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

IN RE: REQUEST FOR APPROVAL OF AMENDED AND RESTATED POWER PURCHASE AND OPERATION AGREEMENT WITH ECOELECTRICA AND GAS SALE AND PURCHASE AGREEMENT WITH NATURGY APROVISIONAMIENTOS, SA	CASE NO.: NEPR-AP-2019-0001 SUBJECT: PETITION FOR INTERVENTION AND MOTION FOR RECONSIDERATION

REQUEST TO ADJUDICATE INTERVENTION AND TO CONSIDER MOTION FOR RECONSIDERATION

TO THE BUREAU:

Comes Now Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico (ICSE), represented by appearing counsel and respectfully alleges and prays:

1. On May 22, 2020 the ICSE filed Petition for Intervention and Motion For Reconsideration. This Motion for Intervention has never been decided, certainly it has not been rejected by the PREB.

2. The Intervention raised significant legal issue on the specific "approval" of the Ecoelectrica/Naturgy contracts with PREPA.

3. ICSE litigated the Ecoeléctrica/Naturgy contracts on the PROMESA Court, which eventually led to an appeal to the First Circuit Court of Appeals, case no. 20-1685.

The Court of Appeals rendered judgment and opinion on August 12, 2021. While it confirmed Judge Swain's approval of PREPA's assumption of the Ecoeléctrica/Naturgy contract (which Windmar opposed), it made a significant statement concerning the powers of the PREB, vis a vis the powers of FOMB and the Swain Court. It stated:

> UTIER and Windmar object that, as a matter of comity, the motion to assume should not be resolved until all issues of Commonwealth law arising out of the PREB proceeding are finally adjudicated, given that the same issues arise in this proceeding. But appellants can point to no instance in which the Title III court's assumption ruling has tied the hands of PREB. Nor is such an occurrence likely. In considering a motion to assume under section 365(a), "a bankruptcy court sits as an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession, and not, as it does in other circumstances, as the arbiter of disputes between creditors and the estate." In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993). As such, any decision on the merits of the Board's motion to assume the renegotiated GSPA and PPOA is "[i]n no way . . . a formal ruling" on legal issues related to the contracts. Id. Moreover, as a matter of practical comity, one suspects that PREB would benefit from knowing sooner rather than later whether the Title III court would allow assumption."

4. Windmar's Objection to the PREB's approval and to PREPA's assumption of the contract, raised important issues of the power and authority of PREPA to act.

The First Circuit's opinion, leaves every legal issue raised, open, and squarely puts the issues on PREB's hands.

5. The pending legal issues raised, now on PREB's hands are:

a) What degree of substantive intervention is required from the PREPA Board of Directors on an issue like the Ecoelectrica/Naturgy new contracts and how is PREB to act when in fact, PREB is confronted with the most absolute, not competent, incomplete, superficial, not professional, intervention by PREPA's Board?;

What is the evidence of PREPA's Board of Directors and FOMB "business judgement"?

Recently, US Magistrate Judge Judith Gail Dein, entered an order related to UTIER's request for discovery on the Federal Court proceeding for assuming the Ecoelectrica/Naturgy contracts.

The Court stated referring to the "business judgment" standard concerning the assumption of the contracts:

> "Yet, "the business judgment rule does not provide [debtors] unfettered freedom to use the power given by Code § 365(a) however they will. Congress did not intend the Code to be a shield behind which a debtor in possession might engage in conduct that would be improper in a non-bankruptcy context. Indeed, as a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight." In re Pilgrim's Pride Corp., 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009). Moreover, "[i]n the exercise of its business judgment, a debtor in possession may be expected to make its decisions rationally[.]" Id. at 427. Thus, "[t]he court must ensure the decision-making process used by the debtor in possession in exercising its powers under the Code is a sensible one." Id." Case 17-04780 LTS, Docket No. 1995 filed on 05/18/20, at page 7.

It adds concerning the approved discovery at pages 13-14:

> "In sum, regardless of the standard applied, UTIER is entitled to the following types of documents (and related discovery): Documents reflecting the procedures followed by PREPA in negotiating and deciding whether to assume the Contracts. Documents reflecting the factors considered by PREPA in deciding whether to assume the Contracts.
> Documents reflecting PREPA's analysis of the factors it considered in deciding whether to assume the Contracts. Such documents should be sufficient to enable UTIER to challenge, if it so desires, the process PREPA elected to follow,5 as well as its contention that PREPA failed to consider policies it was obligated to consider6 and/or more favorable alternatives. On the other hand, the foregoing topics appropriately cabin the production of information to a range appropriate for review of PREPA's actions and the equities PREPA and PREB are tasked to consider. Since the parties have not engaged in an item by item review of the Discovery Requests, this Court declines to do so at this time as well."

As the PREB knows, PREPA's Board dedicated 9 minutes on the September 26, 2019 meeting and two minutes in the October 30, 2019 meeting to discuss the issue of the contracts without any supporting legal, economic or impact on rates, studies.

The meeting of the PREPA Board, where the new contracts were "approved" was held on September 26, 2019. These new complicated contracts which change dramatically the risks allocation, obligations and payments by PREPA, term of the contracts, and prices, were "discussed" for nine minutes, without any substantive analysis of any kind. (See PREPA's website AEEpr.com. Board of Directors web site, September 26, 2019, last 10 minutes of the recording).

At the public meeting held at Mayaguez on October 30, 2019 (minute 1:20 of the third section) Mr. Fernando Padilla made a two minutes presentation Mr. Lopez from PREPA informed the Board and the public that the Resolution had been approved the day before and that the record of the deliberation was on the Board record. Yet, this deliberative Record has not been included in the request for approval to FOMB or PREB, nor is on the record of this actual approval on September 26, 2019.

It is of particular importance that the Sargent and Lundy report was not ready nor submitted on September 26, 2019 when the PREPA Board of Director approved the Contract. Because of this, it can not be considered as supporting the Board, decision, nor its "business judgment".

PREB is not bound by applying a "business judgment" rule to its own decision PREB must balance the equities and hold specifically that the contract complies with the public policy and Laws 57 and 17.

b) What is PREB to do when it is confronted with the admission by PREPA that it could not negotiate a better contract due to Ecoelectrica/Naturgy alleged monopoly, used in a manner that further increases its monopoly power, absent any legal analysis of the legality of the alleged monopoly?

PREPA stated that the "sole provider" exception to soliciting proposals for capacity to replace Ecoelectrica limited PREPA, when that contract expires in 2022, because Ecoelectrica supposedly has a "natural monopoly" as the sole owner of the LNG terminal. The LNG Terminal leases a dock from the Puerto Rico Ports Authority, dated April 1, 1996.

The idea that PREPA has to pay a 2 billion dollar premium for an extension because, as PREPA's motion and Mr. Fernando Padilla sworn statement "explain" Ecoelectrica has a monopoly is intolerable. Such "monopoly" grows out of a government contract for a dock, and the dock is public property.

PREPA has not submitted the Port's Authority contract to its own Board. It was not submitted to PREB.

There is no evidence or legal claim that Ecoelectrica/Naturgy has a valid monopoly for the terminal. Even if it did, there is an issue of, not just having the monopoly, but whether it is been used by Ecoelectrica/Naturgy to further entrench the monopoly. This is "monopolizing" which is a violation of both the Sherman Antitrust Act and of Puerto Rico's Antitrust, Act 77 of June 25, 1964, 10 LPRA, Sec. 260, separate from the existence of the monopoly itself.

There is also an issue of whether Ecoelectrica/Naturgy is covered by the open access- pre Hackberry FERC decision. It is a contract of 1995 and not post Hackberry see 2002 FERC 2567 Hackberry LNG Terminal, and as such has to provide access to other importers of LNG.

The FERC in 2002 decided the Hackberry LNG terminal case 2002 FERC Lexis 2567. The case eliminated the "open access" rule which required from LNG terminals

owners to operate the terminals permitting access of gas from any client. This decision was based on increasing prospectively LNG terminals new investment in the US. It certainly does not apply to a pre Hackberry terminals like Ecoelectrica. Concerning the application to new terminals see: Talus, Access to gas markets: a comparative study on access to LGN terminals in the European Union and the US 2009 Houston Journal of Intl. Laws pages 371 et seq.; see also 164 FERC 61, 107 Domino Cove Port LNG, LP, pages 2 et seq. (2018)).

This interpretation reinforces the issue that the so called monopoly of Ecoelectrica needed at least careful legal analysis, which it is totally lacking. There is a strong legal basis to deny Ecoelectrica the power it exercises by claiming its monopoly, or at a minimum required further evaluation. Evaluation which is non existent, and certainly not on the record.

PREPA has admitted that it operated in this negotiations under the premise that Ecoelectrica/Naturgy monopoly results in a "sole provider" exemption to the RFP mandate, but did not even investigated whether there is in fact such a monopoly, whether it is legal or whether it was been utilized to further monopolize.

There is not, in PREB record, any analysis or legal opinion on the monopoly issue or the sole provider exemption to the RFP process.

Eng. José Ortiz informed the PREB that attorneys from Diaz and Vazquez have "confirmed that **if** Naturgy holds the exclusive rights to the regasification facility, **then** the negotiation of the ECO PPOA and the Naturgy GSPA **could** fit within an exception to the competitive bidding process under the "one supply source" exception found in PREPA's Organic Act." (Emphasis supplied). That is the extent of a legal opinion from Diaz and

Vazquez that results in an overpayment of billions of dollars. There is no Diaz and Vázquez substantive opinion on any legal issue on record.

More important is that even if PREPA law provides for a "sole sources" exemption to the RFP the Regulation 8815, allegedly use to analyze the contract, requires RFP process with no exception.

According to PREPA the Naturgy GSPA falls within the "sole source" exception of PREPA's enabling act, Act No. 83 of May 2, 1942 Section 15(2)(d) because "such circumstances ('there is only one supply source") exist in the case of Naturgy.

Before the CEPR and PREB were created, PREPA as a "government owned self-regulated monopoly" had the power to determine when the sole source exception to a competitive bidding applied. PREPA can no longer self-regulate, it is PREB's decision now."

On the order hand, FERC rejected imposing a non-discriminatory, open access service provision on EcoElectrica because such a provision is for service rendered by natural gas pipeline companies over facilities used to transport gas in interstate commerce. They reason the "facilities will be used to engage in commerce between Puerto Rico and foreign nations. The FERC's jurisdiction under section 7 does not attach to such foreign commerce; our jurisdiction [FERC's] over foreign commerce is limited to the delegated authority under section 3," (Commission Opinions, Orders and Notices, Issued May 15, 1996, 761 5-30-96 61,515).

The new contracts put an adder that would be used in the contracted LNG price if the LNG is from a domestic source, interstate trade. As such the no discriminating open access would be applicable. This issue was not discussed by PREPA nor by PREB.

On July 6, 2005 the Federal Energy Regulatory Commission issued an ORDER GRANTING AUTHORIZATION to the Golden Pass LNG Terminal LP.[1]

As with the EcoElectrica the Golden Pass LNG terminal facilities would be used to import gas from foreign countries. In Golden Pass, FERC using its Hackberry doctrine "found it appropriate to exercise a less intrusive degree of regulation for new LNG import terminals, and does not require the applicant to offer open-access service or to maintain a tariff or rate schedules for its terminalling service. However, the **Commission reserves the authority** under section 3 to take any necessary and appropriate action **if it receives complaints of undue discrimination or anticompetitive behavior."** The door is open to question Ecoelectrica/Naturgy claimed monopoly not just to surrender to them.

There is no legal controversy that the contracts have to comply with antitrust laws, including state antitrust laws. See ONEOK vs. Lear Jet 575 US ___ (2015)). The minimum PREPA's Board, PREB and FOMB could do, and obviously didn't do, was to ask whether the antitrust aspects were substantively considered due to PREPA's management own admission that it was short handed in the negotiation due to the "monopoly power of Ecoelectrica/Naturgy".

c) It is amazing that the PREB decided to permit the intervention of Ecoelectrica/Naturgy as if they could bring real analysis of what is by any standard a sweet deal, the Ecoelectrica/Naturgy/PREPA agreement.

Who would represent in PREB's proceedings a contrary view, a different perspective a different economic analysis, a consumer, not PREPA centered, perspective.

This was after all what laws 57 and 17 tried to accomplish. But instead we get, with PREB imprimatur, more of the same. No debate, no independent analysis and more sweet heart deals, closed rooms deals. It is the competitors or potential competitors who can bring the contrary perspective to an issue, just what PREB needs. See, San Antonio Maritime v. Puerto Rico Cement, 2001 TSPR 16.

d) What is the legal standard that should have been applied by PREB when evaluating this contracts?

The statutory standard that should have been approved by PREB is lowest reasonable cost, not "lower cost than the status quo" and lack of competition project.

1. PREB used in **Wrong standard:** PREPA moved PREB to error by substituting the wrong standard for the right standard. Much learning from the field of behavior economics demonstrates that using status quo as the decisional reference point is classic mental error. And ignoring opportunity cost (the difference between the price PREPA got and the price it could have been) is classic economic error.

e) What is PREB to do when there is no economic analysis other that the self-serving Padilla sworn statement?

What degree of questioning should PREB use when the contracts are submitted without consumer impact analysis, monopoly issue analysis, economic analysis and the Padilla statement is not fact analysis, but only conclusory statements.

It is a reiterated rule in our legal system that the findings of fact of a governmental entity have to be supported by "substantial evidence that is in the administrative file." See Torres Acosta v. Junta, 160 DPR. 696 (2004)

In the case of Torres Acosta, supra, the Examining Board of Engineers, Architects and Surveyors concluded that Mr. Torres engaged in fraud at the time of taking

the engineering professional exam. The Court of Appeals found that the administrative file did not have any evidence whatsoever that would support the conclusion that there had been fraud.

The Supreme Court concluded that **it is up to the courts to verify** whether the administrative decision on appeal "is supported by the evidence that is in the file."

More recently, our Supreme Court indicated in Rodriguez v. Administración, 197 DPR 852 (2017) as follows:

> "We have decided that the deference to administrative decisions will only collapse in appropriate and merited instances, such as: (1) **the administrative decision is not based on substantial evidence**; (2) the administrative body has erred in applying or interpreting laws or regulations that it has been entrusted to administer; (3) the administrative entity has acted arbitrarily, unreasonably or illegally, making findings **that lack a rational basis**, or (4) when the administrative action causes prejudice to constitutional rights.
>
> (Boldface type added)

Our Supreme Court has defined the concept of "substantial evidence" in the sphere of administrative law as **"**any relevant evidence that a reasonable mind could accept as **adequate** to reach a conclusion." See Asociación v. U. Med, 150 DPR 70 (2000); Ramírez v. Depto de Salud, 147 DPR 901 (1999)

The key word is "adequate."

The Supreme Court has stated:

Empresas Loyola v. Comisión de Ciudadanos, 186 DPR 1033 (2012):

> "We must remember that the firmly established rule that decisions by administrative forums are imbued with a presumption of legality and correctness. [**8] The conclusions of these agencies warrant great deference by the courts, and for that reason we must be careful in intervening in administrative decision. This principle of deference answers to the reality that administrative entities possess the experience and the highly specialized knowledge that applies within the sphere of their faculties

and responsibilities. Unlimited v. Mun. de Guaynabo, 2011 TSPR 193, 183 D.P.R.947, 2011 Juris P.R. 198 (2011); Mun. de San Juan v. CRIM, 2010 TSPR 14, 178 D.P.R. 163, 175-176, 2010 Juris P.R. 23 (2010); Borschow Hosp. v. Jta. De Planificación, 177 D.P.R. 545, 566 (2009); Hatillo Cash & Carry v. A.R.Pe., 2008 TSPR 97, 173 D.P.R. 934, 954, 2008 Juris P.R. 117 (2008); Rivera Concepción v. A.R.Pe., 152 D.P.R. 116, 122-124 (2000); Misión Ind. P.R. v. J.P. y A.A.A., 142 D.P.R. 656, 672-673, 1997 Juris P.R. 34 (1998).

As a result of these precepts, we have warned that the criteria of reasonability are what governs in reviewing decisions **[*1042]** and interpretations of an administrative agency. Rebollo v. Yiyi Motors, 2004 TSPR 2, 161 D.P.R. 69, 77-78, 2004 Juris P.R. 4 (2004). The function of this Court upon reviewing decisions by the administrative bodies should be limited to determining whether the agency acted arbitrarily or illegally, or in a manner so unreasonable as to constitute an abuse of discretion. **As far as the findings of fact, we must abstain from intervening in them, if they are supported by substantial evidence that is evident in the file.** Pereira Suárez v. Jta. Dir. Cond., 182 D.P.R. 485, 511-513 (2011); Fuertes y otros v. A.R.Pe., 134 D.P.R. 947, 953 (1993); Murphy Bernabe v. Tribunal Superior, 103 D.P.R. 692, 699-700 (1975).

(Boldface type and underlining added)

In Pacheco v. Estancias de Yauco, 160 DPR 409 (2003) the Court stated:

"In regard to findings of fact by an administrative **[**34]** agency, this Court has decided that "we are forced to sustain such decisions if they are supported by sufficient evidence that is evident in the administrative file considered as a whole" **59 [**35]** We have defined substantial evidence as "any relevant evidence that a reasonable mind could accept as adequate to reach a conclusion." **60** The court must consider the evidence as a whole, both that which supports the administrative decision, as well as that which undermines the weight that the agency has granted it. 61 As we explained in Reyes Salcedo v. Policía de P.R. "the rule of substantial evidence... is intended to prevent substituting the administrative body's criteria in a specialized matter with the reviewing court's criteria."

Furthermore, our Supreme Court has decided that the administrative record will constitute the "exclusive basis" for subsequent judicial review. See Gutierrez v. Hernandez, 172 DPR 232 (2007)

"The decision made by the Court of Appeals was based on dates of procedural events that are different from the ones reflected in the file of this appeal. This violates the rule that in the exercise of the reviewing function of the courts "the administrative file will constitute the exclusive basis ... for subsequent judicial review." "Mun. of San Juan v. J.C.A., supra, 280: see also Section 3.18 of the L.P.A.U., supra; Magriz v. Empresas Nativas, supra. In fact, it is well known that the intermediate appeals court, as a court of law, does not have the power to make decisions without a basis on the file of a given case that it is considering. [*251] Depto. Rec. v. Asoc. Rec. Round Hill, supra, 99. The court of appeals had to bear in mind that "if there is conflicting evidence [**29] [it should have] considered the agency's finding of fact conclusive and that "it should respect the finding of credibility made" by it. Padin Medina v. Administración de los Sistema de Retiro, supra. In light of the foregoing, we believe that the Court of Appeals erred by concluding that the notice of suspending the hearing and its subsequent revocation was made the day before it was being held, a situation that contrasts with the decisions on that detail made by D.A.C.O. and, moreover, the entirety of the case file."

Professor Demetrio Fernández in *Derecho Administrativo y Ley de Procedimiento Administrativo Uniforme [Administrative Law and the Uniform Administrative Procedure Act]*, 2ND EDITION, FORUM [Publishing House] at page 187 state:

What is important is to make "an informed decision with a knowledge and understanding of the evidence produced, without the medium or mechanism by which that knowledge of the matter under discussion came in your possession being important to the case.[134] It is very rigorously pointed out that what is critical in all of this process is the personal knowledge of the evidence and not the mechanism used to acquire an understanding of the evidence.

134 *Ibid*, pg. 883.

At page 366:

Obeying due process of law means that findings of fact are made and conclusions of law are stated. The case law is saturated with instances in which the administrative agencies have been required to formulate findings of fact and conclusions of law.[169] As has been indicated, the current Uniform Administrative Procedure Act demands this requirement.[170]

Finally, the decision must be based exclusively on the evidence presented. As a corollary to this precept, it is required that the agency prepare a record of the proceedings. When it is pointed out that the decision is based on the evidence presented, what is implied is that it is to be on the record. The requirements stated are essentially those that are considered basic to comply with the requirements of due process of law.

169 *Vega Cruz v. Comision Industrial*, 110 D.P.R. 349, 352, 353 (1980); *P.N.P. v. Tribunal Electoral*, 104 D.P.R. 3-4 (1977); *Lopez v. Junta de Planificacion*, 80 D.P.R. 646, 667 (1958); *Goudreau & Co. v. Comision de Servicios Publicos*, 71 D.P.R. 649, 655-56 (1950).

170 *See* 3 L.P.R.A. § 2170.

Fernández state at page 537:

A. **Findings of Fact and Their Review**

The Uniform Procedure Act requires that the agency make findings of fact separately in all final proceedings of adjudication, unless the parties have waived them.[53] Despite the fact that the law does not specifically point out what should be considered by the agency to make the findings of fact, it is obvious that they can rest exclusively on evidence and material that are officially admitted at the hearing being held. The obligation that the exclusive basis for the adjudicative action that is made is the agency's file sheds light on this point.

The following, among others, shall be included in the record: (...)

d) Evidence received or considered.

e) A list of all the material from which official knowledge was taken.

f) An offer of proof, objections and findings thereon.

g) Proposals of findings of fact and conclusions of law, orders requested and exceptions.

53 3 L.P.R.A. § 2164.

At page 538:

It can be gathered from the foregoing that the final decision by the agency has to rest on the file, which, for all legal purposes, is the record. The findings of fact have to find the reason for their existence in the evidence, in the materials that official knowledge was taken of and in everything that has taken place at the hearing held that is part of the case record.[55] The judicial review of the administrative decision is reduced and limited to the record or file of the adjudicative proceeding.[56]

55 Examine *Mundo v. Tribunal Superior*, 101 D.P.R. 302 (1973).

56 3 L.P.R.A. § 2168, in its final part, provides that the agency's file constituted the exclusive basis for subsequent judicial review. In that regard, see *Henriquez v. C.E.S.*, 120 D.P.R. 194 (1987).

In Summary at page 542:

What has been decided by the Supreme Court is composed of several things: (1) the incorporation of the rule of substantial evidence, despite the fact that the organic statute does not mention it; (2) The criteria of the rational basis in order to make a finding of fact legitimate; (3) That, if there is conflicting evidence, the Court must consider that what was decided

by the administrative agency is conclusive; and (4) That the finding of credibility made by the administrative agency must be respected. The case law cited contains the principles listed, and articulates the classic and conventional rule of substantial evidence. The definition of substantial evidence is composed of an element that permeates all civil liability law. It is the mythical figure of the prudent and reasonable man or, if you will, the good *paterfamilias*.[64] The figure arises by invoking a reasonable mind as a criterion for accepting a finding as proper[65] *Hilton Hotels* also considered as part of the doctrine of substantial evidence what was subsequently stated by the U.S. Supreme Court to clarify the scope thereof.[66] The two ingredients that were incorporated in the doctrine were: "(1) Considering other evidence in the record that reasonably reduces or diminishes the weight of such evidence,[67] up to the point that a court cannot, in good conscience, conclude that the evidence is substantial, in view of the total nature of the evidence produced, including any that may be counter to the point of view of the Board and up to the point at which it is clearly shown that the Board's decision is not justified by a fair evaluation of the weight of the evidence":[68] and (2) That of examining the totality of the evidence presented to the agency, or its equivalent, based on the finding of the totality of the record. The substantial rule of evidence is one that surpasses the rule of the amount of the evidence. The evidence must be considered in its totality, including any that reduces or diminishes the weight that the agency has given it, as well as also that which supports it.

64 See *Ayala Cordoba v. San Juan Racing Association*, 112 D.P.R. 804 (1982). It is concluded that the concepts used in both legal systems, Common Law and Civil Law, to signify this mythical figure coincide perfectly in their content. See also *Hernandez v. Gobierno de la Capital*, 81 D.P.R. 1031 (1960).

65 See *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). "Substantial Evidence is more than a *scintilla*. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

66 *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

67 The phrase used by the U.S. Supreme Court in *Universal Camera Corporation* was "whatever in the record detracts from its weight." *Ibid.*

68 *Hilton Hotel*, note 62, supra, pg. 686.

The specific requirements of Regulations 8815, the one used by PREPA and PREB for the contract approval require:

a) The creation of project committee for the preparation of the RFQ's and RFP's including detailed procedures of such committee. Article 3.

b) Processes to Issue the RFQ's and RFP's-Article 4, with detailed requirements or qualifications, contract etc.

c) Detailed evaluation process. Article 5.

d) Processes for selecting proponent Art. 6 and award Art. 7.

There is no evidence on record of any of these processes, proceedings and analysis having been complied with.

The information, which is required, is not part of the record and as such cannot be considered.

f) The main issue raised by this case, in the end, is: What is the role of the PREB, what is the responsibility it has under Laws 57 of 2014 and 17 of 2019 to independently regulate, to non-politically implement the very clear, transparency and renewable energy policy established with bipartitian support under Laws 57 and 17?

In other words, the issue is whether the PREB will be the main promoter of the new policies and whether it will forcefully implement the main determination of dismantling the pernicious integrated monopoly that PREPA has been and that so much damage has caused to Puerto Rico, as PREB and the PREC have concluded in prior proceedings.

The new laws can be a harbinger of progress or another case of dead letter law. If after law 57 and law 17 PREPA continues working in closed rooms, making deals without any public debate- as has been the case with the Ecoelectrica/Naturgy contracts- then the legislation has failed and PREB has failed. The cost is paid by the people of Puerto Rico, the consumers of electric energy.

The particular contracts are not the result of a new policy, a new attitude, a new paradigm. It is not the result of independent, nonpolitical, competent professional regulation, which the PREB is expect to be. The approval would be a more of the same, PREPA centered mentality which is exactly what law 57 and 17 intended to eliminate.

Where is the transparency that both laws announce as the new legal norm?

Back room deals by PREPA's monopoly was the norm to be eliminated, but that is exactly what the Ecoelectrica/Naturgy contract are.

No public discussion or analysis on contracts that should really be part of the IRP process, which is supposed to be open.

Who if not the PREB, has to serve as the public-policy defender, due to its own legal responsibilities, but especially when confronted with the reality of the abandonment of the responsibilities by PREPA's Board?

Law 17 of 2019 states:

> "STATEMENT OF MOTIVES
> The electric power system should be reliable and accessible, promote industrial, commercial, and community development, improve the quality of life at just and reasonable cost, and promote the economic development of the Island. Electric power services in Puerto Rico are inefficient, unreliable, and provided at an unreasonable cost to residential, commercial, and industrial customers despite the existence of a vertically integrated monopolistic structure. This is mainly due to a lack of infrastructure maintenance, the inadequate distribution of generation vis-à vis demand, the absence of the necessary modernization of the electrical system to adjust it to new technologies, energy theft, and the reduction of the Electric Power Authority's personnel. Likewise, the electrical system of the Island is highly polluting as a result of poor energy diversification, the hindering of the integration of distributed generation and renewable energy sources, and high fossil fuel dependency. Consequently, the power plants of the Electric Power Authority have become the main polluters of our environment given their high greenhouse gas emissions.
> . . .
> The Electric Power Authority (PREPA or the Authority) holds hostage approximately 1.5 million customers which represent close to $3.45 billion in total revenue. The electric power generation system is approximately thirty (30) years older than the electric power industry average in the United States. Our

electric power system includes two thousand seven hundred and forty-eight (2,748) miles of transmission lines, thirty-one thousand four hundred and eighty-five (31,485) miles of distribution lines, and three hundred and thirty-four (334) substations. The transmission lines include 230 kV, 115 kV, and 38 kV circuits that transmit energy from the power plants to the distribution substations to be delivered to consumers through lower voltage distribution lines. The Authority generates two-thirds of the Island's power and purchases the rest. Energy demand has decreased from a peak of three thousand six hundred and eighty-five megawatts (3,685 MW) in Fiscal Year 2006 to three thousand one hundred and fifty-nine megawatts (3,159 MW) in Fiscal Year 2014, and three thousand sixty megawatts (3,060 MW) by August 2017, which shows a clear tendency towards lower energy demand. Despite the foregoing, the Authority has a generation capacity of five thousand eight hundred and thirty-nine megawatts (5,839 MW) which includes the nine hundred and sixty-one megawatts (961 MW) provided by the EcoEléctrica Power Plant and AES through twenty (20)- year power purchase agreements. In addition, the main generating units are located in the south area of the Island while the highest energy demand is in the north. See, Build Back Better: Reimagining and Strengthening the Power Grid of Puerto Rico, December 2017. Even though the Authority controls the Island's energy supply, its financial statements as of June 30, 2014, show debts totaling over $11.7 billion. The Authority's bankruptcy conditions have been known for years and have transformed this public corporation into an unsustainable burden for the people of Puerto Rico. Its fragile fiscal situation forced the Authority to undergo a bankruptcy process under Title III of the 2016 Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

. . .

Section 1.4.- Guiding Principles of the Puerto Rico Electrical System.

The activities or functions related to the electric power service shall be governed by the principles of efficiency, quality, continuity, adaptability, impartiality, solidarity, and equality.

i) The efficiency principle compels the correct allocation and use of resources to guarantee that services are rendered at the lowest possible cost and that resources which compose the Electrical System are developed according to the best industry practices;

ii) By virtue of the quality principle, electric power services rendered must meet the technical requirements and the reliability and quality standards established therefor;

iii) The continuity principle implies that services shall be rendered without interruptions, other than those programmed due to technical reasons, force majeure, or fortuitous events, or as a penalty when a customer fails to fulfill his obligations, and even in the event of bankruptcy, liquidation, audit, or substitution or termination of contracts entered into with the companies responsible for rendering such services;
iv) The adaptability principle leads to the incorporation of scientific and technological advances that improve the quality and efficiency of services rendered at the lowest possible cost;
v) The impartiality principle requires that, under the same conditions, consumers are treated equally regardless of their social condition and purchasing power, or the technical conditions or characteristics of the service rendered;
vi) The solidarity principle establishes that the design of the rate structure shall take into account the goal of providing affordable electricity prices to all consumers, particularly to low-income consumers.
vii) The equity principle promotes the attainment of a balanced and appropriate energy service coverage in the various regions and sectors of the Island in order ensure that the basic needs of the entire population are met."

Does the approval of these contracts represent a faithful implementation of these mandates?

What we have is more of the same. It is approving contracts worth over a billion dollars with no public debate. It is approving the contracts with no evidence of economic financial, consumer impact, legality of the alleged monopoly power of Ecoelectrica/Naturgy.

g) PREB's action is based on Regulation 8815. The premise of Regulation 8815 is the use by PREPA of RFP's or other competitive open contract processes. But the Ecoelectrica/Naturgy contract, which is of course, a new contract not a mere modification, under applicable novation law in Puerto Rico Civil Code 31 LPRA3421, was not open, competitive process.

If PREB considered them to be new contracts subject to Regulation 8815, as Eng. José Ortiz stated in its official submittal of the new contracts, then they cannot be considered mere amendments to an existing contract. You cannot have it both ways, a new contract at PREB and the assumption of an existing contract at Court as PREPA is claiming.

As such the Regulation 8815 presupposes a competitive open process, which is totally lacking in the current contractual process.

PREPA's motion dated December 12, 2019 to PREB which is on the record includes the November 4, 2019 CONFIDENTIAL letter from PREPA's executive directors, Mr. Jose Ortiz, requesting approval of the Amended and Restated Power Purchase and Operating Agreement with EcoElectrica and natural Gas Sale and Purchase Agreement with Naturgy: and PREPA's Board Resolution dated October 30, 2019.

In his letter Ortiz describes the execution of the existing contracts as a "restructure" which "converts the ECO PPOA into a tolling arrangement" [2]and enables the Eco facility "to transition from base load production" into a facility that will provide "cycling and ancillary services...to stabilize and balance the grid".

Ortiz goes on to describe the new relationship as "Naturgy will become **a new supplier of natural gas to PREPA** with respect to the Eco facility, and given this the Naturgy GSPA can be considered a **new contractual obligation** for PREPA." (emphasis added).

On page 22 of the Omnibus Reply by PREPA on the case before Judge Swain, paragraph 32 PREPA state:

"32. Objectors attempt to contest the parties' express intentions by pointing to one PREPA official's characterization of the agreements as evidence of the intent and will of the parties to create new contracts rather than amend existing contracts. See Windmar Response at 5–6. But unilateral, post-facto statements cannot override the parties' clear expression of their mutual intent to amend the agreements, nor can it alter the nature of the amendments. Puerto Rico law provides that if "the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed." 31 L.P.R.A. § 3471; see also Exec. Leasing Corp. v. Banco Popular de Puerto Rico, 48 F.3d 66, 69 (1st Cir.1995) ("[y]et to consider the extrinsic evidence at all, the court must first find the relevant terms of the agreement unclear."). In this case, there is no question as to the interpretation of the provisions of the contracts maintaining the original contracts unchanged except for the amendments. There is no need to consider extrinsic evidence, and in fact, it would be improper for the Court to do so....".

The problem with the statement is that the alleged "extrinsic evidence" is not so. It is the official declaration of the Chief Executive of PREPA, Mr. José Ortiz, when he officially and formally submitted the "new contracts" to PREB, as "new contracts". The letter is on PREB's record.

Is PREPA arguing and formally claiming that the official declaration of the highest executive officer of PREPA, when officially submitting an official document to a Government Agency, here the PREB, has no legal value or consequence? Mr. Ortiz statements is, as principal executive officer of PREPA, a PREPA admission that these are new contracts, and as such, there is a need for open competition processes.

h) Where is the evidence of the impact of these contracts on renewable energy development which is the main mandate of Law 17? All we have is self-serving conclusory statements by Mr. Fernando Padilla. Truth is, today we are not closer, nor moving forward with renewable energy. The opposite, we have gas centered, gas favored developments in PREPA. Nothing has changed.

How can PREB be part of all this?

WHEREFORE, it is respectfully requested from PREB to grant in case NEPR-AP-2019-0001, the intervention, which has never been denied, and reconsider the new Ecoeléctrica/Naturgy contract in the full exercise of its legal powers and responsibilities as recognized by the First Circuit Court of Appeals.

CERTIFICATE OF SERVICE I hereby certify that, on this same date, we have filed this motion via the Energy Bureau's online filing system, and sent to Puerto Rico Energy Bureau Clerk and legal counsel to: secretaria@energia.pr.gov; astrid.rodriguez@prepa.com; jorge.ruiz@prepa.com; n-vazquez@aeepr.com; c-aquino@prepa.com; kbolanos@diazvaz.law; adiaz@diazvaz.law; mvazquez@diazvaz.law; ccf@tcm.law; rstgo2@gmail.com; rolando@bufete-emmanuelli.com; jessica@bufete-emmanuelli.com and margarita.mercado@us.dlapiper.com.

RESPECTFULLY SUBMITTED this 26th day of August, 2021, in San Juan, Puerto Rico.

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