

**GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU**



IN RE: REQUEST FOR PROPOSALS FOR
CONVERSION OF SAN JUAN UNITS 5 & 6 TO
NATURAL GAS

CASE NO.: CEPR-AI-2018-0001

SUBJECT: Resolution on ICSE's Motion for
Reconsideration

RESOLUTION

I. Relevant Procedural Overview

On July 30, 2018, the Puerto Rico Electric Power Authority ("PREPA") issued a request for proposal for the supply of liquified natural gas (LNG) fuel in the North and the conversion of San Juan Units 5 and 6 to dual fuel units (diesel and LNG).¹ The Puerto Rico Energy Bureau (hereinafter the "Energy Bureau") was not made aware of the issuance of the RFP by PREPA.

On August 14, 2018, the Energy Bureau commenced the captioned case as an investigative procedure concerning the RFP process (the "Investigation").² As the investigative process progressed, PREPA submitted information in compliance with the Energy Bureau's requests. Once PREPA started complying with the requests of information of the Energy Bureau, the Investigation concluded, and the case was handled by the Energy Bureau as an evaluation of a request for proposals in accordance with Regulation 8815.³ Notwithstanding -and although not required by Regulation 8815- the Energy Bureau continued its evaluation of the RFP under the referenced case number. Thus, information concerning the status of the RFP's evaluation process was made available to the public.

¹ See RFP 81412, Request for Proposals for Fuel Supply in the North and Conversion of San Juan Units 5 and 6, dated July 30, 2018 (the "RFP"), included as part of PREPA's *Compliance Filing* in the instance case, dated August 16, 2018.

² Initially the subject matter of the instance case suggested that the Energy Bureau was conducting a *non-compliance* process pursuant to the *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings*, Regulation No. 8543 of December 18, 2014 ("Regulation 8543"). However, it is evident from the contents of the Resolution and Order dated August 14, 2018 -particularly from the specific orders included in said Resolution and Order- that the Energy Bureau had before its consideration an investigative process. See the specific orders included as part of the Resolution and Order dated August 14, 2018, Section III at page 3. The Energy Bureau was simply gathering information (investigating) to assess whether there was a non-compliance by PREPA. Note further, that in issuing the referenced Resolution and Order the Energy Bureau did not follow the formalities of a *non-compliance* process prescribed in Chapter IV of Regulation 8543.

³ *Energy Bureau and PREPA Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet*, Regulation No. 8815 of 2016 ("Regulation 8815").

At PREPA's request, and in accordance with the applicable statutes and regulations, the Energy Bureau granted confidential treatment to certain information submitted by PREPA as part of the Energy Bureau's RFP evaluation process.⁴ On November 9, 2018, the *Instituto de Competitividad y Sustentabilidad Económica de Puerto Rico* ("ICSE"), filed a motion requesting access to certain documents designated as confidential by the Energy Bureau through a Resolution and Order dated November 2, 2018.⁵

On November 28, 2018, the Energy Bureau issued a Resolution and Order reaffirming its decision to grant confidential treatment to the documents in question. On November 30, 2018, ICSE filed a *Motion for Reconsideration* ("ICSE's Reconsideration"), insisting in having access to the documents designated as confidential by the Energy Bureau through its Resolution and Order dated November 2, 2018. Through Resolution dated December 5, 2018 the Energy Bureau agreed to consider ICSE's Reconsideration.

II. Discussion and Analysis

A. The Evaluation and Approval of the RFP and the Proposed Contract by the Energy Bureau is a Non-Adjudicative Process

ICSE wrongly argues that the Energy Bureau "characterizes" Case No.: CEPR-AI-2018-0001 as a process to modify or amend PREPA's integrated resources plan.⁶ As we stated before: it is not.⁷ PREPA's IRP was approved by the Energy Bureau through a Resolution and Order that now is **final and firm**.⁸ The fact that the Energy Bureau continued evaluating

⁴ See generally Resolutions and Orders of the of the Energy Bureau in the instant case dated: September 11, 2018; September 24, 2018; November 2, 2018; December 18, 2018 and; January 16, 2019.

⁵ ICSE requested access to all the proposals and memoranda detailing the evaluation and decisions-making process of the RFP, more specifically, to the following documents: (1) Invitation to Bid Attachments - Agenda RFP, Procurement Guide (27 documents); (2) Proof of Public Notification (2 documents); (3) Cost Savings Analysis (1 document); (4) Six Bid Submittals and One No Bid (15 documents) except those documents identified as private :... propriety and confidential; (5) Questions, Answers and Agenda (21 documents); (6) Documents Evaluation Process (6 documents); (7) Designation Evaluation Committee (1 document); (8) Notification letters Phase 1 (6 documents); (9) Price Evaluation Analysis (1 document); (10) Board Resolution (1 document); (11) Certification of Procurement Compliance (1 document)..

⁶ See generally *Motion for Access to Confidential Documents* and *Motion for Reconsideration* filed by ICSE in the instant case on November 9, 2018 and November 30, 2018, respectively.

⁷ See Resolution and Order of the of the Energy Bureau in the instant case dated November 28, 2018 at page 1, ¶2 (*This case is an investigative process that is separate from other procedures currently under the consideration of the Energy Bureau.*)

⁸ See *Final Resolution and Order on the First Integrated Resources Plan of the Puerto Rico Electric Power Authority*, Case No. CEPR-AP-2015-002, dated September 26, 2016; *Resolution on the Verified Motion for Reconsideration of Puerto Rico Electric Power Authority*, Case No. CEPR-AP-2015-002, dated February 10, 2017 and; *Resolution*, Case No. CEPR-AP-2015-002, dated February 10, 2017 (the aforementioned resolutions and orders collectively referred to as "PREPA's IRP"). PREPA's IRP was not subject of judicial review.

PREPA's performance and implementation of PREPA's IRP under the same docket number (CEPR-AP-2015-002) does not bear any impact on the **finality** of the Energy Bureau's resolution approving PREPA's IRP. Note also, that on March 14, 2018, the Energy Bureau issued a Resolution and Order in which it determined that Hurricanes Irma and María may have caused "substantial changes in the demand and group of resources" which warranted a review of the IRP prior to the three year mandatory review.⁹ Thus, on May 29th, 2018, the Energy Bureau ordered PREPA to file an updated IRP no later than October 31st, 2018.¹⁰

The Energy Bureau recognizes that in its Resolution and Order dated November 2, 2018, the standard provision for reconsideration and judicial review was included. It further recognizes that its Resolution dated December 5, 2018, expressed that ICSE's Motion for Reconsideration will be considered in accordance to the provisions of Section 3.15 of Act 38-2017.¹¹ Notwithstanding the foregoing, after a thorough evaluation of this matter the Energy Bureau is convinced of the inapplicability of that procedural mechanism. As stated before, the Investigation as well as the Energy Bureau's determination to approve the RFP and the proposed contract were not issued within the context of adjudicative proceedings. Therefore, the reconsideration and judicial review are not available for such determinations.

We reaffirm that the instance case commenced as an investigative process pursuant to Regulation 8543. However, once PREPA submitted the documents requested by the Energy Bureau, the investigation ceased; and a process for the evaluation and approval of a request for proposals pursuant to Regulation 8815 followed. The fact that the Energy Bureau continues evaluating the RFP under the same docket number (CEPR-AI-2018-0001) did not change the character of the process under consideration, that is: a **non-adjudicative process** for the evaluation of a request for proposals to be issued by PREPA.

Furthermore, ICSE's suggestion that as an intervenor party in the PREPA's IRP process it must be recognized as such in this process is unwarranted. First, ICSE was an intervenor in a separate process that has already been completed and it is not under the consideration of the Energy Bureau.¹² Second, ICSE cannot even be admitted as an intervenor in this proceeding, since it is a non-adjudicative procedure. See Section 3.5 of Act 38-2017 (*Any person who has a legitimate interest in an **adjudicative proceeding** before an agency may submit a request in writing to be allowed to intervene or participate in said procedure*). That is, interventions are granted in the context of adjudicative proceedings. Since the Investigation nor the evaluation of the RFP are adjudicative proceedings, ICSE cannot be an intervenor.

⁹ See Resolution and Order, May 29, 2018, In Re: Integrated Resource Plan for Puerto Rico Electric Power Authority, Case No. CEPR-AP-2018-0001.

¹⁰ See Id.

¹¹ Act 38 of 2017, known as the Uniform Administrative Procedure for the Government of Puerto Rico, as amended ("Act 38-2017").

¹² See footnote #8, *ante*.

It is important to highlight, as explained above, that ICSE cannot be an intervening party in the Investigation or the RFP evaluation process, but, additionally, it did not even request intervention in said processes. Therefore, regardless of the nature of the process under consideration by the Energy Bureau, that is, investigative or non-compliance process, ICSE was never recognized as a party to them and, as such, it has nothing to claim.

Considering the above, ICSE's Reconsideration is dismissed since the Energy Bureau's resolution ordering its consideration was improvidently granted.

B. Confidentiality under Act 57-2014, Regulation 8815 and Regulation 8543

Act 57-2014, as amended, establishes several proceedings to protect information that is deemed privileged or confidential. As to that regard, it allows any person who is required to submit information to the Energy Bureau and believes that the information requested has a privilege or needs confidential protection, to request the Energy Bureau such treatment. Under the provisions of Act 57-2014, the Energy Bureau shall provide protection to privileged or confidential information after an evaluation of the information.¹³

To that effect, the Energy Bureau addresses the protection of privileged or confidential information in Regulation 8815 and Regulation 8543. Section 1.15 of Regulation 8543 allows a person that must submit information to the Energy Bureau to request the protection of the information that is privileged or confidential. After the proper evaluation by the Energy Bureau, if the protection is granted, the Energy Bureau and the party requesting the protection must abide to the dispositions of Article 6.15 of Act 57-2014 as well as those included in Regulations 8543 and 8515 to ensure the information remains privileged and/ or confidential. Moreover, Article 10.2 of Regulation 8815 establishes that during an RFP process, proprietary and trade secret information will be protected from disclosure, except as required by law or court order.¹⁴

It is important to note that, during an RFP evaluation process, the communications between the Energy Bureau and PREPA shall be maintained confidential while the administrative competitive procurement process is ongoing. See Article 4.2, Regulation 8815 (*[t]hese communications shall be maintained confidential while the administrative competitive procurement process is ongoing*). Moreover, a *Proponent* (participant in a request for proposals process), as defined in Regulation 8815, may request the confidential treatment for all or a portion of the information submitted as part of an RFP. PREPA's *Project Committee*¹⁵ has the discretion to grant such confidential treatment. See Article 4.6 of

¹³ See Act 57-2014, Article 6.15.

¹⁴ See Regulation 8815, Article 10.2.

Regulation 8815. Furthermore, PREPA may also request the Energy Bureau to grant confidential protection to information that is privileged or confidential belonging to PREPA or to a Proponent. For example, information protected as privileged or confidential includes but is not limited to costs and profitability information. See Article 7.1(d), Regulation 8815. It is well established that the protection of confidential or privileged information remains a duty of both PREPA and the Energy Bureau.

Although some of the information designated as confidential under an ongoing RFP process may be disclosed once the contract is executed, some information, particularly the one that has been granted a protection for being privileged, proprietary or trade secrets, must remain as such. See Article 10.2 of Regulation 8515. The confidential protection under those circumstances survives the conclusion of the RFP proceeding. Particularly, information that has been regarded as proprietary or privileged must remain as such and it is PREPA's obligation to maintain its confidentiality since the right to protect the privileged information belongs to the Proponent. See Article 10.2 of Regulation 8515.

After the conclusion of an RFP process, PREPA shall determine whether or not information and materials provided by a Proponent are confidential, according to Article 10.2 of Regulation 8815. Therefore, as established in both the legislation and the regulations applicable to the privileged or confidential information that is submitted to the Energy Bureau, both the Energy Bureau and PREPA have the obligation to preserve the confidentiality and privilege. Thus, it is not under the sole discretion of the Energy Bureau to withdraw the protection granted to a privileged or confidential information when previously has been demonstrated that the information deserves such protection.

As explained before, PREPA requested the Energy Bureau to classify and protect as confidential and privileged certain RFP documents based upon Act 80-2011¹⁶, Article 6.15 of Act 57-2014, and Regulation 8543. Since the current proceeding is a review of the RFP under Regulation 8815, those protections granted to confidential or privileged information under Regulation 8815 are also applicable.

The Energy Bureau hereby reaffirms the protection granted to the privileged and confidential information submitted by PREPA as part of the Investigation and the RFP evaluation process. This decision is not an impediment for ICSE to request the information from PREPA as holder and protector of the confidential and privileged information pursuant to Regulation 8815.

¹⁵ The *Project Committee* is defined in Regulation 8815 as:


the committee designated in accordance with Section 3.1 of [Regulation 8815] that shall receive and evaluate qualifications and/or Proposals received in the RFQ and/or the RFP process, negotiate with the highest ranking Proponent or Proponents in accordance with [Regulation 8815], as determined by the Project Committee in accordance with [Regulation 8815], and make recommendation for the selection, negotiation, approval and signing of a Contract.

Neither the members of the Energy Bureau nor their employees are part of the *Project Committee*.


¹⁶ Act 80-2011, *The Industrial and Trade Secret Protection Act of Puerto Rico* (hereinafter "Act 80-2011").

Although we resolved in Section II(A) that our consideration of ICSE's Reconsideration was improvidently granted, the foregoing discussion in this Section II(B) serves to reaffirm our prior determination denying ICSE's access to confidential and privileged information.


Be it notified and published.



Edison Avilés Deliz
Chair



José J. Palou Morales
Associate Commissioner



Ferdinand A. Ramos Soegaard
Associate Commissioner

CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on February 22, 2019. The Associate Commissioner Ángel R. Rivera de la Cruz issued a particular vote concurring in part and dissenting in part. I also certify that on this date a copy of this Resolution was notified by electronic mail to the following: agraitfe@agraitlawpr.com, n-vazquez@aepr.com, astrid.rodriguez@prepa.com, jorge.ruiz@prepa.com. I also certify that today, February 22, 2019, I have proceeded with the filing of the Resolution issued by the Puerto Rico Energy Bureau and I have sent a true and exact copy to the following:

Puerto Rico Electric Power Authority


Attn.: Nitza D. Vázquez Rodríguez
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**Instituto de Competitividad y Sostenibilidad
Económica de Puerto Rico**

Lcdo. Fernando E. Agrait

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For the record, I sign this in San Juan, Puerto Rico, today February 22, 2019.



Wanda I. Cordero Morales
Interim Clerk

GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU

IN RE: REQUEST FOR PROPOSAL FOR
CONVERSION OF SAN JUAN UNITS 5 AND 6
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CASE NO.: CEPR-AI-2018-0001

SUBJECT: Resolution on ICSE's Motion for
Reconsideration.

Associate Commissioner Ángel R. Rivera de la Cruz, concurring in part and dissenting in part

Today, the majority of the Puerto Rico Energy Bureau ("Energy Bureau") determined to dismiss the *Instituto de Competitividad y Sustentabilidad Económica de Puerto Rico's* ("ICSE") Motion for Reconsideration to access confidential information associated with the instant case ("Motion for Reconsideration").¹ Although I concur that ICSE doesn't have the right to access such information, I do not agree with the majority's reasoning and arguments in which they based their conclusions. Therefore, for the reasons expressed herein, I concur in part and dissent in part.

* * *

A. *Nature of the instant case and ICSE's petition*

On August 14, 2018, the Energy Bureau issued a Resolution and Order, initiating the instant case ("August 14 Order").² Through the August 14 Order, the Energy Bureau specifically started this case as a Non-Compliance Procedure due to PREPA's apparent non-compliance with certain provisions of the Energy Bureau's September 23, 2016 Final Resolution and Order³, in which it approved the Puerto Rico Electric Power Authority's ("PREPA") first Integrated Resource Plan ("Approved IRP").

In addition, as part of this proceeding the Energy Bureau evaluated PREPA's non-compliance with certain provisions of Regulation 8815.⁴ To that effect, the Energy Bureau evaluated whether PREPA complied with the provisions of Section 4.2 of Regulation 8815,

¹ *Motion for Reconsideration*, November 30, 2018.

² *See Resolution and Order*, Case No. CEPR-AI-2018-0001, August 14, 2018.

³ Final Resolution and Order on the First Integrated Resource Plan of the Puerto Rico Electric Power Authority, Case No. CEPR-AP-2015-0002, September 23, 2016.

⁴ Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet.

which states, among other things, that, prior to launching any procurement process (i.e. request for proposal "RFP"), PREPA will notify the proposed project to the Energy Bureau, stating its consistency with the IRP and compliance with applicable statutes and regulations.

Therefore, contrary to the majority's assertion that the instant case started as an investigation, such case was conducted as a Non-Compliance proceeding. Regulation 8543⁵ establishes the difference between a Non-Compliance proceeding and an Investigation. One of the major differences is that at the end of an Investigation the Energy Bureau must issue a Report of its findings⁶, whereas at the conclusion of a Non-Compliance proceeding, the Energy Bureau may impose all the appropriate remedies, in accordance with the law⁷. Hence, as we will discuss below, a Non-Compliance proceeding before the Energy Bureau is an adjudicative matter.

The actions of the Energy Bureau, as detailed below, regarding the disposition of the instant case are more consistent with the conclusion of a Non-Compliance proceeding than with the conclusion of an Investigation. First of all, the Energy Bureau did not issue a Report at any stage of this proceeding, as it is required at the conclusion of an Investigation. Rather, the Energy Bureau issued a set of orders and directives to PREPA to ensure PREPA's compliance with the provisions of Regulation 8815.

Regarding PREPA's possible non-compliance with Article 4.2 of Regulation 8815, the majority of the Energy Bureau determined in its October 4, 2018 Resolution and Order that "[a]lthough PREPA did not timely submit the RFP to the Energy Bureau, as required under Regulation 8815, we understand that the objectives of Act 57-2014 and Regulation 8815 can still be met even though the initial deviation from the proper course of action, since no contract has been executed, PREPA has effectively responded to the orders of the Energy Bureau regarding the instant case and the issuance of the RFP does not constitute a commitment to award a contract."⁸

Moreover, regarding the effect the aforementioned conversion may have in the Approved IRP, the Energy Bureau determined that "[c]onsidering the conditions of the electric system in the aftermath of Hurricanes Irma and Maria and the critical role the electric service in the economic development of the Island, it is reasonable that until the new IRP is approved, certain degree of flexibility may be exercised by the Energy Bureau regarding certain beneficial initiatives while simultaneously seeking its sustainable development in the long term."⁹ Finally, the majority of the Energy Bureau stated in its

⁵ Regulation 8543, *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings*,

⁶ See Section 15.07, Regulation 8543.

⁷ See Section 14.06, Regulation 8543.

⁸ Resolution and Order, Case No. CEPR-AI-2018-0001, October 4, 2018, p. 9. Citations omitted.

⁹ *Id.*, pp. 5 – 6.

January 29, 2019 Resolution and Order that it “reiterates that conversion of San Juan Units 5 and 6 does not constitute a significant modification to the Approved IRP which entails its amendment.”¹⁰

It is important to note that, on both occasions I disagreed with the majority of the Energy Bureau.¹¹ I still believe that the conversion of San Juan Units 5 and 6 is a modification of the Approved IRP, and as such, the awarded contract is inconsistent with such Approved IRP. However, as an Associate Commissioner of the Puerto Rico Energy Bureau it is my duty to apply all laws and regulations, including the Energy Bureau’s standing resolutions and orders, to the controversies under our consideration.

Through the Energy Bureau’s orders of October 4, 2018 and January 29, 2019 in the instant case, the majority of the Energy Bureau determined to continue the Request for Proposal (“RFP”) process regarding the conversion of San Juan Units 5 and 6, and to approve the proposed contract, respectively.¹² Moreover, as stated before, the majority of the Energy Bureau determined that the conversion of San Juan Units 5 and 6 does not represent a significant modification to the Approved IRP. Although I disagree with these determinations, I must apply them to the controversy surrounding ICSE’s request for reconsideration, since the orders of October 4, 2018 and of January 29, 2019 are Energy Bureau’s standing orders.

First of all, as the Energy Bureau stated before, ICSE is not an intervenor in the instant case.¹³ As such, it is not entitled to access the instant docket’s confidential information. Moreover, starting from the premise that the conversion of San Juan Units 5 and 6 is not a significant modification to the Approved IRP, ICSE’s argument that its intervenor status in the IRP approval process (Case No. CEPR-AP-2015-0002) grants it the right to access the instant docket’s confidential information lacks merit.

Finally, I concur with the analysis presented in Section II.B. of today’s Resolution regarding confidentiality under Act 57-2014, Regulation 8815 and Regulation 8543.¹⁴ To

¹⁰ Resolution and Order, Case No. CEPR-AI-2018-0001, January 29, 2019, p. 6.

¹¹ See in general, Resolution and Order, Case No. CEPR-AI-2018-0001, of October 4, 2018 and of January 29, 2019, Commissioner Angel R. Rivera de la Cruz, dissenting.

¹² In today’s Resolution, the majority of the Energy Bureau determined that, after PREPA submitted the requested information, the instant case became an evaluation and approval process for the RFP, in accordance with Regulation 8815. That effect, on the October 4, 2018 Resolution and Order, the Energy Bureau established a set of conditions or corrective actions that PREPA must meet in order to continue the RFP process. See *Resolution and Order*, Case No. CEPR-AI-2018-0001, October 4, 2018, pp. 9 – 10. I agree with the majority of the Energy Bureau that with these actions, the Energy Bureau expanded the scope of the instant case to the RFP approval process established in Regulation 8815.

¹³ Resolution and Order, Case No. CEPR-AI-2018-0001, November 28, 2018. “ICSE-PR has not requested, nor the Energy Bureau have granted, intervenor status to ICSE-PR in the instant case.”

¹⁴ Although I agree with the analysis regarding confidentiality, I do not concur with the majority’s conclusion that Energy Bureau’s resolution to consider ICSE’s request for reconsideration was improvidently granted.

that effect, it is important to note that, as determined in today's Resolution, the RFP approval process established in Regulation 8815 has certain restrictions regarding confidential information.¹⁵ Therefore, even if ICSE was an intervenor in the instant case, it might not qualify to access the docket's confidential information.

B. ICSE's Due Process

In today's Resolution, the majority of the Energy Bureau expressed that, although it included the standard provision for reconsideration and judicial review in its Resolution and Order of November 2, 2018, and that it determined in its Resolution of December 5, 2018 to consider ICSE's Motion for Reconsideration, "after a thorough evaluation of this matter the Energy Bureau is convinced of the inapplicability of that procedural mechanism."¹⁶ For this reason, the majority of the Energy Bureau dismissed ICSE's Reconsideration, without warning ICSE of its right to file a petition for review before the Court of Appeals. The majority of the Energy Bureau based its determination in the fact that the Resolution of December 5, 2018 was improvidently granted, since the instant proceeding is not an adjudicative proceeding.¹⁷ I disagree.

Section 1.3(b) of Act 38-2017¹⁸ defines "adjudication" as a ruling in which the agency determines the **rights, obligations or privileges afforded to a party**. Moreover, Section 1.3(g) of Act 38-2017 defines "order or resolution" as any agency's **decision or action that particularly adjudicates rights, obligations or privileges to a specific party or parties**.

Section 3.14 of Act 38-2017, states that an agency must advise the parties on the right to request reconsideration before it or to file a petition for administrative review before the Court of Appeals, in all its final resolution or orders. On the other hand, Section 4.2 of Act 38-2017 establishes that any party adversely affected by an agency's final resolution or order, may file a petition for review before the Court of Appeals, after such party has exhausted all remedies provided by the agency.

To that effect, the Puerto Rico Supreme Court has ruled that proper notification is an integral part of the affected party's constitutional right to due process.¹⁹ Regarding the right to proper notification, the Puerto Rico Supreme Court has also established that it is important to include the party's right for judicial review, the term to exercise such right and the date from which such term will start.²⁰

¹⁵ See for example Articles 4.2 and 10.2 of Regulation 8815.

¹⁶ Resolution, Case No. CEPR-AI-2018-0001, February 22, 2019, p. 3.

¹⁷ *Id.*, pp. 3 – 4.

¹⁸ Known as *The Uniform Administrative Procedure for the Government of Puerto Rico Act*, as amended.

¹⁹ See *Maldonado v. Junta de Planificación*, 171 DPR 46, 57 (2007), *Suárez Cáceres v. Comisión Estatal de Elecciones*, 176 DPR 31, 69 (2009).

²⁰ *IM Winner, Inc. v. Junta de Subastas de Guayanilla*, 151 DPR 30, 35-36 (2000).



Therefore, based on the aforementioned definitions, an order is reviewable not only if it is the final order in an adversarial adjudicative process, but also if **it adjudicates a party's rights, privileges or obligations.**²¹ As such, the agency must guarantee the party's right to due process in all such administrative actions, including the right to proper notification as explained above. Finally, no agency can immunize its actions and adjudications with merely identify a procedure as an investigation.²²

In the instant case, the Energy Bureau is not granting ICSE access to the confidential documents contained in the case's docket. This action in itself is adjudicatory in nature, since it determines ICSE's rights to access such documents. Therefore, even if I agreed that the RFP evaluation process under Regulation 8815 is a non-adjudicative procedure, which I do not, the administrative action regarding ICSE's petition to access the referenced confidential documents is an adjudicative action. As such, the Energy Bureau must guarantee ICSE's constitutional right to due process.

Merely dismissing ICSE's Motion for Reconsideration without warning it of its right to file a petition for review before the Court of Appeals, violates ICSE's right to due process. Specifically, ICSE's right to proper notification.

For all the reasons expressed herein, I would have **denied** ICSE's Motion for Reconsideration and would have warned ICSE of its right to file a petition for review before the Court of Appeals.

Ángel R. Rivera de la Cruz
Associate Commissioner

In San Juan, Puerto Rico, on February 22, 2019.

²¹ See *AAA v. UIA*, 2018 TSPR 146, p. 11, "[I]n order for an administrative determination to be final: 'f]irst, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, **the action must be one by which rights or obligations have been determined**, or from which legal consequences will flow.'" (Citing *USACE v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). Quotation marks in the original, translation and emphasis provided.)

²² *ARPe v. Coordinadora Unitaria de Trabajadores del Estado*, 165 DPR 850, 871-872 (2005).