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

M SOLAR GENERATING, LLC **PETITIONER** vs. PUERTO RICO ELECTRIC POWER AUTHORITY **RESPONDENT**	**CASE NO.:** NEPR-QR-2020-0035 **SUBJECT:** Final Resolution and Order, Noncompliance with Act 120-2018 and Act 17-2019

FINAL RESOLUTION AND ORDER

I. Introduction and Procedural Background:

On July 22, 2020, Petitioner, M Solar Generating, LLC ("M Solar") filed a complaint against the Puerto Rico Electric Power Authority ("PREPA") before the Energy Bureau of the Puerto Rico Public Service Regulatory Board's ("Energy Bureau"). The complaint was filed under Act 57-2014[1], Section 6.4 and Section 3.01 of Regulation 8543[2].

In its complaint, the Petitioner states that PREPA and M Solar executed a Power Purchase Operating Agreement ("PPOA") on May 9, 2012. Moreover, Petitioner claims that on April 16, 2016, the Energy Bureau declared M Solar's project in compliance with the Integrated Resource Plan ("IRP"). Nonetheless, the Petitioner argues that PREPA has not assumed or rejected M Solar's PPOA. Petitioner believes that PREPA has acted in bad faith in the execution of the PPOA. The Petitioner is requesting from the Energy Bureau to enter an order requiring the specific performance of the PPOA and compel PREPA to file a motion in its Title III action to assume M Solar's PPOA.

On August 18, 2020, PREPA filed a document titled *Notice of Violation of the Automatic Stay as Reaffirmed by the United States District Court for the District of Puerto Rico*[3].

In essence, PREPA's argument is mainly founded on the fact that the issues brought to the attention of the Energy Bureau were previously brought to the attention of U. S. District Court as part of the of a motion titled *Motion for Relief from Automatic Stay and to Compel the Puerto Rico Electric Power [Authority] to Assume or Reject Executory Contract* seeking relief from the automatic stay imposed by the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA)[4]. In the *Memorandum Order Denying M Solar's Motion for Relief from The Automatic Stay and to Compel PREPA to Assume or Reject the Executory Contract* issued by the United States District Court for the District of Puerto Rico on July 6, 2018[5], the Court stated that specific performance of the Commonwealth's alleged undertaking under the Settlement Agreement to cooperate with the permitting process associated with Petitioner's Project, is procedurally improper.

After various procedural incidents, the Energy Bureau held an Evidentiary Hearing on December 10, 2020.

II. Applicable Law and Analysis

The main issue in this case is whether the Energy Bureau has jurisdiction to entertain the

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

[2] *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings, December 18, 2014.*

[3] The document was filed in the Spanish language under the title *Aviso de violación a la paralización automática según reafirmada por el Tribunal de Distrito de los Estados Unidos para el Distrito de Puerto Rico.*

[4] Public Law 114-187.

[5] Case 17-04780-LTS, PROMESA, Title III, 17-BK-3283-LTS, Docket 902.

subject complaint since PREPA is under the protection of Title III of PROMESA.

The Petitioner's position as expressed in *M Solar's Memorandum of Law* is that the Energy Bureau has primary and exclusive jurisdiction to entertain disputes between PREPA and independent power producers under Act 57-2014, Section 6.4 (a) (6) and as so, can evaluate all agreements between electric power service companies under Act 120, section 6.32 (a). The Petitioner also argues that there is a difference between PREPA's rights under PROMESA to assume or reject contracts and what are the *prior legal steps* PREPA must comply with, thus disregarding applicable local laws. In other words, in order to assume or reject a contract under PROMESA's Title III, PREPA must undergo an evaluation process under local law.[6] M Solar further argues that Section 303 of PROMESA does not impair the powers of the territory or territorial instrumentality.[7]

To address the matters raised by the Petitioner the Energy Bureau must first refer to preemption as a fundamental aspect of the federal legal system. Preemption implies the preeminence of certain laws over other laws. In the case of the United States federal system, federal laws will preempt state or territorial laws.[8] The main issue before us is precisely if PREPA is obliged to engage in the administrative process or as the Petitioner states, engage in the *prior legal steps* prior to the rejection of the contract while being under the protection of the U. S. District Court pursuant to PROMESA.

PROMESA incorporates many of the provisions of the Bankruptcy Code; namely general sections such as chapters 1, 3, and 5[9], as well as certain operational Chapters such as chapters 9 and 11[10]. In the case at bar, Section 362 applies the automatic stay to entities under the protection of PROMESA's Title III.

This bankruptcy section provides:

> **(a)** Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
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> > **(1)** the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (*Our emphasis*).

While M Solar's assertion that its complaint before the Energy Bureau was filed post-Title III for facts that occurred after the filing and thus are not subject to the automatic stay is correct. The U. S. District Court on its July 6, 2018, Memorandum Order[11] agreed and stated that no action to enforce a judgment or other measure contemplated in Section 362 was asserted, thus making the request unnecessary.[12] The Petitioner brought the matter regarding the assumption or rejection of the settlement agreement (executory contract) and failed to carry

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[6] *Known as* Puerto Rico Electric Power Authority Act, as amended ("Act 83-1941") and the Puerto Rico Public Policy Act ("Act 17-2019").

[7] PREPA has been designated as a *covered territorial instrumentality* by the Financial Oversight and Management Board on September 30, 2016.

[8] U. S. Constitution, Article VI.

[9] 48 U. S. C. §2161 (a)

[10] *Id.*

[11] Case No. 17-04780 LTS, Docket entry 902.

[12] We note that L. B. R. 4001-1 (a) provides that a motion for the relief from the automatic stay shall not be combined with any other type of relief, unless so authorized by the court.

the burden of proof necessary for the court to shorten the time to assume or reject was procedurally incorrect.[13]

PREPA as a public corporation is engaged in planning, managing, and implementing public policy regarding the generation and distribution of electric power within the confines of the Commonwealth of Puerto Rico[14]. As such, it is engaged in the process of contracting electric power generating entities. The authority to contract suppliers and subcontractors is inherent to the corporate entity[15] which, as part of the reorganization process under Title III has the right to either assume or reject executory contracts. In the present case the FOMB[16], on behalf of PREPA, rejected the Petitioner's proposal, making any assessment on the part of the Energy Bureau moot. PROMESA[17] in its incorporation of the various Bankruptcy Code provisions establishes remedies that the Petitioner may seek within the Title III proceeding for any damages suffered by the rejection of the contract.

In this particular case, PREPA is under the protection of its creditors by PROMESA, Title III. This statute incorporates provisions from the U. S. Bankruptcy Code. As such, section 365 of the U. S. Bankruptcy Code applies. This section provides that the Debtor may assume or reject an executory contract at any time before confirmation, but the Court may order the trustee or the debtor to act within a shorter time period.[18] In this particular case, petitioner failed to carry the burden of proof necessary to shorten the time for the assumption or rejection of the contract. Upon the confirmation of the plan of reorganization, and if no specific assumption is made on the part of the Debtor, the contract is deemed rejected. In this case, PREPA filed an *Omnibus Motion of the Puerto Rico Electric Power Authority for Order (A) Approving PREPA's Rejection of Certain Power Purchase and Operating Agreements and (B) Granting Related Relief* on November 17, 2020.[19] This motion included as the deadline to object November 17, 2020.[20] Therefore, the Petitioner should have opposed the motion within the established deadline and pursue all available remedies within that proceeding.

With the complaint filed before the Energy Bureau it seems that M Solar seeks to re-litigate a matter that should have been brought to the attention of the Court within the PROMESA proceedings before the U. S. District Court for the District of Puerto Rico.

III. Conclusion

For the reasons stated above the complaint filed by M Solar Generating, LLC, the Energy Bureau determines that the complaint is **DISMISSED**, without prejudice, and **ORDERS** the closing and filing of the instant case.

Any party adversely affected by this Final Decision may file a motion for reconsideration before the Puerto Rico Energy Bureau pursuant to Regulation No. 8543, section 11.01 and applicable provisions contained in Law 38-2017, known as the Government of Puerto Rico's Uniform Administrative Proceedings Act. The motion must be filed within twenty (20) days from the filing a notice of this Final Decision. The request for reconsideration should be filed with the Puerto Rico Energy Bureau's Clerk's Office located at World Plaza Building, 268 Muñoz Rivera Avenue, Plaza Level Suite 202, San Juan, PR 00918. The request for reconsideration may also be electronically filed through the Energy Bureau's to the following

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[13] Case No. 17-04780 LTS, Docket entry 902.

[14] Act 83-1941, *as amended*; Act 17-2019, *as amended*; Act 120-2018, *as amended*.

[15] Act 83-1941 as amended, Sec. 3. Act 164-2009, as amended, Art.2.02.

[16] Financial Oversight and Management Board for Puerto Rico.

[17] The Puerto Rico Oversight, Management, and Economic Stability Act.

[18] 11 U.S.C. § 365(d)(2). *See, Theater Holding Co. v. Mauro*, 681 F.2d 102 (2d Cir. 1982); *In re Holly's Inc.*, 140 B.R. 643 (Bankr. W.D. Mich. 1992).

[19] Case 17-03283 LTS, Docket 15,178.

[20] *Id.*

electronic address: https://radicacion.energia.pr.gov. A copy of the request for reconsideration must be served by First Class U. S. Mail to all parties notified in the present Final Decision within the time afforded above.

The Energy Bureau should consider the request for reconsideration within fifteen (15) days from its filing. If the Energy Board expressly denies the request or if no action is taken regarding such request within fifteen (15) days, the term for requesting judicial review will begin from the date the reconsideration request is denied or upon the expiration of the fifteen-day (15) period, as the case may be. If the Energy Bureau grants the request for reconsideration, the term to request review will begin from the date the request for reconsideration is definitely resolved. The Bureau's decision should be issued and notified within ninety (90) days from the filing of the request for reconsideration. If the Energy Bureau entertains the request for reconsideration but fails to take action on the request within ninety (90) days from the filing, it will lose jurisdiction over the matter, unless the Board, for just cause and within the ninety (90) day period, extends for no more than thirty (30) additional days.

The affected party that does not file the reconsideration proceeding referred above, may file for judicial review before the Puerto Rico Appeals Court within thirty (30) days from the filing and notice of this Final Decision pursuant to Regulation 8543, Section 11.03, applicable provisions of the Government of Puerto Rico's Uniform Administrative Proceedings Act and the Puerto Rico Appeals Court's Rules.

Be it notified and published.

Lillian Mateo Santos
Associate Commissioner

Ferdinand A. Ramos Soegaard
Associate Commissioner

Sylvia B. Ugarte Araujo
Associate Commissioner

CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on June, 10, 2022. President Edison Avilés Deliz and Associate Commissioner Ángel R. Rivera de la Cruz did not intervene. And on this date a copy of this Final Resolution regarding case number NEPR-QR-2020-0035 was notified by electronic mail to the following: maortiz@lvprlaw.com and kbolanos@diazvaz.law, and by regular mail to:

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For the record, I sign this in San Juan, Puerto Rico, today June 10, 2022.

Sonia Seda Gaztambide
Clerk

NEGOCIADO DE ENERGÍA NEPR JUNTA REGLAMENTADORA DE SERVICIO PÚBLICO DE PUERTO RICO