

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

NEPR Received: Nov 9, 2021 8:29 PM

IN RE: THE IMPLEMENTATION OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY INTEGRATED RESOURCE
PLAN AND MODIFIED ACTION PLAN

CASE NO.: NEPR-MI-2020-0012

SUBJECT: Motion Submitting
Pricing Information Per Technology
Group Regarding the Tranche 1 RFP
and Request to Lift Imposition of
Sanctions

**MOTION SUBMITTING PRICING INFORMATION PER TECHNOLOGY
GROUP REGARDING THE TRANCHE 1 RFP AND REQUEST
TO LIFT IMPOSITION OF SANCTIONS**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority, through its counsel of record, and respectfully submits and prays as follows:

1. On November 8, 2021, the Energy Bureau of the Puerto Rico Public Service Regulatory Board (the “Energy Bureau”) issued a Resolution and Order in the captioned case (the “November 8 Order”) in which it addressed the Puerto Rico Electric Power Authority (PREPA)’s non-compliance with the Energy Bureau’s orders concerning submission of pricing information per technology group regarding the Tranche 1 RFP.

2. The November 8 Order was entered by the Energy Bureau in part in response to PREPA’s “*Response to, and Motion for Clarification of, October 12, 2021 Resolution and Order Addressing the Target Date for Issuance of the Tranche 2 RFP and Other Matters*” filed on October 15, 2021 (“October 15 Motion” or “Motion for Clarification”).

3. In the October 15 Motion, PREPA informed the Energy Bureau that it understood it had complied with the submittal of the pricing information per technology group regarding the

Tranche 1 RFP when PREPA representative submitted such information to the Commissioners during the September 16, 2021, meeting. The October 15 Motion stated that:

PREPA disagrees with the Energy Bureau's determination that it has failed to submit pricing information per technology group as required by the August 26 Order. In fact, PREPA representatives provided that pricing information to members of the Energy Bureau on September 16, 2021, in a meeting PREPA and the Energy Bureau organized for the purpose of engaging in good faith discussions with the Energy Bureau on best practices and PREPA's concerns about Energy Bureau requirements for the Tranche 1 process. PREPA provided per technology group pricing information in this manner in order to abide by the process contemplated in the RFP, to protect the confidentiality of RFP responses and to maintain the integrity of the RFP process, while keeping the Energy Bureau abreast of the information requested. Thus, PREPA *has* provided the Energy Bureau with the evaluation of pricing per technology group which the Energy Bureau takes it to task for not having provided as part of PREPA's September 20 Motion and the Energy Bureau has had that information in its possession since September 16, 2021. This constitutes substantial compliance with the requirements of the August 26 Order. Accordingly, **PREPA respectfully requests the Energy Bureau to clarify its October 12 Resolution** to retract its determination that PREPA has not fully complied with the August 26 Order.

October 15 Motion at pp. 2-3, ¶ 3 (emphasis added).

4. Further, PREPA had specifically requested from the Energy Bureau to, among others, “(i) conclude that PREPA ha[d] substantially complied with the Energy Bureau's directives concerning submission of pricing information per technology group; [and] (ii) retract its determination that PREPA has not fully complied with the August 26 Order in this regard.” *Id.* at p. 8.

5. Accordingly, at a minimum, PREPA had been forthcoming with the Energy Bureau regarding its understanding that it indeed had complied with the August 26 Order and had requested a clarification by the Energy Bureau on this precise point.

6. Unfortunately, more than three weeks after requesting clarification regarding compliance with the submittal of the pricing per technology group information, the Energy Bureau's reaction is to impose a \$5,000 fine on PREPA stating that

[t]he general and preliminary information informally provided by PREPA to the Energy Bureau, was neither complete nor final. The processes before the Energy Bureau, regardless of their nature (*e.g.*, adjudicative, or not adjudicative) are based on the information in the record. To be part of the record, information (*e.g.*, documents, motions, photos, video, etc.) must be filed with the Energy Bureau's Clerk via the mechanisms provided in the applicable regulations and resolutions. PREPA has not filed the information required under the August 26 Resolution.

November 8 Order at p. 5.

7. Although PREPA can understand and agree with the Energy Bureau's request for the information to be formally filed in the docket for it to be part of the record, at the time of the filing of the October 15 Motion, PREPA had a good faith understanding that it had indeed complied with submitting the pricing information to the Commissioners and had countered as such with the filing of the motion for clarification.

8. PREPA respectfully submits that the imposition of a \$5,000 fine in the context discussed above, when PREPA had submitted the information to the Commissioners and had, in good faith, filed a motion for clarification on this precise point is an abuse of discretion on the part of the Energy Bureau. The fine is onerous and against the public interest.

9. The Puerto Rico Supreme Court has reiterated that determinations of administrative bodies deserve great respect and deference. *O.E.G. v. Rodriguez. et al.*, 159 D.P.R. 98, 119 (2003), citing *Murphy Bernabe v. Tribunal Superior*, 103 D.P.R. 692, 699 (1975). However, such deference does not apply when the agency acts arbitrarily, illegally, unreasonably or when the determination is not supported by substantial evidence existing in the entire record. *Id.* The

courts shall evaluate if such an act is so unreasonable as to render the decision of the administrative body an abuse of discretion. *Reyes v. Junta de Planificación*, 79 D.P.R. 620, 629 (1956). The specialized knowledge of an administrative agency or the management of technical aspects do not give *carte blanche* to the agency to act in an unreasonable manner. *De León v. Junta de Planificación*, 2021 WL 3206309, at *3 (P.R. Cir. June 29, 2021).

10. Thus, courts must give considerable deference to the administrative body as long as the administrative penalty is supported by substantial evidence, the act is not *ultra vires* and the imposition of the fine has a rational relation to the acts that are sought to be prohibited. *Comisionado v. Prime Life*, 162 DPR 334, 341 (2004); *OEG v. Román*, 159 DPR 401, 417 (2003); *Assoc. Ins. Agencies, Inc. v. Com. Seg. P.R.*, *supra*, pág. 439. *Id.*

11. Further, the Puerto Rico Supreme Court has required that the determination of imposing an administrative fine not be capricious, arbitrary or unreasonable. For example, in *De Leon*, the Puerto Rico Court of Appeals eliminated the fine imposed by the Puerto Rico Planning Board against De Leon, a business owner, for alleged lack of various permits. In the case file, there was evidence the owner had countered the Planning Board's assumptions, but the Planning Board had still imposed the fine and not considered the owner's arguments regarding the substantiated challenge to the fine.

12. In this case, PREPA submits to the Energy Bureau that the record shows PREPA submitted to the Commissioners the information related to the pricing information per technology, albeit in a meeting with the Commissioners and not as a separate filing in the docket. Also, PREPA specifically informed the Energy Bureau that it understood it had complied with the submittal of the pricing information per technology group and requested a clarification in a separate motion. *See* October 15 Motion at p. 2 ("PREPA representatives provided that pricing

information to members of the Energy Bureau on September 16, 2021, in a meeting PREPA and the Energy Bureau organized for the purpose of engaging in good faith discussions with the Energy Bureau on best practices and PREPA's concerns about Energy Bureau requirements for the Tranche 1 process.”).

13. Pursuant to the above, PREPA respectfully requests the Energy Bureau to lift the fine imposed on PREPA for not filing in the docket the information related to the pricing information per technology group. As stated in this motion, PREPA had a good faith understanding, which it made known to the Energy Bureau that it indeed had submitted to the Commissioners the pricing information requested. Imposing a fine when there was a motion to clarify filed which explained PREPA's understanding of the situation is an unwarranted reaction and an abuse of discretion. There is no evidence on the record that may lead the Energy Bureau to conclude that PREPA did not act in good faith and purposely ignored this Honorable Bureau's orders. To the contrary, PREPA has consistently filed timely responses to the orders of the Energy Bureau. The People of Puerto Rico, who ultimately bear the costs of the fine imposed, should not be penalized for what can be categorized as a misunderstanding for which PREPA timely sought clarification.

14. As part of this motion PREPA hereby submits the information which includes the results of Selection of Proposals for Phase III with the pricing evaluation per technology group required by the Energy Bureau.¹ Annex A

15. PREPA respectfully submits that the results of Selection of Proposals for Phase III with the pricing evaluation per technology group as well as the copies of any communications to

¹ By the November 12 deadline, PREPA will submit to PREB copies of any communications to proponents selected to proceed to Phase III.

proponents selected to proceed to Phase III are part of the ongoing deliberative for the Tranche 1 RFP process and, as such, they are confidential and must remain under seal.

16. The documents in possession of PREPA are presumed public. However, access to public information is not absolute and there are various exemptions for access to public information. *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017) (emphasis added). These exceptions are:

(1) **a law so declares**; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is ‘official information’ pursuant to Rule 514 of Evidence, 2009, 32 L.P.R.A. Ap. VI (formerly Rule 31 of Evidence 32 L.P.R.A. for. Ap. IV). *Colon Cabrera v. Caribbean Petroleum*, supra.

Id. at 83.

17. Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, provides that “any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]”² “If the Energy [Bureau], after the appropriate evaluation, believes such information should be protected, it shall grant such protection in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure in which the allegedly confidential document is submitted.” *Id.* at **Sec. 6.15 (a)**. If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.” *Id.* at **Art. 6.15**

² *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056 (“Act 57”) at Art. 6.15.

(c). “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.” *Id.* at **Art. 6.15** (d).

18. In the exercise of its powers the Energy Bureau and PREPA approved Regulation 8815 which has force of law. *Id.* at Art. 6.3 (b); see also Puerto Rico Electric Power Authority Act, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act83”) at Sec. 5 (“The regulations so adopted shall have the force of law once the provisions of Act No. 38-2017, the Government of Puerto Rico Uniform Administrative Procedure Act, are complied with.”). Pursuant to Section 4.2 of Regulation 8815, communications between the Energy Bureau and PREPA shall be maintained confidential while the administrative competitive procurement process is ongoing. Further, a participant in a request for proposals process may request the confidential treatment of all or a portion of the information submitted as part of an RFP.

19. Further, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*.³ Pursuant to Regulation 6285, documents including information related to the evaluation of offers or requests for bids are confidential while the evaluation, adjudication and award processes are still ongoing. *Id.* at Sec. V, ¶ 13.

20. The results of the Selection of Proposals for Phase III with the pricing evaluation per technology group as well as the copies of any communications to proponents selected to proceed to Phase III are part of the ongoing deliberative process for the Tranche 1 RFP that has not been yet awarded.

21. Of no less importance, and as the Energy Bureau is aware, LUMA is also an integral part of the Renewables RFP process given that as Operators for the Transmission and Distribution

³ PREPA, *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”).

System they are responsible for the interconnection studies which will ultimately govern the best interest determination.

22. Finally, PREPA agrees with the Energy Bureau's statement that it is the "entity ultimately responsible for determining whether the pricing of the selected proposals is just and reasonable, and thus, if it complies with the energy policy. November 8 Order at page 3-4. As such, PREPA request the Energy Bureau to determine which price proposals are just and reasonable for PREPA to be able to finalize Phase III and submit the draft Power Purchase and Operating Agreements in compliance with the directives of the November 8 Order.

WHEREFORE, the Puerto Rico Electric Power Authority respectfully requests that the Energy Bureau to 1) find PREPA in compliance with the formal submittal of the pricing information per technology group as requested in the November 8 Order; 2) grant confidential designation to the Selection of Proposals for Phase III with the pricing evaluation per technology group; 3) determine which price proposals are just and reasonable for PREPA to be able to finalize Phase III negotiations and; 4) lift the \$5,000 fine imposed on PREPA as PREPA submits it had a good faith understanding it was in compliance with the August 26 Order by having submitted the

information of pricing per technology group as part of the informal meeting with Commissioners on September 16, 2021.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 9th day of November 2021.

s/ Maralíz Vázquez-Marrero

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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and a courtesy copy of the filing was sent to LUMA through its legal representatives at margarita.mercado@us.dlapiper.com and laura.rozas@us.dlapiper.com.

In San Juan, Puerto Rico, this 9th day of November 2021.

s/ Katuska Bolaños-Lugo
Katuska Bolaños-Lugo

Annex A

[This exhibit has been submitted under seal]