

PowerAdvocate Message re: Definitive O&M Agreement

Dear Qualified Respondent –

The Puerto Rico Public-Private Partnerships Authority (the “Authority”) would like to thank you for your continued participation in the process for the transformation of the Puerto Rico Transmission and Distribution System. In response to certain Requests for Clarifications received from Qualified Respondents in connection with the prior version of the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (the “O&M Agreement”), the Authority and its advisors have prepared, and the Partnership Committee has approved, an update to the definitive version of the O&M Agreement, which is being shared with Qualified Respondents together with this memo.

This definitive version of the O&M Agreement clarifies the intent behind certain provisions and revises certain typographical errors. To assist you and your advisors in reviewing the definitive O&M Agreement, we have summarized below the changes to the O&M Agreement, as well as the relevant sections. Capitalized terms used but not defined in the summary below generally have the same meaning as in the definitive O&M Agreement.

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- Guarantee – §1.1 (Definitions) and elsewhere: In light of the fact that the only form of security is a Guarantee and in order to streamline the O&M Agreement, the term “Acceptable Operator Security” has been removed or replaced with the term “Guarantee”. In addition and as further described in an explanatory footnote in the O&M Agreement, the concept of Owner Security Amount has been removed from the O&M Agreement and is no longer required to be bid.
 - Change in Regulatory Law – §1.1 (Definitions): The language of this definition was clarified to refer to Commonwealth Applicable Law to avoid any ambiguity.
 - Force Majeure Event – §1.1 (Definitions): The language of this definition was clarified to provide that reasonably anticipated weather conditions for the geographic of area of the T&D System are not Force Majeure Events unless they are otherwise picked up by one of the specifically enumerated inclusions described in clauses (A) or (C) of this definition.
 - Prime Rate – §1.1 (Definitions): This definition was updated to include an alternative source of the prime rate if it is no longer published in the Wall Street Journal.
 - Effective Date – §2.2(a) (Execution of the O&M Agreement): This definition was updated to effectively provide that the O&M Agreement will be executed by the Parties at the time that all the conditions to execution have been satisfied.
 - Review of Initial Budgets, System Remediation Plan, System Operation Principles and Performance Metrics – §4.2(e) (Initial Budgets), §4.1(d)(iii) (Transition to Standard of Performance), §4.1(h) (System Operation Principles) and §4.2(f) (Performance Metrics): In order to provide additional time for the preparation of the Initial Budgets, System Remediation Plan, System Operation Principles and Performance Metrics during the Front-End Transition Period, the 60-day period for review by Administrator was shortened to 30 days and the 120-day period for review by PREB was shortened to 90 days.
 - Liability Waiver for Consequential Damages – §4.1(g) (Liability Waiver): The Agreement was updated to clarify that the waiver of liability for consequential damages, loss of revenue, etc. applies

even when resulting from Owner's, ManagementCo's or ServCo's gross negligence or willful misconduct.

- Back-End Transition – §4.2(i) (*Back-End Transition Plan*) and §16.3 (*Transfer Obligations*): The Agreement was updated to clarify that any properly incurred and ordinary costs related to ServCo Employees incurred through the termination or expiration of the O&M Agreement and reflected in the Budgets will be treated as T&D Pass-Through Expenditures. The Agreement was also updated to provide that the Back-End Transition Plan will include, among other things, arrangements relating to the (1) possible hiring of ServCo Employees by a successor operator and (2) the treatment of severance costs associated with any ServCo Employees not hired by a successor operator in connection with the early termination or expiration of this Agreement.
- Owner/Administrator Responsibility re: Employees – §4.3(h) (*Labor*): The Agreement was updated to correct a reference to Operator's hiring of Owner Employees (rather than ServCo employees) during the Front-End Transition Period.
- Availability of Federal Funding – §4.5(i) (*Federal Funding*): The Agreement includes a condition precedent to the Service Commencement Date providing that Owner will have or will have access to adequate funding for Capital Costs for the first three years of the Term, as detailed in the Initial Budgets approved by the Parties.
- Condition Precedent for Shared Services Agreement – §4.5(s) (*Shared Services Agreement*): The execution of the Shared Services Agreement remains a condition precedent to the Service Commencement Date but is no longer a ManagementCo Service Commencement Date Condition, failure of which to achieve could result in the payment of Delay Liquidated Damages.
- Federal Funding Requirements for System Contract – §5.2(d) (*Additional System Contracts or Expired System Contracts After Service Commencement Date*): The Agreement was adjusted to make clear that the requirement that replacements for existing System Contracts comply with the Federal Funding Requirements (including the Federal Funding Procurement Manual) applies only to System Contracts that involve Federal Funding.
- Submission of Federal Funding – §5.9 (*Procurement and Administration of Federal Funding*): The provision was updated to clarify that certain costs may be submitted for Federal Funding pursuant to §5.9(a) and (c) with the mutual agreement of Operator and Administrator pursuant to the Budget process in Article 7.
- Environmental Certification – §5.10(b)(ii) (*Pre Existing Environmental Conditions*): The provision was updated to clarify that the requirement for Operator submit a sworn statement does not require Operator to perform any additional studies (including any Phase I or Phase II studies).
- Leasehold Estates – §5.19 (*Acquisition of Easements, Fee Interests and Concession Rights*) and §6.1 (*Rights and Responsibilities of Owner*): The updated Agreement clarifies where relevant that the references to real property right include leasehold estates.
- Responsibilities of Administrator – §6.2 (*Rights and Responsibilities of Administrator*): The provision was updated to omit the review of the Initial Budgets, since the provision is intended to cover the responsibilities of Administrator from and after the Service Commencement Date.
- ManagementCo and Fixed Fee – §7.1 (*Service Fee*) and §7.2 (*Pass-Through Expenditures*): These provisions were updated to further clarify that the following are costs payable by ManagementCo

from the Fixed Fee: (1) the wages and benefits of senior management level personnel employed by ManagementCo responsible for and dedicated to ServCo, (2) ManagementCo's corporate overhead costs and (3) any subcontract with respect to any service to be provided by ManagementCo between the Service Commencement Date and the expiration or early termination of the O&M Agreement.

- Budgets and PREB Oversight – §7.3 (Budgets): In order to streamline the review process for annual Budgets, the O&M Agreement provides that provide that, for any Budgets that require a rate adjustment to be approved by PREB, Operator will have the right, in its sole discretion, to submit such Budget directly to PREB (in lieu of Administrator). In addition, §7.3(c) was updated to expressly provide that the Parties will have the right to present to PREB the results of an Expert Technical Determination for PREB's reference, which may be helpful to PREB in connection with its review of proposed amendments to Budgets, Rate Orders, etc.
- No Operator Responsibility for Unfunded Amounts – §7.7 (Unfunded Amounts): This provision was updated to clarify that Operator will have no obligation to incur costs or make expenditures in the event that the Service Accounts do not contain sufficient funds.
- Owner Rating Downgrade – §7.8(b) (Reinstatement of Pre-Funding): The Agreement was updated to provide that Owner's obligation to pre-fund the Service Accounts to four and a half months and to fund the Contingency Reserve Account is to be reinstated if the investment grade rating is lost or downgraded.
- Insurance Proceeds Account – §10.3 (Additional Named Insured): The Agreement was updated to provide that, in the event of a loss event, Owner will open an Insurance Proceeds Account into which it will deposit any insurance proceeds, and amounts in such account shall be used as necessary to repair the T&D System.
- Owner Events of Default – §10.3(f) (Failure to Fund Front-End Transition Account or Service Account): The Agreement was updated to clarify that failure to fund the Front-End Transition Account (in addition to failure to fund a Service Account) is an Owner Event of Default.
- Remedies for Termination – §14.6(d) (Additional Remedies): The Agreement was updated to clarify that the caps on damages set forth in §14.6(d) apply to damages that the Parties may seek in the event the O&M Agreement is terminated due to an Event of Default.
- Environmental Indemnification Obligations – §18.2(b) (Indemnification by Owner – Limitations): The Agreement was updated to clarify that the exception to the limitations on Owner's indemnification obligations also applies to clause (viii) of Section 18.2(a) (which refers to Pre-Existing Environmental Conditions).
- Limitations on Operator's Indemnification Obligations – §18.3 (Limitation on Liability): The Agreement was updated to clarify that the caps and other limitations on Operator's liability in §18.3(a) apply with respect to Operator's indemnification obligations under §18.1.
- Scope of Services – Annex I §II: The Agreement was updated to clarify in this annex that Operator is responsible for managing and maintaining all assets of the T&D System.
- T&D Pass-Through Expenditures – Annex X: The Agreement was updated to clarify in this annex that: (1) payroll taxes paid by employers will be T&D Pass-Through Expenditures; (2) project management costs incurred by ServCo Employees will be T&D Pass-Through Expenditures; and (3) to the extent Operator (rather than just ServCo) is responsible for any income or any other taxes

as a result of the establishment of its operations or the continuation thereof (whether at the ServCo or ManagementCo level), they would not be T&D Pass-Through Expenditures and would be the responsibility of Operator.

- Insurance Specifications – Annex XI: The Agreement was updated to clarify in this annex that Operator (rather than Owner) would be the additional insured, as Owner would be the primary insured.
- Form of Federal Funding Certifications – Exhibit A: The form of these certifications was updated to provide that these are to be signed by Contractors or Subcontractors whose costs are to be reimbursed with Federal Funding.
- Form of Guarantee Agreement – Exhibit D: For consistency throughout the document, the form of Guarantee Agreement was updated to include references to amalgamate/amalgamation whenever the Guarantee Agreement refers to merge/merger. In addition, the reference to Owner was removed from §2.1(e)(ii) of the Guarantee Agreement, so that Guarantor does not provide a representation with respect to Owner.

We hope that this summary of the changes to the O&M Agreement will be helpful to you and your advisors in reviewing the definitive O&M Agreement in preparation of the submission of your definitive proposal.

If you have any questions on the above items or any other elements of the definitive O&M Agreement, please let the Authority know by replying to this message via the PowerAdvocate platform.

This communication is subject to confidentiality undertakings and all other terms of the RFP

Thank you.

The Puerto Rico Public-Private Partnerships Authority