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 AND/OR PETITION TO CONTEST AND PETITION FOR INTERVENTION

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority Employee's Retirement System ("PREPA ERS") and respectfully requests that the Puerto Rico Energy Bureau ("Bureau") reconsider **the issuance of the Certificate of Energy Compliance**, pursuant to Section 3.15 and 5.4 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"). In summary, PREPA ERS requests that this Honorable Bureau reopen the captioned case and grant leave to intervene pursuant to Section 3.5 of LPAU.

INTRODUCTION

In the current proceeding, the Bureau granted a Certificate of Energy Compliance for Luma Energy, LLC ("Luma Energy"), so it may take over the Puerto Rico Electric Power Authority's ("PREPA") operations of the Transmission and Distribution ("T&D") system. Upon the Bureau's decision, Luma Energy, PREPA and the Puerto Rico Public-Private Partnership Authority ("P3") signed and then published the contract with Luma Energy ("Luma Contract"). This contract has been the object of much scrutiny and critique, particularly given the negative effects it may have on PREPA's Title III case and on its ratepayers. It has become clear that the Luma Contract puts immense strain on PREPA's finances and does not produce any benefit to PREPA nor to its stakeholders, among which are its creditors, employees, retirees and clients,

that is, the people of Puerto Rico. As a party that is directly affected by the rash financial missteps that PREPA enters into or has pushed upon it, the PREPA ERS joins multiple other objectors to defend the integrity of this essential public utility, as well as the rights of its present and future retirees.

PROCEDURAL BACKGROUND

On May 18, 2020, 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"). Then, on June 17, 2020, the Burau issued a *Resolution and Order (Energy Compliance Certificate)*, in which it granted the *P3 Petition* and the Certificate of Energy Compliance to Luma Energy ("Resolution and Order"). The breadth of this proceeding was done without the public's knowledge and/or participation, which is why such parties as PREPA ERS were caught unaware by the many flaws of the Luma Contract and the effect it has on their rights. For that reason, PREPA ERS comes now to vindicate its rights and contest the issuance of the Certificate of Energy Compliance to Luma Energy.

ARGUMENTS

I. The Bureau should reopen de captioned case as an adjudicatory procedure and allow the PREPA ERS leave to intervene.

A. The process for issuance of a Certificate of Energy Compliance is an informal procedure under LPAU.

The process for the issuance of a Certificate of Energy compliance is an informal procedure under LPAU. From the framework of Act No. 120-2018, P.R. Laws ann. tit. 22 §§ 1111 et seq, it is clear that the process for a Certificate of Energy Compliance is the equivalent of

a licensing process under LPAU.[1] This Certificate of Energy Compliance certifies that the PREPA Transaction under the Bureau's review complies with the regulatory framework and applicable law. P.R. Laws ann. tit. 22 § 1112(d). This is a step that is necessary for a private entity to become a party to a PREPA Transaction. Id. § 1112(f), (h); 1115(g).

The process for this issuance is straightforward: (1) P3 files a petition and attaches the corresponding report and preliminary contract; (2) the Bureau evaluates whether the preliminary contract complies with the regulatory framework through careful study of the report and the preliminary contract; and (3) the Bureau will determine whether the proposal complies with the regulatory framework and applicable law. If it does, the Bureau will issue the Certificate of Energy Compliance, which allows the petitioner to set in motion the approval process and execute the PREPA Transaction. Id. § 1115(g). Essentially, it is a license or permit to contractually bind itself to a PREPA Transaction.

B. The process for issuance of a Certificate of Energy Compliance has been converted into an adjudicative procedure and intervention is allowed.

According to LPAU, certain procedures "shall be deemed **informal non-quasi judicia[l] procedures**, and therefore, shall not be subject to [Chapter III on adjudicative proceedings]." P.R. Laws ann. tit. 3 § 9641 (emphasis added). 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). 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

[1] 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)).

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:

> [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 . . . . *PRTC. v. Junta Regl. de Tel.*, 179 P.R. Dec. 177, 207-08 (2010)(*citing Ranger American v. Loomis Fargo,* 171 P.R. Dec. 670, 680-81 (2007))(emphasis added).

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**. "[I]n 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). Therefore, after an agency, such as the Bureau, makes a final determination which denies or grants approval in an informal process, a formal adjudicative process is activated with all the bells and whistles.

"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**." *San Antonio Maritime*, 153 P.R. Dec. at 390 (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 Station Corporation v. T&B Petroleum*

Corp., 2020 TSPR 14, 2020 WL 1288565 at *9 (emphasis added)(translation provided). *See, also, PRTC. v. Junta Regl. de Tel.*, 179 P.R. Dec. at 207-08.

Thus, in informal proceedings, although intervention is not allowed in the initial proceedings, once the determination is challenged, it becomes a formal adjudicative procedure. As such, the proceeding becomes amenable to intervention.

Therefore, because the Certificate of Energy Compliance procedure is equivalent to a licensing proceeding and, thus, an informal proceeding under LPAU, once the Bureau made a determination, the adjudicative nature of the procedure was activated and even third-parties, like PREPA ERS, 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.

C. The Bureau should grant PREPA ERS leave to intervene because the intervenor factors weigh in its favor.

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

> (a) Whether the petitioner's interests may be adversely affected by the adjudicatory procedure.
> (b) Whether there are no other legal means for the petitioner to adequately protect his interests.
> (c) Whether the petitioner's interests are already adequately represented by the parties to the procedure.
> (d) Whether the petitioner's participation may help, within reason, to prepare a more complete record of the procedure.
> (e) Whether the petitioner's participation may extend or delay the procedure excessively.
> (f) Whether the petitioner represents or is the spokesperson of other groups or entities in the community.
> (g) Whether the petitioner can contribute information, expertise, specialized knowledge or technical advice which is otherwise not available in the procedure. Id.

These criteria are meant to be applied *liberally*. Id. Furthermore, the Supreme Court of Puerto Rico has held that this statute requires agencies "to facilitate the participation of such

citizens whose interests may be affected by administrative action." *Comisión Ciudadanos v. G.P. Real Property*, 173 P.R. Dec. 998, 1011 (2008)(translation provided). Because these factors all weigh in favor of granting leave to intervene, the Bureau should act accordingly.

1. PREPA ERS's interests may be adversely affected by the Bureau's decision.

PREPA ERS is a trust created through a collective bargaining agreement ("CBA") executed in 1942 by and between the Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. ("UTIER"), and the entity now known as PREPA. Through this CBA, and subsequent Resolution by the Governing Board of the entity now known as PREPA, they created a retirement system of and for PREPA's employees. The trust fund is nourished by contributions made by PREPA, its employees and investment incomes. This trust fund is exclusively designed to pay benefits to PREPA's employees and retirees. Because it is a separate entity from PREPA, it has autonomous patrimony that belongs only to its beneficiaries. Due to PREPA's non-payment and the massive retirement of PREPA's employees cased by austerity measures, the PREPA ERS has an actuarial deficit that threatens its capability to pay current and future pensions. PREPA owes the PREPA ERS around $354.7 million, which have been claimed in the Title III procedure. Thus, the PREPA ERS is a creditor of PREPA in the Title III proceedings.

With that background in mind, there can be no doubt of the adverse effect the issuance of the Certificate of Energy Compliance and subsequent PREPA Transaction with Luma Energy have on PREPA ERS's interests. The Luma Contract represents an imminent risk or substantial reduction of PREPA's workforce. While Act No. 120-2018 protects the rights of PREPA's workers, the Luma Contract does not guarantee continued employment, nor does it respect the collective bargaining agreements upon which most of these workers' rights depend. Moreover, Act No. 120-2018 provides for PREPA and the government to establish a voluntary incentivized resignations for those employees that are not hired by Luma Energy. By reducing the workforce,

their contributions will likewise be reduced, which in turn will increase the deficit and lead to insolvency for PREPA ERS.

On the other hand, the Luma Contract has specific provisions about the retirement plan. Luma Energy will not take on any of PREPA's pension debts, which ascends to over $350 million. Moreover, the Luma Contract allows Luma Energy to offer the current PREPA employees that it takes on a competing retirement plan, depriving PREPA ERS of those contributions. While the Luma Contract allows Luma Energy to make employer contributions to PREPA ERS, the permissive language in the Luma Contract does not seem to require that. This is due to Act No. 29-2009 which states that any public employee that participates in PREPA ERS that has 10 years or more of service accumulated and transfers to the public-private entity will preserve the rights acquired under that system and may continue contributing to the pension system. P.R. Laws ann. tit. 27 § 2609(g). Therefore, employees with less time, would not be able to continue as participants of the ERS.

Moreover, PREPA ERS's claim in the Title III proceeding is at risk because of the administrative expense priorities that the Luma Contract requires. These administrative expense priorities would have the effect of prioritizing any monies that become due under the Luma Contract over the payments to retirees, employees and the bondholders. This adverse interest in the number of millions of dollars should suffice to justify the PREPA ERS's right to intervene.

2. PREPA ERS has no other legal means to adequately protect its interests.

The issuance of Certificate of Energy Compliance is a prerogative of the Bureau. It is also the only step in the process of PREPA Transactions that is open to public participation. Thus, PREPA ERS has no other legal means to protect its interests.

3. PREPA ERS's interests are not already adequately represented by the parties in this proceeding.

In this proceeding, there is only one party: P3. P3 appears to represent the interests of PREPA and Luma Energy, because their interests are aligned. Nonetheless, none of those interests are aligned with those that PREPA ERS needs to defend in this proceeding. The parties to this case are adamant on signing and executing the Luma Contract over the criticism and suspicion of the public. Meanwhile, the interests of PREPA ERS and its beneficiaries are ignored, to the point of being nullified. Thus, there is no party in this proceeding to adequately represent PREPA ERS's interests.

4. PREPA ERS's participation is reasonably likely to help prepare a more complete record in this proceeding.

PREPA ERS has decades of experience with PREPA's finances, given its relationship to PREPA. Moreover, PREPA ERS is an active creditor in the Title III proceeding. This participation gives it insight into the effect that the Luma Contract will have on PREPA's restructuring and its ability to pay its debts. This is information that seems to have been ignored throughout this proceeding, which is a dangerous way to operate.

5. PREPA ERS's participation will not excessively extend or delay the proceeding.

PREPA ERS is represented by counsel that is familiar with the issues of the captioned proceeding. Thus, PREPA ERS's participation will not excessively extend or delay the proceeding.

6. PREPA ERS represents other groups or entities in the community.

PREPA ERS represents its beneficiaries, all of whom are retirees and active employees of PREPA's. Furthermore, its members are residents and ratepayers of PREPA. As a high-profile unsecured creditor in PREPA's Title III bankruptcy, PREPA ERS may adequately represent the interests of unsecured creditors, all of whom will be affected by the issuance of the Certificate of

Energy Compliance and the Luma Contract. Thus, PREPA ERS represents other groups or entities in the community.

7. PREPA ERS can contribute information, expertise, specialized knowledge and technical advice which is otherwise not available in the procedure.

PREPA ERS is very familiar with PREPA's finances, because of its relationship with PREPA and its role in the Title III bankruptcy. Thus, it can contribute information on PREPA's financial viability and the effect of the Luma Contract on that viability. In particular, PREPA ERS has a unique perspective of the Title III case, as pension obligations are one of the biggest claims against PREPA and are prioritized even over bondholders.

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

A. The Bureau has improperly limited its scope of review.

In its *Resolution and Order*, the Bureau describes its role under Act No. 120-2018 as "more limited" than the role of P3. *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 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).

This a not "limited authority". The Bureau 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. *Id.* at 8. Contrary to what the Bureau determined, there are many issues of public policy that needed to be safeguarded here and were ignored under the guise of limited authority. This is *ultra vires*. *See, for example, Ayala Hernández v. Consejo Titulares*, 190 P.R. Dec. 547, 568-69 (2014)("In that

respect, it is important to reiterate that, while an agency cannot act in excess of what the law authorizes, **it also cannot impose upon itself more limitations than those the enabling law through regulations.**" (translation provided)(emphasis in the original)).

By limiting the scope of its review, the Bureau ignored the effect of the Luma Contract on multiple areas of public policy, such as the effect on ratepayers and the effect on PREPA employees, including their pension rights, to name a few:

> "[I]t is hereby declared as the **public policy** of the Commonwealth of Puerto Rico that: (a) The **cost** of the electric power generated, transmitted, and distributed in Puerto Rico shall be **affordable, just, and nondiscriminatory for all consumers**; . . . (d) The implementation of strategies geared toward achieving efficiency in the generation, transmission, and distribution of electric power shall be sought in order **to guarantee the availability and supply thereof at an affordable, just, and reasonable cost**; . . . (m) Prices shall be based on the actual cost of the service provided, efficiency standards, or any other parameters recognized by government and nongovernmental organizations specialized in electric power service[.]" P.R. Laws ann. tit. 9 § 1051 (emphasis added).
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> **PREPA's personnel have been critical in restoring the electric power service in the wake of hurricane Maria. Their knowledge of the system is essential to ensure the success of its transformation**.
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> The provisions of this Act and of any Partnership or privatization Contract executed in connection with PREPA pursuant to this Act, **may not be used by the Government of Puerto Rico as grounds for the dismissal of any regular employee.** Any PREPA personnel who opt to remain in the Government of Puerto Rico shall be assigned according to the statutes, regulations, and administrative rules applicable thereto. Likewise, PREPA and the Government of Puerto Rico may devise and offer transition or incentivized voluntary resignation plans.
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> Any established regulations shall ensure strict compliance with the provisions of Section 5.2 of Act No. 8-2017, as amended, known as the "Government of Puerto Rico Human Resources Administration and Transformation Act." Moreover, the concept of mobility and the mechanism established by the Government of Puerto Rico Human Resources Administration and Transformation Office (HRATO) to implement the movement of public employees, as established in Act No. 8-2017, shall apply to PREPA in accordance with said Act. Regular PREPA employees who are not selected to work for the Contractors shall retain their position or be transferred to another position within PREPA or to other Government Entities.
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> **Employees who, as a result of this Act, are transferred under the concept of mobility to another government entity shall keep all of their vested**

> **rights in accordance with the laws, rules, collective bargaining agreements, and regulations applicable thereto, as well as the privileges, obligations, and status with respect to any existing pension or retirement plan, or savings and loan fund established by law in which such employees were enrolled before the approval of this Act** and that are compatible with the provisions of Act No. 26-2017, known as the "Fiscal Plan Compliance Act." No regular PREPA employee shall be left unemployed nor lose benefits as a result of any PREPA Transactions.
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> Sections 10(f) and (g) of Act No. 29-2009 shall govern contractors in what pertains to the management of the public employees hired by such contractor under a Contract. However, **Contractors who hire employees shall establish in the contract that the job classification, the seniority criteria, wages, and fringe benefits shall be equivalent to those held by such employees prior to being hired by the Contractor**, as provided in subsection 4 (10) of Section 6.4 of Act No. 8-2017. P.R. Laws ann. tit. 22 § 1121 (emphasis added).

Furthermore, by ignoring those parts of the regulatory framework, the Bureau completely disregarded the fact that PREPA is currently undergoing a Title III restructuring. This would be a costly error if the Luma Contract were allowed to take effect because the millions of dollars that Luma Energy will be managing will be excluded from PREPA's assets and the **combined rate increase** of the Restructuring Support Agreement ("RSA") and the Luma Contract will be disastrous for PREPA's ratepayers and affect their ability to keep PREPA afloat. [2]

In addition, the Bureau ignored the requisite environmental policy factors. The regulatory framework includes the renewable energy goals of Art. 1.6(7) of Act No. 17-2019, which could hardly be served by handing the obligation over to Luma Energy without setting any guidelines:

> To **reduce and eventually eliminate electric power generation from fossil fuels** by integrating orderly and gradually alternative renewable energy while safeguarding the stability of the Electrical System and maximizing renewable energy resources in the short-, medium-, and long-term. For such purpose, a Renewable Portfolio Standard is established in order to achieve a minimum of forty percent (40%) on or before 2025; sixty percent (60%) on or before 2040; and one hundred percent (100%) on or before 2050. (emphasis added).

[2] See LONDON ECONOMICS INTERNATIONAL LLC, CRITIQUE OF GOVERNMENT PARTIES' ASSERTION THAT THE 9019 SETTLEMENT WILL NOT AFFECT NON-SETTLING CREDITORS AND WILL AVOID A SUBSEQUENT TITLE III FILING BY PREPA (2019)(*available at* https://creditorspr.com/wp-content/uploads/2020/02/Redacted-LEI-Report-filed-version.pdf).

Additionally, the Bureau's evaluation completely ignored the overall prohibition against private monopolies and the general requirements of good faith and reasonable reciprocity in government contracts, both of which are present in the regulatory framework. P.R. Laws ann. tit. 27 § 2602 ("[T]he public policy of the Government of Puerto Rico is to favor and promote the establishment of Public-Private Partnerships . . . to **apportion between the Commonwealth and the Contractor the risk entailed** by the development, operation or maintenance of such projects, ..."(emphasis added)); and Statement of Motives of Act No. 120-2018 ("Thusly, provider and power generation source **monopolies shall be avoided** and diversification shall be promoted. Hence, we avoid past mistakes that now hold us hostage to crude oil."(emphasis added)). Moreover, the Bureau ignored the call to transparency and public participation which is present in the regulatory framework. P.R. Laws ann. tit. 9 § 1051("**Transparency and citizen participation** in every process related to **electric power service** in Puerto Rico shall be promoted[.]"(emphasis added)).

All of these factors needed to be considered by the Bureau, according to the regulatory framework that it expressly adopted in its decision. However, the Bureau did not consider all of these factors. Furthermore, the Bureau did not mention these factors in its decision, thereby impeding objectors from understanding what the grounds for approval were. Public debate over the Luma Contract has yielded multiple studies and identified the flaws of the Luma Contract that are squarely within the regulatory framework and which the Bureau ignored. Therefore, the Bureau improperly limited its review of the Luma Contract and should reconsider its decision.

B. The Bureau's decision was improper due to the biased participation of Chairman Edison Avilés Deliz's.

In its *Resolution and Order,* the Bureau decision was issued with the vote of three of the four commissioners. Among those three was Chairman Edison Avilés Deliz ("Chairman"). The Chairman's participation in this case was improper, because of his participation in the selection

process with the P3 Committee. This duality of functions creates a bias in favor granting the Certificate of Energy Compliance and should have resulted in the Chairman's inhibition from this case.

The Chairman was personally involved in the process that resulted in selecting Luma Energy to take over PREPA's T&D Systems and the negotiation of the Preliminary Contract. While we are not arguing that the Chairman had any malicious motives for this duality, we find that it is virtually impossible to make an impartial decision based solely on the record when one has prejudged the facts and received additional *ex parte* information before the case was even filed. The Chairman's name is on the report submitted to this Bureau for evaluation. His name on that report signifies that he was a part of this process which evaluated all the information made available by the proponents, which is more than what is in the administrative record. Furthermore, there is a palpable injury caused by this bias. The Chairman was the deciding vote in this case, because without his vote, the requisite three-person majority would not have been met. Furthermore, the position of Chairman undoubtedly grants him influence over the decision of the other commissioners.

Evidently, administrative procedures incorporate the minimum requirements of due process. 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. That being said, an impartial adjudicator is a basic tenet of due process. *Id.* 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)).

When an adjudicator is biased, it will almost certainly constitute due process violation. To raise a due process violation of this nature there are two steps: (1) "[T]o identify on which issue the existence of bias is alleged[;]" and (2) "[T]o carefully examine the case in question [for] the true harm it entails and the circumstances in which it arose." *Id.* at 713-14 (translation provided). Bias is particularly present when the adjudicator of facts "has prejudged specific issues or facts of the case, [and this] could lead to their disqualification." *Id.* (translation provided).

> 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.
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> 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.* (footnotes omitted, and emphasis added)(translation provided).

In the present case, the Chairman participated in the process of selecting Luma Energy, negotiating the Preliminary Contract and drafting the Report which was submitted to the Bureau. This makes the Chairman a party in this case, where these actions are submitted to the Bureau for approval. There can be no doubt that this is a prejudgment of the facts. The Chairman had already decided that the P3 Petition should be granted, otherwise, he would not have sanctioned that it be presented in the first place. This is clearly the bias that due process protects us from when it requires impartial adjudicators.

Furthermore, as we have pointed out, without the Chairman's vote this ordeal could have been avoided. The Certificate of Energy could not have been granted with only a two-person

majority, because all Bureau decisions must be made by the "majority of the commissioners[,]" not 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)). Thus, mathematically, in a four-person panel, decisions must be taken with the affirmative vote of three people, not two. Without the Chairman's affirmative vote, the required majority of three votes would not have been met. There would have been two affirmative votes, one dissident and one inhibition. Thus, the Chairman's bias had a determinative effect on the decision and caused prejudice to the PREPA ERS.

Moreover, the Bureau must keep in mind its mandate. The Legislative Assembly intended the Bureau to function always as an independent entity, which is why it was separated from any of the entities that were subjected to its jurisdiction. *See* P.R. Laws ann. tit. 9 § 1051a(j), 1054k. With that mandate of independence and autonomy in mind, the Bureau's ethical regulations were drafted to include requirements that preserve that independence and autonomy. Specifically, the ethical regulations for the Bureau require that the commissioners abstain from **any actions that may be or appear to be a conflict of interest**. *See* Regulation No. 8542 of December 18, 2014 at Art. 2 § 2.01. For one thing, this means that the commissioners have an **express duty to be impartial**. *Id.* at §2.01(A). However, they are **also** mandated **to inhibit themselves** from any procedure **where their impartiality may be reasonably questioned**. *Id.* at § 2.01(E).

C. The Certificate of Energy Compliance was issued without considering the prejudicial effects on PREPA and its Retirement System.

As previously mentioned, part of the regulatory framework includes protections for PREPA employees. Furthermore, the regulatory framework requires that PREPA Transactions yield benefits for PREPA, not just for the contracting private entity. Yet, the Bureau issued the Certificate of Energy Compliance without considering the prejudicial effect of the Luma

Contract on PREPA and its employees, including the pension obligations of the former and the retirement rights of the latter.

Under Section 4.2 of the Luma Contract, Luma Energy would be required to prioritize recruiting PREPA's employees, though there is no indication of how PREPA and P3 intend to ensure compliance with that provision. Notwithstanding, Luma Energy is not obliged to recruit all of PREPA's employees nor even a specific or substantial portion of those employees, which the Puerto Rico Government has recognized were not the problem that lead to PREPA's deficiencies and were, rather, the ones who deserve credit for reenergizing most of Puerto Rico after Hurricane Maria. Luma Energy will have sole discretion to decide which PREPA employees it will recruit. Moreover, those PREPA employees who are recruited will not be guaranteed their rights under the collective bargaining agreements they have with PREPA, including representation by the unions they ascribe to.

These facts, on the impact of the Luma Contract on PREPA employees, are tied to the impact on PREPA ERS. Firstly, Section 5.8 of the Luma Contract provides Luma Energy with the choice of paying the current retirement plan for PREPA employees that they recruit or offering a competing plan. Providing a competing plan, with the coercive persuasion that characterizes the position of a new employer, will deprive PREPA ERS of the contributions of those PREPA employees that Luma Energy recruits and convinces to change retirement plans.

Secondly, while the Luma Contract allows Luma Energy to make employer contributions to PREPA ERS, the permissive language in the Luma Contract does not seem to require that. This is due to Act No. 29-2009 which states that any public employee that participates in PREPA ERS that has 10 years or more of service accumulated and transfers to the public-private entity will preserve the rights acquired under that system and may continue contributing to the pension

system. P.R. Laws ann. tit. 27 § 2609(g). Therefore, employees with less time under their belt would not be able to continue as participants of the ERS.

Thirdly, the Luma Contract is patently clear on the fact that Luma Energy will not be assuming any portion of PREPA's pension obligations, regardless of the employees that it recruits. PREPA ERS has a claim of over $350 million against PREPA which becomes more difficult to satisfy when PREPA is reducing its workforce, handing its revenue over to private interests and allowing Luma Energy to waive any responsibility therein.

Evidently, the Luma Contract does not protect PREPA's employees retirement rights. However, it is also significant how this affects PREPA directly. As the Bureau knows, PREPA is in the middle of a Title III proceeding in the District Court of Puerto Rico. The Luma Contract requires PREPA to provide an administrative expense priority for certain payments accrued under the Luma Contract, which amount to millions of dollars before the calculations are even complete. Furthermore, the Luma Contract requires PREPA to pay millions of dollars at every stage for Luma Energy to perform, without requiring a cent of investment from Luma Energy. Thus, our indebted public utility will continue to financially distress itself to live out some policymakers' fantasy come true of privatizing this essential public service. We must be clear. The Luma Contract does not provide any benefits for PREPA and it transfers practically all of PREPA's functions to a single private corporation. The Luma Contract does not provide a single fall back option nor any significant penalties if Luma Energy fails to deliver, while PREPA is forced to pay for its own failures and Luma Energy's as well.

Furthermore, PREPA ERS's claim in the Title III proceeding is in danger because of the administrative expense priorities that the Luma Contract requires. These administrative expense priorities would have the effect of prioritizing any monies that become due under the Luma Contract over the payments to retirees, employees and the bondholders. This is a priority of

millions of dollars which will affect the payment or PREPA's debts, which is the whole point of the Title III proceeding. This lack of payment will cripple PREPA's restructuring, as well as the rights of its employees, and lead to the insolvency of PREPA ERS, which affects PREPA's employees as well.

III. CONCLUSION

In view of the foregoing, this Honorable Bureau should reconsider its decision and vacate its order authorizing the Certificate of Energy Compliance. In the alternative, the proceedings should be open to allow PREPA ERS to intervene, participate and submit evidence in furtherance of the arguments stated in this motion. Furthermore, in any case, the Chairman should withdraw from casting a vote and inhibit himself from any proceeding regarding this matter, to avoid the reasonable questions of his impartiality.

RESPECTFULLY SUBMITTED.

This 13th day of July 2020, in San Juan, Puerto Rico.

CERTIFICATE OF SERVICE

We hereby certify that on July 13, 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.

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