

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

NEPR

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IN RE: REQUEST FOR PROPOSAL
FOR TEMPORARY EMERGENCY
GENERATION

CASE Number: NEPR-AP-2020-0001

Matter: Engineering Services Internat'l
Inc. motion to Intervene

REPLY TO PUERTO RICO ELECTRIC POWER AUTHORITY OPOSITION TO
PETITION TO INTERVENE

To the Honorable Energy Bureau (“Bureau”):

NOW COMES, ENGINEERING SERVICES INTERNAT'L INC. (“ESI”) through its undersigned legal representation and respectfully STATES, RECITES AND REQUESTS:

1. On June 3, 2020, the Puerto Rico Electric Power Authority (“PREPA”) filed its Opposition to Engineering Services Int’l Petition to Intervene. The appearing party respectfully and briefly replies to such motion, based on the following.

2. First, and most relevantly PREPA failed to submit **any opposition** to central tenet and underlying reason of our intervention, in this case: the undeniable and undisputed *fact* that PREPA’S request for proposal (“RFP”) has been textually **regulated and executed** according to a document known as the “**GUIAS PARA PROCESOS DE ADQUISICIONES DE BIENES Y SERVICIOS A TRAVES DE RFP EN LA AEE V006032016**” (hereinafter “Guides”) and that such Guides are *null and void*. The latter, a known fact, given that the “Guides” have not been adopted pursuant to the

Government of Puerto Rico's Uniform Administrative Procedure Act. ("LPAU" for its spanish *acronym*). Worst, just like stated in our Petition (and unopposed by PREPA) the "Guides" are: a) of unknown origin, *incognito* and b) lacking an adoption date. No one outside PREPA seems to know the *genesis* of these "Guides" which have never been adopted the Government of Puerto Rico in accordance and conforming to the procedures and requirements stipulated in the "LPAU". We bring to the Bureau's attention that PREPA does not refute any the above *facts* in its most recent response, instead PREPA consciously opts to avoid that subject and craftily circumvents it.

3. Understandably, PREPA does not even mention in its introduction nor in the relevant facts of its motion, such undeniable fact. Please note that PREPA *alleges* that the RFP process was initiated pursuant to Regulation 8815. Such Regulation clearly requires and outlines that the RFP process must be regulated and executed according to such regulation; but PREPA did exactly the opposite; it adopted a un-dated, anonymous, questionable origin and ultimately illegal regulation COMPLETELY INCOMPATIBLE with Regulation 8815 and decided that *it*, not Regulation 8815, would regulate the RFP process. We again bring to the Bureau's attention that PREPA does not refute any the above *facts* in its most recent response, instead PREPA again opts to avoid the subject and craftily circumvents it.

4. This action by PREPA completely violates Section 2.1 (Purpose) of Regulation 8815, which clearly and explicitly states that its regulatory process will govern and dictate the way PREPA will receive and evaluate proposals from private parties. In essence - the core of the matter at hand - is that PREPA decided *for itself* that it would adopt *its own* non-descript "regulation", one of unknown origin, anonymous and without

date of adoption *in lieu* of Regulation 8815. Notice again that PREPA did not refute this in its most recent response, instead PREPA *again* discerned the issue at hand.

5. For instance, as indicated in our Petition, Regulation 8815, Section 3.1 specifically requires that for preparation of the RFP's, evaluation of proposals, qualification of proponents and any negotiation with the selected entity or entities shall be scrutinized and overseen by a 5 (five) member *Project Committee* whose members shall be recommended by PREPA's Executive Director *and* appointed by its Board of Directors. Notice again that PREPA did not refute this point of our most recent filing.

6. In sharp contrast, the "Guide's" Evaluation Committee, responsible **for the same functions, is composed only of 3 members** all of which are *appointed* by the Chief of the Procurement Division of PREPA which: a) is a Political Appointee designated by the Executive Director and b) leaves out any legal or procedural right to intervene by PREPA's own Governing Board. The "Guide" effectively entitles and empowers a PREPA Chief of the Procurement Division with sequestration power's over the RFP's evaluation process while simultaneously depriving PREPA's Board of any meaningful participation in such process. This is not only incoherent, but contrary to a registered and acting Regulation 8815. Notice again that PREPA did not refute this point of our most recent filing.

7. PREPA's unforced and deliberate decision to ignore such clear fact(s) in its Motion makes it clear and urgent that the Bureau carefully weight and consider our Petition to Intervene. This is a serious matter, one that should not be left unresolved, because thoughtful analysis reveals all possible outcomes, which evolve into precedence and jurisprudence, are one and the same: depriving the Bureau *and*

PREPA's Governing Board, of their procedural rights as instituted in Law in the form of standing and legal regulations, in this case Regulation 8815.

8. Second, the fact that this proceeding is non-adjudicative in nature does not preclude the Bureau's rights to listen or otherwise consider third party positions or suggestions for that matter; more so when they are precisely aimed at helping and assisting the Bureau in determining the viability and legality of PREPA's RFP. See *Expert Imaging Center v. Departamento de Salud*, KLRA201700682, January 31, 2018, page 10.

9. Third, PREPA's argument relating to the application of the *stare decisis* doctrine is self defeating since such doctrine only applies to adversarial proceedings. It does not apply to a proceeding conducted pursuant the provisions of Chapter V of the LPAU. As stated in *Management Adm. Services Corp. v ELA 152 D.P.R. 607*: "*Dicho de otra manera, de ordinario los planteamientos que han sido **objeto de adjudicación** por el foro de instancia y/o por este Tribunal no pueden reexaminarse*". ("In other words, ordinarily the matters that have been **adjudicated** by the court of first instance and / or by this Court cannot be reviewed.") There is nothing to be adjudicated herein, the application of the *stare decisis* doctrine is utterly and ultimately inapplicable.

10. Finally, PREPA alleges that our Petition failed to hint on what information it may offer for the Bureaus evaluation. We state it again for PREPA's benefit, just as clearly as it is stated on our Petition, **the information consists of PREPA illegally indicating that the RFP is to be regulated and executed according to a "Guide"; itself an meaningless, anonymous and illegal document, that is not bound or**

conforming to any Commonwealth Law, one which is lacking an execution date, and completely incompatible with Regulation 8815.

11. It is a matter of fact that we do not seek a full fledged intervention, but rather a limited intervention, so that the Bureau may itself consider our position and determine if, as a matter of law, PREPA's knowing and deliberate decision to ignore the evaluation process established in Regulation 8815 by instead adopting its own "Guide", which effectively subrogates the entire process to its Chief of the Procurement Division's sole criteria, *is or not* compatible with Regulation 8815? We strongly believe it is not. The contrary begs to question why and how: a) PREPA can autonomously override a Bureau Order expressly stating Regulation 8815 as the RFP's *de facto* foundational and regulatory procedure and b) what would *then be the purpose* of Regulation 8815 which, unlike the "Guide", *is in fact* a legally ratified and acting Regulation? The Public Interest requires that the Bureau immediately consider this issue, this is not an issue that can be glossed over without grave repercussions to the Bureau and ultimately to the General Public. Ignoring it effectively sanctifies a plain view illegality, not only does it further curtail PREPA's image in the public eye but it also undermines and erodes the rule of law, in this case legally ratified procedures and regulations such as a Bureau Order and its PR Department of State Regulation 8815 are *both* challenged and overridden by undated, unregistered, incognito "Guides" concocted by the same entity the Bureau aims to regulate. More so, when PREPA does not refute this in its motion.

THEREFORE, ESI respectfully requests this Bureau to approve its intervention in this proceeding and after all required procedural actions, determine that the RFP as presented by PREPA to its suppliers is null and invalid.

Respectfully submitted,

In San Juan Puerto Rico, this 5 Th. day of June, 2020.

Electronically Filed <https://radicacion.energia.pr.gov>

I CERTIFY: that I have sent a copy of this motion via e mail to: Lic Nelida Ayala n-ayala@aepr.com, Lic. Carlos Aquino, c-aquino@prepa.com, Lic. Astrid Rodríguez Astrid.rodriguez@prepa.com; Lic. Nidsa Vázquez n-vazquez@aepr.com; Lic Jorge Ruiz Pabón; jorge.ruiz@prepa.com; , legal@energia.pr.gov; wcordero@energia.pr.gov, kbolanos@diazvaz.law, rstgo2@gmail.com, pedrosaade5@gmail.com, larroyo@earthjustice.org, rolando@bufete-emmanuelli.com, jessica@bufete-emmanuelli.com, notificaciones@bufete-emmanuelli.com, rmurthy@earthjustice.org

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