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

IN RE: 10-YEAR PLAN FEDERALLY FUNDED COMPETITIVE PROCESS	Case No.: NEPR-MI-2022-0005 Motion for Reconsideration of Resolution and Order of September 17, 2024, and Request for Administrative Hearing

MOTION FOR RECONSIDERATION OF RESOLUTION AND ORDER OF SEPTEMBER 17, 2024, AND REQUEST FOR ADMINISTRATIVE HEARING

TO THE ENERGY BUREAU:

COMES NOW, GENERA PR, LLC ("Genera"), through its undersigned counsel and, very respectfully, states and prays as follows:

I. INTRODUCTION

On September 17, 2024, the Puerto Rico Energy Bureau ("PREB") issued a *Resolution and Order* in which it ruled, among other things, that Genera PR LLC ("Genera") had purportedly engaged in misrepresentations in connection with its proposal for the procurement process conditionally approved by the Puerto Rico Electric Power Authority ("PREPA") for establishing peaker generation systems at Jobos, Daguao, and Palo Seco ("the Projects"). Specifically, the PREB held that the increased costs and timeline of the Projects—which Genera originally estimated would be cheaper and shorter than the PREPA estimates—were due to alleged misrepresentations by Genera, particularly in Genera's **commitment** to improve the original cost estimates and timeline proposed by PREPA. Therefore, the PREB ruled that, in the interest of maintaining the terms originally represented, Genera was ordered to complete the project and achieve COD by the end

of the Second Quarter (Q2) of 2026, consistent with PREPA's approach. The PREB went further to specifically reiterate that "any agreed timeline between Genera and the proponents must not extend beyond the end of Q2 2026". The PREB advised Genera that failure to meet this deadline may carry the imposition of fines and administrative sanctions of up to $25,000 per day, for each day the project remains, "which shall serve as a deterrent for further delays, under Art. 6.36 of Act 57-2014."

Genera respectfully requests the reconsideration of the *Resolution and Order* of September 17, 2024, under Section 3.15 of the Puerto Rico Administrative Procedure Act ("LPAU", in its Spanish acronym), 3 L.P.R.A. § 9655, for the reasons set forth below. In short, the PREB's ruling affects liberty and proprietary interests of Genera insofar as a finding of misrepresentation impacts its commercial reputation and goodwill. The ruling also affects its rights under the Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement ("OMA") dated as of January 24, 2023, by and among PREPA, Genera and the Puerto Rico Private-Public Partnership Authority ("P3 Authority"), including, among others, Sections 7.2, 7.7, 19.2, 19.3, 19.5. The *Resolution and Order* of September 17, 2024, also requires Genera to comply with a timeline that not only implies a further increase in costs that could impact the company but also does not resemble what proponents in the current procurement process say they can actually achieve. If no reconsideration is given (i.e., if the PREB will not permit agreements that align with the delivery schedules submitted by proponents in a competitive process), then the process will stall. Additionally, failure to comply with the timeline and budget would expose Genera to fines of up to twenty-thousand dollars ($25,000) for each day the project remains incomplete beyond the specified deadline. As such, Genera posits that the *Resolution and Order* of September 17, 2024, violates its constitutional right to due process, and is inconsistent with Act 57-2014 and the LPAU for two main reasons.

First, it contains findings of fact that are based solely on allegations by the parties. That is, the PREB adjudicated controverted facts, many of which arise from estimates and forecasts that were later affected by exogenous events, without allowing Genera the opportunity to present evidence and have the issues in controversy adjudicated before an examining officer or administrative judge. The Energy Bureau deemed there was sufficient cause to believe that Genera actually engaged in misrepresentation of material facts about the projected cost savings and COD timeline, thus actually misleading the Energy Bureau in granting them authorization to continue with their proposed approach. But the PREB did not even define or meaningfully explain what the term "misrepresentation" means from a legal standpoint, what the fundamental elements of the concept are, or what evidence satisfied those elements.

Second, the *Resolution and Order* did not advise Genera of its right to request reconsideration and/or seek judicial review. Specifically, Section 3.14 of the LPAU, 3 L.P.R.A. § 9654, requires that final agency resolution and orders advise the parties of the right to request reconsideration and judicial review. The *Resolution and Order* of September 17, 2024, does not contain the required notices, and also fails to advise Genera of any other remedy available in the applicable agency statutes and regulations, effectively depriving it of any alternative to contest a decision that affects its liberty and property interests.

For the reasons stated above, and the arguments discussed in this motion, Genera respectfully requests the reconsideration of the *Resolution and Order* of September 17, 2024, and that the adverse findings of fact made therein be set aside. Genera further requests that the PREB orders that a hearing be conducted, under Sections 6.11 (b) & (c), 6.19 and 6.20[1] of Act 57-2014,

[1] 22 L.P.R.A §§ 1054j, 1054r & 1054s.

to evaluate and adjudicate the allegations regarding Genera's representations in connection with the timeline and costs of the Projects, consistent with the applicable law and due process.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On January 23, 2023, the PREB issued *a Resolution and Order* ("January 23 Order") that conditionally approved PREPA's RFP process for the procurement of emergency peaker generation systems at Jobos, Daguao, and Palo Seco ("the Projects"), subject to various conditions.

On May 25, 2023, before its Service Commencement Date, Genera submitted a document titled *Memorandum of Compliance with May 8 Order*, in which Genera proposed to the PREB a different approach and plan for the procurement of the Black Start and Emergency Peaking Resources and explained that its proposed approach would be more efficient. In subsequent filings before the PREB, Genera explained why its approach would cost less, and be ready earlier, than the other alternative.

On August 16, 2023, Genera filed a *Motion to Submit Bi-Monthly Report on the Status of Emergency Generation and Black-Start Generation Procurement for the Period from August 1 to August 15, 2023, in Compliance with Resolution and Order Dated January 23, 2023* ("August 16 Motion"). Genera included as Exhibit A the bi-monthly report describing the status of the black start and emergency generation procurement process, and recommendations for changes to the RFP processes.

On August 23, 2023, the PREB issued a *Resolution and Order* ("August 23 Order") in which it determined that the changes proposed by Genera in Exhibit A of the August 16 Motion were consistent with the IRP Order. Accordingly, the PREB allowed the RFP process to continue in the manner described by Genera in Exhibit A of the August 16 Motion.

On November 8, 2023, the PREB issued another *Resolution and Order* ("November 8 Order") approving the RFP package submitted by Genera for the procurement of black start and emergency generation services.

On February 29, 2024, Genera filed a document titled *Motion to Submit Bi-weekly Report on the Status of Emergency Generation and Black-Start Generation Procurement in Compliance with Resolution and Order Dated January 23, 2023* ("February 29 Motion") in which Genera stated that initial award was scheduled for March 2024.

On July 1, 2024, Genera filed a *Motion to Submit Bi-weekly Report on the Status of Emergency Generation and Black-Start Generation Procurement in Compliance with Resolution and Order Dated January 23, 2023* ("July 1 Motion"), in which Genera included as Exhibit A the bi-weekly report describing the status of the Emergency Generation and Black-Start Generation Procurement. Genera also informed that starting on July 1, 2024, pursuant to Footnote 16 of the January 23 Order, reports would be submitted on a quarterly basis, consistent with the fiscal year's quarters *(e.g.*, July 1 to September 30 for Q1, October 1 to December 31 for Q2, and so forth), and that their next report was due by October 9, 2024.

On July 30, 2024, the PREB issued a *Resolution and Order* ("July 30 Resolution") in which it stated that Exhibit A that was filed along with the July 1 Motion purportedly failed to adequately inform the progress in the procurement process. Through the July 30 Resolution, the PREB also denied Genera's request to submit quarterly reports instead of bimonthly reports and ordered Genera to submit monthly reports beginning on August 15, 2024.[2] The PREB also ordered Genera to include as part of the next and subsequent monthly progress report its best estimate of the

[2] Pursuant to footnote 15 of the January 23 Order, reports are mandated to be rendered biweekly until June 30, 2024. Subsequently, starting July 1, 2024, and according to footnote 16 of the January 23 Order, reports were required to be submitted on a quarterly basis, consistent with the fiscal year's quarters (e.g. July 1 to September 30 for Q1, October 1 to December 31 for Q2, and so forth).

expected schedule and timetable for completing the critical steps up to project completion. The Energy Bureau further ordered that the reports include the following information:

> 1. A breakdown of each task, estimated cost, cost amount consumed, and timeline for completion of such task.
> 2. The stages of each task, timeline, present status and estimated time for completion.
> 3. A project timeline chart *(e.g.* Gantt Chart) with critical path for the COD of the project.
> 4. Permit list, permits obtained, estimated timeline for each permit and status of such permit.
> 5. Tasks required to prepare for each site where the project shall be installed. Details on any demolition and permits required to prepare for the installation of the project.
> 6. Permit and cost for each site to accommodate the project.

The July 30 Resolution granted Genera ten (10) days to inform how the Genera procurement approach has saved costs and accelerated the COD compared to the PREPA RFP approach. The PREB warned Genera that noncompliance with such orders would result in the imposition of fines under Act 57-2014.

On August 9, 2024, Genera filed a document titled *Motion to Submit Comparison Report in Compliance with Resolution and Order Dated July 30, 2024* ("August 9 Motion"), in which it detailed the distinctions between Genera's RFP process and PREPA's previous RFP process. The RFP Process Comparison Report contained in the August 9 Motion clearly articulated the projected efficiencies and benefits of Genera's project relative to previous initiatives, emphasizing the potential for **significant operational cost savings** and technological enhancements. Based on comprehensive analyses and realistic projections, the RFP Process Comparison Report highlighted key differences in unit configurations and operational efficiencies that are expected to yield substantial cost savings throughout the Projects' lifespan.

Moreover, on August 19, 2024, Genera filed a document titled *Motion to Submit Monthly Report on the Status of Emergency Generation and Black-Start Generation Procurement in Compliance with Resolution and Order Dated July 30, 2024* ("August 19 Motion"). Specifically, the inaugural monthly report on the status of the Emergency Generation and Black-Start

Generation Procurement, submitted as Attachment A to the August 9 Motion, addressed in detail each one of the criteria laid out in the July 30 Resolution. As for the costs and timeline of the Projects, Genera informed in the August 19 Motion that the preliminary estimate for the peaker projects was $911,340,000.00 and projected that COD would be achieved between the first and fourth quarters of 2027.

On August 28, 2024, the PREB ordered Genera to show cause as to why it should not impose the maximum administrative fine of twenty-five thousand dollars ($25,000) for misrepresentation in connection with the RFP process for the procurement of black start and emergency peaking generation systems ("August 28 Order"). The PREB further ordered Genera to submit a written response addressing the following:

> a) The basis for the representations made regarding cost savings and the COD timeline;
> b) A detailed explanation of the reasons for the discrepancies between the projected and actual costs and timelines;
> c) Any mitigating circumstances or evidence that Genera wishes to present in defense of its actions; and
> d) A clarification on whether the increased costs incurred under Genera's administration (any amount exceeding PREPA's original estimate) are expected to be recovered from the Federal Emergency Management Agency ("FEMA") or any other sources.

On September 5, 2024, Genera filed a document titled *Motion in Compliance with Order to Show Cause*. In it, Genera unequivocally stated that the discrepancies between projected outcomes and the current status of the RFP process originated from external factors that significantly exceeded its control, rather than from deliberate or willful misrepresentation. Genera further explained that initial cost overruns and projected delays, though substantial, resulted from evolving market dynamics. Genera supplemented its response through various motions filed thereafter. PREPA also appeared to state its position on this matter.

The procedural background clearly shows that Genera complied with the orders and deadlines imposed by the PREB in the orders to show cause. Genera also responded and

supplied the information required regarding the criteria specified on both the July 31 Resolution and the August 28 Order, and carefully explained the reasons for the changes in timeline and costs of the Projects. Nevertheless, on September 17, 2024, the PREB issued a *Resolution and Order* in which it ruled, in relevant part, as follows:

> After reviewing the arguments put forth by both parties in their respective motions, the Energy Bureau DETERMINES that project delays and cost increases resulted from misrepresentations by Genera, particularly in their commitment to improve the original cost estimates and timeline, proposed by PREPA. If Genera had reason to believe that the timeline and costs would increase, instead of decrease (as originally represented by Genera), it was their responsibility to promptly notify the Energy Bureau. Since Genera guaranteed it would maintain the timeline and costs and failed to notify promptly of the alleged project costs overruns and delays, it must now comply with what it represented in terms of time and costs, which led to the Energy Bureau's RFPs reconfiguration approval. To address the issue with the project timeline, the Energy Bureau evaluated the schedule proposed by the proponents under PREPA's RFPs, with a COD by the spring of 2026. Genera contended its approach could reduce such completion time by 9-12 months, but now proposes completion time across 2027. Therefore, in the interest of maintaining the terms originally represented by Genera, which were the basis for our approval, the Energy Bureau ORDERS Genera to complete the project and achieve COD by the end of the Second Quarter (Q2) of 2026, consistent with PREPA's approach. If Genera fails to meet this deadline, it will be subject to a daily fine of up to twenty-thousand dollars ($25,000) for each day the project remains incomplete beyond the specified deadline, which shall serve as a deterrent for further delays, under Art. 6.36 of Act 57-2014.
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> …
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> The Energy Bureau further WARNS Genera that the payment of **any fine** imposed by the Energy Bureau must be satisfied using the money it receives as payment *(i.e.,* Service Fee) under its contract; such payment shall not be considered, construed or treated as a cost attributable to customers or pass-through expenditures, as per Genera's Operation and Maintenance Agreement.[3]

Genera submits that the *Resolution and Order* of September 17, 2024, is incorrect as a matter of law, and inconsistent with the procedures required in the administrative context as a matter of due process. Accordingly, Genera respectfully asks that the ruling be reconsidered, and

[3] Genera disagrees with the language in the *Resolution and Order* that purports to limit the pass-through nature of fines from the PREB. Genera reserves its right to challenge this assertion, and to defend any and all of its rights under the OMA, during this process or any related procedural event.

the finding of misrepresentation set aside until the issues in controversy are adjudicated in a hearing consistent with due process requirements.

III. APPLICABLE LAW

A. Due process requirements under the United States and Puerto Rico Constitutions.

Article II, Sec. 7 of the Constitution of Puerto Rico, and the Fifth and Fourteenth Amendments to the United States Constitution, L.P.R.A., vol. 1, guarantee that no person shall be deprived of his or her liberty or property without due process of law. Due process of law assumes two different dimensions: substantive and procedural. Under substantive due process, courts examine the validity of a law or regulation in order to protect fundamental individual rights. On the other hand, *procedural* due process imposes on the State the obligation to guarantee that any interference with individual liberty and property interests will take place through a fair and equitable procedure. *Rivera Rodriguez & Co. v. Lee Stowell, etc.,* 133 D.P.R. 881, 887-888 (1993). The Puerto Rico Supreme Court has consistently held, based on the federal precedent of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), that administrative proceedings that affect proprietary and liberty interests of individuals shall comply with the minimum requirements of the due process of law, namely: (1) adequate notice; (2) process before an impartial adjudicator; (3) opportunity to be heard; (4) the right to cross-examine witnesses and examine the evidence presented against him/her; (5) assistance of counsel; and (6) decision based on the record. *Álvarez v. Arias*, 156 D.P.R. 352, 364-365 (2002); *Rivera Rodríguez & Co. v. Lee Stowell,* 133 D.P.R. at 888-889.

Moreover, the Puerto Rico Supreme Court has also held that when an agency establishes procedures and protections through its regulations, those measures become part of the liberty and property interests of the individual and part of the process due by the entity. An administrative

agency cannot arbitrarily depart from the very processes that it has established through its regulatory powers. *Fuentes Bonilla v. ELA*, 200 D.P.R. 364, 397 (2018) ("an agency cannot depart from the processes established by statute or regulation"). (Translation ours).

B. Act No. 57-2014

The *Puerto Rico Energy Transformation and Relief Act* ("Act 57-2014"), was approved on May 27, 2014. Act 57-2014 vested on the PREB authority for, among other things, overseeing and ensuring the execution and implementation of the public policy on the electric power service in Puerto Rico; overseeing the quality, efficiency, and reliability of the electric power services provided by any electric power company certified in Puerto Rico to ensure a robust network that addresses the needs of the Island; holding public hearings, require and gather any pertinent or necessary information to properly carry out its powers and duties; and adopting the rules, orders, and regulations needed to carry out its duties, issue orders, and impose fines to comply with the powers granted by law, as well as for the implementation of this Act. These regulations shall be adopted in accordance with Act No. 38-2017, as amended, known as the 'Government of Puerto Rico Uniform Administrative Procedure Act'. Section 6.3(a),(d),(*l*) & (oo) of Act 57-2014, 22 L.P.R.A § 1054b(a),(d),(*l*) & (oo).

Section 6.11 of Act 57-2014, 22 L.P.R.A. § 1054j, provides for the delegation of powers to hearing officers and administrative judges to adjudicate matters before the PREB. Specifically, Section 6.11 states, in relevant part, as follows:

> **(a)** PREB may issue orders to assign, refer, or delegate the resolution of any adjudicative or non-adjudicative matter to one or more of the commissioners. In said orders, PREB shall specify the name of the commissioner and the specific powers of PREB that are being delegated to him. PREB may delegate to its commissioners the following powers:
>
> **(1)** administer oaths and take depositions;
> **(2)** issue summons;
> **(3)** receive and evaluate evidence;
> **(4)** preside over hearings; and
> **(5)** hold conferences to simplify procedures.

> Any order issued by one or more commissioners pursuant to this Section shall be notified to PREB before it is made public, and PREB may modify, amend, or render the order ineffective by a majority vote of its commissioners.
> **(b)** *Hearing Officers.* —
> PREB shall have the authority to refer or delegate any adjudicative matter to hearing officers. PREB shall assign and distribute among its hearing officers the tasks and matters to be delegated by PREB, after which the hearing officers shall be responsible for issuing recommendations regarding the adjudication of the case or a procedural incident subject to PREB's assignment, referral, or delegation. In issuing a decision, PREB shall have full discretion to accept or reject the recommendations of hearing officers. Any hearing officer appointed to preside over a hearing or investigation shall have the powers expressly delegated to him by PREB in the designation order. Hearing officers shall be designated and shall carry out their duties as provided in Act No. 38- 2017, as amended, known as the "Government of Puerto Rico Uniform Administrative Procedure Act."
> **(c)** *Administrative Judges*. —
> As provided in this subsection, PREB shall be empowered to delegate to administrative judges, with full decision-making powers, the adjudication of any matter, case, and dispute on behalf of PREB, as these may be delegated in accordance with the provisions of this subsection… In exercising its discretion, the Energy Bureau. may delegate to administrative judges cases and disputes related to the review of customers' electricity bills; cases and disputes alleging noncompliance by an electric power service company with the regulations of the Energy Bureau in connection with the quality of the services provided to its customers; cases and disputes alleging noncompliance by the Authority, its successor, subsidiaries, the transmission and distribution network Contractor or an electric power service company or customer with its obligations in connection with the interconnection of distributed generation systems or any other matter that PREB may provide. The Energy Bureau may delegate to its administrative judges any case or dispute in which the total value or cost of the remedies sought is twenty-five thousand dollars ($25,000.00) or less. Administrative judges shall be appointed and shall carry out their duties as provided in Act No. 38-2017, known as the "Government of Puerto Rico Uniform Administrative Procedure Act."

In turn, Section 6.19 of Act 57-2014, 22 L.P.R.A. § 1054r, states that "[t]he Commission shall prescribe through regulations an administrative hearing circuit system that allows for the scheduling and holding of administrative hearings on pending cases before the Commission in the different regions of the Commonwealth of Puerto Rico."[4]

[4] Section 1.3(j) of Act 57-2014, 22 L.P.R.A § 1051a(j), defines "Commission" as:

> **(j) "Commission"** or **"Energy Commission"** — Shall mean the Puerto Rico Energy Bureau or PREB as established by virtue of the Reorganization Plan of the Puerto Rico Public Service Regulatory Board, which is a specialized independent entity created by virtue of this Act, in charge of regulating, overseeing, and enforcing the public policy on energy of the Government of Puerto Rico. Any reference in this Act to the 'Commission or Energy Commission' shall be construed as a reference to the Puerto Rico Energy Bureau.

Moreover, Section 6.20 of Act 57-2014, 22 L.P.R.A. § 1054t, provides, in pertinent part, as follows:

> Any process for which this Act does not specifically provide, shall be governed by Act No. 38-2017, as amended, known as the 'Government of Puerto Rico Uniform Administrative Procedure Act.' Therefore, Act No. 38-2017, supra, shall govern the procedures pertaining to the adoption of regulations, adjudications, judicial review, the granting of franchises, certifications, grievances from subscribers and between electric power companies, and inspections…As provided in the aforementioned Act, the decisions and orders of PREB shall be subject to review by the Court of Appeals of Puerto Rico.

C. Regulation 8543-PREB's Adjudicative Processes

Regulation 8543 was approved on December 18, 2014 pursuant to Sections 6.3, 6.4, 6.34 and 6.25 of Act 57-2015, with the purpose of establishing the rules that will govern the adjudicative procedures before the PREB, in conjunction with and supplementing the provisions of the LPAU and its case law. *See* Sections 1.02 & 1.03 of Regulation 8543.[5] Section 1.03 of Regulation 8543 further provides that it applies, in conjunction with and supplementing the provisions of the LPAU and its case law, to notices of noncompliance and of investigations.

Articles 3.01 through 3.05 of Regulation 8543 sets forth the steps for the commencement of an adjudicative process. Sections 9.01 through 9.06 establish the structure and procedures that govern administrative hearings. And Sections 12.01 through 14.08 govern the procedures for notice of noncompliance.[6] Specifically, Section 14.04 of Regulation 8543 provides for the presentation of oral testimony when (i) it appears necessary to show the veracity of the arguments presented by the party subject to the notice of noncompliance; (ii) the testimony is necessary to prove a defense or to show that the party subject to the notice did not fail to comply with the order or regulation noticed; and (iii) the testimony is deemed not to be redundant.

[5] All translations to provisions of Regulation 8543 are provided by us.

[6] It is important to underscore that here the procedure did not commence through the filing of a complaint or a notice of noncompliance. The present interlocutory issue stems from an order to show cause in miscellaneous matter NEPR-MI-2022-0005.

None of the procedures established in Act 57-2014 and Regulation 8543 were used during the process leading to the *Resolution and Order* of September 17, 2024.

IV. ANALYSIS AND DISCUSSION

A. Resolution of issues of fact and determination of credibility required a hearing that met the minimum requirements of due process.

The August 28 Order instructed Genera to show cause as to why the PREB should not impose an administrative fine of twenty-five thousand dollars ($25,000) for misrepresentation in connection with the RFP process involving the Projects. The PREB specifically ordered Genera to submit a written response addressing the following criteria:

> a) The basis for the representations made regarding cost savings and the COD timeline;
> b) A detailed explanation of the reasons for the discrepancies between the projected and actual costs and timelines;
> c) Any mitigating circumstances or evidence that Genera wishes to present in defense of its actions; and
> d) A clarification on whether the increased costs incurred under Genera's administration (any amount exceeding PREPA's original estimate) are expected to be recovered from the Federal Emergency Management Agency ("FEMA") or any other sources.

On September 5, 2024, Genera filed a *Motion in Compliance with Order to Show Cause*, in which it showed that the discrepancies between projected outcomes and the current status of the RFP process originated from external factors that significantly exceeded its control, rather than from deliberate, intentional, or willful misrepresentation. Genera further explained that initial cost overruns and projected delays, though substantial, resulted from evolving market dynamics. Genera supplemented its response through various motions filed thereafter. Nevertheless, on September 17, 2024, the PREB issued a *Resolution and Order* in which it ruled that Genera had engaged in misrepresentation, required Genera to finalize the Projects by a deadline and costs different than those announced by Genera in its August 19 Motion, and warn that Genera would be exposed to a daily fine of $25,000.00 if it failed to meet any of the goals established. **In so ruling, the PREB did not cite to any evidence that challenged or undermined Genera's**

assertions (because there were none), and issued its determination presumably based on a determination of credibility grounded only on the papers filed. The *Resolution and Order* of September 15 is flawed as a matter of law and should be reconsidered and set aside for the following reasons.

First,* the procedural background clearly shows that Genera complied with the orders and deadlines imposed by the PREB in the orders to show cause. Genera also responded and supplied the information required consistent with the criteria specified on both the July 31 Resolution and the August 28 Order, and carefully explained the reasons for the changes in timeline and costs of the Projects**. Thus, the PREB adjudicated facts that were specifically controverted by Genera without allowing Genera the opportunity to present evidence and have the issues in controversy adjudicated before an examining officer or administrative judge. Genera categorically denied having misrepresented the facts relating to its proposal for the Projects, and specifically argued that the changes that impacted the costs and timeline was driven by events outside of its control. It is evident that the PREB made determinations as to credibility based solely on the papers filed. **Moreover, t*he PREB did not even define, or meaningfully explained, what the term "misrepresentation" means from a legal standpoint, and what are the constitutive elements of the concept.** It did not explain whether the standard applied was one of intention or a less exacting one. This procedural background is clearly inconsistent with the minimum requirements of due process.

Although the PREB has the authority to impose sanctions and fines when the parties to a proceeding fail to comply with orders and regulations, the situation here is different. Here, Genera did not simply fail to comply with an objectively clear order (i.e. missed a deadline). It is uncontested that Genera met the deadlines and addressed all of the factors established by the PREB in the August 28 Order. Genera also directly refuted that it had conducted itself with the intention

to mislead. On this record, the PREB was required to provide a hearing prior to adjudicating a matter that featured several contested facts.

The United States Supreme Court has recognized that an agency's finding of misrepresentation can implicate either a property interest or a liberty interest and, in such cases, due process generally requires a hearing for adjudication. A property interest is typically implicated when the finding of misrepresentation affects a person's legal right to some benefit, such as employment, contract relationship, government benefits or licenses. *See Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Likewise, a liberty interest can be implicated when the agency's finding of misrepresentation harms a person's reputation in a way that significantly alters their status under law, potentially affecting future benefits or business opportunities. *Board of Regents v. Roth*, 408 U.S. 564 (1972) (a person's liberty interest is implicated when the government makes a stigmatizing statement, such as an accusation or dishonesty or misrepresentation, that harms their reputation or affects future opportunities); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (a person's liberty interest was implicated when the government posted notices prohibiting the sale of certain products to an individual due to his alleged misrepresentation or misconduct); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (a government action labeling certain organizations as subversive without a hearing violated due process because it harmed the reputation of individuals associated with those organizations).

The proprietary and liberty interests of Genera were affected by the *Resolution and Order* of September 15, 2024 because a finding of misrepresentation has an impact on its commercial reputation and goodwill. These findings could also affect Genera's rights under the OMA. The *Resolution and Order* also requires Genera to comply with a timeline and budget that could have an economic impact on the company. Additionally, failure to comply with the timeline and budget

would expose Genera to fines of up to twenty-thousand dollars ($25,000) for each day the project remains incomplete beyond the specified deadline.

The courts have also held that an administrative agency cannot adjudicate credibility issues without holding a hearing. Credibility determinations often require the opportunity to observe witnesses, assess demeanor, and cross-examine testimony, all of which are typically part of a formal hearing. *Goldberg v. Kelly*, 397 U.S. 254, 268-270 (1970); *Green v. McElroy*, 360 U.S. 474, 496 (1959). Moreover, courts have held that agencies cannot make credibility determinations solely based on written submissions or documentary evidence when the facts are contested, and witness testimony is central. *Richardson v. Perales*, 402 U.S. 389, 406-407 (1971) (while the Court upheld the use of written medical reports in Social Security disability hearings, it noted that in situations in which the credibility of witnesses is essential, live testimony and cross-examination may be required to ensure due process).

Similarly, the Puerto Rico Supreme Court has ruled, in an employment law context, that a hearing is required when the case presents a challenge to a dismissal of an employee who claims lack of good cause. *López v. Tribunal Superior*, 90 D.P.R. 304, 312-313 (1964). In *López*, the Puerto Rico Supreme Court emphasized that the existence or absence of good cause must be decided by through a hearing, not by the sole understanding of the employer, even if the reasons for the dismissal are considered evident or justified for the employer.

As discussed earlier, the Puerto Rico Supreme Court has consistently held that administrative proceedings that affect liberty or proprietary interests of individuals shall comply with the minimum requirements of the due process of law, namely: (1) adequate notice; (2) process before an impartial adjudicator; (3) opportunity to be heard; (4) the right to cross-examine witnesses and examine the evidence presented against him/her; (5) assistance of counsel; and (6)

decision based on the record. *Rivera Rodríguez & Co. v. Lee Stowell*, 133 D.P.R. 881, 888-889 (1993).

None of these minimum requirements were observed here. Additionally, **none of the procedures established in Act 57-2015 and Regulation 8543—as discussed in the previous section—were used during the process leading to the *Resolution and Order* of September 17, 2024**. Those proceedings contemplate the use of hearing officials and administrative judges and allow for an evidentiary hearing both in the context of a formal adjudicative proceeding or a notice of noncompliance. Because of these shortcomings, the *Resolution and Order* of September 17, 2024 fails as a matter of due process and should be set aside.

As a final note, Genera underscores the practical implications of the PREB maintaining the position manifested in the *Resolution and Order* of September 17, 2024. As stated earlier in this motion, if the PREB does not permit agreements that align with the delivery schedules submitted by proponents in a competitive process, it is possible that the peaker process will likely fail.

B. The *Resolution and Order* of September 17, 2024 fails to notify Genera of its right to seek reconsideration and judicial review, and also fails to notify of any other remedy available in the applicable agency statutes and regulations.

A review of the *Resolution and Order* of September 17, 2024 shows that it did not advise Genera of its right to request reconsideration and/or seek judicial review. As discussed above, the PREB's ruling affects its rights and property. Yet, the PREB did not afford Genera the right to contest the adverse ruling or seek appellate review, thus disregarding key provisions of the LPAU.

Section 3.16 of the LPAU, 3 L.P.R.A. § 9656, states that "[i]f an agency concludes or decides not to conduct or continue an adjudicative proceeding in response to a particular case, it shall terminate the proceeding and serve notice of its determination in writing by certified mail return receipt requested upon the parties stating the grounds therefor and of any review process available,

including the warnings provided in Section 3.14 of this Act."[7] In turn, Section 3.14 of LPAU, 3 L.P.R.A. § 9654, provides, in relevant part, that "[t]he order or decision shall notify the right to request reconsideration by the agency or to file a petition for review as a matter of law before the Court of Appeals, as well as the parties to be served with notice of said petition for review, and the pertinent time limits therefor. The aforementioned time limits shall start to run once these requirements have been met."

The Puerto Rico Supreme Court has held that the notification requirements in Section 3.14 of the LPAU are grounded on due process considerations. *Mun. de Caguas v. AT & T*, 154 D.P.R. 401, 414 (2001); *IM Winner, Inc. v. Mun. de Guayanilla*, 151 D.P.R. 30, 35–38 (2000). Specifically, the Supreme Court has held that an agency's failure to meet any of these requirements renders the determination and any subsequent proceeding invalid, because such notification would violate due process. *Comisión Ciudadanos v. G.P. Real Property*, 173 D.P.R. 998, 1014 (2008); *Olivo Román v. Secretario de Hacienda*, 164 D.P.R. 165, 178-179 (2005). And, as per the very terms of Section 3.14 of LPAU, the terms for reconsideration and for judicial review will not begin to run until a valid notification is made.

The *Resolution and Order* of September 15, 2024, also fails to advise Genera of any other remedy available in Act 57-2014 or Regulation 8543, like the opportunity to request an administrative hearing prior to the final ruling, effectively depriving it of any alternative to contest a decision that affects its liberty and property interests. Consequently, the *Resolution and Order* is incorrect as a matter of law because it does not comply with the notification requirements of LPAU and the concomitant due process infirmities such a disregard implies.

[7] The citations to the LPAU contained in this motion are from the official English translation of the statue available in the LPRA collection (Laws of Puerto Rico Annotated).

WHEREFORE, for the reasons set forth in this motion, Genera respectfully requests the PREB to reconsider the *Resolution and Order* of September 17, 2024, and that the adverse findings of fact made therein be set aside. Genera further requests that the PREB orders that a hearing be conducted, under Sections 6.11 (b) & (c), 6.19 and 6.20 of Act 57-2014, to adjudicate the allegations regarding Genera's representations in connection with the timeline and costs of the Projects, consistent with the applicable law and due process.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 7th day of October 2024.

It is hereby certified that this motion was filed using the electronic filing system of this Energy Bureau, and that electronic copies of this Motion will be notified to the following attorneys who have filed a notice of appearance in this case: **Lcdo. Alexis Rivera**, arivera@gmlex.net; **Lcda. Mirelis Valle Cancel**, mvalle@gmlex.net; **Lcda. María Teresa Bustelo-García**, mbustelo@gmlex.net.

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