

**COMMONWEALTH OF PUERTO RICO  
PUERTO RICO ENERGY COMMISSION**

**IN RE: PUERTO RICO ELECTRIC POWER  
AUTHORITY RATE REVIEW**

**CASE NO.:** CEPR-AP-2015-0001

**SUBJECT:** Ruling on the Motion for Reconsideration filed by the Puerto Rico Aqueduct and Sewer Authority.

**FINAL RESOLUTION**

Through this Final Resolution, the Puerto Rico Energy Commission (“Commission”) rules on the Motion for Reconsideration filed on January 30, 2017, by the Puerto Rico Aqueduct and Sewer Authority (“PRASA”).

**I. Brief Procedural Background**

On May 27, 2016, the Puerto Rico Electric Power Authority (“PREPA”) filed before the Commission its Petition for Approval of Permanent Rates and Temporary Rates (“Petition”), which was determined by the Commission to be complete through Resolution and Order of June 13, 2016. On August 5, 2016, PRASA filed a motion requesting to intervene in the instant proceeding. The Commission approved PRASA’s request on August 12, 2016. On January 10, 2017, the Commission issued its Final Resolution and Order (“Final Order”), through which it approved PREPA’s revenue requirement for Fiscal Year 2017 (“FY2017”) and made several determinations with regards to the specific requests made by PRASA in the instant proceeding.

On January 30, 2017, PRASA filed a *Motion for Reconsideration*, requesting the Commission reconsider its determinations regarding the tariffs for electric service that would apply to PRASA. On February 13, 2017, the Commission issued a Resolution notifying it would address the Motion for Reconsideration filed by PRASA, as well as those motions filed by PREPA and other intervenors.<sup>1</sup>

**II. Summary of Relevant Facts**

On July 1, 2013, the Governor of Puerto Rico signed into law Act 50-2013.<sup>2</sup> Through said Act, the Legislative Assembly required PREPA to establish a special, fixed preferential

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<sup>1</sup> The Motion for Reconsideration filed by PREPA was addressed by the Commission through its March 8, 2017 Resolution. The Motions for Reconsideration filed by Windmar Group, Sunnova Energy Corporation and the Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico were addressed through a separate Resolution.

<sup>2</sup> An Act to provide that the Puerto Rico Electric Power Authority shall grant a preferential rate for electric energy consumption to the Puerto Rico Aqueduct and Sewer Authority, as amended.

rate (“preferential rate”) which would be uniformly applied to all of PRASA’s energy service accounts.<sup>3</sup> Said preferential rate would equal 22 ¢/kWh for fiscal years 2014, 2015 and 2016, and would be reduced to 16 ¢/kWh beginning on fiscal year 2017 and onwards.<sup>4</sup>

Act 50-2013 provided two specific instances in which the preferential rate would cease to exist or could be revoked or modified. The first instance is when PREPA’s average rate for all customers in a fiscal year is equal or less than 16 ¢/kWh.<sup>5</sup> The second instance is if PREPA deems it “necessary and prudent” or when it is “necessary to comply with its obligations under the trust agreement guaranteeing PREPA’s bonds.”<sup>6</sup> In such cases, Act 50-2013 grants PREPA authority to “revoke or modify” the preferential rate “following the procedures established in the applicable laws and the public policy established in this Act.”<sup>7</sup>

On March 28, 2014, PREPA and PRASA signed an agreement implementing the preferential rate, as well as establishing other relevant terms and conditions.<sup>8</sup> On December 29, 2015, PREPA notified PRASA its intention to terminate the preferential rate, effective on July 1, 2016.

Through its intervention in the instant proceeding, PRASA requested the Commission to approve a preferential rate following the criteria established and the public policy set forth by Act 50-2013.<sup>9</sup> PRASA stated that the Commission “has the authority to modify PRASA’s preferential rate [...] limited [only] by the criteria established, among others, in Act 50-2013.”<sup>10</sup> To support its request, PRASA argued that Act 50-2013 remained “in full force and effect”<sup>11</sup> and that, in approving Act 57-2014, it was the Legislative Assembly’s intention to “remove from PREPA the power to review and change its rates,”<sup>12</sup> thus challenging PREPA’s termination of the agreement implementing the preferential rate.

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<sup>3</sup> Article 2 of Act 50-2013.

<sup>4</sup> *Id.*

<sup>5</sup> Article 3 of Act 50-2013.

<sup>6</sup> Article 9 of Act 50-2013.

<sup>7</sup> *Id.*

<sup>8</sup> *See* Testimony of PRASA Witness Ms. Ramírez, Exhibit 5.

<sup>9</sup> *See* Brief on Legal Issues of the Puerto Rico Aqueduct and Sewer Authority at p. 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at p. 3.

<sup>12</sup> *Id.*

In its Final Order, the Commission determined that Act 50-2013 did not require the Commission to approve a preferential rate because: (i) Section 6.25(b) of Act 57-2014 expressly provided that current PREPA rates would remain in effect until they were reviewed by the Commission, after which the Commission would have full authority to establish PREPA's rates,<sup>13</sup> and (ii) at the time of PREPA's Petition was filed, the preferential rate was no longer in effect, given that PREPA had exercised its authority under Article 9 of Act 50-2013 to terminate the effectiveness of the preferential rate and no court with competent jurisdiction had ruled that PREPA acted unlawfully.<sup>14</sup>

### III. PRASA's Motion for Reconsideration

Through its Motion for Reconsideration, PRASA requests the Commission to reconsider its determination, arguing that: (i) "Act 57-2014 modified Act 50-2013, granting the jurisdiction and the mandate to this Honorable Commission to review the preferential rate granted to PRASA" and (ii) "the preferential rate established by Act 50-2013 is in full force and effect as of today and cannot be revoked by [PREPA]."<sup>15</sup> PRASA also argued that "both Act 50-2013 and Act 57-2014 provide the criteria [for] establishing [...] the preferential rate."<sup>16</sup> However, given we reject PRASA's arguments that the Commission should approve a preferential rate, there is no need to address the criteria the Commission should consider when approving a preferential rate.

#### 1. *Effect of Act 57-2014 on Act 50-2013*

When terminating the agreement implementing the preferential rate, PREPA based its decision on Section 9 of Act 50-2013, which provides that PREPA could "revoke or modify" the preferential rate when it deemed it "necessary and prudent [...] or when it deems it necessary to comply with its obligations under the trust agreement guaranteeing PREPA's bonds."<sup>17</sup> PRASA argues that Act 57-2014 "withdrew from PREPA the power to

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<sup>13</sup> See Final Order at ¶367. ("We interpret this sentence to mean that any prior arrangement with regards to PREPA's rates is subject to the Commission's review, and the Commission has the power and authority to review and approve, disapprove or modify all of PREPA's rates.")

<sup>14</sup> In authorizing PRASA's intervention, the Commission established that the instant proceeding was neither the time nor place for addressing PRASA's claims that PREPA unlawfully terminated the preferential rate. The Commission determined that, given that the instant proceeding would establish rates prospectively, a contractual dispute predating the instant proceeding would need to be addressed separately. See Commission's Resolution and Order of August 12, 2016.

<sup>15</sup> See PRASA's Motion for Reconsideration at p. 1.

<sup>16</sup> *Id.*

<sup>17</sup> See PREPA Letter to PRASA's Executive Director, Ing. Alberto M. Lázaro Castro, dated December 29, 2015, filed by PRASA with the Commission on November 1<sup>st</sup>, 2016, CEPR-LS-04-01\_Attach 1.

modify, change or terminate any rate that was in full force and effect, which includes the preferential rate.”<sup>18</sup> The Commission disagrees. PRASA’s argument requires the Commission to assume a legislative intention that is absent from the legislative record and the statute itself. Nowhere in the legislative record is there any discussion regarding the legislative intent of amending Act 50-2013 to remove from PREPA the authority to revoke or modify the preferential rate. Act 50-2013 and Act 57-2014 were approved within a year from each other, and Act 50-2013 was amended by Act 13-2014, which was approved four months prior to the enactment of Act 57-2014 and after the bill which would become Act 57-2014 was filed for the consideration of the Legislative Assembly.<sup>19</sup>

If it was the Legislative Assembly’s intention to amend Act 50-2013 to transfer the authority to revoke or modify the preferential rate from PREPA to the Commission, it could have done so, by either expressly amending Act 50-2013 or by including language to that effect within Act 57-2014. The Legislative Assembly didn’t do so. Indeed, Chapter 7 of Act 57-2014 contains several articles that identify specific sections of various statutes which the Legislative Assembly intended to indirectly amend, while, simultaneously, taking the time to identify other statutes which it wanted to expressly amend or repeal. Act 50-2013 was not among them.

Furthermore, during the rate case technical hearing, the Commission’s Staff asked PRASA’s legal representative whether PRASA had challenged the legality or validity of PREPA’s termination of the preferential rate, to which PRASA’s legal representative answered in the negative.<sup>20</sup> PRASA argues that the Commission’s decision to determine, for purposes of the instant proceeding, that the preferential rate was no longer in effect, constituted a validation of PREPA’s actions which, it contends, is an *ultra vires* act since such determination was made without having received any evidence.<sup>21</sup> The Commission reiterates that its determination with regards to the non-existence of the preferential rate does not constitute a validation of PREPA’s actions. The Commission acted based on the facts it had before its consideration.<sup>22</sup> PRASA’s request, that the Commission “determine

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<sup>18</sup> See PRASA’s Motion for Reconsideration at p. 3.

<sup>19</sup> Senate Bill 0837, which would be enacted into Act 57-2014, was filed on November 20, 2013.

<sup>20</sup> See Technical Hearing Recording, Panel I, Part 1, at 00:17:30.

<sup>21</sup> See PRASA’s Motion for Reconsideration at pp. 6 – 8.

<sup>22</sup> The controversy regarding PREPA’s termination of the preferential rate relates to facts that occurred prior to the subject matter of the instant proceeding and constitute an analysis of contractual obligations and the application of Act 50-2013 to such actions. Said evaluation exceeds the scope of a proceeding for establishing PREPA’s prospective rates. That the result of such an analysis may impact PREPA’s rates does not mean that the instant proceeding was the proper forum for addressing such a controversy. PRASA continues to have the alternative of filing a complaint with the Commission to address the specific claims regarding PREPA’s determination to terminate the preferential rate.

that the agreement [implementing the preferential rate] was valid and in full force<sup>23</sup>, requires the Commission to make a determination regarding the validity of PREPA's actions. As we stated before, whether PREPA acted lawfully or not in terminating the aforementioned agreement is beyond the scope of the instant proceeding.

Therefore, in the absence of evidence suggesting that it was the Legislative Assembly's intention to amend Act 50-2013 and remove from PREPA the authority to revoke or amend the preferential rate, as PRASA argues, and in the absence of any determination by a court with competent jurisdiction regarding the validity of PREPA's actions, it is unreasonable for the Commission to assume that PREPA acted unlawfully when terminating the preferential rate. Accordingly, the Commission reiterates its determination that, at the time PREPA's Petition was filed, the preferential rate was not in effect.<sup>24</sup>

## 2. Act 50-2013's limits on the Commission's discretion to approve PREPA's rates

PRASA argues that Act 50-2013 grants discretion to the Commission to modify the preferential rate, but limits the Commission's ability to disapprove a preferential rate. PRASA further argues that Act 50-2013 provides that the preferential rate shall only cease to exist when PREPA's average rate for all customers during a fiscal year is equal to or less than 16 ¢/kWh.<sup>25</sup> As such, PRASA argues that, unless such a condition exists, the preferential rate could only be suspended or modified, but could not be terminated.<sup>26</sup>

Notwithstanding PRASA's argument, Article 9 of Act 50-2013 granted PREPA the authority to revoke or modify the preferential rate if it deemed it "necessary and prudent" or when "necessary to comply with its obligations under the trust agreement guaranteeing PREPA's bonds."<sup>27</sup> As such, while Act 50-2013 ordered PREPA to provide a preferential rate, it also provided two instances in which PREPA could to revoke or amend it. PREPA's

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<sup>23</sup> See. PRASA's Motion for Reconsideration at p. 8. ("[T]his Commission should have limited its findings to determine that the agreement [implementing the preferential rate] was valid and in full force according to the applicable and current legal framework, since PREPA's ultra vires actions when terminating said agreement do not grant or create a legal framework to justify a contrary determination.")

<sup>24</sup> The Commission's determination in the Final Order does not constitute a validation of PREPA's actions, as such a controversy was not under consideration by the Commission. PRASA may, as it deems it appropriate, seek whatever legal remedies it believes adequate in relation to the relief it seeks with regards to PREPA's termination of the preferential rate.

<sup>25</sup> Article 3 of Act 50-2013.

<sup>26</sup> See PRASA's Motion for Reconsideration at p. 3. ("[T]he legislator has ordered this Commission to keep the preferential rate in full force and effect under the parameters of Act 50-2013 [...] or to modify it according to the criteria and limitations to the Commission's discretion under Act 57-2013."

<sup>27</sup> Article 9 of Act 50-2013.

finances are in dire condition<sup>28</sup> and its physical infrastructure has been described as “ailing,” “degraded” and “deteriorated.”<sup>29</sup> Therefore, assuming that the powers awarded to PREPA under Act 50-2013 were transferred to the Commission by virtue of Act 57-2014, as PRASA contends, given PREPA’s dire financial situation, the state of PREPA’s infrastructure and PREPA’s obligations to its bondholders, the Commission’s determination to disapprove a preferential rate would be consistent with the authority granted by Article 9 of Act 50-2013 of revoking a preferential rate, when doing so is necessary and prudent or it ensures compliance with PREPA’s obligations to its bondholders.

Furthermore, as the Commission stated in its Final Order, PRASA’s requests is not limited to the Commission approving a preferential rate consistent with Act 50-2013, but merely a rate which is fixed, provides budgetary stability and which could be reviewed annually.<sup>30</sup> Act 50-2013 specifically provides the amount of the preferential rate and does not contemplate periodical adjustments. Thus, if the Commission were to approve a preferential rate in the form and manner as proposed by PRASA during the Technical Hearing, the Commission would need to necessarily conclude that Act 50-2013 does not constrain the Commission’s discretion in establishing all PREPA’s rates, because, otherwise, the Commission’s determination regarding PRASA’s rate would be, in fact, inconsistent with Act 50-2013. As such, the Commission reiterates its determination that Act 50-2013 does not constrain or require the Commission to approve a preferential rate at this time.

In light of the aforementioned, PRASA’s Motion for Reconsideration is **DENIED**.

Any party adversely affected by this Resolution may file a petition for review before the Court of Appeals within a term of thirty (30) days from the date a copy of the notice of this Resolution was filed in the record of the Commission. Copy of such filing must be provided to the Commission and to all parties in this proceeding within the aforementioned thirty (30) day term. The filing and notice of such petition shall be made in accordance with Section 4.2 of the LPAU<sup>31</sup> and the rules and regulations of the Court of Appeals

For the benefit of all the parties involved, the Commission issues this Final Resolution in both Spanish and English languages. Should any conflict between each version arise, the English version shall prevail.

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<sup>28</sup> See Statement of Motives of Act 4-2016, the Puerto Rico Electric Power Authority Revitalization Act, and Commission Final Order at ¶10.

<sup>29</sup> See Commission Final Order at ¶22.

<sup>30</sup> See Final Order at p. 128, fn. 272. See, also, Technical Hearing Recording, Panel C, at 2:33:30.

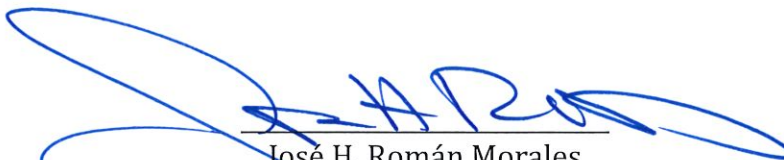
<sup>31</sup> 3 L.P.R.A. § 2172.





Be it notified and published.

  
Ángel R. Rivera de la Cruz  
Associate Commissioner

  
José H. Román Morales  
Associate Commissioner

## CERTIFICATION

I hereby certify that the members of the Puerto Rico Energy Commission has so agreed on April 28, 2017 and on this date a copy of this Final Resolution on Case No. CEPR-AP-2015-0001 was notified by electronic mail to the following: n-ayala@aepr.com, c-aquino@aepr.com, glenn.rippie@r3law.com, michael.guerra@r3law.com, john.ratnaswamy@r3Law.com, codiot@opic.pr.gov, jperez@oipc.pr.gov, mmuntanerlaw@gmail.com, jfeliciano@constructorespr.net, abogados@fuerteslaw.com, info@aae.pr.gov, nydinmarie.watlington@cemex.com, aconer.pr@gmail.com, epenegypr@gmail.com, jorgehernandez@escopr.net, ecandelaria@camarapr.net, pga@caribe.net, manuelgabrielfernandez@gmail.com, agraitfe@agraitlawpr.com, maribel.cruz@acueductospr.com, mgrpcorp@gmail.com, eirizarry@ccdlawpr.com, wilma.lopez@aae.pr.gov, francisco.rullan@aae.pr.gov, pnieves@vnblegal.com and attystgo@yahoo.com. I also certify that today, April 28, 2017, I have proceeded with the filing of the Final Resolution issued by the Puerto Rico Energy Commission and I have sent a true and exact copy to the following:

**Puerto Rico Electric Power Authority**  
Attn.: Nélida Ayala Jiménez  
Carlos M. Aquino Ramos  
P.O. Box 363928  
Correo General  
San Juan, PR 00936-4267

**Rooney Rippie & Ratnaswamy LLP**  
E. Glenn Rippie  
John P. Ratnaswamy  
Michael Guerra  
350 W. Hubbard St., Suite 600  
Chicago Illinois 60654

**Oficina Independiente de Protección al Consumidor**  
p/c Lcdo. José A. Pérez Vélez  
Lcda. Coral M. Odio Rivera  
268 Hato Rey Center Suite 524  
San Juan, Puerto Rico 00918

**Sunnova Energy Corporation**  
p/c Vidal, Nieves & Bauzá, LLC  
Lcdo. Pedro J. Nieves Miranda  
P.O. Box 366219  
San Juan, PR 00936-6219

**Autoridad de Acueductos y  
Alcantarillados de Puerto Rico**  
p/c Lcda. Maribel Cruz De León  
PO Box 7066  
San Juan, Puerto Rico 00916

**Autoridad Acueductos y  
Alcantarillados de Puerto Rico**  
Lcdo. Pedro Santiago Rivera  
305 Calle Villamil, 1508  
San Juan, Puerto Rico 00907

**Asociación de Constructores de  
Puerto Rico**  
p/c Lcdo. José Alberto Feliciano  
PO Box 192396  
San Juan, Puerto Rico 00919-2396

**Centro Unido de Detallistas, Inc.**  
Lcdo. Héctor Fuertes Romeu  
PMB 191 – PO Box 194000  
San Juan, Puerto Rico 00919-4000

**CEMEX de Puerto Rico, Inc.**  
Lcdo. Edwin A. Irizarry Lugo  
CCD Law Group, P.S.C.  
712 Ave. Ponce de León  
San Juan, Puerto Rico 00918

**CEMEX de Puerto Rico, Inc.**  
p/c Enrique A. García  
Lcda. Nydin M. Watlington  
PO Box 364487  
San Juan, Puerto Rico 00936-4487

**Asociación de Consultores y Contratistas  
de Energía Renovable de Puerto Rico**  
p/c Edward Previdi  
PO Box 16714  
San Juan, Puerto Rico 00908-6714

**Energy & Environmental Consulting  
Services Corp.**  
Jorge Hernández, PE, CEM, BEP  
560 C/ Aldebarán, Urb. Altamira  
San Juan, Puerto Rico 00920

**Cámara de Comercio de Puerto Rico**  
p/c Eunice S. Candelaria De Jesús  
PO Box 9024033  
San Juan, Puerto Rico 00902-4033

**Grupo Windmar**  
p/c Lcdo. Marc G. Roumain Prieto  
1702 Ave. Ponce de León, 2do Piso  
San Juan, Puerto Rico 00909

**Instituto de Competitividad  
y Sostenibilidad Económica de  
Puerto Rico**  
p/c Lcdo. Fernando E. Agrait  
701 Ave. Ponce de León  
Edif. Centro de Seguros, Suite 401  
San Juan, Puerto Rico 00907.

**Asociación de Industriales de  
Puerto Rico**  
p/c Manuel Fernández Mejías  
2000 Carr. 8177, Suite 26-246  
Guaynabo, Puerto Rico 00966






**Oficina Estatal de Política  
Pública Energética**  
Ing. Francisco Rullán Caparrós  
Lcda. Wilma I. López Mora  
P.O. Box 413314  
San Juan, Puerto Rico 00940

**Asociación de Hospitales de Puerto Rico**  
p/c Lcda. Marie Carmen Muntaner  
Rodríguez  
470 Ave. Cesar González  
San Juan, Puerto Rico 00918-2627

For the record, I sign this in San Juan, Puerto Rico, today, April 28, 2017.

  
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María del Mar Cintrón Alvarado  
Clerk