

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

**IN RE:** CERTIFICATE OF ENERGY  
COMPLIANCE

**CASE NO.:** NEPR-AP-2022-0001

**SUBJECT:** Petition for Issuance of  
Certificate of Energy Compliance in  
Accordance with Act 120-2018.

**RESOLUTION AND ORDER**  
**(Energy Compliance Certificate)**

**I. Introduction**

For over eighty (80) years Puerto Rico's Electrical System has been vertically integrated with the Puerto Rico Electric Power Authority ("PREPA") controlling the entire production sequence, that is, generation,<sup>1</sup> transmission, and distribution of electric power.<sup>2</sup> As the sole electric utility for the island of Puerto Rico, PREPA serves about 1.5 million customers. Despite its operation as a "government monopoly," for years PREPA has been unable to offer an efficient service at a reasonable cost for its customers.<sup>3</sup> This condition was aggravated after the impact of hurricanes Irma and María, which occurred during the month of September 2017.<sup>4</sup> The Government of Puerto Rico developed and implemented a plan intended to transform Puerto Rico's energy sector and PREPA.

Due to the dire conditions of the Electrical System, the Government of Puerto Rico recognized the need to transform it into a modern, sustainable, reliable, efficient, cost-effective, and resilient one.<sup>5</sup> Accordingly, Act 120-2018 was enacted to set the legal framework for such transformation.<sup>6</sup> Act 120-2018 empowers PREPA to sell its assets related to electric power generation<sup>7</sup> and transfer or delegate any of its operations, functions, or services.<sup>8</sup> It also empowers PREPA and the Puerto Rico Public-Private Partnerships Authority ("P3 Authority") to carry out the processes through which such transactions will be executed.<sup>9</sup>

The transformation of electrical system envisions that the power generation facilities be owned by private parties while the Transmission and Distribution System ("T&D System") remains in the hands of PREPA. Therefore, Act 120-2018 establishes several limitations to PREPA Transactions involving PREPA's Assets devoted to electric power generation. It provides that, (a) all the PREPA Assets devoted to electric power generation may not be sold, or otherwise disposed of or assigned to a single Contractor under a Partnership Contract or

<sup>1</sup> PREPA generates its electricity through a diverse source of assets that utilizes residual fuel, diesel, natural gas, and other sources.

<sup>2</sup> See, *Puerto Rico Electric Power System Transformation Act*, as amended ("Act 120-2018"), *Statements of Motives*.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> PREPA has a total installed generation capacity of approximately 4,785 MW consisting of base-load generation plants and gas turbine peaking plants located throughout the island of Puerto Rico. However, due certain limitations, PREPA's dependable generation capacity is approximately 3,600 MW.

<sup>8</sup> *Id.*; see also, Section 5(a) of Act 120-2018. 22 L.P.R.A. § 1115(a).

<sup>9</sup> *Id.*



a Sales Contract, (b) no Contractor shall sell to another Contractor any asset acquired from PREPA devoted to electric power generation without the consent of the Legislature, and (c) under no circumstances, a PREPA Transaction may constitute or authorize an electric power generation monopoly.<sup>10</sup> However, Act 17-2019<sup>11</sup> provides that the operation of the Legacy Power Generation Assets shall be transferred to one or more electric power companies solely to be operated during their useful life pursuant to the IRP.<sup>12</sup>

PREPA may only sell and dispose of PREPA Assets related to electric power generation through the process established in Act 120-2018 and may only conduct transactions related to electric power generation, distribution and transmission, metering, and any other PREPA function, service, or facility through Partnership Contracts.<sup>13</sup> Any agreement arising from Act 120-2018 shall be entered into pursuant to the legal and administrative framework that regulates Public-Private Partnerships<sup>14</sup> and, thus, for such purposes, Act 120-2018 establishes the process that shall apply to any transaction that establishes a Public-Private Partnership for any PREPA function, services, or facility or the process to the sale, transfer, or otherwise disposal of PREPA Assets related to electric power generation.<sup>15</sup>

As further elaborated below, for any transaction that establishes a Public-Private Partnership in accordance with Act 120-2018, the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") shall certify that the Preliminary Contract complies with Act 17-2019 and its regulatory framework.<sup>16</sup>

## II. Relevant Background

### A. First Petition

On October 21, 2022, the P3 Authority filed before the Energy Bureau a document titled *Puerto Rico Public-Private Partnerships Authority's Request for Issuance of Certificate of Energy Compliance and Request for Confidential Treatment* ("First Petition"). The First Petition included these documents: Exhibit 1: First Preliminary Contract<sup>17</sup> and Exhibit 2: the Report.<sup>18</sup> As part of the First Petition, the P3 Authority also requested the Energy Bureau to treat and designate the First Preliminary Contract and the Report as confidential documents.<sup>19</sup>

Through the First Petition, the P3 Authority requested the Energy Bureau to issue, within thirty (30) days, a Certificate of Energy Compliance for the First Preliminary

<sup>10</sup> Section 8(h) of Act 120-2018.

<sup>11</sup> Known as *Puerto Rico Energy Public Policy Act* ("Act 17-2019").

<sup>12</sup> Act 17-2019, Section 1.2(a).

<sup>13</sup> See, Act 120-2019, Section 5(b).

<sup>14</sup> Except as otherwise provided, capitalized terms used but not otherwise defined in this Resolution and Order have the meaning ascribed to them in, as applicable, Act 120-2018, Act 29-2009, Act 57-2014, Act 17-2019, the Report (as defined below), and the Preliminary Contract (as defined below).

<sup>15</sup> *Id.*

<sup>16</sup> See, Act 120-2018, Section 2(d).

<sup>17</sup> See, PUERTO RICO THERMAL GENERATION FACILITIES OPERATION AND MAINTENANCE AGREEMENT dated as of [●], 2022, by and among [THE PUERTO RICO ELECTRIC POWER AUTHORITY] [PREPA GENCO, LLC] as Owner, THE PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY as Administrator, and [REDACTED-CONFIDENTIAL] as Operator ("First Preliminary Contract").

<sup>18</sup> See, *Partnership Committee Report, Puerto Rico Public-Private Partnership for the Puerto Rico Electric Power Thermal Generation Facilities*, dated October 17, 2022 ("Report").

<sup>19</sup> See, First Petition, pp. 6-16.



Contract, which relates to a PREPA Transaction (the “LGA PREPA Transaction”), in accordance with the provisions of Act 120-2018, Act 29-2009 and Act 57-2014<sup>20</sup>.

The First Preliminary Contract relates to the *Request for Proposals Puerto Rico Electric Power Thermal Generation Facilities — RFP 2020-1*, issued by the P3 Authority on November 10, 2020, pursuant to Act 120-2018 Act 17-2019 and Act 29-2009<sup>21</sup> for the delegation of the operation and maintenance functions of the base-load generation plants and gas turbine peaking plants throughout the island of Puerto Rico and defined by the P3 Authority as the “Legacy Generation Assets.” The P3 Authority defines the Legacy Generation Assets (“LGA”) excluding PREPA’s hydroelectric power plants. However, note that such exclusion does not arise from the definition of *Legacy Power Generation Assets* in Section 1.2(a) of Act 17-2019.<sup>22</sup>

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**B. Second Petition**

On November 17, 2022, the P3 Authority filed a document titled *Puerto Rico Public-Private Partnerships Authority’s Motion Submitting Documents and Requesting Confidential Treatment* (“Second Petition”) through which it requested the Energy Bureau to take notice of the documents included therein and grant confidential treatment. The P3 Authority stated that it acknowledged that filing the Second Petition triggered a new deadline for issuing a Certificate of Energy Compliance by the Energy Bureau.<sup>23</sup> The P3 Authority annexed the following documents to the Second Petition: Exhibit 1: *Memorandum Regarding Comments on the Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement, Draft of October 21, 2022*, which includes a redline version of the Preliminary Contract with certain amendments, identified as Exhibit A (“Second Petition Memorandum”), and an amended version of the First Preliminary Contract (“Second Preliminary Contract”), identified as Exhibit B.

On November 21, 2022, the Energy Bureau issued a Resolution (“November 21 Resolution”) through which it determined that the P3 Authority withdrew the First Preliminary Contract and through the Second Petition it requested the Energy Bureau to evaluate the Second Preliminary Contract and issue an Energy Compliance Certificate in connection therewith. However, the Energy Bureau clarified that for procedural economy, it would use all the documents submitted by the P3 Authority in the instant case to evaluate the Second Preliminary Contract, including without limitation, the Report.

On December 16, 2022, the P3 Authority filed a document titled *Puerto Rico Public-Private Partnerships Authority’s Petition to Withdraw November 17<sup>th</sup> Filing and to Hold in Abeyance its Request for Issuance of Certificate of Energy Compliance, as Amended, and Requesting Further Confidential Treatment of Documents Submitted* (“December 16 Motion”), through which it requested the Energy Bureau to: (i) consider withdrawn its November 17 filing and hold in abeyance the Second Petition, and (ii) treat as confidential the December 16 Motion, all the documents submitted and any additional document that might be submitted until the execution of the Transformation Contract.<sup>24</sup>

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**C. Third Petition**

On December 23, 2022, the P3 Authority filed a document titled *Puerto Rico Public-Private Partnerships Authority’s Motion Submitting Documents, As Amended, and*

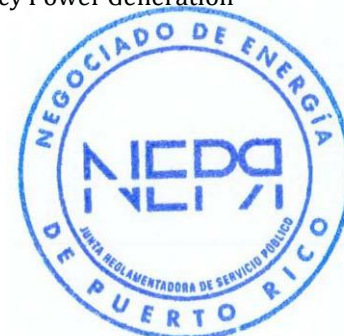
<sup>20</sup> Known as *Puerto Rico Energy Transformation and RELIEF Act*, as amended (“Act 57-2014”).

<sup>21</sup> Known as *Public-Private Partnership Act*, as amended (“Act 29-2009”).

<sup>22</sup> Nevertheless, the distinction is not relevant for purposes of this Resolution and Order, because the base-load generation plants and gas turbine peaking plants considered by the P3 Authority are Legacy Power Generation Assets for purposes of Act 17-2019.

<sup>23</sup> See, Second Petition, p. 2, footnote 3.

<sup>24</sup> December 16 Motion, pp. 3-4.



requesting Confidential Treatment (“Third Petition”) through which it requested the Energy Bureau to (i) resume the instant case and take into consideration the revised Preliminary Agreement (“Third Preliminary Contract”) attached therein as Exhibit I in considering and issuing the certificate of Energy Compliance required under Act 120-2018; and (ii) treat as confidential the Third Petition and all the documents submitted theretofore and any additional document that might be submitted until the execution of the Transformation Contract.

#### **D. Withdrawal of the Second Petition and Confidential Treatment of Documents**

On December 27, 2022, the Energy Bureau issued a Resolution (“December 27 Resolution on Second Preliminary Contract Withdrawal”) through which it granted the P3 Authority’s request to deem withdrawn the Second Preliminary Contract.

The Energy Bureau also issued on December 27, 2022, a Resolution (“December 27 Resolution on Confidential Treatment”) through which it granted confidential designation and treatment to the First Petition, the First Preliminary Contract, the Report, the Second Petition, the Second Petition Memorandum, the Second Preliminary Contract, the December 16 Motion, the Third Petition, and the Third Preliminary Contract. Further, the Energy Bureau deemed that the legal principles regarding confidentiality of the aforementioned documents are also applicable to the documents issued by the Energy Bureau in the instant case, which are the following: (i) the November 21 Resolution, (ii) December 27 Resolution on Second Preliminary Contract Withdrawal; (iii) the December 27 Resolution on Confidential Treatment; and this Resolution and Order. Likewise, the Energy Bureau determined that such analysis applies to the documents to be issued by the Energy Bureau in the instant case (*e.g.*, this Resolution and Order). Therefore, the Energy Bureau determined that the confidential designation extends to each document that forms part or will form part of the administrative record.

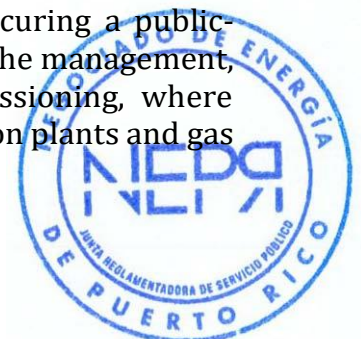
#### **E. Petition**

On January 13, 2023, the P3 Authority filed a document titled *Puerto Rico Public-Private Partnerships Authority’s Petition to Withdraw December 23th Filing and to Hold in Abeyance its Request for Issuance of Certificate of Energy Compliance, as Amended, and Requesting Further Confidential Treatment of Documents Submitted* (“January 13 Motion”), through which it requested the Energy Bureau to: (i) consider withdrawn its December 23 filing and hold in abeyance the Third Petition, and (ii) treat as confidential the January 13 Motion, all the documents submitted and any additional document that might be submitted until the execution of the Transformation Contract.

On January 14, 2023, the P3 Authority filed a document titled *Puerto Rico Public-Private Partnerships Authority’s Motion Submitting Documents, As Further Amended, and requesting Confidential Treatment* (“Petition”) through which it requested the Energy Bureau to, (i) resume the instant case and take into consideration the revised Preliminary Agreement (“Preliminary Contract”) attached therein as Exhibit I in considering and issuing the certificate of Energy Compliance required under Act 120-2018; (ii) treat as confidential the Petition and all the documents submitted theretofore and any additional document that might be submitted until the execution of the Transformation Contract; and (iii) either strike or withdraw from the record the previous versions of the Transformation Contract filed with the PREB in order to avoid unnecessary confusion.

#### **F. Scope of the Petition**

On July 2020, the P3 Authority commenced a process aimed at procuring a public-private partnership with PREPA (*i.e.*, the LGA PREPA Transaction) for the management, operation, maintenance, management of fuel supply, and decommissioning, where applicable (“LGA Project”), of one (1) of more of the base-load generation plants and gas



turbine peaking plants throughout Puerto Rico (i.e., the LGA).<sup>25</sup> The LGA PREPA Transaction entails the engagement of a private operator that could bring its experience and knowledge and best practices from the U.S. mainland and other jurisdictions in the operating and management of PREPA's LGA.<sup>26</sup> Pursuant to the Preliminary Contract, the proposed LGA operator shall be responsible for:

*all management, operation, maintenance, repair and other related services with respect to the Legacy Generation Assets, subject to the terms and conditions of the Agreement, including (1) day-to-day operation and maintenance (including any major maintenance) services, including operation of the Legacy Generation Assets to generate electricity and deliver it into the T&D System; (2) identifying, justifying and managing any required maintenance capital expenditures; (3) providing routine inspections of the Legacy Generation Assets; (4) providing annual operating tests (the Annual Performance Test) of the Legacy Generation Assets in coordination with T&D Operator; (5) establishing appropriate and customary safety work rules and practices; (6) developing an operation and maintenance training program; (7) provisioning, storing and maintaining the inventory of spare and consumable parts, including Capital Spare Parts, for the Legacy Generation Assets; (8) establishing and maintaining a computerized maintenance management system for the Legacy Generation Assets; (9) performing scheduled and emergency maintenance, repair and replacement of equipment, including any balance of plant equipment, painting, and cleaning, among others; (10) managing Planned Outages, Unplanned Outages and Forced Outages and restoration of power supply to the transmission grid; (11) coordinating business continuity and emergency planning and storm restoration and recovery in coordination with T&D Operator; (12) procuring and managing water or auxiliary power supply, as applicable; (13) maintaining and repairing fuel and water systems, including tanks, pumps, filters, and piping, as required; (14) procuring and managing the delivery and quality testing of fuel; (15) liaising with the T&D Operator or any of their assignees or successors regarding dispatch, dispatch planning and related T&D system matters and providing required information; (16) interfacing with and providing reports to regulators including PREB and with environmental compliance agencies such as the EPA, the Puerto Rico Department of Natural and Environmental Resources, the Occupational Safety and Health Administration and others, as may be required; (17) obtaining, complying with and maintaining licenses, permits, consents and the Consent Decree, as necessary; (18) providing periodic reports regarding programmed and non-programmed operations, maintenance, repairs, services and modifications performed and to be performed; (19) preparing for and assisting in, or subcontracting for and overseeing, the decommissioning of the relevant plants as outlined in the Integrated Resource Plan (including any future integrated resource plans) in coordination with PREPA/the T&D Operator, Owner and PREB; (20) participating in emergency planning and drills led by the T&D Operator, as needed; (21) conducting emergency planning and drills independent of T&D Operator; (22) assisting with the transition of the plants to third parties or to new uses (synchronous condensers, etc.) to the extent certain of the plants are removed from the O&M Agreement and (23) developing and maintaining a good neighbor program.<sup>27</sup>*

The LGA PREPA Transaction is intended to achieve the following objectives for the Legacy Generation Assets: (1) introduce private sector operational expertise; (2) facilitate managerial continuity of long-term planning; (3) improve certainty and self-development

<sup>25</sup> See, First Petition, pp. 2-3.

<sup>26</sup> See, Report, pp. 27-28.

<sup>27</sup> See, Preliminary Contract, Annex IX, Section IA, pp. 1-2.



for employees; (4) implement improvements in the safety, reliability, power quality and efficiency of the Legacy Generation Asset operations; (5) facilitate Puerto Rico's transition to PREPA's Vision of the Future of Power in Puerto Rico described in the Approved IRP; (6) implement operational excellence of electricity generation facilities consistent with prudent industry practices, including improved safety and compliance with environmental and other applicable regulatory requirements; and (7) increase cost efficiency while meeting the operational goals noted above in coordination with the T&D Operator.<sup>28</sup>

A similar process to the one at issue in the instant case was followed for the PREPA Transaction pertaining to the operation and maintenance of the T&D System by a private partner (*i.e.*, LUMA<sup>29</sup>). On June 17, 2020, the Energy Bureau issued a Resolution and Order on Case No. NEPR-AP-2020-0002, through which it issued an Energy Compliance Certificate in connection with the T&D O&M Agreement<sup>30</sup>. Likewise, through this Resolution and Order, the Energy Bureau evaluates the Petition and determines whether the Preliminary Contract complies with the Puerto Rico Energy Public Policy and regulatory framework.

### III. Statutory Framework

#### A. P3 Authority's Role in PREPA's Transformation

Act 120-2018 entrusted the implementation of PREPA's transformation to the P3 Authority.<sup>31</sup> Aligned with this legislative intent, the P3 Authority, as a minimum, shall consider when evaluating proponents and their offers concerning a PREPA Transaction these objectives: to expedite a fair and transparent process for the establishment of Public-Private Partnerships with any functions, services, or facilities of PREPA, and to sell the power generation assets thereof, thus placing such assets in the private hands of those who show a fair balance between the commercial interests and the sense of social responsibility; and with the operational, technological, and financial capacity to transform the electric power system into one that is modern, offers reasonable rates, provides universal access, and has efficient and environmentally-friendly energy sources, as well as an infrastructure that is as resistant or resilient as possible to weather and natural events; with financial and legal conditions reasonable for the People of Puerto Rico; and promotes broad access and swiftness in the rendering of direct services to its customers.<sup>32</sup>

The P3 Authority was designated as the sole Government Entity authorized to and responsible for (1) implementing the public policy on PREPA Transactions conducted in accordance with Act 120-2018; (2) determining the Functions, Services, or Facilities for which such Partnerships shall be established, subject to the priorities, objectives, and principles established in the energy policy and the regulatory framework to be developed pursuant Section 9 of Act 120-2018; and (3) determining which PREPA Assets related to electric power generation shall be sold or transferred through -Sales Contracts.<sup>33</sup> If the P3 Authority determines that a Partnership shall not be established for a Function, Service, Facility, or other PREPA Asset, said Function, Service, Facility, or PREPA Asset may be developed by PREPA as provided by Act 83-1941<sup>34</sup> or any other applicable law and it shall not be considered a PREPA Transaction.<sup>35</sup> Besides, Act 120-2018 expressly provides that

<sup>28</sup> See, Report, p. 27.

<sup>29</sup> LUMA Energy, LLC as ManagementCo and LUMA Energy ServCo, LLC as ServCo (collectively, "LUMA")

<sup>30</sup> *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* as of June 22, 2020 ("T&D O&M Agreement") by and among the P3 Authority, PREPA and LUMA. LUMA is the Operator of the T&D System pursuant to the T&D O&M Agreement.

<sup>31</sup> See, Section 3 of Act 120-2018.

<sup>32</sup> *Id.*

<sup>33</sup> See Section 5(b) of Act 120-2018.

<sup>34</sup> Known as the *Puerto Rico Electric Power Authority Act*, as amended ("Act 83-1941").



PREPA may only sell and dispose of PREPA Assets related to electric power generation through the process established and may only conduct transactions related to electric power generation, distribution, and transmission, metering, and any other PREPA function, service, or facility through Partnership Contracts.<sup>36</sup>

Aligned with the abovementioned principles, Section 5 of Act 120-2018 provides a detailed and rigorous process to be followed by the P3 Authority in connection to the execution of any PREPA Transaction. However, and as discussed in further detail below, the role of the Energy Bureau regarding such transactions is more limited. Once the P3 Authority completes the entrusted processes and negotiates a Proposed Contract, the Energy Bureau shall evaluate if the Proposed Contract complies with the energy public policy and the regulatory framework. Therefore, determinations concerning the overall benefits and adequacy of the proposed LGA PREPA Transaction and the specific financial and operational considerations related to the Proposed Contract are entrusted to the P3 Authority and, consequently, the Energy Bureau has limited authority to intervene in such matters.

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Act 120-2018 establishes the scope of the Energy Bureau's role to review the Preliminary Contract and issue a Certificate of Energy Compliance. The Energy Bureau reiterates that the P3 Authority is the entity entrusted by the legislature through Act 120-2018 to make the determination of selecting the proponent and ensuring its capacity to fulfill the requirements of Act 120-2018. Section 5(b)(1) designates the P3 Authority as the sole Government Entity authorized to and responsible for implementing the public policy on PREPA Transactions conducted in accordance with Act 120-2018. Section 5(e)(3) provides that the Selected Proponent should be one with the operational, technological, and financial capacity to transform the electric power system into one that is modern, offers reasonable rates, provides universal access, has efficient and environmentally friendly energy sources, as well as an infrastructure that is as resistant or resilient as possible to weather and natural events. Notably such provision does not establish that the P3 Authority must conduct a rate case as part of the solicitation process to confirm that the Selected Proponent will provide a reasonable rate. An analysis of the Report shows that the Selected Proponent was chosen because it is "well suited to bring to fruition the Government's goal of transforming the generation system into one that is customer-centric, resilient, reliable, affordable, and suitable by operating the Legacy Generation Assets efficiency, reliably, and safely until decommissioning such assets, paving the path for the integration of renewable generation resources."<sup>37</sup>

#### **B. Act 120-2018's Energy Compliance Certificate**

A PREPA Transaction consists of any transactions carried out in accordance with Act 29-2009 and Act 120-2018, whereby PREPA or the Government of Puerto Rico establishes one or more Partnerships (and enters into one or more Partnership Contracts) in connection with any of PREPA's functions, services, or facilities, or executes a Sales Contract for PREPA Assets related to electric power generation.<sup>38</sup> A Partnership Contract shall have the meaning provided in Act 29-2009, provided that, in the event of a PREPA Transaction, an Energy Compliance Certificate shall be required.<sup>39</sup>

A Partnership Contract is the contract executed by the Selected Proponent and the Partnering Government Entity to establish a Partnership, which may include, but shall not be limited to, a contract to delegate a Function, administer or render one or more Services, or conduct the design, building, financing, maintenance, or operation of one or more Facilities that are in themselves or are closely related to Priority Projects as established in

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See, Report, Section 6, pp. 67-68.

<sup>38</sup> See, Act 120-2018, Section 2(l).

<sup>39</sup> See, Act 120-2018, Section 2(f).



Section 3 of Act 29-2009.<sup>40</sup> A Partnership Contract may be, amongst others, a long-term administration and operation contract, and any other contract that separates or combines the design, building, financing, operation, or maintenance phases of the priority projects, as established in Section 3 of Act 29-2009.<sup>41</sup>

An Energy Compliance Certificate is defined as a *certificate* issued by the Energy Bureau in any PREPA Transaction, certifying that the Preliminary Contract complies with the Puerto Rico Energy Public Policy Act and its regulatory framework.<sup>42</sup> A Preliminary Contract refers to all the clauses and specific conditions of a Partnership Contract or Sales Contract agreed upon by the Partnership Committee and the Selected Proponent.<sup>43</sup>

For a PREPA Transaction, the Preliminary Contract shall include an Energy Compliance Certificate upon the submittal thereof for consideration of the Board of the Authority and PREPA. It shall have the same format and content as the Partnership or Sales Contract to be signed by the parties. Once the transaction has been ratified by the Legislative Assembly, the clauses, and conditions may not be amended without the approval of the Legislative Assembly.

Section 5(g) of Act 120-2018 provides the procedural requirements for the procurement of an Energy Compliance Certificate. In the pertinent part Section 5(g) provides that:

*[a]ny contract related to a PREPA Transaction shall require an Energy Compliance Certificate, as defined in this Act. The Partnership Committee shall submit to the Bureau the Report drafted pursuant to Section 9(g) of Act No. 29-2009 before submitting it to the Boards of Directors of the Authority and PREPA. The Bureau shall evaluate the Report, the information furnished, and the Preliminary Contract and issue an Energy Compliance Certificate if they comply with the energy public policy and the regulatory framework. The Energy Compliance Certificate or the resolution denying the issuance thereof shall state the basis for such determination. The Bureau shall have thirty (30) days from the date on which the Preliminary Contract was submitted to issue a Certificate of Compliance or a resolution to deny the issuance thereof. ... Once the Energy Compliance Certificate has been issued, any amendments made to the Preliminary Contract shall require the issuance of a new Energy Compliance Certificate. ... Reviews in connection with the Energy Compliance Certificate issued by the Bureau shall be filed with the Court of Appeals within a term of fifteen (15) days from the notice thereof.*

In accordance with the above discussed legal framework, before the consideration of the Energy Bureau is a Preliminary Contract for a PREPA Transaction, negotiated by the P3 Authority in accordance with Act 29-2009 and Act 120-2018. The Energy Bureau shall determine if it complies with the Puerto Rico Energy Public Policy and the regulatory framework.

## C. Puerto Rico Energy Public Policy and Regulatory Framework

### 1. Applicable Legal Provisions

The Puerto Rico's energy public policy and regulatory framework includes, but is not limited, to the following legislation: (a) Act 83-1941; (b) Act No. 114-2007, as amended, known as the *Electric Power Authority Net Metering Program* ("Act 114-2007"); (c) Act No. 83-2010, as amended, known as the *Green Energy Incentives Act of Puerto Rico* ("Act 83-2010"); (d) Act No. 82-2010, as amended, known as the *Public Policy on Energy Diversification by Means of*

<sup>40</sup> See, Act 29-2009, Section 2(i).

<sup>41</sup> *Id.*

<sup>42</sup> See, Act 120-2018, Section 2(d).

<sup>43</sup> See, Act 120-2018, Section 2(h).





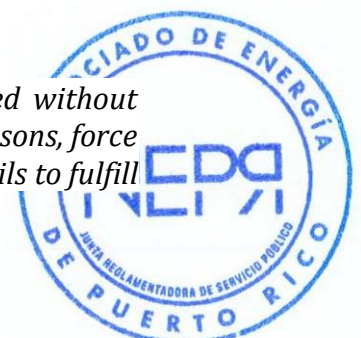
*Sustainable and Alternative Renewable Energy in Puerto Rico Act* (“Act 82-2010”); (e) Act 57-2014, as amended; (f) Act 120-2018, as amended; and (g) Act 17-2019.

Likewise, the energy regulatory framework also includes, without limitation, these rules issued by the Energy Bureau: (a) *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures*, Regulation No. 8543; (b) *Regulation on Mediation and Arbitration Procedures of the Puerto Rico Energy Commission*, Regulation No. 8558; (c) *Amendment to Regulation No. 8618 on Certification, Annual Fees, and Operational Plans for Electric Service Companies in Puerto Rico*, Regulation No. 8701; (d) *New Regulation on Rate Filing Requirement for the Puerto Rico Electric Power Authority’s First Rate Case*, Regulation No. 8720; (e) *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet*, Regulation No. 8815; (f) *Enmienda al Reglamento Número 8653, Reglamento sobre la Contribución en Lugar de Impuestos*, Regulation No. 8818; (g) *Regulation on the Procedure for Bill Review and Suspension of Electric Service Due to Failure to Pay*, Regulation No. 8863; (h) *Enmienda al Reglamento Núm. 9009, sobre el Procedimiento para la Revisión de Facturas Emitidas por la Autoridad de Energía Eléctrica de Puerto Rico Durante Situaciones de Emergencia*, Regulation No. 9018; (i) *Regulation on Integrated Resource for the Puerto Rico Electric Power Authority*, Regulation No. 9021; (j) *Regulation on Microgrid Development*, Regulation No. 9028; (k) *Reglamento sobre el Procedimiento para la Revisión de Facturas Emitidas por la Autoridad de Energía Eléctrica de Puerto Rico Durante Situaciones de Emergencia*, Regulation No. 9043; (l) *Enmienda al Reglamento 9043, Reglamento sobre el Procedimiento para la Revisión de Facturas Emitidas por la Autoridad de Energía Eléctrica de Puerto Rico Durante Situaciones de Emergencia*, Regulation No. 9051; (m) *Enmienda al Reglamento Núm. 8863, Reglamento sobre el Procedimiento para la Revisión de Facturas y Suspensión del Servicio Eléctrico por Falta de Pago*, Regulation No. 9076; (n) *Regulation on Energy Cooperatives in Puerto Rico*, Regulation No. 9117; (o) *Regulation for Performance Incentive Mechanisms*, Regulation No. 9137; (p) *Regulation on Electric Energy Wheeling*, Regulation No. 9138, (q) *Enmienda al Reglamento Núm. 8701, sobre Certificaciones, Cargos Anuales y Planes Operacionales de Compañías de Servicio Eléctrico en Puerto Rico*, Regulation 9182, (r) *Regulation for Demand Response*, Regulation No. 9246, (s) *Regulation for Energy Efficiency*, Regulation No. 9367, (t) *Regulation on Electric Energy Wheeling*, Regulation No. 9374. In addition, the subsequent regulations have been promulgated by the Energy Bureau and are pending for approval: (a) *Regulation for the Evaluation and Approval of Agreements between Electric Services Companies*; (b) *Proposed Regulation For the Evaluation and Approval of Agreements with Electric Power Service Companies*; (c) *Propuesta de Enmienda al Reglamento Núm. 8543, Reglamento de Procedimientos Adjudicativos, Avisos de Incumplimiento, Revisión de tarifas e Investigaciones*; (d) *Reglamento de Certificados de Energía Renovable y Cumplimiento con la Cartera de Energía Renovable de Puerto Rico*.

## 2. Act 17-2019

Section 1.4 of Act 17-2019 establishes the Guiding Principles regarding Puerto Rico's Electrical System. Such provision states that the activities or functions related to the electric power service shall be governed by the principles of efficiency, quality, continuity, adaptability, impartiality, solidarity, and equality. Section 1.4 describes in more detail each principle:

- i) *The efficiency principle compels the correct allocation and use of resources to guarantee that services are rendered at the lowest possible cost and that resources which compose the Electrical System are developed according to the best industry practices;*
- ii) *By virtue of the quality principle, electric power services rendered must meet the technical requirements and the reliability and quality standards established therefor;*
- iii) *The continuity principle implies that services shall be rendered without interruptions, other than those programmed due to technical reasons, force majeure, or fortuitous events, or as a penalty when a customer fails to fulfill*



*his obligations, and even in the event of bankruptcy, liquidation, audit, or substitution or termination of contracts entered into with the companies responsible for rendering such services;*

- iv) The adaptability principle leads to the incorporation of scientific and technological advances that improve the quality and efficiency of services rendered at the lowest possible cost;*
- v) The impartiality principle requires that, under the same conditions, consumers are treated equally regardless of their social condition and purchasing power, or the technical conditions or characteristics of the service rendered;*
- vi) The solidarity principle establishes that the design of the rate structure shall take into account the goal of providing affordable electricity prices to all consumers, particularly to low-income consumers.*
- vii) The equity principle promotes the attainment of a balanced and appropriate energy service coverage in the various regions and sectors of the Island in order ensure that the basic needs of the entire population are met.*

Act 17-2019 also establishes the Puerto Rico Energy Public Policy looking forward. Specifically, Section 1.5 lists various standards to further such Public Policy. Section 1.5 declares as public policy of the Government of Puerto Rico the following: (i) universal access to electric power service; (ii) electric power service model; (iii) energy regulatory entity and performance-based regulations; (iv) energy culture, education, research and development; (v) energy generation, efficiency and demand response programs; (vi) environmental responsibility; (vii) energy use in the public sector; (viii) distributed energy, energy storage and technology integration; (ix) infrastructure design, resilience, maintenance and security; and (x) customer service, participation and transparency.

### 3. Transferring the Operation of the Legacy Generation Assets

The first energy project pursued by the Government of Puerto Rico under the legal framework established by Act 120-2018 and Regulation 9078<sup>44</sup> was the private operation and management (the "T&D Project") of Puerto Rico's T&D System pursuant to a long-term contract.<sup>45</sup> Specifically, on October 31, 2018, the P3 Authority commenced the process to identify a private partner for the T&D Project and, on June 22, 2020, it announced that PREPA had entered into the T&D O&M Agreement<sup>46</sup> with LUMA as the T&D Operator.<sup>47</sup> Under T&D O&M Agreement, LUMA is responsible for operating maintaining and modernizing the T&D System.<sup>48</sup> The LGA Project represents the next critical phase in PREPA's transformation process.<sup>49</sup>

The foregoing proceedings are aligned with the transformation of the electric power system established by Act 17-2019. Section 1.8(b) of Act 17-2019 establishes the concession of the Transmission, Distribution, and Sale of Electric Power as well as of System Operations. Section 1.8(b) provides that, by December 31, 2019, or the closest date thereto, PREPA shall execute one or various Partnership Contracts, in accordance with Act 17-2019, Act 120-

<sup>44</sup> Known as *Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Partnership Contracts and Sale Contracts for the Transformation of the Electric System Under Act No. 120-2018, As Amended.*

<sup>45</sup> See, Report, p. 7.

<sup>46</sup> LUMA is the Operator of the T&D System pursuant to the T&D O&M Agreement.

<sup>47</sup> See, Report, pp. 22, 66.

<sup>48</sup> *Id.*, p. 22.

<sup>49</sup> *Id.*



2018, Act 29-2009 and the regulations, through which it shall transfer the transmission and distribution functions, the sale of electric power, the operation of the Energy Control Center, and all those activities related to such functions. Moreover, and more relevant to the instant case, Subsection (A) provides that PREPA shall transfer the operating, administrative, and/or maintenance functions with the Legacy Power Generation Assets on or before December 31, 2020.

#### 4. Selected Proponent's Performance Incentive Mechanisms

Section 6.25B of Act 57-2014 establishes that the Energy Bureau shall prescribe by regulations incentive and penalty mechanisms that consider Electric Service Companies' performance and compliance with the performance metrics in the Energy Public Policy. Such mechanisms have the purpose of encouraging energy companies to invest, in a cost-effective way, in infrastructure, technology, the incorporation of distributed generation, renewable energy sources, and services that inure to the benefit of the electrical system and consumers.<sup>50</sup>

In accordance with the powers vested on the Energy Bureau through Act 57-2014, Act 17-2019, and Act 38-2017,<sup>51</sup> on December 2, 2019, the Energy Bureau approved Regulation 9137,<sup>52</sup> which establishes the reporting requirements for all eligible Electric Service Companies, and outlines the process to establish Metrics,<sup>53</sup> its Targets,<sup>54</sup> and possible Financial Incentives<sup>55</sup> per type of company. In Article 2 of Regulation 9137, Section 6.3(j) of Act 57-2014 provides the Energy Bureau with the power and duty to "establish performance-based incentives and penalty mechanisms." Article 2 of Regulation 9137 further provides that it is the public policy of the Government of Puerto Rico that the Energy Bureau establish and use performance-based incentives and penalty mechanisms for Electric Power Service Companies "as well as mechanisms that ensure strict compliance with the Orders of the Energy Bureau." Among the mechanisms available to the Energy Bureau is the performance-based regulation.<sup>56</sup>

Article 3 of Regulation 9137 outlines the proceeding to implement performance incentive mechanisms.<sup>57</sup> First, the Energy Bureau will establish Metrics, Targets and Financial Incentives in an initial proceeding.<sup>58</sup> Thereafter, the Energy Bureau shall hold an annual proceeding to evaluate the relevant Companies' Performance Reports, to adjust the Performance Incentive Mechanisms, and to determine whether to establish, eliminate, or modify any Metric, Target, or Financial Incentive.<sup>59</sup> Any penalty or reward assessed or

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<sup>50</sup> *Id.*

<sup>51</sup> Known as *Administrative Procedure Act of the Government of Puerto Rico*, as amended ("Act 38-2017").

<sup>52</sup> Known as *Regulation for Performance Incentive Mechanism* ("Regulation 9137").

<sup>53</sup> "Metric" is defined by Section 1.7(10) of Regulation 9371 as a "quantifiable indicator which can be used and tracked over time to evaluate an entity's performance."

<sup>54</sup> "Target" is defined by Section 1.7(21) of Regulation 9371 as the "goal that may be associated with a Metric and against which, if it is so associated, a Company's performance shall be evaluated."

<sup>55</sup> "Financial Incentive" is defined by Section 1.7(8) of Regulation 9371 as "the financial reward or penalty that may be attached to a Target and which, if it is attached, is applied to a given Electric Power Service Company, for meeting or failing to meet such Target." Section 1.7(8) add that the Financial Incentive shall be expressed as an incentive fee paid in nominal U.S. dollars.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, Article 3.

<sup>58</sup> *Id.*, Section 3.1.

<sup>59</sup> *Id.*



imposed due to compliance or noncompliance with the Metrics and Targets, shall be implemented through an Order issued by the Energy Bureau.<sup>60</sup>

Section 7.1(c) of the Preliminary Contract refers to the Incentives and Penalties that shall apply to the Selected Proponent as Operator, which are described in Section III of Annex II thereto. Specifically, Section 7.1(c)(i) of the Preliminary Contract states that the Selected Proponent shall be eligible to receive Incentive Payments or be subject to Penalties as a deduction from the applicable Service Fee in any Contract Year (as defined in the Preliminary Contract). Section 7.1(c)(i) of the Preliminary Contract also states that the *Incentive Payments or Penalties* to be earned or incurred on any Contract Year shall be calculated as set forth in Section III of Annex II (*Compensation – Incentives and Penalties*).

Section 7.1(c)(ii) of the Preliminary Contract establishes that, within the term set forth, the Selected Proponent shall submit an Incentives and Penalties Report,<sup>61</sup> which shall include the separate Fuel Optimization Report, to the P3 Authority and the Energy Bureau with: (a) supporting performance data, information and reports evidencing its performance regarding one (1) or more of the categories of Incentive and Penalties, and (b) based thereon, its good faith calculation of the proposed Incentive Payment and/or Penalties, in each case for the relevant Contract Year or Contract Years. Section 7.1(c)(iii) of the Preliminary Contract states that the P3 Authority shall have a period of one hundred twenty (120) days to review the Incentives and Penalties Report and meet with the Operator to discuss such Report until an agreement is reached.

Pursuant to Section 7.1(c)(iv) of the Preliminary Contract, if the P3 Authority, as Administrator: (a) does not deliver to the Selected Proponent a written statement describing any disagreements with the Incentives and Penalties Report during the review period described in Section 7.1(c)(iii) (in which case it will be deemed as if the P3 Authority agrees with the Incentives and Penalties Report); (b) the Selected Proponent and the P3 Authority reach a resolution with respect to the matter; or (c) the P3 Authority has no disagreements with the Incentives and Penalties Report, then PREPA shall pay the Incentive Payment as provided in Section 7.1(c)(v) to the Preliminary Contract.<sup>62</sup>

Although Section 7.1(c) may suggest that penalties or reward assessed or imposed due to compliance or noncompliance with the Metrics and Targets, shall be implemented without the Energy Bureau's intervention,<sup>63</sup> the Energy Bureau **CLARIFIES** that such interpretation is incorrect. The payment of incentives and/or imposition of penalties for non-compliance with the established Metrics and Targets is within the purview of the Energy Bureau.

Likewise, Section 7.1(c)(i) of the Preliminary Contract may suggest there will be no need to establish performance-based incentives and penalty mechanisms regarding the Preliminary Contract, since it states that the *Incentive Payments or Penalties* to be earned or incurred on any Contract Year shall be calculated as set forth in Section III of Annex II (*Compensation – Incentives and Penalties*). To avoid doubt, the Energy Bureau **EMPHASIZES** that the foregoing would be an incorrect interpretation. Incentives Payments and Penalties for performance under the Preliminary Contract shall be evaluated and approved by the Energy Bureau in accordance with the applicable laws and regulations.

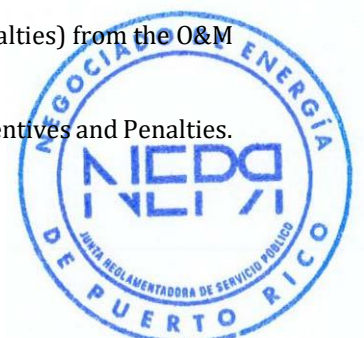
Pursuant to the foregoing discussion, the Energy Bureau **DETERMINES** that the Preliminary Contract shall be subject to the applicable legal provisions and the proceeding or proceedings that the Energy Bureau establishes regarding the Selected Proponent's compliance with the applicable Performance Incentive Mechanisms. Nothing in the Preliminary Contract regarding the Performance Incentive Mechanisms applicable to the Selected Proponent shall be considered contrary to the Energy Bureau's authority over the

<sup>60</sup> *Id.*, Section 3.4.

<sup>61</sup> Report has the meaning set forth in Section 7.1(c)(ii) (Service Fee – Incentives and Penalties) from the O&M Agreement.

<sup>62</sup> Section 7.1(c) addresses additional matters in connection with the abovementioned Incentives and Penalties.

<sup>63</sup> PREB Regulation 9137, Section 3.4.



matter, nor will it limit such authority in any way. The issues in relation thereto will be addressed in detail through one or more separate proceedings established by the Energy Bureau.

5. *The Energy Bureau's Authority to Impose Penalties to the Selected Proponent*

Section 7.1(c)(vii) of the Preliminary Contract provides that each Penalty (as defined in the Preliminary Contract) will be the Owner's sole and exclusive remedy and the Selected Proponent's sole and Exclusive liability with respect to the circumstances to which the relevant Penalty applies and any breach or other act or omission attributable to the Selected Proponent that directly or indirectly caused or contributed to such circumstances, except to the extent that such circumstances resulted from a breach of Applicable Law. It also states that if such breach of Applicable Law results in the imposition of a fine or other penalty, then such fine or other penalty shall be in lieu of, and not in addition to, the Penalty under the Preliminary Contract.

Although Section 7.1(c)(vii) of the Preliminary Contract may suggest a limitation and/or cap regarding Energy Bureau's authority to impose penalties to the Selected Proponent, the Energy Bureau **CLARIFIES** that such interpretation is incorrect. The Energy Bureau's authority to impose penalties to Electric Service Companies remains unaltered and, therefore, the Selected Proponent is subject to it. Moreover, such authority to impose penalties is independent to that of the Owner or Administrator under the Preliminary Contract. Therefore, the penalties that the Owner or the Administrator impose on the Selected Proponent cannot be in lieu of the penalties which the Energy Bureau can establish pursuant to the applicable laws and regulations.

Notwithstanding the foregoing, the Energy Bureau does intent to duplicate penalties imposed by the Owner or Administrator, if any, for a given circumstance. Rather, if the Energy Bureau were to impose a penalty for an act or omission which was already penalized by the Owner or the Administrator under the Preliminary Contract, the Energy Bureau would deduct from its penalty the amount previously imposed by the Owner or the Administrator.

6. *Evaluation of Selected Proponent's Budget Review Process*

Section 2.1 of Act 57-2014 provides as the public policy of Puerto Rico that the cost of the electric power generated, transmitted, and distributed in Puerto Rico shall be affordable, just, and nondiscriminatory for all consumers. Section 2.1 (r) of Act 57-2014 states that an independent electric power regulatory entity with broad powers and duties (*i.e.*, the Energy Bureau) shall ensure compliance with the public policy on energy, the provisions, and mandates of Act 57-2014, and ensure that energy costs are just and reasonable by overseeing and reviewing the rates of PREPA and any other Electric Service Company. Section 6.3 of Act 57-2014 states that the Energy Bureau shall have, among others, the power and duty to oversee and ensure execution and implementation of the public policy on the electric power service of Puerto Rico, and review and approve and, if applicable, modify the rates or fees charged by Electric Service Companies in Puerto Rico in connection with any matter directly or indirectly related to the provision of Electric Services.<sup>64</sup>

Act 57-2014 established procedures and standards for the Energy Bureau to evaluate and establish electric rates to be charged by PREPA.<sup>65</sup> Section 6.25(a) of Act 57-2014 requires PREPA's rate to be "just and reasonable and consistent with sound fiscal and operational practices which result in a reliable service at the lowest reasonable cost."

<sup>64</sup> Act 57-2014, Section 6.3(a) and (k).

<sup>65</sup> Act 57-2014, Section 6.25(b).



To carry out the foregoing requirements, the Energy Bureau approved Regulation 8720,<sup>66</sup> establishing the information requirements with which PREPA had to comply when submitting its petition for new rates. In an ordinary rate proceeding, a regulator determines the total revenue needed to provide service, allocates among customer classes the responsibility for paying that revenue, and then establishes rates for each customer class so that, when those rates are paid, the utility receives the revenue it needs from the customer classes responsible for providing that revenue.

In accordance with the above, the Energy Bureau established rates for each customer class through the Final Resolution and Order issued in *In Re: Revisión de Tarifas de la Autoridad de Energía Eléctrica de Puerto Rico*, Case No. CEPR-AP-2015-0001 on January 10, 2017 (“2017 Rate Order”). Section III of Part Four of the 2017 Rate Order specifically provides that the Energy Bureau will adopt, among others, an annual budget examination procedure designed to impose discipline on PREPA’s spending.<sup>67</sup> The 2017 Rate Order outlines there will be a series of one-year budget examinations that occur between each three-year rate case.<sup>68</sup> The procedures established by the 2017 Rate Order have the purpose of enforcing the Energy Bureau’s duty to oversee the compliance with Puerto Rico’s energy public policy, as provided in Act 57-2014. Specifically, such procedures further the establishment of just and reasonable rates consistent with sound fiscal and operational practices and which shall result in a reliable electric service at the lowest reasonable cost.

Pursuant to the 2017 Rate Order, as part of LUMA's obligations as the Operator of the T&D System, the Energy Bureau established certain parameters regarding the review of LUMA's budgets, specifically, reviewing, and approving, denying, or proposing modifications thereto.

On February 24, 2021, LUMA commenced the filing of the required documents for the Energy Bureau to review and approve the components of LUMA's Initial Budgets.<sup>69</sup> The Energy Bureau opened the docket in *In re: Review of LUMA's Initial Budgets*, Case No. NEPR-MI-2021-0004 (“LUMA's Initial Budgets Case”). Through LUMA's Initial Budgets Case, the Energy Bureau approved the FY2022 Initial Budgets proposed by LUMA, subject certain conditions established.<sup>70</sup>

Section 7.3 of the Preliminary Contract includes provisions pertaining to the Selected Proponent’s O&M Budgets. Section 7.3(a) of the Preliminary Contract provides that the Selected Proponent as Operator, shall (within the term set forth) meet with LUMA as the T&D Operator, the P3 Authority as Administrator, and other relevant parties to determine the allocation of the base rate and the resulting revenues among the budgets that certain parties must prepare.

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<sup>66</sup> Known as *New Regulation on Rate Filing Requirement for the Puerto Rico Electric Power Authority's First Rate Case* (“Regulation 8720”).

<sup>67</sup> See, 2017 Rate Order, p. 149. Specifically, Paragraph No. 441 of the 2017 Rate Order establishes the following:

*The other procedure will be a series of "one year budget examinations" that occur between each three-year rate case. In these proceedings, the [Energy Bureau] will examine PREPA's proposed departmental budgets for the coming fiscal year, compare them to the prior year's budgets, then use that information to establish a just and reasonable revenue requirement for the fiscal year beginning on the upcoming July 1. The purpose of this procedure will be to update the prior year's revenue requirement. This updated revenue requirement will reflect (a) all feasible cost reductions that have been implemented in the prior year, along with those cost reductions that must be implemented in the next year; and (b) any known and measurable changes that we expect to occur in the upcoming fiscal year. As for revenue allocation and rate design, while time constraints will usually preclude changes in the one-year budget examinations, the [Energy Bureau] will adopt Mr. Woolf's recommendation to preserve its powers to make such changes prior to the next three-year rate case.*

<sup>68</sup> *Id.*

<sup>69</sup> See, *In re: Review of LUMA's Initial Budgets*, Case No. NEPR-MI-2021-0004, *Petition for Approval of Initial Budgets and Related Terms of Service*, February 24, 2021.

<sup>70</sup> See, LUMA's Initial Budgets Case, Resolution and Order, May 31, 2021, p. 35.



Sections 7.3(b) through (d) of the Preliminary Contract describe the process for the O&M Budget's preparation, their review by the P3 Authority, and their compliance with the applicable Rate Order issued by the Energy Bureau. Sections 7.3(e) through (h) of the Preliminary Contract pertain to related matters, such as amendments to the Operating Budget, Quarterly Adjustments to the Fuel Budget, the Default Budget if any O&M Budget for a Contract Year is not finalized in accordance with Section 7.3(c) of the Preliminary Contract, and how the Operator, Administrator and Owner shall resolve an O&M Budget Dispute. The Preliminary Contract also provides a Budget Policy for the design of the O&M Budgets in terms of their scope, their amounts, and certain requirements in relation thereto,<sup>71</sup> and includes provisions regarding the rate proceedings required by Applicable Law or ordered by the Energy Bureau.<sup>72</sup>

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Although Section 7.3 of the Preliminary Contract states that the P3 Authority, as Administrator, shall review the O&M Budgets to ensure compliance with the then applicable Rate Order and Section 7.4 of the T&D O&M Agreement, the 2017 Rate Order specifically provides that the "one year budget examinations" will occur between each three-year rate case and that in these proceedings the Energy Bureau will examine PREPA's proposed departmental budgets for the coming fiscal year.<sup>73</sup> The Energy Bureau, nevertheless, **CLARIFIES** that under the Preliminary Contract, the yearly Budgets shall have been approved by the Energy Bureau as established in the 2017 Rate Order.

In accordance with the foregoing discussion, the Energy Bureau **DETERMINES** that, in the process for evaluating the Selected Proponent's annual budgets, the Selected Proponent shall follow the parameters established in the 2017 Rate Case and LUMA's Initial Budgets Case and the other regulatory requirements in statute, regulation, and policy. The Energy Bureau will review, and approve, deny, or propose modifications to the Selected Proponent's annual budgets. Any provision of the Preliminary Contract contrary to the requirements shall be considered inapplicable and the Energy Bureau will apply the procedures and parameters established in the 2017 Rate Order, LUMA's Initial Budgets Case and any other applicable provision.

#### 7. *Fuel Optimization Plan*

Given Puerto Rico's historically high fuel costs that directly flow into electricity rates through the Fuel Cost Adjustment mechanism and the Energy Bureau's statutory mandate to ensure just and reasonable electricity rates, the Energy Bureau expects to carefully review the plans submitted by the Selected Proponent to deliver savings to customers. The Selected Proponent states that its Fuel Optimization Plan will be prepared, "[a]s soon as reasonably practicable, but not less than ninety (90) days following the Effective Date."<sup>74</sup> Therefore, the Energy Bureau's review thereof will commence after the submittal of the Fuel Optimization Plan, which requires approval of the Energy Bureau as noted in the Preliminary Contract.<sup>75</sup> The Energy Bureau will evaluate the Selected Proponent's Fuel Optimization Plan established by Section 4.3(t) of the Preliminary Contract in a separate the proceeding.

#### 8. *Conflict of Interest Policy*

Section 2.2(b)(xii) of the Preliminary Contract states that as a Condition to Execution Administrator shall receive from the Operator and agree upon an organizational conflict of interest policy. The Parties to the Preliminary Contract appear to anticipate that affiliates of

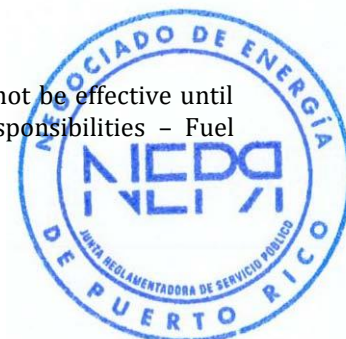
<sup>71</sup> See, Preliminary Contract, Section 7.4.

<sup>72</sup> *Id.*, Section 7.5.

<sup>73</sup> See, 2017 Rate Order, p. 149.

<sup>74</sup> See Exhibit 1 at p.50.

<sup>75</sup> See Exhibit 1 at p. 51, "for the avoidance of doubt, the Fuel Optimization Plan shall not be effective until approved by Administrator and PREB pursuant to this Section 4.2(t) (Operator Responsibilities - Fuel Optimization Plan)."



the Selected Proponent will bid on PREPA's upcoming fuel supply contracts and will continue operating an existing fuel purchase contract with PREPA. Accordingly, a draft Organizational Conflict of Interest Policy was included as part of Annex VI to the Preliminary Contract ("Annex VI-OCIP").<sup>76</sup> Annex VI-OCIP was aimed at setting forth the policies and procedures by which the Selected Proponent will identify and mitigate potential, apparent and actual organizational conflict of interest that arise from the Selected Proponent's performance of the Preliminary Contract.<sup>77</sup> Annex VI-OCIP states that an affiliate of the Selected Proponent owns and operates a micro fuel handling facility in San Juan, Puerto Rico, which provides natural gas to Owner (as defined in the Second Preliminary Contract) pursuant to a Fuel Sale and Purchase Agreement, and that there are other potential procurements for the sale and delivery of Liquefied Natural Gas that affiliates of the Selected Proponent may pursue.<sup>78</sup>

In consideration of the above, Annex VI-OCIP provided, among other things, that prior to the Service Commencement Date (as defined in the Preliminary Contract) the Selected Proponent would have designated a specific group of employees who would have been responsible for all procurement activities for Liquefied Natural Gas sale and delivery, as well as all contract administration activities in which the Selected Proponent is required, under the Preliminary Contract, to administer a contract as agent of the Owner in which an affiliate of the Selected Proponent is the performing contractor.<sup>79</sup> Annex VI-OCIP also stated that it shall be incorporated by reference into the Selected Proponent's Procurement Manual described in Section 4.2(q) of the Second Preliminary Contract.<sup>80</sup>

On the other hand, Section 4.2 (p) of the Preliminary Contract provides that the Procurement Manual shall include an agreed conflict of interest policy, which shall require the use of a third-party procurement office to be retained by the P3 Authority through an independent procurement process, whom shall be tasked with conducting all procurement processes where there is a possible organizational conflict of interest and of administering any and all contracts where there is an organizational conflict of interest and. Section 4.2 (p) further provides detailed requirements applicable to the conflict of interest policy.

Given the potential conflicts of interest in fuel supply and the high proportion of these costs in electricity rates, the Energy Bureau plans to carefully review and approve the organizational conflict of interest policy applicable to the Preliminary Contract and any updates to it, to ensure that future fuel supply procurement is conducted fairly with no bias to affiliates, and results in just and reasonable electricity rates. Accordingly, the Energy Bureau will evaluate the organizational conflict of interest policy in the proceeding pertaining to the evaluation of the Selected Proponent's Fuel Optimization Plan. Moreover, the Energy Bureau **CLARIFIES** that, (i) Annex VI-OCIP and the requirements of Section 4.2(p) of the Preliminary Contract will be used as guidance in the process of approval of a final conflict of interest policy, and (ii) the final version of the conflict of interest policy applicable to the Preliminary Contract shall be reviewed and approved by the Energy Bureau in accordance with the applicable laws and regulations.

#### 9. *Selection of a Single Operator for the Generation Legacy Assets*

On August 24, 2020, the Energy Bureau issued the IRP Final Order, with respect to the Integrated Resource Plan ("IRP") of PREPA.<sup>81</sup> In the Approved IRP the Energy Bureau

<sup>76</sup> *Id.*, ¶II.3.

<sup>77</sup> *See*, Second Preliminary Contract, Annex VI, Section I.

<sup>78</sup> *See*, Second Preliminary Contract, Annex VI, Section II.

<sup>79</sup> *Id.*

<sup>80</sup> *See*, Second Preliminary Contract, Annex VI, Section I.

<sup>81</sup> Final Resolution and Order on the Puerto Rico Electric Power Authority's Integrated Resource Plan, *In re. Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*, Case No. CEPR-AP-2018-0001, August 24, 2020 ("Approved IRP").





recognized the new structure envisioned by the Legislature regarding for the Electric System which comprises the creation of a new competitive power-generation market not subject to the exercise of monopoly power.<sup>82</sup>

The Approved IRP includes a Modified Preferred Resource Plan ("IRP Modified Plan") considering specific power generation capacity additions<sup>83</sup> and retirements.<sup>84</sup> Consistent with and 120-2018 and Act 17-2019, the IRP Modified Plan establishes that new power generation capacity for the Electric System shall be obtained from independent power producers through competitive procurement process. Moreover, the IRP Modified Plan included a program for six (6) tranches of procurement for renewable energy and battery storage resources from third parties.<sup>85</sup> Accordingly, the new power generation assets contemplated in the IRP Modified Plan will not be owned by PREPA but by third parties, participants of an expected power-generation market. Nevertheless, the IRP Modified Plan recognizes that PREPA will continue the operation of the older, oil-fired power generation assets (Legacy Generation Assets) until its retirement.<sup>86</sup>

*adm*  
*Jim*  
The LGA PREPA Transaction involves a transaction for, (i) the delegation of the operation and maintenance functions of the Legacy Generation Assets to only one (1) operator, (ii) does not involve a concession nor a change of ownership regarding the Legacy Generation Assets, and (iii) the compensation of Selected Proponent under Preliminary Contract will be an annual fixed fee (not to be based on the power generated by the Legacy Generation Assets). As discussed further below, under these circumstances, the power-generation market limitations established in Act 120-2018, Act 17-2019, and Act 57-2014 do not apply. That is, the delegating of the operation and maintenance functions of the Legacy Generation Assets to a single operator is not contrary to the energy public policy, the regulatory framework, and the applicable laws.

*JA*  
*Jim*  
*M*  
Act 120-2018 empowers PREPA to sell its assets related to electric power generation by means of a Sales Contract, which is an agreement to *sell, transfer, or otherwise dispose* of PREPA Assets related to electric power generation to one or more private sector proponents.<sup>87</sup> In this case, the proposed PREPA Transaction does not involve *sell[ing]* or *transfer[ring]* PREPA Assets related to power generation. Thus, the Energy Bureau is called to provide context to the phrase *otherwise dispose* to determine if the proposed PREPA Transaction shall be accomplished through a Sales Contract. The Energy Bureau understands that the phrase *otherwise disposal* -in the context of the Act 120-2018- means the alienation of PREPA Assets through a sale, assignment, transfer, or another transfer method where the ownership of the asset is given away or sold. In this case, the Legacy Generation Assets will remain in PREPA's hands which will only transfer the operation and maintenance functions until its retirement, in accordance with the Decommissioning Plan contemplated in the Preliminary Agreement. The proposed PREPA Transaction does not involve a change of ownership, therefore, the requirements for the sale of generation assets do not apply. The Energy Bureau also note that the neither the proposed PREPA Transaction involves the *disposal* or *assignment* of PREPA Assets related to power generation in the context of Section 8(h) of Act 120-2018.

Furthermore, the transferring of the Legacy Generation Assets for its operation and maintenance is consistent with the IRP Modified Plan which recognizes that PREPA will continue the operation of the Legacy Power Generation Assets until its retirement.<sup>88</sup> It is

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<sup>82</sup> *Id.*, pp. 23-25.

<sup>83</sup> *Id.*, ¶¶847-867, pp. 263-269.

<sup>84</sup> *Id.*, ¶¶869-873, pp. 270-271.

<sup>85</sup> *Id.*, ¶ 860, pp. 266-268.

<sup>86</sup> Approved IRP, ¶¶869-873, pp. 270-271.

<sup>87</sup> Sections 5(a), 5(b) and 2(g) of Act 120-2018.



also consistent with Act 17-2019, which provides that the operation of the Legacy Power Generation Assets shall be transferred to one or more electric power companies with the sole purpose of being operated during their useful life pursuant to the Integrated Resource Plan.<sup>89</sup> Moreover, as stated before, Act 57-2014 recognizes that the fifty percent (50%) market share limitation in the power-generation segment does not apply to the Power Legacy Assets.<sup>90</sup>

The power generation market-share limitation established in Act 120-2018, 17-2019 and 57-2014 aims to prevent a power-market participant from controlling the power generation prices and excluding competition. Act 17-2019 reformed the vertically integrated structure of PREPA and adopted mechanisms to assure that transmission and distribution facilities will function as a conduit for the power generation acquired from independent power-generation providers. This reform envisions the development of an open and competitive market in the sector of power-generation. However, concerned with the potential for monopolization in the power-generation sector, the Legislature prohibited monopolization of the horizontal power-generation market, and, to this end, it also established specific safeguards.<sup>91</sup> Specifically, (i) Act 120-2018 provides that, (x) under no circumstances, a PREPA Transaction may be used to constitute or authorize an electric power generation monopoly,<sup>92</sup> and (y) all the PREPA Assets devoted to electric power generation may not be sold, or otherwise disposed of or assigned to a single Contractor under a Partnership Contract or a Sale Contract; (ii) Act 17-2019 provides that no electric power service company, by itself, through or jointly with any subsidiary or affiliate thereof, may control fifty percent (50%) or more of the power generation assets' capacity,<sup>93</sup> and, (iii) Act 57-2014 provides that no electric power service company or the subsidiary or affiliate thereof may control fifty percent (50%) or more of the power generation assets' capacity.<sup>94</sup> Nevertheless, as discussed before, the Power Legacy Assets are excluded from these limitations.

Given the foregoing discussion, the Energy Bureau believes that the possession of monopoly power in the Puerto Rico power-generation market must be assessed without taking into consideration the Legacy Generation Assets. In reaching this determination we emphasize that, (i) the relevant legal provisions carves out an exception with respect to the operation of the Generation Legacy Assets and specifically call for the transfer of its operation and maintenance functions to one or more operators, (ii) the Generation Legacy Assets will be operated for a limited time (until retirement, in accordance with IRP Modified Plan) either by PREPA or by one or more independent operators, (iii) neither PREPA nor the operator (or operators) of the Legacy Generation Assets will be able to control price and exclude competition in the power-generation market.

#### IV. Determination

##### A. Issuance of the Certificate of Energy Compliance

The Energy Bureau carefully analyzed and evaluated the totality of the administrative record, considering the energy public policy and regulatory framework of Puerto Rico. The public policy tenets established through in Act 120-2018 and Act 17-2019 are not affected by the Preliminary Contract. Besides, the principles of public policy established, and the regulatory framework are incorporated in the different provisions of the Preliminary Contract. The regulatory authority of the Energy Bureau to oversight compliance with public

<sup>88</sup> Approved IRP, ¶¶869-873, pp. 270-271.

<sup>89</sup> Section 1.2(a) of Act 17-2019.

<sup>90</sup> Section 6.35(a) of Act 57-2014.

<sup>91</sup> Section 1.3 of Act 17-2019.

<sup>92</sup> Section 8(h) of Act 120-2018.

<sup>93</sup> Section 1.8 of Act 17-2019.

<sup>94</sup> Section 6.35(a) of Act 57-2014.



policy and the regulatory framework remain intact. Therefore, considering such analysis and evaluation, the Energy Bureau **DETERMINES** that the Preliminary Contract complies with the Puerto Rico Energy Public Policy and the regulatory framework and **ISSUES** an Energy Compliance Certificate in connection with the Preliminary Contract.

**B. No Limitation on Jurisdiction or Authority; Rule of Construction; Other Matters**

The scope of the Energy Bureau's evaluation of the Preliminary Contract is limited to the determination of compliance with the Puerto Rico's energy public policy and the current regulatory framework. Although the Energy Bureau provided certain feedback to the P3 Authority during the competitive solicitation process,<sup>95</sup> the Preliminary Contract, results from an independent negotiation conducted by the P3 Authority. The Energy Bureau is not a party to the Preliminary Contract. Thus, no obligation and/or duty may be imposed to the Energy Bureau under the Preliminary Contract. No provision of the Preliminary Contract shall be interpreted, construed, or considered to limit, restrict, supersede, supplant, or otherwise affect, in each case the rights, responsibilities or authority granted to the Energy Bureau under applicable laws and regulations.

Considering the foregoing, the Energy Bureau further clarifies that the issuance of the **Energy Compliance Certificate** regarding the **Preliminary Contract**:

- (1) Shall not be construed, in any way whatsoever, as to impair, restrict, relinquish, or abridge the scope of the Energy Bureau's: (1) administrative powers; (2) statutory and regulatory jurisdiction and/or authority; (3) statutory and regulatory oversight and enforcement powers; (4) rights; (5) duties; and (6) obligations, all in accordance with the applicable laws and regulations.
- (2) Shall not be construed, in any way whatsoever, as a waiver and/or release of any applicable statutory or regulatory requirement nor any related regulatory action applicable to the LGA, their Operator, PREPA (or the successor owner of the LGA).
- (3) Anything in the Preliminary Contract contrary to Section IV(B)(1) and IV(B)(2) above, or otherwise contrary to the law, shall be deemed unenforceable.

**C. Additional Procedural Matters**

Based on the same reasoning included in the December 27 Resolution on Second Preliminary Contract Withdrawal, the Energy Bureau **GRANTS** P3 Authority's request to deem withdrawn the Third Preliminary Contract.

Besides, based on the same reasoning included in the December 27 Resolution on Confidential Treatment, the Energy Bureau **GRANTS** confidential treatment to the, (i) January 13 Motion, (ii) the Petition, (iii) the Preliminary Contract, and (iv) this Resolution and Order. Finally, given that, (i) the Energy Bureau granted P3 Authority's requests to withdraw the First, Second, and Third Preliminary Contracts and, (ii) that P3 Authority considered those documents as drafts, the Energy Bureau **GRANTS** P3 Authority's request to strike those documents from the record of this case.


If the P3 Authority is adversely affected by this Resolution and Order it may request judicial review before the Court of Appeals within fifteen (15) days of the Energy Bureau's Clerk filing of copy this Resolution and Order, in accordance with Section 5(g) of Act 120-2018.

<sup>95</sup> In accordance with Section 8(c) of Act 120-2018.

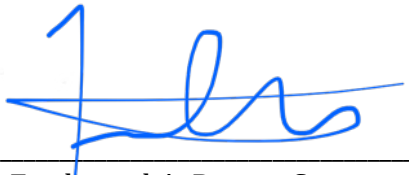


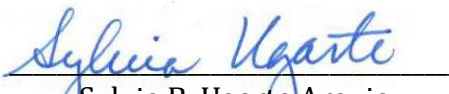
**THE CLERK OF THE ENERGY BUREAU SHALL NOTIFY THIS RESOLUTION AND ORDER TO THE P3 AUTHORITY ONLY AND SHALL KEEP IT CONFIDENTIAL UNTIL OTHERWISE INSTRUCTED BY THE ENERGY BUREAU.**

**BE IT NOTIFIED AND NOT PUBLISHED**

  
\_\_\_\_\_  
Edison Avilés Deliz  
Chairman

  
\_\_\_\_\_  
Lillian Mateo Santos  
Associate Commissioner

  
\_\_\_\_\_  
Ferdinand A. Ramos Soegaard  
Associate Commissioner

  
\_\_\_\_\_  
Sylvia B. Ugarte Araujo  
Associate Commissioner

  
\_\_\_\_\_  
Antonio Torres Miranda  
Associate Commissioner

**CERTIFICATION**

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on January 15, 2023. I also certify that on January 15, 2023 a copy of this Resolution and Order was notified by electronic mail to the following: [fermin.fontanes@p3.pr.gov](mailto:fermin.fontanes@p3.pr.gov). I also certify that today, January 15, 2023, I have proceeded with the filing of the Resolution and Order issued by the Puerto Rico Energy Bureau.

For the record, I sign this in San Juan, Puerto Rico, today January 15, 2023.

  
\_\_\_\_\_  
Sonia Seda Gaztambide  
Clerk

