

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

NEPR Received: Aug 23, 2022 10:32 PM

IN RE: PRELIMINARY STUDIES FOR
NEW COMBINED CYCLE POWER PLANT
IN PALO SECO

CASE NO.: NEPR-MI-2021-0003

SUBJECT: Motion for Reconsideration and
to Set Aside Order for Want of Jurisdiction

**MOTION FOR RECONSIDERATION AND TO SET ASIDE
ORDER FOR WANT OF JURISDICTION**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

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

I. INTRODUCTION

In August 2020, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (“Energy Bureau”) allowed PREPA to evaluate the possibility of developing a new combined cycle gas turbine or an energy storage project in Palo Seco. After completing these studies, PREPA decided not to pursue either of these projects. However, on August 3, 2022, the Energy Bureau ordered PREPA to petition the Federal Emergency Management Agency (FEMA) for federal funds to be utilized to develop an energy storage facility at Palo Seco, an option PREPA had already discarded. Even though PREPA is committed to transitioning its energy production towards 100% renewable energy by 2050 and is mindful that energy storage is an essential component of this transition, PREPA is pursuing and implementing other projects and plans to achieve this ambitious goal. Further, PREPA respectfully submits that the Energy Bureau has broad powers as the regulator but lacks jurisdiction to order PREPA to develop a project that was not explicitly proposed by it.

Wherefore, PREPA respectfully requests the Energy Bureau to set aside this order because it exceeds the jurisdiction vested by the Legislature of Puerto Rico to the Energy Bureau.

II. RECONSIDERATION

This motion is presented according to Act no. 170 of the 12 of August of 1988, as amended, known as the *Uniform Administrative Procedure Act* and Section 11.01 of the Energy Bureau’s *Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings*,¹ which provides that “[a]ny party dissatisfied with the Commission's final decision may file a motion for reconsideration before the Commission, which shall state in detail the grounds supporting the petition and the remedy that, according to petitioner, the Commission should have granted.”

III. APPLICABLE LAWS AND RELEVANT ORDERS

a. The Puerto Rico Electric Power Authority: its creation, duties, and responsibilities.

The Authority is a corporate and political body constituting an autonomous public corporation and governmental instrumentality of the Government of Puerto Rico created by the *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83-1941”). The Authority is a government instrumentality subject to its governing board’s control, and the Energy Bureau regulates both. Act 83-1941 at Sec. 3(b).

Amongst the duties and responsibilities with which the Authority is vested are:

- (a) To provide and allow electric power to be provided in a reliable, clean, efficient, resilient, and affordable manner thus contributing to the general wellbeing and the sustainable development of the people of Puerto Rico;
- (b) To guarantee that a universal electric power service is provided;
- (c) To conduct business responsibly and efficiently, and applying sound fiscal and operating practices;

...

¹ Energy Bureau, *Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings*, No. 8543 (December 16, 2015).

(d) To rise to energy and environmental challenges by using available scientific and technological advances, and incorporate the best practices in the electric power industries of other jurisdictions;

...

(n) To *develop* and comply with an integrated resource plan in accordance with the parameters and requirements established by the Bureau in accordance with the energy public policy.

...

Id. at Sec. 6 (emphasis added).

The powers of the Authority, which are relevant to this motion, include the ability to “to *prepare*, or cause to be prepared plans, projects, and expense budgets for the construction, reconstruction, extension, improvement, expansion, or repair of any undertaking or any part or parts thereof, and from time to time modify such plans, projects, and budgets.” *Id.* at Sec. 5(g) (emphasis added).

Wherefore, after many reforms of the energy public policy, which are explained more in detail in the following sections, PREPA continues to be vested with the power to prepare and develop plans that enable it to render its services and comply with the duties conferred to it by its enabling law.

b. The Puerto Rico Energy Bureau and its vested powers.

In 2014 the Legislature of Puerto Rico recognized a need to implement a comprehensive reform of the energy sector to promote the operation and administration of an efficient system at just and reasonable costs and the need to have a safe and stable electric power grid. Acting upon such a pressing need, the *Puerto Rico Energy Transformation and RELIEF Act*, Act 57 of 2014,² was enacted. Among other reforms thorough, with the enactment of Act 57-2014, Puerto Rico adopted a regulatory and legal framework to be implemented through the creation of a robust independent entity aiming to ensure the transformation of the electric power system of our Island

² *Puerto Rico Energy Transformation and RELIEF Act*, Act No. 57 of May 27, 2014 (“Act 57-2014”).

for the benefit of present and future generations. Act 57-2014 at Chapter VI. That entity was introduced as the Energy Commission, now known as the Puerto Rico Energy Bureau.³

Among the powers and duties vested in the Energy Bureau is the power to oversee and guarantee the execution and implementation of the public policy on the electric power service in Puerto Rico; and also to formulate and implement strategies to achieve the objectives of Act 57-2014 including, but not limited to, attaining the goal of reducing and stabilizing energy costs permanently, controlling volatility in the price of electricity in Puerto Rico, RPS, among others. Act 57-2014 at Sec. 6.3(a) and (f).

c. The power to review and approve PREPA’s plans.

As described in the Statement of Motives of Act 57-2014, “[a] key mission of the Energy [Bureau] shall be to *evaluate* the plans that PREPA is required [to] submit.” A key part of the energy reform was the obligation for PREPA, the company responsible for operating the Electrical System, to *prepare* and *submit* for the evaluation of the Energy Bureau an integrated resource plan (IRP), which shall consider all reasonable resources to satisfy the demand for electric power services during a period of twenty (20) years. *Id.* at Sec. 6.23 (emphasis added).

Afterward, in April of 2019, the *Puerto Rico Energy Public Policy Act*⁴ was enacted, providing for a process to unbundle Puerto Rico’s electrical system vertically integrated monopoly. Act 17-2019 established the long-term electrical system planning and reiterated IRP provisions already introduced with Act 57-2014. Section 1.9 of Act 17-2019 provides that the IRP “shall be *devised* by the electric power company responsible for the operations of the Electrical System and *shall be approved* by the Bureau.” (emphasis added). The Energy Bureau *shall* approve changes *prior to their implementation*. Act 17-2019 at Sec. 1.9(1). “Any amendment to the Integrated Resource

³ Act 57-2014 at Sec 1.3 (j).

⁴ *Puerto Rico Energy Public Policy Act*, Act No.17 of April 11, 2019 (“Act 17-2019”).

Plan shall also be *filed* with the Bureau for *review* and *approval*.” *Id.* at Sec. 1.9(2) (emphasis added).

d. The Approved IRP and Modified Action Plan.

On March 15, 2018, the Energy Bureau issued a *Resolution and Order* commencing an adjudicative process under case no. CEPR-AP-2018-0001,⁵ and authorizing PREPA to file an updated IRP before the mandatory review established in Act 57- 2014 to determine the impacts of Hurricanes Irma and María that devastated Puerto Rico in 2017.⁶ This was PREPA’s second IRP proceeding following the 2015 IRP. On June 7, 2019, PREPA submitted the IRP that was finally reviewed by the Energy Bureau (“Proposed IRP”).⁷ Among the submissions included by PREPA in the Proposed IRP were different scenarios to meet the energy demand and also to comply with Puerto Rico’s transition to meet the Renewable Energy Portfolio (RPS)⁸, including installing required renewable resources, in the form of solar photovoltaic (PV) and battery energy storage systems (BESS), through a competitive procurement process and issuance of requests for proposals (RFP) to build a new gas-fired combined cycle at Palo Seco by 2025 (the “Palo Seco CC”) that would sustain the integration of the renewable resources.

⁵*In Re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*, case no. CEPR-AP-2018-0001 (“IRP Proceeding”)

⁶ See *id.*, *Resolution and Order* entered on March 15, 2018.

⁷ *Puerto Rico Integrated Resource Plan 2018-2019, Draft for the Review of the Puerto Rico Energy Bureau, Prepared for the Puerto Rico Electric Power Authority, June 7, 2019.*

⁸ The RPS was introduced by *Public Policy on Energy Diversification through Sustainable and Alternative Renewable Energy in Puerto Rico*, Act. No. 82 of July 19, 2020, as amended, 22 L.P.R.A. §§ 8121 – 8136. The operative RPS seeks to reduce and eventually eliminate electric power generation from fossil fuels by integrating orderly and gradually alternative renewable energy while safeguarding the stability of the electrical system and maximizing renewable energy resources in the short-, medium- and long-term. The RPS was established to achieve a minimum of forty percent (40%) on or before 2025; sixty percent (60%) on or before 2040; and one hundred percent (100%) on or before 2050 of renewable energy production in Puerto Rico.

On August 24, 2020, the Energy Bureau entered a final order and approved an IRP and Modified Action Plan after reviewing the Proposed IRP submitted by PREPA.⁹ In the Modified Action Plan, the Energy Bureau found that:

- i. PREPA's plan to use RFP to solicit solar photovoltaic and battery energy resource capabilities in line with its need for these resources was acceptable and ordered the development of competitive solicitation processes for procurement of new renewable resources and battery energy storage resources in support of "no regrets" findings for these resources from the [Proposed] IRP and in support of meeting Act 17-2019 targets for renewable energy installations, and exceeding those targets, where economical. Approved IRP at p. 266, ¶¶ 858-859.
- ii. PREPA did not support the inclusion of the Palo Seco CC by 2025 in the least cost plan, but that PREPA *could* begin preliminary work on new generation and/or energy storage at Palo Seco and *should* PREPA *decide* that it wishes to proceed to project development at Palo Seco before the filing of the next IRP, the Energy Bureau allowed PREPA to make a substantive filing requesting approval. *Id.* at p. 272, ¶ 879; *id.* at p. 274, ¶ 883 (emphasis added).

d. The option to construct a new combined cycle or develop energy storage at Palo Seco.

In the Approved IRP, the Energy Bureau established that the preliminary work on a new fossil fuel-powered unit and/or energy storage at Palo Seco that PREPA *could* begin was conditioned to the constraints outlined in the Modified Action Plan, which included, among other things, a limitation for PREPA to spend up to \$5 million for preliminary economic, siting, permitting, and

⁹ See *Final Resolution and Order on the Puerto Rico Electric Power Authority's Integrated Resources Plan* entered on August 24, 2020, in case no. CEPR-AP-2018-0001, *In Re: Review of the Puerto Rico Electric Power Authority Integrated Resource Plan* ("Approved IRP").

planning analysis. *Id.* Per the Approved IRP, the objective of the scoping and feasibility analysis was to develop a revised and tailored *proposal* to the Energy Bureau for *options* regarding the Palo Seco site. *Id.* at p. 273, ¶880. The Energy Bureau directed PREPA to file the study with the Energy Bureau along with a plan and request resources to begin any necessary engineering and design work once the study was completed. *Id.*

The Energy Bureau noted that per the suggested timeline that PREPA outlined in the Proposed IRP, the engineering, procurement, and construction would begin no earlier than 2022, as this date fell before the required date for PREPA to file its next IRP. *Id.* at pp. 274-275, ¶ 883. However, the Energy Bureau approved that “[i]n the event that, following the preliminary work described above, *PREPA decides that it wishes* to proceed to project development at Palo Seco before the filing of the next IRP, the Energy Bureau **WILL ALLOW** PREPA to make a substantive filing requesting approval. *Id.* (bold and all caps in original) (additional emphasis added).

The Energy Bureau also ordered PREPA to submit quarterly reports, commencing no later than June 1, 2021, describing the work performed related to the new generation at Palo Seco. *Id.* 883. Afterward, on February 1st, 2021, the Energy Bureau entered a *Resolution and Order* (the “February 1 Order”), opening the captioned matter and directing PREPA to file monthly reports on the status of the development of the studies for a new combined cycle gas turbine in the San Juan area. Following the submittal of many reports, on July 15, 2022, PREPA submitted a document titled *New Palo Seco Combined Cycle and Power Generation Scoping and Feasibility Report Preliminary Economic, Siting, Permitting and Planning Analysis* (“Feasibility Study”).¹⁰ The Feasibility Study concluded that moving forward with a new combined cycle at this time was not feasible. Therefore, PREPA decided it would not proceed with the Palo Seco CC. Furthermore,

¹⁰ *New Palo Seco Combined Cycle and Power Generation Scoping and Feasibility Report Preliminary Economic, Siting, Permitting and Planning Analysis* dated July 15, 2022.

PREPA did not recommend nor state that it *wished* to proceed with an energy storage project at Palo Seco.

e. The August 3 Order directs PREPA to utilize FEMA funds to develop energy storage at Palo Seco.

On August 3, 2022, the Energy Bureau entered a *Resolution and Order* (“August 3 Order”) directing PREPA to inform the Puerto Rico Public-Private Partnerships Authority (P3A) that it had determined that there should be a public-private partnership for a new combined cycle gas turbine.¹¹ Also, without any findings of facts, analyses, or conclusions of law, the Energy Bureau ordered PREPA to amend the FEMA request and solicit that the federal funds approved for the Palo Seco CCGT shall be utilized to develop an energy storage project at Palo Seco. August 3 Order at p. 8, Sec. V.

However, under the provisions of Act 57-2014 and Act 17-2019, the Energy Bureau does not have jurisdiction to order PREPA to pursue or develop specific projects that PREPA did not propose. The jurisdiction of the Energy Bureau, as the regulator, is limited to approving, disapproving or reviewing the projects and plans submitted by PREPA as the regulated electric service company. Requiring PREPA to amend the FEMA request and order PREPA to solicit from FEMA that the federal funds approved for the Palo Seco CCGT be utilized to develop an energy

¹¹ The Energy Bureau further states that it

FINDS there is a need to determine the costs and timeframe of availability of a new combined cycle gas turbine, to gauge the current market trends for resource costs and compare against the costs of ongoing solar PV and battery energy resource deployment, however delayed, **to attain the goals set in the Approved IRP.**

August 3 Order at p. 8.

However, there are different types of public-private partnerships (P3) and different types of transactions to build and/or purchase power from a combined cycle gas turbine (CCGT) facility. Nevertheless, in the August 3 Order, the Energy Bureau doesn’t specify whether the P3 that it asks P3A to evaluate would be to build, operate or maintain a CCGT. Neither does the August 3 Order specify if the CCGT would be owned by PREPA or the Government of Puerto Rico, or if the P3 would be for a construction and power purchase operating agreement.

storage project at Palo Seco is beyond the powers granted by law to the Energy Bureau. Therefore, PREPA herein respectfully requests the Energy Bureau to set aside the portion of the August 3 Order, which directs PREPA to amend the FEMA request and divert the federal funds previously approved for the Palo Seco CCGT¹² to be utilized for the development of an energy storage project at Palo Seco.

IV. ANALYSIS

a. **The Energy Bureau lacks jurisdiction and doesn't have the vested power to order a regulated entity to develop a project that was not submitted by said entity.**

i. **Jurisdiction of administrative agencies**

“Jurisdiction is the power or authority possessed by a court or an administrative body to consider and decide the matters submitted for its consideration.” *Office of the Commissioner of Insurance v. Corporation for the Defense of the Puerto Rico Weapons License Holder*, 202 D.P.R. 842, 851 (2019). On countless occasions, the Supreme Court of Puerto Rico has reiterated that administrative bodies or agencies, like the courts, cannot assume jurisdiction where they do not have it. *Id.* at 852. This is so because the authority bestowed on an administrative entity is subject to the powers that the Legislative Assembly has conferred explicitly on it in its enabling law. *Id.*

An administrative body may not assume jurisdiction over a matter unless it is *clearly* lawfully authorized to do so. *Id.* (emphasis added). In other words, “[an agency] can only carry out the functions entrusted to it by law, those that arise from its main activity or task, and exercise the powers that are essential to carry out its duties and responsibilities.” *Id.* Consequently, administrative agencies cannot act beyond the powers granted by their enabling statutes. Therefore, any administrative action that does not obey the power conferred on it by legislation must be classified as *ultra vires* and, therefore, void. *Id.*

¹² FEMA had already approved a project worksheet for the construction of a new CCGT in the San Juan area.

Administrative agencies have no discretion to assume jurisdiction where there is none. *Id.* at 879; *see also Ayala Hernández v. Board of Directors and Homeowners Association of Condominio Bosque Sereno*, 190 D.P.R. 547, 559 (2014). In this sense, the administrative agencies must arrive at their decisions without departing from the enabling law, even when they pursue an alleged legitimate purpose. *Id.* at 560 (emphasis added). In other words, neither necessity nor convenience can substitute a quasi-legislative or quasi-judicial source of power for the specific delegation of the power conferred by the law. *Id.* (emphasis added). Furthermore, the Supreme Court of Puerto Rico has resolved that any doubt regarding the existence of quasi-legislative or quasi-judicial power must be resolved against its exercise. *Id.* (emphasis added). Administrative agencies cannot act beyond what was delegated to them, so any administrative action that does not obey the power conferred by legislation must be classified as ultra vires and therefore void. *Id.*

b. The jurisdiction of the Energy Bureau is limited to reviewing projects proposed by the regulated electric service companies.

According to the energy policy laws, Act 57-2014 and Act 17-2019, the mission of the Energy Bureau is to *evaluate* the plans that PREPA *is required [to] submit*. Act 57-2014 at Statement of Motives. For example, this process is carried out when *PREPA submits* for the *evaluation of the Energy Bureau* the IRP. *Id.* at Sec. 6.23. For instance, in the IRP Proceeding, the Energy Bureau evaluated PREPA's submitted projects and determined whether they could be developed or not. Moreover, given that the evaluation inherent in the IRP is part of an adjudicative process, such a process guarantees basic due process rights afforded to PREPA. Among these rights is the inherent right to judicial review or reconsideration of the Energy Bureau's approval, denial or modification of PREPA's proposals. By unilaterally requiring PREPA to develop and implement projects that PREPA has not requested, the Energy Bureau is overreaching the jurisdictional scope of power the legislature has granted to it. PREPA, as a regulated entity, presents the plans and projects it

wishes to pursue. The Energy Bureau, as the regulator, oversees the implementation or lack of projects approved or rejected in conformity with the applicable legislation. Failing to abide by this basic structure jeopardizes the dynamics implicit in the roles of regulator and regulated. Further, such action undermines the quasi-judicial role of the Energy Bureau and would deprive PREPA of its due process rights as a regulated entity determined by applicable laws and regulations.

c. The Approved IRP did not order PREPA to proceed with an energy storage project at Palo Seco.

In the Approved IRP, the Energy Bureau directed PREPA to *evaluate* the inclusion of a new CCGT or energy storage facility at Palo Seco. However, per the precise letter of such order, moving forward with these projects is conditioned to PREPA's request to develop them.

The Energy Bureau found that PREPA had not supported the inclusion of a new CCGT at Palo Seco by 2025 in the least cost plan in the Proposed IRP. Modified Action Plan at p. 272, ¶ 879. However, the Energy Bureau found that “to protect against the uncertainty of near-future solar PV and battery energy storage price outcomes, or other potential reliability concerns,” PREPA *may* begin preliminary work on new generation and/or energy storage at Palo Seco, subject to certain constraints. *Id.* at ¶ 880. Accordingly, pursuing a CCGT and/or battery project at Palo Seco was specifically subjected to PREPA's decision to seek approval from the Energy Bureau for the same.

Per the Approved IRP, the objective of the scoping and feasibility analysis was to develop a revised and tailored *proposal* to the Energy Bureau for *options* regarding the Palo Seco site. *Id.* at p. 273, ¶880. The Energy Bureau directed PREPA to file the study with the Energy Bureau with a plan and requested resources to begin any necessary engineering and design work once the study was completed. *Id.*

Moreover, the Energy Bureau noted that per the suggested timeline that PREPA outlined in the Proposed IRP, the engineering, procurement, and construction would begin no earlier than 2022, and this date fell before the required date for PREPA to file its next IRP. *Id.* at pp. 274-275, ¶ 883. However, the Energy Bureau approved that “[i]n the event that, following the preliminary work described above, *PREPA decides that it wishes* to proceed to project development at Palo Seco before the filing of the next IRP, the Energy Bureau **WILL ALLOW** PREPA to make a substantive filing requesting approval. *Id.* (bold and all caps in original) (additional emphasis added). Once again, we see how the Energy Bureau conditioned the project development at Palo Seco to PREPA’s request to move forward with it.

Further, the Energy Bureau also ordered PREPA to submit quarterly reports describing the work performed related to the Palo Seco CC. *Id.* at 883. Afterward, the Energy Bureau entered the February 1 Order and PREPA submitted multiple Monthly Reports. Recently, on July 15, 2022, PREPA submitted the Feasibility Study in which it was determined that moving forward with a new combined cycle at this time was not feasible and informed that PREPA decided it would not proceed with the Palo Seco CC at this juncture. Furthermore, PREPA did not recommend nor state that it *wished* to proceed with an energy storage project at Palo Seco.

Accordingly, the Energy Bureau does not have jurisdiction to order PREPA to develop a project that PREPA has not proposed or submitted for its evaluation and that was conditioned in the Approved IRP to PREPA’s decision. Furthermore, since the storage project at Palo Seco was subject to PREPA’s decision and the Energy Bureau may not order PREPA to pursue projects that are not presented and proposed by PREPA, the portion of the August 3 Order directing PREPA to amend the FEMA request for the federal funds approved for the Palo Seco CCGT to be utilized for the development of an energy storage project at Palo Seco must be set aside.

d. The Energy Bureau has already reviewed the controversy herein presented and agreed with the arguments made by PREPA in this motion.

In early 2021, the Energy Bureau ruled on an issue related to the one raised by PREPA in this motion. After an evaluation of PREPA's argument and opposing arguments of multiple parties, it determined that not including funds for energy storage systems is a decision that *is* aligned with the Approved IR and Modified Action Plan.

i. Procedural Background of the 10-Year Plan and docket

The Energy Bureau, after becoming aware of PREPA's submittal of the PREPA 10-Year Infrastructure Plan December 2020 ("December 2020 10-Year Plan") to FEMA, issued a *Resolution and Order* in case no. NEPR-MI-2020-0016¹³, directing PREPA, among other things,¹⁴ to file a copy of the December 2020 10-Year Plan. On December 31, 2020, PREPA filed a document titled *Motion in Compliance with Order Entered on December 30, 2020*, with a copy of the December 2020 10-Year Plan and other relevant documents and reports.

On January 25, 2021, upon review of the December 2020 10-Year Plan submitted by PREPA, the Energy Bureau issued a *Resolution and Order* ("January 25 Order") in case NEPR-MI-2021-0002, through which it described a list of near-term generation projects that PREPA included as part of the 2020 10-Year Plan. The Energy Bureau understood that these projects were not consistent with the Approved IRP and Modified Action Plan, including, among others: the construction of a dual fuel 400 MW combined cycle generation plant near San Juan instead of the

¹³ *In Re: Optimization Proceeding of Minigrad Transmission and Distribution Investments*, case no. NEPR-MI-2020-0016.

¹⁴ The Energy Bureau ordered PREPA to attend a Technical Conference on January 11, 2021, and to demonstrate the alignment of the December 2020 10-Year Plan with the Approved IRP. On January 8, 2021, PREPA filed a document titled *Presentation: 10-Year Infrastructure Plan*, which included a presentation summarizing the December 2020 10-Year Plan. On January 11, 2021, the Energy Bureau held the Technical Conference during which PREPA representatives discussed the *Presentation* and answered questions from the Energy Bureau.

execution of studies and permitting ordered in the Approved IRP and the allocating \$0.00 for renewable energy projects or battery for energy storage.

On February 16, 2021, PREPA filed a document titled *Response to Resolution and Order Entered on January 25, 2021, and Request for Approval of Revised 10-Year Infrastructure Plan* (“February 16 Motion”), which included a Revised 10-Year Plan (“Revised 10-Year Plan”). Through the February 16 Motion, PREPA states it agrees with the Energy Bureau that certain aspects of the December 2020 10-Year Plan may seem incompatible with the Approved IRP and Modified Action Plan. Regarding the allocation of funds, or lack thereof, to renewable energy and battery storage projects, PREPA requested to be allowed to maintain the renewables generation and battery storage projects in the Revised 10-Year Plan without funding from PREPA for necessary maintenance expenses or FEMA sections 404, 406 and 428 funds because the renewables generation and battery storage projects are not contrary to the Approved IRP or the Modified Action Plan. February 16 Motion at p. 21. PREPA further stated that:

PREPA requests the Energy Bureau to allow it to keep the renewables generation and battery storage projects in the 10-Year Plan without requesting funding from PREPA NME or FEMA sections 404, 406 and 428 funds because the renewables generation and battery storage projects are not contrary to the [Approved IRP] or the Modified Action Plan.

After evaluating PREPA’s Proposed IRP, the Energy Bureau found that PREPA's plan to use RFPs to solicit solar PV and battery energy resource capabilities in line with its need for these resources was acceptable. The Energy Bureau also found that competitive procurements to obtain PPOAs for these resources must be open to all forms of renewable energy, including, but not limited to wind, hydro, solar PV, VPPs, and storage. In accordance with that finding, the Energy Bureau ordered “PREPA to develop competitive solicitation processes for procurement of new renewable resources and battery energy storage resources in support of "no regrets" findings for these resources from the IRP and in support of meeting Act 17-2019 targets for renewable energy installations and exceeding those targets where economical.”

The Final Procurement Plan and the Tranche 1 RFP were developed by PREPA and approved by the Energy Bureau in accordance with the order cited above. Wherefore, in compliance with the Final IRP Order, PREPA is in the process of procuring PPOAs for new renewable resources and battery energy storage resources.

Neither the 10-Year Plan, nor the Revised 10-Year Plan, provide for investment to acquire new renewable resources and battery energy storage resources because PREPA, in accordance with the Final IRP Order, will not make capital investments to acquire new renewable resources and battery energy storage resources. Generation from new renewable resources and battery energy storage resources will be obtained with PPOAs. However, one of the investment focus areas of PREPA, as reflected in the December 10-Year Plan and the Revised 10-Year Plan, is the renewable integration. PREPA is committed with supporting and enabling the rapid and substantial increase of renewable generation and energy storage. Examples of the projects that will be supported with the investments included in the 10-Year Plan are renewables, hydroelectric, battery storage, emergency back-up generation and flexible dispatch generation. However, and as the Energy Bureau noted in the Order, PREPA has not listed, in the 10-Year Plan, specific projects that will support the integration of renewables because it's not feasible at this time. PREPA cannot include specific projects to support the integration of the renewables generation that will be integrated soon after the award of Tranche 1 RFP because PREPA does not know the specific sites in which those projects will be constructed and interconnected. Nevertheless, once the proponents and locations are selected and the Tranche RFP is awarded, PREPA will revisit its capital investment plans and include any projects that will support the integration.

...

Revised 10-Year Plan Description:

Renewable Energy Storage

In the Final Resolution and Order on the Puerto Rico Electric Power Authority's Integrated Resource Plan issued August 24, 2020, the Puerto Rico Energy Bureau ordered PREPA to develop solar PV and battery storage resources in accordance with competitive procurement protocols. In addition, Act 82-2010 establishes RPS targets by year, which require significant additions of renewable generation to the PREPA system in the near- and mid-terms. Six RFP tranches of solar PV or other renewable (1000 MW, 500 MW, 500 MW, 500 MW, 500 MW, and 750 MW, respectively) have been identified for the near- and mid-terms to be distributed throughout the island. The RFP for the first tranche is expected to be issued in 2021 Q1. These projects and assets will be owned by 3rd parties who will enter into offtake agreements with PREPA.

Battery Energy Storage

In the Final Resolution and Order on the Puerto Rico Electric Power Authority's Integrated Resource Plan issued August 24, 2020, the Puerto Rico Energy Bureau orders PREPA to develop solar PV and battery storage resources in accordance with competitive procurement protocols. In addition, Act 82-2010 establishes RPS targets by year, which require significant additions of battery storage to the PREPA system in the near- and mid-terms. Six RFP tranches of battery storage (500 MW, 250 MW, 250 MW, 250 MW, 150 MW, and 125 MW, respectively) have been identified for the near- and mid-terms to be distributed throughout the island. Currently these projects are still in the early stages of the public bid and a request for proposal to private entities is expected to be issued in 2021 Q1/Q2. The exact location of each project has not yet been identified. Once battery storage projects are added to the system, these will also provide some grid support. These projects and assets will be owned by 3rd parties who will enter into offtake agreements with PREPA.

Pursuant to the above, PREPA respectfully requests the Energy Bureau to reconsider the decision that not requesting funds for renewable energy or battery storage is inconsistent with the Final IRP Order and the Modified Action Plan and allow PREPA to keep it in the Revised 10-Year Plan as a generation project to be completed in the near term without any funding from PREPA NME or FEMA sections 404, 406 and 428 funds.

February 16 Motion at pp. 21-25.

PREPA proffered to the Energy Bureau that the Revised 10-Year Plan was aligned with the Approved IRP and Modified Action Plan and requested the Energy Bureau to find the Revised 10-Year Plan compliant with the Approved IRP and Modified Action Plan.

On March 2, 2021, the Local Environmental Organizations (LEO) filed a document titled *Opposition to PREPA 's Motion Seeking PREB Approval of 10-Year Infrastructure Plan* ("LEO Opposition"). LEO questioned the Revised 10-Year Plan and indicated that "PREPA's current FEMA funding request does not include a single dollar towards renewables or storage, which all parties agree must be PREPA's main priority. [The Energy Bureau] should require PREPA to amend its FEMA funding request to include major investments into renewables and storage." LEO Opp. at p. 4, Sec. I. LEO also asserted that it was absurd that PREPA did not ask for a single dollar

towards these priorities in its FEMA funding request and that nowhere does the Approved IRP, or any Puerto Rico law, prohibit PREPA from making capital investments to acquire new renewable resources and battery energy resources. *Id.* at pp. 4-5. LEO further stated that the Energy Bureau should therefore require PREPA to abandon its narrow focus on renewable energy projects of private (investor-owned) partners, like energy sellers with PPOAs, and instead amend its FEMA funding request to include funding for renewables and storage owned by PREPA itself. *Id.* at p. 6. Finally, LEO argued that the Energy Bureau “should reject PREPA’s refusal to ask for a single dollar of FEMA funding towards clean energy, and direct PREPA to amend its funding request to include the renewable and storage projects that all parties, including PREPA, acknowledge are the main priority right now.” *Id.* at p. 8.

On March 9, 2021, PREPA filed a document titled *Response to the Local Environmental Organizations Opposition to PREPA’s Motion Seeking PREB Approval of 10-Year Infrastructure Plan* (“PREPA Response”). PREPA stated that the Energy Bureau should reject the requests made in the LEO Opposition, which PREPA categorized as a “red herring and misguided intent to amend the Approved IRP with requests already rejected during the IRP approval process.” PREPA Resp. at p. 2. PREPA further stated nothing is off the table on how PREPA could seek to comply with Act 17-2019, and how PREPA seeks to comply with its renewables portfolio is a matter of public policy. At that time, as stated in the PREPA Response, it intended to follow the directives of the Approved IRP and pursue the competitive bidding processes of procuring renewable energy through power purchase agreements. Moreover, PREPA stated that LEO’s proposals included in the LEO Opposition, on the other hand, are nothing less than a request to amend the Approved IRP. PREPA still believes this statement is correct and applies to the arguments and request for relief made in this motion.

On March 19, 2021, PREPA filed a document titled *Motion Submitting March 2021 Revised 10-Year Infrastructure Plan* (“March 19 Motion”). In the March 19 Motion, PREPA indicated that in furtherance of the January 25 Order and to submit additional amendments of the Revised 10-Year Plan for the Energy Bureau’s approval. PREPA’s plan to allocate \$0.00 for renewable generation and energy storage projects was left unaltered in this revision.

On March 26, 2022, the Energy Bureau entered a *Resolution and Order* (“March 26 Order”), considering all the motions summarized above and deciding which projects were or were not aligned with the Approved IRP and Modified Action Plan. Regarding battery storage projects, the Energy Bureau determined that “as presented in the Revised 10-Year Plan, the projects related to Renewable Generation and Battery Energy Storage Systems are aligned with the Approved IRP and the Modified Action Plan.” March 26 Order at p. 13. Wherefore, the Energy Bureau confirmed that PREPA’s plan of not requesting funds from FEMA for the development of battery storage projects is a decision aligned with the Approved IRP and Modified Action Plan. What PREPA asks from the Energy Bureau in this motion stems from that already-confirmed PREPA decision.

ii. The March 26 Order decision supports the request that PREPA makes in this motion.

In the Revised 10-Year Plan, PREPA confirmed that it had decided that it would not allocate any request for FEMA funds towards the development of battery energy storage projects. The public corporation’s decision was and still is consistent with Puerto Rico’s energy public policy, the Approved IRP, and the Modified Action Plan. In 2020, the Energy Bureau evaluated the Proposed IRP and, more specifically, the plan submitted by PREPA to comply with the energy policy. The Energy Bureau found it correct and integrated it into the Modified Action Plan, thus ordering PREPA to acquire large amounts of battery storage through RFPs. As such, the decision

not to pursue FEMA funds to acquire battery storage aligns with the Modified Action Plan, as confirmed by the Energy Bureau in the March 26 Order.

It is also essential to note that the Energy Bureau's decision to confirm that PREPA did not have to allocate funds to acquire energy storage is consistent with the autonomy and role from which PREPA has never been deprived and the Energy Bureau's role as the regulator.

What PREPA requests from the Energy Bureau in this motion is consistent with PREPA and the Energy Bureau's roles and with the decision acknowledged by the Energy Bureau in the March 26 Order. PREPA is obligated, but not limited to, to develop the projects included in the Approved IRP and Modified Action Plan. Projects are *presented by* PREPA and *evaluated by* the Energy Bureau in an adjudicative proceeding. This is compliant with the legal framework cited in Section III of this motion, which provides that PREPA is the entity that proposes projects to the Energy Bureau. Then, the Energy Bureau, in its role as the regulator, determines if the projects are compliant or not or subject to changes.

In the IRP Proceeding, the Energy Bureau adjudicated that the correct way to follow the energy public policy to reach 100% renewable generation by 2050 was to acquire 3,500 MW of renewable energy and battery storage through RFPs. PREPA is following this process, overseen by the Energy Bureau in docket no. NEPR-MI-2020-0012, *In Re: The Implementation of the Puerto Rico Electric Power Authority Integrated Resource Plan and Modified Action Plan*.¹⁵

¹⁵ However, should the Energy Bureau understand that the process has taken more time than what was initially envisioned or that it wants to order PREPA to evaluate additional or new proposals from PREPA to reach the Act 17-2019's targets, it has the option to *sua ponte* initiate a process to amend the operative Modified Action Plan. This argument is based on the fact that per the applicable legal framework argued in Section III of this motion; the Energy Bureau cannot order PREPA to do projects that are not in the Modified Action Plan or that have been otherwise submitted by PREPA; the Energy Bureau may revisit the Approved IRP and ask PREPA to submit projects for further evaluation.

V. CONCLUSION

The role of the Energy Bureau, as the regulator, is to evaluate projects that an electric service company, like PREPA, proposes. The process of assessing if the project complies with applicable laws, regulations, and orders begins once the project is presented. However, the Energy Bureau has not been vested with jurisdiction or power to order PREPA to develop projects. This role has been reserved for PREPA, and acting contrary to this would dilute the regulated entity's role in the regulator. PREPA hereby requests the Energy Bureau to set aside the portion of the August 3 Order in which PREPA is directed to petition FEMA for the reallocation of federal funds allocated initially and approved for the Palo Seco CCGT to be utilized for the development of an energy storage facility at Palo Seco. This project is not contemplated in the Approved IRP or the Modified Action Plan, nor has PREPA submitted it for the evaluation of the Energy Bureau. Deciding otherwise would be contrary to the applicable legal framework, would entail that the Energy Bureau exceeded its authority and vested powers, and would also be contrary to the Energy Bureau's decision in the March 26 Order.

WHEREFORE, PREPA respectfully requests the Energy Bureau to SET ASIDE the portion of the August 3 Order, which requires PREPA to petition FEMA for the reallocation of federal funds allocated initially and approved for the Palo Seco CCGT to be utilized for the development of an energy storage facility at Palo Seco.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23rd day of August 2022.

/s Katuska Bolaños-Lugo

Katuska Bolaños-Lugo

kbolanos@diazvaz.law

TSPR 18,888

Joannely Marrero-Cruz

jmarrero@diazvaz.law

TSPR 20,014

DÍAZ & VÁZQUEZ LAW FIRM, P.S.C.

290 Jesús T. Piñero Ave.

Oriental Tower, Suite 803

San Juan, PR 00918

Tel.: (787) 395-7133

Fax. (787) 497-9664