

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

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**IN RE:** REVIEW OF LUMA’S INITIAL BUDGETS

CASE NO.: NEPR-MI-2021-0004

SUBJECT: Motion to Clarify and Show Cause in Compliance with the April 18 Order

**MOTION TO CLARIFY AND SHOW CAUSE IN COMPLIANCE  
WITH THE APRIL 18 ORDER**

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. RELEVANT PROCEDURAL HISTORY**

1. On March 14, 2023, PREPA filed with the Honorable Puerto Rico Energy Bureau of the Public Service Regulatory Board (“Energy Bureau” or “PREB”) a document titled *Request to Amend FY2023 PREPA Budget for Implementation of FOMB Certified Fiscal Plan Transformation Initiatives* (“March 14 Motion”).
2. Through the March 14 Motion, PREPA impressed upon the Energy Bureau the urgent need PREPA has to amend its fiscal year 2022-2023 (“FY2023”) budget to be able to address the Genera PR LLC (“Genera PR”) Mobilization Service Fee for effective transformation efforts, necessary operations, repairs and maintenance works under the PREPA fiscal plan, and the continuance of payments to its pension system. PREPA explicitly stated in the March 14 Motion, that the budget amendment request does not impact the energy sales rates, nor it represents a burden to the customers, as the update is based on revenues from reimbursed federal funds gathered by PREPA during the present and past fiscal years.
3. After several procedural events and iterations of the budget amendment request on April

2, 2023, PREPA submitted to PREB a document titled *Modified FY2023 Budget Amendment Request for Implementation of FOMB Certified Fiscal Plan Transformation Initiatives and in Compliance with the March 25 Order* (“April 2 Motion”). In the April 2 Motion, PREPA requested the Honorable Energy Bureau to approve the Modified FY2023 Budget Amendment Request for the following amounts:

(i) Genera PR Mobilization Funding - \$15 million to pay for Genera PR Mobilization costs as required under the LGA OMA; (ii) VTP Funding - \$29.4 million to fund a VTP consistent with PREPA's obligations under Act 120-2018 and Act 17-2019; (iii) Pension Funding – \$65M for FY2023 pension funding FY2023 (May and June 2023) while a long-term solution is coordinated and implemented with the Central Government (iv) Generation Necessary Maintenance Expenses (NME) and Operational expenditures - \$46.4 million for FY2023, to ensure stability and continuity of PREPA’s generation assets through necessary maintenance and repair works.

April 2 Motion p. 18

4. In response, on April 5, 2023, the Energy Bureau issued a *Resolution and Order* (“April 5 Order”) directing PREPA to respond to requests for information as stated in Annex A of the April 5 Order. The Energy Bureau also determined that further responsive data was warranted to evaluate responses to the Commissioner’s requests, detailed in the April 5 Order.

5. On April 14, 2023, PREPA submitted a document titled *Motion in Compliance with the April 5 Order* (“April 14 Motion”). Through the April 14 Motion, PREPA submitted its responses to PREB’s requirements of information and also an explanation or response to the referenced

Commissioners' requests, PREPA also reiterated its request for the Energy Bureau to grant approval to the Modified FY2023 Budget Amendment Request.

6. On April 18, 2023, the Energy Bureau issued a *Resolution and Order* partially approving PREPA's Modified FY2023 Budget Amendment Request, subject to the FOMB's March 24 Resolution<sup>1</sup> in the following manner ("April 18 Order"):

- (i) Generation NME and Operational expenditures for FY2023 for \$13,920,000 to be allocated for the operation and maintenance budget and \$3,734,000 for the NME Budget for the Budgetary line items and projects as outlined in Annex A.
- (ii) Genera PR Mobilization Funding of up to \$15 million to pay for Genera PR Mobilization costs as required under the LGA-OMA.
- (iii) VTP Funding of up to \$29.4 million to fund a VTP program consistent with PREPA's obligations under Act 120-2018, as amended by Act 17-2019.
- (iv) Pension Funding needs of up to \$65 million and only for the needs of the current FY2023 (May and June).

7. The April 18 Order had different orders and directives for PREPA, including a show cause order. In what is pertinent to this motion, the Energy Bureau asserted the following:

The Energy Bureau notes that the FOMB March 24 Resolution reflects a Budget Deficit Before Debt Obligations of \$155,840,000. This reflects actions by PREPA that are unacceptable. This is in direct contravention of the Energy Bureau's 2017 Rate order which states, "Only in extraordinary situations, where PREPA proves it had no control of a cost increase (such proof to include testimony from those individuals responsible for the areas that experienced the cost increase), will the Commission permit after-the-fact recovery of costs not pre-approved by the Commission." An appropriate showing of the necessity of these expenditures prior to their being incurred was not made.

April 18 Order at p. 8

8. With the above premise, the Energy Bureau further asserted that "as provided for in Act

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<sup>1</sup> Financial Oversight and Management Board for Puerto Rico ("FOMB") letter and Resolution dated March 24, 2023, certifying a revised fiscal year 2023 budget for PREPA ("FOMB's March 24 Resolution"), which the Energy Bureau took administrative notice of in the April 5 Order.

57-2014, in view of PREPA's unacceptable and direct contravention of the Energy Bureau's 2017 Rate order, PREPA is ORDERED, within ten (10) days of the date of this Resolution and Order, SHOW CAUSE why a penalty, as permitted in accordance with Section 6.36(a) of Act 57-2014 as amended, should not be imposed upon PREPA” (“Show Cause Order”).

9. In response to the Show Cause Order, due today, April 28, 2023, PREPA first clarifies that it has not incurred the costs approved by the FOMB’s March 24 Resolution. The described budget deficit is prospective, and not an actual cost overrun. The proper and adequate context below might dissipate the Energy Bureau’s unfortunate and misplaced characterization of PREPA’s actions included in the Show Cause Order.

## II. LEGAL FRAMEWORK

PREPA is a public corporation created by the Legislative Assembly by virtue of Act No. 83 of May 2, 1941,<sup>2</sup> as amended, that has a legal existence and personality separate and different from the Government of Puerto Rico. Its creation, existence, powers, duties, and activities as a public enterprise have been delegated to it through legislation. PREPA’s assets and franchises are the property of the People of Puerto Rico and its Government. PREPA’s mission is to provide electrical energy service in the most efficient, safe, economical, reliable, and environmentally friendly manner that meets the needs of its customers, who are PREPA’s highest priority. Among others, PREPA’s goals are to (i) improve the quality of service to clients; (ii) reduce energy costs; (iii) achieve financial stability; (iv) maintain environmental compliance; (v) integrate generation projects with renewable energy sources; (vi) promote safety in the work area; (vii) increase organizational efficiency and productivity; and (viii) restore the credibility of the public

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<sup>2</sup> *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”).

corporation.

On May 2014, the *Puerto Rico Transformation and RELIEF Act*<sup>3</sup> was enacted into law. At that time, the transformation of PREPA began. The Legislature determined that “PREPA need[ed] a new legal mandate from the People of Puerto Rico.” Act 57-2014 at Statement of Motives. As such, Act 57-2014, provided a framework to, among other processes, lay the groundwork to begin the first-rate review process. *Id.* at Sec. 6.25 (b). During the rate review process, the requesting electric power service company must show that the proposed rate is *just* and *reasonable*, consistent with sound fiscal and operational practices that provide for a *safe* and *adequate service* at the lowest reasonable cost. *Id.* The responsibility for said adjudication was bestowed upon the Puerto Rico Energy Commission, now the Puerto Rico Energy Bureau. *Id.* Pursuant to Act 57-2014, the approved rate remains in effect for, at least, three (3)-year cycles, unless the Energy Bureau *motu proprio* decides to conduct another rate review. *Id.* at Sec. 6.25 (b)(9)(v). Any rate modification, as was intended for the initial rates, requires the electric service company to show that the proposed change is just and reasonable and consistent with sound fiscal and operational practices that provide for a reliable and adequate service, at the lowest reasonable cost. *Id.* at Sec. 6.25 (c).

On June 1, 2015, pursuant to the mandates of Act 57-2014, the Energy Bureau initiated the procedure by ordering PREPA to file a petition for rate review consistent with the regulation on filing requirements that had been issued by the Energy Bureau. The adjudicative process began and lasted for over a year. Thereafter, the Energy Bureau entered the 2017 Rate Order establishing the revenue requirement and allocated the revenues in rates for Fiscal Year 2018

The 2017 Rate Order requires that the proposed annual budgets submitted for review *do*

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<sup>3</sup> *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056 (“Act 57”).

*not* increase the overall revenue requirements, thus no change be required to the existing base rates, or the current rate structure approved by the 2017 Rate Order. PREPA's current rate was established in January 2017 with the 2017 Rate Order and implemented on May 31, 2019.<sup>4</sup>

In what is pertinent to this motion, on overspending or budget overruns the Energy Bureau stated in the 2017 Rate Order at p. 150 ¶ 443

Only in extraordinary situations, where PREPA proves it had no control of a cost increase (such proof to include testimony from those individuals responsible for the areas that experienced the cost increase), will the Commission permit after-the-fact recovery of costs not pre-approved by the Commission. In those instances, where PREPA does not provide proof or did have control of the over-runs, the Commission will decide the appropriate treatment based on the facts. This approach satisfies the needs of bondholders and of customers by providing discipline over PREPA's budgets and spending.

Notwithstanding, on June 30, 2016, the United States Congress enacted *the Puerto Rico Oversight, Management and Economic Stability Act* (PROMESA) (48 U.S.C. §§ 2101–2241) in response to the economic crisis in Puerto Rico. PROMESA created the Financial Oversight and Management Board for Puerto Rico (“FOMB” or “Oversight Board”). PROMESA authorized the FOMB to certify five (or more) fiscal year plans for Puerto Rico and its public corporations and to initiate bankruptcy-like proceedings if necessary. On September 30, 2016, FOMB designated PREPA as a “covered territorial instrumentality” under PROMESA section 101(d). Pursuant to PROMESA section 315, “[t]he Oversight Board in a case under this title is the representative of the debtor” and “may take any action necessary on behalf of the debtor to prosecute the case of the debtor, including filing a petition under section 304 of [PROMESA] . . . or otherwise generally submitting filings in relation to the case with the court.” On June 29, 2017, FOMB issued a

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<sup>4</sup> *Resolution and Order* entered in case no. CEPR-AP-2015-0001, *In Re: Puerto Rico Electric Power Authority Rate Review* (May 21, 2017).

restructuring certification pursuant to PROMESA sections 104(j) and 206. On July 2, 2017, FOMB filed a voluntary petition for relief for PREPA pursuant to section 304(a) of PROMESA, commencing PREPA's case under title III of PROMESA (the "Title III Case"). By operation of PROMESA and pursuant to PROMESA section 315(b), the Oversight Board represents PREPA in the PREPA Title III Case.

PROMESA's express preemption provision, section 4, is broad and unequivocal, which provides that: "[t]he provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this Act." PROMESA at § 4 (emphasis added). Further, Title III of PROMESA provides that "the Oversight Board shall submit a Budget to the Governor and the Legislature . . . and such Budget shall be . . . approved by the Governor and the Legislature . . . in full force and effect . . .". *Id.* at § 202(d)(3). As the First Circuit made clear, "[u]nder PROMESA's preemption provision, the grants of authority to the Board at §§ 201 and 202 to approve Fiscal Plans and Budgets 'prevail over any general or specific provisions of territory law' . . . ." *See Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. for P.R. (In re Fin. Oversight & Mgmt. Bd. for P.R.)*, 916 F.3d 98, 116 (1st Cir. 2019) (citation omitted).

Therefore, PREPA is subject to the Oversight Board's final approval of budgets, and any PREPA budget that is certified by the Oversight Board pursuant to PROMESA section 202 in any fiscal year during which PREPA is a covered territorial instrumentality shall be the final and enforceable budget for PREPA, not subject to review, approval, or contest by any other local agency, including the Energy Bureau. Moreover, any approved budget by the FOMB shall preempt any other budget for PREPA.

### **III. RESPONSE TO THE SHOW CAUSE ORDER**

The FOMB March 24 Resolution issued the Revised FY2023 FOMB Certified Budget for

PREPA to cover additional expenses needed to achieve objectives in the 2022 FOMB Certified Fiscal Plan for PREPA and Puerto Rico Energy Public Policy directives. PREPA remains subject to FOMB as the ultimate budget authority for the duration of its Title III proceeding and for as long as PROMESA requires thereafter. PREPA has no control over final budgets certified by FOMB and as aforementioned, must abide by these budgets under PROMESA.

The \$155,840,000 budget deficit presented in the FOMB Revised FY2023 FOMB Certified Budget for PREPA is largely driven by cost increases from contracts that the Energy Bureau has reviewed and approved, T&D System O&M Agreement<sup>5</sup> and the Thermal Generation Facilities O&M Agreement<sup>6</sup>. These O&M Agreements require payments to private third-party service providers in FY2023 of over \$135 million in annual operator fees and expense reimbursements. None of these costs were contemplated in the 2017 Rate Order.

The Revised FY2023 FOMB Certified Budget for PREPA also does not represent PREPA's actual expenditures, nor does it represent a request to the Energy Bureau for "after-the-fact recovery of costs" incurred by PREPA. The expenditures presented in the FOMB March 24 Resolution are "future" or "before-the-fact" expenses submitted to the Energy Bureau for approval. Furthermore, the recovery of these costs will not be funded through increased rates to customers but rather through a proposed combination of PREPA operating funds and Puerto Rico Government contributions, as set forth in the 2023 Commonwealth Fiscal Plan certified by the FOMB on April 3, 2023.

For additional clarity, the \$155.8 million budget deficit consists of 1) \$15 million for

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<sup>5</sup> Puerto Rico Transmission and Distribution Operation and Maintenance Agreement between LUMA, P3A and PREPA executed on June 22, 2020 ("T&D System O&M Agreement").

<sup>6</sup> Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement between PREPA, P3A and Genera PR ("Thermal Generation Facilities O&M Agreement").



Genera PR Mobilization, pursuant to the O&M Agreement approved by FOMB and PREB, among others, 2) \$29.4 million related to the PREPA Voluntary Transition Program set forth in an Administrative Order issued by AAFAF, 3) \$65 million related to emergency PREPA pension system contributions that are required to maintain monthly benefit payments, and 4) \$46.4 million related to O&M expenses, of which PREB has conditionally approved \$17.7 million in its April 18 Order. In summary, \$109.4 million or 70% of the deficit to be funded from operating cash on hand, is not attributable to PREPA operations.

PREPA contends that the Energy Bureau was premature in reaching its conclusion regarding PREPA's actions *overlooking* the underlying basis for the budget numbers. PREPA has complied with FOMB directives, fiscal plans, certified budgets, decisions, and Orders from the Energy Bureau. As such, and based on the preceding factual context, it is evident that a penalty should not be imposed on PREPA.

**WHEREFORE**, PREPA respectfully requests the Energy Bureau to **NOTE** the above; **DETERMINE** that PREPA has complied with the Energy Bureau's directives and that no penalty shall be imposed; and **FIND** PREPA in compliance with the April 18 Show Cause Order.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 28<sup>th</sup> day of April 2023.

/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](mailto:margarita.mercado@us.dlapiper.com) and [laura.rozas@us.dlapiper.com](mailto:laura.rozas@us.dlapiper.com).

In San Juan, Puerto Rico, this 28<sup>th</sup> day of April 2023.

*/s Joannely Marrero-Cruz*

Joannely Marrero Cru