

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

IN RE: AGUIRRE SITE ECONOMIC ANALYSIS

CASE NO.: CEPR-AP-2017-0001

SUBJECT: Resolution on ELAC's requests of information to PREPA and PREPA's objections

RESOLUTION AND ORDER

On May 8, 2017, Enlace Latino de Acción Climática-El Puente de Williamsburg, Inc. and Comité de Diálogo Ambiental Inc. ("ELAC") pursuant to Commission's Regulation No. 8543¹ and the Commission's resolutions and orders in this proceeding, submitted to the Puerto Rico Electric Power Authority ("PREPA") its first requirement of information and production of documents ("ELAC's ROI"). The deadline for PREPA to file its answers to ELAC's ROI was May 18, 2017. On such date PREPA filed a motion, in which it requested an extension to file its responses until May 26, 2017. On May 19, 2017, the Commission issued a resolution in which ordered PREPA to file all available responses by May 22, 2017 and the remaining responses by May 24, 2017. PREPA filed its first set of responses on May 22, 2017,² a second set of responses on May 30, 2017³ and a third set of responses on June 6, 2017.⁴

On June 7, 2017 ELAC filed a motion, in which it stated that PREPA had failed to complete its answers to ELAC's ROI, even though the Commission had extended PREPA's deadline to do so. On its motion, ELAC argued that according to the Commission's Regulation No. 8543, the Rules of Civil Procedure and the court's jurisprudence, ELAC's ROI were reasonable requirements, relevant to the matter at hand and that PREPA must comply by

¹ Regulation No. 8543, Regulation on Adjudicative Proceedings, Non-Compliance Notice, Rate Reviews and Investigations.

² See PREPA's 1st Submission of Responses to the Request of Information and Production of Documents of Enlace Latino de Acción Climática, El Puente de Williamsburg, Inc., Comité de Diálogo Ambiental, Inc., May 22, 2017. PREPA provided answers for questions: 9, 18, 20, 21, 24, 26, 28, 29, 30, 31, 32, 33, 34, 36, 38, 40, 41, 52, 58, 60, 61, 62, 67, 70, 75, 76, 77, 80, 81, 83, 84, 85, 87 and 88. PREPA objected and in some cases provided some type of answer to questions: 14, 16, 25, 27, 35, 37, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 59, 64, 65, 68, 71, 72, 74, 82, 86, 89, 90, 91, 92, 93 and 94.

³ See PREPA's 2nd Submission of Responses to the Request of Information and Production of Documents of Enlace Latino de Acción Climática, El Puente de Williamsburg, Inc., Comité de Diálogo Ambiental, Inc., May 30, 2017. PREPA provided answers for questions: 22, 69, 73 and 79. PREPA objected question 78 and provided an answer.

⁴ See PREPA's 3rd Submission of Responses to the Request of Information and Production of Documents of Enlace Latino de Acción Climática, El Puente de Williamsburg, Inc., Comité de Diálogo Ambiental, Inc., June 6, 2017. PREPA provided answers for questions: 1, 2, 3, 4, 5, 6, 7, 8, 15, 17, 19, and 63.

providing the answers and documents requested. ELAC added that, to the date of ELAC's motion, PREPA had failed to produce several of the documents requested in ELAC's ROI:⁵

1. The contracts for the renewable energy projects that have not been built and that allegedly remain active;
2. Documents regarding the alleged cost of 2 cents per kWh for the integration of renewable energy for the control of the change in peak night energy demand to mid-day;
3. Documents of the sales forecast filed to the Oversight and Management Fiscal Board ("Fiscal Board") created under PROMESA that shows a reduction in energy sales of 23% in the next ten years and 2.9% per year between 2017 and 2026;
4. Documents that show the alleged 240 MW of distributed renewable energy projects anticipated for this year;
5. Cogeneration projects of industrial and commercial clients of 42.6 MW or more; and
6. Documents regarding increases in the average fossil fuel costs of 64% according to PREPA in pages 25 and 26 of its Fiscal Plan filed before the Fiscal Board.

PREPA's submissions of responses included answers to the questions, reference documents and were accompanied by a motion with general objections to the requirements included on ELAC's ROI. In its direct answers, PREPA also objected to several of the questions included in ELAC's ROI, even though it provided answers for some of them. In general, PREPA objected to any discovery request not subject to discovery because it is privileged information, attorney work product or subject to any other exemption from discovery. PREPA also argued that part of the requests in ELAC's ROI called for the submission of information greater or different than that of the scope of this proceeding, required them to perform new analysis or produce documents which are non-existent.⁶ PREPA also objected to several questions arguing that the requests were overly broad or unduly burdensome, and that questions were unclear.⁷ Finally, PREPA stated that some requests were not proper to discovery, since they called for legal opinions and/or contained arguments or premises that are incorporated into the request.⁸

Within an administrative adjudicative proceeding, the discovery process is not applicable, unless authorized by the agency's regulations for adjudicative proceedings and the proceeding's presiding official.⁹ The Commission extended the discovery rights to all parties in adjudicative proceedings before the Commission in Regulation No. 8543. The

⁵ ELAC's June 7, 2017 motion titled *Motion about pending discovery and requesting order to require the production of documents*, at 4.

⁶ PREPA's 1st Submission of Responses, *supra*, at 1-2, PREPA's 2nd Submission of Responses, *supra*, at 1-2 and PREPA's 3rd Submission of Responses, *supra*, at 1-2.

⁷ *Id.*

⁸ *Id.* at 3.

⁹ Section 3.8 of the Uniform Administrative Procedure Act, as amended.

above regulation, among other things, establishes the rights and obligations between the parties during discovery, within an adjudicative proceeding before the Commission. It also establishes that the Rules of Civil Procedure, as well as the Rules of Evidence may apply in a supplemental manner, when in the exercise of its discretion, the Commission determines it through an order in the proceeding at hand.¹⁰

According to Regulation No. 8543, during the discovery process “[t]he parties may make discovery on any matter, non-privileged, that is relevant to the matters in dispute in the pending case”,¹¹ except “[t]he mental impressions, conclusions, opinions or legal theories about the case, of the lawyer or other representative”.¹² Also, the Commission may limit the scope of the discovery in cases of duplicity of the requested discovery, where the discovery may be acquired by less burdensome methods or when the costs of producing the requested information exceeds the benefits that it can contribute to the case.¹³

In a case where the answering party objects to the requirement of information and production of documents, the party issuing the discovery has several mechanisms available to compel the other party to answer the requirement. Among the mechanisms available in the discovery proceeding, Section 8.03 (F) of Regulation No. 8543 establishes that:

The party submitting an interrogatory may object the responses by means of a motion to the Commission that includes a verbatim transcription of the question and of the answer in question and the grounds on which the objection is based. In its motion, the objecting party may also request the imposition of sanctions.¹⁴

In the instant proceeding, PREPA has objected to forty-four (44) of ELAC’s ROI requirements and has failed to answer seven (7) of the questions. On ELAC’s June 7, 2017 motion, ELAC fails to specify which of PREPA’s objections they are opposing to and also failed to present the specific arguments for such opposition. ELAC also argues that, pursuant to Regulation No. 8543, it may request PREPA all information relevant to the main controversy on the instant proceeding and that since PREPA failed to request a protective order for the documents referred to in its motion, they must produce all of them. Furthermore, ELAC states that pursuant to the Rules of Civil Procedure, an objection stating that the requested information is not admissible during a trial does not proceed, if there is a reasonable probability that such information will lead to admissible evidence. It adds that “[t]he concept

¹⁰ Regulation No. 8543, Section 2.01.

¹¹ *Id.* at Section 8.01.

¹² *Id.* at Section 8.01(A)

¹³ *Id.* at Section 8.02(A).

¹⁴ *Id.* at Section 8.03(F).

of relevance of the rules of discovery of evidence is broader than the criterion in relation to the admissibility of evidence.”¹⁵

Finally, ELAC argues that the requested information is relevant to the AOGP Economic Analysis, contributes to limit the arguments in the instant case, it’s important to gather evidence in this administrative procedure and facilitates the search for truth and to perpetuate evidence in this process.¹⁶ ELAC adds that the lack of PREPA’s compliance has affected their adequate participation in this proceeding, and requests the Commission to order PREPA to file the requested documents and to grant the intervenors ten (10) days from the day of PREPA’s filing of responses to file their motions and arguments.

After carefully reviewing ELAC’s arguments and PREPA’s objections to ELAC’s ROI, the Commission determines that ELAC has failed to put the Commission in a position to make a determination on the validity of PREPA’s objections to its ROI. ELAC has failed to comply with Section 8.03 (F) of Regulation No. 8543 to the extent it has not specified which of PREPA’s objections they are opposing and their arguments for such opposition. While during the discovery process the parties are allowed to request information that might not be admissible as evidence if it will lead to a reasonable probability that such information will lead to admissible evidence, such right is not unlimited. The Commission has discretion to limit the scope of the discovery when circumstances warrant it, in order to avoid complicating the administrative proceeding.¹⁷ Therefore, in order for the Commission to compel PREPA to provide further answers to the objected questions, ELAC needs to put the Commission in a position to do so by submitting the corresponding request and the basis for its arguments, so that the Commission may determine whether the evidence in question is necessary for the resolution of the pending administrative case.¹⁸

With respect to the the five (5) documents requested by ELAC, referenced in its motion, the Commission makes the following determinations:

1. **Request of Information Question No. 35:** Provide any documents which show the capital cost and financing assumptions that underlie any signed agreements PREPA has in place with renewable energy producers.
 - a. **Answer:** PREPA objects to this Request to the extent it is vague, ambiguous, and not reasonably calculated to lead to the discovery of relevant or admissible evidence. Further, PREPA objects to this Request to the extent it requires PREPA to interpret and respond to ambiguous language including, but not limited to, “capital cost” and “financing assumptions”, as

¹⁵ ELAC’s June 7, 2017 motion, *supra* at 4.

¹⁶ *Id.* at 5.

¹⁷ Véase, Ríos Colón v. F.S.E.n v. F.S.E., 139 D.P.R. 167, 178-79 (1995) (The intent of the UAPA is “Not to superfluously complicate administrative procedures, nor leave the discovery of evidence at the mercy of the whim of the parties.”.)

¹⁸ *Id.*

well as to the extent it is unclear as to whether it is referring to PREPA or the counter-parties under the PPOAs. Subject to and without waiving these objections and PREPA's General Objections, PREPA states as follows:

PREPA has answered questions on the subject of its renewables PPOA numerous times in the Integrated Resource Plan case, Rate Review, among others, and has noted that the renewables PPOAs are available on PREPA's website. See

<http://aeepr.com/Documentos/Ley57/CONTRATOS/EnergiaRenovable1.htm> and <http://aeepr.com/Documentos/Ley57/ENMIENDAS/EnergiaRenovableEnmiendas1.htm> for the PPOAs and amendments thereto.

- b. **ELAC's request in its June 7 motion:** The contracts for the renewable projects that have not been built and that allegedly remain active.

Commission's Determination: The Commission partially **GRANTS** PREPA's objection. PREPA provided a link to the list of contract. The Commission **ORDERS** PREPA to produce a list of the relevant contract's numbers.

2. **Request of Information Question No. 40:** Provide documents that serve as a basis for an estimated cost of 2 cents per kWh for the control systems to shift from the night peak to the mid-day.

- a. **Answer:** The following response was provided by Nelson Bacalao, Siemens PTI.

This was a high-level estimate of the costs, including incentives that PREPA would have to incur to facilitate this transfer. The actual costs are a function of the nature of the load (industrial, commercial, or residential) and the required levels of transfer and need to be determined via specialized studies.

- b. **ELAC's request in its June 7 motion:** Documents with regards to the alleged cost of 2 cents per kWh for the integration of renewable energy for the control of the change in peak night energy demand to mid-day.

Commission's Determination: The Commission **ORDERS** PREPA to produce any document related to estimates and/or costs. PREPA must inform the Commission in the event there are no documents that serve as basis for this information.

3. **Request of Information Question No. 86:** Provide the documents submitted to the PROMESA Oversight Board and referenced in the PREPA Fiscal Plan, page 25 that indicate that energy sales will drop by 23% over the next 10 years?

- a. **Answer:** PREPA objects to this Request to the extent it seeks information beyond that which is mandated by the Commission's directives and which

is publicly available to any interested party. Subject to and without waiving these objections and PREPA's General Objections, PREPA states as follows: While the Fiscal Plan process is an entirely separate proceeding conducted on a separate time frame and within completely different parameters than instant proceeding, the publicly available PROMESA information is available at:

<https://jutasupervision.pr.gov/wp-content/uploads/wpfd/50/590a2c5d741d.pdf>.

- b. **ELAC's request in its June 7 motion:** Documents with regards to increases in the fossil fuel costs average of 64% according to PREPA in pages 25 and 26 of its Fiscal Plan filed before the Fiscal Board.

Commission's Determination: *The Commission GRANTS PREPA's objection. The requested document is out of scope and is not relevant to solve the controversy addressed in this proceeding.*

- 4. **Request of Information Question No. 88:** Provide documents referenced in the PREPA Fiscal Plan that show continued and accelerated deployment of DG of 240 MW in the pipeline as of 2017.
 - a. **Answer:** Please refer to PREPA's response to Request No. 86.
 - b. **ELAC's request in its June 7 motion:** Documents that show the alleged 240 MW of distributed renewable energy projects anticipated for this year.

Commission's Determination: *The Commission GRANTS PREPA's objection. The requested document is out of scope and is not relevant to solve the controversy addressed in this proceeding.*

- 5. **Request of Information Question No. 89:** Provide documents referenced in the PREPA Fiscal Plan that indicate a pipeline of co-generation units planned by large industrial/commercial clients of 42.6 MW or more.
 - a. **Answer:** Please refer to PREPA's response to Request No. 86.
 - b. **ELAC's request in its June 7 motion:** Cogeneration projects of industrial and commercial clients of 42.6 MW or more.

Commission's Determination: *The Commission GRANTS PREPA's objection. The requested document is out of scope and is not relevant to solve the controversy addressed in this proceeding.*

- 6. **Request of Information Question No. 92:** Provide the documents that form the basis of the statement on page 30 in the PREPA Fiscal Plan indicating that total sales including CILT are expected to decline at an average annual rate of 2.9% between 2017 and 2026.



- a. **Answer:** Please refer to PREPA's response to Request No. 86.
- b. **ELAC's request in its June 7 motion:** Documents of the sales forecast filed to the Oversight and Management Fiscal Board ("Fiscal Board") created under PROMESA that indicate a reduction in energy sales of 23% in the next ten years and 2.9% per year between 2017 and 2026.

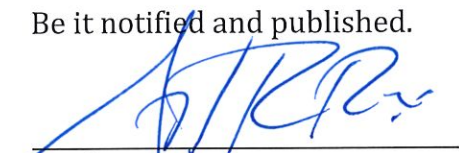
Commission's Determination: *The Commission GRANTS PREPA's objection. The requested document is out of scope and is not relevant to solve the controversy addressed in this proceeding.*


PREPA must comply with the above directives on or before **June 19, 2017**.

Finally, pursuant to the Commission's June 7, 2017 Resolution and Order in the instant proceeding, PREPA must file all pending answers by **June 16, 2017**.

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

Be it notified and published.


Ángel R. Rivera de la Cruz
Associate Commissioner


José H. Román Morales
Associate Commissioner
Interim Chairman

CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Commission has so agreed on June 16, 2017 and on this date a copy of this Resolution and Order regarding the Case No. CEPR-AP-2017-0001 was notified by electronic mail to the following: j-morales@aepr.com, n-vazquez@aepr.com, c-aquino@aepr.com, n-ayala@eepr.com, equinones@qaclaw.com, vcandelario@qaclaw.com, gmartinez@qaclaw.com, pbarcelo@estrellallc.com, lmorera@estrellallc.com, serdar.tufekci@na.engie.com, richard.houston@na.engie.com, jperez@oipc.pr.gov, codiot@oipc.pr.gov, rstgo2@gmail.com, ladrian@gasnaturalfenosa.com, francisco.rullan@aae.pr.gov, wilma.lopez@aae.pr.gov, tonytorres2366@gmail.com, sierra@arctas.com, molinilawoffices@gmail.com, ccf@tcmrslaw.com, carlos.reyes@ecoelectrica.com, cfl@mcvpr.com, hmc@mcvpr.com, mgrpcorp@gmail.com, victorluisgonzalez@yahoo.com, epo@amgprlaw.com, acasellas@amgprlaw.com, agraitfe@agraitlawpr.com, and lfortuno@steptoe.com. I also certify that today, June 16, 2017, I have proceeded with the filing of the Resolution and Order issued by the Puerto Rico Energy Commission and I have sent a true and exact copy to the following:

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For the record, I sign this in San Juan, Puerto Rico, today, June 16, 2017.



María del Mar Cintrón Alvarado
Clerk