

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

IN RE: REGULATION ON WHEELING

CASE NO.: CEPR-MI-2018-0010

SUBJECT: Establishment of Customer Eligibility for Wheeling.

RESOLUTION AND ORDER

I. Introduction

Through this Order, the Energy Bureau of the Puerto Rico Public Service Regulatory Board (“Energy Bureau”) establishes the initial categories of eligible customers pursuant to the amended final *Regulation on Electric Energy Wheeling* (“Amended Final Wheeling Regulation”) as issued on December 7, 2021. The Energy Bureau issues this initial determination pursuant to Section 7.02 of the Amended Final Wheeling Regulation as well as its regulatory powers established by Act 57-2014,¹ Act 17-2019² and Act 38-2017.³

The Amended Wheeling Final Regulation establishes a clear, flexible framework for wheeling services. The goal is to clearly identify the categories of participants and the relationships between those participants. As discussed in the Resolution adopting the Amended Final Wheeling Regulation, the intent is that the Amended Final Regulation is consistent with the full scope of the Energy Bureau’s statutory authority, but subsequent orders may establish prudential limitations on wheeling. Specific wheeling policies should be able to evolve over time within the overall framework established by this Amended Final Regulation. This initial determination establishes that large commercial and industrial customers (250 kVA and over) shall be eligible to participate in wheeling as wheeling customers. Residential customers and small commercial customers (less than 250 kVA) will not be eligible initially, unless they fit into a relevant exception determined in subsequent orders as discussed below.

II. Customer Eligibility for Participation in Wheeling

The Amended Final Wheeling Regulation provides in Section 7.02 that: “The Energy Bureau may establish by order the eligibility of customers to enter into a Retail Supply Agreement. Such order may limit eligibility by customer class or by other reasonable distinctions between customers or provide for appropriate protections for certain categories of customer to be eligible.”

Under this Section, the Energy Bureau believes that consumer protection for residential customers is an issue of paramount importance. While customer protections may be integrated into provisions of wheeling services agreements and retail supply agreements, in this initial phase the Energy Bureau believes it is more prudent to limit initial eligibility to large commercial and industrial customers (250 kVA and over), who can be reasonably expected to apply additional sophistication to their decision whether to participate in wheeling. In subsequent orders, the Energy Bureau may determine that small commercial (less than 250 kVA) and residential customers who participate in select programs which provide substantial benefits and consumer protections to said customers may participate in wheeling due to participation in those programs, such as microgrids or municipal ventures.

¹ Puerto Rico Energy Transformation and RELIEF Act, as amended.

² Puerto Rico Energy Public Policy Act.

³ Administrative Procedure Act of the Government of Puerto Rico, as amended.

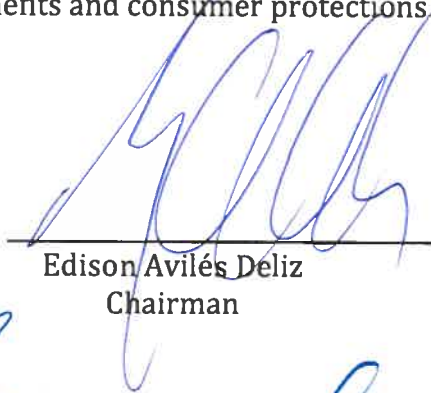


III. Conclusion.

For all of the above, the Energy Bureau **ORDERS** that:

1. Large commercial and industrial customers (both, 250 kVA and over) **shall be eligible** to participate in wheeling.
2. Small commercial (less than 250 kVA) and residential customers **shall not be eligible** to participate in wheeling until subsequently determined by the Energy Bureau, pursuant to a specific program that provides substantial benefits and consumer protections to those customers.

Be it notified and published.



Edison Avilés Deliz
Chairman



Ángel R. Rivera de la Cruz
Associate Commissioner



Lillian Mateo Santos
Associate Commissioner



Ferdinand A. Ramos Soegaard
Associate Commissioner




Sylvia B. Ugarte Araujo
Associate Commissioner



CERTIFICATION

I certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on December 7, 2021. President Edison Avilés Deliz and Associate Commissioner Ángel R. Rivera de la Cruz concurred with a written opinion. I also certify that on January 11, 2022, a copy of this Resolution was notified by electronic mail to: astrid.rodriguez@prepa.com, jorge.ruiz@prepa.com, margarita.mercado@us.dlapiper.com, laura.rozas@us.dlapiper.com, kbolanos@diazvaz.law, jmarrero@diazvaz.law, carlos.reyes@ecoelectrica.com, Legal@lumamc.com, wayne.stensby@lumamc.com, mario.hurtado@lumamc.com, Ashley.engbloom@lumamc.com, legal@lumapr.com, Elias.sostre@aes.com; jesus.bolinaga@aes.com; cfl@mcvpr.com; ivc@mcvpr.com; notices@sonnedix.com; leslie@sonnedix.com; victorluisgonzalez@yahoo.com; tax@sunnova.com; jcmendez@reichardescalera.com; r.martinez@fonroche.fr; gonzalo.rodriguez@gestampren.com; kevin.devlin@patternenergy.com; fortiz@reichardescalera.com; jeff.lewis@terraform.com; mperez@prrenewables.com; coter@landfillpr.com; geoff.biddick@radiangen.com; hjcruz@urielrenewables.com; carlos.reyes@ecoelectrica.com; meghan.semiao@longroadenergy.com; tracy.deguise@everstreamcapital.com; agraitfe@agraitlawpr.com; h.bobea@fonrochepr.com; ramonluisnieves@rlnlegal.com; hrivera@jrsp.pr.gov; info@sesapr.org; yan.oquendo@ddec.pr.gov; acarbo@edf.org; pjcleanenergy@gmail.com; nicolas@dexgrid.io; javrua@gmail.com; JavRua@sesapr.org; lmartinez@nrdc.org; thomas.quasius@aptim.com; rtorbert@rmi.org; lionel.orama@upr.edu; noloseus@gmail.com; aconer.pr@gmail.com; dortiz@elpuente.us; wilma.lopez@ddec.pr.gov; gary.holtzer@weil.com; ingridmvila@gmail.com; rstgo2@gmail.com; agc@agcpr.com; presidente@ciapr.org; cpsmith@unidosporutuado.org; jmenen6666@gmail.com; CESA@cleanegroup.org; acasepr@gmail.com; secretario@ddec.pr.gov; julia.mignuccisanchez@gmail.com; professoraviles@gmail.com; gmch24@gmail.com; ausubopr88@gmail.com; carlos.rodriguez@valairlines.com; amaneser2020@gmail.com; acasellas@amgprlaw.com; presidente@camarapr.net; jmarvel@marvelarchitects.com; amassol@gmail.com; jmartin@arcainc.com; eduardo.rivera@afi.pr.gov; leonardo.torres@afi.pr.gov; carsantini@gmail.com; directoralcaldes@gmail.com; imolina@fedalcaldes.com; LCSchwartz@lbl.gov; thomas@fundacionborincana.org; cathykunkel@gmail.com; joseph.paladino@hq.doe.gov; adam.hasz@ee.doe.gov; Sergio.Gonsales@patternenergy.com; Eric.Britton@hq.doe.gov; energiaverdepr@gmail.com; Arnaldo.serrano@aes.com; gustavo.giraldo@aes.com; accounting@everstreamcapital.com; mgrpcorp@gmail.com; jczayas@landfillpr.com; Jeanna.steele@sunrun.com; mildred@liga.coop; rodrigomasses@gmail.com; presidencia-secretarias@seguros multiples.com; cpsmith@cooperativahidroelectrica.coop; maribel@cooperativahidroelectrica.coop; apoyo@cooperativahidroelectrica.coop; larroyo@earthjustice.org; flcaseupdates@earthjustice.org; gguevara@prsciencetrust.org; hrivera@jrsp.pr.gov; contratistas@jrsp.pr.gov; agraitfe@agraitlawpr.com; rstgo2@gmail.com, pedrosaade5@gmail.com, rolando@bufete-emmanuelli.com; notificaciones@bufete-emmanuelli.com; rhoncat@netscape.net; Marisol.Bonnet@hq.doe.gov; ernesto.rivera-umpierre@hq.doe.gov; elizabeth.arnold@hq.doe.gov; info@icsepr.org; john.jordan@nationalpfg.com; info@marinsacaribbean.com; aconer.pr@gmail.com; pathart@ge.com; contratistas@jrsp.pr.gov; Laura.rozas@us.dlapiper.com; msulejmanagic@ieefa.org; renewableenergy@me.com; rcorrea@prfaa.pr.gov; JGOB@prepa.com; israel.martinezsantiago@fema.dhs.gov; jcintron@cor3.pr.gov; gsalgado@cor3.pr.gov; energia@ddec.pr.gov; Francisco.Berrios@ddec.pr.gov; Laura.Diaz@ddec.pr.gov; isabel.medina@ddec.pr.gov; ialicea@sanjuanciadadpatria.com; alescudero@sanjuanciadadpatria.com; oabayamon@yahoo.com. I also certify that today, January 11, 2022, I have filed the Resolution issued by the Puerto Rico Energy Bureau.

I sign this in San Juan, Puerto Rico, today January 11, 2022.


Sonia Seda Gaztambide
Clerk



**GOVERNMENT OF PUERTO RICO
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IN RE: REGULATION ON WHEELING

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SUBJECT: Establishment of Customer Eligibility for Wheeling.

Chairman Edison Avilés Deliz Concurring Opinion

On December 7, 2021, the Energy Bureau of the Puerto Rico Public Service Regulatory Board (“Energy Bureau”), issued a Resolution and Order (“December 7 Eligibility Resolution”) through which it established customer eligibility to enter into retail supply agreements for wheeling services. The initial categories of eligible customers were defined pursuant to the amended final *Regulation on Energy Wheeling* (“Amended Final Wheeling Regulation”) also issued on December 7, 2021.

Section 7.02 of the Amended Final Wheeling Regulation declares that the “Energy Bureau may establish by order the eligibility of customers to enter into a Retail Supply Agreement. Such order may limit eligibility by customer class or by other reasonable distinctions between customers or provide for appropriate protections for certain categories of customer to be eligible.” The authority and process set forth by Section 7.02, was applied in the December 7 Eligibility Resolution by limiting the definition of customer eligibility for participation in wheeling to “large commercial and industrial customers” and expressly excluding, based on policy considerations for consumer protection, small commercial and residential customers. The December 7 Eligibility Resolution, nevertheless, acknowledges that, once programs are put in place that confer small commercial and residential customers the substantial benefits and consumer protections that the Energy Bureau expects to guarantee, they may be established as eligible customers for participation in wheeling by order of the Energy Bureau.

Act No. 17-2019¹ establishes a comprehensive energy policy which is intended to change the Island’s electric sector. At Section 1.8, Act No. 17-2019 provides for the unbundling and transformation of Puerto Rico’s electric power system and commands the unbundling of the electric system via sales of the Puerto Rico Electric Power Authority (“PREPA”) generation and transfer of control of Transmission and Distribution by concession or Operation and Maintenance agreements. The statutory demands on PREPA to unbundle its rates and separate generation, transmission and distribution charges were intended to introduce and facilitate the implementation of wheeling, inasmuch as an integral part of wheeling is the concept of unbundling prices for electric services.

Act 57-2014² assigned the Energy Bureau certain primary responsibilities, which include the power and duty to “[r]egulate the wheeling mechanism in the Commonwealth of Puerto Rico in accordance with the applicable laws,” as per Section 6.3(g) of Act 57-2014.³ Furthermore, Section 6.4(a)(5) of Act 57-2014 allocated to the Energy Bureau primary and exclusive jurisdiction over “[c]ases and disputes regarding wheeling or electric power interconnection with the transmission and distribution network, and any person that is connected, or wishes to connect to the electric power grid in Puerto Rico or any person with a direct or indirect interest in these electric power services.”

In pursuit of its ministerial duties and the protection of the interests of customers and consumers, the Energy Bureau adopted and enacted regulation 9138 on Electric Energy

¹ The Puerto Rico Energy Public Policy Act.

² The Puerto Rico Energy Transformation and RELIEF Act, as amended.

³ Section 1.7 of Act 17-2019 reaffirms the Energy Bureau’s authority to prescribe the rules that apply to the wheeling of power in Puerto Rico and set the rates applicable to customers for such services.



Wheeling⁴ to implement the energy wheeling mechanism in Puerto Rico, in accordance with applicable legislative mandates and to implement a system that allows, among others, Electric Power Service Companies, Micro grids, Energy Cooperatives, Municipal Ventures, Large Industrial and Commercial consumers, and Community Solar and other demand aggregators, to participate in the energy wheeling mechanism in Puerto Rico. The December 7, 2021 Amended Final Wheeling Regulation furthers the implementation of the energy wheeling mechanism in Puerto Rico by providing for the establishment by the Energy Bureau the eligibility of customers to enter into Retail Supply Agreements. In the exercise of its statutory and regulatory powers and duties, the Energy Bureau established the eligibility of large commercial and industrial customers and precluded, until otherwise ordered, small commercial and residential customers from being eligible to participate in wheeling.

The primary responsibilities and jurisdictions assigned to the Energy Bureau by Act 57-2014 and Act 17-2019, on electric energy wheeling and the legal precedent denies the need to amend the Regulation on Energy Wheeling for any and each instance in which the Energy Bureau determines that additional customer class or classes shall be included in the definition of eligibility to participate in wheeling. The Regulation itself informs the Energy Bureau's actions by affirming that the Energy Bureau "may establish **by order** the eligibility of customers to enter into a Retail Supply Agreement," thus establishing the lines of demarcation of the Energy Bureau's authority and discretion.

Binding precedent also refutes any requirement or obligation that any expansion or modification to customer eligibility for wheeling be carried out through the rulemaking process given that there has been a clear, specific, and express delegation of powers to the Energy Bureau by Puerto Rico's Legislative Assembly.⁵ More recently, in Domínguez Castro v. ELA, 178 DPR 1 (2010), the Puerto Rico Supreme Court reviewed the doctrine of the delegation of powers to administrative agencies and boards within the framework of the constitutional separation of powers amongst the branches of government. The Court clarified the instances in which the delegation of powers from one branch to another is permissible. The powers delegated to the Energy Bureau by the Puerto Rico Legislative Assembly and the express criteria established to regulate wheeling in Puerto Rico is supported by the "adequate norms, guidelines, standards, criteria, or intelligible principles or those procedural and substantive guarantees or safeguards that serve as a guide to the delegation and that delimit its powers, to avoid that the actions of the administrative entities turn out to be arbitrary or capricious."⁶

In Perez v. Mortgage Bankers Association, 135 S.Ct. 1199 (2015), the United States Supreme Court reversed the D.C. Circuit's *Paralyzed Veterans doctrine*, which requires agencies to use the notice-and-comment process before it can significantly revise an interpretive rule, is contrary to the clear text of the Administrative Procedure Act's rulemaking provisions and improperly imposes on agencies an obligation beyond the Act's maximum procedural requirements. Justice Sotomayor, writing the opinion of the Court, held that the *Paralyzed Veterans doctrine* "is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA."⁷ Specifically, Justice Sotomayor highlighted that the D.C. Circuit had improperly focused exclusively on Section 1 of the APA, which defines what a rulemaking is, rather than Section 4(b)(A), which sets forth the procedures an agency must

⁴ Regulation on Electric Energy Wheeling, No. 9138, September 16, 2019.

⁵ See, Luce & Co. v. Minimum Wage Board, 62 DPR 452 (1944) and Hilton Hotels v. Minimum Wage Board, 74 DPR 670 (1953).

⁶ Domínguez Castro v. ELA, 178 DPR 1 (2010).

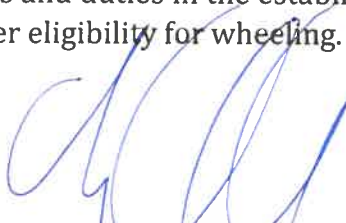
⁷ Perez, 135 S.Ct. at 1206.



use when engaging in rulemaking and which specifies that interpretive rules need not meet the notice-and-comment requirement of legislative rules.⁸

Taking into account and consideration the relevance and applicability of the language used by the United States Supreme Court in *Perez* and how it clearly contradicts the proposition that the Energy Bureau needs to activate the rulemaking process before further expanding customer eligibility for wheeling as well as the Puerto Rico Supreme Court's forceful assertion that "nothing prevents the Legislature from establishing general norms that are broad and that leave the administrator an adequate margin of freedom to complement the legislative norms through the use of a specialized judgment, which can be developed according to an analysis, appreciation and administrative discretion that has a reasonable basis."⁹ In view of the analysis above, the legal clarity and sufficiency of the legislative delegation of powers upon the Energy Bureau on the subject of wheeling, the Energy Bureau acted within its delegated powers and duties in the establishment, in the December 7, 2021 Resolution and Order, of customer eligibility for wheeling.

Therefore, I concur.



Edison Avilés Deliz
Chairman

In San Juan, Puerto Rico, on December 9, 2021.



⁸ *Id.* at 1207.

⁹ *Domínguez Castro v. ELA*, 178 DPR 1 (2010).

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Associate Commissioner Ángel R. Rivera de la Cruz, concurring

Today, the Puerto Rico Energy Bureau (“Energy Bureau”) issued a Resolution and Order through which, it established the initial categories of eligible customers pursuant to the amended final *Regulation on Electric Energy Wheeling* (“Amended Final Wheeling Regulation”) as issued on December 7, 2021. For the reasons expressed herein, I concur.

* * *

On December 7, 2021, the majority of the Energy Bureau issued a Resolution in the instant case (“December 7 Resolution”), through which it approved the Amended Final Wheeling Regulation. On that occasion, I issued a written opinion, concurring in part and dissenting in part with such determination. I disagreed with the definition of “Wheeling Customer” and with the provisions of Section 7.02 of the Amended Final Wheeling Regulation.

In general terms, my position was that wheeling eligibility must be clearly established in the Amended Final Wheeling Regulation, instead through an order as provided in the referenced Section 7.02. I also stated that such eligibility must be limited to large commercial and industrial customers until such time the electric system is ready for an open electric market and safeguards are in place to protect residential and small commercial customers.

I reaffirm this position. However, as stated before, through the December 7 Resolution, the majority of the Energy Bureau approved the Amended Final Wheeling Regulation. Section 7.02 of the Amended Final Wheeling Regulation provides that:

The Energy Bureau may establish by order the eligibility of customers to enter into a Retail Supply Agreement. Such order may limit eligibility by customer class or by other reasonable distinctions between customers or provide for appropriate protections for certain categories of customer to be eligible.

As an Associate Commissioner, it is my duty and obligation to follow the law and approved regulations. Therefore, even though I disagree with the provisions of Section 7.02 of the Amended Final Wheeling Regulation, I am required to abide by it.

Today’s Resolution and Order establishes that only large commercial and industrial customers shall be eligible for wheeling. It also establishes that small commercial and residential customers shall not be eligible to participate in wheeling until subsequently determined by the Energy Bureau, pursuant to a specific program that provides substantial benefits and consumer protections to those customers. I agree with such determinations since they are consistent with my written opinion with respect to the December 7 Resolution.

Therefore, I concur.



Ángel R. Rivera de la Cruz
Associate Commissioner

In San Juan, Puerto Rico, on December 7, 2021.

