**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-2020-002**<br>SUBJECT: Opposition |

**PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY'S OPPOSITION TO UTIER'S "PETITION FOR INTERVENTION AND FOR PUBLIC ACCESS TO INFORMATION"**

**COMES NOW** the Puerto Rico Public-Private Partnerships Authority (the "P3 Authority") and pursuant to Act 29-2009, 27 P.R. Laws Ann. §2601 *et seq.* ("Act 29"), Act 57-2014, 22 P.R. Laws. Ann. §1051 *et seq.* ("Act 57"), and Act 120-2018, 22 P.R. Laws. Ann. §1111 *et seq.* ("Act 120") (each as amended), respectfully submits:

## I. INTRODUCTION

UTIER has filed a "Petition for Intervention and for Public Access to Information" whereby it presents a speculative, doomsday scenario related to the PREPA Transaction mandated by Act 120. Based on its self-serving and unsupported contentions, UTIER seeks to intervene in the process for the issuance of the Certificate of Energy Compliance in accordance with Act 120 and further requests that certain confidential documents be disclosed. UTIER also requests that PREB ignore Act 120's requirement that a Certificate of Energy Compliance be evaluated and granted within thirty (30) days. Although the P3 Authority denies the aspersions cast by UTIER on the public-private partnership process and the unfounded, speculative scenarios set forth in the referenced Petition, ultimately there is no need to discuss such contentions at length. While

inflammatory, they are irrelevant to analyzing UTIER's particular requests:[1] a request to intervene, a request for disclosure of confidential information, and a request for the PREB to extend a proceeding that is not subject to extensions. For the reasons more fully explained below, all 3 requests must be denied. The request to intervene fails at the outset because there is no right to intervene –by UTIER or any other party—in this proceeding. The request to disclose confidential information is likewise doomed. The information at issue here is confidential pursuant to applicable laws and regulations, and such laws and regulations are narrowly tailored to protect compelling public interests. Finally, the attempt at extending the 30-day period set forth in Act 120 is obviously contrary to law. All of UTIER's requests should be denied. Not only do they lack legal foundation but, such requests would lead the PREB to act in a manner contrary to applicable law.

## II. DISCUSSION

UTIER's Petition includes three requests for relief, none of which is supported by the law: a request to intervene; a request for disclosure of confidential documents; and a request for the PREB to set aside the thirty-day term required by law to issue the Certificate of Energy Compliance. We discuss each in turn, explaining the reasons why the relief sought by UTIER is contrary to the law.

### A. UTIER Does Not Have a Right to Intervene

UTIER first posits that it has a right to intervene in this proceeding that should be recognized by PREB, thereby allowing it access to all documents related to this proceeding, as well as an opportunity to litigate the issuance of the Certificate of Energy Compliance based on UTIER's disagreement with the Government's public policy. In support of such contention,

[1] The P3 Authority does not waive any argument and reserves all rights to address UTIER's irrelevant contentions and arguments at a later date, if necessary.

UTIER self-servingly concludes that: (a) this proceeding is governed by Puerto Rico's Administrative Procedures Act (known as LPAU, for its Spanish acronym), 3 P.R. Laws Ann.§ 9601et seq.; (b) this is an adjudicative proceeding pursuant to the LPAU, such that there may be interventions by third parties. It is on the basis of such contentions that UTIER then argues that it meets the requirements for intervention.

UTIER's first premise, that this proceeding is governed by the LPAU, is incorrect. The requirement that the PREB issue a Certificate of Energy Compliance for a PREPA Transaction[2] arises out of Act 120, section 5(g), 22 P.R. Laws. Ann. §1115(g). Act 120's requirements on this end are straightforward: (1) the P3 Authority (the Partnership Committee established by the P3 Authority for the PREPA Transaction) must submit to the PREB the Partnership Report prepared in accordance with Act 29, Art. 9(g), along with the Preliminary Contract; (2) the PREB then evaluates the same and, if the Preliminary Contract complies with the energy public policy and relevant regulatory framework, it issues a Certificate of Energy Compliance; (3) the term for PREB to evaluate and issue a Certificate or deny the same is 30 days. See 22 P.R. Laws. Ann. §1115(g). Noticeably absent from such provisions is *any* reference to the LPAU or to the procedures set forth therein.

Moreover, Act 120 must be read together with Act 29, 27 P.R. Laws Ann. §2601 *et seq*. After all, Act 120 uses the provisions of Act 29 and the positive experience with the public-private partnership ("P3") model to carry out the public policy of transforming PREPA through public-private partnerships. See 22 P.R. Laws. Ann. §1113 ("With this Act, we take advantage of the successful bidding process of the Public-Private Partnership model which has proved to be a useful tool for improving the quality of public services.") To that end, Act 120 makes Act 29 expressly

[2] Capitalized terms not otherwise defined have the definition set forth in Act 120 and/or the P3 Authority's May 18 Request.

applicable to all aspects of the PREPA Transaction, unless Act 120 otherwise provides. See section 4 of Act 120, 22 P.R. Laws. Ann. §1114 ("**All** of the provisions of Act 29-2009 (including, but not limited to, Section 11 of Act No. 29-2009) **shall apply** to PREPA Transactions, except as otherwise provided in this Act.") (emphasis added). In turn, Act 29 expressly states that the LPAU is not applicable to the procedures and actions carried out in connection with public-private partnerships. See 27 P.R. Laws Ann. §2618 ("***all*** procedures and actions authorized under this chapter, including but not limited to procedures and actions **in connection with** the approval of regulations, the determination of projects for the establishment of partnerships, the selection of proposals, and the award of partnership contracts, are hereby exempted from **all** of the provisions of §§ 2101 et seq. of Title 3, known as the 'Uniform Administrative Procedures Act of the Commonwealth of Puerto Rico.'") (emphasis added).

The Certificate of Energy Compliance for a PREPA Transaction is a requirement of Act 120 and is part of the process of a PREPA Transaction. PREPA Transactions, in turn, are subject to Act 29, which expressly excludes the application of the LPAU. As such, the LPAU does not apply to the proceedings before this PREB in connection with the Certificate of Energy Compliance required by section 5(g) of Act 120.

UTIER conveniently fails to mention any of this legislative framework. Instead, UTIER conclusorily alleges that Act 120 is devoid of procedural guidelines and, therefore, Act 57, 22 P.R. Laws Ann. §§ 1051 et seq., must apply. The first conclusion is incorrect, as already explained. Act 120, which includes the provisions of Act 29, requires a simple, straight-forward process that is not subject to the LPAU. Moreover, Act 120 also provides that it shall prevail over any inconsistent provision in Act 57. See 22 P.R. Laws. Ann. §1114. To the extent Act 57 would require application

of the LPAU to the proceedings concerning the Certificate of Energy Compliance, it would be inconsistent with Act 120's integration of Act 29 and, hence, inapplicable.

Even if UTIER's first contention were not incorrect and the LPAU somehow applied to this proceeding, the second contention would undoubtedly be wrong. The procedure for obtaining a Certificate of Energy Compliance is **not**, as UTIER self-servingly alleges, an adjudicative proceeding. An adjudicative proceeding is one in which an agency's decision is being questioned or there is a juxtaposition of some rights over others. See 3 P.R. Laws Ann. §9641; Claro TV y Junta Regl. Tel v. One Link, 179 DPR 177, 211 (2010).[3] It is a quasi-judicial process that entails the existence of a controversy between one or more parties to be resolved by the agency through the adjudication of rights and obligations. See J.P. v. Frente Unido I, 165 DPR 445, 461, 464-465 (2005); 3 P.R. Laws Ann. §9641.

The process to issue a Certificate of Energy Compliance is not adjudicative in nature. It is not born of a controversy between parties that must be decided, there is no complaint or claim against any party, nor is there any need to present evidence. It is a straightforward proceeding where a Preliminary Contract is submitted to the PREB to evaluate whether it complies with the energy public policy. See 22 P.R. Laws Ann. §1115.[4] It is one part of a thorough P3 process subject to special legislation (Act 29) that clearly provides for a bid procurement process, and not an administrative proceeding. This is critical because proceedings related to bids are expressly excluded from the category of adjudicative proceedings. See 3 P.R. Laws Ann. §9641(a)(2). And the certification phase in particular would be much closer to the permit and license proceedings

[3] As per the Spanish language original:

> *Aunque tal consideración podría hacer parecer que este proceso es adjudicativo, no lo es porque no se está cuestionando la decisión de una agencia ni se está contraponiendo un derecho sobre otro.*

[4] It bears noting that UTIER misconstrues the nature and extent of the evaluation required for the issuance of the Certificate of Energy Compliance.

regulated by Section V of the LPAU (3 P. R. Laws Ann. §9681 *et seq.*) than an adjudicative proceeding. Like such proceedings, the Certificate of Energy Compliance required by Act 120 demands celerity and efficiency. See Claro y Junta Regl. Tel., 179 D.P.R. at 201 (noting that license, franchise, and permit processes require a rapid and efficient process, as opposed to the lengthy and complex processes required for agency adjudication, and citing to the LPAU's provisions that licenses, permits and like authorizations must be issued within 30 days) and compare with 22 P.R. Laws Ann. § 1115(g) (establishing a simple and efficient process of submitting two documents to PREB for evaluation of the PREPA Transaction's compliance with the energy public policy, and allowing a strict term of 30 days for such evaluation and certification).

There is no question that the right to seek intervention applies only to adjudicative proceedings under the LPAU. See Claro y Junta Regl. Tel., 179 D.P.R. at 209 ("As is evident, the right to intervene can only exist within an adjudicative proceeding") (translation ours). The process to obtain a license, permit or like authorization or document is ***not*** adjudicative in nature and, therefore, there can be no right to intervene in such process in its initial concession stage. Id at 211. See also IRR Gas Station Corp. v.T&B Petroleum Corp., 2020 TSPR 14 at *11 (Conformity Opinion by Judge Rodríguez) (explaining that the agency should have denied a request for intervention filed prior to the agency having issued a construction permit because at that stage of the proceedings there was no right to intervene).[5]

Thus, even if the process to obtain a Certificate of Energy Compliance were subject to the LPAU, it could not be deemed an adjudicative proceeding. As such, even if the LPAU applied here

[5] Consistent with the foregoing, this PREB's regulations recognize a possible right of intervention in adjudicative proceedings, but no such right is recognized in the regulation concerning certificates to be issued pursuant to Art. 6.13 of Act 57-2014. Compare Regulation 8543 of PREB dated December 18, 2014 with Regulation 8618 of PREB dated July 14, 2015, each as amended.

–and it does not, for the reasons explained above—there would be no right to intervene. In light of the foregoing, it is unnecessary to consider UTIER's attempts at justifying the intervention pursuant to section 3.5 of the LPAU, 3 P.R. Laws Ann. §9645. As a threshold matter, intervention is simply not feasible in this process.[6]

**B. The Preliminary Contract and Partnership Committee Report Are Confidential**

UTIER further requests that this PREB grant it access to certain confidential documents submitted by the P3 Authority wit, the Preliminary Contract and the Partnership Report. UTIER claims to have a right to review such documents. Once again, UTIER is incorrect.

As UTIER recognizes, certain documents held or produced by government entities may be deemed confidential and outside the purview of public access if, among other things, a law or regulation so provides. See UTIER's Motion at p. 14 (citing Ortiz v. Dir. Adm. Tribunales, 152 DPR 161 (2000)). The documents at issue here, the Preliminary Contract and Partnership Report submitted to the PREB, are confidential pursuant to applicable laws and regulations, at least at this stage.

Pursuant to Act 120, Act 29 applies to the PREPA Transformation process, including this process before PREB. Act 29 and relevant regulations require that the Partnership Report and the Preliminary Contract be kept confidential *at least* until such contract is finalized. See sections 9(g)(vi) and 9(i) of Act 29, 27 P.R. Laws Ann. §2608(g) and (i).[7] Section 9(*i*) of Act 29, in particular, provides that "[i]n the course of the procedures for the evaluation and selection of and negotiation with Proponents, the confidentiality of the information furnished and generated in

[6] The P3 Authority disputes that UTIER's purported intervention is justified pursuant to the criteria set forth in section 3.5 and reserves the right to contest such arguments if necessary.

[7] Note that certain information, such as trade secrets, proprietary information or other confidential information, may be exempt from public disclosure even after approval of the partnership contract.

connection with such procedures for the evaluation, selection, negotiation and grant of the proposals and the Partnership Contract shall be governed by the confidentiality criteria established by the Authority." For the PREPA Transformation, the P3 Authority issued the "Regulation for the 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" (hereinafter, "Act 120 Regulation.")[8] The Act 120 Regulation provides that the documents at issue here, like all information and documents concerning proposals submitted for the P3 process, as well as evaluations thereof, discussions, and negotiations "**will be kept confidential through the evaluation, selection and negotiation process**". See Article 5.1(a)(ii)(6) of Act 120 Regulation. Indeed, the Regulation itself provides when the Partnership Report and information and documents concerning proposals, evaluations, discussions and negotiations (at least those portions that do not contain trade secrets or are otherwise entitled to continued confidentiality) can be disclosed: "[u]pon the signing of the Transformation Contract." Id; see also Art. 11.2 of Act 120 Regulation.[9]

Hence, the documents at issue here are and must be kept confidential. UTIER, while conveniently omitting these legal provisions, appears to be arguing against their application here by claiming that the Preliminary Contract has already been adjudicated and there is no ongoing proceeding. See UTIER's motion at p. 17. That is simply untrue.

[8] See Art. 5(d) of Act 120, 22 P.R. Laws Ann. §1115(d), authorizing the P3 Authority to issue one or more regulations to govern PREPA transactions in particular.

[9] Art. 11.2(d) of the Act 120 Regulation provides in relevant part that "[o]nce the Governor and, if applicable, the Legislative Assembly, have approved the Transformation Contract, the [P3] Authority will make public the Committee Report of the relevant Partnership Committee which will contain the information related to the procurement, selection, and negotiation process… ". See also Act 120 Regulation, Art. 4.5(n) and Art. 4.7(b)(iii)(3); Art. 12.3 of the P3 Authority's "Regulation for the Procurement, Evaluation, Selection, negotiation and Award of Participatory Public-Private Partnership Contracts," as amended (providing that the Partnership Committee Report shall be made public "[o]nce the Governor has executed the Partnership contract.")

The public-private partnership process does not conclude until the Preliminary Contract is approved by the Governor. The process of obtaining a Certificate of Energy Compliance from the PREB is a necessary step for the transaction, but it is by no means the final step. After the PREB has issued the Certificate of Energy Compliance, the Preliminary Contract must be approved by PREPA and the P3 Authority and, thereafter, by the Governor (and, under certain circumstances, by the Legislative Assembly). See Act 120, sections 5(g) and 10, 22 P.R. Laws Ann. §1115(g) and 1120. Until the Preliminary Contract has final approval and is executed (thereby becoming a Partnership Contract), the process is ongoing, and the Partnership Committee may, *at any time*, "terminate negotiations with the Proponent and commence negotiations with the next highest ranked Propo[nent]". Art. 5.1(a)(iv) of the Act 120 Regulation.

The ongoing nature of the process requires that confidentiality be maintained so as to fulfill the compelling state interest in ensuring a fair and level playing field in the P3 process and promoting the participation of the greatest number of qualified proponents. It is only through a robust and competitive process that the Government will be able to achieve the most favorable terms for the relevant P3 and thus protect the best interests of the people of Puerto Rico.

The confidentiality requirements applicable to the P3 process serve two purposes, both of which ultimately are essential to ensure the greatest benefit to the public of a public-private partnership. First, protection of proponents' information and proposals through the execution of the Transformation Contract (and beyond that for certain items such as proprietary information and trade secrets) serves to promote that a greater number of participants engage in the P3 process because they are not concerned that their data will end up in the hands of their competitors. Greater participation in a P3 process enhances competition and provides the Government with more alternatives.

Second, ensuring that proponents do not have access to each other's proposals, the Partnership Committee's evaluation of such proposals, or information about the negotiations between a proponent and the Partnership Committee, is key to preserving the Partnership Committee's leverage and ability to negotiate the best terms for the P3. It also ensures the fairness of the process. Throughout the P3 process, the Partnership Committee may negotiate with more than one proponent at the same time. See Art. 5.1(a)(iii) of the Act 120 Regulation. The Partnership Committee can select the most qualified proponent and negotiate improved terms to its proposal based on what other participants are prepared to offer. Even if the Partnership Committee opts to negotiate with one proponent at a time, it may, "[a]t any point in time," "terminate negotiations with the Proponent and commence negotiations with the next highest ranked Propo[nent]." Art. 5.1(a)(iv) of the Act 120 Regulation. In such cases, it is critical for the Government that the second proponent not have an unfair advantage by having had access to information related to the negotiations with the first proponent. Any process allowing for such unequal competition would discourage participation, be contrary to Act 29 and deprive the P3 Authority, the Government, and ultimately the people of Puerto Rico, of potential alternatives for the P3. In order to maintain the true competitive tension necessary for the Partnership Committee to negotiate the best terms for the eventual contract, confidentiality must be preserved while there is any possibility of further negotiation with one or more proponents. See ECA General Contractors, Inc. v. Municipio Autónomo de Mayagüez, 200 D.P.R. 665, 672-673 (2018) (in the context of formal government bidding procedures explaining that confidentiality during the required stages "is an indispensable element of a fair and honest competition."). [10]

[10] It is also worth noting that a P3 process may be of interest to publicly-traded companies. These public companies may be particularly sensitive to disclosure of their participation in a P3 process before a Transformation Contract is executed. A disclosure could potentially trigger certain filings pursuant to securities laws regarding the potential

In sum, the confidentiality provisions (i) promote participation by a greater number of entities in the P3 process and (ii) increase the Partnership Committee's bargaining power, thereby enhancing the Government's ability to negotiate the best terms possible for a P3. This ultimately benefits the people of Puerto Rico and serves the public interest. Act 120 recognizes as much, calling upon the Partnership Committee to evaluate as many qualified proponents as possible and to maximize a competitive environment, with the goal of securing a "broader, faster, and more beneficial transformation for the People of Puerto Rico". See 22 P.R. Laws Ann. §1113.

It should be noted that the requirement that all information and documents related to be P3 process be kept confidential until the execution of the relevant Transformation Contract is true of all P3 processes that the P3 Authority manages, not just the PREPA transformation process. The P3 Authority's ability to manage these P3 processes in a uniform manner, without having one P3 process set an incorrect precedent that could affect market interest in other P3 processes, is critical to ensuring that the Government's public policy favoring P3s can be carried out effectively.

The reasons supporting the legislative decision to preserve the confidentiality of a P3 process until execution of a Transformation Contract are especially applicable in the PREPA transformation context. The Preliminary Contract agreed with the Selected Proponent is subject to review and approval by various bodies before it may be executed. If the Preliminary Contract were to be rejected by any of these bodies, confidentiality would be crucial to the P3 Authority being able to restart the P3 negotiation process with other proponents without losing its leverage and

transaction and could affect the company's share price. Maintaining confidentiality of the P3 process until a Transformation Contract is executed allows public companies to participate in a P3 process without concern of material non-public information being disclosed prior to the point at which the P3 transaction has been formalized (*i.e.*, upon execution of the Transformation Contract). This increases the likelihood of public company participation in a P3 process and thus the number of potential participants, both of which are all the more critical when the proposed P3 entails a highly specialized field with limited qualified market players, as is often the case with energy related matters.

bargaining power by having the terms of the Preliminary Contract and the details of the Partnership Committee Report publicly known.

It bears noting, moreover, that the confidentiality provisions applicable here are in no way related to an attempt at suppressing expression and, moreover, that they have been narrowly tailored so as to protect confidentiality only insofar as needed to promote the compelling state interests outlined above. To that end, the confidentiality provisions here, like those at issue in Ortiz, 152 DPR 161, are temporary by nature. Once the Preliminary Contract has been finally approved and has been executed, and there is no longer a need to ensure competition and a greater bargaining power for the Government, Act 29 requires the P3 Authority release the Partnership Report and other information and documents related to the P3 process, including the Contract, unless there are other grounds for maintaining certain parts confidential.

### C. UTIER Misleads the PREB by Alleging that the 30-day Term for Issuing a Certificate of Energy Compliance may be Ignored or Extended

As a last item, UTIER requests that the PREB extend the 30-day term set forth in Act 120, claiming that such extension is feasible because Act 57 allows PREB to extend a 30-day term applicable to certain actions set forth in section 6.13 of that law. UTIER's argument proves too much.

Section 6.13 of Act 57, 22 P.R. Laws Ann. §1054*l*, provides that for certifications to be issued under such provision, the PREB will have 30 days to consider the request and, if such time elapses without a different decision by the PREB, the request shall be deemed authorized "unless the Commission has ordered that such term be stayed to obtain more information that allows it to consider the request on the merits" (translation ours). But that language is different from the one in Act 120, which provides that "the Bureau shall have thirty (30) days from the date in which the Preliminary Contract was submitted to issue a Certificate of Compliance or a resolution denying

its issuance […]. If a Certificate of Compliance or resolution denying the same is not issued within such term, the PREPA Transaction **shall be deemed approved by the Bureau and it shall be understood that the PREPA Transaction has received a Certificate of Energy Compliance**" (translation ours, emphasis added). Conspicuously absent from such language is any reference to the Bureau having the authority to stay the term –as section 6.13 of Act 57 allows—or extend it in any way. Moreover, the wholly mandatory language in Act 120 ("shall have thirty days", "shall be deemed approved") leaves no room for the type of misleading argument made by UTIER.

Simply put, Act 120 requires that the PREB evaluate the Preliminary Contract and the Partnership Report and, within 30 days, issue a Certificate of Energy Compliance for the PREPA Transaction. There are no extensions or stays possible, contrary to Act 57, and Act 120 provides what the default result will be if a Certificate is not issued or denied within the relevant term.

## III. CONCLUSION

UTIER has sought to intervene in a process where no such right applies, contends that legitimately confidential information should be reveled and and would have this PREB extend a term set forth by law and which is not subject to extensions or stays. All of UTIER's requests should be denied. Not only do they lack legal foundation, but such requests would lead the PREB to act in a manner contrary to applicable law.

**WHEREFORE**, the P3 Authority respectfully requests that PREB **DENY** UTIER'S "PETITION FOR INTERVENTION AND FOR PUBLIC ACCESS TO INFORMATION."

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 17th day of June 2020.

**IT IS HEREBY CERTIFIED** that on this same date, we electronically filed the foregoing with PREB through its filing system at http://www.radicacion.energia.pr.gov. We have further

notified copy of this Opposition to counsel for UTIER at the email addresses set forth in their Petition: rolando@bufete-emmanuelli.com; jessica@bufete-emmanuelli.com; notificaciones@bufete-emmanuelli.com.

**PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY**
Roberto Sánchez Vilella (Minillas) Government Center
De Diego Ave. Stop 22
San Juan, P.R. 00907
Tel. 787-722-2525

Fermín E. Fontanes Gómez
Executive Director
Email: Fermin.Fontanes@p3.pr.gov