



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

PV PROPERTIES, INC.
MOVANT

vs.

AUTORIDAD DE ENERGÍA ELÉCTRICA DE
PUERTO RICO
RESPONDENT

CASE No.: CEPR-QR-2017-0001

SUBJECT: Resolution on Notice of Automatic Stay of Proceedings filed by the Puerto Rico Electric Power Authority.

RESOLUTION

On July 12, 2017, the Puerto Rico Electric Power Authority (“PREPA”) filed before the Puerto Rico Energy Commission (“Commission”) a motion titled “Notice of Automatic Stay of Proceedings Pursuant to the Commencement of case Under Title III of PROMESA” (“Motion”). In its Motion, PREPA requested the Commission to stay the proceedings in the instant case, pursuant to Sections 362(a) and 922(a) of the Bankruptcy Code,¹ as incorporated by reference under section 301(a) of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”).²

As argued by PREPA, Section 362(a) of the Bankruptcy Code states that the commencement or continuation of a judicial, administrative, or other actions or proceedings against a debtor that was or could have been commenced before the commencement of the petition under Title III or any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under a Title III proceeding is automatically stayed without further action.³ However, Section 362(b)(4) of the Bankruptcy Code states:

The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an **action or proceeding by a governmental unit [...] to enforce such governmental unit’s or organization’s police and regulatory power**, including the enforcement of a judgment other than a money judgment,

¹ 11 U.S.C. § 362(a), 922(a).

² PREPA’s Motion at ¶ 6. The cited text corresponds to Section 362(a)(1) of the Bankruptcy Code.

³ *Id.*, at ¶ 4.

obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.⁴

Regarding the exception referenced above, the United States Court of Appeals for the First Circuit has established that “[t]his exception discourages debtors from submitting bankruptcy petitions either primarily or solely for the purpose of evading impending governmental efforts to invoke the governmental police powers.”⁵ Moreover, “the courts have devised two interrelated, fact-dominated inquiries - the so-called “public policy” and “pecuniary purpose” tests - for assessing whether a particular governmental proceeding comes within the subsection 362(b)(4) exception.”⁶ To conduct these inquiries, it must be determined “whether the particular regulatory proceeding at issue is designed primarily to protect the public safety and welfare, or represents a governmental attempt to recover from property of the debtor estate, whether on its own claim, or on the nongovernmental debts of private parties.”⁷

To that effect, the United States Bankruptcy Court for the District of Puerto Rico has stated that under the pecuniary purpose test, the government's proceeding is analyzed “to determine whether the same seek to enforce a matter of public safety and welfare, **which favors the stay exception**, or its pecuniary interest, which does not.”⁸ Therefore, “the governmental unit satisfies the “pecuniary purpose” test if its actions were not brought primarily to benefit the government's pecuniary interest.”⁹

On the other hand, “[u]nder the public policy test, the relevant inquiry is whether the government is primarily trying to effectuate public policy or to adjudicate private rights.”¹⁰ Moreover, “[i]f the action furthers both public and private interests, then the same should be exempt from the automatic stay if the private interests do not significantly outweigh the public benefit from enforcement.”¹¹

⁴ 11 U.S.C. §362(b)(4). Emphasis added.

⁵ *McMullen v. Seigny*, 386 F. 3d. 320, 324-325 (1st Cir. 2004).

⁶ *Id.*, at 325.

⁷ *Id.*

⁸ *Montalvo v. Autoridad de Acueductos y Alcantarillados*, 537 B.R. 128, 143 (Bankr. D. P.R. 2015). Emphasis added.

⁹ *Id.*

¹⁰ *Id.* Quotation marks omitted.

¹¹ *Id.* Citing *Chao v. Hosp. Staffing Servs. Inc.*, 270 F. 3d 374, 390 (6th Cir. 2001). Quotation marks omitted.

Act 82-2010¹² invests the Commission with “any powers as necessary and convenient to fully attain the purposes of this Act”.¹³ Among other things, the Commission has the power “**to issue to do or cease and desist orders** to any person in order to comply with the requirements, purposes, and objectives of this Act, including without it being limited to compliance with the Renewable Portfolio Standard”¹⁴.

According with Act 82-2010 Statement of Motives “this Act creates, for the first time, a Renewable Portfolio Standard in Puerto Rico and establishes the requirements and specific percentages through which [PREPA] and other retail electricity suppliers shall supply electric power from renewable energy sources and alternative renewable energy throughout the next twenty-five (25) years.”¹⁵ Regarding the Renewable Portfolio Standard, Act 82-2010 Statement of Motives also established that:

With this, we seek to achieve a twenty percent (20%)-sustainable renewable energy production in Puerto Rico and dramatically reduce our dependence on fossil fuels for energy consumption. Furthermore, this shall pave the way for the “Puerto Rico: Green Island” initiative, which seeks to establish and implement the Puerto Rico’s new energy policy based on energy source diversification and conservation. In this manner, it is ensured that the generation of electricity in this jurisdiction be affordable, feasible, reliable, stable, and sustainable, while “green jobs” are created and the environment is preserved.¹⁶

Moreover, “[t]he production of electric power from sustainable renewable energy and alternative renewable energy sources has highly valuable attributes, which shall yield benefits for the entire citizenry, since the use of this kind of energy reduces air pollution and mitigates the adverse effects on the health of our people associated with pollution.”¹⁷ Finally, Article 6.3(r) of Act 57-2014¹⁸, establishes that the Energy Commission will have the power and duty to “[o]verseer compliance with any mandatory standard or goal under the Renewable Energy Portfolio imposed by legislation or regulations.”¹⁹

¹² Public Policy on Energy Diversification by Means of Sustainable and Alternative Renewable Energy in Puerto Rico Act, as amended.

¹³ *Id.* Article 2.4, 12 L.P.R.A. § 8125.

¹⁴ *Id.* Emphasis added.

¹⁵ *Id.* Statement of Motives, ¶ 7.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 11.

¹⁸ Puerto Rico Energy Transformation and RELIEF Act, as amended.

¹⁹ *Id.* Article 6.3(r), 9 L.P.R.A. § 1054b.

Recently, in *Rafael Lacourt Martínez v. Junta de Libertad Bajo Palabra the Puerto Rico*,²⁰ and *Laboratorio Clínico Irizarry v. Departamento de Salud, y otros*,²¹ the Puerto Rico Supreme Court urged lower courts to carefully review the specific circumstances of each case prior to staying any proceeding since an automatic stay is not indiscriminately applicable to every proceeding. Specifically, the Supreme Court stated that the automatic stay “gives the debtor breathing spell from his creditors[,] stops all collection efforts, all harassment, and all foreclosure actions [and] permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.”²² Citing longstanding jurisprudence recognizing that both federal and state systems “have jurisdiction to initially determine whether pending litigation is stayed,”²³ the Supreme Court determined that proceedings not involving a monetary claim against the debtor are not automatically stayed.²⁴

In light of the aforementioned, for an action before the Commission to be automatically stayed pursuant to Section 301(a) of PROMESA, the primary purpose of such action must be to determine that the movant has a right to payment, that it has a right to an equitable remedy for which monetary payment is an alternative remedy or to protect the government’s pecuniary interest. On the other hand, if the primary purpose of an action by the government is to enforce and or adopt public policy, then such an action is not considered to be automatically stayed, even if, as a consequence of such a government action, a pecuniary claim may arise against the debtor.

The Commission, among other things, has regulatory power to oversee and implement the Renewable Portfolio Standard, as established by Act 82-2010. The main controversy in the instant case is whether the provisions of Act 82-2010, including compliance by PREPA with the Renewable Portfolio Standard established therein, are readily enforceable, or if PREPA is exempt from complying with Act 82-2010 until appropriate rules and regulations have been adopted.²⁵ While Movant’s Claim seeks a determination that PREPA should purchase certain Renewable Energy Credits at a set price, there is an underlying and compelling interest in clarifying and determining the scope and applicability of the provisions of Act 82-2010. Therefore, the primary purpose of

²⁰ 2017 TSPR 144

²¹ 2017 TSPR 145

²² *Id.* citing 3 Collier on Bankruptcy, sec. 362.03, sub sec. 6 and H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

²³ *Id.* citing *Mid-City Parking, Inc.*, 332 B.R. 798, 803 (N.D. Ill. 2005).

²⁴ *Id.* citing *Atilés-Gabriel v. Puerto Rico*, 2017 WL 2709757, 2 (D. PR 2017)(“The relief sought concerns a person’s liberty; it does not seek a right to payment, nor an equitable remedy for which monetary payment is an alternative remedy.”)

²⁵ See “Querella” filed by the Movant on March 3, 2017 and “Moción de Desestimación”, filed by the Respondent on March 23, 2017.

the instant case is to determine whether the provisions of Act 82-2010, including the mandate requiring PREPA to comply with the Renewable Portfolio Standard, is currently and readily enforceable, or whether compliance with such provisions is dependent on the approval of the appropriate rules and regulations.

To address both controversies, the Commission ordered both parties to file a legal brief answering several questions which would provide the Commission with sufficient information to issue a policy determination with regards to the applicability and enforceability of Act 82-2010 and the rights and responsibilities of each party involved.²⁶

The implementation of the Renewable Portfolio Standard and the increase in production of electric power from sustainable renewable energy is a matter of public safety, welfare and concern. The Commission has, for the first time, the opportunity to make a policy determination with regards to Act 82-2010 and the rights and responsibilities established therein. The instant case does not benefit the government's or the Commission's pecuniary interest nor its primary purpose is the adjudication of monetary responsibility. Accordingly, the "pecuniary purpose" test is satisfied.

Act 82-2010 and Act 57-2014 established a public policy of promoting energy generation through renewable sources.²⁷ At the center of this public policy is compliance with the Renewable Portfolio Standard by retail energy suppliers, including PREPA. Determining the scope and enforceability of Act 82-2010 is a public policy action, not limited to the adjudication of specific private rights. The fact that a possible outcome of the proceeding would benefit Movant's claims with respect to PREPA's obligation under Act 82-2010 does not outweigh the underlying public interest in promoting compliance with Puerto Rico's Renewable Portfolio Standard. Consequently, the "public policy" test is satisfied.

In light of the aforementioned, the Commission finds that the instant proceeding falls within the exception of Section 362(b)(4) of the Bankruptcy Code. Respondent's request for a stay of the proceedings in the instant case is **DENIED**. Respondent shall have

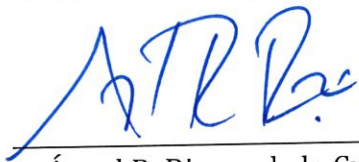
²⁶ Resolution and Order of June 2, 2016 in the instant proceeding.

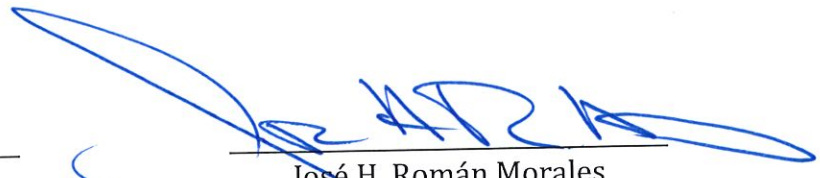
²⁷ See Article 1.2(h) of Act 57-2014, 9 L.P.R.A. § 1051. "The maximum percentage of renewable energy that may be integrated and incorporated into Puerto Rico's electricity infrastructure in a safe and reliable manner and at a reasonable cost shall be identified and kept updated. Moreover, suitable technologies and locations shall also be identified to make such integration feasible in accordance with the best interest of the Commonwealth of Puerto Rico". See also Statement of Motives, Act 57-2014; "Through the adoption of regulations using the SGIP and SGIA's as models, procedures shall be standardized, current obstacles for interconnection shall be eliminated, a reliable and safe interconnection process shall be provided for, and the economic activity of the Island shall be increased by reducing energy costs. These amendments shall also allow Puerto Rico to continue with its mission of achieving the goals established in Act 82-2010, [...] by enabling a greater interconnection of renewable sources to the electric power grid."

fifteen (15) days from the date this Resolution is notified to file its legal brief in response to the Commission's June 2, 2017 Resolution and Order.²⁸



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 September 13, 2017 and on this date a copy of this Resolution regarding the Case No. CEPR-QR-2017-0001 was notified by electronic mail to the following: javrua@gmail.com, marcgrp@gmail.com, javier.morales@prepa.com y kbolanos@cnrd.com. I also certify that today, September 13, 2017, I have proceeded with the filing of the Resolution 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, September 13, 2017.


María del Mar Cintrón Alvarado
Clerk

²⁸ Movant, PV Properties Inc. filed its legal brief on June 22, 2017.