

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

NEPR Received: May 11, 2020 8:19 PM
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**IN RE:
REQUEST FOR APPROVAL OF
AMMENDED AND RESTATED POWER
PURCHASE AND OPERATING
AGREEMENT WITH ECOELECTRICA
AND NATURAL GAS SALE AND
PURCHASE AGREEMENT WITH
NATURGY**

CASE NO.:
NEPR-AP-2019-0001

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. INTRODUCTION

Several local organizations request the Energy Bureau¹ to grant them intervention in the case of caption and to reconsider its final determination of a reconsideration in which the Energy Bureau approved the EcoEléctrica and Naturgy agreements. The designation of the Petitioners as intervenors in the case of caption is not consistent with the non-adjudicative nature of this process. Also, there is no legal provision for a reconsideration of a final order that adjudicates a reconsideration. Moreover, in this stage of the proceedings, the only available vehicle as a matter of law is for the party affected by the order, PREPA, to seek judicial review of such determination. Therefore, the Petitioners request to intervene should be denied and their motion for reconsideration should be denied and stricken from the record.

¹ Capitalized terms not defined herein shall be ascribed the same meaning provided to them in the subsequent sections.

II. PROCEDURAL SUMMARY

On November 5, 2019, the Puerto Rico Electric Power Authority (“PREPA”) filed a *Request for Approval of Amended and Restated Power Purchase and Operating Agreement with EcoEléctrica and Naturas Gas Sale Purchase Agreement with Naturgy; Request for Confidential Treatment of this Letter and Accompanying Attachments* (the “Request for Approval”). At the time, PREPA requested the Energy Bureau to approve (a) the proposed Amended and Restated Power Purchase and Operating Agreement between EcoEléctrica, L.P. and PREPA (“Eco-PPOA”) and (b) the proposed Amended and Restated Natural Gas Sale and Purchase Agreement between Naturgy Aproveisionamientos, S.A. and PREPA (“Naturgy-GSPA”) (the “Proposed Agreements”), pursuant to Regulation 8815. PREPA later amended the request and moved the Energy Bureau to evaluate the Proposed Agreements pursuant to the provisions of Article 6.32 of Act 57-204 and the Energy Public Policy established in Act 17-2019. The Request for Approval was duly supported by analysis, expert reports and the draft Proposed Agreements.

After several procedural milestones, including the denial of the Petition without prejudice of PREPA filing after the Proposed Agreements were evaluated under the Proposed IRP Proceedings², PREPA appeared before the Energy Bureau for a Technical Conference.³ During

² *In Re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*, case no. CEPR-AP-2018-0001.

³ On November 27, 2019, the Energy Bureau entered a Resolution and Order denying the Request for Approval. The Energy Bureau determined that, since the Proposed Agreements terms had not been considered in the evaluation process of the Approved IRP, the Energy Bureau couldn’t determine that the Proposed Agreements were considered in the Approved IRP. Moreover, the Energy Bureau determined that requesting the information it needed to thoroughly evaluate the Proposed Agreements under the case of caption was going to be duplicative of these carried in the Proposed IRP Process. Therefore, the Energy Bureau denied the Petition and, since it had not made an evaluation of the Petition on the merits, the determination was without prejudice. The Energy Bureau granted PREPA leave to file the Petition after it issued a final resolution in the Proposed IRP Proceedings. On December 9, 2019, PREPA filed a *Request for Reconsideration of Resolution and Order on Denial without Prejudice of Approval of Amended and Restated Power Purchase and Operating Agreement with EcoEléctrica and Natural Gas Alte and Purchase Agreement with Naturgy* (the “Reconsideration”). After the Reconsideration was filed, PREPA requested a hearing to brief the Energy Bureau on the processes and considerations that lead to the Proposed Agreements. On January 17, 2020, the Energy Bureau granted PREPA’s request and scheduled a Technical Hearing that was held on February 14, 2020.

the Technical Conference, PREPA's officers and experts briefed the Energy Bureau about the terms of the Proposed Agreements, discussed the underlying basis of the reports and analysis submitted by PREPA and also answered the Energy Bureau's technical questions. After thoroughly evaluating the submittals by PREPA and finding compliance with the Proposed IRP, on March 11, 2020, the Energy Bureau reconsidered its November 27, 2019's denial of the Request for Approval and issued a final *Resolution and Order* approving the Proposed Agreements.⁴ In summary, the Energy Bureau determined that the Proposed Agreements are consistent with the Proposed IRP Proceedings and the *Puerto Rico Energy Public Policy Act* approved on April 11, 2019 ("Act 17-2019").⁵

On April 27, 2020, one hundred and seventy-four (174) days after PREPA filed the Request for Approval and forty-seven (47) days after the Energy Bureau resolved PREPA's Reconsideration and entered the Final Resolution and Order approving the Proposed Agreements, the Petitioners filed the *Joint Petition for Intervention and Motion for Reconsideration* (the "Petition to Intervene").⁶ Among others, the Petitioners, not only ask the Energy Bureau for leave to intervene in the case of caption, they also to move the Energy Bureau to "re-examine critical questions, with input from UTIER, local environmental organizations and the public at large" and "ultimately deny the approval of the [Agreements]."⁷ In summary, they want to urge the Energy Bureau to restart the whole process.

The Energy Bureau should deny the Petitioners request to intervene because such request is not consistent with the non-adjudicative nature of this proceeding. Also, *arguendo* that

⁴ See *Resolution and Order* entered on March 11, 2020.

⁵ *Id.*

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

⁷ Petition at pgs 1-2.

Petitioners have a right to intervene or for limited participation in this case, there is no right to a reconsideration of the order and the only available vehicle as a matter of law is for the party affected by the order, PREPA, to seek judicial review from such determination.⁸

III. 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.”⁹ In an adjudicatory proceeding the agency determines the **rights, obligations or privileges that correspond to a party**.¹⁰

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.¹¹

⁸ The Petitioners ask the Energy Bureau for leave to intervene to restart the process of the Request for Approval which means that the Energy Bureau would have to withdraw its Final Resolution and Order.

⁹ Puerto Rico Administrative Procedures, Act No. 38 from June 30, 2017 (the “Act 38-2017”) (Emphasis provided).

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

¹¹ *Id.* at § 9645.

The matter of caption was submitted for the consideration of the Energy Bureau pursuant to Article 6.32 of Act 57-2014. As the Final Resolution and Order provides:

Article 6.3 of Act 57-2014 provides that the Energy Bureau has the power to establish and implement regulations and the necessary regulatory actions to determine the guidelines, standards, practices, and processes pertaining to purchase power agreements, as well as to modernizing power plants or electric power generation facilities. In addition, the Energy Bureau has the power to establish and implement, through regulation, the public policy rules regarding electric power service companies, as well as any transaction, action or omission in connection with the electric power grid and the electric power infrastructure of Puerto Rico. The Energy Bureau shall implement public policy rules that are consistent with the Energy Public Policy.

Moreover, Paragraph (b) of Article 1.11 of Act 17-2019 provides that any power purchase agreement, or any amendment to, or extension of, a power purchase agreement awarded prior to the approval of Act 57-2014 between PREPA and any independent power producer, such as EcoEléctrica, shall be executed pursuant to the provisions of Article 6.32 of Act 57-2014 and the regulations adopted thereunder by the Energy Bureau.

In order to ensure that such agreements have an appropriate and reasonable price, the parameters established by the Energy Bureau shall be consistent with the ones normally used by the industry for such purposes, as well as any other parameter or method used to regulate revenues attributable to power purchase agreements. In addition, Power Purchase Agreements shall be awarded taking into account the goals and mandates established in the Renewable Portfolio Standards, which compel the transition from energy generation from fossil fuels to an aggressive integration of renewable energy as provided in Act 82-2010.

On the other hand, Article 6.32 of Act 57-2014 provides a comprehensive statutory framework for the evaluation and approval of power purchase agreements, as well as other transactions involving electric power services companies, such as PREPA and EcoEléctrica. It reiterates the Energy Bureau's authority to adopt the necessary regulations and regulatory actions that govern the process of evaluation and approval of power purchase agreements and other transactions involving electric power services companies. As explained before, Paragraph (b) of Article 6.32 expressly states that any extension of, or amendment to, a power purchase agreement executed prior to the

approval of Act 57-2014 shall comply with the Puerto Rico Energy Public Policy Act and shall be subject to the approval of the Energy Bureau.¹²

As evident from the above, Article 6.32 of Act 57-2014 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.

The Energy Bureau has had the opportunity to settle a request for intervention in the case of caption. EcoEléctrica, party to one of the Proposed Agreements, requested the Energy Bureau for leave to intervene in the proceedings.¹³ 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.¹⁴ After analyzing EcoEléctrica's request to intervene and what their participation in the Request for Approval would imply, the Energy Bureau determined to **deny** their request to intervene and granted EcoEléctrica only a limited participation¹⁵

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 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 EcoEléctrica's 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

¹² Final Resolution and Order at pgs. 7-8 (Original footnotes and citations omitted).

¹³ *Petition of EcoElectrica, L.P. to Intervene* filed on December 16, 2019 (the "EcoEléctrica Petition").

¹⁴ *Id.*

¹⁵ See *Resolution* dated January 28th, 2020 in case NEPR-AP-2019-0001.

as an independent power producer and that the intervention would not cause undue delay in the process .¹⁶ Notwithstanding and in spite of all of this, the Energy Bureau **denied EcoEléctrica’s intervention and granted them only a limited participation.**¹⁷ The reasoning behind the Energy Bureau’s decision was that the intervenor designation “was not consistent with the non-adjudicative nature of this phase of the proceeding.”¹⁸

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.¹⁹ The controversies submitted to a court, litigated and decided should be respected and obeyed as final.²⁰ This practice promotes the stability and certainty of the law.²¹ As a general rule, a court must resist to alter its own decisions and rulings.²² The value of judicial precedent responds to considerations about stability and certainty that the law must have, in the spirit of imparting fair justice.²³ The reasoning behind judicial precedent is that it is advantageous to use accumulated experiences from previous cases, in addition to avoiding having to deal with the same problem differently each time it is presented in court.²⁴

¹⁶ *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.”).

¹⁷ *See Id.* at Sec. IV (Emphasis provided).

¹⁸ *See Resolution and Order* denying EcoEléctrica’s Request to Intervene at Sec IV.

¹⁹ *Mgmt. Adm. Servs, Corp. v. E. L. A.*, 152 D.P.R. 607 (2000).

²⁰ *Mgmt. Adm. Servs, Corp.* at 607-608.

²¹ *Id.*

²² *Id.*

²³ *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.”)).

²⁴ *Rodriguez* at 928 (*See* M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 8th ed., London, Sweet Maxwell, 2008, p. 1536.).

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 drafts of the Proposed Agreements and determined that they complied, to the extent of their review, with Act 57-2017 and Puerto Rico Public Energy Policy. Therefore, there is no right for a party to intervene before this forum.

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

Notwithstanding, if this forum were to derail from what is clear precedent on the matter of intervention and decided to evaluate Petitioners request on the merits, it is PREPA's position that the factors set forth for intervention by section 3.5 of Act 38-2017 are not met and Petitioners request should be denied.

Petitioners list the following subjects as areas of interest that they would like to explore related to the Proposed Agreements: (1) whether the Proposed Agreements are new agreements or amended agreements; (2) the absence of a required competitive process; (3) whether the Proposed Agreements violate anti-trust laws; (4) whether the Proposed Agreements are inconsistent with PREPA's Renewable Portfolio Standard; and (5) if, in general, the Proposed Agreements are appropriate, reasonable or in the public interest. However, the contract approval processes within the Energy Bureau's jurisdiction were not intended to allow for unbounded requests and second-guessing process by third parties. The Energy Bureau was envisioned by the Puerto Rico legislature as the agency designated by

law with overseeing PREPA's processes and compliance with Puerto Rico's energy policy, including the renewable energy portfolio standards.²⁵ 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 of regulating, overseeing, and ensuring compliance with the public policy on energy of the Commonwealth of Puerto Rico."²⁶

Among the powers and duties granted to 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.²⁷

²⁵ 22 L.P.R.A. § 1054, *et seq.*

²⁶ *Id.* at § 1051, *Statement of Motives, Regulations.*

²⁷ *Id.* at § 1054b

Pursuant to these prerogatives, the Energy Bureau proceeded with a detailed analysis of how the Proposed Agreements complied not only with Act 57-2014 and Act 17-2019 but also with the Proposed IRP, thoroughly considered and analyzed the Proposed Agreements and aptly sustained its determination with the record.²⁸ Further, the interests pursued in both Act 57-2014 and Act 17-2019 were adequately safeguarded by the Energy Bureau's independent criteria as PREPA's regulator. 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, a process that has a final determination, to square one.²⁹ The Petitioners' request is nothing less than for the Energy Bureau to reevaluate the approval of the Proposed Agreements, begin the process anew and allow Petitioners to provide "their input."³⁰ There is no rational basis to allow for such request more so when every single Petitioner, with the exception of UTIER, fully participated in the Proposed IRP Proceedings where the Proposed Agreements were also considered and amply discussed.³¹

²⁸ 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).

²⁹ See 3 L.P.R.A. § 9645(e) (The Petitioners must show that their intervention will not extend or delay the process excessively.)

³⁰ Petition to Intervene at Sec. IV(v) (Emphasis provided).

³¹ The Petitioners in the case of caption, except UTIER, participate in the Proposed IRP Proceedings as the Local Environmental Organizations. On December 13, 2020, the Local Environmental Organizations were served with a resolution and order issued by the Energy Bureau which provides:

On the other hand, on November 5, 2019, PREPA filed before the Energy Bureau a document titled Request for Approval of Amended and Restated Power Purchase Agreement with EcoEléctrica and Natural Gas Sale and Purchase Agreement with Naturgy; Request for Confidential Treatment of its Letter and Accompanying Attachments ("Petition"), under Case No. NE PR-AP-2019-0001.2 In its Petition, PREPA requested the Energy Bureau to, pursuant to Section 7.1 of Regulation 8815 review and approve an Amended and Restated Power Purchase and Operating Agreement between EcoEléctrica, L.P. ("EcoEléctrica") and PREPA, and an Amended and Restated Natural Gas Sale and Purchase Agreement between Naturgy Aproveisionamientos, S.A. ("Naturgy") and PREPA, (together the "Agreements").⁴ PREPA also requested the Energy Bureau to treat the Petition and its attachments as confidential documents.

Pursuant to the above, the Petitioners request for intervention in the present non-adjudicative process should be denied. Moreover, the present stage of the proceedings does not allow for a further reconsideration of an already reconsidered order. Given that Petitioners are not entitled to participate in the present proceeding, the reconsideration dispositions are not available and Petitioner's request for reconsideration should be denied and stricken from the record.

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 11th day of April 2020.

/s Maraliz Vazquez-Marrero
Maraliz Vázquez-Marrero
mvazquez@diazvaz.law
TSPR 16187

/s Katuska Bolaños-Lugo
Katuska Bolaños-Lugo
kbolanos@diazvaz.law
TSPR 18888

DÍAZ & VÁZQUEZ LAW FIRM, P.S.C.
290 Jesús T. Piñero Ave.
Oriental Tower, Suite 1105
San Juan, PR 00918
Tel.: (787) 395-7133

See Resolution and Order entered on December 13, 2019 in case no. CEPR-AP-2018-0001, *In Re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*. Therefore, the majority of the Petitioners have been aware of the case of captioned since December of 2019, more than four (4) months before the Petition to Intervene was filed.

Fax: (787) 497-9664

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: ccf@tcm.law; rstgo2@gmail.com; rolando@bufete-emmanuelli.com; jessica@bufete-emmanuelli.com; notificaciones@bufete-emmanuelli.com; valvarados@gmail.com; fcintronmoscoso@elpuente.us; ausbopr88@gmail.com; acasepr@gmail.com; jmenen6666@gmail.com; Julia.mignuccisanchez@gmail.com; gmchg24@gmail.com; noloseus@gmail.com; cambiopr@gmail.com; jaramillo@utier.org; brendasantiago@utier.org.³²

In San Juan, Puerto Rico, this 11th day of May 2020.

s/ Katuska Bolaños
Katuska Bolaños

³² PREPA provides notice directly to all the appearing parties because the appearing counsels have failed to present a notice of appearance, nor have they identified which of the appearing parties is their client.