

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



IN RE: CERTIFICATE OF ENERGY
COMPLIANCE

CASE NO.: NEPR-AP-2020-0002

SUBJECT: Request for Issuance of Certificate of Energy Compliance in Accordance with Act 120-2018; Request for Confidential Treatment in Accordance with Act 29-2009, Act 57-2014 and Act 120-2018.

RESOLUTION AND ORDER
(Energy Compliance Certificate)

I. Relevant Background

On May 18, 2020, the Puerto Rico Public-Private Partnerships Authority ("P3 Authority"), filed before the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("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 of Documents Submitted to PREB* ("Petition"). The Petition included the following documents: Exhibit 1: Preliminary Contract¹ and Exhibit 2: the Partnership Committee Report². As part of the Petition, the P3 Authority requested the Energy Bureau to treat and designate the Preliminary Contract and the Report as confidential documents.³ On June 1, 2020, the Energy Bureau issued a Resolution ("June 1 Resolution") through which it granted the P3 Authority's request for confidential designation and treatment regarding the Preliminary Contract and the Report.

Through the Petition, the P3 Authority requests the Energy Bureau to issue a Certificate of Energy Compliance⁴ for a Preliminary Contract, related to a PREPA

¹See PUERTO RICO TRANSMISSION AND DISTRIBUTION SYSTEM OPERATION AND MAINTENANCE AGREEMENT dated as of [●], 2020, by and among THE PUERTO RICO ELECTRIC POWER AUTHORITY as Owner, THE PUERTO RICO PUBLIC-PRIVATE PARTNERSHIPS AUTHORITY as Administrator, [REDACTED-CONFIDENTIAL] as ManagementCo, and [REDACTED-CONFIDENTIAL] as ServCo ("Preliminary Contract").

² See *Partnership Committee Report, Puerto Rico Public-Private Partnership for the Electric Power Transmission and Distribution System*, dated May 15, 2020 ("Report").

³ See Petition at pp. 6-15.

⁴ Except as otherwise provided, capitalized terms used but not otherwise defined in this Resolution and Order

Transaction, in accordance with the provisions of Act 120-2018⁵, Act 29-2009⁶ and Act 57-2014⁷. Specifically, the P3 Authority alleges that the PREPA Transaction under consideration in this case entails the engagement of a private operator that could bring its experience and expertise and best practices from the U.S. mainland and other jurisdictions in the operating and management of PREPA's transmission and distribution system ("T&D System").⁸ Pursuant to the Preliminary Contract the proposed T&D System operator shall be responsible for:

all electric transmission, distribution, load serving and related activities for the safe and reliable operation and maintenance of the T&D System, subject to the terms and conditions of the main body of the Agreement, including (1) expansions and replacements to meet the Contract Standards, including fleet, asset management, asset acquisition/procurement, IT infrastructure, as further provided in this document and preparation and implementation of required components of the Integrated Resource Plan, while prioritizing expansion and replacement projects that improve the safe, reliable and economic dispatch of the T&D System's connected generating units; (2) management and performance of construction of improvements thereto, including compliance with approved FEMA scope of work for projects that are eligible for Federal Funding and required maintenance; (3) delivery of electricity to customers, including the implementation of the activities set forth in Sections II.A and II.B of this Annex I (Scope of Services); (4) billing and collections implementation and optimization; (5) maintenance and improvement of public lighting system; (6) maintenance of fiber optic cable structure infrastructure, as set forth in lease agreement between Owner and PREPA Networks, LLC, a wholly-owned subsidiary of Owner incorporated in April 2004 to execute the Optical Telecommunications Infrastructure Lease Agreement for dedicated provision of local wholesale telecommunication services (for the avoidance of doubt, the Parties acknowledge and agree that, except as specified in this item (6), Operator shall have no other responsibility relating to PREPA Networks, LLC); (7) compliance with interconnection of renewables in accordance with Applicable Law; (8) management of the System Operation Principles to meet safe and reliable system operations in accordance with Prudent Utility Practices and

have the meaning ascribed to them in, as applicable, Act 120-2018, Act 29-2009, Act 57-2014, Act 17-2019, and the Preliminary Contract.

⁵ Known as the "Puerto Rico Electric Power System Transformation Act", as amended ("Act 120-2018").

⁶ Known as "Public-Private Partnership Act", as amended ("Act 29-2009").

⁷ Known as the "Puerto Rico Energy Transformation and RELIEF Act", as amended ("Act 57-2014").

⁸ See Report at p. 353.



*the System Operation Principles; and (9) recordkeeping and reporting in accordance with Applicable Law or Prudent Utility Practices.*⁹

According to the Report, the P3 Authority's objective with the PREPA Transaction is to transform Puerto Rico's energy system into a modern, sustainable, reliable, efficient, cost-effective, and resilient one.¹⁰ The P3 Authority further argues that the Proposed Transaction is intended to achieve the following objectives for the PREPA's T&D System: (a) delivery of low-cost electricity to ratepayers of Puerto Rico; (b) increase in T&D System resiliency, achieving performance in line with codes, specifications, and standards consistent with mainland U.S. electric utilities; (c) increase in T&D System reliability; (d) deployment of new technologies; and (e) implementation of industry best practices and operational excellence through managerial continuity and long-term planning.¹¹

On June 15, 2020, the Energy Bureau held a Confidential Technical Conference with the attendance of representatives of the P3 Authority, as well as representatives of the Selected Proponent. During the Technical Conference, the attendees answered questions from the Commissioners regarding the Report and the Preliminary Contract. Particularly, Commissioners were concerned with certain provisions of the Preliminary Contract, which may be construed as limiting the powers, duties, authority, and obligations of the Energy Bureau regarding approvals and oversight activities under its regulatory authority.

On June 17, 2020, the P3 Authority filed before the Energy Bureau a document titled *Puerto Rico Public-Private Partnerships Authority's Motion Submitting Documents and Requesting Confidential Treatment* ("June 17 Filing"). The June 17 Filing included the following documents: Exhibit 1: *Memorandum Regarding Confidential Technical Conference* ("Memorandum"). Attached to the Memorandum, is a blackline version of certain pages to the Preliminary Contract reflecting certain changes described in the June 17 Filing and the Memorandum. In the June 17 Filing, the P3 Authority requested the Energy Bureau to treat and designate the Memorandum and its attachments as confidential documents.¹² On June 17, 2020, the Energy Bureau issued a Resolution ("June 17 Resolution") through which it granted the P3 Authority's request for confidential designation and treatment regarding the Memorandum and its attachments.

The June 17 Filing addressed certain specific items regarding the Preliminary Contract, as well as an amendment to the Preliminary Contract that further clarify that no provision under such contract is meant to restrict or limit in any way the rights,

⁹ See Preliminary Contract, Annex I, at p. 166.

¹⁰ See Report at pp. 353-354.

¹¹ See Report at pp. 353-354.

¹² See June 17 Filing at pp. 2-4.



responsibilities or authority granted to Energy Bureau under the applicable laws and regulations.¹³

Act 120-2018 establishes the legal framework for the transformation of the electric power system in Puerto Rico.¹⁴ It empowers the Puerto Rico Power Authority (“PREPA”) to sell its assets related to electric power generation and transfer or delegate any of its operations, functions, or services.¹⁵ However, any agreement arising from Act 120-2018 shall be entered into pursuant to the legal and administrative framework that regulates Public-Private Partnerships 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. In addition, Act 120-2018 empowers PREPA and the P3 Authority to carry out the processes through which such transactions shall be executed.¹⁶

After conducting certain evaluations, PREPA and the P3 Authority decided that it is in the public interest of the people of Puerto Rico to select a third-party T&D System operator for the PREPA electric grid assets through a competitive solicitation process, to be conducted in accordance with Act 120-2018 and Act 29-2009.

Section 8(c) of Act 120-2018, provides that once the P3 Authority establishes the Functions, Services, Facilities, or PREPA Assets for which PREPA Transactions shall be conducted under Act 120-2018 and Act 29-2009, the Energy Bureau shall provide the technical, expert, financial, and human resources assistance as the P3 Authority requests in order to ensure that each PREPA Transaction is successful. Accordingly, pursuant to a memorandum of understanding signed on November 15, 2018 by the P3 Authority, the Puerto Rico Fiscal Agency and Financial Advisory Authority (“PRFAFAA”), and Energy Bureau, the P3 Authority and PRFAFAA shared with the Energy Bureau certain information related to the proposed PREPA Transaction. Specifically, the P3 Authority provided the Energy Bureau the opportunity to review and provide comments on various drafts of the

¹³ See June 17 filing at p.1, Memorandum at pp. 631-632 and 637-640. Notably, Section 20.16 of the Preliminary Contract provides that: *[n]otwithstanding anything to the contrary herein, no provision of this Agreement shall be interpreted, construed or deemed to limit, restrict, supersede, supplant or otherwise affect, in each case in any way, the rights, responsibilities or authority granted to PREB under Applicable Law with respect to the T&D System, Owner or Operator. See Id. at p. 639-640.*

¹⁴ See generally, *Statements of Motives*, Act-120-2018, pp 3-5.

¹⁵ *Id.*

¹⁶ *Id.*



then proposed operation and maintenance agreement.¹⁷ Therefore, the Preliminary Contract consider certain comments and suggestions of the Energy Bureau.¹⁸

As more specifically described in the Report, the P3 Authority conducted a competitive solicitation process, selected a Preferred Proponent, and negotiated a Preliminary Contract. According to Section 5(g) of Act 120-2018, the Preliminary Contract must be submitted to Energy Bureau for determining whether such contract complies with the Puerto Rico Energy Public Policy and regulatory framework. If the Energy Bureau so determines, it shall issue an Energy Compliance Certificate, otherwise it must deny the request.

II. Statutory Framework and Analysis

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

Act 120-2018 entrusted the implementation of PREPA's transformation to the P3 Authority.¹⁹ Aligned with this legislative intent, the P3 Authority, as a minimum, shall take into consideration when evaluating proponents and their offers concerning a PREPA Transaction the following objectives: to expedite a fair and transparent process for the establishment of Public Private Partnerships in connection 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 who have 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.²⁰

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

¹⁷ On May 17, 2019, October 7, 2019, and October 25, 2019, the Energy Bureau provided comments or feedback to certain drafts of the proposed O&M Contract. Moreover, on October 15, 2019, the Proponents met with the Energy Bureau to discuss the role of Energy Bureau under the applicable regulatory framework, as well as the then proposed O&M Contract. The foregoing exchange was duly covered by the Memorandum of Understanding Executed between the P3 Authority and the Energy Bureau, pursuant to the provisions of Act 120-2018.

¹⁸ The amended version of the Preliminary Contract submitted as part of the June 17 Filing, also addressed certain concerns posed by the Commissioners during the Confidential Technical Hearing.

¹⁹ See Section 3 of Act 120-2018.

²⁰ *Id.*



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 to 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.²¹ 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 of May 2, 1941 or any other applicable law and it shall not be considered a PREPA Transaction.²² Besides, Act 120-2018 expressly provides that PREPA may only sell and dispose of PREPA Assets related to electric power generation through the process established in this Act 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.²³

Aligned with the above-mentioned 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. That is, 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 PREPA Transaction, as well as 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.

B. Act 120-2018's Energy Compliance Certificate

A PREPA Transaction consists of any and all transactions carried out in accordance with the provisions of 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.²⁴ 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.²⁵

²¹ See Section 5(b) of Act 120-2018.

²² *Id.*

²³ *Id.*

²⁴ See Section 2(l) of Act 120-2018.

²⁵ See Section 2(f) of Act 120-2018.



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 Section 3 of Act 29-2009.²⁶ A Partnership Contract may be, amongst others, a long-term administration and operation contract, and any other kind of contract that separates or combines the design, building, financing, operation or maintenance phases of the priority projects, as established in Section 3 of Act 29-2009.²⁷

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.²⁸ A Preliminary Contract, in turn, refers to all the clauses and specific conditions of a Partnership Contract or Sales Contract that are agreed upon by the Partnership Committee and the Selected Proponent.²⁹

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 therein 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

²⁶ See Section 2(i) of Act 29-2009.

²⁷ *Id.*

²⁸ See Section 2(d) of Act 120-2018.

²⁹ See Section 2 (h) of Act 120-2018.





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

The Puerto Rico's energy public policy and regulatory framework includes, but is not limited, to the following legislation: (a) Act No. 83 of May 2, 1941, as amended, known as the *Puerto Rico Electric Power Authority Act* ("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 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, the following 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* (pending issuance of registration number). In addition, the subsequent regulations have been promulgated by the Energy Bureau and are pending for approval: (a) *Regulation For Energy Efficiency and Demand Response*; (b) *In Re: Enmienda al Reglamento sobre Certificaciones, Cargos Anuales y Planes Operacionales de Compañías de Servicio Eléctrico en Puerto Rico*; and (c) *Propuesta de Enmienda al Reglamento Núm. 8543, Reglamento de Procedimientos Adjudicativos, Avisos de Incumplimiento, Revisión de tarifas e Investigaciones*.

IV. Determination

A. Issuance of the Certificate of Energy Compliance

The Energy Bureau carefully analyzed and evaluated the Report, the Preliminary Contract (as modified), taking into consideration 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 provisions of the Preliminary Contract. Besides, the principles of public policy established, and the regulatory framework are incorporated in the different provisions of the Preliminary Contract. Moreover, the regulatory authority of the Energy Bureau to oversight compliance with public policy and the regulatory framework remain intact.

Therefore, in light of such analysis and evaluation, the Energy Bureau **DETERMINES** that the Proposed Contract (as modified) complies with the Puerto Rico Energy Public Policy and the regulatory framework and **ISSUES** an Energy Compliance Certificate in connection with the Preliminary Contract (as modified).

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

As stated before, 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,³⁰ 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 (as modified).

³⁰ In accordance with Section 8(c) of Act 120-2018.



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

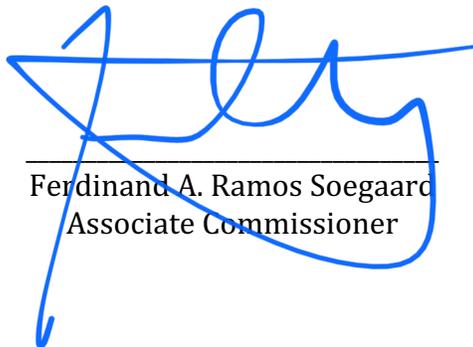
- (1) Shall not be construed, in any way whatsoever, as to impair, restrict, relinquish or abridge the scope of the Energy Bureau's: (1) administrative powers; (2) statutory and regulatory jurisdiction and/or authority; (3) statutory and regulatory oversight and enforcement powers; (4) rights; (5) duties; 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 T&D System, the Operator, PREPA (or the successor owner of the T&D System).
- (3) Anything in the Preliminary Contract (as modified) contrary to the provisions of Section IV(C)(1) and IV(C)(2) above, or otherwise contrary to the law, shall be deemed unenforceable.

Any party to this proceeding adversely affected by this Resolution and Order 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.

Be it notified and published.



Edison Avilés Deliz
Chairman



Ferdinand A. Ramos Soegaard
Associate Commissioner



Lillian Mateo Santos
Associate Commissioner



CERTIFICATION

I hereby certify that the majority of the members of the Puerto Rico Energy Bureau has so agreed on June 17, 2020. Associate Commissioner Ángel R. Rivera de la Cruz dissented with a written opinion. I also certify that on June 17, 2020 a copy of this Resolution and Order was notified by electronic mail to the following: fermin.fontanes@p3.pr.gov. I also certify that today, June 17, 2020, 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 June 17, 2020.


Wanda I. Cordero Morales
Clerk



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



IN RE: CERTIFICATE OF ENERGY
COMPLIANCE

CASE NO.: NEPR-AP-2020-0002

SUBJECT: Request for Issuance of Certificate of Energy Compliance in Accordance with Act 120; Request for Confidential Treatment in Accordance with Act 29-2009, Act 57-2014 and Act 120-2018.

Associate Commissioner Ángel R. Rivera de la Cruz, dissenting

Today, the majority of the Puerto Rico Energy Bureau (“Energy Bureau”) issued an Energy Compliance Certificate regarding the Preliminary Contract for the operation and maintenance of the Puerto Rico Electric Power Authority’s (“PREPA”) Transmission and Distribution System (“T&D System”), submitted by the Public-Private Partnership Authority (“P3A”) on May 18, 2020, as part of a PREPA Transaction. For the reasons expressed herein, I dissent.

* * *

Act 120-2018¹ authorizes the P3A to conduct PREPA Transactions; as such term is defined therein.² PREPA Transactions include the execution of a Sales Contract for PREPA Assets related to electric power generation and any Partnership established in connection with any of PREPA function, services, or facilities, such as the operation and maintenance of PREPA’s T&D System.³

Section 3 of Act 120-2018, Legislative Intent and Declaration of Public Policy, states in part:

Based on the legal and proprietary powers that the People of Puerto Rico and its Government have over PREPA, it is the intent and the policy of this Legislative Assembly to expedite a fair and transparent process for the establishment of public- private partnerships in connection with any functions, services, or facilities of the public corporation, 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 who have the operational, technological, and

¹ *The Puerto Rico Electric Power System Transformation Act*, as amended.

² Act 120-2018, Section 5(a).

³ *Id.*, Section 2(m).

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 that are reasonable for the People of Puerto Rico; and promotes broad access and swiftness in the rendering of direct services to its customers.

As a minimum, **all of the foregoing shall be taken into consideration by the Partnership Committee as the fundamental interests of the People of Puerto Rico when evaluating proponents and their offers.**



...

It is made clear that the results of these negotiations shall align the corporate and business interests of the proponents with the Fundamental Interests of the People of Puerto Rico in order to achieve the transformation of the electric power service, as we have described, and to strengthen the socioeconomic, community, entrepreneurial, and industrial development, and improve the quality of life. (Emphasis supplied).

Therefore, the public policy with respect to PREPA Transactions is predicated, in part, on the establishment of reasonable rates and the alignment of the corporate and business interests of the proponents with the fundamental interests of the People of Puerto Rico. This is a reiteration of the public policy that all rates should be “just and reasonable rates”, as established in Act 57-2014.⁴

The Preliminary Contract provides for the review and approval of the annual operation budget of PREPA’s system. This includes the generation budget and the T&D system operation budget. The Preliminary Contract also provides for the determination that the annual budgets are consistent with the applicable Rate Order (i.e. the rates approved by the Energy Bureau that are in effect at the time of such determination). However, the Preliminary Contract establishes that the P3A, not the Energy Bureau, will make such review, approval and determination. This provision essentially removes the Energy Bureau from the annual budget review process, limiting its visibility to the budgets that will be in effect during any given year.

Moreover, the Preliminary Contract provides for the operator of the T&D System to request the Energy Bureau a budget modification, if the operator determines that the approved budget will not be sufficient to cover projected operational expenses during a given year. In addition, there is no obligation in the Preliminary Contract for the operator to request a modification of the budget if the projected operational expenses are lower than the

⁴ Article 6.25(a), Act 57-2014, *The Puerto Rico Energy Transformation and RELIF Act*, as amended. See also, Section 6B(a) of Act 83 of May 2, 1941, *The Puerto Rico Electric Power Authority Act*, as amended.





approved budget. Specifically, the Preliminary Contract is silent with respect to revenues collected in excess if, for a given year, revenues obtained from rates are higher than the actual costs to operate the T&D System.

This type of mechanism shifts all the risks of budget overruns to the ratepayers, whereas they will not benefit if actual costs are lower than revenues. As such, this mechanism doesn't promote an efficient operation of the T&D System.

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It was argued during the Technical Conference Call held on June 15, 2020, that this type of provision is used in other jurisdictions in the United States. I must clarify that this is one of the many mechanisms that can be used to recover costs associated with the operation of an electrical system. In addition, this type of mechanism is usually applicable to investor-owned (i.e. privately owned) utilities. That is not the case here.

The Preliminary Contract is for the operation and maintenance of the T&D System by a third party, the Selected Proponent. PREPA maintains the ownership of the T&D System, hence, the T&D System will continue to be publicly owned. Under these circumstances, the operator (i.e. the Selected Proponent) will manage the T&D System on behalf of PREPA for a fee. All other expenses are defined as pass-through expenses.

Once the Selected Proponent takes over the operation of the T&D System, there will be three different financial streams: budgets, revenue from rates and actual operation costs. For example, in any given year, a budget could be \$100 million, revenues from rates could be \$102 million and actual costs could be \$104 million. Under these circumstances, according to the provisions of the Preliminary Contract, the operator can request the Energy Bureau to allow the collection of additional revenues in the amount of \$2 million, that is, the difference between revenues and the actual cost. This in turn represents a difference of \$4 million between budgeted costs and actual costs. However, if in any given year a budget is \$100 million, actual costs \$98 million and revenue from rates is \$102 million, the Preliminary Contract is silent with respect to the \$4 million revenue excess, in relation to the actual costs of \$98 million.

True pass-through expenses are reconciled periodically in order to align revenues with actual costs. The specific timeframe for such reconciliation is driven by the nature of the expense. For example, under the current PREPA rate, the Energy Bureau reconciles fuel and purchased power costs every three months. The fuel (FCA) and purchased power (PPCA) reconciliation riders have a built-in adjustment provision that reconciles, during the following period (i.e. the following three months), any excess or deficiency in revenues incurred in the first two months of the current period and the last month of the prior period. For the costs associated with the Contribution in Lieu of Taxes and the other PREPA subsidies, such reconciliation is done on a yearly basis.

In a scenario where the Selected Proponent is an operator of the publicly owned T&D System that will receive a specific fee for its services (including any fees earned based on performance), there should be no profit or loss from revenues related to actual prudent costs incurred in providing service. Therefore, budgets, revenues from rates and actual prudent

operational costs must align to serve the public interest. Such alignment is only possible if revenues are reconciled with prudent costs on a timely basis. This way, PREPA and the operator of the T&D System will have sufficient dollars to provide reliable service, while the ratepayers will pay the actual prudent costs associated with such reliable service.

Notwithstanding the above, the Energy Bureau will have an opportunity to align revenues and actual prudent costs for the duration of the Preliminary Contract. Current rates were established to recover revenues in a scenario where PREPA is the operator and manager of the T&D System. Therefore, it can be easily inferred that a rate modification will be required in order to implement the Preliminary Contract. During such proceeding, the Energy Bureau, exercising its regulatory powers, should develop and establish a rate structure that provides for the yearly reconciliation of actual prudent costs and revenues. This way, the Energy Bureau, as the regulator, will not only maintain visibility of the costs and revenues related to the operation of the T&D System, but will also ensure that prudent costs and revenues are aligned to better serve the public interest.

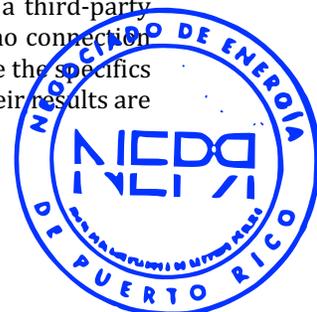
To that effect, it is important to note that there is no documentation on the administrative record of the instant case regarding the impact the Preliminary Contract will have on rates. Neither is there a cost-benefit analysis specific to the Preliminary Contract. Both of these are necessary to meet the statutory mandate to evaluate the private entity's capacity to offer reasonable rates, as required by Section 3 of Act 120-2018. Even if the transfer of the operation of the T&D System is mandated by law, such transfer must meet the public policy of establishing just and reasonable rates.

Ordinarily, the Energy Bureau would request petitioners to submit any supporting information the Energy Bureau deems necessary to conduct its review (i.e. rate impact analysis and cost-benefit analysis). However, the Energy Bureau has a jurisdictional thirty-day term to issue a determination whether or not the Preliminary Contract meets the public policy and regulatory framework,⁵ which would prevent us from requesting additional information at this time. Based on the complexity of the proposed PREPA Transaction (i.e. the transfer of the operation and maintenance of the T&D System to a private entity) and the fact that additional information would be required to determine if the Preliminary Contract is consistent with providing just and reasonable rates, such thirty-day term proved to be inadequate for the evaluation of the Preliminary Contract.

In the absence of a rate impact analysis and a cost-benefit analysis, I am not in position to determine if the implementation of the Preliminary Contract will result in just and reasonable rates, as required by established public policy.⁶ As such, and due the referenced

⁵ Act 120-2018, Section 5(g).

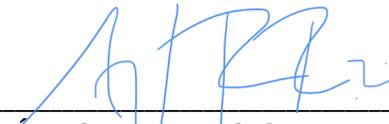
⁶ In an Exhibit to the Partnership Committee Report submitted with the filing, P3A included a high-level analysis regarding two hypothetical scenarios in which two levels of savings were achieved by hiring a third-party operator for the T&D System. The analysis was an arithmetic reduction in costs that showed no connection with the operation of the T&D System by a third-party. Moreover, such scenarios did not analyze the specifics of Preliminary Contract; therefore, it cannot be concluded that the hypothetical scenarios and their results are consistent with the specifics of the Preliminary Contract.



statutory thirty-day restriction, I would have rejected, without prejudice, the Preliminary Contract. However, I would have granted P3A leave to refile its proposal, requiring it to provide the aforementioned analyses in such future filing.

I must state that, from my perspective, the Selected Proponent has shown all the required due diligence during the Request for Proposal process and, in my opinion, it developed a sound plan to implement the Preliminary Contract. Moreover, my vote today should not be construed as a rejection, on the merits, of the Preliminary Contract or the Selected Proponent's implementation plan. Simply put, my position today is that I could not make a determination on one of the crucial elements of the public policy on energy: will the implementation of the Preliminary Contract be consistent with the public policy that all rates must be just and reasonable? Based on the foregoing analysis, additional information is required to answer in the affirmative.

Therefore, I dissent.



Ángel R. Rivera de la Cruz
Associate Commissioner

In San Juan, Puerto Rico, on June 17, 2020.

