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

IN RE: REQUEST FOR APPROVAL OF AMENDED AND RESTATED POWER PURCHASE AND OPERATION AGREEMENT WITH ECOELECTRICA AND GAS SALE AND PURCHASE AGREEMENT WITH NATURGY APROVISIONAMIENTOS, SA	CASE NO.: NEPR-AP-2019-0001 SUBJECT: PETITION FOR INTERVENTION AND MOTION FOR RECONSIDERATION

PETITION FOR INTERVENTION AND MOTION FOR RECONSIDERATION

Comes Now, INSTITUTO DE COMPETITIVIDAD Y SOSTENIBILIDAD ECONÓMICA DE PUERTO RIC0 (ICSE-PR) and, CENTRO UNIDO DE DETALLISTAS (CUD); CAMARA DE MERCADEO, INDUSTRIA Y DISTRIBUCION DE ALIMENTOS (MIDA); PUERTO RICO MANUFACTURES ASSOCIATION (PRMA); UNIDOS POR UTUADO (UPU), known as the Not For Profit Intervenors, represented by appearing counsel and respectfully allege and pray:

INTRODUCTION

On March 11, 2020 the Puerto Rico Energy Bureau (PREB) approved the so called Amended and Restated Power Purchase and Operating Agreement (Ecoelectrica PPOA) between Ecoelectrica and the Puerto Rico Electric Power Authority (PREPA). The PREB order also approved the so called Amended and Restated Gas Sale Purchases Agreement (Naturgy GPSA) between PREPA and Naturgy Aprovisionamientos S.A. (Naturgy).

The order is not final due to the extension of the terms ordered by the Supreme Court of Puerto Rico and the PREB itself.

Appeals are postponed until June 8th 2020, as per Supreme Court order dated May 5, 2020 and reconsiderations are held until May 25th 2020 as per PREB order dated May 3, 2020.

It is an important fact that on April 1st 2020 PREPA and FOMB presented the same two agreements to the US Federal District Court in the PROMESA cases 17 BK-3283-LTS and 17-BK-7480-LTS. PREPA and FOMB have specifically stated, to the Hon. Judge Laura Taylor Swain, that the contracts have been approved by PREB, when they know or should know, that there is no final legal approval by PREB due to the fact that both reconsideration and appeals are still available and as such there is no PREB approval, not legally final nor binding.

After the original filing in the PROMESA Court, on a reply motion filed by PREPA on May 11 2020 case No. 17-04780 LTS, Docket No. 1986, page 5, footnote 6, PREPA has recognized that its submittal to the PROMESA Court is depended on PREB's order been final, which it isn't. So, as of today the filing in the PROMESA Court is premature, is not ripe. PREPA has recognized so, again in its Omnibus Reply filed on PROMESA case 17-04080, docket no. 1997 filed in May 18, 2020 and is now requesting that any Court approval is pending final unappelable PREB order.

REQUEST FOR INTERVENTION

Intervention is requested for the Not For Profit, both under the Puerto Rico Administrative Procedure Act. Law 38 of June 30, 2017 3 LPRA § 9645 and Regulation on Adversary Procedures No. 8543, Section 5.05.

PREB cannot deny intervention based on Regulation 8815 not providing for intervention. Regulation 8815 was approved by PREPA on August 12, 2016 and by the PREB on September 1, 2016.

The legal basis for 8815 is, as stated in the Regulation Article 1.1:

> "1.1 Legal Basis. This 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 AND OTHER RESOURCES (this "Regulation") is promulgated by virtue of the power vested in the Puerto Rico Energy Commission and the Puerto Rico Electric Power Authority by Sections 6B(a)(ii); 6B(a)(iii) of Act No83 of May 2, 1941, as amended, and Article 6.3 of Act No. 57-2014, as amended."

On April 11, 2019 Law 17 was approved, significantly amending Law 57.

Since the original Law 57 the legislated mandate has been Section 1.2 (o):

> "(o) Transparency and citizen participation in every process related to electric power service in Puerto Rico shall be promoted;"

Section 1.2 was particularly amended in 2019 to read:

> "Section 1.4.- Principles of Transparency and Accountability. (a) In accordance with the public policy established in Section 1.2 of this Act, every information, data, delivered demand, statistics, reports, plans, and documents received and/or disclosed by any of the entities created under this Act, the Authority, its successor, the transmission and distribution network Contractor, and every electric power company shall be subject to the following principles: (1) ... (b) ..."

Law 57, Section 1.2 (cc) states:

> "(cc) "Citizen Participation" - Shall mean the various mechanisms that allow customers of PREPA and electric power generation companies certified in Puerto Rico to have a forum to express their concerns, make suggestions, and be included in the decision-making processes. These mechanisms shall include, but not be limited to, the request and receipt of comments, photographs, and other documents from the public,

administrative meetings of PREPA where customer focus groups participate, regional meetings open to PREPA's customers in such region, public hearings, and the establishment of vehicles that enable participation by electronic means."

And include a Section 1.4, which state:

"Section 1.4.- Principles of Transparency and Accountability.

(a) In accordance with the public policy established in Section 1.2(o) of this Act, every information, data, statistics, reports, plans, and documents received and/or disclosed by any of the entities created under this Act, PREPA, and every electric power company shall be subject to the following principles:

(1) The information shall be complete, except for privileged information which shall be suppressed in accordance with the Rules of Evidence adopted by the Judicial Branch of Puerto Rico;

(2) The disclosure of the information shall be timely;

(3) The data shall be in a raw and detailed form, not modified. In addition to the original text of any document where such information or data appears, documents where such information is organized and shown so that it may be easily handled by persons without expertise in the disciplines addressed therein may understand them shall be published and made available to customers;

(4) The information shall not be subject to confidentiality standards broader than those required;

(5) The data must be machine processable;

(6) The public may access such information electronically without the need to register or create an account, and free of charge;

(7) Data produced by employees, officials, or contractors working for the Commonwealth of Puerto Rico shall not be subject to any copyright, patents, trademarks, or trade secret. Reasonable restrictions based on doctrines of privacy, security, and evidentiary privileges may apply; and

(8) Such data must be available in nonproprietary format; that is to say, no one shall have exclusive control over it."

Law 17 of 2019-approved 3 years after the Regulation 8815 amplifies the right to participation of consumers in energy processes.

It requires for PREB to approve regulations, which have not been approved, and PREB has maintained the 2016, 8815 Regulation, which do not incorporate Law 17 new mandates:

"The Energy Bureau shall have the following powers and duties:

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

(b) Establish by regulations 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, and implement such public policy rules. These regulations shall be consistent with the public policy on energy set forth through legislation;.."

In addition, Law 17, Section 6.4, on the jurisdiction of PREB states:

"(c) Complaints for noncompliance with the public policy on energy.

(1) At the request of any affected party with legal standing, and as provided in this Act, PREB, may address complaints alleging or claiming that an electric power service company is not complying with the public policy on energy of the Government of Puerto Rico set forth in the "Puerto Rico Energy Public Policy Act" and the current rule of law. Likewise, PREB may address those complaints regarding legal transactions or acts related to the purchase of energy or fuel; agreements between the Authority or its successor, the transmission and distribution network Contractor, independent power producers, and energy companies; cases and controversies among them; wheeling rates and interconnection charges; and cases and controversies regarding wheeling or electric power interconnection between the Authority, its successor or its subsidiaries or the transmission and distribution network Contractor, and any person that is connected, or wishes to connect, to the electric power grid within the Government of Puerto Rico, or any person with a direct or indirect interest in these electric power services."

It is not possible to square the combined mandates of Law 57 (prior to Regulation 8815) as amended by Law 17 (post Regulation 8815) with PPOA contracts approved in closed rooms as PREPA and Ecoelectrica, with PREB blessing, pretend.

Law 17 amendments to Law 57 and the stronger transparency and citizen participation standards, override Regulation 8815 limited participation.

Act 38-2017 identify the factors to be considered by an agency to evaluate whether to grant or deny intervention.

Petitioner "Not For Profit" complies with all applicable factors.

a) Whether the petitioner's interests may be adversely affected by the adjudicatory procedure.

ICSE, and the other not for profit, have been active in PREB and PREC Proceedings, including contract cases, two IRP's and the rate case. ICSE, and the other not for profit, have also been active in the PROMESA PREPA Bankruptcy proceedings. ICSE and the other not for profit represent the widest group of electric power consumers residential, commercial, and industrial. The "not for profit" is the only group of entities that represents all electric power consumers and not any particular group or interest. PREB's decision directly impacts the interests represented by ICSE.

b) Whether there are no other legal means for the petitioner to adequately protect his interests.

Due to PREPA, both management and Board of Directors, and PREB's decision to handle this matter behind to back of the consumers, as it if were a private matter, the appearing party has no other forum or legal proceeding to present its position and protect its interests.

c) Whether the petitioner's interests are already adequately represented by the parties to the procedure.

There are no other parties in the current case which represent the same interests as those of appearing party.

d) Whether the petitioner's participation may help, within reason, to prepare a more complete record of the procedure.

PREPA and Ecoelectrica/Naturgy are not opposing parties. They are representing a same interest which is to have the new contracts approved. Amazingly PREPA defends

the contracts with Ecoelectrica/Naturgy although it openly admits that PREPA was shorthanded in dealing with a monopolist, who use the monopoly power (obtained through a contract with the Puerto Rico Port Authority) to further monopolize and impose a tying monopolistic power, to further limit competition and to limit, not to say castrate, PREPA's options.

If intervention is not permitted the record will not be complete for PREPA/ Ecoelectrica/Naturgy limited the record to what fits its predetermined interest. This is certainly not what transparency and participation is all about.

e) Whether the petitioner's interests are already adequately represented by the parties to the procedure.

The "Not For Profit" are represented by counsel who has extensively litigated in the PREB, the PREC and the PROMESA Court Case. As such, the not for profit, will appear and litigate in a professional, independent, competent manner, bringing a fresh different perspective. Currently no party represents the same interests of intervenor.

f) Whether the petitioner represents or is the spokesperson of other groups or entities in the community.

ICSE, and the other not for profit, are a wide group of community organizations including manufacture, services, commercial, and residential consumers and as such can claim to represent a broad public interest. These intervenors had an important part in the conceptualization, drafting and approval of the Law 17 of 2019, and as such duly represent significantly the public interest.

g) Whether the petitioner can contribute information, expertise, specialized knowledge or technical advice which is otherwise not available in the procedure. 3 LPRA § 9645.

Petitioner have been activatively involved in energy field for the last 6 years.

The collective knowledge and experience of ICSE, and the other not for profits, is unique, bringing specialized, practical, commercial, industrial, economic knowledge, currently not present in the proceedings, as well as knowledge on modern governance of government entities.

This motion is timely.

Petitioner has filed within the timeframe available for reconsideration and/or appeals of PREB's determinations.

The Covid Pandemic has created havoc in the legal proceedings in Puerto Rico's Courts and in the Governments Agencies. This motion is reasonably timed in spite of the Covid impact.

MOTION OF RECONSIDERATION

The PREB approval has to be reconsidered for the following reasons:

One: The PREB March 11 determination does not comply with the Administrative Procedure Act.

PREB determination is not legally final. PREPA has admitted so, in recent, prior cited filing in the PROMESA Court. PREB approval was dated March 11, 2020. Court terms operations are on hold until June 8th 2020, so no appeal term is running. Additionally, the PREB decision did not include a notice on the right of interested parties to ask for reconsideration. The reconsideration term is also in abeyance and is a formal requirement of the Puerto Rico Administrative Procedure Act. The Supreme Court of Puerto Rico has estate in Punta de Arena v. Junta de Subastas, 153 DPR 733 (2001); Comisión de Ciudadanos al Rescate de Caimito v. G.P. Real Property S.E. y otros, 173 DPR 998 (2008); Román v. OGP, 2020 TSPR 18, that the incorrect notice, (lacking the

notice of right to file reconsideration) makes the notice null and void requiring a new notice.

The PREB states in its March 11, 2020 Resolution:

> "Any party adversely affected by this Resolution and Order may file a petition for review before the Court of Appeals within a term of thirty (30) days from the date a copy of the notice of this Resolution and Order was notified and copy of such notice was filed by the Energy Bureau's Clerk. Filing and notice of a petition for review before the Court of Appeals shall be made pursuant to the applicable provisions of Regulation 85432, Act 38-2017 and the Rules of the Puerto Rico Court of Appeals."

This notice, as stated, does not comply with Puerto Rico's Administrative Procedure Act, Sections 3.14; 3.15, Law 38 of 2017 which requires the notice to include the availability or reconsideration and appeal as the case may be. The appeal terms as the reconsideration is on hold so it has not run yet.

The Reconsideration is available even when a prior reconsideration motion has been filed, as was the case with the PREPA request for reconsideration. See, Colón Borges v. Marrero Rodríguez, Puerto Rico Supreme Court 2018 TSPR 178.

Two: The first issue raised by this case is: What are the public policy values that PREB has to protect and implement?:

> "Law 57 of 2014 specifically state, at statement of motives-regulations:
>
> REGULATIONS
>
> The Energy Commission created herein shall be 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.
>
> Section 1.2.- Declaration of the Public Policy on Electric Power.
>
> The transformation and restructuration of our electric power system are essential to achieve the competitiveness and economic development of the Commonwealth of Puerto Rico. For such reason, it is hereby declared as the public policy of the Commonwealth of Puerto Rico that:

(g) The Island shall become a jurisdiction with diversified energy sources and high efficiency electric power generation. To achieve this, it shall be necessary to reduce our dependence on energy sources derived from fossil fuels, such as oil, and to develop short-, medium-, and long-term plans that allow us to establish a well-balanced and optimum energy portfolio for the electrical system of the Commonwealth of Puerto Rico;

(q) PREPA shall promote the necessary changes in order to become an entity that satisfies the electric power needs of the 21st century-Puerto Rico;

(r) An independent electric power regulatory entity with broad powers and duties shall be created to ensure compliance with the public policy on energy, the provisions and mandates of this Act, and ensure that energy costs are just and reasonable by overseeing and reviewing the rates of PREPA and any other electric power service company;..."

These are some examples of Law 57 which put on PREB an affirmative duty to implement a new public policy on a new PREPA, which is not what has happened in this case.

Three: What is the level of transparency, and access of the citizens to the electric energy decision process mandated by law?; What happens is that PREB and PREPA decided, once again, to ignore Puerto Rico's Law 17 Mandate for transparency and jointly decided, without any real meaningful public participation to decide the Ecoelectrica case in the tradition of "closed rooms". This does not mean that there are no legitimate interested parties, like ICSE and the not for profit, that have the right to ask for reconsideration on the public interest issue and to appeal if so decides.

After all, PREB determination is a determination (wrong and incomplete as we claim) on the public interest and compliance with Law 57 and Law 17 mandates, which is a very legitimate concern of ICSE and the not for profit, and a legitimate issue for reconsideration and appeal;

The "Puerto Rico Energy Transformation and RELIEF" Act and the beginning of Citizen Participation.

1. The electric power generation industry and consequently the PREPA operations are the most important sector and subject in qualitative terms in the development of our economy and our society. Let us remember that from 1941 to 2014, the PREPA operated without the supervision of an independent governmental regulatory entity to regulate its operations in favor of the public interest. That created a culture of self-preservation that many times ignored or left on the fringes the common interests of the rest of society. This was remedied by the Legislator through the adoption of the different amendments to the PREPA organic law, above all, Act 57-2014, the Puerto Rico Energy Transformation and RELIEF Act.

2. At these important times, more than any time before in history, it is vitally important that all of the social sectors participate in the process of transforming this industry, as embodied in the public policy set forth in Act 57-2014 and Act 17 of 2019. That, in turn, may only be possible if the legislative intent of imbuing transparency and the opening up of the operational processes takes the shape of concrete and specific actions that allow for its full achievement.

3. The Puerto Rico Energy Transformation and RELIEF Act, 57-2014 established several cardinal principles of public policy that are aimed at radically transforming the principles that govern the production and distribution of electric power in Puerto Rico. One of these principles involves ***transparency and citizen participation*** in the energy processes, especially as far as the PREPA operations are concerned. It is provided that this legislation is to promote transparency and citizen participation in all the processes related to the Puerto Rico power service. Article 1.3 (cc) defines citizen participation as:

> "Citizen Participation" - Shall mean the variety of mechanisms that allow customers of the PREPA and electric power generation companies certified in Puerto Rico to have a forum to express their concerns, make suggestions, and be included in the decision-making processes. These mechanisms shall include, but not be limited to, the request and receipt of comments, photographs, and other documents from the public, meetings of the PREPA administrators with customer focus groups, regional meetings open to PREPA's customers in that region, public hearings, and the establishment of vehicles that make participation by electronic means possible."

Following this precept, Article 1.2 (o) of Act 57-2014 provides that:

> "As an essential element for competitiveness and the economic development of the Commonwealth of Puerto Rico it is necessary for there to be a transformation and restructuring of our electric sector. For that reason, it is declared as a public policy of the Commonwealth of Puerto Rico that:
>
> (o) Transparency and citizen participation shall be promoted in every process related to electric power service in Puerto Rico;

While Article 1.4 (A) of Act 57-2014 provides that the information generated by the PREPA in the course of its operations will be presumed to be public, except for anything that is classified as confidential under the Rules of Evidence of the General Justice Court. In its relevant sections, it indicates as follows:

> "Article 1.4 – Principles of Transparency and Accountability.
> (a) In accordance with the public policy established in Section 1.2(o) of this Act, all information, data, statistics, plans, reports and documents received and/or disclosed by any of the entities created under this Act, by the Authority, and by every electric power company shall be subject to the following principles:
> **(1) The information must be complete, except for privileged information which should be suppressed in accordance with the Rules of Evidence adopted by the Judicial Branch of Puerto Rico;**
> **(2) The disclosure of the information shall be timely;**
> (3) The data shall be in a raw and detailed format and not modified. In addition to the original text of any document where such information or data appears, documents shall be published and made available to customers where said information is organized and shown so that it may be easily handled and allow persons without specialized knowledge in the subject areas to understand them;
> (4) The information shall not be subject to any confidentiality rules that are broader than those necessary;
> (5) The data must be machine processable;
> (6) The public may access such information electronically without the need to register or create an account, and free of charge;
> (7) Data produced by employees, officials, or contractors working for the Commonwealth of Puerto Rico shall not be subject to any copyright, patents, trademarks, or trade secrecy. Reasonable restrictions based on doctrines of privacy, security, and evidentiary privileges may apply; and
> (8) Such data must be available in a nonproprietary format, that is, no one shall have exclusive control over it. (Boldface type added.)

The legislative intent is obvious, that being to promote the broadest disclosure of the PREPA operational information, so that its users are in a better position to contribute both technical and financial opinions and suggestions about its operational processes. **The new Act on energy public policy specifies the interest in transparency as a basis for public policy. See Act 17-2019.**

Four: What degree of substantive intervention is required from the PREPA Board of Directors on an issue like the Ecoelectrica/Naturgy new contracts and how is PREB

to act when in fact, PREB is confronted with the most absolute, not competent, incomplete, superficial, not professional, intervention by PREPA's Board?;

What is the evidence of PREPA"s Board of Directors and FOMB "business judgement"?

As recently as this week US Magistrate Judge Judith Gail Dein, entered an order related to UTIER's request for discovery on the Federal Court proceeding for assuming the Ecoelectrica/Naturgy contracts.

The Court stated referring to the "business judgment" standard concerning the assumption of the contracts:

> "Yet, "the business judgment rule does not provide [debtors] unfettered freedom to use the power given by Code § 365(a) however they will. Congress did not intend the Code to be a shield behind which a debtor in possession might engage in conduct that would be improper in a non-bankruptcy context. Indeed, as a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight." In re Pilgrim's Pride Corp., 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009). Moreover, "[i]n the exercise of its business judgment, a debtor in possession may be expected to make its decisions rationally[.]" Id. at 427. Thus, "[t]he court must ensure the decision-making process used by the debtor in possession in exercising its powers under the Code is a sensible one." Id." Case 17-04780 LTS, Docket No. 1995 filed on 05/18/20, at page 7.

It adds concerning the approved discovery at pages 13-14:

> "In sum, regardless of the standard applied, UTIER is entitled to the following types of documents (and related discovery): Documents reflecting the procedures followed by PREPA in negotiating and deciding whether to assume the Contracts. Documents reflecting the factors considered by PREPA in deciding whether to assume the Contracts.
>
> Documents reflecting PREPA's analysis of the factors it considered in deciding whether to assume the Contracts. Such documents should be sufficient to enable UTIER to challenge, if it so desires, the process PREPA elected to follow,5 as well as its contention that PREPA failed to consider policies it was obligated to consider6 and/or more favorable alternatives. On

> the other hand, the foregoing topics appropriately cabin the production of information to a range appropriate for review of PREPA's actions and the equities PREPA and PREB are tasked to consider. Since the parties have not engaged in an item by item review of the Discovery Requests, this Court declines to do so at this time as well."

But we already know. PREPA's Board dedicated 9 minutes on the September 26, 2019 meeting and two minutes in the October 30, 2019 meeting to discuss the issue of the contracts without any supporting legal, economic or impact on rates, studies.

The meeting of the PREPA's Board, where the new contracts were "approved" was held on September 26, 2019. As mentioned, these new complicated contracts, which change dramatically the risks allocation, obligations and payments by PREPA, term of the contracts, and prices, were "discussed" for nine minutes, without any substantive analysis of any kind. (See PREPA's website AEEpr.com. Board of Directors web site, September 26, 2019, last 10 minutes of the recording).

As also mentioned at the public meeting held at Mayaguez on October 30, 2019 (minute 1:20 of the third section) Mr. Fernando Padilla made a two minutes presentation Mr. Lopez from PREPA informed the Board and the public that the Resolution had been approved the day before and that the record of the deliberation was on the Board record. Yet, this deliberative Record has not been included in the request for approval to FOMB or PREB, nor is on the record of this actual approval on September 26, 2019.

It is of particular importance that the Sargent and Lundy report was not ready nor submitted on September 26, 2019 when the PREPA Board of Director approved the Contract. Because of this, it can not be considered as supporting the Board, decision, nor its "business judgment". PREB is not bound by whether PREPA Board complied or

not with the "business judgment" standard. PREB has an affirmative duty to "balance the equities" and determine that the contracts comply with Law 57, 17 and public policy.

Five: What is PREB to do when it is confronted with the admission by PREPA that it could not negotiate a better contract due to Ecoelectrica/Naturgy alleged monopoly, used in a manner that further increases its monopoly power which is an independent violation of the Antitrust Legislation, absent any legal analysis of the legality of the alleged monopoly.

PREPA stated, and as such admitted, that the "sole provider" exception to soliciting proposals for capacity to replace Ecoelectrica limited PREPA, when that contract expires in 2022, because Ecoelectrica supposedly has a "natural monopoly" as the sole owner of the LNG terminal. The LNG Terminal leases a dock from the Puerto Rico Ports Authority, dated April 1, 1996.

The idea that PREPA has to pay a 2 billion dollar premium for an extension because, as PREPA's motion and Mr. Fernando Padilla sworn statement "explain" Ecoelectrica has a monopoly is intolerable. Especially since its monopoly grows out of a government contract for a dock, and the dock is public property.

PREPA has not submitted the Port's Authority contract to its own Board. It was not submitted to PREB.

There is no evidence or legal claim or legal opinion that Ecoelectrica/Naturgy has a valid monopoly for the terminal. Even if it did, there is an issue of, not just having the monopoly, but whether it is been used by Ecoelectrica/Naturgy to further entrench the monopoly. This is "monopolizing" which is as mentioned a violation of both the Sherman

Antitrust Act and of Puerto Rico's Antitrust, Act 77 of June 25, 1964, 10 LPRA, Sec. 260, separate from the existence of the monopoly itself.

There is also the important issue of whether Ecoelectrica/Naturgy is covered by the open access- pre Hackberry FERC decision, being a contract of 1995 and not post Hackberry see 2002 FERC 2567 Hackberry LNG Terminal, and as such has to provide access to other importers of LNG.

The FERC in 2002 decided the Hackberry LNG terminal case 2002 FERC Lexis 2567. The case eliminated the "open access" rule which required from LNG terminals owners to operate the terminals permitting access of LNG from any client. This decision was based on increasing prospectively LNG terminals new investment in the US. It certainly does not apply to a pre Hackberry terminals like Ecoelectrica. Concerning the application to new terminals see: Talus, Access to gas markets: a comparative study on access to LGN terminals in the European Union and the US 2009 Houston Journal of Intl. Laws pages 371 et seq.; see also 164 FERC 61, 107 Domino Cove Port LNG, LP, pages 2 et seq. (2018)).

This interpretation reinforces that the so called monopoly of Ecoelectrica needed at least careful legal analysis, which it is totally lacking. There is a strong legal basis to deny Ecoelectrica the power it exercises by claiming monopoly, or at a minimum required further evaluation.

PREPA has admitted that it operated in this negotiations and was shorthanded under the premise that Ecoelectrica/Naturgy monopoly results in a "sole provider" exemption to the RFP mandate, but did not even investigated whether there is in fact such a monopoly, whether it is legal or whether it was been utilized to further monopolize.

Not only there is the issue of sole provider, the main issue is whether Ecoelectrica/Naturgy have, in law, the monopoly.

There is not, in PREB record, any analysis or legal opinion on the monopoly issue or the sole provider exemption to the RFP process.

Eng. José Ortiz informed the PREB that attorneys from Diaz and Vazquez Law Firm have "confirmed that **if** Naturgy holds the exclusive rights to the regasification facility, **then** the negotiation of the ECO PPOA and the Naturgy GSPA **could** fit within an exception to the competitive bidding process under the "one supply source" exception found in PREPA's Organic Act." (Emphasis supplied). That is the extent of a legal opinion from Diaz and Vazquez that results in an overpayment of billions of dollars. There is no Diaz and Vázquez substantive opinion on any legal issue on record.

More important is that even if the PREPA Law provides for "sole source exemption" to the RFP, the Regulation 8815, used to evaluate the contract, requires the RFP process with no exception.

As mentioned, according to PREPA the Naturgy GSPA falls within the "sole source" exception of PREPA's enabling act, Act No. 83 of May 2, 1942 Section 15(2)(d) because "such circumstances ('there is only one supply source") exist in the case of Naturgy.

Before the CEPR and PREB were created, PREPA as a "government owned self-regulated monopoly" had the power to determine when the sole source exception to a competitive bidding applied. PREPA can no longer self-regulate, it is PREB's decision now.

On the order approving Ecoelectrica LNG terminal, FERC rejected imposing a non-discriminatory, open access service provision on EcoElectrica because such a provision is for service rendered by natural gas pipeline companies over facilities used to transport gas in interstate commerce. They reason the "facilities will be used to engage in commerce between Puerto Rico and foreign nations. The FERC's jurisdiction under section 7 does not attach to such foreign commerce; our jurisdiction over foreign commerce is limited to the delegated authority under section 3," (Commission Opinions, Orders and Notices, Issued May 15, 1996, 761 5-30-96 61,515).

The new contracts, to be "assumed", put an adder that would be used in the contracted LNG price if the LNG is from a domestic source, interstate trade. As such the no discriminating open access would be applicable.

On July 6, 2005 the Federal Energy Regulatory Commission issued an ORDER GRANTING AUTHORIZATION to the Golden Pass LNG Terminal LP.[1]

As with the EcoElectrica the Golden Pass LNG terminal facilities would be used to import gas from foreign countries. In Golden Pass, FERC using its Hackberry doctrine "found it appropriate to exercise a less intrusive degree of regulation for new LNG import terminals, and does not require the applicant to offer open-access service or to maintain a tariff or rate schedules for its terminalling service. However, the **Commission reserves the authority** under section 3 to take any necessary and appropriate action **if it receives complaints of undue discrimination or anticompetitive behavior."** The door is open to question Ecoelectrica/Naturgy claimed monopoly not just to surrender to them. PREPA's didn't do it.

There is no legal controversy that the contracts have to comply with antitrust laws, including state antitrust laws. See ONEOK vs. Lear Jet 575 US ___ (2015)). The minimum PREPA's Board, PREB and FOMB could do, and obviously didn't do, was to ask whether the antitrust aspects were substantively considered due to PREPA's management own admission that it was short handed in the negotiation due to the "monopoly power of Ecoelectrica/Naturgy".

Six: What is PREB to do when there is no opportunity for any party to present counter evidence and counter arguments to PREPA's - Ecoelectrica/Naturgy self-serving arguments.

Is PREB going to simply ignore the arguments raised by ARCTAS, the Environmental Intervenors and now ICSE and the other not for profit entities?

It is amazing that the PREB decided to permit the intervention of Ecoelectrica/Naturgy as if they could bring real different analysis of what is by any standard a sweet deal, the Ecoelectrica/Naturgy/PREPA agreement.

Who would represent in PREB's proceedings a contrary view, a different perspective a different economic analysis, a consumer, not PREPA centered, perspective.

This was after all what laws 57 and 17 tried to accomplish. But instead we get, with PREB imprimatur, more of the same. No debate, no independent analysis and more sweet heart deals, closed rooms deals. It is the competitors or potential competitors who can bring the contrary perspective to an issue, just what PREB needs. See, San Antonio Maritime v. Puerto Rico Cement, 2001 TSPR 16.

Seven: What is the legal standard that should have been applied by PREB when evaluating this contracts?

The statutory standard that should have been approved by PREB is lowest reasonable cost, not "lower cost than the status quo" and lack of competition project.

> 1. PREB used in **Wrong standard:** PREPA moved PREB to error by substituting the wrong standard for the right standard. Much learning from the field of behavior economics demonstrates that using status quo as the decisional reference point is classic mental error. And ignoring opportunity cost (the difference between the price PREPA got and the price it could have been) is classic economic error.

Eight: What is PREB to do when there is no economic analysis other that the self-serving Padilla sworn statement?

What degree of questioning should PREB use when the contracts are submitted without consumer impact analysis, monopoly issue analysis, economic analysis and the Padilla statement, which is not factual analysis, but only conclusory statements.

It is a reiterated rule in our legal system that the findings of fact of a governmental entity have to be supported by "substantial evidence that is in the administrative file." See Torres Acosta v. Junta, 160 DPR. 696 (2004)

In the case of Torres Acosta, supra, the Examining Board of Engineers, Architects and Surveyors concluded that Mr. Torres engaged in fraud at the time of taking the engineering professional exam. The Court of Appeals found that the administrative file did not have any evidence whatsoever that would support the conclusion that there had been fraud.

The Supreme Court concluded that **it is up to the courts to verify** whether the administrative decision on appeal "is supported by the evidence that is in the file."

More recently, our Supreme Court indicated in Rodriguez v. Administración, 197 DPR 852 (2017) as follows:

> "We have decided that the deference to administrative decisions will only collapse in appropriate and merited instances, such as: (1) **the administrative decision is not based on substantial evidence**; (2) the administrative body has erred in applying or interpreting laws or regulations that it has been entrusted to administer; (3) the administrative entity has acted arbitrarily, unreasonably or illegally, making findings **that lack a rational basis**, or (4) when the administrative action causes prejudice to constitutional rights.

(Boldface type added)

Our Supreme Court has defined the concept of "substantial evidence" in the sphere of administrative law as "any relevant evidence that a reasonable mind could accept as **adequate** to reach a conclusion." See Asociación v. U. Med, 150 DPR 70 (2000); Ramírez v. Depto de Salud, 147 DPR 901 (1999)

The key word is "adequate."

The Supreme Court has stated:

Empresas Loyola v. Comisión de Ciudadanos, 186 DPR 1033 (2012):

> "We must remember that the firmly established rule that decisions by administrative forums are imbued with a presumption of legality and correctness. [**8] The conclusions of these agencies warrant great deference by the courts, and for that reason we must be careful in intervening in administrative decision. This principle of deference answers to the reality that administrative entities possess the experience and the highly specialized knowledge that applies within the sphere of their faculties and responsibilities. Unlimited v. Mun. de Guaynabo, 2011 TSPR 193, 183 D.P.R.947, 2011 Juris P.R. 198 (2011); Mun. de San Juan v. CRIM, 2010 TSPR 14, 178 D.P.R. 163, 175-176, 2010 Juris P.R. 23 (2010); Borschow Hosp. v. Jta. De Planificación, 177 D.P.R. 545, 566 (2009); Hatillo Cash & Carry v. A.R.Pe., 2008 TSPR 97, 173 D.P.R. 934, 954, 2008 Juris P.R. 117 (2008); Rivera Concepción v. A.R.Pe., 152 D.P.R. 116, 122-124 (2000); Misión Ind. P.R. v. J.P. y A.A.A., 142 D.P.R. 656, 672-673, 1997 Juris P.R. 34 (1998).
>
> As a result of these precepts, we have warned that the criteria of reasonability are what governs in reviewing decisions **[*1042]** and interpretations of an administrative agency. Rebollo v. Yiyi Motors, 2004 TSPR 2, 161 D.P.R. 69, 77-78, 2004 Juris P.R. 4 (2004). The function of this Court upon reviewing decisions

by the administrative bodies should be limited to determining whether the agency acted arbitrarily or illegally, or in a manner so unreasonable as to constitute an abuse of discretion. **As far as the findings of fact, we must abstain from intervening in them, if they are supported by substantial evidence that is evident in the file.** Pereira Suárez v. Jta. Dir. Cond., 182 D.P.R. 485, 511-513 (2011); Fuertes y otros v. A.R.Pe., 134 D.P.R. 947, 953 (1993); Murphy Bernabe v. Tribunal Superior, 103 D.P.R. 692, 699-700 (1975).

(Boldface type and underlining added)

In Pacheco v. Estancias de Yauco, 160 DPR 409 (2003) the Court stated:

"In regard to findings of fact by an administrative **[**34]** agency, this Court has decided that "we are forced to sustain such decisions if they are supported by sufficient evidence that is evident in the administrative file considered as a whole" **59 [**35]** We have defined substantial evidence as "any relevant evidence that a reasonable mind could accept as adequate to reach a conclusion." **60** The court must consider the evidence as a whole, both that which supports the administrative decision, as well as that which undermines the weight that the agency has granted it. 61 As we explained in Reyes Salcedo v. Policía de P.R. "the rule of substantial evidence... is intended to prevent substituting the administrative body's criteria in a specialized matter with the reviewing court's criteria."

Furthermore, our Supreme Court has decided that the administrative record will constitute the "exclusive basis" for subsequent judicial review. See Gutierrez v. Hernandez, 172 DPR 232 (2007)

"The decision made by the Court of Appeals was based on dates of procedural events that are different from the ones reflected in the file of this appeal. This violates the rule that in the exercise of the reviewing function of the courts "the administrative file will constitute the exclusive basis ... for subsequent judicial review." "Mun. of San Juan v. J.C.A., supra, 280: see also Section 3.18 of the L.P.A.U., supra; Magriz v. Empresas Nativas, supra. In fact, it is well known that the intermediate appeals court, as a court of law, does not have the power to make decisions without a basis on the file of a given case that it is considering. [*251] Depto. Rec. v. Asoc. Rec. Round Hill, supra, 99. The court of appeals had to bear in mind that "if there is conflicting evidence [**29] [it should have] considered the agency's finding of fact conclusive and that "it should respect the finding of credibility made" by it. Padin Medina v. Administración de los Sistema de Retiro, supra. In light of the foregoing, we believe that the Court of Appeals erred by concluding that the notice of suspending the hearing and its subsequent

revocation was made the day before it was being held, a situation that contrasts with the decisions on that detail made by D.A.C.O. and, moreover, the entirety of the case file."

Professor Demetrio Fernández in *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme [Administrative Law and the Uniform Administrative Procedure Act]*, 2ND EDITION, FORUM [Publishing House] at page 187 state:

> What is important is to make "an informed decision with a knowledge and understanding of the evidence produced, without the medium or mechanism by which that knowledge of the matter under discussion came in your possession being important to the case.[134] It is very rigorously pointed out that what is critical in all of this process is the personal knowledge of the evidence and not the mechanism used to acquire an understanding of the evidence.
>
> [134] *Ibid*, pg. 883.
>
> At page 366:
>
> Obeying due process of law means that findings of fact are made and conclusions of law are stated. The case law is saturated with instances in which the administrative agencies have been required to formulate findings of fact and conclusions of law.[169] As has been indicated, the current Uniform Administrative Procedure Act demands this requirement.[170]
>
> Finally, the decision must be based exclusively on the evidence presented. As a corollary to this precept, it is required that the agency prepare a record of the proceedings. When it is pointed out that the decision is based on the evidence presented, what is implied is that it is to be on the record. The requirements stated are essentially those that are considered basic to comply with the requirements of due process of law.
>
> [169] *Vega Cruz v. Comision Industrial*, 110 D.P.R. 349, 352, 353 (1980); *P.N.P. v. Tribunal Electoral*, 104 D.P.R. 3-4 (1977); *Lopez v. Junta de Planificacion*, 80 D.P.R. 646, 667 (1958); *Goudreau & Co. v. Comision de Servicios Publicos*, 71 D.P.R. 649, 655-56 (1950).
>
> [170] *See* 3 L.P.R.A. § 2170.

Fernández state at page 537:

> A. **Findings of Fact and Their Review**
>
> The Uniform Procedure Act requires that the agency make findings of fact separately in all final proceedings of adjudication, unless the parties have waived them.[53] Despite the fact that the law does not specifically point out what should be considered by the agency to make the findings of fact, it is obvious that they can rest exclusively on evidence and material that are officially admitted at the hearing being held. The obligation that the exclusive basis for the adjudicative action that is made is the agency's file sheds light on this point.

The following, among others, shall be included in the record: (...)

d) Evidence received or considered.

e) A list of all the material from which official knowledge was taken.

f) An offer of proof, objections and findings thereon.

g) Proposals of findings of fact and conclusions of law, orders requested and exceptions.

[53] 3 L.P.R.A. § 2164.

At page 538:

It can be gathered from the foregoing that the final decision by the agency has to rest on the file, which, for all legal purposes, is the record. The findings of fact have to find the reason for their existence in the evidence, in the materials that official knowledge was taken of and in everything that has taken place at the hearing held that is part of the case record.[55] The judicial review of the administrative decision is reduced and limited to the record or file of the adjudicative proceeding.[56]

[55] Examine *Mundo v. Tribunal Superior*, 101 D.P.R. 302 (1973).

[56] 3 L.P.R.A. § 2168, in its final part, provides that the agency's file constituted the exclusive basis for subsequent judicial review. In that regard, see *Henriquez v. C.E.S.*, 120 D.P.R. 194 (1987).

In Summary at page 542:

What has been decided by the Supreme Court is composed of several things: (1) the incorporation of the rule of substantial evidence, despite the fact that the organic statute does not mention it; (2) The criteria of the rational basis in order to make a finding of fact legitimate; (3) That, if there is conflicting evidence, the Court must consider that what was decided by the administrative agency is conclusive; and (4) That the finding of credibility made by the administrative agency must be respected. The case law cited contains the principles listed, and articulates the classic and conventional rule of substantial evidence. The definition of substantial evidence is composed of an element that permeates all civil liability law. It is the mythical figure of the prudent and reasonable man or, if you will, the good *paterfamilias*.[64] The figure arises by invoking a reasonable mind as a criterion for accepting a finding as proper[65] *Hilton Hotels* also considered as part of the doctrine of substantial evidence what was subsequently stated by the U.S. Supreme Court to clarify the scope thereof.[66] The two ingredients that were incorporated in the doctrine were: "(1) Considering other evidence in the record that reasonably reduces or diminishes the weight of such evidence,[67] up to the point that a court cannot, in good conscience, conclude that the evidence is substantial, in view of the total nature of the evidence produced, including any that may be counter to the point of view of the Board and up to the point at which it is clearly shown that the Board's decision is not justified by a fair evaluation of the weight of

the evidence":[68] and (2) That of examining the totality of the evidence presented to the agency, or its equivalent, based on the finding of the totality of the record. The substantial rule of evidence is one that surpasses the rule of the amount of the evidence. The evidence must be considered in its totality, including any that reduces or diminishes the weight that the agency has given it, as well as also that which supports it.

[64] See *Ayala Cordoba v. San Juan Racing Association*, 112 D.P.R. 804 (1982). It is concluded that the concepts used in both legal systems, Common Law and Civil Law, to signify this mythical figure coincide perfectly in their content. See also *Hernandez v. Gobierno de la Capital*, 81 D.P.R. 1031 (1960).

[65] See *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). "Substantial Evidence is more than a *scintilla*. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

[66] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

[67] The phrase used by the U.S. Supreme Court in *Universal Camera Corporation* was "whatever in the record detracts from its weight." *Ibid.*

[68] *Hilton Hotel*, note 62, supra, pg. 686.

The specific requirements of Regulations 8815, the one supposedly used by PREPA and PREB for the contract approval require:

a) The creation of project committee for the preparation of the RFQ's and RFP's including detailed procedures of such committee. Article 3.
b) Processes to Issue the RFQ's and RFP's-Article 4, with detailed requirements or qualifications, contract etc.
c) Detailed evaluation process. Article 5.
d) Processes for selecting proponent Art. 6 and award Art. 7.

There is no evidence on record of any of these processes, proceedings and analysis having been complied with.

The information which is required is not part of the record and as such cannot be considered.

Nine: The PREB March 11 2020 resolution specifically makes reference to ex parte communications between PREB and PREPA.

The consideration of the contract, necessarily is part of the IRP process as PREB recognizes in this resolution. The ex parte communications, while the IRP process was

on going, with no notice and obviously without any participation of IRP intervenors, by itself vitiate the contracts approval process.

Ten: The main issue raised by this case, in the end is: What is the role of the PREB, what is the responsibility it has under Laws 57 of 2014 and 17 of 2019 to independently regulate, to non-politically implement the very clear, transparency and renewable energy policy established with bipartitian support under Laws 57 and 17?

In other words, the issue is whether the PREB will be the main promoter of the new policies and whether it will forcefully implement the main determination of dismantling the pernicious integrated monopoly that PREPA has been and that so much damage has caused to Puerto Rico, as PREB and the PREC have concluded in prior proceedings.

The new laws can be a harbinger of progress or another case of dead letter law. If after law 57 and law 17 PREPA continues working in closed rooms, making deals without any public debate- as has been the case with the Ecoelectrica/Naturgy contracts- then the legislation has failed and PREB has failed. The cost is paid by the people of Puerto Rico, the consumers of electric energy.

The particular contracts are not the result of a new policy, a new attitude, a new paradigm. It is not the result of independent, nonpolitical, competent professional regulation, which the PREB is expect to be. The approval would be a more of the same, PREPA centered mentality which is exactly what law 57 and 17 intended to eliminate. Where is the transparency that both laws announce as the new legal norm?

Back room deals by PREPA's monopoly was the norm to be eliminated, but that is exactly what the Ecoelectrica/Naturgy contract are.

No public discussion or analysis on contracts that should realty be part of the IRP process which is supposed to be open.

Who if not the PREB, has to serve as the public-policy defender, due to its own legal responsibilities, but especially when confronted with the reality of the abandonment of its responsibilities by PREPA's Board?

Law 17 of 2019 states:

> "STATEMENT OF MOTIVES
>
> The electric power system should be reliable and accessible, promote industrial, commercial, and community development, improve the quality of life at just and reasonable cost, and promote the economic development of the Island. Electric power services in Puerto Rico are inefficient, unreliable, and provided at an unreasonable cost to residential, commercial, and industrial customers despite the existence of a vertically integrated monopolistic structure. This is mainly due to a lack of infrastructure maintenance, the inadequate distribution of generation vis-àvis demand, the absence of the necessary modernization of the electrical system to adjust it to new technologies, energy theft, and the reduction of the Electric Power Authority's personnel. Likewise, the electrical system of the Island is highly polluting as a result of poor energy diversification, the hindering of the integration of distributed generation and renewable energy sources, and high fossil fuel dependency. Consequently, the power plants of the Electric Power Authority have become the main polluters of our environment given their high greenhouse gas emissions.
>
> . . .
>
> The Electric Power Authority (PREPA or the Authority) holds hostage approximately 1.5 million customers which represent close to $3.45 billion in total revenue. The electric power generation system is approximately thirty (30) years older than the electric power industry average in the United States. Our electric power system includes two thousand seven hundred and forty-eight (2,748) miles of transmission lines, thirty-one thousand four hundred and eighty-five (31,485) miles of distribution lines, and three hundred and thirty-four (334) substations. The transmission lines include 230 kV, 115 kV, and 38 kV circuits that transmit energy from the power plants to the distribution substations to be delivered to consumers through lower voltage distribution lines. The Authority generates two-thirds of the Island's power and purchases the rest. Energy demand has decreased from a peak of three thousand six hundred and eighty-five megawatts (3,685 MW) in Fiscal Year 2006 to three thousand one hundred and fifty-nine megawatts (3,159 MW) in Fiscal Year 2014, and three thousand sixty megawatts (3,060 MW) by August 2017, which shows a clear tendency

towards lower energy demand. Despite the foregoing, the Authority has a generation capacity of five thousand eight hundred and thirty-nine megawatts (5,839 MW) which includes the nine hundred and sixty-one megawatts (961 MW) provided by the EcoEléctrica Power Plant and AES through twenty (20)- year power purchase agreements. In addition, the main generating units are located in the south area of the Island while the highest energy demand is in the north. See, Build Back Better: Reimagining and Strengthening the Power Grid of Puerto Rico, December 2017. Even though the Authority controls the Island's energy supply, its financial statements as of June 30, 2014, show debts totaling over $11.7 billion. The Authority's bankruptcy conditions have been known for years and have transformed this public corporation into an unsustainable burden for the people of Puerto Rico. Its fragile fiscal situation forced the Authority to undergo a bankruptcy process under Title III of the 2016 Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

. . .

Section 1.4.- Guiding Principles of the Puerto Rico Electrical System.

The activities or functions related to the electric power service shall be governed by the principles of efficiency, quality, continuity, adaptability, impartiality, solidarity, and equality.

i) The efficiency principle compels the correct allocation and use of resources to guarantee that services are rendered at the lowest possible cost and that resources which compose the Electrical System are developed according to the best industry practices;

ii) By virtue of the quality principle, electric power services rendered must meet the technical requirements and the reliability and quality standards established therefor;

iii) The continuity principle implies that services shall be rendered without interruptions, other than those programmed due to technical reasons, force majeure, or fortuitous events, or as a penalty when a customer fails to fulfill his obligations, and even in the event of bankruptcy, liquidation, audit, or substitution or termination of contracts entered into with the companies responsible for rendering such services;

iv) The adaptability principle leads to the incorporation of scientific and technological advances that improve the quality and efficiency of services rendered at the lowest possible cost;

v) The impartiality principle requires that, under the same conditions, consumers are treated equally regardless of their social condition and purchasing power, or the technical conditions or characteristics of the service rendered;

vi) The solidarity principle establishes that the design of the rate structure shall take into account the goal of providing affordable electricity prices to all consumers, particularly to low-income consumers.

vii) The equity principle promotes the attainment of a balanced and appropriate energy service coverage in the various regions and sectors of

the Island in order ensure that the basic needs of the entire population are met."

Does the approval of these contracts represent a faithful implementation of these mandates?

What we have is more of the same. It is, approving contracts worth over a billion dollars with no public debate. It is approving the contracts with no evidence of economic financial, consumer impact, legality of the alleged monopoly power of Ecoelectrica/Naturgy.

Eleven: As stated PREB's action is based on Regulation 8815. The premise of Regulation 8815 is the use by PREPA of RFP's or other competitive open contract processes. But the Ecoelectrica/Naturgy contract, which is of course, a new contract not a mere modification, under applicable novation law in Puerto Rico Civil Code 31 LPRA3421, was not open, competitive process.

Under Section 3241 of Puerto Rico's Civil Code, Title 31, novation extinguishes a contract when the clauses of the "new one" alter the basic elements of the first contract. Such is the case in this alleged mere assumption of an existing contract.

Under a novation applicable law, PREPA is not "assuming" an existing contract, it is approving a new contract subject to different administrative and legal proceedings.

Where are the processes that Regulation 8815 requires for a new contract? The processes are simply not present. Ecoelectrica/Naturgy overwhelmed PREPA under the guise of having a monopoly which was not only not questioned, it was not even studied, so PREPA permitted to be subjected to monopoly power, used to further the monopolization by Ecoelectrica/Naturgy.

PREB acted in the contract analysis under PREB Regulation 8815 which is not the applicable regulation. The Regulation 8815 is for Request for Proposal and Request for Qualification of new projects which the submitted amended and restated contracts are not.

If PREB considered them to be new contracts subject to Regulation 8815, as Eng. José Ortiz stated in its Official submittal of the new contracts, then they cannot be considered an assumption of an existing contract. You cannot have it both ways, a new contract at PREB and the assumption of an existing contract at Court as PREPA is claiming.

As such the Regulation 8815 presupposes a competitive open process, which is totally lacking in the current contractual process. There is no evidence in the record of PREB, of compliance with the detailed proceedings of Regulation 8815 if it applies as PREB and PREPA claim.

Twelve: Where is the evidence of the impact of these contracts on renewable energy development which is the main mandate of Law 17? All we have is self-serving conclusory statements by Mr. Fernando Padilla. Truth is, today we are not closer, nor moving toward with renewable energy. The opposite, we have gas centered, gas favored developments in PREPA. Nothing has changed.

How can PREB be part of all this?

PREB is not dealing with a good faith, respectful of public policy entity when dealing with PREPA. PREPA today is the very same old PREPA centered institution. It refuses to open up, it refuses to comply and implement clear legal mandates.

This is the PREPA that has opposed that the London Economic study on the impact of the RSA to be presented in the Swain Court; it has opposed that the Dr. Cao-economic study on the negative impact of the RSA on Puerto Rico economy be part of the PROMESA Court case, and be admitted as evidence; has opposed to have Executive Director, Jose Ortiz be deposed in the PROMESA case; has opposed the participation of intervenors like ICSE and the other not for profit in the PROMESA case; it has insisted in obtaining full confidentiality for Costa Sur documents and before for the San Juan Units 5 & 6 documents; it has insisted in fracturing the IRP process decoupling Costa Sur Ecoelectrica/Naturgy contracts, and before the San Juan Units 5 & 6 contracts from the open IRP process of which there are obviously part and now pretends to have these contracts approved in a close room and not in an open transparent manner. This is clearly a patterns of conduct, clearly contrary to Laws 57 and 17, and a pattern that must be rejected by PREB, not promoted by PREB.

Thirteen: Why are PREPA, PREB and Ecoelectrica/Naturgy in such a hurry to approve this costly complicated contracts is such a short term.

The FOMB has formally postponed the RSA consideration in the Swain Court, it has also postponed the consideration of the Government of Puerto Rico Fiscal Plan. Why the urgency of approving the Ecoelectrica/Naturgy contracts in the middle of the earthquakes and the Pandemic.

PREB should be consistent. If we are recognizing that reality forces the postponement of the RSA and the Commonwealth Fiscal Plan, the same should apply to this request for " approval" of the "new" Ecoelectrica and Naturgy contracts. FOMB and

PREPA has officially stated in its status report of the government parties regarding the Covid 19 Pandemic:

> "On May 1, 2020, the Oversight Board filed its Status Report of the Financial Oversight and Management Board for Puerto Rico Regarding the Covid-19 Pandemic and the Proposed Disclosure Statement Schedule [Case No. 17-BK-3283-LTS, ECF No. 13018], in which the Oversight Board noted that "before the [Commonwealth's] plan and disclosure statement process can continue, the Oversight Board must assess this new and changing landscape...." Commonwealth Status Report ¶ 5. Subsequently on May 1, 2020, the Court entered its Order Setting Deadline for Status Report Regarding the Covid-19 Pandemic and the Proposed Disclosure Statement Schedule [Case No. 17-BK-3283-LTS, ECF No. 13023], in which the Court directed the Oversight Board to file an updated status report regarding the timeline for the plan of adjustment and disclosure statement process for the Commonwealth, ERS, and PBA on or before July 15, 2020.
>
> Nonetheless, the situation remains fluid, and the impact of the pandemic and the measures taken to counteract it will continue to be felt by PREPA, PREPA's customer base, and the economy more broadly in the ensuing weeks and months. The Government Parties will continue to monitor the situation and provide updates to the Court relating to the impact of the pandemic on PREPA's financial condition.
>
> The world is continuing to make "real time" adjustments to inhibit the spread of COVID-19 and address the consequences of both the disease and countermeasures. During this unprecedented time, the Government Parties' focus remains on ensuring the health and well-being of the people of Puerto Rico, and assessing the short- and medium-term impact of the pandemic on Puerto Rico's economy. A great deal will depend on when, how, and on what schedule Puerto Rico's economy will reopen, and the complicated nature of what a post-COVID-19 Puerto Rico and world economy will look like. Indeed, the mainland United States is facing the same issues and uncertainties. Thus, the Oversight Board still lacks sufficient visibility into PREPA's prospects to determine the feasibility of the restructuring contemplated by the RSA."

Fourteen: Why, and under what regulation or law the Ecoelectrica/Naturgy contracts are not fully analyzed as part of the IRP.

Why an over a billion dollar, 12 year contract that commits Puerto Rico to more fossil fuel, a movement clearly contrary to the movement directly ordered by Law 57 and 17?

Why it is proper to commit without an IRP determination to a billion dollar 12 year contract when no analysis of source of fuel and final mix is determined in the IRP?

Why commit to such contract when no final analysis of roof top solar, virtual power plants, distributed energy, micro and mini grids, energy efficiency exists and it has to be determined in the IRP?

How this contract is incompliance with Law 17 mandates for renewable adoption is not even analyzed? Only a prior IRP approval will permit such analysis.

Fifteen: Let's analyze specific statements in the PREB's March 11, 2020 Resolution which are in fact misleading.

1. Page 1- The PREPA submittal was based on Sec. 7.1 Regulation 8815. This is incorrect for section 7.1 refers to contract awards that are based on an RFP, and a detailed RFP process, which is not the case here. There was no RFP for the new contracts.

2. At page 2-PREB enumerates documents allegedly included as part of PREPA's proposal for the approval of the Ecoelectrica/Naturgy contracts.

The problem is that the Board of Directors of PREPA approved the contracts on the meeting of September 26, 2019, and at such date, neither the Sargent and Lundy study (November 19, 2019) nor the Memo to PREPA and IRP team from Siemens (October 2, 2019) were yet approved. There is nothing on the record to establish that these two documents were considered by the Board. The official meeting recording has no discussion, nor reference to these documents in the nine minutes discussion of the contracts.

3. The PREB specifically concludes in the original resolution which denied approval to the contracts that by submitting the contracts to the "IRP Evaluation Process does not represent undue burden...".

But then proceeds to approve the contracts without an IRP approved in place.

4. Page 4-"On December 26, 2019, PREPA filed a document titled Motion Informing Approval by FOMB of the Puerto Rico Electric Power Authority's Amended and Restated Power Purchase Agreement with EcoElectrica and Natural Gas Sale and Purchase Agreement with Naturgy and Request for Technical Conference...". The problem is that FOMB did not "Approved" the contract. All it did was to state that the contract complied with the Fiscal Plan. But it added:

> "Please note that our review is solely limited to the compliance of the proposed contract with the applicable fiscal plan and no other matters... The review performed by the FOMB does not cover a legal review of the contractual documentation... (ii) compliance with applicable laws, rules and regulations governing procurement activities, both federal and local.". (Letter signed by Atty. Jaime El Koury)

5. Page 5- PREB recognized it held ex parte communications with PREPA and EcoElectrica, the two parties with direct financial interest in the already PREPA approved contract (although we claim the approval was not valid due to lack of business judgment and fiduciary duties compliance by the Board).

How can such communications occurs outside the official open IRP process and close the doors to the intervenors in the IRP proceeding?

6. Page 7-PREB states:

> "In order the 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."

What alternative contractual agreement PREB analyzed other than the PREPA/ Ecoelectrica/Naturgy option, based as PREPA admitted in the limited capacity of PREPA due to Ecoelectrica/Naturgy alleged monopoly and monopolizing power.

7. At page 9- PREB state:

> "The terms of the Proposed Agreements were not part of the analysis of PREPA's Approved IRP. As such, the EcoEléctrica Facility was modeled under the terms of the Current Eco-PPOA. On the other hand, as part of PREPA's proposed IRP, PREPA included potential revisions to capacity payments to EcoEléctrica as some scenario assumptions, but other portions of the specific terms of the proposed Agreements were not included in the analysis of PREPA's Proposed IRP."

The PREB proceeds to approve the contracts without having decided on the IRP.

WHEREFORE, it is respectfully requested from PREB to authorize the intervention, reconsider the Ecoelectrica/Naturgy new contracts and deny approval.

CERTIFICATE OF SERVICE I hereby certify that, on this same date, we have filed this motion via the Energy Bureau's online filing system, and sent to Puerto Rico Energy Bureau Clerk and legal counsel to: secretaria@energia.pr.gov; astrid.rodriguez@prepa.com; jorge.ruiz@prepa.com; n-vazquez@aeepr.com; c-aquino@prepa.com; kbolanos@diazvaz.law; adiaz@diazvaz.law; mvazquez@diazvaz.law; ccf@tcm.law; rstgo2@gmail.com; rolando@bufete-emmanuelli.com and jessica@bufete-emmanuelli.com.

RESPECTFULLY SUBMITTED this 22th, day of May, 2020, in San Juan, Puerto Rico.

FERNANDO E. AGRAIT
T.S. NÚM. 3772
EDIFICIO CENTRO DE SEGUROS
701 AVENIDA PONCE DE LEÓN
OFICINA 414
SAN JUAN, PUERTO RICO 00907
TELS 787-725-3390/3391
FAX 787-724-0353
EMAIL: agraitfe@agraitlawpr.com