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BY ELECTRONIC MAIL

April 10, 2024

Honorable Omar J. Marrero Díaz
Executive Director
Puerto Rico Fiscal Agency and Financial Advisory Authority

Dear Hon. Marrero Díaz:

We write regarding Act 10-2024 (“Act 10” or the “Act”). The Oversight Board has received your submission pursuant to PROMESA § 204(a)(1) regarding the Act, which we address below. Before doing so, we believe it is important to address what the Act does and its inconsistency with PROMESA and the certified Fiscal Plan for Puerto Rico and the certified Fiscal Plan for the Puerto Rico Electric Power Authority (“PREPA”) (collectively, the “Fiscal Plans”).

Act 10 amends Act 114-2007¹ (“Act 114”) to prevent the Puerto Rico Energy Bureau (“PREB”) from making any changes to the Commonwealth’s current net metering and energy distribution policy until at least 2031.

The Oversight Board has significant concerns about the implications of the Act on Puerto Rico’s energy transformation under the Fiscal Plans, namely its effect on PREB. The PREPA Fiscal Plan requires that PREB determine whether to make changes to the net metering system and initiate those changes by April 11, 2024. Act 10 postpones that date by at least six years, and price modifications for current and new net metering program participants for 20 years after PREB makes changes to the net metering policy. As such, the Act is directly at odds with the PREPA Fiscal Plan.

¹ Act 114 is also known as the Puerto Rico Net Metering Program Act.

Act 10 is also significantly inconsistent with the Fiscal Plans' requirement that PREB be able to operate independently and "free from any direct or indirect political influence or interference."² As discussed below, Act 10 represents a direct challenge to this requirement.

Net metering programs can be an effective way to encourage individual consumers to invest in green energy and therefore require careful study and calibration by an experienced regulator insulated from political influence that compromises the objective evaluation of the policy. Act 10 intrudes on PREB's independence in this important area. In so doing, it violates PROMESA § 108(a)(1) and impairs and defeats the purposes of PROMESA, as determined by the Oversight Board pursuant to PROMESA § 108(a)(2).

The Government, by enacting Act 17-2019 ("Act 17"), tasked PREB, as PREPA's independent regulator, with conducting a study to "consider the costs and benefits associated with ... the net metering program," presumably to ensure the net metering program established by Act 114 was structured optimally. In entrusting the analysis to PREB, the Government recognized the importance of de-politicizing the energy sector and entrusting important decisions about PREPA to an independent, experienced regulator. This is consistent with the Fiscal Plans, which recognize that a strong, independent, regulator is a key pillar of Puerto Rico's much needed energy sector transformation.

Pursuant to Act 114 and Act 17 and the PREPA Fiscal Plan, PREB is required to conduct and complete a study concerning the Commonwealth's current net metering and energy distribution policy, and has until April 11, 2024, to implement any changes to PREPA's net metering structure it deems appropriate based on the results of the study. Act 10 suspends this schedule, requiring PREB to redo its net metering and energy distribution study, but prohibits PREB from commencing such work until January 2030. Act 10 further specifies that PREB may not change the current net metering structure until the study is completed, and then provides that any changes can only take effect 12 months after PREB decides to make any such changes.

Accordingly, Act 10 mandates that the current net metering structure remains in place until at least 2031, and likely much longer. In addition, the Act provides that any customer with a net metering contract or that has a distributed generator installed and certified by a licensed professional at the time PREB issues its final determination changing the net metering structure (which, as noted above, cannot be before 2031) shall be entitled to enjoy the pre-change net metering terms for at least 20 years (or until at least 2051).

Act 10 reflects not only a concerning departure from the Government's policy and the Fiscal Plans' requirement regarding the need for PREPA to be managed by an independent, experienced regulator, but also a vivid illustration of its vital importance. Prior to the enactment of Act 10, PREB was set to make changes to the net metering program based on the results of a lengthy study that would be subject to public comment and would consider several key factors and implications of the program, including costs.

² Certified 2023 PREPA Fiscal Plan at 74.

Under Act 10, the Government has abruptly decided, without public hearings or the benefit of any study, to mandate the current net metering program remain in place until at least 2031. This type of interference in the management of PREPA is one of the root causes of its current challenges, which is precisely why the Government created PREB and why the Fiscal Plans mandate PREPA be regulated by an independent regulator.

Net metering programs encourage customers to invest in distributed generation (such as rooftop solar panels). Under such programs, customers with installed distributed generation systems may export their excess energy to the PREPA power grid and receive credits to offset their energy purchases from PREPA. Essentially, net energy metering program participants offset their energy consumption charges with the excess energy their systems produce.

Under the current system, participants receive a full kilowatt hour credit on their energy bills for every kilowatt hour they export to PREPA. As such, if the number of kilowatt hours the participant exports in a given month equals or exceeds the number of kilowatt hours the participant consumed in that month, the participant would not have any volumetric energy usage charges for that month.

A sub-optimal net metering program may have “unintended detrimental effects,” including “an unequitable distribution of costs throughout the system.”³ Currently, as a result of the 1:1 offset net metering policy, the volumetric charge component of most net metering customers’ PREPA bill is reduced materially, if not fully offset, despite most customers remaining interconnected to the grid for purposes of peak nighttime consumption and when their distributed generation systems produce insufficient energy for their needs (e.g., on rainy days).

The fixed costs of maintaining the energy grid, such as transmission lines that continue to serve these customers, are incorporated into PREPA’s volumetric energy rates. As such, PREPA’s operational and maintenance costs are disproportionately borne by customers unwilling or unable – because of economic situation, housing situation (rental, apartment building), or otherwise – to participate in the current net energy metering program.

All impacts should be considered and studied now per Act 17 and as required by the PREPA Fiscal Plan, not delayed until 2030, so that necessary adjustments to the net metering program, as determined by PREB, can be made to serve both PREPA’s long term sustainability and its interests in distributed green energy generation. Act 10, if permitted to remain in effect, will have significant impacts on the energy system and the residents of Puerto Rico by preventing PREB from taking any action in this important space for at least six years.

For those reasons, the Oversight Board determined that Act 10 impairs or defeats the purposes of PROMESA, pursuant of § 108(a)(2). Please find attached the resolution with the Oversight Board's determination.

In addition, the Act violates PROMESA § 108(a)(1). That provision prohibits the Governor or the Legislative Assembly (the “Legislature”) from exercising “any control, supervision, oversight, or review over the Oversight Board or its activities.”

³ Certified 2023 PREPA Fiscal Plan at 58.

The PREPA Fiscal Plan, certified by the Oversight Board, establishes specific dates for PREB to complete its net metering study and implement any changes to the Commonwealth’s net metering structure it deems appropriate. It also – along with the Commonwealth Fiscal Plan – requires that PREB be permitted to operate independently and free of political interference.⁴

The Act directly challenges both mandates. As such, the Act constitutes an impermissible effort to exercise control over the Oversight Board’s activities – including its ability to determine the contents of fiscal plans. This type of action is barred by PROMESA § 108(a)(1) and, as such, for this additional reason, the Act violates PROMESA.

Accordingly, we urge you to take immediate action to repeal or amend Act 10 and to permit PREB to continue its work assessing and making necessary changes to the net metering program. Please advise if the Government intends to do so by **April 15, 2024**.

The Governor’s Section 204(a) Submission for Act 10 is Deficient

The § 204(a) submission for Act 10 does not comply with PROMESA’s requirements. On February 12, 2024, the Oversight Board received the Governor’s PROMESA § 204(a) submission for Act 10 (the “Submission”). The Submission consists of:

- A copy of Act 10; and
- A document titled “Section 204(a) Certification, Act 10-2024, Enacted on January 10, 2024” prepared by AAFAF (the “Certification”), with two attachments:
 - Attachment A (the “OMB Attachment”) prepared by the Puerto Rico Office of Management and Budget (“OMB”); and
 - Attachment B (the “Treasury Attachment”) prepared by the Puerto Rico Department of Treasury (“Treasury”).⁵

PROMESA § 204(a)(2) requires the Governor to submit to the Oversight Board a copy of every new law, along with (1) a “formal estimate” of the impact the law will have on expenditures and revenues and (2) a certification, prepared by the same entity that prepared the formal estimate, finding that the new law either is or is not “significantly inconsistent with the Fiscal Plan.” The Submission fails to meet these requirements.

First, the Submission does not include a compliant formal estimate. The OMB Attachment is a one-page document that states that the Act will “not entail a fiscal impact and if it did, it would be a minimum for the certified budget for the fiscal year 2023-2024. Nor does it imply budgetary impact for subsequent fiscal years contained in the Certified Tax Plan.”⁶ The Treasury Attachment finds the Act “does not have a tax impact” for fiscal year 2024 but provides no explanation for

⁴ Certified 2023 PREPA Fiscal Plan at 61; Certified 2023 Commonwealth Fiscal Plan, vol. 3 at 42.

⁵ Citations and quotations attributed to the Treasury Attachment and the OMB Attachment are based on machine English translations of these documents obtained by the Oversight Board.

⁶ OMB Attach. at 1.

how it reached this conclusion.⁷ The lack of detail in these documents renders them insufficient “formal estimates” per the requirements established by PROMESA and court precedent.⁸ Accordingly, the Submission fails to meet §204(a)’s formal estimate requirement.⁹

Second, the Submission does not include a compliant certification. As an initial matter, the absence of a proper formal estimate (discussed above) necessarily means that any certification is also deficient.¹⁰ But even if the submitted estimates were compliant, the Submission does not include the required certification statement from the estimating agencies. Both the OMB Attachment and the Treasury Attachment are silent on whether the law is or is not significantly inconsistent with the Fiscal Plan.

It is true that AAFAF states in its report that “the Government has determined that Act 10 is not significantly inconsistent with the Certified Fiscal Plan,”¹¹ but that statement does not satisfy PROMESA § 204(a) because AAFAF did not prepare a formal estimate and § 204(a) requires that the certification be prepared by the agency preparing the estimate.¹² But even if AAFAF could submit a § 204(a) certification, its certification is defective for numerous other reasons.

For instance, AAFAF’s certification is limited to the Commonwealth Fiscal Plan and not the PREPA Fiscal Plan. As such, AAFAF has not certified consistency with the primary fiscal plan

⁷ Treasury Attach. at 1. The Treasury Attachment is also a noncompliant formal estimate because it only projects the fiscal impact for a single fiscal year, and not the entirety of the term covered by the Fiscal Plan, as required by PROMESA § 204(a). *See Pierluisi v. Fin. Oversight & Mgmt. Bd. For P.R. (In re Fin. Oversight & Mgmt. Bd. For P.R.)*, 37 F.4th 746, 747 (1st Cir. June 22, 2022) (the “formal estimate” requirement must cover “the entire period of the fiscal plan.”).

⁸ *See Vázquez Garced v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight and Mgmt. Bd. for Puerto Rico)*, 511 F. Supp. 3d 90, 126, 128–29 (D.P.R. 2020) (finding the Government’s fiscal estimates, which did not “provide the requisite analytical support,” failed PROMESA § 204(a)’s formal estimate requirement).

⁹ Based on prior correspondence with AAFAF, we understand that pursuant to Executive Order 2019-057, AAFAF does not prepare formal estimates for § 204(a) submissions. Accordingly, we do not consider the AAFAF Certification, despite its discussion of the Act’s costs, to be a formal estimate. Even if that were not the case, the AAFAF Certification does not analyze the impact the Act will have on revenues and expenditures, as required by § 204(a), but rather examines fiscal plan projections. Accordingly, even if it was intended to meet the formal estimate requirement it too would be deficient. Even so, the AAFAF Certification does highlight the lack of analysis conducted and lack of detail provided by the Governor’s estimating agencies. *See supra*; *see also* OMB and Treasury Attachments.

¹⁰ *See In re Fin. Oversight and Mgmt. Bd. for P.R.*, 650 B.R. 334, 357 (D.P.R. 2023) (finding certification deficient in part because it relied on deficient estimates).

¹¹ AAFAF Certification at 6. As previously shared with AAFAF, the Oversight Board does not endorse its articulation of the “significantly inconsistent” standard. *See Memorandum of Law in Support of the Oversight Board’s Motion for Summary Judgment, Vázquez Garced v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight and Mgmt. Bd. For Puerto Rico)*, Case No. 20-0080, ECF No. 49 at 5–9 (D.P.R. 2020).

¹² Per Executive Order, AAFAF does not prepare § 204(a) formal estimates. *See supra* n.8.

at issue.¹³ Further, AAFAF’s certification is incorrect and premised on a misreading of the PREPA Fiscal Plan. As mentioned above, the PREPA Fiscal Plan states unequivocally that PREB “must” determine whether to make changes to the net metering system and initiate those changes by April 11, 2024. Act is directly at odds with a significant provision of the PREPA Fiscal Plan, to the extent it significantly affects PREB’s authority to initiate changes to the net metering system as required therein. Act 10 is also significantly inconsistent with the Fiscal Plans’ requirement that PREB be able to operate independently and “free from any direct or indirect political influence or interference.”¹⁴

For each of the above-stated reasons, the Submission fails to include a formal estimate and certification that meet the basic requirements set forth in PROMESA § 204(a)(2). Therefore, pursuant to PROMESA § 204(a)(3)(A-B), the Oversight Board notifies the Governor and the Legislature that the Governor has not provided a compliant formal estimate or certification as required by § 204(a)(2) and directs the Governor, pursuant to PROMESA § 204(a)(4)(A), to provide the missing materials. Please provide this information by **April 19, 2024**.

However, even if Act 10 satisfies Section 204 requirements, it still fails to meet the requirements of PROMESA and the Fiscal Plan for the reasons stated above.

* * *

Consequently, we urge you to not implement the Act and accordingly take immediate action to repeal or amend Act 10 and to permit PREB to continue its work assessing and making necessary changes to the net metering program. Please advise by **April 15, 2024**, if the Government will repeal or amend Act 10 and allow PREB to complete its study and submit the Government’s concrete plan and timeline for doing so. Be advised that the Act may not be implemented until it is amended as requested herein. If the Government does not agree to repeal or amend Act 10, we will expect your submission of the requested information and materials discussed above by **April 19, 2024**.

Please note the Oversight Board reserves the right to take such actions as it deems necessary, consistent with PROMESA §§ 104(k), 108(a), and 204, including seeking remedies to prevent implementation and enforcement of Act 10 and to have the law nullified. We hope such actions will be unnecessary.

¹³ The AAFAF Certification separately discusses the Act’s impact on both the “Certified [Commonwealth] Fiscal Plan and the PREPA’s Certified Fiscal Plan,” *see* AAFAF Certification at 5-6, but its certification of consistency refers only to the “Certified Fiscal Plan” for the Commonwealth, *id.* at 6. *See also id.* at 4 (defining “Certified Fiscal Plan” as “the 2023 Certified Fiscal Plan for Puerto Rico, as certified by the Oversight Board on April 3, 2023.”). PROMESA § 204(a) requires the assessment to be made as to the “Fiscal Plan,” which is defined by PROMESA as both “a Territory Fiscal Plan or an Instrumentality Fiscal Plan, as applicable.” PROMESA §§ 5(10); 204(a)(2).

Hon. Marrero Díaz

April 10, 2024

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We look forward to continuing to work together for the benefit of the people of Puerto Rico.

Sincerely,



Jaime A. El Koury
General Counsel

CC: Hon. Pedro R. Pierluisi
Hon. José L. Dalmau Santiago
Hon. Rafael Hernández Montañez
Mr. Edison Avilés Deliz



**FINANCIAL OVERSIGHT AND MANAGEMENT BOARD
FOR PUERTO RICO**

April 5, 2024

RESOLUTION RELATING TO ACT 10-2024

WHEREAS, on June 30, 2016, the federal Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) was enacted;

WHEREAS, § 101 of PROMESA created the Financial Oversight and Management Board for Puerto Rico (the “Oversight Board”);

WHEREAS, on January 10, 2024, the Governor signed into law Act 10-2024 (“Act 10” or the “Act”);

WHEREAS, Act 10 amends Act 114-2007 to prohibit the Puerto Rico Energy Bureau (“PREB”) from making any changes to the Commonwealth’s current net metering and energy distribution policy until at least 2031;

WHEREAS, net metering allows customers who have installed distributed generation systems (such as rooftop solar panels) to export their excess energy to the PREPA power grid and receive credits to offset their energy purchases from PREPA;

WHEREAS, the certified 2023 PREPA Fiscal Plan (the “PREPA Fiscal Plan”) has observed that net metering programs can be an effective way to encourage individual consumers to invest in green energy, yet a sub-optimal net metering program may have “unintended detrimental effects,” including “an unequitable distribution of costs throughout the system”;

WHEREAS, for this reason, the PREPA Fiscal Plan, consistent with Act 114 and Act 17-2019 (“Act 17”), requires PREB to conduct and complete a study concerning the Commonwealth’s current net metering and energy distribution policy, and to implement any changes to PREPA’s net metering structure it deems appropriate based on the results of the study by April 11, 2024;

WHEREAS, Act 10 amends Acts 114 and 17 and suspends this PREPA Fiscal Plan schedule to delay any potential change to PREPA’s net metering policy until at least 2031, by effectively requiring PREB to redo its current net metering study but prohibiting PREB from (i) commencing that new study until January 2030, (ii) making any changes to the current net metering policy until it completes its study, and (iii) implementing any net metering policy changes until one year after announcing such changes;

WHEREAS, the Act further provides that any customer with a net metering contract or that has a distributed generator installed and certified by a licensed professional at the time PREB issues its final determination potentially changing the net metering policy (which, per the Act, cannot be before 2031) shall be entitled to enjoy the pre-change net metering terms for at least 20 years (or until at least 2051);

WHEREAS, the certified 2023 Commonwealth Fiscal Plan (the "Commonwealth Fiscal Plan") and PREPA Fiscal Plan (together, the "Fiscal Plans") provide that PREB must be permitted to operate independently and free of political interference;

WHEREAS, the Oversight Board has determined Act 10 violates the Fiscal Plans by interfering with PREB’s independence, by imposing numerous decisions upon PREB regarding net metering, including: (1) requiring it to ignore its current net metering study, (2) prohibiting it from commencing a new study until January 2030, (3) prohibiting it from making any changes to PREPA’s net metering policy until at least 2031, and (4) mandating that it establish a legacy program that will provide PREPA net metering customers and other eligible customers with the current net metering program’s terms through at least 2051;

WHEREAS, the Oversight Board has also determined that Act 10 violates the terms of the PREPA Fiscal Plan by prohibiting PREB from studying or making a change to PREPA’s net metering policy until 2030 in contravention of the PREPA Fiscal Plan’s requirements that PREB conduct and complete a study concerning the Commonwealth’s current net metering and energy distribution policy and implement any changes to PREPA’s net metering structure it deems appropriate based on the results of the study by April 11, 2024;

WHEREAS, the Oversight Board has the sole authority to determine the contents of fiscal plans, which are developed to provide a method for the Commonwealth and its instrumentalities to achieve fiscal responsibility and access to the capital markets;

WHEREAS, Congress, in PROMESA, protected the Oversight Board’s decisions regarding the contents of fiscal plans from challenge (*see* PROMESA § 106(e));

WHEREAS, the Oversight Board has determined that Act 10, by preventing PREB from complying with the terms of the PREPA Fiscal Plan, is an impermissible effort by the Governor and Legislative Assembly (the "Legislature") to "exercise [] control, supervision,

oversight, or review over the Oversight Board or its activities,” namely its authority to determine the contents of fiscal plans;

WHEREAS, the Oversight Board has determined Act 10 impairs or defeats PROMESA’s purposes, including that of achieving fiscal responsibility and access to capital markets, by directly contravening the express terms of the Fiscal Plans, which require PREB to be politically independent;

WHEREAS, the Oversight Board has determined Act 10 impairs or defeats PROMESA’s purposes, including that of achieving fiscal responsibility and access to the capital markets, by directly contravening the express terms of the PREPA Fiscal Plan, which requires PREB to complete its net metering study and implement any changes to PREPA’s net metering structure it deems appropriate by April 11, 2024;

WHEREAS, the Oversight Board has determined Act 10 impairs or defeats PROMESA’s purposes, including that of achieving fiscal responsibility and access to the capital markets, because the Act is expressly contrary to the terms of the Fiscal Plans;

WHEREAS, the Oversight Board has determined Act 10 impairs or defeats PROMESA’s purposes, including that of achieving fiscal responsibility and access to the capital markets, because it constitutes an effort to exercise control over the Oversight Board, which is barred by PROMESA § 108(a)(1);

WHEREAS, the Oversight Board has determined Act 10 impairs or defeats PROMESA’s purposes because it impairs the Oversight Board’s ability to carry out its statutory duties under PROMESA § 201(b)(1)(B), (G), (H), and (J) to ensure funding of the essential public services of reliable electricity, to enable the achievement of fiscal targets, to create independent revenue forecasts, and to provide for capital expenditures and investments necessary to promote economic growth;

WHEREAS, on February 12, 2024, the Oversight Board received the Governor’s PROMESA § 204(a) submission for Act 10 (the “Submission”);

WHEREAS, the Oversight Board has determined the Submission does not include a formal estimate of the impact Act 10 will have on expenditures and revenues that is compliant with PROMESA § 204(a)(2)(A);

WHEREAS, the Oversight Board has determined the Submission does not include a certification of the Act’s consistency with either of the Fiscal Plans compliant with PROMESA § 204(a)(2)(B);

WHEREAS, although the PROMESA § 204(a) process remains ongoing, for the reasons discussed above, Act 10 is significantly inconsistent with the Fiscal Plans and the Oversight Board does not believe a contrary conclusion is possible;

WHEREAS, after consultation with the Oversight Board's legal, financial, and other advisors, and following deliberation, the Oversight Board has determined it is necessary and appropriate under PROMESA to take such actions as it considers necessary, consistent with its powers under PROMESA, to prevent further harm to Puerto Rico's financial future from Act 10; and

NOW, THEREFORE, IT IS HEREBY RESOLVED that the Oversight Board:

1. Has determined Act 10 impairs or defeats the purposes of PROMESA, for each of the reasons set forth above;
2. Has determined, for reasons set forth above, Act 10 was enacted in violation of PROMESA;
3. Has determined Act 10 is significantly inconsistent with the Fiscal Plans;
4. Directs the Governor and all relevant covered territorial instrumentalities (the "Government") not to implement or enforce Act 10;
5. Advises the Government it is barred by PROMESA §§ 108(a)(1)-(2) from implementing or enforcing Act 10;
6. Directs the Legislature and Governor to repeal the Act or amend it in a manner consistent with the Fiscal Plans;
7. Informs PREB that Act 10 was enacted in violation of PROMESA, and advises it to comply with the terms of the PREPA Fiscal Plan; and
8. Approves taking legal action against the Government and other appropriate parties, pursuant to its authority under PROMESA, including § 104(k), to enforce the bar in PROMESA §§ 108(a)(1) and (2) against implementing and enforcing Act 10, and to have it declared a nullity, to prevent further harm to the Commonwealth and its citizens and to carry out PROMESA.

Agreed and authorized as of the date first set forth above.