

COMMONWEALTH OF PUERTO RICO  
PUERTO RICO ENERGY COMMISSION

IN RE: REVIEW OF RATES OF THE  
PUERTO RICO ELECTRIC POWER  
AUTHORITY

CASE NO. CEPR-AP-2015-0001

SUBJECT: SUBMISSION OF "LEGAL  
ISSUES"

INSTITUTO DE COMPETITIVIDAD Y SOSTENIBILIDAD ECONOMICA DE PUERTO  
RICO (ICSE-PR) LEGAL BRIEF ON RATE CASE

TO THE ENERGY COMMISSION:

NOW COMES the Instituto de Competitividad y Sostenibilidad Económica de Puerto Rico (ICSE-PR) represented by appearing counsel and respectfully alleges and prays:

1. On December 19, 2016 after the Technical Hearings ended on December 16, 2016, the Commission has invited the parties to submit separate briefs on substantive issues and on legal issues.
2. Yesterday, December 27, 2016 ICSE-PR filed its substantive issues brief. Today, December 28, 2016 is formally filling this legal brief.

I. ICSE's Comments to Specific Commission Questions:

1. Is the Commission required to take into consideration general economic conditions when evaluating the reasonableness of PREPA's Petition?

The answer is unequivocally yes. The Commission cannot consider a petition reasonable if it is totally separated from reality.

As we have stated before

"A: The applicable law is Law 57 of 2015. Law 57, contrary to Law 4 of 2016, which was the main applicable law for the transition charges and securitization process, does not in any manner limit the discretion and power of the Energy Commission (PREC). On the contrary Law 57 states very clearly mandates of law that refer to how PREPA should operate and the specific values and interest to be protected.

With great clarity Act 57 identifies how "costly" electricity service is in Puerto Rico, which "impedes economic development" and hinders efforts to stimulate the economy. The act's preamble describes Puerto Rico as "hostage to an inefficient energy system." To address this problem (in

addition to reducing air contamination), Act 57 aims to transform PREPA, move the Commonwealth to save energy consumption; promote net metering and renewable energy; establish "regulation" to promote the use of "highly efficient fossil generation", based on an integrated resource plan with a 20-year horizon. Furthermore, the Puerto Rico Legislature and the Governor, committed to Act 57's goals of "Puerto Rico Energy Transformation and RELIEF" with the broadest citizen participation."

Law 57, chapter VI, Sub chapter B states:

"Section 6.3.- Powers and Duties of the Energy Commission. The Energy Commission shall have the following powers and duties: (a) Oversee and ensure execution and implementation of the public policy on the electric power service of the Commonwealth of Puerto Rico;.."

...

"(f) Formulate and implement strategies to achieve the objectives of this Act, including, but not limited to, attaining the goal of reducing and stabilizing energy costs permanently, and controlling volatility in the price of electricity in Puerto Rico. In exercising its powers and authorities, the Energy Commission shall require that the prices included in any power purchase agreement, wheeling rate, and interconnection charge are fair and reasonable, consistent with the public interest, and compliant with the parameters established by this Commission through regulations;

(Included with this Brief as Exhibit I, is a General Summary of the Values, and Interests protected and mandated by Law 57).

With such broad powers and authority it would be inconceivable that PREPA having openly admitted that elements such as "rate shocks, gradualism, economics, low income and economic conditions are issues part of the rate process, the Commission would not be able to take such issues into account. A rate raises that is not economically viable or that could easily unravel if it helps push down the economy further, which would reduce sales, is in itself not reasonable.

The importance is the highest. A rate increase that does not take into account the real economic conditions, which at the same time did not take into account elasticity of demand, nor is based on PREPAs part on economic impact of the increase, cannot be approved. The real possibility of reduced demand, reduced income and a resulting worst final situation for PREPA is basic to the whole process.

2. What are the legal standards the Commission should apply when interpreting the public policy behind Act 57?

The legal standard is in Law 57 itself (see exhibit A) and is also in the specific powers and authority granted to the Commission.

Prior to the creation of the Commission under Law 57, the public policy was established, overseen and executed by PREPA and its Board of Directors. The Public Policy was PREPA's Policy. This situation was totally transformed by Law 57, which not only established very detailed public policy mandates, but took away from PREPA the definition, the overseeing and execution of the public policy. The Commission does not have to look elsewhere for the legal standards. It's Law 57 and its wholesale delegation to the Commission itself.

From being the "public policy unit", PREPA is now part of the public policy established by the legislature and the Commission.

3. How should the Commission define "prudence"?
4. What standards should the Commission use to determine "prudence"?
5. Does the Commission have legal authority to adopt or implement mechanisms designed to induce prudent spending?
6. Can the Commission require PREPA to submit its budgets for approval?

The exercise of the Commission's authority is not a dictionary definition process.

When Law 57 states:

"...(b) The Energy Commission shall have general jurisdiction over the following matters:

(1) The Energy Commission shall have regulatory, investigative and adjudicative jurisdiction over PREPA and any other certified electric power company providing services within the Commonwealth of Puerto Rico..."

It is obvious that the Commission has wide latitude in defining the exercise of its own powers and doing so in a reasonable manner, such as any government entity has to do.

Law 57 also states on Section 6.3:

"...(c) Establish and implement regulations and the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of electricity rates of Puerto Rico;

(d) Oversee the quality and reliability of the electric power services provided by PREPA and any other electric power company certified in Puerto Rico;

...

...(y) Conduct inspections, investigations, and audits, if necessary, to attain the purposes of this Act. The Energy Commission may delegate this power

through resolution. In such resolution, the Energy Commission shall establish the limits and the term of such delegation of powers;...”.

Section 6.4 states:

“(c) Complaints for Noncompliance with the Public Policy on Energy:

(1) At the request of any affected party with legal standing, and as provided in this Act, the Commission may address complaints alleging or claiming that an electric power service company is not complying with the public policy on energy of the Commonwealth of Puerto Rico. Likewise, the Commission may address those complaints regarding transactions or juridical acts related to the purchase of energy or fuel; agreements between PREPA and independent power producers; cases and controversies among independent power producers; wheeling rates and interconnection charges; and cases and controversies regarding wheeling or electric power interconnection between PREPA or its subsidiaries, and any person that is connected, or wishes to connect to the electric power grid within the Commonwealth of Puerto Rico or any person with a direct or indirect interest in these electric power services.”

These expression of the Law reaffirm the wide net powers that the Commission has.

Let's for the sake of argument state that the Commission has no power to define prudence, induce prudence, and approve budgets. How would the Commission comply with its mandate that Puerto Rico should have the lowest energy cost, a modern electrical system etc.?

Imagine that PREPA could act imprudently with uncontrolled budgets. It would be the absolute negation of the transformation defined by Law 57?

It is the Commission the one who now “ensures, execute and implement of the Public Policy” (Law 57 Sec. 6.3).

Once again, is it prudent or reasonable to propose a rate increase with absolutely no prior study of economic impact of such increase nor any study on elasticity of demand? This is what PREPA did. Is the Commission impeded or incapacitated to do what any reasonable prudent person would have done?

In summary, included below Sections of Act 57 and Act 4 that support answering a “sound” Yes to this question.

Act 57-2014, Section 6.3

Section 6.3.- Powers and Duties of the Energy Commission.

The Energy Commission shall have the following powers and duties:

“(a) Oversee and ensure execution and implementation of the public policy on the electric power service of the Commonwealth of Puerto Rico;

(b) Establish by regulations the public policy rules regarding electric power service companies, as well as any transaction, action or omission in connection with the electric power grid and the electric power infrastructure of Puerto Rico, and implement such public policy rules. The Energy Commission shall draft such regulations in consultation with the Commonwealth Energy Public Policy Office. These regulations shall be consistent with the public policy on energy set forth through legislation;”

“(f) Formulate and implement strategies to achieve the objectives of this Act, including, but not limited to, attaining the goal of reducing and stabilizing energy costs permanently, and controlling volatility in the price of electricity in Puerto Rico. In exercising its powers and authorities, the Energy Commission shall require that the prices included in any power purchase agreement, wheeling rate, and interconnection charge are fair and reasonable, consistent with the public interest, and compliant with the parameters established by this Commission through regulations;

(g) Regulate the wheeling mechanism in the Commonwealth of Puerto Rico in accordance with the applicable laws;”

Act 4-2026, Section 16

Section 16.- Section 6.3 of Act No. 57-2014, is hereby amended to read as follows:

Section 6.3.- Powers and Duties of the Energy Commission.

The Energy Commission shall have the following powers and duties:

“(c) Establish and implement regulations and the necessary regulatory actions to guarantee the capacity, reliability, safety, efficiency, and reasonability of electricity rates of Puerto Rico and establish the guidelines, standards, practices, and processes to be followed by the Authority when purchasing electricity from other power service companies and/or modernize its power plants or facilities; provided, that every power purchase agreement shall meet the standards, terms, and conditions established by the Commission in accordance with the provisions of Section 6B(a)(ii) and (iii) of Act No. 83 of May 2, 1941, as amended”.

7. Is the Commission bound by the provisions of the RSA?

The answer is no. The Commission is an arm of the Commonwealth of Puerto Rico which was not a party to the RSA. Imposing on the Commission the RSA is an

amendment to the Commission's power and authority which only the legislature can do, with the Governor's approval.

The legislative record of Law 57 of 2015, and of Law 4 of 2016 does not support that the legislature made the specific legislative determination that the RSA was part of the law and that it was subjecting the Commission to the same.

In addition, the RSA is referred in Act 4 as Creditors' Agreement. As stated on the definition of Creditor's Agreement in Act 4 "Neither the Agreement nor any future amendment thereto or supplement thereof shall be inconsistent with the provisions of the 'Puerto Rico Electric Power Authority Revitalization Act.' None of the provisions of the Creditors' Agreement executed prior to the approval of this Act shall be understood to be binding upon or create obligations between the Customers or the Commonwealth of Puerto Rico and the creditors of the Corporation and the Authority" (see below).

Act 4, 2016, Section 3

Section 3.- Section 1.3 of Act No. 57-2014 is hereby amended to read as follows:

Section 1.3.- Definitions.

"(a) 'Creditors' Agreement' shall mean the agreement executed on January 27, 2016 (including annexes, exhibits, and schedules attached thereto), by and among the Authority and various of the principal creditors thereof, as amended or supplemented, whereby certain terms and conditions of the current debt are modified and the Authority commits to (i) implement certain administrative, operational, and governance reform measures; (ii) optimize electric power transmission and distribution; (iii) modernize electric power generation; and (iv) achieve operational savings. Neither the Agreement nor any future amendment thereto or supplement thereof shall be inconsistent with the provisions of the 'Puerto Rico Electric Power Authority Revitalization Act.' None of the provisions of the Creditors' Agreement executed prior to the approval of this Act shall be understood to be binding upon or create obligations between the Customers or the Commonwealth of Puerto Rico and the creditors of the Corporation and the Authority".

8. Is the Commission bound by the provisions of the 1974 Trust Agreement?

9. How should the Commission interpret the inclusion of the phrase "must comply with the terms and provisions contained in the agreements with bondholders"?

PREPA, not the Commission is bound by the RSA and the 1974 Trust Agreement. As such in the revenue requirement request PREPA has to bring to the Commission is attention whatever revenues are required to comply with such contractual requirements. After all, subject to specific situations, constitutionally PREPA is bound by its contracts.

10. Is the Commission required to approve a Formula Rate Mechanism as proposed by PREPA in its Petition?

11. Does Act 57 prevent yearly reviews of PREPA's rates?

No to both questions. The Commission under act 57 has the power to:

"(f) Formulate and implement strategies to achieve the objectives of this Act, including, but not limited to, attaining the goal of reducing and stabilizing energy costs permanently, and controlling volatility in the price of electricity in Puerto Rico. In exercising its powers and authorities, the Energy Commission shall require that the prices included in any power purchase agreement, wheeling rate, and interconnection charge are fair and reasonable, consistent with the public interest, and compliant with the parameters established by this Commission through regulations;"

"...(k) Review and approve and, if applicable, modify the rates or fees charged by electric power service companies in Puerto Rico in connection with any matter directly or indirectly related to the provision of electric power services;..."

Section 6.25 (a) of Law 57, as amended by Act 4, states:

"(a) ...The Commission shall ensure that all rates are just and reasonable and consistent with sound fiscal and operational practices that provide for a reliable and adequate service at the lowest reasonable cost. The regulations of the Energy Commission for the rate review process shall comply with such principles."

This in Section 6.25 (b) it established the process for the "first rate review process" which is the one where we are now included.

But then the same section 6.25 at c it state:

(c) Rate Modification.- Every rate modification request previously approved by the Commission shall be filed with the Commission. The request shall state the grounds for the modification, the effect of such modification on the revenues and expenditures of the Authority or requesting certified company, and any other information requested by the Commission through regulations or request. The Commission may initiate, *motu proprio*, or at the request of the Independent Consumer Protection Office or any other interested party, the rate review process when it is in the best interest of customers. Any modification to a rate proposed the Authority or a certified electric power company, whether to increase or decrease the same, shall undergo an evidentiary and a public hearing process to be held by the

Commission to determine whether the proposed change is just and reasonable and consistent with sound fiscal and operational practices that provide for a reliable and adequate service, at the lowest reasonable cost. The Commission shall provide an opportunity to allow the participation of ICPO, CEPPPO, the citizens, and interested parties in the process. The review and the order issuance processes shall not exceed one hundred eighty (180) days from the Commission's determination by resolution that the Authority's request is complete; provided, however, that the Commission may extend the review process for an additional term that shall not exceed sixty (60) days."

So it is clear that the Commission has power for a first rate review process, has a separate power for modifications of approved rates, which includes new *motu proprio* rate review processes. This new proceedings are not subject to the 180 days of the first rate case.

12. What is the extent of the Commission's authority to oversee PREPA's management?

13. To what extent does the "management prerogative" doctrine apply to PREPA?

The Commission is not authorized under law to "manage" PREPA and as such PREPA's management has, under the Board of Directors and applicable law the responsibility to perform its duties. Notwithstanding, the Commission under the powers of Act 57 can oversee PREPA's operation to comply with its mandate which included achieving the lowest energy cost and a modern electrical system.

14. Is the Commission authorized to prescribe specific actions to be taken by PREPA?

Yes, without doubt. There is no way the Commission can comply with its main responsibility of "oversee and ensure implementation of the public policy" if it cannot order PREPA to take particular actions. A holistic view of the Commission- PREPA relation does not permit any other conclusion. The Commission approves rates, IRP, performance reviews among other delegated powers. A contrary interpretation would turn the Commission into only a sort of comptroller office identifying violations but without power to put into effect remedies. Such in not what Law 57 states.

The Commission can also establish parameters and standards and if unfulfilled, take additional actions, such as instructing that the area where unfulfilled performance standards occur be contracted out to the private sector.

15. Can the Commission require PREPA to restructure its debt?

16. Does the Commission have authority in this rate case to review the terms under which past debt was issued by PREPA?

17. Assume the Commission does not agree with the terms of PREPA's legacy debt, does Act 57 grant the Commission the authority to require PREPA to restructure its debt?

It is ICSE'S legal judgment that due, in most part, to the constraints included in Law 4, 2016, presently the Commission does not have the statutory power to "order" PREPA to restructure its debt, or to question how the debt was created.

Respectfully ICSE believes that these immediate prior questions miss the real issue and mischaracterizes the legal situation.

The real issue is the absolute impossibility of PREPA paying all its debt and at the same time maintain a viable electric utility. Independent of the level of debt and how such debt was entered, the real economic-fiscal situation is that it is not possible to pay all the debt.

This was admitted by PREPA and the RSA participants. It has been publicly stated by PREPA's management, the Governor himself, but more recently by the PROMESA Board in its December 20<sup>th</sup> communication, which has stated:

"Energy reform. The cost of electricity in Puerto Rico is high compared with competing economies. Power prices are also highly variable over time due to Puerto Rico's dependence on oil-fired power plants and link to the volatile global oil markets. Furthermore, the supply of electricity is also increasingly unreliable due to aging infrastructure. Lowering the cost of energy and increasing system reliability are key priorities to lower the cost of living and doing business in Puerto Rico. Low energy prices are spurring economic activity and new investments across the rest of the U.S. Unfortunately, Puerto Rico has largely missed out on the low-cost energy boom. Getting there will require a fundamental reevaluation of energy policy and the way the Puerto Rico Electric Power Authority ("PREPA") delivers its services today.

There is a pressing need to stabilize the situation at PREPA and accelerate critical capital projects that can bring new and cheaper energy resources to Puerto Rico. We believe that a process should be established for interested stakeholders to weigh in on the pros and cons of the current proposed PREPA restructuring and more generally on the options for energy reform. The Board will work with the Government and with PREPA on an expedited basis to assess the PREPA restructuring in light of the goals of delivering lower cost, reliable power to Puerto Rico as soon as possible."

...

### “3. Restructuring long-term liabilities

Given the budget gap, long-term liabilities will need to be restructured under a fiscal plan in compliance with PROMESA. Structural reforms will not be sufficient to allow Puerto Rico to fund its long-term liabilities as they currently stand. The Government budget is simply not large enough to allow it to provide essential services and pay debt service as currently structured, even if it implements extensive fiscal initiatives.

The restructuring must greatly simplify the complex debt structure currently in place, which will serve to improve debt management and enhance transparency to assure investors about Puerto Rico’s fiscal health going forward. Our efforts to update the current fiscal gap, as well as define a framework for analysis and various potential initiatives, should lay the groundwork to evaluate the best approach to address the debt burden, while ensuring continued access to capital markets for the Government of Puerto Rico and hundreds of Puerto Rican companies. Change is also needed to ensure the pension costs are sustainable and to address the massive pension liabilities built up over decades. We will work closely with the Government to establish a transparent and orderly restructuring process in compliance with PROMESA and where high quality information is clearly communicated to all stakeholders and the legal tools available are used as necessary to implement equitable solutions.

As the Oversight Board had anticipated in its November meeting, it will start coordinating good faith conversations with creditors this week.”

It is reasonable a rate increase that ignores these facts?

#### 18. What are just and reasonable rates?

It is basic that when the Legislature and the Governor approve legislation, its interest is in obtaining a particular result, which is typically called the legislative intent. It has been consistently interpreted that when the law is clear, the obligation of those interpreting the law is to put into effect the intent, which is found by looking at what the law says.

Law 57, as we have mentioned before, enumerate in a very detailed format what is the legislative interest with the transformation mandated for Puerto Rico’s Electric System.

Rates are reasonable only when they, are an instrument to comply with the laws mandates. A rate is reasonable only when it is an instrument to obtain the results intended.

Rates are reasonable only where they are an efficient instrument that will not self-destruct by generating less economic development, less electricity demand and the corresponding reduced earnings for PREPA itself. Nothing is reasonable, when it take you to the exact opposite situation than the one you intended.

A rate that will unravel, due to economic conditions, elasticity of demand, among other factors is not reasonable.

Just is a more complex term. Coming from “justice” it talks about balance, fairness, when the benefits out weights the costs and when it does not harm anyone in a serious manner.

Just is not a synonym of equality, it would be more a synonym of fair. A progressive tax system is considered to be just when those who have more pay more, in other words you pay in relation of your capacity of bearing such taxes. A rate which in a similar mode recognize the capacity of society to comply with such, is just.

19. Can the Commission defer decisions on cost allocation and rate design while addressing revenue requirement?

20. Would rates be just and reasonable if cost allocation and rate design are not addressed, given circumstances surrounding this case (no adjustment since 1989, no reliable ECOSS)?

21. If any portion of the filing is incomplete, does Act 57 require the Commission to deny the Petition?

22. What are the legal consequences of denying a Petition?

It doesn't sound reasonable to approve a rate and approve a cost allocation where the Commission and its consultants conclude that it cannot trust or at least it is not satisfied with PREPA's information.

After all, the main duty of the Commission in this proceedings is to approve a rate increase precisely based on the facts believed by the Commission and filed in the record.

If the information is not in the record, or it is incomplete and unreliable, the Commission cannot approve.

The burden of proof is on PREPA, not in the intervenor, not in the Commission. If the Commission's judgment is, as we believe it is, that PREPA has not complied with its burden of proof, the Commission has no alternative but to deny the petitioned rates.

The Commission is under no legal compulsion to approve rates that the Commission believes are based in incomplete, flawed information.

There is no legal consequences of denying the proposed rates. The Commission can modify the rates, approve a temporary increase and open a new rate cases.

As we have started before:

“b. ICSE-PR understands the need of approving the necessary revenues for PREPA’s operation. However, the ICSE-PR understand that it is not on the best interest of PREPA consumers, nor of PREPA itself, to approve a permanent rate increase at this time.

c. The approval of a permanent rate increase of around 26% will send the wrong signal to PREPA, to governmental entities, the markets and the PREPA consumers with detrimental effects. Granting a permanent rate increase, promotes a false sense of stability of the Public Utility (PREPA); an incorrect sense of financial recuperation of PREPA; and at the same time it would be unreasonable to the PREPA consumers (residential, commercial and industrial) and to the Puerto Rico population as a whole. The consequences of wrong signals to governmental entities, the markets, the Financial Control Board, PREPA and PREPA consumers could result in inevitable long term consequences to the detriment of the public interest. We understand of course, that such is not the intention of this Honorable Commission.”

...  
“ii. “The disapproval of the PREPA’s Proposed Rate Increase is not intended to block any source of additional revenues to PREPA. On the contrary, such a decision will allow to conclude this initial proceeding orderly and in compliance with the Commissions own regulations and the immediate commencement of a new Rate Review Proceeding, inclusive of a new provisional rate, without the time constrains that the Initial Rate Review required per Act 4, 2016.

iii. A new Rate Review Proceeding will not only send the right signal to governmental entities, the markets PREPA and the PREPA consumers, of the precarious situation of PREPA and the need of additional time to conduct an adequate process to establish permanent rates (emphasis provided), but will allow the Commission the faculty of establishing the necessary provisional rates while PREPA satisfactorily produces information and provides it to the Commission. A new proceeding will provide enough time for PREPA (while counting with provisional rates) to conclude in an orderly manner its restructuration process and to define existing open issues as the emission of PREPA Restructuring Bonds, comprising the statutory requirement of the evaluation by the PROMESA Board of PREPA’s Fiscal Plan. A new proceeding will also provide for

PREPA to complete its organizational restructuring, including critical aspects as data generation and information reporting, pointed out several times through this proceeding.”

Truth is that as Fisher and Horowitz have stated:

“i. Quite simply, PREPA has dug itself into a hole of disrepair, and suffers from shortages of both resources and skills. (P.17)

...

ii. PREPA is failing at the basic mandate of an electric utility, which is to safely and reliably supply electricity to its customers. Neither the Commission, other governmental authorities, nor the public should be misled about PREPA’s current state, which is unambiguously one of crisis. (p.18)

...

iii. PREPA suffers from a severe lack of adequately trained staff and sound internal policies, protocols, and tools. PREPA’s recordkeeping is archaic and unreliable. Its approaches to problem-solving are often improvised, with results that are disastrous as often as they are admirable. It has repeatedly shown itself to be penny-wise and pound-foolish. PREPA needs guidance, training, and talent to be able to take advantage of the opportunities for improvement afforded to it by this Commission. The Commission therefore finds itself in the position of having to both regulate and teach—and, equally, PREPA must find or develop in itself a commitment to cooperation and a willingness to learn. (p. 18)

...

iv. We recognize that PREPA, today, may not have the capacity to repair itself even if the Commission were to allocate it unlimited funding. (p. 20).”

The Commission can enter into a consent agreement with PREPA. We have stated.

“h. Although it is clear that PREPA need of adequate revenues for its operation, given the critical condition of PREPA, as stated by the Commission’s own experts, PREPA is not capable to manage itself out of its present crisis. For such reasons, PREPA cannot have a permanent rate increase but a provisional one, that would provide funds for its operation, but also to reflect decreases in revenues as it is financially, organizational and operationally restructured. The Commission cannot obviate that any Utility with the characteristics of PREPA would file bankruptcy, even before getting to this point of recognizing its extreme crisis. For these reason the Commission should:

- i. Enter into a Consent Judgement with PREPA with specific conditions to be allowed to continue its operation.
- ii. Disapprove the current petition imposed the by PRPEA; apply to PREPA the necessary fines and penalties; and immediately open a new proceeding (without the time constrains of the current process) with a provisional rates that would allow PREPA to continue in operation.
- iii. Direct PREPA's towards a harmonious filing with cost and revenues impacts of an approved Fiscal Plan by the PROMESA Board, which includes supervision of its financial restructuring under Title VI or ultimately Title III of PROMESA.
- iv. Decide upon a permanent rate increase after PREPA has worked its financial, organizational and operational restructuring and provided to the Commission all the necessary data, studies, analysis and information required toward a fair and reasonable tariff for all rate classes and all sectors involved."

As an example, if the Commission follow the path of the IRP Order where it censure PREPA's filing, disapproves the Integrated Resource Plan submitted by PREPA and approves a Modified Integrated Resource Plan, it will be in compliance with Law 57, both in fulfilling its duty and with the mandate of the Law, especially when considering the deficiencies on the Rate Case filing that may exceed the ones of the IRP Case.

In summary, there is precedent and legal base for the Commission to act in the January 11<sup>th</sup> order, based in the insufficient filing of PREPA, in rejecting of such filing and conditionally concede a Modified Revenue Requirement, that do not considers cost allocation and rate design, aimed to maintain the operation of the utility. The Commission should also immediately start a new rate case to attend the many open issues resulting from this Rate Case proceeding.

If the Commission decides to concede such Modified Revenue Requirement, it should be subject to a strong oversight in the form of a Consent Order by the Energy Commission towards the correction of the utility mismanagements and deficiencies; and also subject to further changes to the debt service by the PROMESA Board.

23. Does Act 57 require permanent rates to be reconciled with provisional rates on a customer class basis, rather than on a per-customer basis?

24. Does Act 57 require the Commission to reconcile rates at any specific moment?

ICSE is not expressing position in these two issues.

25. What is the difference in treatment between grandfathered and non-grandfathered net-metering customers?

26. Are grandfathered net-metering customers exempt from all charges imposed by the Commission?

27. Are non-grandfathered net-metering customers subject to charges on their total inflow from PREPA?

28. Can the Commission distinguish between base rate charges and special charges (CILT, subsidies, etc.) for purposes of determining how they are applied to net-metering customers? For example, base rate would only be applied to net inflow (when inflow > outflow), while CILT and other charges would apply to their total inflow from PREPA.

29. How should the Commission interpret the term “just” when evaluating a charge to be imposed on net-metering customers?

30. How should the Commission interpret the phrase “shall have the purpose of covering the operating and administrative expenses of the grid services that receives any customer that entered into a Net Metering Agreement” in Article 4(i) of Act 114, as amended?

31. How can the Commission interpret the requirement established in Article 4(i) of Act 114, as amended, that “the grid services received by a net metering customer shall be clearly differentiated from the services that the Authority bills on a regular basis to all of its customers”?

32. How should the Commission interpret the term “excessive” when evaluating a charge to be imposed on net-metering customers?

33. How should the Commission interpret the phrase “established in such a manner as to constitute an obstacle to the implementation of renewable energy projects” in Article 4(ii) of Act 114, as amended, when evaluating a charge to be imposed on net-metering customers?

ICSE adopts and endorses Windmar’s Group legal position in questions 25<sup>th</sup> to 33<sup>rd</sup>, and will not make any independent statement on these issues.

34. Does Act 50-2013 limit the Commission's discretion in approving rates applicable to PRASA? How?

ICSE is not expressing position on this issue. Notwithstanding, as seen during the Technical Hearings, any unnecessary cost that increase the revenue requirement of PREPA should be eliminated whether possible, since those cost will be bear by the consumers.

General Conclusion:

For the Commission to approve a permanent rate increase as submitted by PREPA it would have to:

- A. Overcome the reality of lack of credible, complete information, so having to act without PREPA having complied with its burden of proof.
- B. Act "in the dark" in terms of lack of a valid ECOSS report.
- C. Ignore the Economic reality of Puerto Rico, as presented by Dr. Cao's report, the fiscal Board of PROMESA actions, and public information concerning the Government Finances, as presented in the transition to a new government.
- D. Ignore the authority, already exercised by the Fiscal Board under PROMESA, which include the potential reduction in PREPA's debt.
- E. Act without having a final IRP in place which is basic for PREPA's operations, expenses and revenue requirements.
- F. Act in the absence on a performance review which can impact the "reasonableness" and "prudence" of PREPA's expenses and operations.
- G. Act in the absence of adequate load factor analysis and in the absence of demand analysis which include the consideration of economic impact of the increase, the elasticity of demand, the demand side management, the use of renewable and energy efficiency factors.
- H. Act without PREPA having presented any specific pertinent evidence on how the rates are consistent with Law 57 values and interests mandates.

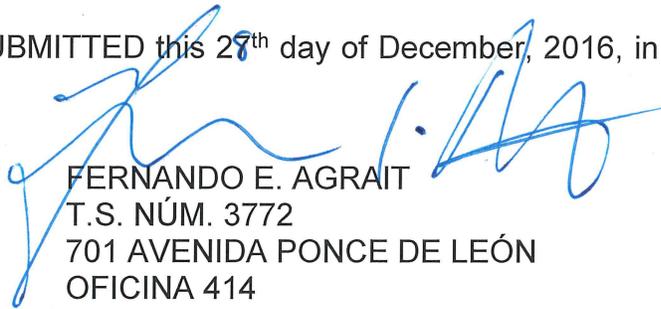
Finally, this Commission has a duty to- acting for the first time ever in Puerto Rico as an independent PREPA "evaluator" to educate, PREPA, the Government the Rates Payers and other stakeholders on how rate making is done currently by complying with the law, and values expressed in Law 4 and Law 57.

RESPECTFULLY SUBMITTED.

WHEREFORE, ICSE respectfully request that the Commission received this legal brief and act accordingly.

I HEREBY CERTIFY: that today a true and exact copy of this document and its attachments was notified sent via e-mail to the following persons: n-ayala@aepr.com; n-vazquez@aepr.com; c-aquino@aepr.com; glenn.rippie@r3law.com; michael.guerra@r3law.com; john.ratnaswamy@r3Law.com; codiot@oipc.pr.gov; jperez@oipc.pr.gov; cfl@mcpvpr.com; ivc@mcpvpr.com; mmuntanerlaw@gmail.com; jfeliciano@constructorespr.net; abogados@fuerteslaw.com; jose.maeso@aae.pr.gov; edwin.guionones@aae.pr.gov; nydinmarie.watlington@cemex.com; aconer.pr@gmail.com; epenegypr@gmail.com; jorgehernandez@escopr.net; ecandelaria@camarapr.net; pga@caribe.net; manuelgabrielfernandez@gmail.com; mreyes@midapr.com; mgrpcorp@gmail.com; attystgo@yahoo.com; afigueroa@energia.pr.gov; tnegron@energia.pr.gov; legal@energia.pr.gov; mcintron@energia.pr.gov; eirizarry@ccdlawpr.com; pnieves@vnblegal.com; maribel.cruz@acueductospr.com.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December, 2016, in San Juan, Puerto Rico.



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LAW 57 OF 2014, VALUES AND INTERESTS PROMOTED AND PROTECTED

Law 57 establishes very clear mandates on what are the values and interests promoted and protected by the PREPA transformation. The law states the specific mandates, and enumerates the very specific interests and values it wants to promote and protect. All these interests and values are either mandated or are the result and consequence of new structures (The Commission), procedures and information requirements in the law.

More than a mere enumeration of aspirations, the law is very specific in its mandates and such mandates must be part of the process of evaluating the new rates.

The Statement of Motives expresses:

1. There is a broad consensus on the need to evolve from our dependence on fossil fuels and use to the maximum extent possible the Island's energy resources, such as the sun and the wind, conservation, and efficiency.
2. The high cost of energy limits our ability to stimulate the economy, strengthen small- and medium-sized business, as well as to attract private investors from abroad, develop commercial, industrial and manufacturing activities, and improve the quality of life of all Puerto Ricans. This prevents our Island from becoming a competitive and attractive place in all aspects. We have been held as hostages of a poorly efficient energy system that excessively depends on oil as fuel, and that does provide the tools to promote our Island as a place of opportunities in the global market. The current cost per kilowatt-hour of approximately twenty-seven cents (\$0.27) is extremely high when compared to other jurisdictions that compete with Puerto Rico to attract investors and severely affects the pockets of local consumers.
3. Therefore, it is imperative and compelling to enforce a thorough reform of the energy sector that promotes the operation and administration of an efficient system at just and reasonable costs, considering that we are an isolated jurisdiction that needs to have a safe and stable electric power grid. We need to adopt a regulatory and legal framework through the creation of a robust independent entity that will ensure the transformation of the electric power system of our Island for the benefit of present and future generations.
4. After more than seventy (70) years of its creation, and more than three decades of having achieved the total electrification of the Island, PREPA has become a monopoly that regulates itself; sets its own rates without actual oversight; incurs

operational, managerial, and administrative deficiencies whose actual cost, at the end of the day, is borne directly by customers; and whose governance lacks transparency and citizen participation. All of the above contributes to Puerto Rico being among the top U.S. jurisdictions with the highest energy cost.

5. As a summary the Statement of Motives states:

This Legislative Assembly reasserts its commitment to the People of Puerto Rico through the creation and implementation of an Energy Reform consisting of multiple initiatives that are all related to common goals such as permanently reducing the cost of energy and provide the People of Puerto Rico with a reliable, affordable, efficient, and transparent electric power service.

6. Page 5- Need to approve and submit an Energy Relief Plan, to detail how PREPA will comply with the new legislative mandates.
7. P. 6-Modifications to contributions made to municipalities, to “reduce operating expenses”.
8. P. 9- At that time, our Legislative Assembly stated that Act No. 114-2007 resulted, among other things, from the need to incentivize the generation of electric power through renewable energy sources due to our excessive dependence on fossil fuels to generate electricity and their well-known polluting effect on the environment, as well as the high costs reflected on electricity bills. However, in spite of the subsequent amendments to the Act, the regulations adopted by PREPA with regard to systems with a nameplate capacity in excess of 1 MW, far from supporting the development of renewable energy alternatives, have had the practical effect of obstructing the development thereof.
9. The Public Policy of the Law restated in Section 1.2:
- (a) The cost of the electric power generated, transmitted, and distributed in Puerto Rico shall be affordable, just, and nondiscriminatory for all consumers;
  - (b) The availability of energy supply shall be guaranteed to the People.
  - (c) The implementation of the public policy on energy shall be an ongoing planning, consultation, execution, evaluation, and improvement process in all energy-related matters.
  - (d) The implementation of strategies geared toward achieving efficiency in the generation, transmission, and distribution of electric power shall be sought in order to guarantee the availability and supply thereof at an affordable, just, and reasonable cost;

(e) The safety and reliability of the electricity infrastructure shall be guaranteed by integrating clean and efficient energy and using modern technological tools that promote economic and efficient operations;

(f) The electrical infrastructure shall be maintained in optimum conditions as to ensure the reliability and safety of the electric power service;

(g) The Island shall become a jurisdiction with diversified energy sources and high efficiency electric power generation. To achieve this, it shall be necessary to reduce our dependence on energy sources derived from fossil fuels, such as oil, and to develop short-, medium-, and long-term plans that allow us to establish a well-balanced and optimum energy portfolio for the electrical system of the Commonwealth of Puerto Rico;

...  
(m) Prices shall be based on the actual cost of the service provided, efficiency standards, or any other parameters recognized by government and nongovernmental organizations specialized in electric power service;

...  
(s) Every electric power contributions, subsidies, or direct or indirect payments provided by PREPA shall be properly used in accordance with the objectives for which they were granted.

10. (e) "Interconnection Charge"- Shall mean the fair and reasonable amount of money that a person shall pay to PREPA for the right to connect his/her facility to Puerto Rico's electric power grid.

11. (nn) "Wheeling Rate" - Shall mean a just and reasonable amount of money that PREPA may charge to a power producer for using its transmission and distribution facilities for wheeling and for the right to interconnect the electrical power generation facility of such power producer to the electric power grid of Puerto Rico, in accordance with the provisions of Act No. 73-2008.

12. Section 1.4.- Principles of Transparency and Accountability.

(a) In accordance with the public policy established in Section 1.2(o) of this Act, every information, data, statistics, reports, plans, and documents received and/or disclosed by any of the entities created under this Act, PREPA, and every electric power company shall be subject to the following principles:

(1) The information shall be complete, except for privileged information which shall be suppressed in accordance with the Rules of Evidence adopted by the Judicial Branch of Puerto Rico;

(2) The disclosure of the information shall be timely;

(3) The data shall be in a raw and detailed form, not modified. In addition to the original text of any document where such information or data appears, documents where such information is organized and shown so that it may be easily handled by persons without expertise in the disciplines addressed therein may understand them shall be published and made available to customers;

### 13. Article 2.6 States

“Section 6.- Powers.

PREPA shall be responsible for providing reliable electric power, contributing to the general wellbeing and sustainable future of the People of Puerto Rico, maximizing benefits, and minimizing social, environmental, and economic impacts. It shall also offer and provide services based on affordable, just, reasonable, and nondiscriminatory costs that are consistent with the protection of the environment, as well as nonprofitable, and focused on citizen participation and its customers.

### 14. Article 2.8

(e) The Board may establish an adjustment fee to recover variable costs in the purchase of fuel and the purchase of energy, subject to the provisions of this Section. Said adjustment fee for the purchase of fuel and the purchase of energy shall only include the costs directly related to the purchase of fuel and the purchase of energy. Under no circumstances, the payment of lines of credit (including interest) shall be part of the costs directly related with the purchase of fuel and the purchase of energy.

The provisions of Act No. 21 of May 31, 1985, as amended, known as the “Uniform Rate Revision and Modification Act,” and the provisions of Act No. 170 of August 12, 1988, as amended, known as the “Uniform Administrative Procedures Act”, shall apply to PREPA’s rates modification and review processes insofar as they are compatible with the rate modification and review provisions and requirements established in this Section. If the provisions of Act No. 21 are incompatible with the provisions of this Act, the provisions of this Act shall prevail.”

### 15. Article 2.9

(i) High Efficiency Generation - Within a term that shall not exceed three (3) years after July 1st, 2014, PREPA shall ensure that, at least sixty percent (60%) of the electric power generated in Puerto Rico based on fossil fuels (gas, coal, oil, and others) is “high-efficiency”, as such term is defined by the Commission. The term “high efficiency” shall include as main factors the thermal efficiency of the power plant or facility per type of fuel used, fuel cost, technology, potential of proposed technology to reduce production costs per kilowatt-hour, and/or any other

parameter of the industry that guarantees thermal efficiency in the generation of power. The percentage required under this Section shall include the fossil fuel powered energy sold to PREPA under power purchase agreements executed as of the approval of this Act.

16. Article 2.9

- (ii) Production Costs - If it is necessary for PREPA to purchase energy for Puerto Rico, any power purchase agreements shall comply with the parameters of this Act and those imposed by the Commission, provided that no energy cogenerator shall realize gains attributable to fuel. The cogenerators' profit margin under power purchase agreements to be approved by the Commission shall be consistent with the parameters established by said regulatory entity. Such parameters shall be consistent with price escalators adjustments normally used by the industry to such purposes, as well as any other parameter or methodology used to regulate gains attributable to power purchase agreements in order to ensure that such agreements have a reasonable and just price.

17. Article 2.9 (a)(viii)

(viii) Distributed Generation - PREPA shall identify the most effective and economic manners to make the electric power infrastructure of Puerto Rico more distributed and sustainable, and promote the use and strategic integration of sustainable energy technologies and practices. To comply with this duty, PREPA shall plan, build, and update distribution systems to ensure the integration to the maximum extent possible of renewable distributed generation.

18. Article 2.9 (a)(ix)

(ix) Environmental Regulations - PREPA shall be timely and fully compliant with all applicable environmental legislation and regulations, including, but not limited to the Mercury and Air Toxic Standards (M.A.T.S.), which are monitored by the U.S. Environmental Protection Agency (EPA)

19. Article 2.9 (h)(ii)- Identifies the requirements of the IRP (obviously pertinent to rate structure)

(A) A range of future demand forecasts established by using methods that examine the effect of economic factors on electricity consumption as well as the effect of the use of lands under the Land Use Plan for Puerto Rico in effect, and

the trend changes in the amount, type, and efficiency of electricity, and its end-use.

(B) An evaluation of the conservation resources available in the market, including the management of electricity demand, as well as an evaluation of the programs in effect and the necessary programs to improve energy conservation.

(C) An evaluation of the range of conventional and nonconventional generation technologies available in the market.

(D) An evaluation of the transmission capacity and reliability of the system.

(E) A comparative evaluation of the energy supply resources, including transmission and distribution.

(F) An evaluation of the combination of resources designated to promote energy sources diversification; stabilize energy costs; and improve the reliability and stability of the electric power grid.

(G) An evaluation of the existing electric power plants or facilities of PREPA that takes into account the improvements in the operational efficiency of plants, the useful life of existing plants, and the retirement date and decommissioning costs thereof, if applicable.

(H) Evaluation of the environmental impacts of PREPA related to air emissions and water consumption, solid waste, and other environmental factors.

(I) Evaluation of the interconnection of renewable energy projects and other independent power producers to the electric power grid, to comply with Act No. 82-2010.

#### 20. Article 2.10 (d)

(d) Before granting any subsidy or incentive related to the electric power service, any existing and proposed subsidies or incentives shown in PREPA's rate paid or to be paid by nonsubsidized customers shall be evaluated. PREPA shall publish on its website any information about the different subsidies, their legal basis, the approximate cost of each one of them for PREPA, and the characteristics of the customer sectors or universe that benefit from each subsidy.

#### 21. Art. 5.1

"Section 2.- Eligibility. To be eligible for this benefit, the solar electric equipment, windmill, or other source of sustainable or alternative renewable energy, as such terms are defined in Act No. 83-2010, known as the "Green Energy Incentives Act of Puerto Rico," must meet all the requirements established in the Federal legislation and regulations applicable to net metering programs that allow for interconnection to the electric power grid. Unless otherwise provided, or unless another requirement is specifically imposed through the applicable Federal legislation or regulations to expressly prevent state legislation, every solar electric

equipment unit, windmill or other source of sustainable or alternative renewable energy, as defined in Act No. 83, supra, must meet the following requirements:...

22. Article 5.1 (a)

“Section 9.- Public Policy on Interconnection. It shall be the public policy of the Commonwealth of Puerto Rico to ensure that the procedures for the interconnection of distributed generators to the electric power system of the Electric Power Authority are effective in terms of costs and processing time, in order to promote the development of these types of projects and incentivize economic activity through the reduction of energy costs in the residential, commercial, and industrial sectors. For such reasons, it is hereby established that the procedures for the interconnection of distributed generators with a generating capacity of up to five (5) megawatts (MW) which shall participate in the Net Metering Program, shall be consistent with the Small Generator Interconnection Procedures (SGIP) and the Small Generator Interconnection Agreement (SGIA), provided in Order No. 2006 of the Federal Energy Regulatory Commission (FERC), as amended, and any other future amendments thereto that are adopted by the Energy Commission. PREPA shall uniformly follow the interconnection procedures in all of its regions.