

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

NEPR
Received:
Oct 16, 2019
4:48 PM

IN RE: PUERTO RICO ELECTRIC
POWER AUTHORITY INTEGRATED
RESOURCE PLAN

CASE NO. CEPR-AP-2018-0001

SUBJECT: MOTION
CONCERNING PREPA'S SECRET
RFPs

Joint Motion From EDF and Local Environmental Organizations Concerning
PREPA's Secret Requests For Proposals

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW, EDF and Local Environmental Organizations,¹ by and through their legal counsel, to respectfully set forth and pray:

1. On several occasions since the beginning of this IRP proceeding, PREPA has violated Law 83 of May 2, 1941, Section 6B, Subsection (a)(iii) and Regulation 8815 by secretly issuing a Request for Proposals ("RFP") without obtaining prior Energy Bureau approval (or even notifying the Energy Bureau). These secret RFPs also violate the legislative intent behind Law 120-2018.² These secret RFPs failed to follow all of Regulation 8815's public notice requirements, and therefore fail to encourage participation of the public, and especially local workers and companies. PREPA's practice of issuing secret RFPs also violates the Integrated Resource Plan's intent to avoid a fragmented approach to

¹ Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc. - Enlace Latino de Acción Climática, Comité Yabucoño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club and its Puerto Rico chapter, Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., Campamento Contra las Cenizas en Peñuelas, Inc., and CAMBIO Puerto Rico

² If the Public Private Partnership Authority was involved in these RFPs: Section 6(d)(ii) of Law 120-2018 specifically states that the Partnership Committee must have the advice of the Bureau before even considering exempting PREPA Transactions from Act 83 Section 6B.

resource analysis and acquisition. Regulation 8815 allows PREPA to cancel RFPs at any point.

2. Local Environmental Organizations therefore ask the Energy Bureau to:
 - a. Issue a Public Notice that any RFP issued by PREPA, without following each and every requirement of Regulation 8815 and Law 83, is null and void.
 - b. Order PREPA to cancel any current RFP processes that did not follow the requirements of Regulation 8815 and Law 83.
3. Last year, PREPA secretly issued a Request for Proposals to convert San Juan units 5 & 6 to gas-fired units.³ This summer, PREPA secretly issued a Request for Proposals for Mobile Generating Units to be installed at Yabucoa and Palo Seco.⁴ We note that the order in which PREPA has issued RFPs for specific resources and/or technology types is a very good indication of the order of importance in which PREPA views those technologies. By issuing these secret RFPs, PREPA has usurped the Bureau's right to decide the relative importance of these technologies through the Integrated Resource Plan process.
4. On both occasions, after learning of the RFPs, the Bureau issued orders noting that "PREPA failed to inform the Energy Bureau of the issuance of the RFP, as required by Regulation 8815." This understates PREPA's deliberate violations of Law 83 and Regulation 8815. Regulation 8815 sets forth a rigorous procedure, detailed below, intended to ensure that each RFP is a good use of Puerto Ricans' ratepayer dollars, that the Project complies with the Integrated Resource Plan, and that local contractors are favored to carry out this ratepayer-funded work. Law 120-2018 reiterates the need for PREPA to ensure that these RFPs are carried out "with financial and legal conditions that are reasonable for the People of Puerto Rico". The practice of issuing secret RFPs without any involvement by the Energy Bureau or stakeholders is plainly illegal and unreasonable, and therefore violates the legislative intent of Law 120-2018.

PREPA failed to provide adequate public notice of the secret RFPs, or sufficiently examine the qualifications of companies that responded to the secret RFPs.

5. PREPA failed to provide public notice of the secretly issued RFPs on the Energy Bureau website as required. Regulation 8815, Section 4.4. Local workers, suppliers, contractors, and investors, diligently watching that site for RFPs, would not have received notice of the RFP, as intended by Law 83 and

³ That illegal RFP is the subject of Energy Bureau Case CEPR-AI-2018-0001.

^e That illegal RFP is the subject of Energy Bureau Case NEPR-2019-0001. Following this RFP, on May 20, 2019, PREPA signed a contract to purchase three 22-MW mobile units for \$58M.

Regulation 8815. The failure to provide adequate public notice violates Puerto Rico policy to encourage the participation of local entities. Regulation 8815 Section 4.5(m). The failure to provide adequate public notice is the first reason to order cancellation of the secret RFPs.

6. Going forward, the Energy Bureau should require PREPA to follow the public notice requirements, and also to issue a Request For Qualifications along with the RFP, as encouraged by Regulation 8815 part 4.3. The Energy Bureau should require that any future RFPs include a Request for Qualifications with an examination of any potential conflict of interest as detailed in Regulation 8815 Section 4.13: “Communications by Proponents with the Authority that compromise the integrity of the RFP process shall not be allowed and shall result in disqualifications of such Proponents from the RFP process.” PREPA must also ensure “complete and total separation of interests between those consultants who make recommendations to PREPA and those businesses who would benefit from the recommendations so as to avoid even the appearance of a conflict.”⁵ When a single entity is on both sides of that line, then PREPA’s recommendations begin to “blur the line between public interest and [that entity’s] interests.”⁶
7. The Energy Bureau should also require PREPA to hire an independent party to conduct these Requests For Proposals, and determine the bid that is most favorable to the public interest. When awarding a contract, that independent party should examine three questions:
 - a) Did the bid result from a competitive solicitation or a competitive negotiation that was equally open to all parties, on the island and elsewhere?
 - b) Are Proponents that have no prior communications with PREPA paying the same price as Proponents that have been in prior communication with PREPA?
 - c) Is the transaction is priced at a benchmark or index price that governs similar transactions?

These are critical questions to answer to ensure that contracts awarded by utilities serve the public interest. Bos. Edison Co. Re: Edgar Elec. Energy Co., 55 FERC ¶ 61382 (June 7, 1991). And using the independent party reduces the possibility that the utility will favor a consultant that it has communicated

⁵ Energy Bureau February 10, 2017 Resolution On The Verified Motion For Reconsideration Of The Puerto Rico Electric Power Authority, Case CEPR-AP-2015-0002, para. 117.

⁶ Id.

with before. FERC guidelines set forth four principles for RFPs, that would ensure that no party has any undue advantage:

- a) Transparency. “No party... should have an informational advantage in any part of the solicitation process. ...To compete effectively, bidders should have equal access to data relevant to the RFP. Any communication between RFP issuer and bidder that is not part of the bid should be made available to all other bidders.”⁷
- b) Definitions. “The product or products sought through the RFP should be defined in a manner that is clear and nondiscriminatory. ...An RFP should not be written to exclude products that can appropriately fill the issuing company's objectives.”⁸
- c) Evaluation: “...RFPs should clearly specify the price and nonprice criteria under which the bids are evaluated. Price criteria should specify the relative importance of each item as well as the discount rate to be used in the evaluation. Non-price criteria should also specify the relative importance of items such as firm transmission reservation requirements, including acceptable delivery points; credit evaluation criteria, such as the bond rating; the plant technology if more than one technology is listed in the RFP; plant performance requirements, such as availability; and the anticipated in-service date if the plant needs to be constructed.”⁹ 78
- d) Oversight: “Effective oversight of competitive solicitations can be accomplished by using an independent third party in the design, administration, and evaluation stages of the competitive solicitation process.”¹⁰

⁷ Ameren Energy Generating Co. & Union Elec. Co., d/b/a Amerenue, 108 FERC ¶ 61081 (July 29, 2004), para. 72

⁸ *Id.* paras. 76-77. See also Monongahela Power Co. Allegheny Energy Supply Co., LLC, 162 FERC ¶ 61015 (Jan. 12, 2018), paras. 73-77, rejecting an RFP for generation assets that improperly excluded bids for third-party owned assets.

⁹ Amerenue, *supra*, para. 78. See also Monogahela Power Co., *supra*, paras. 77-79, rejecting an RFP that failed to properly disclose scoring criteria upfront.

¹⁰ Amerenue, *supra*, par. 81

PREPA's illegal RFP issuances violate the procedures of Regulation 8815 designed to ensure compliance with the Integrated Resource Plan.

8. At the outset of any proposal for a new Project, PREPA must convene a Project Committee. Collectively, the members of the Project Committee must possess the specialized background necessary to understand the scope of the Project and the needs of PREPA, as detailed in the Integrated Resource Plan. Regulation 8815 Sections 3.1, 4.1.
9. Article 4 of Regulation 8815 explains that the Project Committee must maintain detailed minutes for each meeting, approve each proposed Project,¹¹ and present its recommendations on each Project to the PREPA Board in writing. The Project Committee must approve each proposed Project. The purpose of the Project Committee's meetings, recommendation, and approval is to ensure a well-designed Project that fits PREPA's needs, complies with the Integrated Resource Plan, and encourages participation of local entities.
10. PREPA has not provided the minutes from the Project Committee meetings to discuss the San Juan 5 & 6 Project, or the Mobile Units Project. PREPA has not provided the Project Committee recommendations on those Projects. At this point, PREPA has not provided evidence that the Authority even convened Project Committees for these Projects. PREPA's failure to properly vet these Projects through a Project Committee is the second reason to cancel the two illegal RFPs.
11. As detailed below in paras. 11-15, Law 83 and Regulation 8815 make it clear that Requests for Proposals require prior Energy Bureau approval before public issuance.
12. To initiate the Energy Bureau approval process, PREPA's Executive Director must submit a detailed recommendation to the Energy Bureau. Regulation 8815 Section 4.2.
13. Because IRP compliance is an integral part of the Energy Bureau's review, PREPA must submit "a detailed narrative, with specific examples, regarding how the proposed project and the terms of the Contract, as described in the proposed RFP and approved by the Board, complies with the [Integrated Resource Plan]." Regulation 8815 Section 4.2. The Legislature also intended that work on the electric system infrastructure "be performed in a planned and efficient manner". Regulation 8815 Section 5(e)(4). Actions taken on an *ad hoc* and haphazard manner, without consulting the Integrated Resource Plan, the Energy Bureau, or the public, cannot satisfy this requirement.

^e The Energy Bureau's August 7, 2019 Order in NEPR-IN-2019-0001 cited this requirement.

14. Once PREPA has submitted a recommendation meeting all requirements of Regulation 8815 Section 4.2, the Energy Bureau may propose modifications to the project.
15. After PREPA makes those modifications, the Energy Bureau may approve or reject the project.
16. The Energy Bureau's July 23, 2019 Order notes that PREPA must obtain the Energy Bureau's approval prior to executing a contract as a result of the RFP process. But this is insufficient to guarantee the reasonability of Puerto Rico's electric rates, or to oversee the quality of electric power services. As spelled out in Regulation 8815, the Energy Bureau must be involved from the very beginning, in order to ensure that the RFP is consistent with the Integrated Resource Plan. The current situation makes this requirement even more urgent, since the Energy Bureau is now considering a transformative Integrated Resource Plan whose success is key to Puerto Rico's future.
17. PREPA's refusal to obtain Energy Bureau approval (or even provide the Energy Bureau with notice) of the secret RFPs is the third reason to order cancellation of these RFPs.

The Energy Bureau has the authority, and indeed the obligation, to mandate cancellation of secret RFPs.

18. The Energy Bureau has not only the authority, but the duty to take "the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of the rates of Puerto Rico's electrical system" and "[o]versee the quality, efficiency, and reliability of the electric power services provided by any electric power company certified in Puerto Rico." Articles 6.3(c) and (d) of Act 57-2014. In this case, that authority and duty compel the Bureau to order PREPA to cancel secret RFPs, until the PREPA and the Bureau can diligently carry out all steps of Regulation 8815 that **precede** the public issuance of an RFP.
19. Regulation 8815 contemplates a procedure for cancelling an RFP process, if the RFP fails to meet the goals outlined here: "The Board upon recommendation of the Executive Director and the Project Committee [if one exists] may cancel an RFP process at any time." 4.12.
20. Since the Projects were not properly vetted by a Project Committee and the Energy Bureau, there may well be serious flaws that impact the capacity, reliability, safety, efficiency, and reasonability of rates of the island's electrical system. By violating Law 83 and Regulation 8815, PREPA leaves itself

vulnerable to an argument from losing bidder that an RFP process without prior Energy Bureau approval was illegal from the beginning and the contract awarded at the end of that process is void and unenforceable.

WHEREFORE, Local Environmental Organizations request that the Energy Bureau:

- a. Issue a Public Notice that any RFP issued by PREPA, specifically including the Request for Proposals for Mobile Generating Units to be installed at Yabucoa and Palo Seco without following each and every requirement of Regulation 8815 and Law 83, is null and void.
- b. Issue a Public Notice that any contract awarded as a result of such RFPs is null and void.
- c. Order PREPA to cancel any current RFP processes that did not follow the requirements of Regulation 8815 and Law 83.
- d. Any other relief that the Bureau deems just and reasonable.

Respectfully submitted,

/s/ Raghu Murthy

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/s/ Agustín F. Carbó Lugo

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