

**GOVERNMENT OF PUERTO RICO
PUERTO RICO ENERGY COMMISSION**



**IN RE: PUERTO RICO ELECTRIC POWER
AUTHORITY'S FISCAL PLAN**

CASE NO.: CEPR-IN-2018-0001

SUBJECT: Order Requiring PREPA to
Submit February 12, 2018 Revised Fiscal
Plan.

ORDER

Through this Order, the Puerto Rico Energy Commission ("Commission") **ORDERS** the Puerto Rico Electric Power Authority ("PREPA") to submit to the Commission, **no later than March 5, 2018 at 3:00 pm**, the Fiscal Plan PREPA filed with the Financial Oversight and Management Board for Puerto Rico ("FOMB") on February 12, 2018 ("Feb. 12 Fiscal Plan"). PREPA shall file said Fiscal Plan electronically via email at **secretaria@energia.pr.gov** and shall include with its submission a list of PREPA employees or consultants capable of explaining the Fiscal Plan's details, connecting specific individuals with specific subjects. This Order is entered pursuant to Article 6.3, 6.4 and 6.24 of Act 57-2014¹ and Article XV of Regulation 8543.²

I. Legal Bases

The Commission is the entity "in charge of regulating, overseeing, and ensuring compliance with the public policy on energy of the Commonwealth of Puerto Rico."³ Act 57-2014 directs the Commission to "review and approve policies and strategic plans, as well as short-, medium-, and long-term plans in connection with energy resources integrated planning in Puerto Rico, and oversee compliance therewith;"⁴ "guarantee the orderly and integrated development of our electrical system;"⁵ "oversee all types of operations, processes, and mandates pertaining to the efficiency of the energy sector of the Island;"⁶ and

¹ Puerto Rico Energy Transformation and RELIEF Act, as amended.

² Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings.

³ Statement of Motives of Act 57-2014 at ¶ 18.

⁴ *Id.*, Article 6.3(h).

⁵ *Id.*, Statement of Motives at ¶ 19.

⁶ *Id.* at ¶ 20.



"establish and implement regulations and the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of electricity rates of Puerto Rico."⁷ The statute also empowers the Commission to "require the production and inspection of records, inventories, documents, and physical facilities of any juridical persons or entity subject to the jurisdiction of the Energy Commission or the Commonwealth Energy Public Policy Office."⁸

This Commission's jurisdiction over PREPA and its activities remains unchanged by Congress's enactment of PROMESA.⁹ Moreover, this Order is not preempted by PROMESA or any FOMB directive, because it is not in conflict with any PROMESA provision; PREPA's compliance does not preclude it from complying with any FOMB order.¹⁰

II. Purposes of the Commission's Review

As the entity with exclusive authority to regulate the performance of Puerto Rico's electricity markets, the Commission is obligated to evaluate activities proposed by PREPA that fall within the Commission's statutory jurisdiction. Such activities include, without limitation, operational maintenance and enhancements, environmental compliance actions, capital expenditures, rate levels and rate structure, and resource mix and resource planning. Commission review and, where necessary, modification of these proposed activities will ensure that the Fiscal Plan ultimately certified by FOMB is, as required by PROMESA, consistent with applicable Commonwealth law, including Act 57-2014. In this manner, the Commission's efforts support those of FOMB, because if the Plan certified by FOMB is not consistent with Commonwealth law, a final Plan of Adjustment based on such Plan will not be lawful.

The Feb. 12 Fiscal Plan is PREPA's response to the FOMB's letter dated February 5, 2018 ("February 5 letter"), finding deficiencies in PREPA's Fiscal Plan dated January 24, 2018 ("Jan. 24 Fiscal Plan"). The Jan. 24 Fiscal Plan addressed both PREPA's *status quo* situation (the current monopoly market structure and the current assets owned by PREPA, independent power producers and customers) and ways to transform the *status quo* (such as through the sale of PREPA's generation assets, the ownership of new generation assets by third party private market participants, and the granting by the Commonwealth of a concession to operate a transmission and distribution system owned by the

⁷ Article 6.3(c).

⁸ *Id.*, Article 6.3(nn)(6).

⁹ Puerto Rico Oversight, Management, and Economic Stability Act, Public Law No: 114-187.

¹⁰ PROMESA sec. 4 signals "conflict" preemption, not "occupation-of-the-field" preemption. Because is not impossible for PREPA to comply with this Commission order and any FOMB order, there is no conflict. A detailed explanation of the non-preemptive relationship between PROMESA and this Commission's authority appears in the Commission's pleading submitted to the U.S. District Court on December 19, 2017, Docket No. 29, Adv. Proc. No. 17-256-LTS, in Bankruptcy Case No. 17-04780-LTS.

Commonwealth). We assume that the Feb. 12 Fiscal Plan addresses these same topics, because FOMB's February 5 letter required no exclusions. We repeat, therefore, what we said in our January 31 Resolution and Order relating to the Jan. 24 Fiscal Plan: "While the immediate concern of the Commission, and of this Resolution, is to provide FOMB with a timely assessment of initiatives addressing PREPA's *status quo*, after completing its review of such initiatives, the Commission will leverage its expertise and knowledge to provide the Governor, Legislative Assembly, FOMB and stakeholders with an objective and professional assessment of the proposed Transformation Plan, including the appropriate steps for its successful implementation."

Our January 31 Resolution and Order included an Appendix I entitled "Questions Regarding Parts I through VIII of PREPA's Fiscal Plan." We expect that most of those questions, modified as necessary, will be relevant to the Feb. 12 Fiscal Plan. On receiving the Feb. 12 Fiscal Plan we will issue a new question list. At that time the Commission also will determine what, if any, public procedures it will host prior to making and issuing its assessment of the Fiscal Plan's consistency or inconsistency with applicable Commonwealth law.

III. Procedural Matters

FOMB has indicated a wish to certify a PREPA Fiscal Plan no later than March 30, 2018. PREPA shall inform FOMB that the Commission commits, assuming it receives the Feb. 12 Fiscal Plan timely (by 3:00pm on March 5, 2018), to provide any necessary revisions no later than five days prior to the FOMB's currently desired deadline--and earlier if FOMB so requests and if PREPA submits the Feb. 12 Fiscal Plan to us timely. The Commission has always been ready to cooperate with FOMB on deadlines that suit both entities.

Should PREPA believe that the Feb. 12 Fiscal Plan requires confidential treatment, it shall mark the document confidential on submission and identify the statutory basis for this treatment. If the Commission, on examining the document, finds that the document is not entitled to confidential treatment, it will state its reasons and give PREPA an opportunity to respond. Until assessing PREPA's response, the Commission will treat the document as confidential. If the Commission finds that the document is entitled to confidential treatment, such document will be accessible only to the Commissioners and Commission staff and consultants, pursuant to the Commission's Policy on Management of Confidential Information, Order No. CEPR-MI-2016-0009, as amended.

IV. Commission Relations with Other Entities

On February 14, 2018, the Commission received a letter from the Puerto Rico Fiscal Agency and Financial Advisory Authority ("FAFAA"). FAFAA, acting on behalf of PREPA, declined to comply with the Commission's orders of January 22, 2018 and January 31, 2018, requiring PREPA to submit the Jan. 24 Fiscal Plan and present witnesses able to explain it. FAFAA gives two reasons. First, FAFAA cites FOMB's assertion that FOMB has "the exclusive power to evaluate, approve and certify PREPA's fiscal plan"; as well as FOMB's disagreement

with the Commission's legal conclusion that the Fiscal Plan FOMB considers must be one that the Commission has approved first. As the Commission explained above, unless the Commission has found that those activities in the Fiscal Plan subject to the Commission's jurisdiction are consistent with Commonwealth law, FOMB cannot lawfully certify the Fiscal Plan. Contrary to FAFAA's and FOMB's misunderstanding, the Commission is not entering FOMB's legal terrain but ensuring that FOMB's decisions within that terrain will be lawful--an outcome everyone wants. FOMB and the Commission share the objectives of disciplining PREPA's performance and obtaining a Plan of Adjustment that complies with PROMESA. The conflict FAFAA and FOMB purport to identify is one of their own creation.

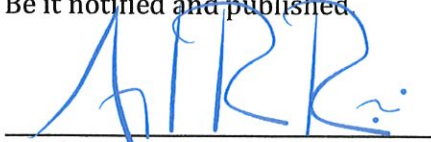
Second, FAFAA argues that the Commission's orders on the PREPA fiscal plans "impinge on AAFAF's legal authority," because the orders "seek to regulate or usurp the authority of AAFAF with regard to the fiscal planning and budget process, which is clearly outside the scope of [the Commission's] authority." FAFAA is doubly wrong. First, our orders are directed at PREPA, not FAFAA, because the Commonwealth's electric system is owned and run by PREPA, whose operations Act 57-2014 direct the Commission to oversee. Second, PREPA's fiscal planning and budget processes directly affect its revenue requirement and therefore its rates. Act 57-2014 authorizes the Commission to set PREPA's lawful rates. To the extent the Fiscal Plan embodies actions that affect PREPA's costs, those actions must be reviewed by the Commission; otherwise the Commission cannot ensure that PREPA's rates satisfy the statutory standard of "just and reasonable." The necessary implication of FAFAA's assertion--unsupported by any legal analysis--is that the Commission's Act 57-2014 authority no longer exists, because it has been superseded by AAFAF and FOMB. That is not the law.

In requiring submission of the Jan. 24 and Feb. 12 Fiscal Plans and assessing its lawfulness under Commonwealth law, the Commission has no intention of "usurping" the authorities and duties of the Governor, the Legislature, FAFAA or FOMB. Rather, the Commission is carrying out its duties as commanded by Act 57-2014. The aspirations expressed by the Governor and various legislators, to find the most cost-effective, pro-competitive ways to serve our citizens, are shared emphatically by this Commission. But without the Commission's assurance that the Fiscal Plan is lawful under Commonwealth law, there can be no assurance that the final Plan of Adjustment, so necessary to the Commonwealth's and PREPA's recovery, will be lawful under federal law.

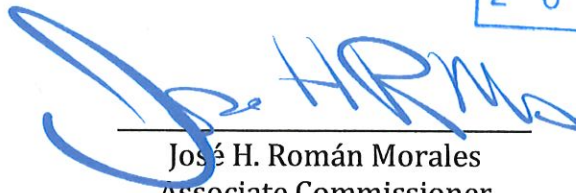
V. Conclusion

This Order carries out the Commission's duties under Act 57-2014, while supporting FOMB's duties under PROMESA. Should PREPA fail to comply with this Order, the Commission will seek specific enforcement through judicial order, as provided in Article 6.3(II) of Act 57-2014. Failure by PREPA to comply will also leave the Commission no choice but to notify FOMB that the Commission is unable to find that the Feb. 12 Fiscal Plan complies with applicable Commonwealth law, as required by PROMESA. Such notification will, under PROMESA Section 201, preclude FOMB from lawfully certifying the Fiscal Plan.

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 March 5, 2018 and on this date a copy of this Order regarding the Case No. CEPR-IN-2018-0001 was notified by electronic mail to the following: c-aquino@aepr.com, n-vazquez@aepr.com and n-ayala@aepr.com. I also certify that today, March 5, 2018, I have proceeded with the filing of the Order issued by the Puerto Rico Energy Commission and I have sent a true and exact copy to the following:

Autoridad de Energía Eléctrica de Puerto Rico

Attn.: Nitza Vázquez Rodríguez
Nélida Ayala Jiménez
Carlos M. Aquino Ramos
P.O. Box 363928
Correo General
San Juan, PR 00936-3928

For the record, I sign this in San Juan, Puerto Rico, today, March 5, 2018.


María del Mar Cintrón Alvarado
Clerk