

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

NEPR Received: Apr 6, 2020 11:35 AM
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IN RE:

**REQUEST FOR PROPOSALS FOR
TEMPORARY EMERGENCY
GENERATION**

CASE NO.:

NEPR-AP-2020-0001

SUBJECT:

Petition for Intervention and Request for
Reconsideration

**OPPOSITION TO JOINT PETITION FOR INTERVENTION AND REQUEST FOR
RECONSIDERATION TO BE STRICKEN FROM THE RECORD**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority through the undersigned legal representation and respectfully sets forth and prays as follows:

I. INTRODUCCION

On February 12, 2020, the Puerto Rico Electric Power Authority (“PREPA”) filed a *Notification and Urgent Request for Approval of Request for Proposals for Temporary Emergency Generation* (the “Request for RFP Publication Approval”) pursuant to Regulation 8815¹. At the time, PREPA requested the Energy Bureau of the Public Service Regulatory Board (the “Energy Bureau”) to approve the draft Request for Proposals for Temporary Emergency Generation (the “Emergency Generation RFP”). Through the Emergency Generation RFP process, PREPA sought “to acquire 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.”² On March 3, 2020, the Energy Bureau approved the

¹ *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* dated September 1, 2016 (the “Regulation 8815”).

² *Resolution and Order* entered on March 3, 2020 (the “Order Approving RFP”), Sec. 1, pags. 3-4.

Emergency Generation RFP “subject to the conditions and limitations established in the [Order Approving RFP].”³ The Energy Bureau emphasized that PREPA couldn’t acquire any source of electric generation for permanent use as part of Puerto Rico’s electric grid and, among other conditions, established a process for PREPA to constantly report to the Energy Bureau on the condition of the Costa Sur Facility.⁴ PREPA published the Emergency Generation RFP, through the Power Advocate platform, on March 12, 2020.⁵

On March 25, 2020, twenty-two (22) days after the Energy Bureau resolved PREPA’s request for the approval of the Emergency Generation RFP, Petitioners filed the *Joint Petition for Intervention and Motion for Reconsideration* (the “Petition to Intervene”).⁶ Among others, the Petitioners have requested that the Energy Bureau **halt** the Emergency Generation RFP and allow for their intervention in the present proceedings for the purpose of providing alleged input on critical issues.⁷ Notwithstanding and as will be discussed below, Petitioners’ request for intervention is not contemplated in Regulation 8815 given that the current proceeding before the Energy Bureau is a non-adjudicative process related to an request for proposals approval process for PREPA and Petitioners are not the party in question. For those same reasons their request for reconsideration should be stricken from the record as Petitioners have no right to reconsideration as a matter of law. Lastly, 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.

³ *Id.* at Sec. II(c)

⁴ *Id.* at Sec. III, ¶¶ 1-12.

⁵ *Notice of Publication of Request for Proposals 102750 for Temporary Emergency Generation* filed on March 12, 2020.

⁶ The Petitioners are named in page 1 of the Petition to Intervene.

⁷ *See* Petition to Intervene at pag. 39.

II. LEGAL STANDARD

The Puerto Rico Administrative Procedures Act provides that “[a]ny person having a legitimate interest in an **adjudicatory proceeding** before an agency may file a written, duly grounded application in order to be allowed to intervene or participate in said procedure.”⁸ In an adjudicatory proceeding the agency determines the **rights, obligations or privileges that correspond to a party.**⁹

Pursuant to Act 38-2017, the Energy Bureau has the prerogative to grant or deny a Petition to Intervene at its discretion after taking the following factors into consideration, among others:

- (a) Whether the petitioner’s interests may be adversely affected by the adjudicatory procedure.
- (b) Whether there are no other legal means for the petitioner to adequately protect his interests.
- (c) Whether the petitioner’s interests are already adequately represented by the parties to the procedure.
- (d) Whether the petitioner’s participation may help, within reason, to prepare a more complete record of the procedure.
- (e) Whether the petitioner’s participation may extend or delay the procedure excessively.
- (f) Whether the petitioner represents or is the spokesperson of other groups or entities in the community.
- (g) Whether the petitioner can contribute information, expertise, specialized knowledge or technical advice which is otherwise not available in the procedure.

The agency shall apply the above criteria liberally and may require that additional evidence be submitted to it in order to issue the corresponding determination with regard to the application to intervene.¹⁰

The matter of caption was submitted for the consideration of the Energy Bureau pursuant to Regulation 8815.¹¹ Under Regulation 8815, the Energy Bureau, among other things, must review and approve certain procurement processes of PREPA. More specifically, the intention and purpose of Regulation 8815 and its limited procedures is:

⁸ Puerto Rico Administrative Procedures, Act No. 38 from June 30, 2017 (the “Act 38-2017”) (Emphasis provided).

⁹ 3 L.P.R.A. § 9603(b) (Emphasis provided).

¹⁰ *Id.* at § 9645.

¹¹ See Request for RFP Publication Approval, pag. 2.

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 the generation fleet and other resources of the Authority, that is consistent and transparent, and that encourages and supports a climate of private sector innovation and investment in the Commonwealth to address the specific power generation needs of the Authority. In order to carry out the purposes of the Acts, this Regulation provides guidelines and procedures for, among others: (i) soliciting, obtaining and evaluating proposals by third parties; (ii) selecting the entities or individuals that will enter into agreements with the Authority; (iii) negotiating and awarding agreements; and (iv) defining the process for the approval by the Energy [Bureau] of the final agreements to be executed.¹²

As evident from the above, Regulation 8815 regulates certain procurement processes submitted by PREPA to the Energy Bureau and is thus more akin to a process regulating *ex-parte* procedures of PREPA than the adjudication of rights which would allow Petitioners to request intervention. Accordingly, the Petition to intervene and additional request for reconsideration should be denied.

III. DISCUSSION

As explained in the submittal of the draft Emergency Generation RFP, the devastating effects of the January 2020 seismic events in the Costa Sur facility have affected PREPA's overall generation capacity. Historically Puerto Rico has seen peaks in electricity use by its customers during the summer and early fall months of the year. This peak must be adequately addressed by PREPA with enough generation capacity. At a time when there is not enough generation capacity to address this projected shortfall, the finalization of the Emergency Generation RFP is of the utmost importance, not only for PREPA, but for its customers. With this in mind, the Energy Bureau reviewed and approved the Emergency Generation RFP considering its "obligation to

¹² Regulation 8815, Art. 1.2

ensure the sound implementation of public policy regarding power service in Puerto Rico, and acting in a proactive manner to protect the consumer's rights to receive a reliable service at just and reasonable price.”¹³ Further, the Order Approving the RFP considered the “special and unusual circumstances surrounding the [Emergency Generation RFP] process, such as the conditions of PREPA's physical infrastructure, in particular that of the Costa Sur Facility.”¹⁴ In this regard, the Energy Bureau's review and approval of the Emergency Generation RFP was “limited to [it's] compliance with Act 57-2014, Regulation 8815 and no other matters.”¹⁵

Within this context, Petitioners do not have a legal right to intervene in these proceedings given that they are not adjudicative in nature and the reconsideration dispositions contemplated in Regulation 8815 do not apply to them. As stated, the Energy Bureau did a limited review of the Emergency Generation RFP to determine that it complied with Act 57-2014¹⁶, Regulation 8815 and **no other matters**.¹⁷

In fact, just a few months ago, the Energy Bureau had the opportunity to settle a request for intervention in a case similar to this one. In the case of Request for Approval of PPOAs (the EcoEléctrica PPOA)¹⁸, PREPA moved the Energy Bureau to review and approve certain proposed amendments to a power purchase and operating agreement (“PPOA”) with EcoEléctrica L.P. (“EcoEléctrica”) and a gas sale purchase agreement with Naturgy Aprovevisionamientos S.A. At the time, PREPA was submitting for the Energy Bureau's approval a renegotiated and amended PPOA pursuant to Regulation 8815. As with the case of caption, the petition was non-adjudicative in

¹³ Order Approving RFP at Sec. II(C), pag. 11.

¹⁴ *Id.*

¹⁵ *Id.* (Emphasis provided).

¹⁶ Puerto Rico Energy Transformation and RELIEF Act, approved on May 27, 2014, as amended (“Act 57-204”).

¹⁷ *Id.*

¹⁸ *In Re: Request for Approval of Amended and Restated Power Purchase and Operating Agreement with EcoEléctrica and Natural Gas Sale Purchase Agreement with Naturgy*, case no. NEPR-AP-2019-0001 (“Request for Approval of PPOAs”).

nature and therefore there were no counter parties to the submission. However, EcoEléctrica, party to one of the proposed amended agreements, filed a petition to intervene.¹⁹ EcoEléctrica argued that it was entitled to have full rights as an intervening party because it (1) had substantial interests in the proceedings, (2) was able to assist with the proceeding, (3) would not delay the proceeding and, (4) its interests were aligned with the public interest.²⁰ After analyzing EcoEléctricas’s request to intervene and what their participation in the Request for Approval of PPOAs would imply, the Energy Bureau determined to deny their request to intervene and granted EcoEléctrica only a limited participation²¹

In evaluating EcoEléctricas’ request to intervene, the Energy Bureau considered that “[it’s] expertise and industry knowledge may benefit the review process, particularly **considering [EcoEléctrica’s prior] participation in the negotiation** of the Proposed Agreements”. Further, the Energy Bureau reasoned that the kind of participation that would be granted to EcoEléctrica did not “result in an **undue delay** in the resolution of the pending [matters].”²²

The Energy Bureau ruled that:

EcoEléctrica is not afforded an intervenor party designation, because such designation **is not consistent with the non-adjudicative nature of this phase of the proceeding**. As part of the participation herein granted, EcoElectrica may: (a) submit written comments, suggestions or any documents as it may deem necessary or helpful, and (b) provide testimony during the Technical Hearing.²³

EcoEléctrica’s expertise and knowledge in relation to the matters addressed in the EcoEléctrica PPOA was indisputable. They were the party to the original and amended

¹⁹ See *Petition of EcoEléctrica, L.P. to Intervene* dated December 16th, 2019 in case NEPR-AP-2019-0001 (the “EcoElectrica Petition”).

²⁰ See EcoEléctrica Petition.

²¹ See *Resolution* dated January 28th, 2020 in case NEPR-AP-2019-0001.

²² *Id.* at Sec. III (Original emphasis).

²³ See *Id.* at Sec. IV (Emphasis in original).

agreements and had the technical expertise to assist the Energy Bureau in navigating any concerns or questions it had as to the proposed PPOA. Also, when evaluating the EcoEléctrica petition to intervene, the Energy Bureau considered that they had already been a party to the negotiations of the agreements in question, that they were a corporation with vast experience as an independent power producer and that the intervention would not cause undue delay in the process .²⁴ Notwithstanding and in spite of all of this, the Energy Bureau **denied EcoEléctrica's intervention and granted them only a limited participation.**²⁵

The Energy Bureau's determination on EcoEléctrica's petition to intervene shall be the precedent when deciding requests for intervention in matters under Regulation 8815. In Puerto Rico, the law of the case, also known as the *stare decisis*, applies to the effect that prior orders from the same judge might have within the same case.²⁶ The controversies submitted to a court, litigated and decided should be respected and obeyed as final. ²⁷ This practice promotes the stability and certainty of the law.²⁸ As a general rule, a court must resist to alter its own decisions and rulings.²⁹ The value of judicial precedent responds to considerations about stability and certainty that the law must have, in the spirit of imparting fair justice.³⁰ The reasoning behind judicial precedent is that it is advantageous to use accumulated experiences from previous cases,

²⁴ See *Id.* at Sec. III ("EcoElectrica's expertise and industry knowledge may benefit the review process, particularly considering its participation in the negotiation of the Proposed Agreements and its vast experience as an independent power producer.").

²⁵ See *Id.* at Sec. IV (Emphasis provided).

²⁶ *Mgmt. Adm. Servs, Corp. v. E. L. A.*, 152 D.P.R. 607 (2000).

²⁷ *Mgmt. Adm. Servs, Corp.* at 607-608.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Rodriguez v. Hosp.*, 186 D.P.R. 889, 927–28 (2012) (See, e.g., K.N. Llewellyn, Case Law in Encyclopedia * 928 of the Social Sciences, New York, The Macmillan Company, 1930, Vol. III-IV, p. 249 ("The force of precedent in the law is heightened by ... that curious, almost universal sense of justice which urges that all men are to be treated properly alike in like circumstances.")).

in addition to avoiding having to deal with the same problem differently each time it is presented in court.³¹

The Energy Bureau's reasoning and subsequent denial of EcoEléctrica's intervention in the EcoEléctrica PPOA petition should be followed to deny Petitioners' request for intervention in the matter of caption. Considering the applicable laws and the rationale used by the Energy Bureau for the resolution of the EcoElectrica's petition to intervene, the Petitioner's request should be denied.

As stated before, the present matter does not adjudicate the rights of any party, it is an *ex parte* process in which the Energy Bureau reviewed a draft of a proposed request for proposals and determined that it complied, to the extent of their review, with Act 57-2017 and Regulation 8815. Therefore, there are no adjudicative proceedings presently before this forum and no rights for a party to intervene. It is PREPA's position that the analysis should stop here and the Petitioners' request for intervention should be outright denied.

In spite of the above, and in contrast to clear precedent from this forum, should the Energy Bureau favor evaluating the factors set forth by section 3.5 of Act 38-2017 and decide on the merits on Petitioners' intervention request, it is PREPA's position that the requirements for intervention are not met and the Petitioners request should be denied.

Contrary to Petitioners allegation that their participation wouldn't extend or delay the procedures excessively, it is a fact that Petitioners' participation would return this process to

³¹ *Rodriguez* at 928 (See M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 8th ed., London, Sweet Maxwell, 2008, p. 1536.).

square one.³² The Petitioners' request is nothing less than to “**halt**” the proceedings to give their input.³³ The purpose of the Emergency Generation RFP, already approved by the Energy Bureau, is to address an emergency situation which affects PREPA's capacity to comply with the upcoming generation demand. This is not a process that can be suddenly stopped to allow parties to provide input. A non-adjudicative process under Regulation 8815 does not provide for other parties to provide *input* in the approval of a draft request for proposals. The Energy Bureau has the necessary expertise to review the matter at hand and their determination is to be granted great deference.³⁴

As discussed before, the Energy Bureau has already had the opportunity to address the undue delay matter in the EcoEléctrica Petition to intervene in the Request for Approval of PPOAs case. In the present matter, Petitioners have the audacity to state that they would not “extend or delay the process excessively” when they are requesting a complete stop to proceedings after the Energy Bureau entered a *Resolution and Order* granting PREPA leave to publish the Emergency Generation RFP³⁵, and thirteen days after the Emergency Generation RFP was published by PREPA on March 12, 2020. It is unacceptable that, not only do Petitioners want to intervene at in a non-adjudicative process at this stage of the proceedings, but that they seek to *halt* the request for proposals process to be able to provide their *input*. Petitioner ask nothing else than a complete stop to a process in which PREPA

³² See 3 L.P.R.A. § 9645(e) (The Petitioners must show that their intervention will not extend or delay the process excessively.)

³³ Petition to Intervene at Sec. IV(v) (Emphasis provided).

³⁴ Courts give deference to administrative decisions because administrative agencies have expert knowledge and also, specialized experience in the matters that are entrusted to them. *P.C.M.E. Comercial, S.E. et al. v. Junta de Calidad Ambiental, et al.*, 66 D.P.R. 599 (2005).

³⁵ See Order Approving RFP.

seeks to secure sufficient generation to keep up with the projected demand peaks and, therefore, jeopardize PREPA's ability to provide power to Puerto Rico.³⁶

The Petition is also flawed because Petitioners' interest will not be adversely affected by the RFP approval process. The objective of this process is to determine if the Emergency Generation RFP complies with Act 57-2014 and Regulation 8815. The Energy Bureau is the regulatory agency designated by law and with the expertise to determine whether the procurement process detailed in Regulation 8815 is complied with or not. No other entity, party or person is given any standing to participate or provide additional input in the process, much less halt and intervene in the same.

Lastly, Petitioners claim that their rights are not adequately represented in the matter of caption. They seek to protect their interests in ensuring that the resources ultimately selected in the Emergency Generation RFP process are consistent with the transformation to an affordable, disaster-resilient grid powered entirely by renewable energy and to achieve the requirements of Law 17-2019. Petitioners are mistaken. First, there are no rights to be represented in this matter because it is not an adjudicative process. Second, the interests detailed by Petitioners are adequately safeguarded by the Energy Bureau's independent criteria as PREPA regulator. Pursuant to the law, Energy Bureau is the agency designated by law with overseeing PREPA's processes and compliance with Puerto Rico's energy policy, including the renewable energy portfolio standards.³⁷ As a matter of fact, the Energy Bureau is "the key component for the faithful and transparent execution of the Energy Reform. It shall be an independent government entity in charge

³⁶ *Id.*

³⁷ 22 L.P.R.A. § 1054, *et seq.*

of regulating, overseeing, and ensuring compliance with the public policy on energy of the Commonwealth of Puerto Rico.”³⁸ Among the powers and duties of the Energy Bureau are to:

(a) Oversee and ensure execution and implementation of the public policy on the electric power service of the Commonwealth of Puerto Rico.

...

(c) Establish and implement regulations and the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of electricity rates of Puerto Rico and establish the guidelines, standards, practices, and processes to be followed by the Authority when purchasing electricity from other power service companies and modernize its power plants or facilities; provided, that every power purchase agreement shall meet the standards, terms, and conditions established by the Commission in accordance with the provisions of subsection (a)(2) of § 196c of this title.

...

(d) Oversee the quality and reliability of the electric power services provided by PREPA and any other electric power company certified in Puerto Rico.

...

(h) Review and approve policies and strategic plans, as well as short-, medium-, and long-term plans in connection with energy resources integrated planning in Puerto Rico, and oversee compliance therewith.

...

(r) Oversee compliance with any mandatory standard or goal under the renewable energy portfolio imposed by legislation or regulations.

...

(v) Establish reliability standards for the electric power grid of Puerto Rico in accordance with the parameters recognized by governmental and nongovernmental organizations specialized in electric power service, and oversee compliance therewith.³⁹

Pursuant to the above, the Petitioners request for intervention in the present non-adjudicative process should be denied. Moreover, since Petitioners are not entitled to participate in the present proceeding, the reconsideration dispositions are not available to Petitioners and their request for reconsideration should be outright denied and stricken from the record.

³⁸ *Id.* at § 1051, *Statement of Motives, Regulations*.

³⁹ *Id.* at § 1054b.

IV. CONCLUSION

WHEREFORE, PREPA requests the Energy Bureau to DENY Petitioner's request for intervention and DENY and STRIKE the request for reconsideration from the record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6th day of April 2020.

/s Katuska Bolaños
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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date I have filed the above motion using the Energy Bureau's Electronic Filing System, at the following address: <http://radicacion.energia.pr.gov> and that a courtesy copy of the filing was sent via e-mail to organizations that have requested to intervene: rstgo2@gmail.com; pedrosaade5@gmail.com; rolando@bufete-emmanuelli.com; jessica@bufete-emmanuelli.com; notificaciones@bufete-emmanuelli.com; larroyo@earthjustice.org; and jluebkemann@earthjustice.org.

In San Juan, Puerto Rico, this 6th day of April 2020.

s/ Katuska Bolaños
Katuska Bolaños