

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



IN RE: REQUEST FOR PROPOSAL FOR
TEMPORARY EMERGENCY GENERATION

CASE NO.: NEPR-AP-2020-0001

SUBJECT: Resolution to Joint Petition for Intervention and Motion for Reconsideration and Opposition to Joint Petition for Intervention and Request for Reconsideration to be Stricken from the Record.

RESOLUTION

I. Procedural Overview

On February 12, 2020, the Puerto Rico Electric Power Authority ("PREPA") filed before the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") a document titled *Notification and Urgent Request for Approval of Request for Proposals for Temporary Emergency Generation* ("February 12 Filing"). The February 12 Filing included the following three (3) attachments: **Exhibit A:** PREPA'S Chief Executive Order Recommendation Letter, **Exhibit B:** Request for Proposals Temporary Emergency Generation February 12, 2020 Confidential Draft ("Proposed RFP"), and **Exhibit C:** Business Case Assessment, Temporary Emergency Generation Capacity ("Business Case Assessment").

The Proposed RFP, in turn, included the following documents: **Appendix A:** Sites for Temporary Generation, **Appendix B:** Low Sulfur Fuel (diesel) Specifications, **Appendix C:** GT Protection Requirements, **Appendix D:** Act 2-2018 Sworn Statement Anti-Corruption Code, **Appendix E:** PREPA Bid Bond form, **Exhibit A:** Contract Draft¹, and **Exhibit B:** PREPA's RFP Guide.² PREPA requested the Energy Bureau to treat the Proposed RFP and its attachments, as well as the Business Case as confidential documents.³

¹ The proposed contract is titled: *Lease and Operating Agreement relating to the emergency installation, lease and operation of dual-fuel fired, dispatchable power generation technology, located at [•], Puerto Rico as part of PREPA's Temporary Generation Program*. ("Proposed Dual-Fuel Units LOA").

² GUÍA PARA PROCESOS DE ADQUISICIONES DE BIENES Y SERVICIOS A TRAVÉS DE SOLICITUD DE PROPUESTAS (*Request for Proposals*), 2016.

³ See Memorandum of Law Requesting Confidential Treatment for Certain Exhibits Attached to the Notification and Urgent Request for Approval of Request for Proposals for Temporary Emergency Generation, February 12, 2020 ("February 12 Memorandum"). However, PREPA did not submit a redacted copy of the foregoing documents with the February 12 Memorandum as required by the August 31, 2016 Resolution on Case No. CEPR-MI-2016-0009, *In re: Policy on Management of Confidential Information in Procedures before the Commission*, at p. 2 ("August 31, 2016 Resolution").

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Through the Proposed RFP PREPA intends to acquire temporary capacity and energy to replace the loss of 820 MW of the Costa Sur Facility base load until the facility is repaired, replaced or other alternate solutions are adopted to deal with the Costa Sur Facility's current condition. According to PREPA, preliminary assessments indicate that the repair of the Costa Sur Facility, if feasible, would take no less than twelve (12) months.⁴ PREPA argues that the temporary emergency generation would provide additional generation capacity to cover such period, but more significantly, it would provide temporary generation capacity for the upcoming peak load season which starts on or about June 2020.⁵

The purpose of the Proposed RFP is to search for an entity, or multiple entities, that can enter into a lease, installation, operation and maintenance agreement (or agreements) with PREPA for dispatchable generation capacity of a total aggregate of up to 500 MW, for an initial period of twelve (12) months, with one potential extensions of six (6) months.⁶ The required generation shall be installed at various locations identified by PREPA in the Proposed RFP. PREPA petitioned the Energy Bureau to review and approve the Proposed RFP, pursuant to the provisions of Act 57-2014⁷ and Regulation 8815⁸.

On February 25, 2020, PREPA submitted a document titled *Supplement to Notification and Urgent Request for Approval of Request for Proposals for Temporary Emergency Generation* ("February 25 Filing"). The February 25 Filing included the following documents: **Exhibit A: Lease and Operating Agreement**⁹, **Exhibit B: Load Forecast vs Generation Availability, Generation Availability/Outage Schedule, Updated 24 Sep 2020**, **Exhibit C: Load Forecast vs Generation Availability, Generation Availability without Costa Sur, January to December 2020** (the "Forecast") and, **Exhibit D: Puerto Rico Power Authority Generation Directorate Costa Sur Recovery Project Rev. 2/21/2020** ("Generation Directorate Report"). PREPA also requested the Energy Bureau to treat Exhibits A and D of the February 25 Filing as confidential documents.¹⁰

⁴ See Proposed RFP at p. 5.

⁵ *Id.*

⁶ See Proposed RFP at p. 8.

⁷ *The Puerto Rico Energy Transformation and RELIEF Act*, as amended.

⁸ *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*, September 1, 2016 ("Regulation 8815").

⁹ *Lease and Operating Agreement relating to the emergency installation, lease and operation of [renewable energy] generation and battery energy storage technology, located at [•], Puerto Rico as part of PREPA's Temporary Generation Program* ("Proposed Renewable Energy Units LOA").

¹⁰ See *Memorandum of Law Requesting Confidential Treatment for Certain Exhibits Attached to the Supplement to Notification and Urgent Request for Approval of Request for Proposals for Temporary Emergency Generation*



On March 3, 2020, the Energy Bureau issued a Resolution and Order ("March 3 Resolution") through which it approved the Proposed RFP and granted PREPA's request for confidential designation and treatment with regard to the following documents: (a) the Proposed RFP and its attachments, (b) the Business Case Assessment, (c) the Proposed Renewable Energy Units LOA¹¹ and, (d) the Generation Directorate Report¹². The approval of the Proposed RFP is subject to PREPA's compliance with twelve (12) conditions.¹³ Condition #11 specifically states that five (5) days prior to the publication of the RFP, PREPA shall submit to the Energy Bureau an updated version of the Proposed RFP covering the modifications established through the March 3 Resolution.¹⁴

On March 5, 2020, in compliance with Condition #11 of the March 3 Resolution, PREPA submitted a document titled *Motion to Submit Revised Proposed RFP Documents* ("March 5 Filing"). The March 5 Filing included the following documents: **Exhibit A: Request for Proposals, RFP 102750, Temporary Emergency Generation, March 5, 2020 Confidential Draft** ("Revised Proposed RFP")¹⁵, **Exhibit B: Revised Proposed Dual-Fuel Units LOA**¹⁶, and **Exhibit C: Revised Proposed Renewable Energy Units LOA**.¹⁷ PREPA requested the Energy

("February 25 Memorandum"). Note, however, that PREPA did not submit a redacted copy of the foregoing documents, as required by the August 31, 2016 Resolution.

¹¹ Exhibit A of the February 25 Filing.

¹² Exhibit D of the February 25 Filing.

¹³ See March 3 Resolution at pp. 14-15.

¹⁴ Amongst others, the Energy Bureau ordered, that, before executing any LOA, but not later than April 1, 2020, PREPA shall provide to the Energy Bureau: (a) the final report assessing the damages of the Costa Sur Facility and (b) a detailed plan describing the proposed actions to be taken regarding the Costa Sur Facility, including, but not limited to, plans to repair or replace the Costa Sur Facility as well as any other alternate solution proposed by PREPA to substitute Costa Sur Facility base load generation. See March 3 Resolution at pp. 14-15. Moreover, beginning on March 31, 2020, PREPA shall submit to the Energy Bureau, on a monthly basis, a Progress and Status Report on PREPA's response to the damages to the Costa Sur Facility. See *Id.*

¹⁵ The Revised Proposed RFP does not include the attachments, except for the Revised Proposed Dual-Fuel Units LOA and the Revised Proposed Renewable Energy Units LOA, which were identified as Exhibits B and C, respectively, on the March 5 Filing.

¹⁶ *Lease and Operating Agreement relating to the emergency installation, lease and operation of dual-fuel fired, dispatchable power generation technology, located at [•], Puerto Rico as part of PREPA's Temporary Generation Program* ("Revised Proposed Dual-Fuel Units LOA").

¹⁷ *Lease and Operating Agreement relating to the emergency installation, lease and operation of [renewable energy] generation and battery energy storage technology, located at [•], Puerto Rico as part of PREPA's Temporary Generation Program* ("Revised Proposed Renewable Energy Units LOA").



Bureau to designate and treat the Revised Proposed RFP and its attachments as confidential documents.¹⁸

On March 25, 2020, Comité Diálogo Ambiental, Inc., El Puente de Williamburg, Inc., Enlace Latino de Acción Climática, Comité Yabucoeño 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., CAMBIO Puerto Rico, and Unión de Trabajadores de la Industria Eléctrica y Riego ("Petitioners") submitted a document titled *Joint Petition for Intervention and Motion for Reconsideration* ("Joint Petition").¹⁹ In general, Petitioners ask the Energy Bureau to: (a) recognize them as intervenors in the instant case; (b) reconsider the March 3 Resolution, (c) order PREPA to stay the RFP process until the Energy Bureau evaluates information propounded by the Petitioners and the public at large and, (d) order PREPA to make public the Revised Proposed RFP.

On March 31, 2020, PREPA filed a document titled *Motion to Inform* in which PREPA enclosed an Attachment titled *Costa Sur Damage Assessment and Repairs Project Status Report* dated March 31, 2020 ("March 31 Compliance Filing"). On April 1, 2020, PREPA filed a document titled *Motion to Submit Reports Assessing Damages* ("April 1 Compliance Filing"). The April 1 Compliance Filing contained certain reports regarding the inspections conducted at the Costa Sur Site.

On April 6, 2020, the Energy Bureau issued a Resolution and Order ("April 6 Resolution") through which it granted PREPA's request for confidential designation and treatment with regard to the following documents: the Revised Proposed RFP and its attachments, including the Revised Proposed Dual-Fuel Units LOA and the Revised Proposed Renewable Energy Units LOA. The Energy Bureau further ordered PREPA to submit a redacted copy of: (i) the Proposed RFP with Appendixes A, B, C, D, and E and their corresponding Exhibits; (ii) Exhibits A, B, and C of the February 25 Filing; and (iii) the Revised RFP with all Appendixes and their corresponding Exhibits and Exhibits B and C of the March 5 Filing. The Energy Bureau also ordered PREPA to upload copies of such redacted documents in a conspicuous area of its website for easy access by the general public.²⁰

In response to the Joint Petition, on April 6, 2020, PREPA filed a document titled *Opposition to Joint Petition for Intervention and Request for Reconsideration to be Stricken from the Record* ("PREPA's Response"). In general, PREPA argues that the Joint Petition should be denied because: (a) Petitioners' request for intervention is not contemplated in

¹⁸ See Memorandum of Law Requesting Confidential Treatment for Exhibits Attached to Motion to Submit Revised Proposed RFP Documents, March 5, 2020, at p. 2.

¹⁹ Attached to the Joint Petition is certification of Ingrid M. Vila Biaggi which is identified as Exhibit A.

²⁰ April 6 Resolution, at p. 5.



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Regulation 8815 given that the instant case is a non-adjudicative process, (b) pursuant to Regulation 8815 Petitioners do not have a right to reconsideration as a matter of law, and (c) Petitioners “request that the proceedings shall be halted would cause grave harm to PREPA and its customers given that peak electricity use is a couple of months away and the need for the additional generation to supply the demand is becoming more pressing”.²¹

On April 7, 2020, PREPA filed a document titled *Motion to Inform Additional Publication* (“April 7 Compliance Filing”). Through the April 7 Compliance Filing PREPA informed that on April 2, 2020, PREPA published a notice of the availability of the Revised RFP in its website.²² It also informed that additional notice of the availability of the Revised RFP was published on *El Nuevo Día* newspaper on April 7, 2020.²³

On April 8, 2020, the Energy Bureau issued a Resolution announcing that it will evaluate the Joint Petition and PREPA’s Response. The Energy Bureau informed that it will issue a determination as soon as practicable. On the same day, Petitioners filed a document titled *Reply to PREPA’s Opposition to Joint Petition for Intervention* (“Petitioners’ Reply”). The Petitioners’ Reply essentially reiterates the arguments of its Joint Petition, further insisting on having the opportunity to provide information to be considered by the Energy Bureau in the instant case.

On April 13, 2020, PREPA filed a document titled *Motion to Submit* (“April 13 Compliance Filing”), through which it submitted unredacted copies of the following documents: (a) the Proposed RFP with Appendixes A, B, C, D and E and their corresponding Exhibits, (b) Exhibits A, B and C of the February 25 Filing, (c) the Revised RFP with all their corresponding Exhibits as well as Exhibits B and C of the March 5 Filing and, (d) the final approved RFP as published.

On April 24, 2020, Petitioners filed a document titled *Petitioners’ Response to PREPA’s April 13 Motion to Submit* (“April 24 Response”). In the April 24 Response, Petitioners argue that the published RFP fails to comply with Regulation 8815 in terms of requirements to protect ratepayers from paying high prices and in terms of public disclosure.²⁴ Petitioners also state that recent statements from PREPA’s Executive Director “debunk PREPA’s claims that [the temporary] generation is urgently necessary.”²⁵ For these reasons, Petitioners

²¹ See PREPA’s Response at p. 2.

²² Attached to the April 7 Compliance Filing, identified as Exhibit I, is a snapshot of PREPA’s webpage titled *Oportunidades para Subastas*, dated April 7, 2020. According to PREPA, access to the documents of the Revised RFP is available through PREPA’s electronic sourcing platform known as *Power Advocate*.

²³ Attached to the April 7 Compliance Filing, identified as Exhibit II, is a copy of page 19 of *El Nuevo Día* (newspaper) dated April 7, 2020.

²⁴ April 24 Response, p. 6.

²⁵ *Id.* Petitioners expressed that “[i]n a *Nuevo Día* article published today and a publicly available webinar last week, PREPA’s Executive Director, Mr. José Ortiz, confirmed that the utility will be able to handle summer peak



reiterated their request for the Energy Bureau to halt the instant proceeding to allow for public input.²⁶

II. Discussion and Analysis

A. The Administrative Process Under Regulation 8815

Section II.B. of the March 3 Resolution includes a comprehensive discussion of the legal framework applicable to the evaluation of the Proposed RFP in accordance with Act 57-2014, Act 17-2019²⁷ and Regulation 8815 that we hereby incorporate as part of this Resolution.²⁸ We summarize below certain portions of the discussion that are relevant to the issues raised by Petitioners.

The Energy Bureau adopted Regulation 8815 to establish a procurement, evaluation, selection, negotiation and award process for contracting with third parties for the purchase of energy and for the procurement, evaluation, selection, negotiation and award process for the modernization and upgrade of PREPA's generation fleet and other PREPA resources.²⁹ Regulation 8815 requires that, before the issuance of an RFP, PREPA notifies the Energy Bureau, in writing, the recommendation regarding the proposed project, including all related documents that explain the project, and a detail narrative regarding how the proposed project and the terms of the proposed contract, as described in the proposed RFP, complies with the Integrated Resource Plan ("IRP"). After conducting an evaluation of the proposed RFP in accordance with Act 57-2014 and Regulation 8815, the Energy Bureau shall approve or disapprove it.³⁰

demand without these temporary generation units. Mr. Ortiz explained that peak demand is roughly down 9-10%, 300 MW below what would be expected in a typical year for this month." *Id.*, p. 5. Moreover, according to Petitioners, "[o]n new temporary generation, Mr. Ortiz stated that 'I feel very comfortable we're not going to need this necessarily.'" *Id.*

²⁶ *Id.*, p. 6.

²⁷ *The Puerto Rico Energy Public Policy Act* ("Act 17-2019").

²⁸ *See* March 3 Resolution at pp. 6-8.

²⁹ *See* Article 1.2 of Regulation No. 8815.

³⁰ In evaluating the instant case pursuant to Regulation 8815, the Energy Bureau is mindful that Section 6.32 of Act 57-2014, as amended by Act 17-2019, also provides a legal framework for the evaluation and approval of all agreements between electric power service companies, including independent power producers, prior to the execution thereof. We concluded, however, that Regulation 8815 is aligned the provisions of Article 6.32 regarding the requirement that the proposed RFP must be consistent with PREPA's IRP. *See* March 3 Resolution at pp. 7-11. We further emphasized that Regulation 8815 provides an expedited and thorough evaluation process for both, the proposed RFP and the negotiated contract resulting from the selection process, that is also aligned with Article 6.32 and the general energy public policy promulgated by Act 17-2019. *See Id.*



Should the Energy Bureau approve the proposed RFP and, upon completion of the negotiation of a contract, the Project Committee³¹ shall prepare a report ("RFP Report"), which shall include: (i) the reasons for signing the proposed contract, (ii) the reasons for selecting the chosen proponent, (iii) a description of the procedure followed, including comparisons between the chosen proponent and other proposals presented, (iv) an explanation of how the pricing terms included in the proposed contract comply with the parameters established in the RFP, as approved by the Energy Bureau, and (v) all other information pertinent to the RFP procedure and the evaluation conducted.³² The Project Committee shall present the RFP Report and the proposed contract to PREPA's Executive Director and Board of Directors.³³ The Board of Directors shall have the option to accept or reject the proposed contract.³⁴ If the Board of Directors rejects the proposed contract, additional negotiations with other proponents may ensue.³⁵

Once PREPA's Board of Directors approves a contract, PREPA shall submit to the Energy Bureau, for its evaluation, the RFP Report and the proposed contract, as well as the required profitability and pricing information analysis.³⁶ The Energy Bureau must review the proposed contract's terms and conditions to ensure compliance with those approved under the RFP and the contract form included as part of the RFP.³⁷ The Energy Bureau shall complete its review within thirty (30) days from the date of the receipt of any additional information timely requested by the Energy Bureau or the submittal date of the proposed contract and the RFP Report, as applicable.³⁸ The Energy Bureau may approve or reject the proposed contract.³⁹

If both, the Board of Directors and the Energy Bureau approve the proposed contract, PREPA may notify the final award to the selected proponent and, upon compliance with

³¹ As defined in Section 2.21 of Regulation 8815.

³² The RFP Report shall detail the evaluation by the Project Committee of each of the steps in the competitive solicitation process, including bidder qualification, bid evaluation, and selection of a final shortlist, as well as, its assessment regarding whether the process was conducted fairly and transparently. See Article 7.1(a) of Regulation 8815.

³³ See Article 7.1(b) of Regulation 8815.

³⁴ See *Id.*

³⁵ See Article 7.1(c) of Regulation 8815.

³⁶ *Id.* at Article 7.1(d).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*



certain procedural requirements, execute the contract.⁴⁰ Note that once approved by the Energy Bureau, and before its execution, the terms and conditions of an approved contract or project cannot be modified without prior approval from the Energy Bureau.⁴¹

According to the foregoing discussion, the Energy Bureau concludes that the administrative process conducted pursuant to Regulation 8815 for the evaluation and approval of an RFP, as well as the proposed contract, is envisioned and designed to have PREPA appearing as the sole and proper party before the Energy Bureau. That is, PREPA is the entity properly seeking and entitled to be admitted as a party in the proceeding under Regulation 8815. The evaluation and approval (or disapproval) of a proposed RFP and a proposed contract under Regulation 8815 do not involve an adjudication because the Energy Bureau is not facing a process to determine a party's rights, obligations or privileges.⁴² Thus, such procedure is an *ex parte* administrative process petitioned by PREPA, which does not encompass the type of adjudicative proceeding sanctioned by Chapter III of Act 38-2017.

The administrative process before the Energy Bureau under Regulation 8815 has two parts: (1) the evaluation and approval (or disapproval) of a proposed RFP and (2) the approval (or disapproval) of the proposed contract (or contracts) that results from the approved RFP process. In each instance, PREPA must submit, for Energy Bureau review and approval, the proposed RFP and the proposed contract that results from the RFP process. Therefore, the administrative process before the Energy Bureau under Regulation 8815 commences when PREPA submits the request for approval of a proposed RFP and concludes when either, the Energy Bureau rejects the proposed RFP pursuant to Section 4.2 of Regulation 8815 or, if the proposed RFP is approved, when the Energy Bureau approves or rejects the proposed contract (or contracts) pursuant to Article 7.1 of Regulation 8815.⁴³

B. Petitioners' Request for Intervention

Petitioners requested the Energy Bureau to evaluate the Joint Petition pursuant to the criteria established Sections 3.5 of Act 38-2017. Accordingly, in the Joint Petition, Petitioners generally allege that:

- a. Petitioners' interests will be adversely affected by the Energy Bureau's authorization of the Proposed RFP.


⁴⁰ See, in general, Articles 7.1 through 7.3 of Regulation 8815.

⁴¹ *Id.* at Article 7.2(c).

⁴² See Section 1.3(b) of Act 38-2017, as amended, known as the *Uniform Administrative Procedure Act of the Government of Puerto Rico* ("Act 38-2017"). [Adjudication means the pronouncement by which an agency determines the rights, obligations or privileges that correspond to a party].

⁴³ See, in general, Articles 7.1-7.2 of Regulation 8815. Note however, that after the notice of the award of the contract, and, at any time before the contract is signed, the Board of Directors may cancel the award of the contract, provided that the Energy Bureau approves such cancellation.



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- b. There are no other legal means for the Petitioners to adequately protect their interests.
 - c. The Petitioners' interests are not already adequately represented by the parties to this proceeding.
 - d. The Petitioners' participation is reasonably likely to help prepare a more complete record in this proceeding.
 - e. The Petitioners' participation will not excessively extend or delay the proceeding.
 - f. The Petitioners represent other groups or entities in the community.
 - g. The Petitioners can contribute information, expertise, specialized knowledge and technical advice which is otherwise not available in the procedure.

To support the description of the nature of its interest in this proceeding, Petitioners allege that they have several "legitimate environmental, social, and economic interests" in the resources to be procured through the Proposed RFP. Specifically, Petitioners allege: (a) that Petitioners and their members have a significant interest in ensuring that PREPA provides safe, affordable, and disaster-resilient power to the people of Puerto Rico in compliance with the Act 57-2014 and Act 17-2019, (b) many of Petitioners' members "likely live and work close to the proposed fossil fuel plants and infrastructure" and that these members "will be exposed to contaminants from fossil fuel combustion", and (c) that Petitioners have an interest in the wider impacts on emissions of disaster-intensifying greenhouse gases and the pollution of Puerto Rico's air, soil, and water.⁴⁴ In the Joint Petition, Petitioners also discussed other requirements for the intervention prescribed by Section 3.5 of Act 38-2017.⁴⁵

Petitioners also allege in the Joint Petition that: (a) PREPA has ignored expert opinions that the Costa Sur plant "can be back online far sooner than PREPA claims"; (b) PREPA has not provided adequate information on the timing or costs of repairing Costa Sur, which could eliminate the need for temporary emergency generation contemplated in the Proposed RFP; (c) PREPA has not provided public justification for generation sought through the Proposed RFP; (d) the Proposed RFP appears to be biased against renewable generation and distributed generation and; (e) PREPA has not provided adequate information about the impact of the Proposed RFP on ratepayers.

As we stated before, the instant proceeding is not an adjudicative process. Moreover, as previously discussed, the administrative process before the Energy Bureau under Regulation 8815 has two parts: (1) evaluation of the proposed RFP and (2) evaluation of the proposed contracts that result from the RFP process. The Energy Bureau concluded the first part on March 3, 2020 when it issued the March 3 Resolution to conditionally approve the Proposed RFP, subject to meeting certain requirements. The second part of the proceeding will commence once PREPA submits, for the Energy Bureau's

⁴⁴ See Joint Petition at pp. 33-34.

⁴⁵ See Joint Petition at pp. 28-38.



evaluation, the proposed contracts that resulted from the RFP process. The Energy Bureau will make its final determination regarding this proceeding once it evaluates any proposed contracts submitted by PREPA.

It is important to emphasize that PREPA is not authorized to execute any contracts regarding temporary generation prior to the Energy Bureau issuing its final determination in the instant case. As such, the Energy Bureau will evaluate any proposed contract, the conditions and necessity of such contract, as well as PREPA's full compliance with all the conditions established in the March 3 Resolution, prior to making its final determination. Therefore, since the Energy Bureau will issue its final determination once it evaluates any proposed contract (or contracts), staying the RFP process is not warranted at this time.

Moreover, due to the non-adjudicative nature of this process, the current stage of the instant proceeding does not allow for other parties' intervention.⁴⁶ Notwithstanding the above, the Energy Bureau **DETERMINES** to grant some participation to Petitioners. Petitioners may: (a) submit written comments, suggestions, or any documents as they deem necessary or helpful for the issuance of the final decision regarding the instant case, and (b) provide any other documentation or information the Energy Bureau might request in the future. As such, the Energy Bureau **GRANTS** Petitioners **until 5:30 p.m. on Friday, May 1, 2020**, to file any document or information Petitioners deem necessary or helpful for the Energy Bureau to issue a final determination in the instant case.

C. Reconsideration of the March 3 Resolution

The instant case commenced with PREPA's February 12 Filing. Through the March 3 Resolution the Energy Bureau conditionally approved the Proposed RFP. As discussed in Part II.A. above, there are several steps that PREPA must complete prior to the Energy Bureau issuing a final decision approving or rejecting the proposed contract (or contracts) that result from the RFP process. Therefore, no final decision has been issued at this time in the instant case.

Act 38-2017 establishes the obligation to include the request for reconsideration and judicial review process only in final decisions of administrative agencies issued in *formal* and *informal* **adjudicative administrative actions**.⁴⁷ Therefore, assuming *arguendo*, that the final decision of the Energy Bureau in the instant case is subject of reconsideration and judicial review pursuant Act 38-2017, such obligation is not applicable to the March 3 Resolution insofar as it is not a final decision of the Energy Bureau. As such, the Energy

⁴⁶ Section 3.5 of Act 38-2017 clearly states that "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.

⁴⁷ See, in general, Sections 1.3 (g)-(i), 3.14, and 4.2 of Act 38-2017; Dept. Educación v. Sindicato Puertorriqueño, 168 D.P.R. 527 (2006), and J. Exam Tec. Med. v. Elias, et al, 144 D.P.R. 483 (1997).



Bureau clarifies that, contrary to Petitioners' assertion in the Joint Petition⁴⁸, the Energy Bureau did not fail to comply with Sections 3.14 and 3.15 of Act 38-2017, which require that a "final resolution and order" warns about the availability of the reconsideration and judicial review rights.⁴⁹

Moreover, as discussed in Parts II.A. and II.B. above, the administrative process conducted pursuant to Regulation 8815 for the evaluation and approval of an RFP, as well as the proposed contract, is not an adjudicative process, as delineated in Chapter III of Act 38-2017. As such, due to the current proceeding stage (i.e. approval of the proposed RFP), the request for reconsideration process established in Section 3.15 of Act 38-2017 is not applicable to the March 3 Resolution. As such, the Energy Bureau **DENIES** Petitioners' request for reconsideration of the March 3 Resolution.

D. Availability of the Proposed RFP

Petitioners asked the Energy Bureau to order PREPA to publish the Proposed RFP with limited redactions.⁵⁰ As discussed before, PREPA's April 13 Compliance Filing included unredacted copies of: (a) the Proposed RFP with Appendixes A, B, C, D and E and their corresponding Exhibits, (b) Exhibits A, B and C of the February 25 Filing, (c) the Revised RFP with all their corresponding Exhibits as well as Exhibits B and C of the March 5 filing and, (d) the final approved RFP as published. Considering PREPA's submission and subsequent publication in the Energy Bureau's website, Petitioners' request for access to the Proposed RFP and its attachments [as well as the Revised RFP or the published RFP] is moot, since the documents have been made public by PREPA.

As part of the April 6 Resolution, the Energy Bureau ordered PREPA to upload, amongst others, copies of the Revised RFP and its attachments in a conspicuous area of its website for easy access by the general public. Through the April 7 Compliance Filing, PREPA informed that access to the Revised RFP documents is available through PREPA's electronic sourcing platform Power Advocate. Petitioners argue that the Power Advocate platform only allows access to the Revised RFP documents to companies participating in the process as bidders and not to the general public. Moreover, Petitioners alleged that the Power Advocate platform imposes additional confidentiality requirements upon the general public intending to access the Revised RFP documents. We need not to resolve such contention since Petitioners already obtained access to the documents requested in the Joint Petition. However, in the future, the final approved RFPs -as published by PREPA- shall also be also

⁴⁸ See Joint Petition at p. 9.

⁴⁹ We need not to decide herein if the rejection of a proposed RFP pursuant to Section 4.2 of Regulation 8815 or the approval (or rejection) of a proposed contract pursuant to Section 7.1 of Regulation 8815 are subject to reconsideration or judicial review. Neither we need to resolve at this moment who is entitled to exercise such rights if they exist.

⁵⁰ See Joint Petition at pp. 27-29.





accessible to the general public in PREPA's website, outside the Power Advocate platform, for the easy access by the general public not familiar with the use of such electronic platform.


III. Conclusion

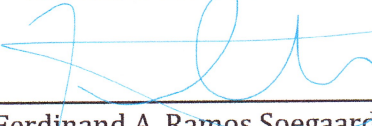
For all of the above, the Energy Bureau **DENIES** the Joint Petition. However, the Energy Bureau **GRANTS** some participation to Petitioners. Petitioners may: (a) submit written comments, suggestions, or any documents as they deem necessary or helpful for the issuance of the final decision regarding the instant case, and (b) provide any other documentation or information the Energy Bureau might request in the future. As such, the Energy Bureau **GRANTS** Petitioners **until 5:30 p.m. on Friday, May 1, 2020**, to file any document or information Petitioners deem necessary or helpful for the Energy Bureau to issue a final determination in the instant case.

Be it notified and published.


Edison Avilés Deliz
Chairman


Lillian Mateo Santos
Associate Commissioner


Ángel R. Rivera de la Cruz
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 April 27, 2020. I also certify that on April 27, 2020 a copy of this Resolution was notified by electronic mail to the following: astrid.rodriguez@prepa.com, jorge.ruiz@prepa.com, n-vazquez@aepr.com, c-aquino@prepa.com, kbolanos@diazvaz.law, rstgo2@gmail.com, rolando@bufete-emmanuelli.com, jessica@bufete-emmanuelli.com, pedrosaade5@gmail.com, larroyo@earthjustice.org, jluebkmann@earthjustice.org and rmurthy@earthjustice.org. I also certify that today, April ___, 2020, I have proceeded with the filing of the Resolution issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today April 27, 2020.


Wanda I. Cordero Morales
Clerk

