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** **SUBJECT:** Hearing Examiner's Questions on

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:

After the March 7, 2025 hearing, the Hearing Examiner submitted written questions that arose from the hearing regarding procedural considerations in the present proceeding. *See Questions on the Energy Bureau's Statutory Discretion to Organize the Rate Case* in Order of March 10, 2025.

ICSE herein provides its answers. ICSE's aim is to provide the whole picture *inside the box*. "Outside-the-box" theorization can become in essence the rejection of the statutory framework which will produce a proceeding that does not comply with the law. This certainly should not be the aspiration of any of the parties to this proceeding and, of course, to the PREB.

1. Provisional rate structure

a. Under Act 57-2014, section 6.25(e), may the Energy Bureau establish, within a single proceeding, two provisional rates in sequence—one from July 1, 2025 until the conclusion of the revenue requirement phase (Phase 1); and another from the conclusion of Phase 1 until the conclusion of the rate design phase (Phase 2)?

The statute is silent on the PREB's ability to modify the provisional rate ***after*** its imposition. However, what is important is the factual framing of what the PREB is actually doing when modifying the provisional rate. In the March 7 Hearing, the Hearing Examiner and Mr. Shannon discussed a process of reconciliation of the provisional rate that could later mean the modification of the provisional rate. It is our interpretation that a process in which a reconciliation occurs implies necessarily that there could be an under collection or an overcollection; that is, reconciliation is a means to ascertain and approximate (this would be the best term given that it is still a provisional rate and not a permanent one) to which degree the provisional rate is just and reasonable.

There is longstanding case law in Puerto Rico administrative law that administrative agencies can reconsider their determinations in any moment to correct mistakes "independent on the fact that its own enabling act establishes" this discretion. Martínez v. Tribunal Superior, 83 DPR 717, 721 (1961).[1] Therefore, if a second or amended provisional rate is established before the PREB renders its final determination, it could squarely be characterized as a reconsideration of an interlocutory determination. This is

[1] It is important to highlight that what the Puerto Rico Supreme Court did in this case was afford to administrative agencies the same powers attributed and principles applicable to Courts under the Puerto Rico Rules of Civil Proceeding. This general administrative law principle will be also important for answers to the other questions framed by the Hearing Examiner.

a general ability in the hands of administrative agencies that no principle of law should limit it.

b. Alternatively, since the incremental charge that converts the original 2017 rates into provisional rates lies within a new rider, can the Energy Bureau simply adjust that rider after the revenue requirement phase without that adjustment being considered a second provisional rate?

ICSE thinks that the characterization posed in our previous answer holds truth in the concrete example given in this question.

c. In both of the above scenarios, is it legally consistent with the last sentence of section 6.25(f) of Act 57 to conduct only one reconciliation at the conclusion of the entire rate case (i.e., after Phase 2 is finalized), with the result effective back to July 1, 2025?

We would hold that flexibility is warranted. Multiple reconciliations mean a more mathematically precise (i.e., "more" just and reasonable) proceeding by the PREB. There is no expression in the law of only one reconciliation nor of being a jurisdictional time period.

2. Determination of completeness, and the 180-day clock

Under section 6.25(c) of Act 57-2014, what are the legal requirements for issuing the formal determination that "the rate review request is complete"—the determination that triggers the 180-day period within which the Energy Bureau must issue a final order on rates?

We will assume that the phrase "final order on rates" means final in the sense that it will trigger rights of appeal. The determination of completeness should be based on the information the PREB understands is needed to commence deliberation. It is in a sense

like the discovery phase in a normal litigation because all information and evidence is available and there is not necessarily an actual determination on the merits of the evidence to be introduced in the record. It is merely the process in which the rate revision solicitant (and other parties) make available to the PREB the evidence to be used. It is in this regard that the PREB decides that the request is complete.

Now the effect of the determination of completeness is strictly procedural. This determination cannot be executed. The understanding of what constitutes a final determination under Puerto Rico law is that the only thing left to do is to execute the decision. No execution is possible without actual rate design. The only thing by definition that can be implemented is the permanent rate, with the exception of a provisional rate. However, a provisional rate can be squarely conceptualized as what is known as a "provisional remedy" under Puerto Rico procedural law. *See* Rule 56 of Rules of Civil Procedure, 32 LPRA Ap. V, R. 56.

Now, the Hearing Examiner also posed the following assumptions:

> In this situation, is there any prohibition on the Energy Bureau's issuing the completeness determination after all the prefiled testimony has arrived in the second phase (on rate design)? The reason for waiting would be that for this single proceeding, the application would not be complete until LUMA, in its rebuttal testimony on rate design, has had an opportunity to adjust its original proposal in response to intervenor testimony and Energy Bureau consultant reports.

We would like to go back to our analogy of a discovery phase. LUMA's rate application would be just like an amended complaint in a court of law *after* the conclusion

of a discovery process. This is normal and there is no reason in law to reject this proceeding's design.

3. Final determinations, appeals, and phased orders

a. Assume, as above, a single formal proceeding with two phases, Phase 1 being revenue requirement and Phase 2 being rate design. Instead of issuing a single Final Order at the end of Phase 2, can the Energy Bureau issue two separate Final Orders, one at the end of each Phase, without the Phase 1 order on revenue requirements triggering immediate appeal rights (and the duty to seek appeal) under Puerto Rico administrative law (Ley 38-2017)?

&

b. Is there any way to structure or label the Phase 1 determination to avoid triggering the appeal period? Is the Energy Bureau's only option, given a single formal proceeding, to issue a single Final Order at the close of Phase 2?

As a rule, the Puerto Rico Rules of Evidence and of Civil Procedure don't apply automatically to administrative proceedings. But the case law has established that they may be used to "guide the course of the administrative proceedings as long as they don't obstruct their flexibility, agility, and simplicity." Otero v. Toyota, 163 DPR 716, 735 (2005). In that sense, if the elements of flexibility, agility, and simplicity are benefited by the application of the rule, it is then encouraged. The case cited in Answer 1.a. of this document is an example of the application of a provision under the Rules of Civil Procedure.

Under the Puerto Rico law, Courts apply Rule 42.3 which roughly translates to:

> When a lawsuit involves more than one claim, whether through a complaint, counterclaim, crossclaim, or third-party complaint, or when multiple parties are involved, the court may enter a final judgment on one or more of the claims or parties without resolving the entire case, **provided that it expressly concludes that there is no reason to delay the entry of judgment on such claims until the entire case is resolved, and provided that it expressly orders the entry of the judgment**.
>
> When such a conclusion and express order are made, the partial judgment entered shall be final for all purposes concerning the claims or the rights and obligations adjudicated therein, and once it is recorded and a copy of its notification is filed in the case record, the time periods established in Rules 43.1, 47, 48, and 52.2 shall begin to run with respect to it.

This rule is based on Rule 54(b) of the Federal Rules of Civil Procedure.

For Rule 42.3 to apply, the court must specifically state that there is no reason to postpone entering the judgement of one of the claims. Consequently, the partial determination acquires finality and can be appealed. Now, there are two considerations: (1) if the interest is to avoid an appeal of an interlocutory determination or (2) if the interest is simply to not affect the parties' rights to appeal an interlocutory determination; that is, to not make the interlocutory determination unappealable if such determination is not challenged immediately after it is entered.

We will first consider the latter consideration given it's the most straightforward. Under Puerto Rico administrative law, the terms to appeal (known more specifically as "judicial review") only activate when the agency notifies the final decision **and makes it clear to the parties** of their rights for reconsideration and judicial relief and the applicable terms for doing so. This notification—known as adequate notification—is a jurisdictional requisite. *See* Maldonado v. Junta Planificación, 171 DPR 46, 57–58 (2007). So, there is no

need for concern on the part of the Bureau about affecting the rights of the parties to seek judicial review.

Now, the first consideration: the interest to avoid judicial review of an interlocutory determination. As can be surmised from the notification rule explained above, the PREB can simply notify its interlocutory determination without recognizing the right for judicial review in order to avoid activating the court's jurisdiction. However, this could mean that an affected party may seek judicial relief seeking and order directed to the PREB to issue the adequate notification. Notwithstanding, it's imperative for the court to solve the administrative decision to be final.

It is our opinion that a revenue requirement determination can be a final determination insofar that a rate design is independent of it. However, if the rate design itself is dependent on the revenue requirement, the determination of what revenues are necessary is inexorably part of the design. That is, the revenue requirement determination is a prior independent matter altogether. The elemental question is: Can the establishment of a revenue requirement be executed? Wouldn't that be properly done through the imposition of rate ultimately designed? The only thing that can be executed is the rate design once finished; therefore, the former cannot be characterized under law as a final decision. **As previously stated, under Puerto Rico Law a ruling is final only if it can be executed**.

However, assuming *arguendo* that the revenue requirement decision could be final in the sense that it activates the rights of judicial review, it may very well be in the interest of the PREB to issue a <u>partial final determination</u> complying with the formalities Puerto

Rico Courts used when entering a ruling under Rule 42.3. When a party appeals a ruling as this, the Court of Instance can very well continue with the other issues under its consideration: there is no stay. Therefore, the rate design phase is not affected. Even though that may require efforts before Courts and the PREB, it could also be beneficial in the "final" final rate determination because the judicial review of that decision will be limited to the design of the rate and not on the financial needs of the system.

4. Duration limitation for provisional rates

> Section 6A(e) of Act 83-1941 (the Organic Act of the Puerto Rico Electric Power Authority) addresses provisional rates (called "temporary rates" in the English translation). This subsection includes this language (emphasis added):
>
> > Said temporary rate shall remain in effect during the period of time needed by the Commission to evaluate the rate modification request proposed by the Authority and issue a final order thereon, and up to the date on which the new bill is implemented, which shall not exceed sixty (60) days after the approval of the rate, *unless the Commission extends such term for just cause.*

a. Does the italicized phrase, allowing the Commission to extend the term for "just cause," allow the Energy Bureau to keep the provisional rate in effect through the entire time needed to conduct evidentiary procedures on both the revenue requirement and the rate design? Is the need to conduct sufficient evidentiary procedures to correct rates that have not changed in eight years "just cause"? Would the consequence of ceasing the provisional rate after 60 days be a reversion to the 2017 rates that apparently all agree are the wrong rates?

Indeed the "need to conduct sufficient evidentiary procedures" constitutes just cause under the statute. However, the true just cause here—and should be articulated as such—is the structural underfunding from the Rate Order of 2017. Reverting from the provisional rate to the 2017 rate would harm the effectiveness of cost collections.

Notwithstanding the foregoing, the PREB is still conducting an investigative proceeding regarding the cash flow issues of the system that could very well end in establishing an emergency rate under article 6.25 (d) of Act 57-2014. Without entering details given its confidential nature, our suggestion is to look at these two rates jointly.

b. Section 6.25(e) of Act 57-2014 has language similar to that in Section 6A(e) of Act 83-1941, except that the Act 57 language lacks the "just cause" addition. Is there any legal reason why the Energy Bureau cannot rely on the Act 83 language, especially since that language applies to rates charged by PREPA, which is what we have in our situation?

The applicable law to this case would be Act 83-1941. Act 57-2014 applies subsidiarily in that regard given that the more specific provisions are on Act 83-1941. This is a general Puerto Rico principle of statutory construction.

c. In both the Act 83 language and the Act 57 language, what is the referent of the word "which" in the phrase "which shall not exceed sixty (60) days after the approval of the rate"? Is the referent the phrase "the period of time needed"? Or is the referent the phrase "the date on which the new bill is implemented"? Could the Legislature have meant that the Energy Bureau has to process a request for a billion-dollar revenue requirement and a complex rate design in only 60 days, otherwise the rates charged would revert to the very rates that are being questioned?

The literal reading (and only one, in our opinion) is that the provisional rate can only be in effect for 60 days since. Act 83-1941, however, uses the phrase just cause in the same provision. That is not the case in Act 57-2014. Nonetheless, just cause is a universal concept in administrative law and there is no rational reason to conclude that absent an express prohibition, there is a bar on extending the provisional rate for a longer period

under Act 57-2014. We want to make it clear that this is a case squarely under Act 83-1941 that don't need to address these legal questions.

5. Practical question

When FY 2026 begins on July 1, 2025, PREPA, LUMA, and Genera will be receiving and spending revenue arising from provisional rates. Assume that those provisional rates will be based on a proposed FY 2026 budget that the Energy Bureau has not yet approved. If the Energy Bureau, at the end of the proceeding sets permanent rates below the provisional rates, the companies would already have spent an amount exceeding what the permanent rates support. Where then would the money come from to refund to customers their overpayments during that interim period? Are there only two choices—(a) the customers' own future payments, or (b) prospective underspending, after the Energy Bureau's decision, relative to the approved budget? Are there other ways to avoid this problem?

If consumers overpay because the provisional rate was higher than needed, they will have a credit, as in any case when there is an overpayment. What was "overspent" is not an issue, because we must presume that the "overspending" was on legitimate operational expenses. That is, "overspent" line items are simply line items that were paid at a time that was not the most appropriate. However, this appropriateness is in a way artificial since it is a matter of timing, not a matter of legitimacy because they would have been spent prospectively anyhow.

So, the solution is to credit the consumer accounts prospectively (the length of time to pay the credits would depend on the total amount to be credited) and there is no underspending prospectively because legitimate operational expenses were incurred with the money received in advance of the credit. The premise is that the expenses

incurred when the clients were overcharged were legitimate and budgeted expenses that would have been spent if there was no credit.

WHEREFORE, it is respectfully requested that the PREB take into consideration the foregoing.

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, March 13th, 2025.

FERNANDO E. AGRAIT LAW OFFICE
EDIFICIO CENTRO DE SEGUROS
OFICINA 414
701 AVENIDA PONCE DE LEON
SAN JUAN, PUERTO RICO 00907
Tel:(787) 725-3390-3391
Fax: (787) 724-0353

***/s/* LCDO. FERNANDO E. AGRAIT**
T.S. Núm. 3772
Email:agraitfe@agraitlawpr.com

***/s/* LCDO. JOSÉ POU ROMÁN**
T.S. Núm. 23,523
Email: jpouroman@outlook.com