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

IN RE: PUERTO RICO ELECTRIC POWER AUTHORITY RATE REVIEW	**CASE NO.: NEPR-AP-2023-0003**

ICSE'S MOTION ON LEGAL ISSUES RAISED BY THE HEARING EXAMINER'S MEMO TO THE PARTIES

TO THE HONORABLE ENERGY BUREAU:

Comes now the **Institute of Competitiveness and Economic Sustainability ("ICSE" as its Spanish acronym)**, represented by the undersigned, respectfully states and prays:

On December 20, 2024, this Bureau issued the Resolution and Order (the "December 20 Order") directing PREPA, LUMA, and Genera to answer requests of information (ROIs) regarding the rate case's filing requirements by January 17, 2025.

On January 3, 2025, the Hearing Examiner published a document titled *Technical Conference of January 10, 2025: Consultants' Agenda and Explanation* in which the Examiner included a list of legal questions to be discussed at the January 10 conference.

It is not clear from the agenda whether the time to answer such questions is the same deadline for complying with the December 20 Order. ICSE does not read the January 3 Agenda as an amendment or supplement to the December 20 Order but understands that a brief elaboration of Puerto Rico administrative law case law is timely given the questions that are due to be answered by the parties PREPA, LUMA, and Genera.

Specifically, ICSE wishes to address questions #3 and #4 of the Appendix on Legal Issues of the January 3 Agenda:

> **#3. What are the Bureau's statutory powers, if any, to hold LUMA and Genera financially accountable for imprudent action and inaction; that is, action or inaction that causes costs, revenues, or service quality to depart from the levels that the Bureau would expect if performance were prudent? By what means, if any, can the Bureau prevent recovery in rates of expenses imprudently incurred by LUMA or Genera, while making one of those companies financially responsible for covering the shortfall?**
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> **#4. Aside from any Bureau power to hold LUMA and Genera financially accountable for imprudence, consider this scenario: The Bureau makes findings, after a fully litigated case in which LUMA or Genera was a party, that (a) LUMA or Genera has acted imprudently or failed to act prudently, and (b) the consequences to customers amounted to a specific dollar level of excess cost. Would the Bureau's conclusion have collateral estoppel effect in a contract breach action against the company brought by P3A?**

Powers of administrative agencies

There is a series of decisions by the Puerto Rico Supreme Court in which the Court establishes the general rule about which powers an administrative agency has under the statutory provisions of their organic law. There are a couple of cases of the Department of Consumer Affairs of Puerto Rico ("DACO" as per its Spanish acronym) that are applicable to all administrative agencies. The cases selected to be briefed on this document are Hernández Denton v. Quiñones Desdier, 102 DPR 218 (1974) and Quiñones v. San Rafael Estates, S.E., 143 DPR 756 (1997).

Hernández Denton v Quiñones Desdier is a case in which the Supreme Court elaborates on the quasi-judicial powers of the Services to the Consumer Administration or ASERCO (precursor of DACO). A consumer filed a claim before ASERCO against a contractor for construction defects in their home. The administrative agency solved the complaint in favor of the consumer holding that the contractor breached the contract and awarded the consumer $1,806.75 in damages.

The contractor claimed that the agency lacked the power to award damages given that there was no express statutory delegation in ASERCO's organic law. The language deemed as insufficient by the contractor was the following:

> (8) [ASERCO shall have the power to a]ddress and investigate complaints filed by consumers of goods and services acquired or received from the private sector […], take the corrective action warranted by law, and refer such complaints, when necessary, to the appropriate body, agency, or department, promoting, in accordance with applicable laws and regulations, the swiftest and most effective resolution of the issues raised.

The Court establishes the following framework of statutory construction:

> The issue at hand must be examined within the broad framework of the development of administrative law and the new trends in the administration of justice. **It is sometimes difficult to extract the meaning of a statute by adhering solely to its bare terms, without reference to the circumstances, noticeable by the courts, that give rise to it**.
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> Note, for now referring only to the internal materials available to interpret the statute, that according to the Statement of Motives of Law No. 148 of June 27, 1968, ASERCO was created to "protect... the Puerto Rican consumer and... safeguard their interests in order to guarantee certain basic rights, such as their right... to be protected against hazardous products and unscrupulous practices...." In light of these objectives, the cited subsection 8, about which the legislative history remains silent, **must certainly be interpreted in the broadest possible manner to fulfill the legislature's intent**.[1]

That is to say that the powers of an administrative agency under Puerto Rico law are not subjected exclusively to the "bare terms" of their respective enabling law, but to the legislative intent of the legislation.

[1] Hernández Denton v. Quiñones Desdier, 102 DPR 218, 220-21 (1974) (emphasis ours).

In Quiñones Irizarry v. San Rafael Estates, the Court had a very similar case to Hernández Denton v. Quiñones Desdier: damages for construction defects and an impugnation of DACO's ability to devise remedies.

The Court discusses previous cases:

> This Court has upheld the delegation by the Legislative Assembly to an administrative body of the authority to award compensation for damages suffered, when the enabling law of that body has expressly recognized it as such.
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> […]
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> In other cases, this Court has upheld the awarding of damages, even when the agency's statute did not specifically refer to that power, provided that such action furthered the purposes of the law.[2]

The Opinion concludes:

> In summary, we have recognized in our jurisdiction the power of certain administrative agencies to award damages. Some had a specific delegation of that power in their statute. In others, we upheld the awarding of damages when it was related to the service the agency provided and carried out to further the purposes of the law.[3]

As can be expected, the Court held that DACO had the power to order the payment of damages and even redress for mental anguish.

These cases show unequivocally that the powers of an administrative agency are not bound by the provisions of a legislation and that delegation of powers under Puerto Rico law does not require a strict degree of specificity in the statute. This also means that an administrative agency's finding of the existence of a determined power is not a change in administrative law. The latter conclusion is expressly stated by the Supreme Court in the Hernández Denton case.[4]

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[2] Quiñones v. San Rafael Estates, S.E., 143 DPR 756, 765-66 (1997) (*citing* Rovira Palés v. P.R. Telephone Co., 96 DPR 47 (1968) and UTIER v. JRT, 99 DPR 512, 525-26 (1970)).
[3] *Id.*, at page 767.
[4] *See* Hernández Denton, at page 221.

Now, we must apply the analysis expounded by the case law while reading the PREB's organic law, Act 57-2014, in order to answer the Hearing Examiner's question #3. There is no question that the PREB's powers to (i) establish incentives, (ii) secure the affordability of rates, (iii) regulate electric service companies, (iv) establish the rates of its regulated entities, and others are a sufficient basis to conclude that the PREB has powers to hold accountable PREPA's agents and to prevent recovery in rates of expenses imprudently incurred by LUMA or Genera. There is also no doubt that under these circumstances the PREB can hold PREPA's agents financially responsible for the extent of the financial damage caused by the imprudent expenditure. This also ties up to the PREB's power ***and exclusive jurisdiction*** to solve disputes between electric service companies.

The PREB's primary exclusive jurisdiction

Question #4 by the Hearing Examiner asks whether a ruling by the PREB would have the effect of collateral estoppel in an action of contract breach brought by the P3A. A ruling by the PREB of contract breach would certainly constitute a ruling on the merits of that particular controversy. The thing is that the process through which the P3A can terminate the contract is not an adjudicatory proceeding. So, it cannot be wholly framed into the doctrine of collateral estoppel or *res judicata* when these concepts presuppose relitigating an issue. It is worth noting that the P3A lacks a regulation on adjudicative proceedings and its enabling law is also silent on the procedural guaranties the agency must provide. There's no express indication either in Act 29-2009 or Act 120-2018 that the P3A has quasi-judicial powers.[5]

[5] It must be kept in mind the broad case law regarding an agency's powers. The case law seems to suggest that quasi-judicial powers are implicit to all administrative bodies. However, in the case of the P3A, as mentioned, there has been no indication in the agency's history—either through rulemaking or otherwise—that it has quasi-judicial powers.

Article 10 of Act 29-2009, 27 LPRA § 2609 establishes simply that an alliance contract must include the process of termination.

We frame our approach on the issue of termination because our understanding is that breach of contract under PREPA and LUMA's OMA covers this topic in its termination provisions. In the case of the question as applicable to PREPA and LUMA, Article 15 of their OMA is even more important to the question posed by Mr. Hempling because it makes direct reference to the PREB's power to solve disputes:

> Except as otherwise expressly provided in this Agreement, any dispute among the Parties arising out of, relating to or in connection with this Agreement or the existence, interpretation, breach, termination or validity thereof (a "Dispute") shall be resolved in accordance with the procedures set forth in this Article 15 (Dispute Resolution), which shall constitute the sole and exclusive procedures for the resolution of such Disputes (the "Dispute Resolution Procedure"), including as to the validity of any termination or effective date of any termination. Operator acknowledges and agrees that Administrator (or any Designated Person appointed by Administrator) shall be authorized to participate in or act for and on behalf of Owner in any Dispute Resolution Procedure contemplated by this Article 15 (Dispute Resolution). **For the avoidance of doubt, the Dispute Resolution Procedures set forth in this Agreement shall not apply to any dispute between a Party and PREB, which disputes shall be subject to resolution in accordance with Applicable Law. Notwithstanding anything to the contrary herein, in the event that Operator disagrees with a decision of PREB, nothing shall prejudice, limit or otherwise impair Operator's right to exercise its rights pursuant to Act No. 38 of June 30, 2017[6] and Section 6.5(c) of Act 57**.

For that matter, neither Genera's nor LUMA's OMA can restrict the PREB's power to solve controversies arising between its regulated entities. Under Article 6.4 of Act 57-2014 the Bureau has jurisdiction over certain cases arising under applicable energy laws. Under section (a) of this provision we find the PREB's **primary and exclusive** jurisdiction:

> (a) The Energy Bureau shall have primary and exclusive jurisdiction over the following affairs:

[6] This is Puerto Rico's version of the Administrative Procedure Act ("APA") and is commonly referred to as "LPAU".

[…]

> (6) Cases and disputes regarding agreements between the Authority, its successor, or the transmission and distribution network Contractor, independent power producers, and energy companies as well as cases and disputes between independent power producers. This includes, but shall not be limited to, power purchase agreements whereby an independent power producer agrees to provide electric power to an energy company to be distributed, and cases in which the reasonableness of the interconnection charges or of the terms and conditions of a power purchase agreement are questioned.

Simply put, these are cases and controversies arising between regulated entities ("electric service companies" as they are referred to in the legislation). To use the words of the PREB as argued in Windmar v. PREB, Case No. SJ2023CV07387 (505):

> Under Act 57-2014, the Energy Bureau is the administrative agency with exclusive authority to address disputes arising from alleged non-compliance with energy public policy, mandates related to energy matters, and charges from any independent producer (Windmar, PV Properties, Coto Laurel). In other words, the primary exclusive jurisdiction to address non-compliance with the energy public policy outlined in Act 17-2019 and other laws, including Act 57-2014, rests with the Energy Bureau.
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> From its inception, the legislature recognized the expertise of the Energy Bureau and, moreover, the importance of its active and effective role in matters related to Puerto Rico's energy system. In line with the doctrine of primary exclusive jurisdiction, courts have no authority to address a matter expressly delegated to an agency by law. Act 17-2019 was enacted recognizing the Energy Bureau as the specialized administrative body responsible for regulating, supervising, and enforcing the energy public policy of the Commonwealth of Puerto Rico. To this effect, Act 17-2019 itself establishes that:
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> "[t]he Energy Bureau shall be the independent entity responsible for regulating the energy market in Puerto Rico. The Bureau shall have broad powers and duties, as well as the financial and technical resources and the qualified personnel necessary to ensure compliance with energy public policy, the provisions, and mandates of this Act...".[7]

[7] *Request for dismissal*, at pp. 10 and 17 (*citing* the Statement of Motives, Act 17-2019) (filed October 10, 2023).

Once a decision rendered by the PREB becomes final and is not subject to appeal, this becomes binding and enforceable against the parties. So, if an action is brought against LUMA or Genera and a previous ruling by the PREB has been made on the issue that give base to the cause of action, the administrative determination constitutes *res judicata*. This doctrine is generally understood under Puerto Rico administrative law to apply in three instances: (i) inside the same agency, (ii) interagency-wise, and (iii) between an agency and courts.[8]

Even though the P3A is a governmental entity that is not subject to the PREB's jurisdiction because it is not an electric service company, it would be unreasonable to think that a determination as the one described in Question #4 would not preclude relitigating a contract breach action. Our mention of *res judicata* and not of collateral estoppel may seem as a leap, but it is our understanding that assuming that (1) there arises a controversy between **P3A** and LUMA/Genera and (2) there is a previous PREB determination on the same controversy but the appearing parties are **PREPA** and LUMA/Genera, **the P3A's appearance in the subsequent case would be as a representative of PREPA**. That is, the P3A cannot be treated as a different party from PREPA and would be directly bound by the PREB's determination. In that sense, the P3A would be subjected to the PREB's jurisdiction because the entity it represents under the OMA is a regulated entity.[9]

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[8] *See* Pérez Droz v. Administración de los Tribunales Sistemas de Retiro de los Empleados Del Gobierno y la Judicatura, 184 DPR 313, 319 (2012) (*citing* Pagán Hernández v, UPR, 107 DPR 720 (1978) and U.S. v. Utah, 384 U.S. 394 (1966)).

[9] *See* the Third Recital of the *Puerto Rico Therman Generation Facilities Operation and Maintenance Agreement* ("WHEREAS, pursuant to Act 120, Owner desires to engage Operator to provide the O&M Services for the Legacy Generation Assets in accordance with the terms of this Agreement and has designated Administrator as a Representative of Owner for purposes of this Agreement") and Section 6.2. In LUMA's OMA *see* the Fourth Recital ("WHEREAS, Owner desires to engage Operator to provide the O&M Services for the T&D System in accordance with the terms of this Agreement and has designated Administrator as a Representative of Owner for purposes of this Agreement") and Section 6.2.

The considerations of judicial policy underlying the doctrines of *res judicata* and collateral estoppel would outweigh relitigating the controversies. However, as the Supreme Court of Puerto Rico has stated, these doctrines are not to be applied inflexibly so there may be circumstances that merit not applying them. Notwithstanding, the context of the limited scenario presented by the Hearing Examiner's question seems sufficient to hold the doctrines' applicability. Certainly, there is no reason to conclude that Acts 29-2009 and 120-2018 delegate powers to the P3A, the effect of which is that contracting government entities can evade the jurisdiction of the Energy Bureau simply by being parties to an alliance contract. Otherwise, the regulatory authority of the PREB would be diminished and Act 17-2019 was precisely enacted with the opposite purpose: enhancing the Bureau's powers. Even more, Section 8(b) of Act 120-2018, 22 LPRA § 1118, established:

> PREPA Transactions shall be subject to the provisions of the energy public policy and the regulatory framework, except for those excluded by this Act or those expressly authorized by the Legislative Assembly. **No Partnership or Sales Contract related to PREPA Transactions shall include language that impairs the powers and duties of the [Bureau]**.[10]

This of course includes the primary and exclusive jurisdiction of the PREB to solve cases and controversies between electric service companies.

[10] *See also* Section 21.17 of the PREPA-Genera OMA ("Notwithstanding anything to the contrary herein, but without affecting Operator's remedies in the event of a Change in Regulatory Law, no provision of this Agreement shall be interpreted, construed or deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the Legacy Generation Assets, Owner or Operator") and Section 20.17 of the PREPA-LUMA OMA ("Notwithstanding anything to the contrary herein, no provision of this Agreement shall be interpreted, construed or deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the T&D System, Owner or Operator").

Conclusion

ICSE is grateful for the opportunity to make the foregoing arguments. ICSE holds that the Energy Bureau holds immense powers delegated by the Puerto Rico Legislature to promote utility best practices, to hold accountable responsible parties under its primary and exclusive jurisdiction, and to redress any harmed party in the energy sector in any way consistent with other applicable substantive rules under Puerto Rico law. It shouldn't be ignored the fact that Act 17-2019's purpose was to strengthen the already broad powers given to the PREB by Act 57-2014. In light of the case law herein discussed, this legislative intent should not be taken lightly.

WHEREFORE, it is respectfully requested that the PREB take into consideration the foregoing in establishing the Filing Requirements.

RESPECTFULLY SUBMITTED.

I **CERTIFY** the present document was submitted electronically in the PREB's filing system and copy sent to: the Hearing Examiner; notice of filing to PREPA counsel arivera@gmlex.net; to LUMA counsel mailto:margarita.mercado@us.dlapiper.com and andrea.chambers@us.dlapiper.com; and Genera counsel lrn@roman-negron.com.

In San Juan, Puerto Rico, January 17, 2025.

[Signature page follows]

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