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



**IN RE:** CERTIFICATE OF ENERGY COMPLIANCE

**CASE NO.:** NEPR-AP-2020-0002

**SUBJECT:** MOTION FOR RECONSIDERATION

# MOTION FOR RECONSIDERATION

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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") **reconsider its June 18th, 2020 Resolution** ("June 18 Resolution") pursuant to Section 3.15 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" for its Spanish acronym), thereby granting UTIER leave to intervene and providing the public access to the documents presented before the Bureau in the captioned case ("protective documents"),[1] pursuant to Puerto Rico's constitution, law and public policy. **Additionally, UTIER requests reconsideration of the issuance of the Certificate of Energy Compliance** that the Puerto Rico Public-Private Partnerships Authority ("P3") requested.

## INTRODUCTION

In the current proceeding, the Bureau granted a Certificate of Energy Compliance for a private entity, which was selected in 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 reiterates its right to intervene. The cited RFQ cannot be described as anything other than the privatization of the Puerto Rico Electric Power Authority's ("PREPA") functions. The government may retain the ownership of the infrastructure, but a private entity will be awarded essentially **all** of PREPA's most important functions. All of this happened behind closed doors and hidden from the people of Puerto Rico, only to be revealed when the opportunity for public debate was lost. Following the Bureau's order, the political approval process was streamlined and the people of Puerto Rico woke up one

[1] Since the UTIER Petition was filed, P3 has submitted additional documents that have been granted confidentiality under the same terms as the previous documents. The reference to "protective documents" refers to both the May 18th Submissions and the June 17th Submissions. UTIER is requesting public access to both, after the Bureau performs a conscious analysis of whether confidentiality is warranted to any of them.

morning to find that their public utility was being altered beyond recognition, and their essential service handed over to questionable private interests, with little consideration for the effect of such actions on the people and on PREPA's Title III bankruptcy.[2]

"PREPA's transformation process has been characterized by a lack of transparency."[3] UTIER comes before the Bureau once again to seek the transparency that is sorely lacking throughout this entire process, as evidenced by the subsequent approval of the contract which is the object of this case, by three entities, within a time period so limited that no one would mistake it for anything other than rubberstamping. Despite the multiple calls for transparency throughout the regulatory framework and from Puerto Rico's citizens, the Bureau allowed obscure procedures to take place; procedures that will have enduring effects on the people of Puerto Rico and PREPA. Lack of transparency has led PREPA astray before and will undoubtedly do so again.

In this case, UTIER has sought aperture for its members and for the rest of the population, because the privatization of PREPA's T&D systems affects us all. Despite the Bureau's latest decisions, UTIER maintains that it has the right to intervene in these proceedings, as a directly affected party. Furthermore, and contrary to the Bureau's determination, UTIER's

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[2] In the span of less than 24 hours, the contract that this Bureau approved went through the PREPA Board, the FOMB and the Governor's office, even before the period to appeal the Bureau's order was lapsed, and without any public input. This demonstrates what UTIER has said all along, the process before the Bureau is the only one where public participation has chance and that chance is squandered if the Bureau does not reconsider. See NotiCel, *Denuncian posible aumento de tarifa y falta de transparencia en aprobación de acuerdo de la AEE*, NOTICEL (Jun 22, 2020 3:28 pm) https://www.noticel.com/aee/20200622/denuncian-posible-aumento-de-tarifa-y-falta-de-transparencia-en-aprobacion-de-acuerdo-de-la-aee/; NotiCel, *JCF "da la bienvenida" al acuerdo de administración de la AEE con LUMA Energy*, NOTICEL (Jun 22, 2020 3:45 pm) https://www.noticel.com/la-junta-de-control-fiscal/20200622/jcf-da-la-bienvenida-al-acuerdo-de-administracion-de-la-aee-con-luma-energy/?fbclid=IwAR2E3kl9XS-_vNI8EvqH0pAGq-S7Jz3D-anli7n5RmnkloeCeZHo-J0-l6g; Lorraine M. Martínez, *El ciudadano: el más afectado y el gran ausente en el acuerdo entre la AEE y LUMA*, NOTICEL (Jun 23, 2020 6:00 am) https://www.noticel.com/aee/gobierno/top-stories/20200623/el-ciudadano-el-mas-afectado-y-el-gran-ausente-en-el-acuerdo-entre-la-aee-y-luma/?fbclid=IwAR1EkDIJ7DBRqstdJpqEqBt8JMv2nyYa68sJyX0Ib-0r7hj1pI11jE4yjGU

[3] Tom Sanzillo & Ingrid M. Vila-Biaggi, *Is Puerto Rico's Energy Future Rigged? Examining the New $1.5 Billion Fortress-PREPA Deal*, IEEFA, at 25 (June 2020) https://ieefa.org/wp-content/uploads/2020/06/Is-Puerto-Ricos-Energy-Future-Rigged_June-2020.pdf.

request for access to information is alive and valid, regardless of its status as a party or intervenor to this proceeding. Moreover, in light of recent events, UTIER is determined to exercise its rights and seek justice in this case.

## PROCEDURAL BACKGROUND

On May 18, 2020, the Puerto Rico Public-Private Partnerships Authority ("P3") filed 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 PREB ("P3 Petition"). On June 9, 2020,[4] the Bureau issued a Resolution ("June 9 Confidentiality Resolution") and granted P3's request for confidential treatment of the submitted documents. This includes the "Preliminary Contract comprised of the initial agreement and the supplemental agreement terms" and the "Report prepared by the Partnership Committee . . . ." June 9 Confidentiality Resolution at 1 f.n. 2 & 3. This Report

> includes the reasons for entering into a Public-Private Partnership, the reason for selecting the chosen proponent, a description of the selection procedure, including the comparisons between the proposed Contract by the Selected Proponent, the recommended Transformation Contract and the other proposal presented, as well as all other information pertinent to the selection procedure and the evaluation conducted. Id. at 1 f.n. 3.

On June 15, 2020, UTIER appeared before the Bureau through its Petition for Intervention and for Public Access to Information ("UTIER Petition"). On June 17, 2020, P3 filed the Puerto Rico Public-Private Partnership Authority's Opposition to UTIER's "Petition For Intervention And For Public Access to Information" ("P3 Opposition"). P3 also filed Puerto Rico Public-Private Partnerships Authority's Motion Submitting Documents and Requesting Confidential Treatment ("Second P3 Motion"). On the same date, the Bureau issued two resolutions. One of the resolutions granted the Second P3 Motion and granted confidential

[4] Although the Bureau's latest decision says the order was issued on June 1st, UTIER believes it is a typo as the order itself uses the date June 9th.

treatment to the submissions therein ("June 17 Confidentiality Resolution"). The submission in this case was the "Memorandum that discusses several provisions of the Preliminary Contract and includes pages of the Preliminary Contract with Amendments." June 17 Confidentiality Resolution at 1 f.n. 1.

The other resolution issued on Jun 17, 2020, was a Resolution and Order (Energy Compliance Certificate), in which the Bureau granted the P3 Petition and the Certificate of Energy Compliance ("CEC Resolution and Order"). On June 18, 2020, the Bureau issued another resolution and denied UTIER leave to intervene ("June 18 Resolution").[5] **Thus, UTIER seeks reconsideration of both the June 18 Resolution and the CEC Resolution and Order.** While UTIER is aware of the subsequent events, which have been discussed by the press with the disadvantage of obscurity, those events do not affect the procedural stage of this case. Regardless of what goes on outside the Bureau, the June 18 Resolution and the CEC Resolution and Order **are not final, as the deadline for appeals is not due.** Thus, UTIER appears to preserve its rights and those of its members.

## ARGUMENTS

### I. The Bureau should reconsider the June 18 Resolution as it denies UTIER leave to intervene in the captioned case, because it was an error of law.

[5] It should be noted that the Bureau's June 18 Resolution does not apprise UTIER of its right to seek reconsideration or judicial review, nor the deadline to do so, pursuant to Section 3.14 of LPAU. See P.R. Laws ann. tit. 3 § 9654 ("The judgment or order **shall advise** on the right to request reconsideration before the agency or to file a petition for review as a matter of law before the Court of Appeals. . . . Said terms **shall take effect once these requirements have been met**."(emphasis added)). This requirement applies to the denial of intervention. See Id. § 9646 ("If the agency decides to deny an application for intervention in an adjudicatory process, it **shall give notice** of its determination in writing to the petitioner, its grounds therefore, **and the appellate review that is available**."(emphasis added)). While UTIER thought it prudent to appear quickly to preserve its rights, it does not waive any argument regarding the timeliness of its filing nor any derived arguments. The Bureau has left UTIER guessing as to the applicable time periods and the available appellate mechanisms, putting it at a disadvantage and violating its due process rights. See IM Winner, Inc. v. Junta de Subastas del Gobierno Mun. de Guayanilla, 151 P.R. Dec. 30, 37 (2000)("[W]e reiterate the duty to notify such duties under due process and independently of the legislation itself. Thus, we warn: '[Pursuant to Section 3.14] and due process of law, it is unavoidable to conclude that when the affected party is not notified of such rights, nor the term to exercise them, the term does not begin to elapse to appeal in elevation.'"(translation provided)).

Regarding the June 18 Resolution, the Bureau should reconsider its decision to deny UTIER the requested leave to intervene. The Bureau's decision in that respect is based on the belief that this procedure is *ex parte* and that somehow makes it non-adjudicative. This is a legal error.

**A. The captioned procedure under Act 120-2018 before the PREB is an adjudicative proceeding and it is not exempted from LPAU. Therefore, intervention is available.**

In its June 18 Resolution, the Bureau determined that this is "an *ex parte* administrative process petitioned by the P3 Authority, which does not encompass the type of adjudicative proceeding sanctioned by Chapter 3 of Act 38-2017." June 18 Resolution at 2. The Bureau based its determination on Section 5(g) of Act No 129-2018. Specifically, the Bureau cited the following:

> Any contract related to a PREPA Transaction shall require an Energy Compliance Certificate, as defined in this Act. The Partnership Committee shall submit to the Bureau the Report drafted pursuant to Section 9(g) of Act No. 29- 2009 before submitting it to the Boards of Directors of the Authority and PREPA. The Bureau shall evaluate the Report, the information furnished, and the Preliminary Contract and issue an Energy Compliance Certificate if they comply with the energy public policy and the regulatory framework. The Energy Compliance Certificate or the resolution denying the issuance thereof shall state the basis for such determination. The Bureau shall have thirty (30) days from the date on which the Preliminary Contract was submitted to issue a Certificate of Compliance or a resolution to deny the issuance thereof. . . . Once the Energy Compliance Certificate has been issued, any amendments made to the Preliminary Contract shall require the issuance of a new Energy Compliance Certificate. . . . Reviews in connection with the Energy Compliance Certificate issued by the Bureau shall be filed with the Court of Appeals within a term of fifteen (15) days from the notice thereof.

P.R. Laws ann. tit. 22 § 1115 (as cited in June 18 Resolution)(ellipsis in June 18 Resolution). Respectfully, UTIER disagrees with the Bureau's interpretation for a number of reasons.

**1. Characterizing the Energy Compliance Certificate Procedure as an *ex parte* procedure does not preclude the application of LPAU nor of Chapter III of LPAU specifically.**

UTIER is preoccupied with the trend this Honorable Bureau is creating by denying parties intervention with swift decisions that, in summary, state that if a proceeding is *ex parte* there is no right to intervene, because *ex parte* somehow means non-adjudicative. First, **the term *ex parte* does not exclude or eliminate the nature of adjudicative procedures**. Second, all administrative procedures are subject to LPAU, **unless expressly excluded**. Third, all adjudicative procedures are subject to Chapter III of LPAU, **unless expressly excluded**. Lastly, the combination of those three facts leads to the inevitable conclusion that this process is subject to Chapter III of LPAU.

Contrary to what this Honorable Bureau and P3 seem to believe, the categorization of a procedure as *ex parte* **does not make a procedure non-adjudicative**. The term *ex parte* means:

> **Done or made at the instance and for the benefit of one party only**, and without notice to, or argument by, anyone having an adverse interest; of, relating to, or involving court action taken or received by one party without notice to the other, usu[ually] for temporary or emergency relief. *Ex Parte*, Black's Law Dictionary (11th ed. 2019)(emphasis added).[6]

**This classification does not remove the *adjudicative* nature of a proceeding.** This classification only removes **the requirement of an *adversarial* nature** for the process to be initiated.[7] There are many processes throughout the law that are *ex parte* and that characterization does not alter the surrounding legal framework, which may permit intervention nor require adjudication.[8] An *ex parte* procedure is one **where there is only one party**

[6] See, also, *Motion*, Black's Law Dictionary (11th ed. 2019)(defining *ex parte motion* as "[a] motion made to the court **without notice to the adverse party**; a motion that a court considers and rules on without hearing from all sides."(emphasis added)).

[7] The term adversarial is the opposite of *ex parte.* However, the Bureau's decisions seem to say that adjudicative is the opposite of *ex parte*. This is not so. Adversarial is defined as "involving a dispute between opposing parties." *Adversary Proceeding*, Black's Law Dictionary (11th ed. 2019).

[8] Intervention is defined as "[t]he entry into a lawsuit by a **third party** who, **despite not being named a party to the action**, has a personal stake in the outcome." *Intervention*, Black's Law Dictionary (11th ed. 2019)(emphasis added). Thus, even when there is only one party, an intervenor may be granted entry. LPAU also defines intervenor as "any person **who is not an original party** in any adjudicative process conducted by an agency and who has shown his qualifications or interest in the procedure." P.R. Laws ann. tit. 3 § 9603(f)(emphasis added).

**appearing** before the court, or administrative agency, seeking relief. This is not a classification that automatically denies the adjudicative nature of any proceeding.[9]

> Adjudication focuses on the resolution of individual rights or duties. **Adjudication involves a decisionmaking.** Often this type decisionmaking produces individual impact. Therefore, adjudication encourages participation and responsiveness before the decisionmaker.[10]

The only conclusion made by the Bureau in its June 18 Resolution is that UTIER's intervention is unwarranted because this procedure is *ex parte* and, therefore, not adjudicative. Because this classification of *ex parte* does not deprive any proceeding of its adjudicative nature, the Burau's determination in the June 18 Resolution is an error in law. Thus, on that note alone, the Bureau should reconsider its decision and allow intervention based on the arguments set forth in the UTIER Petition.

Additionally, nothing in the definition of adjudication under LPAU excludes *ex parte* procedures. An adjudication is "the statement whereby an agency determines the rights, obligations or privileges that correspond to a party." P.R. Laws ann. tit. 3 § 9603(b). Note that the definition does not reference multiple parties nor any adversarial requirement. An adjudication is made whenever an agency determines what **a party is entitled to** under the law. Thus, "[w]hen by provision of law, rule, regulation or of this chapter, an agency must formally adjudicate a controversy, the proceedings **shall** be governed by [Chapter III]." Id. §

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[9] Furthermore, wherever "an administrative agency is **engaged in deciding specific legal claims or issues** through a procedure substantially similar to those employed by courts, the agency is in substance engaged in **adjudication**." Restatement (Second) of Judgments § 83 (emphasis added). Since courts can also decide *ex parte* procedures, this definition does not exclude those procedures. See, also, William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 Wash. & Lee L. Rev. 351, 401 (2000)("**The basic attribute of adjudication is its limited formal scope**. This limitation is reflected in a number of ways, including the imposition of a standing requirement, the limited number of parties affected, the nature of the dispositive facts as 'adjudicative' rather than 'legislative,' and the incremental, analogical method by which common-law courts decide cases. . . . **That limited nature not only distinguishes adjudication from legislation** but also protects the rights of non-parties to the adjudication by ensuring that they have a realistic day in court when their turn comes, on the theory that the issue will not have been prejudged." (emphasis added)(footnotes omitted)).

[10] Poe Leggette, et al, *Agency Rulemaking and Adjudication 101*, Rocky Mountain Mineral Law Foundation Special Institute No. 2: Natural Resources Development And The Administrative State: Navigating Federal Agency Regulation And Litigation 11 (2019).

9641(a)(emphasis added). Controversy here is not equivalent to conflict between parties, it is a reference to "legal controversies" or "legal issues", i.e. a determination that applies the law to the facts. See Javier A. Echevarria Vargas, Derecho Administrativo Puertorriqueño 141 (Ed. Situm 2011)("The adjudicative function consists of evaluating and deciding a factual controversy applying to the specific facts of the case, the norms and the current law."(citing López v. Junta de Planificación, 80 DPR 646 (1958))(translation provided)).

Section 9641(a) **expressly excludes** from applicability of Chapter III: (1) voluntary dispute resolution, such as mediation, and (2) proceedings regarding the Treasury Department. Id. Further, "[t]he adjudication of bids, the granting of loans, scholarships, subsidies, subventions, debt emissions, capital investments, recognitions or prizes, and all procedures or stages of the environmental documents evaluation process [under the *Public Environmental Policy Act*] shall be deemed informal non-quasi judicia[l] procedures . . . ." Id. Those informal non-quasi-judicial procedures will not be subject to Chapter III of LPAU, **except as provided in the law**. Id. This means that there are instances where they will be subject to Chapter III. Also, they will be subject to Section 3.15 on reconsideration, with the exception of bidding processes, which have their own section for reconsideration. Id.

It should be noted that, although Act No. 120-2018 includes a bid procurement process in P3, the process before the Bureau **is for granting a certificate and not for bid adjudication**. Granting a certificate is a determination that applies law to fact, the agency must ask itself: Does this applicant meet the legal requirements? P3 itself has said that these are two separate procedures, one for bidding and one for certification: "It is one part of a thorough P3 process subject to special legislation that clearly provides for a bid procurement process, and not an administrative proceeding. . . . **And the certification phase in particular is much closer to the permit and license proceedings** . . . ." P3 Opposition at 5 (emphasis added)(citations and

parenthesis omitted). This shows that there are two distinct procedures, the bidding in P3 and the certification in the Bureau.

**2. LPAU applies to all administrative procedures that have not been expressly excluded.**

According to Section 1.4 of said law, LPAU "**shall** apply to **all the administrative procedures** conducted before **all the agencies** that are not **expressly excepted** by this chapter." P.R. Laws ann. tit. 3 § 9604 (emphasis added). An administrative procedure, as defined by LPAU, includes "the drafting of rules and regulations, the **formal adjudication of any controversy under the consideration of an agency**, **the granting of licenses** and any investigative process initiated by an agency within the scope of its legal authority." Id. at § 9603(*l*)(emphasis added). There is no indication that this process has been expressly excluded from LPAU's adjudicative procedures.

As you can see, there is no exclusion of *ex parte* proceedings under LPAU. Furthermore, neither the granting of certificates under Act No. 120-2018, nor the granting of certificates in general, have been **expressly excluded** from LPAU or from Chapter III of LPAU under the applicable sections nor does Act No. 120-2018 expressly exclude them. On the contrary, LPAU has a broad applicability and few exceptions, none of which fit the Bureau's determination in the June 18 Resolution.[11]

**B. In the alternative, if the captioned procedure is considered an informal adjudicative procedure, upon a decision by this Bureau, intervention is available.**

As previously mentioned, according to LPAU, certain procedures "shall be deemed **informal non-quasi judicia[l] procedures**, and therefore, shall not be subject to [Chapter III on

[11] In its filings, P3 has argued that a joint reading of Act No. 120-2018 and Act No. 29-2009 expressly exempts this process from LPAU. However, this is a stretch. UTIER recognizes that **P3's bidding procedures have been exempted** from LPAU by Act No. 29's explicit language. However, the Bureau is an independent administrative agency and its does not perform the same functions nor receive its delegation from the same law as P3. Although Act No. 120-2018 applies to both agencies, **it does not expressly extend P3's exemption to other agencies.**

adjudicative proceedings]." P.R. Laws ann. tit. 3 § 9641 (emphasis added). See, also, William Vázquez Irizarry, Derecho Administrativo, 83 Rev. Jur. U.P.R. 627, 632 (2014).[12] Under LPAU, agencies are instructed to "establish speedy and efficient procedures for the issuing of licenses, franchises, permits, endorsements and **any similar matters**." Id. § 9681 (emphasis added).[13] While these informal procedures are not initially subject to Chapter III, "[a]ny person who has been denied the granting of a license, franchise, permit, endorsement, authorization, **or similar matter shall have the right** to question the agency's determination **through an adjudicatory process** as established in the special law involved and in [Chapter III on adjudicative proceedings]." Id. § 9684 (emphasis added). This right to intervene has repeatedly been extended to third-party opposers, through case law. See PRTC. v. Junta Regl. de Tel., 179 P.R. Dec. 177, 207-08 (2010)("[The Supreme Court of Puerto Rico] clearly held that the adjudicative procedure following an agency decision to grant or deny a license, permit or franchise **is available** to applicants who were denied said authorization as well as **to third parties interested in challenging the agency's grant.** Once the adjudicative process is activated, a person not originally deemed a party by the [agency] may move to intervene . . . ."(emphasis added)(citing Ranger American v. Loomis Fargo, 171 P.R. Dec. 670, 680-81 (2007)). See, also Echevarria Vargas, *supra*, at 317 ("The adjudicative procedure that arises after the agency determines to

[12] Vázquez Irizarry explains that LPAU recognizes formal and informal adjudicative procedures: "In terms of the legal text, the panorama is as follows: **there are formal and informal adjudicative processes**. Chapter III of LPAU is fundamentally a map of requirements and rules that govern formal processes. . . . LPAU provides nothing about how to proceed informal processes. Rather, it limits itself to pointing out a list of processes that should be considered informal. Id. (citing P.R. Laws ann. tit. 3 § 9641)(footnotes omitted)(translation provided). Under the Administrative Procedure Act, the same distinction is present. See, for example, Emily S. Bremer, The Exceptionalism Norm in Administrative Adjudication, 2019 Wis. L. Rev. 1351, 1382 (2019)("In this straightforward account, formal and informal adjudication are easy categories to define and understand. After all, 'formal' adjudication simply refers to adjudicatory hearings that Congress has required by statute to be conducted in accord with the APA's adjudication provisions, 5 U.S.C. §§ 554, 556, and 557. 'Informal' adjudication includes all other adjudicatory hearings, which are subject to the minimum requirements of Constitutional due process and must comply with § 555 of the APA."(footnotes omitted)).

[13] Although LPAU does not define license, the APA, in which LPAU is inspired, defines it to include certifications. See 5 U.S.C. § 551(8)(defining licensing as "includes the whole or part of an agency permit, **certificate**, approval, registration, charter, membership, statutory exemption or other form of permission[.]"(emphasis added)).

grant or deny a license, permit or franchise, will be available for the petitioners that are denied said authorization as well as for third-parties that are interested in challenging the authorization granted by the agency. This third-party could be a competitor, as long as they establish a legitimate and substantial interest in the controversy."(translation provided)(citations omitted)).

Thus, even when a proceeding is informal, and considered essentially non-adjudicative for purposes of LPAU, it converts into an adjudicative proceeding, after the agency has made a determination on the initial request. "That is, in case of disagreement with the administrative determination regarding the granting of the license or permit, **the L.P.A.U. refers us to the adjudication procedure**." San Antonio Maritime v. P.R. Cement Co., 153 P.R. Dec. 374, 390 (2001)(emphasis added)(translation provided); *accord* IRR Gas Station Corporation v. T & B Petroleum Corp., 2020 TSPR 14, 2020 WL 1288565 at *8, 12 (2020)(J. Rodriguez, conforming opinion). Therefore, after a determination to the effect of denying or granting approval in an informal process, an adjudicative process emerges. "As a result, **the adjudication process is not an alien one from the granting** of licenses, franchises, permits, endorsements and **similar procedures, but one closely related**." San Antonio Maritime, 153 P.R. Dec. at 390 (emphasis added)(translation provided). "Faced with such a scheme, **and the interest of the licensing and permitting process being one established in order to protect the public**, it is appropriate that **we recognize the right to intervene in said process**." Id. (emphasis added)(translation provided). Thus, the subsequent adjudicative proceeding is amenable to intervention.

> [A] person affected by the determination of an agency, be it an applicant who was denied said authorization **or third-person-opponents who were interested in contesting its concession,** had at their disposal the right to intervene in the process of challenge of an administrative decision. **This right to intervene arises once the procedure becomes adjudicative after the agency grants or denies a permit**. IRR Gas, 2020 WL 1288565 at *9 (emphasis added)(translation provided). See, also, PRTC. v. Junta Regl. de Tel., 179 P.R. Dec. at 207-08.

Furthermore, under those informal proceedings, reconsideration is governed by the same provisions as an adjudicative proceeding. See P.R. Laws ann. tit. 3 § 9641, 9655.

In view of the foregoing, if the Bureau agreed with P3's argument in its P3 Opposition, this would be an informal procedure under LPAU. P3 considers that "the certification phase in particular would **be much closer to the permit and license proceedings regulated by Section V of the LPAU** than an adjudicative proceeding. Like such proceedings, the Certificate of Energy Compliance required by Act 120 demands celerity and efficiency." P3 Opposition at 6 (citations and parenthesis omitted)(emphasis added). That would mean that, although intervention is not allowed in the initial stage, once the Bureau made a determination, the adjudicative nature of the procedure is activated and even third-parties, like UTIER, have a right to intervene under LPAU. This licensing process, the certification of a private entity that will take over PREPA's functions, is meant to protect the public. Thus, intervention is not only allowed, it is warranted.[14]

## II. The Bureau should reconsider the CEC Resolution and Order because it is contrary to law.

### A. In the CEC Resolution and Order, the Bureau has improperly limited the scope of its own review.

In its CEC Resolution and Order, the Bureau describes its role under Act No. 120-2018 as "more limited" than the role of P3. CEC Resolution and Order at 6. It says:

> [T]he Energy Bureau **shall evaluate if the Proposed Contract complies with the energy public policy and the regulatory framework**. Therefore, determinations concerning the overall benefits and adequacy of the proposed PREPA Transaction, as well as the specific financial and operational

[14] UTIER wants to leave on record, that it would be improper just to say that this procedure is not adjudicative, not informal, not rulemaking and not investigative. The procedure must be defined somehow**.** After all, administrative agencies get their authority from a delegation certain government power, which is delegated within constitutional confines. If the Bureau is not exercising a validly delegated power or if it has been granted some new undefinable power with unlimited discretion, it would require a more inquisitive analysis into the constitutionality of such a delegation or exercise of administrative authority. Such definitions are an essential part of the rule of law and due process.

considerations related to the Proposed Contract are entrusted to the P3 Authority and, consequently, the Energy Bureau has limited authority to intervene in such matters. Id. (emphasis added). See, also, P.R. Laws ann. tit. 22 § 1115(g).

UTIER cannot conceive how the Bureau considers this a "limited authority", especially after it defines the "energy public policy and the regulatory framework" as including seven different statutes, seventeen regulations and three pending regulations. Id. at 8-9. This list is not even exhaustive, as the Bureau recognizes. CEC Resolution and Order at 8.[15] Contrary to what

[15] It reads specifically:

> **The Puerto Rico's energy public policy and regulatory framework includes, but is not limited, to the following legislation**: (a) Act No. 83 of May 2, 1941, as amended, known as the Puerto Rico Electric Power Authority Act ("Act 83-1941"); (b) Act No. 114-2007, as amended, known as the Electric Power Authority Net Metering Program ("Act 114-2007"); (c) Act No. 83-2010, as amended, known as the Green Energy Incentives Act of Puerto Rico ("Act 83- 2010"); (d) Act No. 82-2010, as amended, known as the Public Policy on Energy Diversification by Means of Sustainable and Alternative Renewable Energy in Puerto Rico Act ("Act 82-2010"); (e) Act 57-2014, as amended; (f) Act 120-2018, as amended; and (g) Act 17- 2019.
>
> **Likewise, the energy regulatory framework also includes, without limitation, the following rules issued by the Energy Bureau**: (a) Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures, Regulation No. 8543; (b) Regulation on Mediation and Arbitration Procedures of the Puerto Rico Energy Commission, Regulation No. 8558; (c) Amendment to Regulation No. 8618 on Certification, Annual Fees, and Operational Plans for Electric Service Companies in Puerto Rico, Regulation No. 8701; (d) New Regulation on Rate Filing Requirement for the Puerto Rico Electric Power Authority's First Rate Case, Regulation No. 8720; (e) Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet, Regulation No. 8815; (f) Enmienda al Reglamento Número 8653, Reglamento sobre la Contribución en Lugar de Impuestos, Regulation No. 8818; (g) Regulation on the Procedure for Bill Review and Suspension of Electric Service Due to Failure to Pay, Regulation No. 8863; (h) Enmienda al Reglamento Núm. 9009, sobre el Procedimiento para la Revisión de Facturas Emitidas por la Autoridad de Energía Eléctrica de Puerto Rico Durante Situaciones de Emergencia, Regulation No. 9018; (i) Regulation on Integrated Resource for the Puerto Rico Electric Power Authority, Regulation No. 9021; (j) Regulation on Microgrid Development, Regulation No. 9028; (k) Reglamento sobre el Procedimiento para la Revisión de Facturas Emitidas por la Autoridad de Energía Eléctrica de Puerto Rico Durante Situaciones de Emergencia, Regulation No. 9043; (l) Enmienda al Reglamento 9043, Reglamento sobre el Procedimiento para la Revisión de Facturas Emitidas por la Autoridad de Energía Eléctrica de Puerto Rico Durante Situaciones de Emergencia, 9 Regulation No. 9051; (m) Enmienda al Reglamento Núm. 8863, Reglamento sobre el Procedimiento para la Revisión de Facturas y Suspensión del Servicio Eléctrico por Falta de Pago, Regulation No. 9076; (n) Regulation on Energy Cooperatives in Puerto Rico, Regulation No. 9117; (o) Regulation for Performance Incentive Mechanisms, Regulation No. 9137; (p) Regulation on Electric Energy Wheeling, Regulation No. 9138, (q) Enmienda al Reglamento Núm. 8701, sobre Certificaciones, Cargos Anuales y Planes Operacionales de Compañías de Servicio Eléctrico en Puerto Rico (pending issuance of registration number). **In addition, the subsequent regulations have been promulgated by the Energy Bureau and are pending for approval**: (a) Regulation For Energy Efficiency and Demand Response; (b) In Re: Enmienda al Reglamento

the Bureau determined; this is no small matter. There are many issues of public policy that need to be safeguarded here because, as we have seen, they are scarcely addressed elsewhere.

For example, Associate Commissioner Ángel R. Rivera de la Cruz ("Commissioner Rivera") argues in his dissent that "the public policy with respect to PREPA Transactions is predicated, in part, on the establishment of reasonable rates and the alignment of the corporate and business interests of the proponents with the fundamental interests of the People of Puerto Rico." Associate Commissioner Ángel R. Rivera de la Cruz, dissenting at 2. Commissioner Rivera concluded that "[t]his is a reiteration of the public policy that all rates should be 'just and reasonable rates', as established in Act 57-204." Id. (footnote omitted). Pursuant to that public policy element, Commissioner Rivera would have "rejected, without prejudice, the Preliminary Contract." Id. at 5.[16] Specifically, Commissioner Rivera understood that "[he] could not make a determination on one of the **crucial elements of the public policy on energy** . . ." and, therefore, would have needed more time to approve the certification. Id. (emphasis added).

UTIER agrees with Commissioner Rivera's interpretation about the crucial public policy element regarding the ratepayers.[17] However, UTIER adds that the regulatory framework, which includes Act No. 120-2018, also includes those sections that refer to PREPA's employees' rights. As argued in the UTIER Petition, Section 15 of Act No. 120-2018 **explicitly** includes provisions on the rights of PREPA's employees. See 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

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> sobre Certificaciones, Cargos Anuales y Planes Operacionales de Compañías de Servicio Eléctrico en Puerto Rico; and (c) Propuesta de Enmienda al Reglamento Núm. 8543, Reglamento de Procedimientos Adjudicativos, Avisos de Incumplimiento, Revisión de tarifas e Investigaciones. (emphasis added).

[16] The Bureau may recall that this is one of the alternatives UTIER presented in its request for remedies in the UTIER Petition.

[17] The Bureau may recall that in the UTIER Petition, UTIER argued that ratepayers were not adequately represented in this process and that UTIER could serve as a vehicle for those concerns through intervention. Further evidence of this fact is that the representative for consumers in the PREPA Board dissented from the approval and was overridden by the majority, whose interests are aligned elsewhere.

employee of rights they are entitled to under the applicable laws, regulations and collective bargaining agreements. Id. Because it is part of the regulatory framework, which the Bureau is tasked with applying, it should have been considered as well, before the issuance of a Certificate of Energy Compliance. These are just two examples of how the Bureau's narrow interpretation of its role under Act No. 120-2018 caused it to ignore essential elements in its analysis. Perhaps if UTIER had been granted intervention earlier, the Bureau would have considered these issues more carefully. Thus, the Bureau should reconsider its decision and give the missing elements their just consideration. The proper interpretation of the scope of review makes the propriety of UTIER's right to intervene even more evident. UTIER's perspective on the issues of policy that are not represented in the interests of P3 are an essential contribution to a proper determination.

As UTIER argued in its UTIER Petition, the 30-day deadline set forth in Act No. 120-2018 should not inhibit the Bureau from giving something as important as this proceeding the careful consideration it deserves.[18] As we argued at that point, this period 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 or refile. Additionally, the subsequent approval processes **do not bar reconsideration in this case.** The Certificate of Energy Compliance is a *sine qua non* requirement for the PREPA Transaction. Without it, the contract is invalid and *ultra vires,* regardless of the postulations made outside of this Bureau's jurisdiction.

**B. The Bureau's decision in this case violates UTIER's constitutional due process rights.**

**1. UTIER's right to an impartial adjudicator was violated in this process.**

[18] For the purpose of efficiency, UTIER incorporates by reference its prior due process arguments, UTIER Petition at 19-20, which the Bureau did not address in its resolutions.

As mentioned thus far, UTIER requests that this case be reopened and reconsidered. Additionally, UTIER respectfully requests that Chairman Edison Avilés Deliz ("President Commissioner") be disqualified or otherwise inhibit himself from these proceedings because his participation in the selection process with the P3 Committee creates an inescapable bias. Having personally taken part in the selection of the proponent for whom P3 seeks the Certificate of Energy Compliance, the President Commissioner has prejudged the facts of this case and is incapable of making an impartial decision based solely on the record—a fact that UTIER only came to learn after the disclosure of the P3 Report and other documents, due to the insistence on behalf of the relevant government entities to keep important proceedings secret until it is too late for public debate to weigh in on them. Furthermore, there is a palpable injury caused by this bias, where the President Commissioner's vote is what constituted the majority decision in this case. Nor can we ignore that as, President Commissioner, his seniority and experience must have influence over the decision of the other commissioners, at least those who were appointed to the Bureau around the same time.

LPAU incorporates a series of due process requirements in formal adjudicative procedures. Specifically, and among others, it "guarantees the parties involved . . . an impartial adjudication, and that the decision will be based exclusively on the record." Com. Seg. v. Real Legacy Assurance, 179 P.R. Dec. 692, 706 (2010)(citation omitted)(translation provided). See P.R. Laws ann. tit. 3 § 9641. While LPAU only incorporates the minimum due process guarantees, as we have argued previously, constitutional due process is circumstantial. See Connecticut v. Doehr, 501 U.S. 1, 10 (1991)("These cases 'underscore the truism that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" (quotation marks omitted)). Thus, a statutory guarantee does not preclude a constitutional due process consideration. See Echevarria Vargas, *supra,* at 141 ("This

process must be performed according to the scope of the constitutional due process clause which constitutes the guarantee of a citizen's rights faced with possible unjustified interventions by the State. Due process imposes upon the State the obligation to guarantee that its interference with an individual's liberty and property interests will be through a just and equitable process."(translation provided)).

That being said, an impartial adjudicator is a basic tenet of due process. See Com. Seg. v. Real Legacy Assurance, 179 P.R. Dec. at 713 ("Without a doubt, a just process before an impartial adjudicator is a basic right of any individual. The essence of every adjudicative procedure, be it judicial or administrative, is in the celebration of a fair litigation before an impartial adjudicator of facts."(footnotes omitted)(translation provided)). That said, when an adjudicator is biased, it will almost certainly constitute due process violation.

> Faced with an allegation of bias in an administrative proceeding, the first step of the analysis is to identify **on which issue the existence of bias is alleged**. That is why agencies and courts must be alert to allegations of bias shown by an examining officer **on factual aspects of the case**. This is so because, **when the** examining officer **has prejudged specific issues or facts of the case**, it could lead to their **disqualification**. The key is to identify whether, from the behavior exhibited by the examining officer, it can be concluded that, **prior to presenting the evidence** or during the course of the procedures, it shows that, **prior to the start of the process, he prejudged specific issues that affect the resolution of the controversy**. As an example, the disqualification of the adjudicator of the facts proceeds when it is shown that he has made a prior commitment to adjudicate the facts in a certain way.
>
> . . . . . .
>
> Rather, for bias to be successfully raised -for the purpose of disqualifying the examining officer- it is necessary **to demonstrate their prior commitment to obtain a certain conclusion regarding specific issues of the case**; that is, for example, being willing to recommend that the claimant violated the law without first having heard the evidence or without having disclosed the particular facts that gave rise to the controversy. Id. at 713-14 (footnotes omitted, and emphasis added)(translation provided).

Thus, the first step to establishing a due process violation of this variety is to identify the bias. More specifically, and relevant to this case, that the adjudicator of **facts** has prejudged those facts and made conclusions before being presented with the evidence. The second step is to

demonstrate the prejudice caused by this bias. "[I]t is necessary to carefully examine the case in question, since its success will depend on the true harm that it entails and the circumstances in which it arose." Id. at 714 (translation provided). Generally, "agencies' resolutions are considered institutional decisions, so that the integrity of the process is strengthened in the face of the fact that several officials are involved in the resolution of the dispute." Id. (translation provided) However, this does not mean that the presence of multiple adjudicators exempts any one of them from being impartial and the bias of one may have an effect on the entirety of the process.

In the present case, as we have presented, the President Commissioner participated in the process of selecting and negotiating the very contract and report whose compliance he is tasked with adjudicating here. This is undeniably a prejudgment of the facts and, therefore, bias, of the kind that is barred by the due process requirement for impartial adjudicators. Furthermore, without the President Commissioner's vote, the Certificate of Energy could not have been granted, given the fact that all Bureau decisions must be made by the "majority of the commissioners" not the majority of present or voting commissioners, nor the majority of votes, See P.R. Laws ann. tit. 9 § 1054d ("The decisions of the Commission shall be made by **the consent of the majority of the commissioners**." (emphasis added)). This is a requirement for absolute majority, not simple majority. Thus, without the President Commissioner's vote, in a four-person panel, the required majority of three votes would not have been met, given the presence of a dissenting opinion. Perhaps, with the President Commissioner's inhibition, the dissent would have even successfully rallied the remaining commissioners to further consider the issue of the ratepayers. Either way, the inhibition of the President Commissioner would have prevented the harm in this case.

Thus, UTIER requests that this Honorable Bureau reconsider its decision and, upon reopening the case, that the President Commissioner withdraw from casting a vote in the matter,

due to his inevitable bias in favor of granting the Certificate of Energy Compliance to his own selected proponent.

**2. UTIER's right to be meaningfully heard was denied in this process.**

As argued in the UTIER Petition, UTIER has a right to due process in this proceeding, because it has a property interest at stake in the result.[19] The fundamental requirement of due process is the opportunity to be heard "**at a meaningful time and in a meaningful manner**." Matthews v. Eldridge, 424 U.S. 319, 333 (1976)(emphasis added). By issuing the CEC Resolution and Order, the Bureau made decision that directly affects the rights of UTIER and its members, **without granting it the space to be heard**. The Bureau is the only body where UTIER could be **meaningfully heard**, a fact which has been made plain by the subsequent events regarding this issue**.** See, also, Echevarria Vargas, *supra*, at 314 ("The capacity to grant permits or authorizations is not unlimited. A governmental agency cannot issue decisions about permits or authorizations **that contravene rights that have been acquired and preestablished**, unless preeminent public values are affected."(translation provided)(citations omitted, and emphasis added)).

The June 18 Resolution did not consider any of UTIER's substantive arguments and only decided that UTIER did not have the right to intervene because this is an *ex parte* procedure, which, as we have stated, is an error in law. In fact, as we outlined above, **if this procedure were governed by Chapter V of LPAU** rather than Chapter III, **the fact that the Bureau has made a final determination gives rise to the right to intervene under Chapter III**. See, PRTC. v. Junta Regl. de Tel., 179 P.R. Dec. 177, 207-08 (2010); San Antonio Maritime v. P.R. Cement Co., 153 P.R. Dec. 374, 390 (2001). See, also, IRR Gas Station Corporation v. T & B

[19] For the purpose of efficiency, UTIER incorporates by reference its prior due process arguments, UTIER Petition at 10-13, which the Bureau did not address in its resolutions.

Petroleum Corp., 2020 TSPR 14, 2020 WL 1288565 at *8, 12 (2020)(J. Rodriguez, conforming opinion).

## III. The Bureau should reconsider the June 18 Resolution as it denies access to the protective documents in the captioned case, because the right to access to public information is not contingent on UTIER's status as intervenor and because disclosure is warranted.

Though, since the Bureau's decisions, P3 has made public its report and the approved contract, it has not made public all of the documents provided in this case, such as the memorandum submitted on June 17th, 2020 nor the actual petition that initiated this case. Thus, UTIER still has a claim for the disclosure of those documents and is exercising it. Furthermore, the Bureau's decision to set aside UTIER's request in the first place was a legal error that will very likely be repeated in similar cases.

### A. UTIER's request for disclosure of the protective documents is not moot.

In a footnote of its June 18 Resolution, the Bureau determined that having denied UTIER the status of intervenor, its requests for access to public documents were moot. See June 18 Resolution at 2 f.n. 9 ("Given the determination concerning UTIER's request for intervention, UTIER's request for disclosure of confidential documents in this case is moot."). This determination misses the mark on UTIER's request for access of public information.

> A case becomes academic when due to **events we are no longer faced with a live and present controversy**. If the controversy loses validity due to factual or legal changes during its process, and creates a context in which, **instead of giving a remedy that changes the litigant's situation, the court would only issue an advisory opinion**, the court must refrain from resolving the merits of the controversy. Jorge Moreu v. Pueblo de P.R., 201 P.R. Dec. 799, 801(2019)(citations omitted)(translation provided). See, also, ELA v. Aguayo, 80 P.R. Dec. 552, 584 (1958)(defining a moot case as "one which seeks to get a judgment **on a pretended controversy when in reality there is none**, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, **cannot have any practical legal effect upon a then existing controversy**." (emphasis added)(official translation)).

As UTIER argued in its UTIER Petition, the right to access public information is a constitutional and statutory right that belongs **to all Puerto Rico's citizens**. The Supreme Court of Puerto Rico has determined that right of public access to public information is intrinsic to free speech and a free press, because the primary purpose of those rights is to guarantee the free discussion of government affairs. See Ortiz v. Bauermeister, 152 P.R. Dec. 161, 175 (2000); Soto v. Srio. de Justicia, 112 P.R. Dec. 477, 485 (1982). **This access can only be limited by the government if there is a compelling public interest** weighing in favor of confidentiality. Ortiz, 152 P.R. Dec. at 175.; see, also, Soto, 112 P.R. Dec. at 485. For that reason, UTIER made the request for public documents, not for its own benefit as an intervenor, but to safeguard the public's right to know. UTIER is a union composed of many Puerto Rican residents and citizens, who have an individual constitutional right to access public information, **regardless of whether they are a party to the process or not.** Therefore, UTIER has standing to exercise these claims in their name.

> 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.** UTIER Petition at 17-18 (italics in original, bold added).[20]

It is clear that the request for the protective documents is not only for the benefit of UTIER, **it is for the benefit of the public**.

In the captioned case, even if UTIER were not granted the status of intervenor, **it would still have a constitutional right to access public information.** Just as the press or any citizen may exercise its constitutional right by seeking a mandamus for public documents, see, for instance, Bhatia Gautier v. Gobernador, 199 P.R. Dec. 59 (2017)(holding that a legislator has

[20] UTIER will not rehash the rest of its constitutional and statutory arguments regarding the right to public access here, given that the Bureau did not consider them in its June 18 Resolution. Nonetheless, UTIER incorporates those arguments by reference, UTIER Petition at 14-18, and does not waive the rights stated or derived from those statements.

standing for a mandamus to seek publication of a document submitted to the Financial Oversight Board), or moving for public hearings in cases that they are not a party to, see, for example, El Vocero de P.R. v. Puerto Rico, 508 U.S. 147 (1993)(where Petitioner was a reporter seeking access to preliminary hearings), UTIER and any citizen has the right to request disclosure of public documents. **This right is independent of any right as a party to the captioned case.**

Thus, there has been no change in the circumstances surrounding UTIER's request for disclosure of the protective documents. Therefore, the issue is not moot, and the Bureau should have resolved it in its Resolution.

**B. The confidentiality of the protective documents is not narrowly tailored to the applicable law nor to the alleged compelling state interest.**

Additionally, although the Bureau has not expressed itself on the issue of access to public information on the merits, UTIER will address P3's arguments, as manifested in the P3 Opposition. P3 argues that UTIER's request is unwarranted because the confidentiality of the protective documents meets all the requirements under applicable law, i.e. that it (1) promotes a compelling public interest, (2) is narrowly tailored to that interest and (3) does not attempt to suppress speech.

To begin with, P3 never alleged the existence of multiple bidders while the Bureau's adjudication process was still ongoing. Thus, there is doubt as to whether the compelling state interest that is set forth in the P3 Opposition truly existed when this case was initiated. However, even in the alternative that it did, it does not exist now. P3 has announced the identity of the private entity for whom it sought the Certificate of Energy Compliance and published both the contract and the report on its internet page,[21] so any interest in confidentiality is moot. Thus, UTIER does not concede that there is or ever was, in fact, a compelling state interest.

[21] *Available at* http://www.p3.pr.gov/assets/20-0520-02-partnership-committee-report-r18.pdf; http://www.p3.pr.gov/assets/executed-consolidated-om-agreement-td.pdf).

Furthermore, if the case were that there is only one bidder at the initial stage of these proceedings, for whatever reason, the only possible aim of confidentiality would be to suppress public discussion on the wisdom of the transaction. This is further evidenced by how quickly the approval process was set in motion and culminated without the hindrance of complying with democratic principles and allowing the regulatory and government bodies to consider public opinion, as well as expert opinions that may have generated valuable public debate.

Moreover, P3 contends that the confidentiality granted to the protective documents was narrowly tailored to the compelling state interest. However, the confidentiality granted to the protective documents is not even narrowly tailored to Act No. 120-2018, Act No. 29-2009 nor its regulation. Art. 9(i) of Act No. 29-2009 states:

> In the course of the procedures for the evaluation and selection of and negotiation with Proponents, **the confidentiality of the information furnished and generated in 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.** P.R. Laws ann. tit. 22 § 2608(i)(emphasis added).

This article does not say that **all** the information furnished and generated in connection with procedures under this act **are confidential**. It instructs P3 to use the established criteria in order to determine **whether** the information provided should be granted confidentiality. When a law delegates to an agency the task of setting criteria, those criteria should be present in the corresponding regulation. Therefore, to find said criteria UTIER is looking at the Regulation for Act No. 120-2018. Section 11.2 of that regulation governs confidentiality.

According to Section 11.2(a): "All Proposals submitted to the Authority and a Partnership Committee will become the property of the Authority and the Partnership Committee, **except for documents or information submitted by Proponents which are trade secrets, proprietary information or privileged or confidential information of the Proponent.**" (emphasis added). Further down, Section 11.2(c) states:

> The Authority and the Partnership Committee will endeavor to maintain the confidentiality of any information that a Proponent indicates to be proprietary or a trade secret, or that must otherwise be protected from publication according to law, except as required by law or by a court order. The Authority and the Partnership Committee will determine whether or not the requested materials are exempt from disclosure. In the event the Authority or a Partnership Committee elects to disclose the requested materials, it will provide the Proponent notice of its intent to disclose. In no event will the Government of Puerto Rico, a Partnership Committee, PREPA or the Authority participating in a PREPA Transaction be liable to a Proponent for the disclosure required by law or a court order of all or a portion of a Proposal submitted to the Authority or the Partnership Committee under these guidelines. (emphasis added).

Thus, according to its own criteria, P3 has to maintain confidentiality of such documents as constitute trade secrets or otherwise are protected under the law, i.e. by evidentiary privilege, for example. Rule 513 of the Rules of Evidence of Puerto Rico. What it **does not say** is that **all documents submitted in an ongoing procurement process are confidential.**

UTIER believes that there is confusion regarding the correct interpretation of the confidentiality requirements under Act No. 120-2018. However, after a joint reading of all the applicable law articles and regulation sections together, it is evident that **confidentiality is limited to that information that is privileged or otherwise sensitive and confidential under applicable law**. While P3 does not have the **obligation to publish information related to the ongoing process in the newspapers or government websites until the contracts are ultimately approved,** this is not the same as granting confidential treatment to every piece on information related to the ongoing process under Act No. 120-2018. See Regulation for Act No. 120, Sections 5.1(a)(ii)(6) and 11.2(a), (c) & (d) with Act No. 29-2009, Art. 9(i) & (j), P.R. Laws ann. tit. 27 § 2608(i) & (j).

The law and regulations limit confidentiality to those documents that are already granted confidentiality under applicable law, such as privileged information. The criteria for confidentiality under Act No. 29-2009 and the regulation corresponding to Act No. 120-2018 is

similar to the exceptions to the constitutional right to access public documents.[22] Thus, they are not a blanket confidentiality for all documents submitted in the procurement process. For example, the P3 committee report is not confidential and should have been disclosed. See P.R. Laws ann. tit. 27 § 2608(i) & (j)(stating that the report will not contain confidential information and P3 should provide public access to it).

In view of the foregoing, the Bureau should evaluate whether the remaining documentation meets the criteria for confidentiality under the applicable law **and** whether the law meets the standard for the exception to the constitutional right to access public information.[23] Upon such an analysis, the Bureau should determine that the blanket confidentiality granted to P3's submissions was improper, and any confidentiality should be narrowly tailored according to the nature of the submissions. Furthermore, any document that does not meet the constitutional criteria should be disclosed to the public.[24] This, of course, includes the P3 Motion.

[22] It is worth mentioning that, if the joint interpretation of the law and the regulation were that **there are no criteria to limit P3's discretion in this case**, either the law or the regulation would be vulnerable to a constitutional challenge. See López Salas v. Junta de Planificación, 80 P.R. Dec. 646, 661 (1958)("Undoubtedly, the Legislature cannot delegate **arbitrary or unlimited powers** to administrative agencies. The statute must prescribe a definite standard which may serve as a guidance and limit the use of delegated power, whether of rule-making or adjudication."(emphasis added)(official translation)); see, also, Asoc. Fcias. Com. v. Depto. de Salud, 156 P.R. Dec. 105, 117 (2002)("[A]gencies have a **duty to specify, through regulations, the criteria outlined in a very general way in the delegating legislation**, in order to avoid arbitrary and unfair application, and to provide adequate guidelines so that the parties affected by administrative actions are duly informed of the status of current law."(emphasis added)(translation provided)).

[23] It should be noted that **even privileged information may be susceptible to disclosure,** under the right circumstances. See, for example, Ponce Adv. Med. v. Santiago González et al., 197 P.R. Dec. 891, 909 (2017)(explaining that disclosure of trade secrets may be warranted if the privilege seeks to hide injustice or fraud). Also, the fact that a law provides confidentiality or privilege does not preclude constitutional challenge based on access to information. See, for example, Gautier v. Gobernador, 199 P.R. Dec. 59, 80-89 (2017)(finding that courts should interpret privileges carefully and determine whether the reason for privilege outweighs the reason for disclosure).

[24] If P3's compelling state interest was to ensure robust competition, by keeping the proponents' from obtaining their competitors' proposal, then any confidentiality granted should have been narrowly tailored to that purpose. This does not, for example, preclude granting access to UTIER, as an interested party, that are not competitors, subject to terms and conditions of non-disclosure. There were always alternatives to blanket confidentiality of every bit of information related to the process.

## CONCLUSION

To recap, with regards to UTIER's motion for reconsideration of the June 18 Resolution, UTIER is asking for the following remedies: (1) that the Honorable Bureau reconsider its denial of leave to intervene; (2) that the Honorable Bureau reconsider its determination that the disclosure issue is moot and (3) that the Honorable Bureau grant the petition for disclosure of the remaining public documents, **which is entirely independent from UTIER's petition for leave to intervene**. Regarding the CEC Resolution and Order, UTIER maintains that (1) granting the Certificate of Energy Compliance without UTIER's participation is a violation of its constitutional due process rights, which makes said resolution unconstitutional. UTIER exercised its right to intervene in a timely manner to protect its interests and would have provided valuable information to this case that was ignored. Furthermore, the President Commissioner should withdraw from adjudicating a case where he has prejudged the outcome. The withdrawal of the President Commissioner would have prevented the decision in this case and forced the Bureau to address the dissent's valid arguments against approval. (2) The Energy Bureau improperly limited the scope of its own review and decided the captioned case in a hurry, without proper consideration for the regulatory framework. The Bureau's decision would have been better informed and more likely to touch upon forgotten issues of policy with the participation of UTIER. UTIER is a party composed of ratepayers, employees of PREPA and active participants in the energy and environmental policy debate surrounding PREPA's transition. Its interests are aligned with the regulatory framework and directly affected by the Bureau's decision. With the benefit of hindsight, we can confirm that the Bureau is the body with the most expertise and opportunity to perform a truly thorough evaluation of the proposed PREPA Transaction, with the participation of UTIER. In view of the foregoing, the Bureau should reconsider both the June 18 Resolution and the CEC Resolution and Order.

**RESPECTFULLY SUBMITTED** this 24th day of June 2020, in San Juan, Puerto Rico.

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**CERTIFICATE OF SERVICE**

We hereby certify that on June 24, 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 24, 2020.

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