proposed Amendment Ensures Availability of Critical Baseload Generation at the Lowest Cost and the Facility’s Environmental Compliance

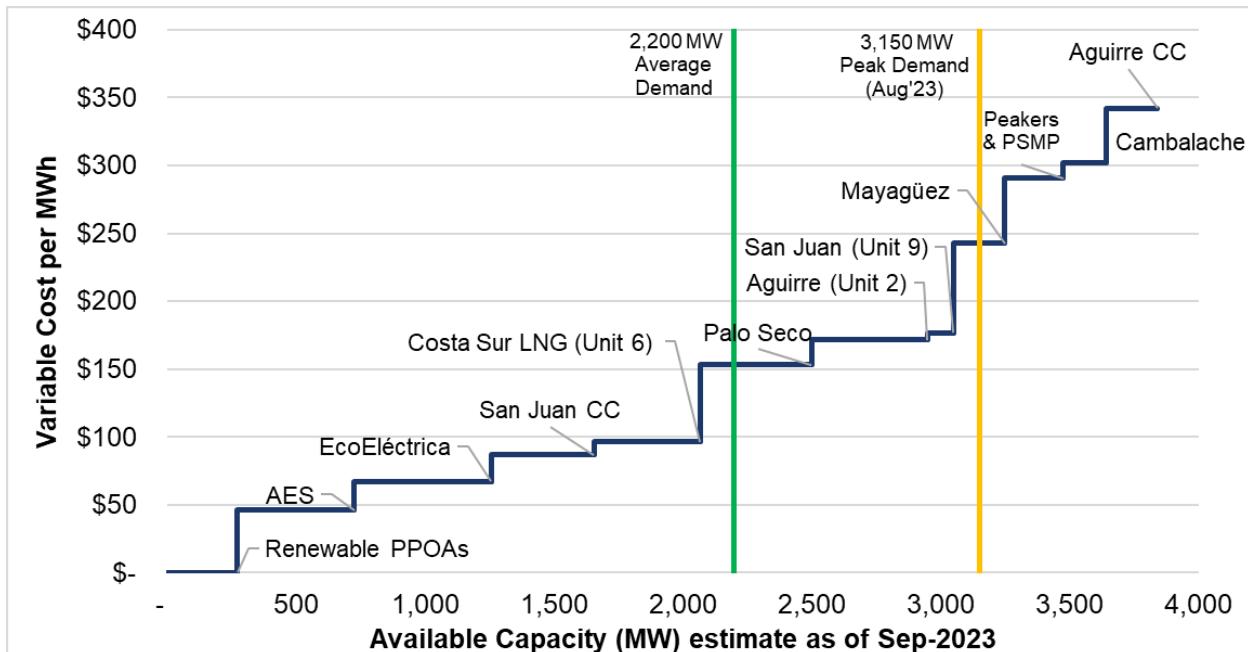
In addition to the IRP’s requirements, among the main objectives of Act 17-2019 is to “reduce and eventually eliminate electric power generation from fossil fuels by integrating *orderly and gradually* alternative renewable energy *while safeguarding the stability of the Electrical System.*” Act 17-2019 at § 1.6(7) (emphasis added). The Proposed Amendment is designed to

allow for the orderly integration of renewable energy generation while ensuring the electrical system's stability.

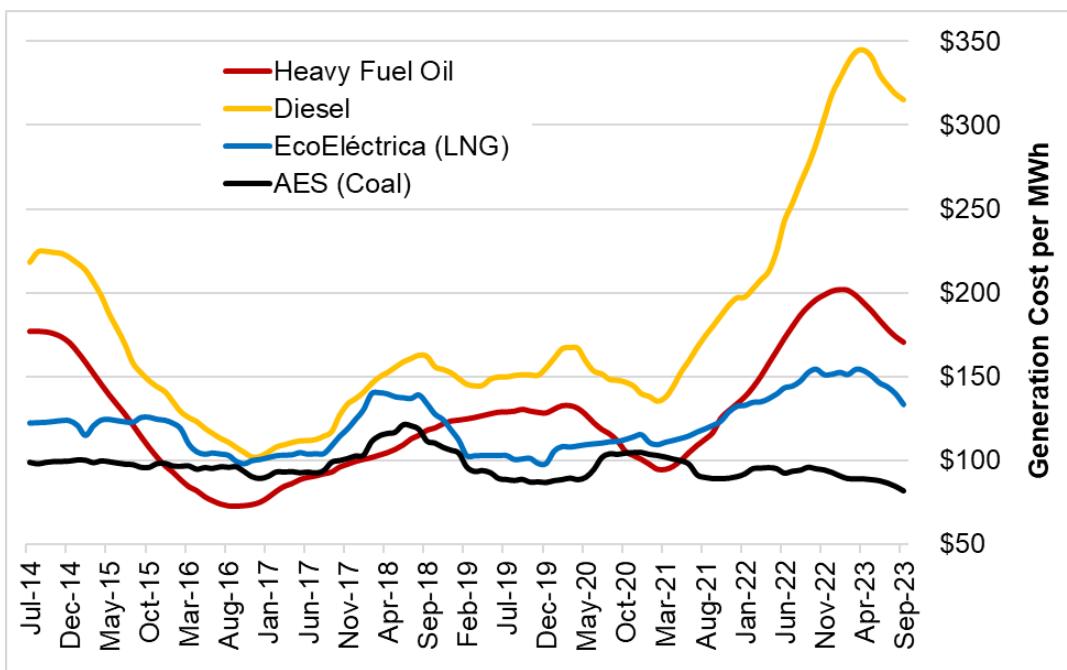
As previously mentioned, the Proposed Amendment will not extend the PPOA's term—the use of coal burning as a power generation source in Puerto Rico will be eliminated before January 1, 2028. However, to avoid the abrupt total loss of the Facility's 454 MW capacity today, which would severely impact Puerto Rico electric customers, the Proposed Amendment will ensure that Puerto Rico has dependable and cost-efficient baseload generation available while it transitions to renewable energy and retires the Facility in an orderly fashion.

Without the Proposed Amendment, the Facility will likely be forced to shut down or be subject to a risky bankruptcy process in the very near term. Generation supply constraints mean that without the Facility's availability, black-outs and load shedding would become increasingly likely to occur. At best, under these scenarios, higher energy rates for Puerto Rico customers would be a near certainty due to much higher cost replacement generation. As illustrated in the charts below, the higher cost of marginal generation for both average and peak load would result in a higher cost per kWh increase than the all-in cost of the PPOA, including the Proposed Amendment. Therefore, by approving the Proposed Amendment, the Energy Bureau will help provide stable, reliable, and sustainable energy for Puerto Rico through the short-term continued operations of one of its lowest cost and most reliable generators during this pivotal transition period.

Puerto Rico Generation Supply and Demand (Q3-2023 YTD)



Historical Fuel / PPOA Cost per MWh - Rolling 12 Month Average



IV. REQUEST FOR CONFIDENTIAL TREATMENT OF INFORMATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF

PREPA requests that, as set forth in the chart on **Exhibit A**, the information provided in **Exhibit B** and **Exhibit C** be designated as confidential pursuant to the deliberative process privilege and the Energy Bureau’s Policy on Management of Confidential Information, CEPR-MI-2016-0009, issued on August 31, 2016, and partially amended on September 16, 2016. The Proposed Amendment, attached as **Exhibit B**, is pre-decisional and, therefore, confidential as it is part of an ongoing deliberative process. In addition, **Exhibit C** is a study that AES-PR provided to PREPA under a confidentiality and non-disclosure agreement because it contains AES-PR’s proprietary information and trade secrets and includes critical energy infrastructure information (“CEII”). In compliance with Energy Bureau policy, PREPA hereby submits its memorandum of law in support of its request for confidentiality setting forth the legal basis for which PREPA is entitled to file **Exhibits B and C** under the seal of confidentiality.

A. Applicable Law Regarding Submittal of Confidential Information Before the Energy Bureau

In general, documents in possession of a public corporation like PREPA are presumed public. However, access to public information is not absolute. *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017). A government entity may keep information confidential when:

(1) a law so declares; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is “official information” pursuant to Rule 514 of Evidence.

See *id.* at 83 (internal citations omitted).

Article 6.15 of Act 57-2014 is the bedrock provision on the management of confidential information filed before the Energy Bureau. It provides, in pertinent part, 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 57-2014 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). The confidential information shall be provided “only to the lawyers and external consultants involved in the administrative process after the execution of a confidentiality agreement.” Act 57-2014 at Art. 6.15(b).

Moreover, 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).

The Energy Bureau’s Policy on Confidential Information (as amended, the “Confidentiality Policy”) details the procedures a party should follow to request that a document or portion thereof be afforded confidential treatment. In essence, the policy requires identifying confidential information and filing a memorandum of law explaining the legal basis and support for a request to file information confidentially. *See* CEPR-MI-2016-0009, § A, as amended by the

Resolution dated September 20, 2016, CEPR-MI-2016-0009. The memorandum should also include a table that identifies the confidential information, a summary of the legal basis for the confidential designation, and why each claim or designation conforms to the applicable legal basis of confidentiality. *Id.* at ¶ 3. The party that seeks confidential treatment of information filed with the Energy Bureau must also file both a “redacted” or “public version” and an “unredacted” or “confidential” version of the document that contains confidential information. *Id.* at ¶ 6.

With regard to CEII specifically, § D of the Confidentiality Policy provides that CEII is “Validated Confidential Information” and only authorized representatives may review such information:

The information designated by the [Energy Bureau] as Validated Confidential Information on the grounds of being CEII may be accessed by the parties’ authorized representatives only after they have executed and delivered the Nondisclosure Agreement.

Those authorized representatives who have signed the Non- Disclosure Agreement may only review the documents validated as CEII at the [Energy Bureau] or the Producing Party’s offices. During the review, the authorized representatives may not copy or disseminate the reviewed information and may bring no recording device to the viewing room.

Id. at § D (on Access to Validated Confidential Information).

B. Request for Confidential Treatment of Exhibit B

The Proposed Amendment, attached as **Exhibit B**, is confidential given that it is pre-decisional, has yet to be executed, and is still subject to deliberations and approval of both the Energy Bureau and the Oversight Board. Permitting access to those deliberations through the Proposed Amendment’s disclosure would undermine the very interests that the deliberative process privilege is intended to protect: discouraging the free exchange of ideas among public

officials by subjecting their private deliberations to public scrutiny. There is no need to intrude upon internal government deliberations to interpret those documents. Therefore, PREPA requests that the Proposed Amendment be treated as confidential pending its approval and execution.

C. Request for Confidential Treatment of Exhibit C

To assist the Energy Bureau’s review of the Proposed Amendment, PREPA is providing **Exhibit C**, which contains AES-PR’s proprietary information and trade secrets and is protected under Puerto Rico law.⁸ Specifically, Act 80-2011 defines a trade secret as any information that:

has a present or a potential independent financial value or that provides a business advantage, insofar as such information is not common knowledge or readily accessible through proper means by persons who could make a monetary profit from the use or disclosure of such information; and [f]or which reasonable security measures have been taken, as circumstances dictate, to maintain its confidentiality.

The Legislative Assembly has acknowledged in Act 80-2011’s Statement of Motives that the broad definition of a trade secret includes “any confidential information with trade or industrial value, which its owner reasonably protects to prevent its disclosure.” In Puerto Rico, moreover, trade secrets “do not require registration or compliance with any formalities in order to be protected.” As the Legislative Assembly has noted, “failure to protect trade secrets could leave companies at the mercy of any competitor or former employee who gains knowledge of any such secret, whether directly from the owner or by other means.”

⁸ See *Industrial and Trade Secret Protection Act of Puerto Rico*, as amended, Act No. 80-2011 (“Act 80-2011”); see also Act No. 57-2014, § 6.15 (establishing that any person having the obligation to submit information to the Energy Bureau can request privileged or confidential treatment of any information that the submitting party believes to warrant such protection).

PREPA has a strong interest in preserving not only its proprietary secrets but also those of its current and potential suppliers and contractors—including AES-PR—that entrust PREPA with information in confidence as part of business and financial dealings. **Exhibit C** contains confidential information that AES-PR entrusted to PREPA under the assurance of confidentiality, within the context of their contractual relationship. Sharing this data openly could not only breach such contractual confidences, but also give AES-PR’s competitors or business counterparties a competitive edge by allowing insight into AES-PR’s business practices and data.

In addition, **Exhibit C** contains critical energy infrastructure information and should be sealed pursuant to § D of the Confidentiality Policy. While the Confidentiality Policy does not specifically define CEII, federal regulations do. In such regulations, “critical infrastructure” is defined as “existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.” 18 C.F.R. § 388.113(c)(4). The Facility fits within this definition. It contributes up to 25% of the electricity generated on Island, so any interruption would likely disrupt Puerto Rico’s security, economic security, public health, or safety.

In addition, federal regulations define CEII as:

specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
- (ii) Could be useful to a person in planning an attack on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the general location of the critical infrastructure.

18 C.F.R. § 388.113(c)(2). **Exhibit C** fits squarely within this definition as well.

WHEREFORE, for the reasons stated above and in compliance with the above laws, PREPA respectfully requests that the Energy Bureau evaluate and approve the Proposed Amendment manner, and that it treats the Proposed Amendment, annexed as **Exhibit B**, and **Exhibit C** as confidential.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on the 7th day of November, 2023.

GONZÁLEZ & MARTÍNEZ
1509 López Landrón
Seventh Floor
San Juan, PR 00911-1933
Tel.: (787) 274-7404

s/ Alexis G. Rivera Medina
Alexis G. Rivera-Medina
TSPR No.: 18,747
E-mail: arivera@gmlex.net

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, on the 7th day of November, 2023.

s/ Alexis G. Rivera Medina
Alexis G. Rivera-Medina