

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

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**IN RE: CERTIFICATE OF ENERGY
COMPLIANCE**

CASE NO.: NEPR-AP-2020-0002

SUBJECT: PETITION FOR INTERVENTION

PETITION FOR INTERVENTION AND FOR PUBLIC ACCESS TO INFORMATION

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TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW Unión de Trabajadores de la Industria Eléctrica y Riego (“UTIER”) and respectfully requests that the Puerto Rico Energy Bureau (“Bureau”) grant leave to intervene in this proceeding, pursuant to Section 3.5 of Act No. 38-2017, as amended, known as the Uniform Administrative Procedure Act of the Government of Puerto Rico, P.R. Laws ann. tit. 3 §§ 2101 et seq. (“LPAU”) and provide access to the documents presented before the Bureau in the captioned case, pursuant to Puerto Rico’s constitution, law and public policy.

INTRODUCTION

Although it does not appear to be cited directly in the Docket, UTIER understands that this proceeding is regarding the Request for Qualifications: Puerto Rico Electric Power Transmission and Distribution System, RFQ 2018-2 (October 31, 2018) (“RFQ”). Because of the *fundamental* nature of that RFQ, UTIER hereby seeks leave to intervene. The cited RFQ cannot be described as anything other than the privatization of the Puerto Rico Electric Power Authority’s (“PREPA”) functions. Regardless of how it is denominated, if the Bureau decides to grant an Energy Compliance Certificate in this proceeding, privatization will be imminent. The government may retain the ownership of the infrastructure, but an *unknown* private entity will be awarded essentially *all* of PREPA’s most important functions. All of this is happening behind closed doors and hidden from the people of Puerto Rico.

The people of Puerto Rico, a group that *also* composes the breadth of PREPA’s ratepayers, have spent the better part of this year coming to grips with the new realities of the COVID-19 pandemic. They are suffering from whiplash over the conglomerate of political and legal events that the federal and local governments have thrown at them in the past few months. They are *still* suffering the consequences of past, current and impending environmental disasters, such as hurricanes and earthquakes. Meanwhile, the Puerto Rico Public-Private Partnerships

Authority (“P3”) is selling PREPA out from under them, while they are too preoccupied to find that information out for themselves.

UTIER is an active stakeholder in PREPA’s future. This is true given its status as a creditor in PREPA’s Title III Bankruptcy; it is true because of its members’ status as PREPA’s employees. But it is also true because its members are also residents of Puerto Rico, meaning they are also PREPA’s ratepayers. UTIER, more than most, is concerned with the ramifications of this proceeding. Because this proceeding is pivotal to PREPA’s future, UTIER respectfully requests that the Honorable Bureau comply with due process requirements and exercise the strict scrutiny that this matter deserves, as the effects of its decision will ripple throughout Puerto Rico’s history.

PROCEDURAL BACKGROUND

The first UTIER heard of this proceeding was the Bureau’s resolution, just a few days ago. On June 9th, 2020, the Bureau issued a resolution in the captioned case (“Resolution”). The Resolution granted P3’s request for confidential treatment of Exhibits 1 and 2 of the Puerto Rico Public-Private Partnerships Authority’s Request for Issuance of Certificate of Energy Compliance and Request for Confidential Treatment of Documents Submitted to Bureau (“P3 Motion”). According to the Resolution, these exhibits were: (1) the Preliminary Contract and (2) the Partnership Committee’s report, under Act No. 29-2009, P.R. Laws ann. tit 27 §§ 2601 et seq. According to the Resolution, this report includes the reasons for selecting the proponents and description of the procedure and other pertinent information. This two-page Resolution is the *only* publicly or otherwise available information of the captioned proceeding. UTIER has no knowledge of any other procedural milestones.

PETITION TO INTERVENE

UTIER respectfully requests the leave of this Honorable Bureau to intervene in this proceeding. UTIER was founded in the early 1940's and it is one of four labor unions that represent PREPA's employees and retirees. UTIER's members are responsible for the *operation and maintenance* of PREPA's systems. Also, they are responsible for the *repairs, renovations, and improvements of PREPA's property*. As a union, UTIER's job is to protect and defend PREPA's workers, as well as negotiate collective bargaining agreements on their behalf. However, in carrying out the faithful representation of its members, UTIER is, of necessity, involved in the public debate regarding Puerto Rico's energy policies, including the environmental effects of PREPA's projects and the effect of policies on consumers.

I. The right to intervene is recognized by LPAU which applies in this proceeding.

As a threshold issue, the applicable law to this proceeding is LPAU. Under Act No. 120-2018, P.R. Laws ann. tit. 22 §§ 1111 et seq, P3 needs a Certification of Energy Compliance ("CEC")¹ from the Bureau, before it can present a PREPA Transaction Contract ("PREPA Transactions")² to PREPA's Governing Board. *Id.* § 1115(g). However, this requirement is devoid of a set of procedures for *the Bureau* to follow.

While Section 5 includes the CEC as a requirement, as part of the procedure for authorizing PREPA Transactions as defined under Act No. 120-2018, with respect to the process *before the Bureau* it only provides limited guidance. That is, it does not prescribe the procedural requirements or applicable regulation to the procedure *before the Bureau*. It only explains that (1) P3 will seek Bureau approval and (2) the Bureau will make a determination within the next

¹ This is defined as a certificate that the Bureau issues when it has certified that the PREPA Transaction meets the applicable regulatory and statutory frameworks and complies with the *Puerto Rico Energy Public Policy Act*. P.R. Laws ann. tit. 22 § 1112(d).

² This includes any and all transactions through which public-private partnerships are established with PREPA or contracts to sell PREPA's actives related to energy generation. *Id.* § 1112(m).

30 days. It also provides a 15-day term for judicial review. At this time, there are no Bureau regulations regarding this procedure or based on this law.³

Due to the absence of procedural guidelines for the Bureau's determination, we go to Act No. 57-2014, P.R. Laws ann. tit. 9 §§ 1051 et seq, for guidance. Under Act No. 57-2014, specifically, Art. 6.20, in any process for which said law does not provide *particular instructions*, the Bureau will apply LPAU. P.R. Laws ann. tit. 9 § 1054s. This includes adjudicative procedures, judicial review and processes for the awarding certificates. Id. Thus, the applicable law to these proceedings, *before the Bureau*, is LPAU inasmuch as the two previously discussed laws are silent on the matter.

Regarding administrative procedures, LPAU expressly applies to all administrative procedures that have not been explicitly exempted. P.R. Laws ann. tit. 3 § 9604. Of course, there are three principal kinds of administrative procedure, rulemaking, investigation and adjudication. Therefore, the captioned case is clearly adjudicative in nature and adjudications are governed by Chapter 3 of LPAU.

Adjudicative procedures are not only those that arise from a complaint or adversary pleadings. They also include those *ex parte* requests that require an adjudication, that is a determination based on the applicable law where the agency passes judgment on the request. Section 1.3(b) of LPAU defines "adjudication" as a "statement whereby an agency determines the rights, obligations or privileges that correspond to a party." Id. § 9603(b). Section 3.2. on Adjudicative Procedure, provides in pertinent part that:

Except when otherwise established by law, the adjudicative procedure before an agency, may be initiated by the agency itself or by the presentation of a complaint, application or petition, in person or in writing, within the term

³ It should be noted that P3 does not have the authority to prescribe those procedures to the Bureau, that is a prerogative of the Bureau or the Legislature.

established by law or regulations, with regard to a matter that is under the jurisdiction of the agency. Id. § 9642.

The process before the Bureau, in the captioned case, is one such procedure. According to the Bureau's Resolution, P3 initiated the process with a petition for a CEC. Pursuant to Act No. 120-2018, the Bureau now has to pass judgment on that petition and determine whether the applicant complies with the applicable law and regulation. This is an adjudication, the Bureau is determining whether the applicant has the right to the CEC and, subsequently, to the PREPA Transaction.

Under this Chapter of LPAU, any person with a legitimate interest in an adjudicative proceeding can submit a written application for intervention and the administrative agency would need to apply the regulatory factors to determine whether to grant said application. As we will argue below, UTIER has a legitimate interest in these proceedings and those regulatory factors weigh in favor of intervention.

II. UTIER has a legitimate interest in this proceeding.

Act No. 120-2018 authorizes the sale of PREPA's assets and transactions for public-private partnerships which would delegate PREPA's functions to a private entity. This means that many of the functions that PREPA executes, through employees which are members of UTIER, would be in the hands of private entities. This fundamentally alters the nature, as well as the terms and conditions, of UTIER's members' jobs. It also puts their rights and continued employment at risk. Thus, all proceedings under this law have the potential to adversely affect the interests of UTIER and its members.

In fact, Act No. 120-2018 itself recognizes the interests that PREPA's employees have in these proceedings. Section 15 of Act No. 120-2018 *explicitly* includes provisions on the rights of PREPA's employees. P.R. Laws ann. tit. 22 § 1121. According to that Section, this law cannot be used as grounds to fire any regular employees nor deprive any employee of rights they are

entitled to under the applicable laws, regulations and collective bargaining agreements. Id. This is a recognition of UTIER's interest. Nonetheless, this should not be interpreted as cancelling out UTIER's previously stated concerns.

The effect of an eventual transfer of PREPA's functions to a private entity will inevitably result in a change in *employer* for UTIER's members. That change subjects UTIER's members to the discretion of that new employer and creates the potential for arbitrariness and violations. While the law confers UTIER those rights, who if not UTIER will ensure that these provisions are met throughout the administrative procedures regarding the PREPA Transactions? How will these be protected without the benefit of UTIER's input and participation? There is currently no information available about what the new arrangement would be or how UTIER's members will be treated. Therefore, UTIER should be allowed to participate in the approval process and guard these clearly recognized interests, which are otherwise not being defended, rather than wait for approval and, potentially, flood the courts with challenges to the legality of their treatment under the PREPA Transactions.

Moreover, there has been no indication of the effect of the proposed PREPA Transaction on PREPA's Trust Agreement. Under the standing Trust Agreement, PREPA must prioritize the payment of operational expenses, including labor, and pensions over bondholder claims. Would the privatization of PREPA's functions affect the Trust Agreement? Will the obligations between PREPA and its employees and retirees be transferred to the unknown private entity? UTIER is in the dark. The contractual obligations that bind PREPA and its employees, through UTIER, will undoubtedly be affected if and when those functions for which PREPA employs UTIER's members are transferred to a private entity that is not a party to those agreements. Thus, UTIER, also, has a vested interest in compliance with the Trust Agreement and other obligations, such as

its collective bargaining agreements, which will be affected by the determination in this proceeding.

III. The intervenor factors of LPAU favor the allowance of UTIER's intervention.

Under LPAU, there are seven factors for an agency to consider when it receives a petition for intervention. P.R. Laws ann. tit. 3 § 9645. These factors are:

- (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. Id.

These criteria are meant to be applied *liberally*. Id. Furthermore, the Puerto Rico Supreme Court has held that this statute requires agencies "to facilitate the participation of such citizens whose interests may be affected by administrative action." Comisión Ciudadanos v. G.P. Real Property, 173 P.R. Dec. 998, 1011 (2008)(translation provided).

A. UTIER's interests may be adversely affected by Bureau's decision.

As previously established, UTIER represents PREPA's employees. As such, its interests are affected by the proposed concessions under Act No. 120-2018, which aim to transfer PREPA's operations to private entities. Specifically, this procedure is for a "single Private Partner [that] will assume all rights and responsibilities related to the operation, maintenance and

management of the T&D system.”⁴ This includes a broad list of rights and responsibilities, including the operation and maintenance of the T&D assets and system. These rights and responsibilities directly coincide with the duties performed by UTIER’s members and, thus, the transfer of PREPA’s functions to a private entity will affect UTIER and its members. Furthermore, UTIER’s members are residents and, thus, ratepayers. The transition of PREPA’s actives to private entities will undoubtedly affect ratepayers.

B. UTIER has no other legal means to adequately protect its interests.

According to Section 8 of the Puerto Rico Public-Private Partnerships Authority Regulation for Procurement, Evaluation, Selection, Negotiation and Award of Partnership Contracts and Sale Contracts for the Transformation of the Electric System, approved under Act No. 120-2018, after Bureau approval, the remaining steps are approval by PREPA’s Governing Board, the Financial Oversight and Management Board, the Governor and the Legislature. These are all purely political processes where UTIER, and any other interested party, will not be granted participation.

The concession of the CEC is no doubt the most formal and rigorous step in the approval of PREPA Transactions, under Act No. 120-2018. The Bureau is tasked with ensuring that the PREPA Transaction meets all the applicable legal requirements, including energy public policy. Furthermore, it is the only step that involves an adjudicative procedure and, therefore, permits participation of affected parties. The P3, in general, is exempt from LPAU’s provisions under Act No. 29-2009, according to Art. 19(c) of said law. P.R. Laws ann. tit. 27 § 2618(c). If the Bureau does not grant intervention now, it would deprive UTIER of the only legal method of protecting its interests.

⁴ *Request for Qualifications: Puerto Rico Electric Power Transmission and Distribution System, RFQ 2018-2* (October 31, 2018) at 13.

C. UTIER's interests are not already adequately represented by the parties to this proceeding.

Given that the only appearing party in this process is P3, there are no parties in this proceeding that adequately protect UTIER's interests. Without the benefit of intervention for UTIER, those interests would probably not even be considered, even though they are part of the legal framework that governs this process, as established in Act No. 120-2018, Section 15. Furthermore, as there appears to be no public hearing or process for public input under consideration, PREPA's ratepayers' interests are likewise not being represented adequately.

D. UTIER's participation is reasonably likely to help prepare a more complete record in this proceeding.

As previously mentioned, UTIER's participation will aid in the consideration of specific legal requirements under Act No. 120-2018 that would otherwise be ignored. Furthermore, UTIER has the firsthand knowledge and expertise to help prepare a more complete record, because those functions of PREPA's that P3 proposes to delegate to private actors are directly related to UTIER's members' duties. UTIER's members are also ratepayers and can offer the perspective of PREPA's customers.

E. UTIER's participation will not excessively extend or delay the proceeding.

UTIER is appearing with legal representation and is well versed in PREPA related issues. Other than the minimal delay caused by UTIER's request that this Bureau provide access to the P3 Motion and time to examine it, there is no *excessive* delay caused by UTIER's intervention. Any slight delay is balanced out by the contribution that UTIER can make to the proceeding, by aiding the Bureau in its determination.

F. UTIER represents other groups or entities in the community.

While UTIER is a labor union and represents PREPA's employees, it is also composed entirely of Puerto Rican residents. Therefore, UTIER also represents the interests of PREPA's ratepayers and is capable of providing input in that area. Furthermore, UTIER is active in the

public debate on Puerto Rico's energy needs and collaborates with multiple environmental advocacy groups and other energy centered and public policy organizations that wish to contribute to PREPA's development. UTIER can also serve as a vehicle for those organizations' interests.

G. UTIER can contribute information, expertise, specialized knowledge and technical advice which is otherwise not available in the procedure.

UTIER's members are charged with the operation and maintenance of PREPA's systems. This firsthand experience with the work involved in those duties and the deficiencies of PREPA's system are not currently available in this proceeding, where the *only* appearing party is P3. P3 is not tasked with these specialized issues and does not have the technical expertise in these areas. P3 is a vehicle for private-public partnerships that has only been tasked with procuring such partnerships specifically for PREPA in the last two years. UTIER's expertise will be invaluable to a more complete analysis by the Bureau. UTIER can provide expert analysis of the proposed transaction.

IV. Denying UTIER the opportunity to participate in this proceeding is a procedural due process violation.

Under the Puerto Rico Constitution, just as under the U.S. Constitution, no one shall be deprived of their property without due process. P.R. Const. art. II § 7; U.S. Const. amend. V, XIV. For the purpose of this Petition for Intervention, we are concerned with procedural due process. There are three elements involved in procedural due process: (1) the existence of a protected interests; (2) the deprivation of that protected interest; and (3) a due process.

A. UTIER and its members have a property interest in their employment under PREPA.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of

Regents v. Roth, 408 U.S. 564, 577 (1972). The Puerto Rico Supreme Court has specifically recognized that public employees have a property interest in keeping their jobs, if they are protected by law or if the circumstances of that employment create an expectation of continuity. Unión Independiente v. Aut. Edf. Público, 146 P.R. Dec. 611, 617 (1998). Evidently, this is because their employers are public entities, against whom constitutional rights apply always.

As we have mentioned, UTIER represents PREPA's employees. PREPA, evidently, is a public utility. Thus, its employees are *public employees* for whom procedural due process is available with respect to their property interests in their employment. Furthermore, under the specific legislation of this proceeding, UTIER and its members have a *recognized* property interest in their employment. As previously discussed, Act No. 120-2018, specifically Section 15, states that this law cannot be used as grounds to *fire any regular employees nor deprive any employee of rights they are entitled to under the applicable laws, regulations and collective bargaining agreements*. Id. This is a recognition of UTIER and its members' property interests. Thus, the first element of due process is met. There is a legally recognized property interest under procedural due process.

Moreover, as previously mentioned, there has been no indication of the effect of the proposed PREPA Transaction on PREPA's Trust Agreement, under which PREPA must prioritize the payment of operational expenses, including labor, and pensions over bondholder claims. Thus, UTIER, also, has a property interest in the compliance with the Trust Agreement and other obligations, such as its collective bargaining agreements, which will be affected by the determination in this proceeding.

B. UTIER and its members may be deprived of their property interest as a result of this proceeding.

To the extent that it may grant the CEC to an unknown private entity, who will then be given practically all of PREPA's functions, this proceeding will deprive UTIER's members of

their current rights as public employees. Additionally, it may even deprive some of UTIER's members of their employment altogether, despite the language of the law. We reiterate that, just because the law recognizes the rights of PREPA's employees, that does not mean that these will be respected and honored by P3 nor the prospective unknown private entity that takes over PREPA's functions.

As previously argued, the change of employer that would result at the end of this process, if P3 acquires all the necessary approvals, will affect the property interests of UTIER's members regarding their employment. Regardless of the legal requirements, changes in the person of the employer alter the relationship and rights the employees will have with it. Any change of employer has the potential to alter the existing dynamics and rights that employees have under the current employer. Additionally, UTIER's members, for the most part, will likely be changing from a public employer to a private employer, which alters their rights. Moreover, this procedure will affect UTIER and its members' property interests because all obligations between PREPA and its employees, like the cited provisions of PREPA's Trust Agreement and UTIER's collective bargaining agreement, will be vulnerable if proposed PREPA Transaction goes through.

C. Due process in this case requires granting UTIER leave to intervene and access to P3's submissions.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). For that reason, due process is circumstantial. Thus, there are three factors to consider in the determination of whether due process is met: (1) the private interest affected; (2) the risk of an erroneous determination due to the process that is implemented and the value of additional safeguards; and (3) the public interest alleged. Unión Independiente, 146 P.R. Dec. at 616; see, also, Mathews, 424 U.S. at 335.

If we take a look in the current proceeding, the private interest that is affected is UTIER's members' property interest as described above. However, P3 has not yet had the opportunity to allege any public interest that depends on excluding UTIER from this proceeding, nor can UTIER conceive any. Moreover, any allegations that P3 may have made for the confidentiality of its submissions would be in favor of other private interests, not a public interest. Furthermore, there is no indication that any public interests would be affected in this proceeding if UTIER were granted participation and access to the documents requested in this Petition for Intervention. Meanwhile, there is a *great* risk of a prejudicial and erroneous determination if UTIER is not granted the procedural safeguards it is requesting.

The procedure set forth in Act No. 120-2018 and P3's corresponding regulation only include one administrative procedure. This procedure, before the Bureau, is probably the most rigorous one that the proposed PREPA Transaction will have to overcome, because it directly considers all of the applicable laws and regulations. Furthermore, the Bureau is the most specialized entity in the chain of events. If the Bureau denied intervention and granted the CEC in this case, UTIER would not have any other legal forum in which to advocate for its members' rights. Furthermore, without UTIER's participation, the Bureau would not be able to determine if the rights of PREPA's employees will be protected adequately according to Section 15 of Act No. 120-2018. Without UTIER's input, the Bureau will not have information needed to protect those interests and will almost certainly erroneously deprive UTIER of the protected property interest.

ARGUMENTS AND RELIEF REQUESTED

As argued above, UTIER should be granted leave to intervene in this case. Additionally, UTIER requests that the Bureau grant access to the P3 Motion and its exhibits, submitted to the

Bureau on May 18th, 2020, according to the Bureau's Resolution. Furthermore, UTIER requests a period of 30 days to examine the P3 Motion and its exhibits and respond.

I. P3's Motion and exhibits are public documents which should be available to the public for inspection, pursuant to the constitutional and statutory right of any citizen to inspect public documents.

A. In Puerto Rico, there is a constitutional and statutory right of access to public information.

Section 4 of Article II of the Puerto Rico Constitution establishes freedom of speech and freedom of the press. P.R. Const. art. II § 4. The Puerto Rico Supreme Court has determined that both freedom of speech and freedom of the press require the *right of public access to public information*, because the primary purpose of those rights is to guarantee the free discussion of government affairs. Ortiz v. Bauermeister, 152 P.R. Dec. 161, 175 (2000). Thus, the right to access public information is intrinsic to free speech and a free press. See Soto v. Srio. de Justicia, 112 P.R. Dec. 477, 485 (1982). Therefore, the right to access public information has been recognized as a *fundamental constitutional right*. Ortiz, 152 P.R. Dec. at 175. This access can *only* be limited by the government if there is a *compelling public interest* weighing in favor of confidentiality. Id.; see, also, Soto, 112 P.R. Dec. at 485.⁵

Confidentiality of public information can be invoked under a limited number of circumstances: (1) if a law or regulation declares it; (2) if it is privileged information under the evidentiary rules; (3) if revealing the information would cause harm a third-party's *fundamental* rights; (4) if the information is regarding a confidential informant's identity or (5) if the information is "official information" under the evidentiary rules. Ortiz, 152 P.R. Dec. at 177. If confidentiality is invoked based on *a law*, there are additional considerations. First of all, the

⁵ Public information, for these purposes, is defined to include any document that originated, is held by or has been received by *any* State dependency, including administrative agencies, such as the Bureau. See Ortiz, 152 P.R. Dec. at 176 (citing P.R. Laws ann. tit. 3 § 1001(b)(defining public document)); see, also, P.R. Laws ann. tit. 3 § 1001(g)(defining State dependency).

invocation must comply with the requirements of law. For example, if the law provides confidentiality in a precise stage of a proceeding, the invocation is not applicable at a different stage. Additionally, case law has established another set of requirements for a valid invocation of confidentiality based on a *law*: (1) the law must be within the State's powers; (2) it must promote a *compelling government interest*; (3) the restriction cannot be linked to suppressing expression; and (4) the restriction cannot be broader than necessary to promote that interest. *Id.* at 178.

To allow the government to manage public affairs under a secrecy cloak is to invite arbitrariness, bad administration, governmental unresponsiveness, public irresponsibility, and corruption. A citizenry alert and militant against these potential evils of any governmental machinery may carry out its controlling function only if it had within its reach the information that would allow it to discover, in time, the dangerous areas and to demand liability. To deprive the citizenry of this information is tantamount to promote a collective paralysis aggravated by the civic shortsightedness of he who has none or only partial knowledge of the government's actions. *Soto*, 112 P.R. Dec. at 486 f.n. 4 (official translation)(emphasis added).

Thus, keeping public information confidential must be substantiated and justified, to the extent that it meets strict judicial scrutiny.

Furthermore, the Legislature of Puerto Rico has seen it fit to pass statutes that reflect the importance of this constitutional principle and create expedite mechanisms with which to exercise this right. For example, Act No. 141-2019, the Transparency and Expedite Procedure for Access to Public Information Act (translation provided), the declaration of Public Policy dictates that the constitutional right to access information of this nature requires government *transparency*. *See* Art. 3(3), Act No. 141-2019. It also adopts the definition of public information previously cited and states that *any document* of that kind is presumed public and *must be accessible to the people and the press*. *Id.* at Art. 3(4). Under this law, the Government *must* facilitate access to public information, not at whim or at the sign of trouble, but *routinely and periodically*. *Id.* at Art. 4.

Another example of this trend, creating swift statutory mechanisms for the exercise of the constitutional right to public information, is Act No. 122-2019, Government Open Data Act (translation provided). This law declares as Public Policy that open access to government data is *essential* to promote the innovation and for *accountability* purposes. Art. 4, Act No. 122-2019. This law incorporates the same exceptions to disclosure as the constitutional doctrine, i.e. law, privilege, informant identity, official information, and harm to constitutional rights of others. Id. at Art. 4(a)-(e). It also incorporates other exceptions which are in line with those of the constitutional doctrine, and similarly require a demonstration of a *compelling* state interest, such as threats to national security, Id. at Art. 4(i), and other information that falls under the blanket of evidentiary privileges, such as trade secrets, Id. at Art. 4(ix), or harm to constitutional rights, such as personal information that would invade a third party's privacy. Id. at Art. 4(vi), (xi). See, also, Art. 2, Puerto Rico Innovation and Technology Service Act, Act No. 75-2019(declaring public policy for technological innovation that promotes transparency in information).

Puerto Rico law and jurisprudence recognize the extent and importance of public access to public information. UTIER asks this Bureau to do the same.

B. P3 has not substantiated the need to keep all its submissions confidential.

In the captioned case, the public docket does not include *any* of P3's submissions, as the petitioner in the case. It does not include the P3 Motion nor its exhibits. We cannot ascertain the arguments P3 set forth to justify that course of action, because the P3 Motion is not accessible to the public. However, according to the Bureau's Resolution, P3 alleged that the exhibits to the P3 Motion should not be disclosed because they are part of an ongoing procurement process. There is no mention of making the P3 Motion itself confidential, thus, we do not understand why this document is not public.

The Bureau granted confidentiality based on Art. 6.15 of Act No. 57-2014, which states the rules for confidentiality before this agency. P.R. Laws ann. tit. 9 § 1054n. Nonetheless, although this article allows for information to be treated as confidential, it does not itself provide the *grounds* for confidentiality, other than expressing that the information is claimed to be privileged or confidential. *Id.* It only provides the *vehicle* to request confidentiality. Therefore, P3 must have independent grounds for its claim to confidentiality. Otherwise, keeping these documents shielded from public scrutiny is constitutionally and statutorily infirm. If P3 has raised such grounds, we are unaware, because the P3 Motion has not been made public.

Here, according to the Bureau, P3 requested confidentiality because the “[e]xhibits are part of an ongoing procurement process and, therefore, the information should not be disclosed.” Resolution at 1. We note that, if P3 is requesting the CEC for the unknown private entity, it has presumably already adjudicated the RFQ. If that is so, this is not an *ongoing* procurement process but an *adjudicated* procurement process. Therefore, the confidentiality that would apply to an ongoing procurement process does not apply here. The compelling state interests that may be present in an ongoing procurement process are not equally present or compelling once P3 has already chosen a proponent. Furthermore, throughout the rest of the procedure set out by Act No. 120-2018 and the corresponding regulation, there is little room for public intervention, or even *disclosure* to the public of *what* is happening with PREPA’s assets and functions.

This process before the Bureau seeks a CEC for an unknown private entity with the goal of privatizing PREPA’s functions, in such a way that PREPA will practically exist only in name. This is a matter of great public concern and it is being examined by a public agency, i.e. the Bureau. Thus, the documents that the Bureau has received are *public documents*; it is *public information* that the public has a right to know. Unless P3 or the Bureau have a *compelling* state

interest and can assert an independent legal ground for confidentiality, UTIER has a right to access the documents of this case, as does the public.

II. P3's submissions have been granted confidentiality in excess of the available confidentiality under the applicable law.

A. Under Act No. 57-2014, the Bureau can only grant confidentiality after it considers the public interest and transparency.

As previously mentioned, Art. 6.15 of Act No. 57-2014 states the rules for confidentiality before this agency. P.R. Laws ann. tit. 9 § 1054n. Although this article allows for information to be treated as confidential, it *explicitly* instructs the Bureau to find the way to grant protection that *least impacts the public and transparency*, as well as the parties of the case. Id.(a) Also, the Bureau can *only* keep documents completely away from public scrutiny in *exceptional cases*. Id.(c). There is no indication in the Resolution that the Bureau considered this.

If the Bureau had considered the impact that this secrecy has on the public and on the transparency of the process, it would undoubtedly have provided a more detailed explanation of what documents will be confidential and why. On the contrary, here, the Bureau seems to take P3's word for the confidential nature of all the documents, because it does not provide any independent legal basis for that decision. The decision to make these documents confidential should have balanced the *rationale for confidentiality with the impact on the public and transparency*, as Act No. 57-2014 requires. Furthermore, if the Bureau was intent on making *all* the submissions confidential in their entirety, it should have explained what the *exceptional* circumstances were that lead it to do so.

B. Under Act No. 120-2018, the confidentiality section of Act No. 29-2009 should be applied restrictively, because it only applies if it is not otherwise inconsistent with Act No. 120-2018.

Act No. 29-2009 includes a section on confidentiality. P.R. Laws ann. tit. 27 § 2608(i). Art. 9(i) states that P3 will govern its treatment of confidential information according to the criteria it establishes. Id. The statement of motives of said law sheds light on what confidential

information is, i.e. trade secrets, and Art. 9(b) includes a list of information that P3 should respect as confidential, which includes: intellectual property, trade secrets and exclusivity rights. Id.(b)(ii). Furthermore, the Puerto Rico Public-Private Partnerships Authority Regulation for Procurement, Evaluation, Selection, Negotiation, and Award of Partnership Contracts and Sale Contracts for the Transformation of the Electric System under Act No. 120-2018, as amended, in Section 11.2, states that “[a]ll Proposals submitted to the [P3] will become the property of [P3], except for documents or information submitted by Proponents *which are trade secrets, proprietary information or privileged or confidential information of the Proponent.*” (emphasis added). Thus, it is not *all* documents that are part of an ongoing procurement process that are confidential under Act No. 29-2009. It is that specific information that consists of trade secrets and other already privileged and confidential information.

Furthermore, Section 4 of Act No. 120-2018 states that Act No. 29-2009 applies to PREPA Transactions unless otherwise indicated. P.R. Laws ann. tit. 22 § 1114. This same section explains that if any provision of Act No. 29-2009 were inconsistent with Act No. 120-2018, the latter prevails. Id. Act No. 120-2018, in various sections, establishes as priorities the existence of a *transparent and public process*. Thus, confidentiality should be interpreted restrictively.

III. The Energy Bureau should suspend or extend the 30-day deadline to resolve this matter.

UTIER anticipates hesitation on the part of the Bureau, and opposition on the part of P3, to allow intervention and accept new information given the time period set forth in Act No. 120-2018. However, this should not inhibit the Bureau from giving something as important as this proceeding the careful consideration it deserves. We cannot lose sight of the gravity of what P3 is intending to do here. P3 is seeking a CEC, which is basically the approval of an unknown single private entity that will take over practically all of PREPA’s functions. This is effectively

the privatization of the sole distributor of electricity for the entire archipelago of Puerto Rico. It is no small matter.

Thus, the Bureau should not feel entrapped by the 30-day period set forth in Art. 5(g) of Act No 120-2018. P.R. Laws ann. tit. 22 § 1115(g). First of all, it would be too strict to presume that this deadline is *jurisdictional*. Thus, it should be considered extendable, as there is just cause for to extend the timeframe for Bureau consideration. In the alternative, the Bureau should reject the transaction and advise P3 of the right to seek reconsideration. This aligns with the Bureau's own organic law, such as Act No. 57-2014.

Act No. 57-2014 includes an article on granting certifications. Art. 6.13, Act No. 57-2014, P.R. Laws ann. tit. 9 § 1054*l*. In general, the Bureau needs to grant certificates to energy companies that wish to provide services in Puerto Rico. *Id.* § 1054*l*(a). In that case, the Bureau is also granted a 30-day deadline, with similar language to Art. 5(g) of Act No. 120-2018. However, it expressly states that the Bureau may suspend that deadline so it may obtain more information that will permit it to consider the merits of the request. *Id.* §1054*l*(b). It would be highly inconsistent for the Bureau to interpret Art. 5(g) of Act No. 120-2018 differently from Art. 6.13 of Act No. 57-2014. Because Act No. 120-2018 is not focused on the Bureau, but rather on P3 and what it must do to secure a PREPA Transaction, its provisions lend little to no consideration to the process that the Bureau needs to undergo before it grants a CEC under that law. Thus, the Bureau should interpret the provision as to allow it to follow those processes that it normally would in response to a request for energy certification.

Given the importance and the breadth of the request in the captioned case, the Bureau should exercise its most stringent judgment and extend or suspend its 30-day deadline, so that it may consider all pertinent information, including that which UTIER has to offer. The Bureau is the independent regulator whose sole purpose is to oversee this kind of proceeding. It should, as

it was created to do, exercise its role in a manner that complies with due process. Act No. 120-2018 should not be read to deprive the Bureau of that authority. In the alternative, the Bureau should deny the certification, without prejudice to refile, because it has not received all the information necessary to properly execute its role, such as the information UTIER has to offer on behalf of its members and the community.

CONCLUSION

In view of the foregoing, UTIER respectfully requests from this Honorable Bureau to grant leave to intervene and provide public access to P3's submissions in the captioned case. Furthermore, UTIER requests a 30-day period, beginning when they become available, to inspect the submissions and respond to the P3 Motion. If, in the alternative, the Bureau believes that it does not have discretion to allot itself more time, it should deny the certification, without prejudice, because it has not received all the information necessary to properly execute its role. Additionally, if the Bureau understands that the applicable law is an obstacle to the any citizen's constitutional right to access public documents, these obstacles would be subject to judicial review because they are constitutionally infirm.

RESPECTFULLY SUBMITTED this 15th day of June 2020, in San Juan, Puerto Rico.



472 Tito Castro Ave.
Marvesa Building, Suite 106
Ponce, Puerto Rico 00716
Tel: (787) 848-0666
Fax: (787) 841-1435

/s/Rolando Emmanuelli Jiménez, Rolando
Emmanuelli-Jiménez
RUA: 8509

/s/Jessica Méndez-Colberg

Jessica Méndez-Colberg
RUA: 19853

Email: rolando@bufete-emmanuelli.com
jessica@bufete-emmanuelli.com
notificaciones@bufete-emmanuelli.com

CERTIFICATE OF SERVICE

We hereby certify that on June 15, 2020, we have filed this Motion via the Energy Bureau's online filing system, and sent to the Puerto Rico Energy Bureau Clerk and legal counsel to: secretaria@energia.pr.gov and fermin.fontanes@p3.pr.gov.

Respectfully submitted on this day June 15, 2020.

/s/Rolando Emmanuelli Jiménez
Rolando Emmanuelli-Jiménez
RUA: 8509

/s/Jessica Méndez-Colberg
Jessica Méndez-Colberg
RUA: 19853

Email: rolando@bufete-emmanuelli.com
jessica@bufete-emmanuelli.com
notificaciones@bufete-emmanuelli.com



472 Tito Castro Ave.
Marvesa Building, Suite 106
Ponce, Puerto Rico 00716
Tel: (787) 848-0666
Fax: (787) 841-1435