

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



IN RE: AGUIRRE SITE ECONOMIC
ANALYSIS

CASE NO.: CEPR-AP-2017-0001

SUBJECT: Resolution Resolving Motion for
Reconsideration of Final Resolution and
Order filed by PREPA

RESOLUTION

1. Through this Resolution the Puerto Rico Energy Commission (“Commission”) **RESOLVES** the *Motion for Reconsideration of Final Resolution and Order* (“Motion for Reconsideration”) filed by the Puerto Rico Electric Power Authority (“PREPA”) on May 16, 2018.

I. Introduction and Brief Background

2. On March 15, 2018, the Commission issued a Resolution and Order in Case No. CEPR-AP-2018-0001, In Re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan (“IRP Resolution”). The IRP Resolution made three key determinations related to the implementation and enforcement of Section 6B of Act 83¹ and Article 6.23 of Act 57-2014:² (i) the date from which the 3-year period for the mandatory review of an Integrated Resource Plan (“IRP”) is to be computed; (ii) the date on which, under ordinary circumstances, the scheduled 3-year mandatory review of PREPA’s Modified IRP³ would commence; and (iii) a determination that hurricanes Irma and María may have caused “substantial changes in demand and group of resources”⁴ which would warrant a review of PREPA’s Modified IRP prior to the 3-year mandatory review.

¹ The Puerto Rico Electric Power Authority Act, Act No. 83 of May 2, 1941, as amended.

² The Puerto Rico Energy Transformation and RELIEF Act, as amended.

³ See Resolution on the Verified Motion for Reconsideration of the Puerto Rico Electric Power Authority, Case No. CEPR-AP-2015-0002, February 10, 2017. Pursuant to Act 38-2017, known as the Uniform Administrative Procedure Act of the Government of Puerto Rico, an IRP is deemed to be legally binding and enforceable once any post-administrative decision remedies have been fully exhausted. However, unless otherwise ordered by a court with competent jurisdiction, the filing of post-administrative decisions remedies does not automatically suspend the validity of the determinations made therein.

⁴ IRP Resolution at p. 3 (citing Article 6B(h)(i) of Act 83).



3. Pursuant to Section 6B(h)(i) of Act 83 and Article 6.23(d) of Act 57-2014, the Commission authorized PREPA to “file an updated IPR on or about October 2018.”⁵ The Commission determined that authorizing PREPA to file an updated IRP prior to the mandatory review established in Act 83 and Act 57-2014 was appropriate (i) given the need to assess the effects, if any, hurricanes Irma and María had on Puerto Rico’s electric market, (ii) PREPA’s public statements regarding their intention of developing an updated IRP ahead of schedule⁶ and (iii) the publishing by PREPA of a “Request for Proposal (“RFP”) seeking proposal for the ‘provision of professional services for performing an [IRP].’”⁷

4. On April 26, 2018, the Commission issued a Final Resolution and Order in the instant case (“AOGP Order”) through which it closed and dismissed, without prejudice, the pending economic evaluation of the proposed Aguirre Site. The Commission found that PREPA’s filing for Title III protection under PROMESA,⁸ the undetermined effects of hurricane María on the electric system and PREPA’s intention of developing a new IRP had turned the Aguirre Site analysis moot.

5. The AOGP Order granted PREPA the option of determining whether to include AOGP as a resource alternative in the development of its upcoming IRP proposal, which filing the Commission authorized through the aforementioned IRP Resolution. In doing so, the economic feasibility of the Aguirre Site would be evaluated based on updated projections which take into account recent changes in policy and socio-economic assumptions.

II. PREPA’s Motion for Reconsideration

6. On May 16, 2018, PREPA filed its Motion for Reconsideration requesting the Commission to reconsider

the inconsistent establishment of October 2018 as the deadline for PREPA to file its IRP, and to issue an amended Resolution consistent with the statute and the Commission’s prior order identifying March 2020 as the deadline for PREPA to file the next IRP with the Commission.⁹

7. In its Motion for Reconsideration, PREPA recognizes that it is currently engaged in the “preparation of a new IRP [which it expects] will be completed around

⁵ *Id.* at p. 4.

⁶ See February 1, 2018 PREPA Governing Board Press Release (<https://www.aeepr.com/Noticias/noticiasread.asp?r=YQVATMSJWX>).

⁷ IRP Resolution at p. 3. See, also, Request for Proposal Invitation (<https://www.aeepr.com/Docs/Invitation%20letter.pdf>).

⁸ The Puerto Rico Oversight, Management and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549.

⁹ Motion for Reconsideration at p. 2.



September 2018.”¹⁰ PREPA then states that “it is within PREPA’s powers to determine if this IRP, prepared for [the purpose of guiding the electric sector transformation process], also will be presented as a ‘statutory’ IRP, nearly two years ahead of the due date for the next statutory IRP”.¹¹

8. In support of its request, PREPA argues that “Act 83-1941 reserves to PREPA the authority to make this determination”, referring to the decision of whether to file or not a “non-statutory” IRP with the Commission.¹² PREPA recognizes that the “statutory” IRP, as well as any amendments to said IRP, must be approved by the Commission.¹³

9. However, PREPA argues that, because the IRP it is currently developing is a “non-statutory IRP”, such IRP need not be filed with the Commission, nor is the Commission authorized to “accelerate any statutory deadlines” for the filing of an IRP.¹⁴ Finally, PREPA concludes that it is not “required to file an amended IRP with the Commission unless and until it elects to amend the current IRP,” which it argues, it has not done.¹⁵

10. On May 18, 2018, Enlace Latino de Acción Climática-El Puente de Williamsburg, Inc. and Comité de Diálogo Ambiental, Inc. (“ELAC”) filed a Motion opposing PREPA’s Motion for Reconsideration (“ELAC’s Opposition”). Among other things, ELAC argued that PREPA’s Motion for Reconsideration was a “collateral attack” on the IRP Resolution and that PREPA’s distinction between a “statutory IRP” and a “non-statutory” IRP is without legal basis and designed to avoid Commission jurisdiction.¹⁶

III. Commission Determination Regarding PREPA’s Request for Reconsideration

11. PREPA’s Motion for Reconsideration identifies an inconsistency between the IRP Resolution and the AOGP Order related to the filing of an updated IRP by PREPA on or about October 2018.

12. The IRP Resolution authorized PREPA to file an updated IRP on or about October 2018, prior to the 3-year mandatory review established by Act 83 and Act 57-

¹⁰ *Id.* at p. 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at p. 3-4.

¹⁶ ELAC’s Opposition at ¶4.

2014.¹⁷ The AOGP Order, on the other hand, stated that the IRP Resolution “requires PREPA to file its next IRP on or around October 2018.”¹⁸

13. The Commission agrees with PREPA’s contention that there is an inconsistency between the IRP Resolution and the AOGP Order. While the IRP Resolution was limited to authorizing PREPA to file an updated IRP, the AOGP Order incorrectly stated that said IRP Resolution required PREPA to file an updated IRP.

14. The Commission hereby **CLARIFIES** that the IRP Resolution did not order PREPA to file an updated IRP, but rather authorized PREPA to file such updated IRP if it determined to do so.

15. The IRP Resolution did not order PREPA to file an updated IRP because PREPA had already publicly stated it would develop an updated IRP. The IRP Resolution established the legal means through which such updated IRP would be filed and approved by the Commission, as required by Act 83 and Act 57-2014.

16. Nonetheless, the AOGP Resolution incorrectly characterized the provisions of the IRP Resolution.

IV. Legal Basis for the Development, Filing, Approval, Implementation and Enforcement of an Integrated Resource Plan pursuant to Act 83 and Act 57-2014.

17. In approving Act 57-2014, the Puerto Rico Legislature recognized the need for a meaningful transformation of Puerto Rico’s electric market. To achieve such goal, the Legislature empowered the Commission with broad regulatory powers aimed at forcing structural changes within all levels of Puerto Rico’s energy sector, reduce dependence on fossil fuel generation, reduce and stabilize energy prices and promote greater integration of clean, renewable energy resources.¹⁹

18. The lack of Commission vetted and carefully crafted capital investment and resource plans throughout history has denied PREPA the necessary tools to adequately plan short-, medium- and long-term maintenance and capital investments, resulting in an underperforming energy infrastructure, inefficient generation standards, high energy costs and a markedly vulnerable system.²⁰

¹⁷ IRP Resolution at p. 4.

¹⁸ AOGP Order at p. 3.

¹⁹ See Commission Resolution of February 10, 2017, addressing Windmar’s Motion for Reconsideration, Case No. CEPR-AP-2015-0002, at p. 2.

²⁰ *Id.*

19. A cornerstone of the strategy for transforming Puerto Rico's energy infrastructure is implementing effective and reliable planning standards. To address its chronic planning woes, Act 57-2014 required PREPA to develop and file for Commission review and approval an Integrated Resource Plan ("IRP").²¹

20. An integrated resource plan is "a plan that considers all reasonable resources to satisfy the demand for electric power services during a specific period of time, including those related to the offering of electric power, whether existing, traditional, and/or new resources, and those related to energy demand, such as energy conservation and efficiency or demand response and localized energy generation by the customer."²²

21. The purpose of an integrated resource plan is to describe the combination of energy supply and conservation resources that satisfies in the short-, medium-, and long-term the present and future needs of the energy system, both of Puerto Rico and its customers, at the lowest possible cost.²³

22. Sub-section (bb) of Section 6 of Act 83²⁴ commands PREPA to "[d]evelop and maintain an [IRP] in accordance with the parameters and requirements established by the Commission as provided in [Section 6B]." Section 6B(h) of Act 83²⁵ establishes the general requirements that apply to the development of an IRP by PREPA.

23. Referring to the first IRP developed after the enactment of Act 57-2014, Section 6B(h)(i) directs PREPA to file its IRP "for the Commission's review and approval" and that such IRP shall be thereon "revised every three (3) years to show changes in the energy market conditions, the environmental regulations, fuel prices, capital costs, and other factors." Section 6B(h)(i) then clarifies and provides that "[a]ny amendment to the integrated resource plan shall also be filed for the Commission's review and approval."

24. Section 6B(h)(3) of Act 83 provides further guidance into the process PREPA is required to follow when updating any IRP by establishing that

[t]he integrated resource plan shall be evaluated and approved by the Commission and **may not be eliminated or altered by any subsequent PREPA Board without first carrying out, and thus evidencing, a plan review process, before the Commission.** The Commission shall issue all the necessary rules to be followed by PREPA to devise its integrated resource plan,

²¹ *Id.*

²² Act 57-2014, § 1.2(hh); 22 L.P.R.A. §1051a.

²³ Resolution addressing Windmar's Reconsideration at p. 3.

²⁴ 22 L.P.R.A. §196.

²⁵ 22 L.P.R.A. §196c.

which shall include an evaluation plan of PREPA's effectiveness in attaining the goals set. (Emphasis added).

Section 6B(h)(3) reiterates the overarching public policy furthered by Act 57-2014, that PREPA's actions, and in particular those related to resource planning, are subject to Commission approval. Of particular importance is the fact that the Legislature specifically sought to limit PREPA's Governing Board's authority and ability to eliminate or alter an IRP without Commission approval.

25. Similarly, Article 6.23 of Act 57-2014²⁶ contains specific provisions related to the development of an IRP by PREPA. Sub-sections (a) and (b) reiterate the requirement established in Section 6B of Act 83 that PREPA must file its first IRP for Commission approval. Sub-section (c) of Article 6.23 then specifically empowers the Commission to "review, approve and modify [the IRP] to ensure full compliance with the public policy on energy of the Island and the provisions of [Act 57-2014]."

26. Sub-section (d) of Article 6.23 then commands the Commission to "supervise and oversee compliance [with the approved IRP]." Finally, sub-section (d) provides that "[e]very three (3) years, the Commission shall carry out another review process, and, if applicable, modify such plans."

V. Is there such a thing as a "non-statutory" IRP?

27. No.

28. As ELAC points out in its Opposition, in distinguishing between "statutory" and "non-statutory", PREPA is merely attempting to circumvent Commission jurisdiction.²⁷ PREPA argues that, because the IRP it is currently developing is not a "statutory" IRP, it exists outside the realms of Act 83 and Act 57-2014, and, therefore it is "within PREPA's powers to determine" if it will file said IRP for Commission review.²⁸

²⁶ 22 L.P.R.A. §1054v.

²⁷ ELAC's Opposition at ¶4.

²⁸ PREPA's Motion for Reconsideration at p. 3. PREPA's arguments that it seeks to develop a "non-statutory" IRP for the main purpose of "[using] it as a guide for it and the Government for the electric sector transformation process" begs an important question: why would PREPA spend significant amounts of money and resources developing an IRP if it will not seek to file said IRP with the Commission, and, as a result, said IRP would neither be valid nor legally enforceable and PREPA would be unable to rely in its conclusions? While the Commission is not privy to PREPA's reasons for taking such actions, ELAC's supposition that PREPA is attempting to circumvent Commission jurisdiction may very well be a plausible response.



29. But there is no legal basis justifying PREPA's distinction between a "statutory" and a "non-statutory" IRP, nor did PREPA elaborate on this distinction in its Motion for Reconsideration.

30. An IRP exists within the context of Act 83 and Act 57-2014. PREPA's authority to act, and the limits on that authority, are set by law.²⁹ "In enacting an agency's enabling act, the Legislative Assembly authorizes and delegates to said agency the powers necessary so that it may act in accordance to the purposes pursued by its enactment."³⁰ "Any administrative action exceeding [the framework of authority delegated to the agency] shall be null and shall be essentially illegal."³¹

31. PREPA's authority to develop an IRP stems from Section 6 of Act 83.³² Section 6 identifies the powers and authority delegated to PREPA by the Legislative Assembly. Sub-section (bb) of Section 6 authorizes PREPA to "develop and maintain an [IRP] **in accordance with the parameters and requirements established by the Commission as provided in [Section 6B of Act 83].**" (Emphasis added.)

32. As previously discussed, Section 6B sets forth the requirements applicable to the development of an IRP by PREPA and its subsequent approval by the Commission. Chief among these is the specific requirement that both the first IRP developed by PREPA, as well as any subsequent amendments "must be filed for Commission review and approval."³³

33. If there is still any uncertainty as to whether PREPA may pursue the development of a so-called "non-statutory" IRP, Section 6B(h)(iii) dispels any doubt, by removing from the PREPA Governing Board any authority to adopt an IRP which has not been filed and approved by the Commission.

34. Further constraining PREPA's discretion in the development of an IRP is the fact that the Legislative Assembly bestowed on the Commission the responsibility for ensuring that any IRP is in "full compliance with the public policy on energy of the Island" and made the Commission the entity responsible for supervis[ing] and oversee[ing] compliance" with the approved IRP.³⁴

²⁹ See Caribe Comms., Inc. v. P.R.T. Co., 157 D.P.R. 203, 211 (2002).

³⁰ González y otros v. Adm. De Corrección, 175 D.P.R. 598 (2009); See also DACO v. Farmacia San Martín, 175 D.P.R. 198 (2009).

³¹ See González, *supra*. See also, Plaza las Américas v. N&H, 166 D.P.R. 631 (2005).

³² 22 L.P.R.A. §196.

³³ 22 L.P.R.A. §196c.

³⁴ 22 L.P.R.A. §1054v.

35. PREPA is not authorized by Act 83 to pursue an IRP if that IRP is being developed for any other purpose than to be submitted for Commission consideration. The development by PREPA of an IRP, and any other policy or strategic plan related to its resource planning, must be made within the powers delegated to PREPA by the Legislative Assembly.³⁵ Act 83 specifically requires PREPA to develop its IRP in compliance with the parameters established by the Commission and Section 6B. These parameters unequivocally include the requirement that any IRP or subsequent amendment be filed before the Commission for approval. The development of an IRP for purposes other than filing such IRP for Commission approval is contrary to Act 83 and Act 57-2014 and outside of the scope of authority delegated to PREPA by Act 83.

36. PREPA's own statements in its Motion for Reconsideration hint at the irreconcilable nature of its so called "non-statutory" IRP. PREPA argues that it "is having a non-statutory IRP done for planning and analysis purposes"³⁶ Yet, that is exactly what any IRP, "statutory" or otherwise, is. An IRP is the legal document which identifies PREPA's resource needs and the document PREPA is legally required to follow as it undertakes capital and maintenance investments or takes any other actions related to its infrastructure and energy resources.

37. Therefore, the difference between a "statutory" and a "non-statutory" IRP is mere fiction. There is only the IRP mandated by Act 83. Accordingly, if PREPA is to pursue the development of an IRP, then both Act 83 and Act 57-2014 require PREPA to file such IRP proposal for Commission review and approval before it can undertake any action based on the information contained therein.

VI. The requirement of filing an IRP with the Commission

38. Section 6B(h)(1) of Act 83 and Article 6.23 of Act 57-2014 require for an IRP to be reviewed every three years. Section 6B(h)(1), however, authorizes for a review of an IRP prior to the 3-year mandatory review when there are "substantial change[s] in the energy demand or group of resources."³⁷

39. In its Motion for Reconsideration PREPA argues that Act 83 grants PREPA "the authority to make [the] determination" as to whether to file or not an IRP prior to the 3-year mandatory review established by Act 83. PREPA argues, therefore, that it has sole authority

³⁵ See Section 6.3(h) of Act 57-2014, 22 L.P.R.A. §1054b, which authorizes the Commission to "[r]eview 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."

³⁶ PREPA's Motion for Reconsideration at pp. 3-4.

³⁷ 22 L.P.R.A. §196c.

to commence the review of an IRP prior to the 3-year mandatory review and to determine whether to file that IRP for Commission approval.³⁸

40. However, sub-section (d) of Article 6.23 of Act 57-2014 specially provides that the review of an IRP is to be “carried out” by the Commission. That is, once an IRP is approved, any review of that IRP is made pursuant to Commission directives or consistent with the procedures established by the Commission for the periodical review of PREPA’s IRP.

41. Sections 2.04 and 2.05 of Regulation 9021³⁹ set forth the requirements applicable to the development of an IRP by PREPA both under ordinary conditions—every 3-years—and advanced reviews due to substantial changes in demand or resources. In the case of advanced review, Regulation 9021 authorizes PREPA to pursue the review of an IRP prior to the 3-year mandatory review for a variety of reasons. However, that authority exists solely within the context of a review process conducted by the Commission.

42. PREPA may determine that a substantial change in demand or resource has occurred and, therefore, a review of an IRP is warranted. In such circumstance, PREPA need not seek prior Commission approval to commence the development of an updated IRP. However, the entire purpose of pursuing the development of an updated IRP is for that IRP to be filed for Commission review. PREPA is not authorized to pursue the development of an IRP for mere planning and analysis purposes and intend for that IRP, which has not been filed for Commission review or approved by the Commission, to influence and guide PREPA’s actions.

43. The review of an IRP must be tied to a specific statutory or regulatory purpose. Under Regulation 9021, PREPA may pursue the development of an IRP either to comply with the 3-year mandatory review requirement or because of a need to address a substantial change in demand or resources. Either way, the review of any IRP, or any modification to an existing IRP, developed by PREPA must comply with Act 83, Act 57-2014 and Regulation 9021. An IRP developed outside the provisions of Act 83, Act 57-2014 and Regulation 9021 is neither legally binding nor enforceable.

44. Furthermore, the Commission has the authority to order PREPA to file an IRP at any moment prior to the 3-year mandatory review. Section 2.05(B) of Regulation 9021 authorizes the Commission to “require PREPA to file an update, amendment or review to the approved IRP.”

45. The Commission’s IRP Resolution implemented Sections 6B(h) of Act 83, Article 6.23 of Act 57-2014 and Section 2.05 of Regulation 9021 by authorizing PREPA to pursue an advanced revision to the IRP. While the Commission agrees with PREPA that the

³⁸ PREPA’s Motion for Reconsideration at p. 3.

³⁹ Regulation on Integrated Resource Plan for the Puerto Rico Electric Power Authority.



IRP Resolution did not order PREPA to file an IRP,⁴⁰ it does not mean that the Commission may not do so at any moment in time.

46. Consequently, given PREPA's misunderstanding of the IRP review process established in Act 83 and Act 57-2014, the Commission will, immediately or soon after the issuance of this Resolution, publish an order directing PREPA to file an updated IRP.

VII. Conclusion

47. PREPA's Motion for Reconsideration correctly points out an inconsistency between the IRP Resolution and the AOGP Order. While the IRP Resolution authorized, but did not order, PREPA to file an updated IRP for Commission approval on or about October 2018, the AOGP Order incorrectly stated that the Commission had ordered PREPA to file an updated IRP.

48. Yet, PREPA's arguments in support of its Motion for Reconsideration raised significant concerns with regards to its legal authority in developing an IRP which warranted further discussion.

49. PREPA's distinction between "statutory" and "non-statutory" IRP as the basis for justifying that it may pursue a review of an IRP without the need to file such IRP for Commission approval is misguided and without legal basis.

50. Act 83 specifically authorizes PREPA to pursue the development of an IRP subject to the "parameters and requirements established by the Commission as provided in [Section 6B of Act 83]". Inasmuch as PREPA's authority to act is confined by the powers delegated to it through its enabling act, PREPA's contention that it can pursue the development of an IRP that is outside of the scope of Act 83 and Act 57-2014 is flawed.

51. PREPA further argues that Act 83 grants it the authority to determine if and when a revised IRP is filed with the Commission prior to the mandatory 3-year review. However, PREPA ignores the fact that Act 57-2014 instills on the Commission the responsibility for conducting the review of an IRP. It is the Commission, not PREPA, the entity responsible for establishing the rules and procedures that will guide the development, review, approval and enforcement of any PREPA IRP.

52. Under Regulation 9021, PREPA may pursue the development of an IRP, however it must file such IRP for Commission review. Failure to do so would render such IRP as null and void and any action taken by PREPA based on the conclusions of such IRP are equally null and void.

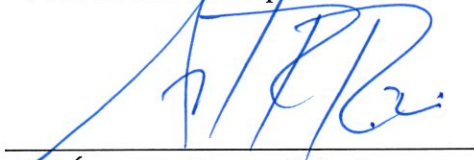
53. Because the authority to pursue the development of an IRP exists within the contexts of the review process conducted by the Commission, the Commission may require PREPA to file an updated IRP at any moment prior to the 3-year mandatory review.

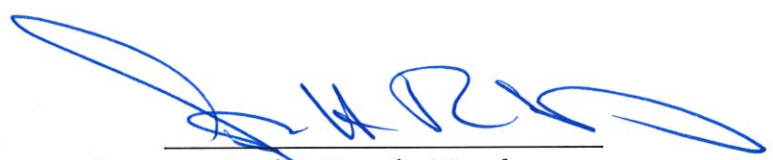
⁴⁰ See discussion in Part III of this Resolution.



54. 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 by the Commission's Clerk. Copy of a petition for review 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 4.02 of Act 38-2017⁴¹ and the rules and regulations of the Court of Appeals.

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 May 24, 2018 and on this date a copy of this Resolution was notified by electronic mail to the following: j-morales@aepr.com, n-vazquez@aepr.com, c-aquino@aepr.com, n-ayala@aepr.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, kbolanos@cnrd.com and lfortuno@steptoe.com. I also certify that today, May 24, 2018, I have proceeded with the filing of this Resolution issued by the Puerto Rico Energy Commission and I have sent a true and exact copy to the following:

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⁴¹ The Uniform Administrative Procedure Act of the Government of Puerto Rico.



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For the record, I sign this in San Juan, Puerto Rico, today, May 24, 2018.


Zugeily Colón del Valle
Interim Clerk