

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

NEPR

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IN RE: REQUEST FOR PROPOSALS FOR
TEMPORARY EMERGENCY
GENERATION

CASE NO. NEPR-AP-2020-0001

SUBJECT: RESPONSE TO
PREPA'S RFP CANCELLATION
NOTICE

PETITIONERS' RESPONSE TO PREPA'S RFP CANCELLATION NOTICE

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW, Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., - Enlace Latino de Acción Climática, Comité Yabucoño Pro-Calidad de Vida, Inc., Alianza Comunitaria Ambientalista del Sureste, Inc., Sierra Club and its Puerto Rico chapter, Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc., Amigos del Río Guaynabo, Inc., Campamento Contra las Cenizas en Peñuelas, Inc., CAMBIO Puerto Rico, and Unión de Trabajadores de la Industria Eléctrica y Riego (collectively, "Petitioners"), to request that the Energy Bureau allow Petitioners to respond to PREPA's June 1, 2020 Cancellation Notice. If allowed, Petitioners' response follows below.

Petitioners request that the Energy Bureau continue to require biweekly reports from PREPA on Costa Sur repairs and load management negotiations and also use this docket to determine whether PREPA's conduct during this RFP process violated applicable laws and regulations. The very first step of this investigation should be an Energy Bureau order pursuant to Regulation 8815 Rule 4.8(g) requiring PREPA to publish all Proposals, as well as all information in PREPA's possession related to the procurement, evaluation, scoring, selection and negotiation process.¹

We agree with PREPA's decision to cancel the RFP. The \$1.278B² temporary generation rental scheme was quite possibly the worst option to make up any shortfall from the loss of Costa Sur Units 5 and 6. The purpose of this docket now shifts to monitoring PREPA's repairs of Costa Sur 5 and Costa Sur 6, and PREPA's progress on obtaining at least 250 MW of load management agreements with large customers. The Energy Bureau required biweekly reports on both of these items from PREPA, starting on June 1st. We appreciate that PREPA provided the Costa Sur Repairs Report ahead of the due date, on May 29th. We note that PREPA is 16 days overdue on the Large Customer Load Management Report.

Through this docket, the Energy Bureau can also examine whether PREPA's conduct during this failed RFP process violated applicable laws and regulations. PREPA's cancellation of the RFP concludes this RFP process. This triggers

¹ Regulation 8815 Rule 4.8(g) includes exceptions for trade secrets, information protected from publication by law, and information that the Proponent has clearly identified as (and PREPA has determined to be) proprietary or privileged.

² PREPA's March 2, 2020 letter to COR3 estimated that this scheme would cost estimated \$71M per month (\$26M for lease costs, \$45M for fuel). May 7th Motion in Compliance with Bench Order, PDF p. 10. The RFP sought contracts for twelve months, with a possible six-month extension. \$71M/month * 18 months = \$1.278B.

Regulation 8815 Rule 4.8(g), requiring publication of the Proposals as well as information in PREPA's possession concerning this process.

PREPA Failed to Comply with Law 33-2019

The Puerto Rico legislature has mandated a complete transition away from fossil fuel generation by 2050, starting with a 20% renewable mandate by 2023. PREPA's proposal to spend \$1.278B on fossil fuel generation is completely antithetical to those goals. Why did PREPA fail to recognize that renting temporary generation was probably the worst solution to meeting summer peak demand? After reviewing the record in this case and all information submitted by PREPA and by Petitioners, the Energy Bureau determined that PREPA could lower peak demand by at least 250 MW through load management agreements with large customers. This option is more cost-effective than temporary generation rental, and much more in line with the required renewables transition. PREPA continues to ignore this cost-effective option, despite explicit Energy Bureau orders to conduct "an aggressive and expeditious process of negotiation, coordination and programming with high-demand industrial and commercial clients, with the objective of establishing" no less than 250 MW of demand response management agreements.³ As detailed above, PREPA's first report on this process is sixteen days overdue.

Finally, why did PREPA's RFP process fail to attract any renewable or storage bids: directly at odds with Puerto Rico's wishes to transition entirely to these

³ Puerto Rico Energy Bureau, May 22 Resolution and Order, paras. 7 and 8, <https://energia.pr.gov/wp-content/uploads/2020/05/2020-05-22-Resolucion-y-Orden-NEPR-AP-2020-0001-Aprobacion-de-Presupuesto-para-Reparacio%CC%81n-de-las-Unidades-CS-5-y-CS-6-de-la-Central-Costa-Sur.pdf>

resources?⁴ PREPA's RFP purported to seek renewable and storage options, but the RFP discouraged renewable and storage bids due to PREPA's bias against those resources. PREPA further exacerbated this problem by failing to properly publicize the RFP, in violation of Regulation 8815, Section 4.4.⁵ . Due to these failures, PREPA received zero renewable bids. Once the Integrated Resource Plan process is complete, PREPA will be issuing RFPs for thousands of MW of renewables and storage. To ensure the success of those RFPs, the Energy Bureau must examine why this RFP failed to attract any renewable and storage bids.

**PREPA Failed to Prevent Potential Conflicts of Interest, in Violation of
Regulation 8815 Section 4.13**

PREPA should publish the list of shortlisted bidders and provide the justification for those selections. In particular, the Energy Bureau should examine the selection of New Fortress Energy.⁶ This company was not chosen for its experience⁷ with this type of contract: on New Fortress Energy's Q1 conference call, CEO Wes Edens explained that the company did not have significant experience with

⁴ At the April 30, 2020 PREPA Governing Board meeting, Fernando Padilla acknowledged that "...no renewable nor battery storage type of solution was delivered within the proposals." <https://youtu.be/smDxRXRs0TE?t=1748>

⁵ Local workers, suppliers, contractors, and investors, diligently watching the PREPA and Energy Bureau websites for RFPs, would not have received notice of the RFP until weeks later, in violation of Law 83 and Regulation 8815. Foreign companies and foreign contractors were given ahead start over Puerto Ricans. The failure to provide timely public notice violates Puerto Rico policy to encourage the participation of local entities. Regulation 8815 Section 4.5(m).

⁶ *New Fortress Energy LLC (NFE) Q1 2020 Earnings Call Transcript*, The Motley Fool, (May 6, 2020, 1:34pm) <https://www.fool.com/earnings/call-transcripts/2020/05/06/new-fortress-energy-llc-nfe-q1-2020-earnings-call.aspx> [hereinafter NFE Earnings Call Transcript]

⁷ Regulation 8815 Section 5.1(h) states that "[p]roponent experience constructing and operating similar facilities" is a key factor on which to evaluate the proposals.

this type of contract, but rather was looking to use this RFP to gain experience with temporary generation to bring to other markets:

So this will be a good test of that for us. And I think if we're successful, it can be a huge arrow in our quiver kind of going forward and looking to other markets. And so, I think this fast power notion, of which this is a real life example and proxy for what could happen, is something that is really exciting. ... And if we're fortunate enough to be selected, we'll have some real life experience then to draw on to then look at some other applications for around the world.⁸

On this call, CEO Edens also disclosed that PREPA had selected New Fortress Energy for the RFP Shortlist. The Energy Bureau should investigate whether Mr. Edens' disclosure of PREPA's shortlisting violated Regulation 8815 Section 4.14, which forbids Proponents from disclosing "the nature or contents of ... their communications and meetings with" PREPA. Regulation 8815 Section 5.1 further requires that all "evaluations, discussions and negotiations ... be kept confidential throughout the evaluation, selection and negotiation process until the signing of the Contract..."⁹

New Fortress Energy was in close contact with PREPA and PREPA's consultant, King & Spalding, during the RFP process, concerning New Fortress Energy's operations at San Juan Units 5 and 6. Generally, such communications violate Regulation 8815 Section 4.13's prohibition on contact or communications. The record does not show that New Fortress Energy sought or obtained the consent of the

⁸ NFE Earnings Call Transcript.

⁹ See also Regulation 8815 Section 5.1(f) ("Prior to the Award of a Contract, information related to Proposal or its evaluation will not be discussed with anyone other than the Proponent who submitted it and personnel involved in the evaluation and selection process.")

Project Committee, as required. The Energy Bureau should require PREPA, under Regulation 8815 Section 4.8(g), to publish all information in PREPA's possession related to the procurement, evaluation, scoring, selection and negotiation process, so that the public can carefully review all communications among New Fortress Energy, PREPA, and King & Spalding to determine whether they "compromise the integrity of the IRP process".

This would not be the first time that New Fortress Energy, PREPA, and King & Spalding communicated during an RFP process in violation of Regulation 8815 Section 4.8(g): these parties were in close contact before and during the RFP Process for the conversion of San Juan Units 5 and 6.¹⁰

In conjunction with the justification for short-listing New Fortress Energy, the Energy Bureau should closely examine whether PREPA's gas consultant, King & Spalding, has a potential for bias and should have been excluded from involvement in resource planning and the RFP process. King & Spalding represents PREPA in its dealings with New Fortress Energy, which is an affiliate of Fortress Investment Group. But at the same time, King & Spalding also represents another Fortress Investment Group affiliate, which sit side by side on the Fortress Investment Group webpage with New Fortress Energy.¹¹ Wes Edens founded, and serves as CEO, of both New Fortress Energy and Fortress Investment Group.¹²

¹⁰ Tom Sanzillo & Ingrid M. Villa-Biaggi, IEEFA, *Is Puerto Rico's Energy Future Rigged?* (2020), https://ieefa.org/wp-content/uploads/2020/06/Is-Puerto-Ricos-Energy-Future-Rigged_June-2020.pdf

¹¹ Fortress Investment Group LLC, <https://www.fortress.com/> (last visited Mar. 6, 2020).

¹² New Fortress Energy, LLC, <https://www.newfortressenergy.com/about> (last visited Mar. 6, 2020).

The potential for bias is clear: King & Spalding advises PREPA in gas resource planning and on its business with one Fortress Investment Group affiliate, **knowing** that King & Spalding's clients (Fortress Investment Group and its other affiliates) benefit if that business increases. King & Spalding has a business interest in having New Fortress Energy provide increased resources to PREPA. King & Spalding would receive a material benefit if New Fortress Energy had obtained this temporary generation RFP contract. This violates the prohibition on potential for bias that the Energy Bureau set forth in the 2016 Integrated Resource Plan docket:

Where the consultant conducting resource planning has a business interest in resource selection, there is a risk of bias, intentional or unintentional. That risk rises when the modeling technique used by the consultant involves subjectivity. ... Utility deference to a consultant with a potential for bias is not a prudent practice.¹³

Puerto Ricans have endured scandal after scandal where rushed, secretive procurement processes funneled millions of dollars to insiders and politically connected firms.¹⁴ Therefore, PREPA should be making every effort to avoid even the appearance of potential for bias in its RFP processes.

We had previously notified the Bureau that on May 15th, at least six General Electric trailer-mounted aeroderivative gas-fired turbine generators were delivered

¹³ Puerto Rico Energy Bureau, Final Resolution and Order on the First Integrated Resource Plan of the Puerto Rico Electric Power Authority, para. 110, Dkt. No. CEPR-AP-2015-002 (Sept. 23, 2016).

¹⁴ For example:

- [The \\$160M owed to Whitefish Energy Holdings after a rushed procurement following Hurricane Maria.](#)
- [The arrests of the Cobra Acquisitions LLC's CEO and the findings in the audit made by the Department of Homeland Security's Office of Inspector General regarding Cobra's \\$1.8B contracts in Puerto Rico.](#)
- [Corruption in the government's contracting process for \\$40M of medical equipment to deal with COVID-19.](#)

at the Port of San Juan.¹⁵ Petitioners respectfully request that the Energy Bureau require PREPA to provide any information it has on these generators. Given PREPA's rush at that time to move forward with temporary generator rental, one wonders whether these generators were brought to the island under any agreement by PREPA to rent these generators, whether written or unwritten. We request that the Energy Bureau order PREPA to divulge any information its employees have and all documents in PREPA's possession on the temporary generators.

**Failure to Provide Accurate and Updated Information, in violation of Law 57
and Regulation 8543 Section 1.14**

We also urge the Energy Bureau to inquire whether PREPA provided accurate and up-to-date information to all parties, as required by Law 57 and Regulation 8543. This RFP involved several critical stakeholders: twenty-four bidders, FEMA, insurance companies, the Energy Bureau, and the public. PREPA served as the go-between among all parties but failed to provide all parties with all relevant facts in a timely manner. This violates the requirement Regulation 8543 Section 1.14 to present only accurate and up-to-date information:

The presentation of a document whose content has been formulated by the undersigned party, shall be equivalent to certifying that the content of said document is true and that, according to the signer's best knowledge, information and belief, formed after reasonable inquiry, the document is based on facts, arguments, legal sources, and correct information.

¹⁵ Petitioners' Second Motion to Submit Supplemental Filing, paras. 4-8. <https://energia.pr.gov/wp-content/uploads/2020/05/2020-05-20-AP20200001A42-Petitioners-Second-Suppl.-filing.pdf>

PREPA's failure to provide accurate and updated information violates its obligation to promote "[t]ransparency and citizen participation in every process related to electric power service in Puerto Rico".¹⁶

For example: PREPA initially claimed that FEMA would have funded most of the temporary generation scheme, but once FEMA rejected that proposal, PREPA failed to disclose to stakeholders just how limited and uncertain FEMA funding would have been.

FEMA's April 28th letter to PREPA and COR3 made it clear that FEMA funding for the temporary generation scheme would not cover operation and maintenance of the units:

The essential services provided by PREPA, through its Costa Sur power plant, are deemed eligible to be temporarily relocated to another facility. However, all costs associated with operating and maintaining the temporary facility will not be considered eligible for [Public Assistance Program] funding.¹⁷

FEMA further stated that temporary generation rental would make PREPA ineligible to collect the estimated \$384M¹⁸ of expenses incurred in the operation of the peaking units used to substitute Costs Sur's generation:

Once temporary generation initiates, the use of the "Peaking Units", currently utilized by PREPA to compensate for energy

¹⁶ Law 57, Section 1.2(o).

¹⁷ May 7 Motion, PDF pp. 145-46.

¹⁸ May 30th Energy Bureau Resolution and Order, p. 14, Docket NEPR-MI-2020-0001, p. 12.
<https://energia.pr.gov/wp-content/uploads/2020/05/82e69ffade504d4ca003fb00191ab41f-compressed-0f5c6543daf38f8c8c0ebaab721193f1.pdf>

deficiency, will not be eligible for [Public Assistance Program] funding."¹⁹

From April 28th until PREPA cancelled the RFP on June 1st, the public, the Energy Bureau, and all other stakeholders considered the RFP under the assumption that FEMA would pay for a significant percentage of the temporary generation scheme, as PREPA had claimed. Regulation 8543 Section 1.14 obligated PREPA to correct this false claim. Surely bidders and the Energy Bureau would have found it useful to know the limits of FEMA funding.

PREPA's correspondence to FEMA also contained inaccurate and outdated information. For example, FEMA's very first letter to PREPA and COR3 on this topic, on March 13th, asked the most critical question: "Has PREPA identified any other alternate power generation sources to mitigate the shortage in base generation?"²⁰ PREPA's subsequent responses never disclosed to FEMA that PREPA was already working on bringing units like Aguirre 2 back online, or that the Energy Bureau had ordered PREPA to meet with large customers to investigate load management agreements. FEMA may well have been able to quickly fund those projects, had they been informed properly.

Conclusion

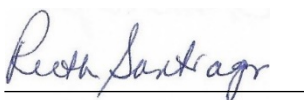
Petitioners ask the Energy Bureau to continue to require biweekly reports from PREPA on Costa Sur repairs and load management negotiations, and also examine

¹⁹ May 7 Motion PDF pp. 145-46.

²⁰ May 7 Motion PDF pp. 143.


whether PREPA's conduct during this failed RFP process violated applicable laws and regulations. As the first step in this investigation, Petitioners request that an Energy Bureau order pursuant to Regulation 8815 Rule 4.8(g) requiring PREPA to publish all Proposals, as well as all information in PREPA's possession related to the procurement, evaluation, scoring, selection and negotiation process.

Respectfully submitted on this day June 16, 2020,



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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 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, astrid.rodriguez@prepa.com, jorge.ruiz@prepa.com, n-vazquez@aeopr.com, c-aquino@prepa.com, and kbolanos@diazvaz.law, ESI - manuelgabrielfernandez@gmail.com, OIPC - hrivera@oipc.pr.gov, jrivera@cnslpr.com.

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*The Puerto Rico Supreme Court is currently not accepting *pro hac vice* applications during its closure due to the Covid-19 pandemic. Once the Court reopens, *pro hac vice* applications will be submitted, if appropriate. Counsel Raghu Murthy and Jordan Luebkekmann have been granted permission to appear before the Puerto Rico Energy Bureau *pro hac vice* previously in another docket [CEPR-AP-2018-0001].