

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

NEPR
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IN RE: PUERTO RICO ELECTRIC
POWER AUTHORITY INTEGRATED
RESOURCE PLAN

CASE NO. CEPR-AP-2018-0001

SUBJECT: MOTION TO COMPEL
DISCOVERY RESPONSES BY AES-
PR LLC

MOTION TO COMPEL COMPLETE DISCOVERY RESPONSES BY AES-PR

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

1. On January 10th, AES-PR provided responses to Local Environmental Organizations' Request Of Information.
2. LEO's ROI was filed in accordance with Paragraph II(D) of the Energy Bureau's August 21, 2019 Resolution and Order, stating that "The parties will have the opportunity to conduct discovery with regards to the Intervenor's Pre-Filed Testimony, pursuant to the provisions of Regulation No. 8543."
3. On January 23rd, Local Environmental Organizations sent an email request to AES-PR counsel, seeking information and documents necessary to provide a complete response to LEO's ROIs.
4. To date, AES-PR has not responded to LEOs' email request.
5. As a general objection, AES has not provided relevant documents. LEO's ROI included instructions requiring these documents:

4. These discovery requests are to be answered with reference to all information in your possession, custody or control or reasonably available to you. These discovery requests are intended to include requests for information, which is physically within your possession, custody or control as well as in the possession, custody or control of your agents, attorneys, or other third parties from which such documents may be obtained.

These instructions comport with the Puerto Rico Supreme Court holding that the discovery of evidence requires that documents and objects in possession of a party that are relevant to the resolution of a dispute be available to the other party to eliminate surprises, issues raised are simplified and the procedures are more efficient. García Rivera et al. v. Enriquez, 153 D.P.R. 323 (2001). The high court has established that the purposes of the rules for discovery of evidence are to: (1) specify the issues in dispute; (2) obtain evidence to be used in the trial; (3) facilitate the search for the truth, and (4) perpetuate evidence. Rivera v. Bco. Popular, 152 D.P.R. 140 (2000).

6. LEOs also note a general objection to AES' refusal to acknowledge a continuing duty to supplement its responses. PREB's August 21st Order, para. (A)(6), requires that all answers be true and correct. If a change of circumstances makes the original answer untrue or incomplete, the answering party has an obligation to update the answer. For that reason, PREB's own ROIs include a notice that answering parties "shall have a continuing duty to update, correct or amend its answers and notify the [questioning party] of any additional

information obtained after a response to any requirement provided herein is given.”¹

7. Following below are LEO’s specific objections to AES-PR’s responses.

¹ PREB 10th Requirement of Information to PREPA, Instruction 8.

8. AES' response to LEO ROI 18 failed to include the source documents.

Request of Information: What is the volume of Agremax currently at the AES plant site?

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states that as of December 31, 2019, AES-PR had an inventory of approximately 357,000 short tons of Agremax.

LEOs' Argument That The Response Is Incomplete: AES must provide the source document for the assertion of an inventory of approximately 357,000 short tons of Agremax as of December 31, 2019. The volume of Agremax at the AES site is relevant to this proceeding because of the environmental and health effects from Agremax, which PREB must consider under Law 17-2019 Section 1.09(H)(3). The volume of Agremax is also relevant insofar as it affects the ability of AES-PR to handle and dispose of waste from coal burning, and ultimately to continue operating its power plant, especially under the recently-passed PS 1221 concerning coal ash handling.

The concept of relevance of the evidence in the discovery rules is broader than the criterion in relation to the admissibility of evidence. Ades v. Zalman, 115 D.P.R. 514 (1984); Rivera Alejandro v. Algarín, 112 D.P.R. 830 (1982). For purposes of discovery it is enough that there is a reasonable possibility of the relationship of the discovery requested with the matter in dispute. Medina v. M. S. & D. Química P.R., Inc., 135 D.P.R. 716 (1994). The discovery of evidence in civil cases must be broad and liberal. Ades v. Zalman, 115 D.P.R. 514 (1984); Rivera Alejandro v. Algarín, 112 D.P.R. 830 (1982). Discovery rules must be interpreted liberally and require the cooperation and good faith of both parties. García Rivera et al. v. Enriquez, 153 D.P.R. 323 (2001).

9. AES' response to LEO ROI 22 failed to include the source documents.

Request of Information 22: Has AES conducted testing of dust, soil, groundwater or surface water on or near its plant site? If so, please provide all data.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states that groundwater monitoring is conducted pursuant to the CCR Rule. The data are provided in reports available on the AES-PR CCR public website including the following:

https://aespuertorico.com/wp-content/uploads/2018/02/2017_01_31_AES_Groundwater-Monitoring-and-Corrective-Action_Annual-Report.pdf

https://aespuertorico.com/wp-content/uploads/2019/03/180161r_AES_2018_Groundwater_Monitoring_Report.pdf

<https://aespuertorico.com/wp-content/uploads/2019/11/Corrective-Measures-Assessment-English.pdf>

Storm water is sampled in accordance with the US EPA Multisector General Permit and is publicly available through EPA's Enforcement and Compliance History Online website for NPDES Permit Limit and Discharge Monitoring Reports. <https://echo.epa.gov/tools/data-downloads/icis-mpdes-dmr-and-limit-data-set>. The data for AES-PR is available under External Permit Number PRR053093.

LEOs' Argument That The Response Is Incomplete: As detailed above, Puerto Rico law states that the environmental and health effects of power plants are relevant to the IRP. Therefore, AES must provide the NPDES permit, and the documents showing the actual volumes of water discharged.

10. AES' Response to LEO's ROI 27 failed to include the source documents.

Request Of Information 27: What does AES propose to do about the CCR and/or Agremax pile at its plant site? Please provide a timeline for proposed activities.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states that the government of Puerto Rico recently enacted PS 1221, which prohibits the disposal of CCRs, limits the beneficial uses of CCRs and imposes a limit of 180 days of storage of CCRs on the island of Puerto Rico. AES-PR has already reduced – and intends to continue to reduce – its Agremax inventory significantly by shipping (by barge) Agremax to the continental United States for disposal or beneficial use. The ability to deliver Agremax to locations over 1000 miles away is subject to the limited availability of Jones Act-qualified vessels, as well as interruption by weather and other disruptors. Subject to those limitations, AES-PR presently expects to reduce its on-site inventory to approximately 100,000 tons (or approximately 90 days of inventory) by the end of June 2020 by continuing to ship Agremax to the United States for disposal in subtitle D landfills or beneficial use. Some inventory will remain, because the Agremax needs adequate time to cure before delivery off-site for disposal or beneficial use.

LEOs' Argument That The Response Is Incomplete: For the reasons detailed above, the requested information is relevant to this proceeding. AES-PR must provide the source document for its plan to reduce its on-site inventory to approximately 100,000 tons (or approximately 90 days of inventory) by the end of June 2020.

11. AES incorrectly asserted that LEO's ROI 35 is irrelevant to this proceeding.

Request Of Information: Provide documents on AES fuel quality for the past five years.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding.

LEOs' Argument That The Response Is Incomplete: AES-PR refused to answer this question. Local Environmental Organizations contend that the requested information is relevant to this proceeding because AES fuel quality for the past five years, and the documentation supporting these figures, are critical to understanding the health impacts on communities surrounding the AES-PR power plant, and the communities near the inventories of AES coal ash and Agremax.

12. AES's Response to LEO ROI 36 failed to provide the source document.

Request of Information 36: Provide documents on AES' qualifying facility status under the Public Utility Regulatory Policy Act (PURPA).

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding. Notwithstanding and without waiving its objections, AES-PR states: The AES-PR facility is not currently a qualifying facility under PURPA.

LEOs' Argument That The Response Is Incomplete: AES' status under PURPA is a factor in determining the company's compliance with the PPOA, which is certainly relevant to this proceeding. Therefore, AES must provide the source documents that explain why AES is no longer a qualifying facility under PURPA

13. AES incorrectly asserted that LEO's ROI 38 is irrelevant to this proceeding.

Request Of Information. Provide all valuations, assessments of value or similar documents concerning the AES plant in AES' possession.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding and seeking privileged and confidential information.

LEOs' Argument That The Response Is Incomplete. AES-PR refused to answer this question. Local Environmental Organizations contend that the requested information is relevant to this proceeding because under the PPOA, valuation of the AES plant is relevant to determining the costs of contract termination.

14. AES' response to LEO ROI 39 fails to include the source documents.

Request for Information 39: Provide documents that indicate the price per kWh at which AES sells power to PREPA.

AES-PR Response: The price is set by the PPOA.

LEOs' Argument That The Response Is Incomplete. There is a formula in the AES PPOA that requires inputs to calculate the price. We request the documents that provide the information on the inputs.

15. AES refused to respond to LEO ROI 40.

Request For Information 40: State the volume of AES's fresh water use from the South Coast Aquifer or any other source for the past five years and for the current year specifying the volume from each source and providing water consumption documents such as franchises.

AES-PR Response: AES-PR objects to this request as not relevant to the issues before the PREB in this proceeding.

LEOs' Argument That The Response Is Incomplete: As detailed above, Puerto Rico law states that water consumption, environmental effects, and health effects from power plants are relevant to the IRP. Water consumption is a specifically required consideration of an IRP under article 1.9(3) (H) of Law 17-2019 (“...consumo de agua...”).

16. AES refused to answer LEO ROI 45.

Request Of Information 45: Describe the proposed fuel delivery method for the conversion of the AES plant, provide documents.

AES-PR Response: AES-PR objects to this request to the extent that it calls for production of confidential, privileged information. Notwithstanding and without waiving its objections, AES-PR states: See Response to No. 44, supra.

LEOs' Argument That The Response Is Incomplete: The response to ROI 44 does not explain whether AES has investigated any possible fuel delivery method. The fact of whether AES has conducted this research, and the feasibility of any possible fuel deliver methods that were researched, is clearly relevant to consideration in this IRP of converting AES to a gas-fired plant.

17. AES failed to provide source documents for LEO ROI 51.

Request Of Information 51. Indicate whether AES is planning to build any new power installations and/or storage infrastructure in Puerto Rico. If so, provide the relevant documentation.

AES-PR Response: AES-PR objects to this request to the extent that it seeks information and documents that are privileged and confidential. Notwithstanding and without waiving its objections, AES-PR states that it has no agreements with PREPA to build any new power installations or storage infrastructure in Puerto Rico, but AES-PR intends to compete for the opportunity to build new renewable energy power installations (such as utility level solar) and power storage infrastructure (such as battery projects), just as any other provider. If AES-PR and PREPA reach a new power purchase agreement that encompasses new power installations or storage facilities, as may be required by law, that final agreement would come before PREB for review, consistent with the Bureau's rulings. E.g., Resolution and Order, In Re: Request For Approval of Amended and Restated Power Purchase and Operating Agreement With EcoElectrica and Natural Gas Sale and Purchase Agreement With Naturgy, Case No. NEPR-AP-2019-0001 (Nov. 27, 2019). At that point, information could be disclosed, consistent with the limits on disclosure of and protections afforded under federal and Puerto Rico law. Id.

LEOs' Argument That The Response Is Incomplete: AES must provide the source documents for plans, if any, to build new power installations or storage infrastructure in Puerto Rico.

18. AES refused to answer LEO ROI 54.

54. Has AES made any offer, whether solicited or not, to purchase, lease, operate or otherwise manage any PREPA generation plant, the PREPA transmission and distribution (T&D) system and/or any PREPA functions or systems? If so, please provide the documentation.

AES-PR Response: AES-PR objects to this request as irrelevant to the issues before the PREB in this proceeding.

LEOs' Argument That The Response Is Incomplete: AES-PR refused to answer this question. Local Environmental Organizations contend that the requested information is relevant to this proceeding, because plants, transmission & distributed systems, or services offered by AES could satisfy the needs identified in the IRP.

19. AES incorrectly asserted that LEO's ROI 55 is irrelevant to this proceeding.

Request Of Information: Has Fluence, the joint venture created by AES and Siemens Industry participated in requests for proposals, requests for qualifications and/or bidding for electric system equipment or services in Puerto Rico? If so, please provide the documents.

AES-PR Response: AES-PR objects to this request as irrelevant to the issues before the PREB in this proceeding.

LEOs' Argument That The Response Is Incomplete: AES-PR refused to answer this question. Local Environmental Organizations contend that the requested information is relevant to this proceeding, because electric equipment and services offered by Fluence in response to an RFP could satisfy the needs identified in the IRP.

20. The LEO discovery requests not addressed by AES deal with the plant operational matters, requests for proposals for new generation and infrastructure, environmental issues, particularly use and contamination of water bodies for electric generation and emissions related to burning fossil fuels. All are relevant to the IRP, contribute to clarify the issues in dispute; obtain evidence to be used in the administrative process; facilitate the search for the truth and perpetuate evidence.
21. For these reasons, LEOs respectfully request a Bureau order compelling AES to provide the information and documents necessary to complete its responses to LEO's Request Of Information.

Respectfully submitted,

s/ Pedro Saadé

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CERTIFICATE OF SERVICE

We hereby certify that, on February 10, 2020, we have filed this Motion via the Energy Bureau's online filing system, and sent to the Puerto Rico Energy Bureau Clerk and legal counsel to: secretaria@energia.pr.gov; astrid.rodriguez@prepa.com; jorge.ruiz@prepa.com; n-vazquez@aepr.com; c-aquino@prepa.com and to the following persons:

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Respectfully submitted on this day February 10, 2020

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