

A SACRED DAWN: THE FUTURE OF PUERTO RICO’S NET-METERING PROGRAM

ARTICLE**

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May the Sun rise! May it be greeted by the old and new; may the coming generations behold it as a sacred dawn that follows one of the most forsaken nights the sorrowful human species has ever withstood[.]

—Eugenio María de Hostos y Bonilla.¹

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INTRODUCTION

Net-metering programs were implemented in various states pursuant to the Energy Policy Act of 2005.² This Act amended the Public Utility Regulatory Act of 1978 to include dispositions on net metering as well as adopting renewable technologies

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in lieu of fossil fuel energy dependence.³ The Act put in place a timeline to be followed by the States in considering and implementing net metering programs to be offered to consumers upon request.⁴ States had two years from the enactment of Section 1251 to commence their consideration process or set a hearing date for doing so. Each State regulatory authority and non-regulated electric utility then had a corresponding three years from enactment to reach a final determination as to net metering. Massachusetts, Minnesota, and Arizona are recognized as being amongst the first jurisdictions in the United States to adopt net metering policies even before Public Law 109-58.⁵ Such programs have since been adopted globally.⁶

A way to conceptualize net-metering is as a billing adjustment mechanism that incentivizes energy generation at the consumer level. Individuals install their own generation, mostly wind turbines or solar panels on their property to offset their energy consumption from the electrical grid via the interconnection of their systems to that of the utility company. Any excess generation can then be sold as a commodity on the market in the form of energy credits, even up to a 1:1 retail value. Demand from the electrical grid is thereby eased and the consumer pays less to meet their energy needs. This is, of course, the idealized operation and results of a net-metering program.

Puerto Rico implemented net-metering with Law 114-2007 as part of a longer trajectory of environmental public policy on the archipelago.⁷ For context, there was no legal environmentalist rhetoric in the handling of natural resources following the American invasion in 1898, as observed in Puerto Rican caselaw during the first forty years of colonial governance. As stated by Professor Luis E. Rodríguez Rivera:

[T]he environment was not treated . . . as an element of the population's patrimony or heritage which must be protected and conserved. Instead, the environment and its natural resources were viewed as a commodity whose exploitation enhanced the [archipelago]'s economic development. Although this latter view may be consistent with prevailing American/Western attitudes of the time, the absence of environmentalist or conservationist rhetoric . . . allowed the Supreme Court to simply apply contractual and property law to the environment-related disputes before it.⁸

1 August 12th Letter to Federico Henríquez y Carvajal, Mayagüez, Puerto Rico (1899) (Translation provided) (Refers to the end of Ulises H. Heureaux Lebert's dictatorship over the Dominican Republic in 1899. Eugenio María de Hostos y Bonilla returns to the City of Santo Domingo in January of 1900 and resides there until his passing in 1903).

2 Energy Policy Act of 2005, Pub. L. No. 119-58, 119 Stat. 594 (2005).

3 *Id.* at §1251 (a).

4 *Id.* at §§ 1251(b).

5 Yin-huei Wan, *Net Metering Programs*, NREVSP-460-21651 (1996), <https://www.nrel.gov/docs/legosti/old/21651.pdf>.

6 IEA (2024), *Renewables 2024*, IEA, Paris <https://www.iea.org/reports/renewables-2024>, License: CC BY 4.0.

7 P.R. LAWS ANN. tit. 22, §§1011-20(b) (2019 & Supl. 2024)

8 Luis E. Rodríguez Rivera, *Genesis of Puerto Rico's Environmental Law: Study of Early Puerto Rico Environmental Case Law*, 67 REV. JUR. UPR 201, 209 n.29 (1998).

It was not until the ratification of the Puerto Rico Constitution of 1952 that an environmental provision was integrated into the Puerto Rican legal corpus in Article VI § 19.⁹ This having been done with the rationale that “Puerto Rico being an archipelago and having few natural resources, there must be a constant concern on behalf of the Commonwealth in the conservation thereof”.¹⁰ Several statutes have since then been enacted to operationalize that constitutional environmental directive such as the Environmental Public Policy Acts of 1970 and 2004.¹¹ It is important to note that any and all prospective energy public policy is grounded in and framed as a derivative of the aforementioned environmental public policy and the Constitution. Thus, the 15th Legislative Assembly of Puerto Rico and Governor Aníbal S. Acevedo Vilá passed Act No. 114-2007 thereby instructing the Puerto Rico Electrical Energy Authority to implement a net-metering program.¹²

Net-metering has since become an integral part of Puerto Rico’s energy sector transformation and provides a fail-safe during service interruptions related to atmospheric phenomena such as Hurricane María in 2017. This having been possible to the recent development and proliferation of battery energy storage systems. In certain communities and urban centers such as Adjuntas, Isabela, and Castañer, solar power generation is now the bedrock of their energy independent visions for Puerto Rico, a way to reclaim local sovereignty in light of colonial austerity measures and the ongoing climate change crisis.¹³ These latter two compose a morbid dyad whereby the possibilities for climate disaster mitigation and recovery are truncated within the confines of government insolvency worsened by a lack of political autonomy.¹⁴ With this in mind, it is crucial to assess the legal scaffolding of net-metering to secure the program’s survival in Puerto Rico. Of particular relevance here is ongoing federal adversarial proceedings which—depending on the outcome—could be detrimental to Puerto Rico’s net-metering incentives and constitutional order.

I. PUERTO RICO’S NET-METERING PROGRAM.

A. Act No. 114-2007.

The Statement of Motives for Act. No. 114-2007 succinctly narrates the current state of the Puerto Rican energy sector which moved the Legislative Assembly to ordain a net-metering program for the archipelago:

⁹ CONST. PR. Art. VI § 19 (“It shall be the public policy of the Commonwealth to *conserve*, develop and use its natural resources in the most effective manner possible for the general welfare of the community).

¹⁰ 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE 2615 (Ed. Conmemorativa 2003)(Translation provided).

¹¹ P.R. LAWS ANN. tit. 12, §§1121-40(a)(1978)(repealed 2004); P.R. LAWS ANN. tit. 12, §§ 8001-07(f) (2022 & Supl. 2024).

¹² P.R. LAWS ANN. tit. 22, §§1011-20(b).

¹³ González, Alexis Massol, et al. “A HISTORIC JUNCTURE: The Reality of Puerto Rico in 2018.” In *CASA PUEBLO: A PUERTO RICAN MODEL OF SELF-GOVERNANCE*, 151–62. Lever Press, 2022; Sheila Matos, *Barrio Eléctrico impulsa resiliencia energética en Isabela con instalación de placas solares*, PERIÓDICO VISIÓN (Oct. 23, 2024), <https://periodicovision.com/barrio-electrico-impulsa-resiliencia-energetica-en-isabela-con-instalacion-de-placas-solares/>; Community Energy Resiliency Plan, Interstate Renewable Energy Council, October 2024. <https://irecusa.org/wp-content/uploads/2024/11/RACER-Report-10.24-ENGLISH-compressed.pdf>.

¹⁴ For a primer on the doctrine of the Insular Cases, see Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 284 (2007).

The excessive dependency on fossil fuels to generate electricity and their ensuing environmental pollution, high costs in electricity bills, questionable charges in the matter of fuel costs and the purchase of energy, frequent interruptions in the electrical service caused by greater power demand opposite a stagnant generation capacity, and the absence of efficient preventive maintenance in the electrical system of the [archipelago], leave little hope for relief in energy costs for the people of Puerto Rico.¹⁵

The Act set in place the basic norms to be built upon by subsequent regulation. Eligibility for the net-metering program is based on the technical specifications of possessing a generator capable of an output of twenty-five kilowatts for residential use and up to one megawatt for commercial use.¹⁶ Said generator may be composed of solar electric equipment, a windmill, or any other source of renewable energy as defined by the Green Energy Incentives Act of Puerto Rico.¹⁷ The equipment must comply with all corresponding federal and local regulation to then be interconnected to the power grid.¹⁸ Once interconnection has been achieved through the intervention of a licensed electrical specialist, the agreement holder with the Electric Power Authority must comply with the terms of the contract and all applicable laws, regulations, and other norms.¹⁹ Further, the Agreement Form contemplates an aggregate net-metering model on two scenarios: shared energy generation across various properties of one landowner; and shared net-metering to distribute electrical power amongst community members.²⁰

When a customer's generation surpasses their energy consumption, they are compensated with *Energy Credits* on their account. These credits can either be redeemed at a later time towards their statement or transferred to another person in a commercial sale. Credits left unused at the end of the June billing cycle are compensated at a proportion of 3 to 1.²¹ Any controversy or dispute relating to the energy credits or the net-metering program as a whole are to be adjudicated by the Puerto Rico Energy Bureau—the independent regulatory body of the Electrical Power Authority—referred to in prior legislation as the Energy Commission until the advent of Act No. 57-2014.²² Questions of negligence, fault,

¹⁵ Statement of Motives, Act. No. 114-2007, 2007 LPR 482.

¹⁶ *Id.*

¹⁷ P.R. LAWS ANN. tit. 13, §10421 (2018 & Supl. 2024) (“Sustainable Renewable Energy” – means energy derived from the following sources: a. Solar energy; b. Wind energy; c. Geothermal energy; d. Renewable biomass combustion; e. Renewable Biomass Gas Combustion f. Combustion of biofuel derived solely from renewable biomass; g. Qualified hydropower; h. Marine and hydrokinetic renewable energy, as that term is defined in Section 632 of the ‘Energy Independence and Security Act of 2007[’]; i. Ocean thermal energy; j. Any other clean or renewable energy that the Administration may define in the future, through regulations or order, as renewable energy.” (citation omitted)).

¹⁸ Federal Energy Regulatory Commission Order No. 2006, Docket No. RM02-12-000 (2005).

¹⁹ LUMA, Interconnection Agreement Form, LUMA PR, <https://lumapr.com/wp-content/uploads/2023/11/Interconnection-and-Net-Metering-Agreement-Individuals.pdf>.

²⁰ *Id.*

²¹ Statement of Motives, Act. No. 114-2007, 2007 LPR 482.

²² P.R. LAWS ANN. tit. 22, §§1051-56 (2019 & Supl. 2024).

and liability are determined through Article 1536 of the Puerto Rico Civil Code and the jurisprudence of the Puerto Rico Supreme Court.²³

B. Net-Metering Regulation.

The Puerto Rico Electric Power Authority delivered on the decree of Act. No. 114-2007 by first adopting Final Rule No. 7544 of 2008 and then Final Rule No. 8915 of 2017.²⁴ Major differences between the previous and current regulation is due in great part to changes in applicable local law. Prominent pieces of energy legislation passed after 2007 in Puerto Rico encompass energy diversification public policy, amendments to the permit and licensing processes, green energy incentives, and so forth.²⁵ Notably, the then Energy Commission of Puerto Rico ordered the Electrical Power Authority to incorporate aggregate and shared net-metering models to the existing program by means of an order dated March 20th of 2015.²⁶ Per Final Rule No. 8915, basic or standard net-metering is defined as the service provided to a single client who has interconnected their renewable energy equipment to the electrical grid and benefits from equivalent deductions on their corresponding bill.²⁷ Shared net-metering employs the same procedure but to the benefit of multiple consumers who live on neighboring properties to that of the one housing the distributed generator and subscribe to one mutual agreement.²⁸ Lastly, aggregate net-metering allows for the accreditation of excess power generation across multiple properties into one account regardless of their distance between one another.²⁹ It remains unclear whether these last models have been implemented in practice.

i. Administrative Non-Compliance.

At least two private companies—Máximo Solar Industries, Inc. and Windmar PV Energy, Inc.—have filed administrative complaints against the Puerto Rico Electrical Power Authority over delayed interconnection of photovoltaic generators despite the expedited process provided by Act 17-2019.³⁰ Since their 25 kW generators were not being interconnected to the energy grid, they were not benefitting from the billing adjustment benefit of the net metering program. Given that the transmission and distribution system operator would be the actor to execute the Energy Bureau's decision, LUMA LLC., was accumulat-

²³ P.R. LAWS ANN. tit. 31, §10801 (2015 & Supl. 2024)(Article 1536 is the local general tort liability statute)(“A person who by fault or negligence causes harm to another, shall be obligated to repair it”)(Translation provided).

²⁴ PREPA Final Rule No. 7544 of 2008; PREPA Final Rule No. 8915 of 2017.

²⁵ P.R. LAWS ANN. tit. 23, §§9011-28(h) (2020 & Supl. 2024); P.R. LAWS ANN. tit. 12, §§8121-32 (2022 & Supl. 2024); P.R. LAWS ANN. tit. 13, §§10421-52 (2018 & Supl. 2024); P.R. LAWS ANN. tit. 22, §§1051-56 (2019 & Supl. 2024); P.R. LAWS ANN. tit. 22, §§1071-84; Ley de política pública de diversificación energética-enmiendas, Act No. 133-2016, 2016 LPR 1507.

²⁶ *In re Autoridad de Energía Eléctrica*, Case No. CEPR-MI-2014-0001 (CEPR, Mar. 20, 2015).

²⁷ PREPA, Regulation to Interconnect Generators to the Distribution System of the Puerto Rico Electric Power Authority and to Participate in the Net Metering Programs, Regulation No. 8915 (Mar. 8, 2017).

²⁸ *Id.* at 9-10.

²⁹ *Id.*

³⁰ *Maximo Solar v. AEE*, Case No. NEPR-QR-2020-0029 (March 31, 2022); *Windmar PV Energy, Inc. v. AEE*, Case No. NEPR-QR-2020-0061 (Mar. 31, 2022).

ed as an indispensable party. LUMA and the Power Authority insisted that the statutory term of 30 days could be extended with just cause. The private companies answered that the statute was clear and that the 30 days ought to begin upon their presentation of their generator certification at either the offices of the Power Authority or LUMA. The Energy Bureau agreed that the statutory 30 days could be extended citing a just cause, notwithstanding, just cause is to be determined using a restrictive interpretation of the statutory language. These consolidated administrative complaints demonstrate that the service of the current operators of the energy grid is incongruous with the needs of the public as well as private sectors. Service must improve to secure the renewable energy goals for Puerto Rico.

In an effort to encourage compliance on behalf of LUMA, the Energy Bureau approved a resolution on July 5th, 2024, imposing various administrative penalties up to 25,000 USD.³¹ These measures were taken in the wake of an increase in power outages across Puerto Rico which “cause significant suffering to the Puerto Rican people, affecting their quality of life and every day activities” as well as “economic losses which impact business, industries, and commerce”, coupled with the commissioners’ observation that sufficient mitigation strategies were simply not been put in place or executed.³² LUMA, Genera, and the Power Authority were allotted five days to show cause for why penalties should not be imposed upon them. The Power Authority appealed to the Puerto Rico Court of appeals seeking administrative review of the Energy Bureau’s July 5th Resolution and Order, the same was denied on December 10th, 2024.³³ The three-judge panel determined the Energy Bureau did not engage in illegal, capricious or arbitrary conduct to merit review of their imposition of penalties. The Legislative Assembly recently endorsed further administrative enforcement measures with Camera Project 268, which permits daily penalties upwards of 250,000 USD.³⁴ Time will tell if a stringent series of administrative penalties will espouse adequate electrical service and energy grid resilience.

C. Executive Order No. 64-2017.

It is worth noting that the Governor of Puerto Rico has on at least one occasion proclaimed an exemption from the foregoing net-metering regulation requirements. On September 17th, 2017, Governor Ricardo Rosselló Nevares signed Executive Order No. 47-2017 to declare a state of emergency ahead of Hurricane María’s landfall in Yabucoa.³⁵ Almost a month later, he signed Executive Order No. 64-2017 authorizing citizens to modify their generation systems to include batteries without going through the formal application pro-

³¹ July 5th Resolution and Order, Case No. NEPR-AP-2024-0005.

³² *Id.* (Translation provided).

³³ Autoridad de Energía Eléctrica v. Negociado de Energía, KLRA202400591 (Dec. 10, 2024).

³⁴ P.C. 268, 20th Leg. Assemb., 1st Sess. (P.R. 2025) (Ley para enmendar el artículo 6.36 de la Ley 57-204, Act. No. 2-2025, §1, <https://sutra.oslpr.org/SutraFiles/anejos/153233/Ley%202-2025.pdf>).

³⁵ Executive Order No. 2017-47, *Declarando estado de emergencia a consecuencia del inminente paso del huracán María y activando la Guardia Nacional para que provea apoyo durante esta emergencia*, (Sept. 17, 2017), <https://docs.pr.gov/files/Estado/OrdenesEjecutivas/2017/OE-2017-047.pdf>.

cesses with the Electrical Power Authority.³⁶ This executive action illustrates how critical net-metering can be for survival during states of emergency and later recovery efforts. As recently as December 31st, 2024, Puerto Ricans experienced a nation-wide power outage which affected nearly 90% of utility consumers and again on April 16, 2025.³⁷ Under these circumstances, a net-metering program goes beyond a mere monetary or environmental incentive to a means for subsistence in times of governmental absence or inability, an alternate source of an essential public utility.

II. FISCAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO.

A. PROMESA.

On June 9th, 2016, the 114th United States Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act, commonly referred to as PROMESA.³⁸ The same was signed into law by President Barack H. Obama on June 30th, 2016.³⁹ PROMESA imposed a Fiscal Oversight and Management Board on Puerto Rico with the purpose of “[providing] a method for [Puerto Rico] to achieve fiscal responsibility and access to the capital markets”.⁴⁰ The Board was to be composed of seven unelected members solely named by the President of the United States without the consent of Congress nor the people of Puerto Rico. Any legislation, executive action or contract espoused by the Government of Puerto Rico can be nullified by the United States District Court for the District of Puerto Rico per the Board’s request. This however, is contingent upon agreement from Chief Judge Laura Taylor Swain of the Southern District of New York, who sits on the District of Puerto Rico upon designation by Chief Justice John G. Roberts of the United States Supreme Court since 2017.⁴¹ The FOMB and PROMESA have been the subject of controversy since their inception, spawning ample protests and federal jurisprudence.⁴² Past FOMB Chairman and Professor at the University of Pennsylvania Carey Law School David A. Skeel has acknowledged the contentious nature of the Board and admitted how its authority exceeds that of prior restructuring efforts in the City of Detroit and District

³⁶ Executive Order No. 2017-64, *Para energizar residencias con sistemas de generación fotovoltaica y baterías, y acelerar la recuperación del sistema de energía eléctrica de Puerto Rico luego del paso del huracán María*, (Oct. 16, 2017), <https://docs.pr.gov/files/Estado/OrdenesEjecutivas/2017/OE-2017-064.pdf>.

³⁷ Luis Ferré-Sadurní, et. al, *Most of Puerto Rico is Darkened by New Year’s Eve Blackout*, N.Y. TIMES, Dec. 31, 2024; Patricia Mazzei, *‘Massive Blackout’ Leaves All of Puerto Rico Without Power*, N.Y. TIMES, Apr. 16, 2025.

³⁸ 48 U.S.C. 2101.

³⁹ *Id.*

⁴⁰ *Id.* at § 101.

⁴¹ U.S. District Court – District of Puerto Rico, Designation and Assignment of an Active United States Judge for Service in Another Circuit, <https://promesa.prd.uscourts.gov/sites/default/files/lts-desig-20170519-20171119.pdf>.

⁴² Adrian Florido, *Residents of Puerto Rico Protest Austerity on May Day*, NATIONAL PUBLIC RADIO (2019). <https://www.npr.org/2019/05/02/719366897/residents-of-puerto-rico-protest-austerity-on-may-day>; Peaje Investments, LLC v. García-Padilla, 845 F.3d 505 (1st Cir. 2017); Fin. Oversight & Mgmt. Bd. v. Aurelius Investment, LLC, 590 U.S. 448 (2020); Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339 (2023); Fin. Oversight & Mgmt. Bd. v. Cooperativa de Ahorro y Crédito, 79 F.4th 95 (1st Cir. 2023); Fin. Oversight & Mgmt. Bd. v. Hernández-Montañez, 82 F.4th 57 (1st Cir. 2023); Fin. Oversight & Mgmt. Bd. v. Pierluisi, Case No. 3:24-00062 (2024).

of Columbia in several respects.⁴³ For example, PROMESA bestows upon the Board several powers to be wielded at their “sole discretion.”⁴⁴ An important detail here is that the legal bedrock upon which PROMESA rests is not the Bankruptcy Clause of the U.S. Constitution, but instead the “plenary powers” of Congress enshrined in the Territorial Clause.⁴⁵

In order for the Board to be dissolved, the Government of Puerto Rico must achieve a restructuring of all of its debt, and produce a balanced budget for four consecutive fiscal years in accordance with modified accrual accounting standards.⁴⁶ In the eight years of the Board’s operations, it is unclear how many balanced budgets have been achieved by the Government due to ongoing fiscal audits.⁴⁷ The debt of the Electrical Power Authority remains a major component of the ongoing debt restructuring proceedings. Said debt is part of a lengthy history of financial mismanagement within PREPA:

PREPA’s persistent financial deficits are a result of, among other things, decades-long fiscal and operational mismanagement, and a historical inability to adjust energy rates to a level that would ensure PREPA could cover its costs and the capital investments required to modernize its energy system. PREPA has been operating under a structural financial deficit since 2004, which has worsened over time. To cut costs, PREPA historically reduced or stopped investing in system upgrades, leading to an energy system that is vulnerable and prone to frequent and extended outages and voltage fluctuations. Additionally, PREPA has failed to fully fund its pension plan and, since 2014, has not paid its debt service other than through the issuance of additional bonds.

Over the past decade, revenues have decreased due to out-migration, economic decline, and increased adoption of distributed generation and energy efficiency measures. As the revenue base contracted, higher rates and associated volatility led to an increase in outstanding collections and bad debt, causing customers to further invest in energy efficiency and reduce their reliance on the grid, all with an adverse impact on PREPA’s revenues. In response to these liquidity challenges, PREPA financed its fuel procurement through credit lines, which further contributed to PREPA’s unsustainable debt.⁴⁸

Such is the backdrop against which the Commonwealth had to file a voluntary petition under Title III of PROMESA in the U.S. Bankruptcy Court for the District of Puerto Rico

43 David A. Skeel, *Two Years of PROMESA*, 87 REV. JUR. UPR 862, 863, 872-74 (2018).

44 *Id.* at 872 n.4 (“P.R.O.M.E.S.A. [repeatedly] gives authority to the oversight board in its ‘sole discretion.’”) (*See, e.g.*, 48 U.S.C. § 2141(c)(3), (“The Oversight Board shall review any proposed Fiscal Plan to determine whether it satisfies the requirements set forth in subsection (b) and, if the Oversight Board determines in its *sole discretion* [emphasis added] that the proposed Fiscal Plan[does or does not satisfy such requirements.]”).

45 U.S. CONST. Art. I § 8, Art. IV Sec. 3 Cl. 2.

46 48 U.S.C. §§ 2101 & 209.

47 Lorae Stojanovic and David Wessel, *Puerto Rico’s bankruptcy: Where do things stand today?*, BROOKINGS INSTITUTION (Aug. 17, 2022), <https://www.brookings.edu/articles/puerto-ricos-bankruptcy-where-do-things-stand-today/>.

48 FOMB, 2023 CERTIFIED FISCAL PLAN FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY 46, <https://ntc-prod-public-pdfs.s3.us-east-2.amazonaws.com/eVtTyFLQ2DBtKVd4UmJN9FcjOvw.pdf>

seeking relief to restructure the debt not only of the Electrical Power Authority but several other government instrumentalities.⁴⁹ For further context, Puerto Rican Municipalities were once eligible debtors for bankruptcy proceedings under Chapter 9 of the U.S. Bankruptcy Code prior to a set of 1984 amendments which specifically excluded the District of Columbia and Puerto Rico from the Chapter 9 definition of a State.⁵⁰ The Legislative Assembly approved Law 71-2014 to allow for public instrumentalities to restructure their outstanding debts under a local bankruptcy scheme. Creditors filed suit alleging that the statute was preempted by federal law, seeking its enjoinder. The District Court of Puerto Rico enjoined the Act's enforcement, and the First Circuit affirmed. Finally, the Supreme Court pronounced that Law 71-2014 was indeed preempted by the US Bankruptcy Code given that Puerto Rico was considered a State under the general statute except for Chapter 9.⁵¹ Shortly thereafter, Congress passed PROMESA into law to provide Puerto Rico a "mechanism . . . to restructure its debt and forge a path for its return to the capital markets".⁵²

B. Privatization of the Electrical Grid.

The first electric lighting system in Puerto Rico was installed on the estate of a wealthy landowner of Villalba in 1893.⁵³ Throughout the early 1900's, electrical power generation in Puerto Rico remained a wholly private affair until the government's successful acquisition of the three largest energy providers on the archipelago: the Porto Rico Railway, Light, and Power Company, the Mayagüez Light, Ice and Power Company, and the Ponce Electric Company.⁵⁴ The Puerto Rican Government consolidated these three private corporations with the System of Utilization of Water Resources and the Irrigation Service to create the Puerto Rico Water Resource Authority in 1941.⁵⁵ From then on, energy generation and distribution in Puerto Rico was to be managed by a single public corporation which in 1979 was renamed the Electrical Power Authority.⁵⁶

⁴⁹ See *In re The Financial Oversight and Management Board for Puerto Rico*, Case No. 17-03283, ECF No. 1 (D.P.R. 2017).

⁵⁰ Sebastián Negrón-Reichard, *The Exclusion of Puerto Rico's Municipalities from the 1984 amendments to the U.S. Bankruptcy Code is Unconstitutional Because the Amendments Violate the Bankruptcy Clause and the Equal Protection Component of the U.S. Constitution*, 25 HARV. LATINO L. REV. 67; See also 11 U.S.C. §§ 901-946.

⁵¹ *Puerto Rico v. Franklin California Tax-Free Trust*, 579 US 115 (2016); See also *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322 (1st Cir. 2015); (Justice Sonia Sotomayor's dissent and Judge Juan Torruella's concurrence present sharp interrogatives into the constitutionality of the 1984 amendments to the U.S. Bankruptcy Code. Justice Sotomayor focuses on the inapplicability of pre-emption doctrine while Judge Torruella harps on the Uniformity Clause).

⁵² Negrón-Reichard, *supra* note 52 (citing 48 U.S.C. §§ 2101-41).

⁵³ EUGENIO LATIMER TORRES, *HISTORIA DE LA AUTORIDAD DE ENERGÍA ELÉCTRICA: IMPLANTACIÓN DE LOS SISTEMAS DE LUZ Y FUERZA EN PUERTO RICO 1893-1993* (1997).

⁵⁴ AUTORIDAD DE ENERGÍA ELÉCTRICA, *GÉNESIS Y DESARROLLO DE LOS SISTEMAS HIDROELÉCTRICOS EN PUERTO RICO* (1992).

⁵⁵ Statement of Motives, Act No. 120-2018 (quoting Act No. 83-1941); See Act No. 18-1908.

⁵⁶ Autoridad de Fuentes Fluviales-Cambio de nombre a la Autoridad de Energía Eléctrica, Act No. 57-1979, 1979 LPR 124.

i. Act No. 120-2018.

The 18th Legislative Assembly of Puerto Rico and then-Governor Ricardo A. Rosselló Nevares passed the Puerto Rico Electric Power System Transformation Act on June 21, 2018.⁵⁷ The Act built upon the pre-existing framework of the Public-Private Partnership Act of 2009 to provide the procedure through which to privatize the Electrical Power Authority by selling its assets to a private corporation.⁵⁸ The process would be as follows: PREPA names a Partnership Committee to evaluate potential contractors and negotiate the terms of the Partnership or Sales Contracts, the Committee then submits a report accompanied with a preliminary contract to the Energy Bureau who deliberates and issues an Energy Compliance Certificate,⁵⁹ the preliminary contract is then sent to the Governor's Office, and upon approval is presented to the Legislative Assembly.⁶⁰ For such an agreement to become legally binding it must be ratified by both the Governor and the Legislative Assembly as well as the FOMB per the Board's powers under PROMESA.⁶¹ The only assets still under the control of the Electrical Power Authority are the eleven hydroelectric plants across the nation which combined with eolic and solar energy barely produce less than 2.5% of total generation.⁶² Acts 120-2018 and 29-2009 could be invoked to privatize hydroelectric generation as well but there have been no feasible plans or proposals to do so.

ii. LUMA Energy, LLC.

In 2020, the Electrical Power Authority's assets were assigned to be operated by a joint venture named LUMA Energy, LLC, composed of Quanta Services, Inc., and ATCO Ltd., based in Houston, Texas, and Alberta, Canada, respectively.⁶³ The LUMA contract secured the necessary approvals and Energy Compliance Certificate on behalf of the Energy Bureau, lasting 15 years from the effective date of June 22, 2020.⁶⁴ The Energy Bureau's decision sparked a lawsuit on behalf of the Electrical Industry and Irrigation Worker's Union (hereinafter, "UTIER", for its Spanish acronym). The UTIER sought judicial review on two grounds, first that the Energy Bureau's Energy Compliance Certificate should not have

57 P.R. LAWS ANN. tit. 22, §§ 1111-25 (2019 & Supl. 2024)

58 Statement of Motives, Act No. 120-2018, <https://bvirtualogp.pr.gov/ogp/Bvirtual/leyesreferencia/PDF/2018/0120-2018.pdf>; See PPPA Final Rule No. 9078-2019 (the corresponding regulation as to the privatization process).

59 P.R. LAWS ANN. tit. 22, § 2(d) ("The Certificate issued by the Commission in any PREPA Transaction certifying that the Preliminary Contract complies with the regulatory framework, the 'Puerto Rico Energy Public Policy Act,' and the Code of laws in effect").

60 *Id.* §§ 5, 10.

61 The Board could oppose any such contract if it deems it—at its sole discretion—incongruous with the goals set forth by PROMESA, despite approval by the Electrical Power Authority, Public-Private Partnership Committee, Legislative Assembly, and Governor's Office.

62 Jacqueline Glattard, et al., *The Energy Insurrection: An Analysis of Net Metering in Puerto Rico (2014-2022)*, May 23, 2022. <https://casapueblo.org/wp-content/uploads/2022/05/scientific-technical-report.pdf>.

63 Eliván Martínez Mercado, *Will LUMA Keep Its Prize?*, CENTRO DE PERIODISMO INVESTIGATIVO (Oct. 26, 2020), <https://periodismoinvestigativo.com/2020/10/will-luma-keep-its-prize/>.

64 June 17th Resolution and Order, Case No. NEPR-AP-2020-0002; June 18th Resolution and Order, Case No. NEPR-AP-2020-0002.

been emitted and second that the union was wrongfully denied their petition to intervene in the administrative case.⁶⁵ Yet, there was a dissenting vote on behalf of Commissioner Ángel R. Rivera de la Cruz who found that “[i]n 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.”⁶⁶ The proceedings around the negotiation and approval of the contract remain the subject of intense public scrutiny in light of continued failures in the grid’s operations and a persistent pattern of regional or national power outages.⁶⁷ Another factor is that the documents submitted in by the Public-Private Partnership Authority were kept confidential by the Energy Bureau per the Authority’s request and at the dismay of the UTIER.⁶⁸

There have been repeated calls to cancel the contract by actors such as members of the Legislative Assembly and Puerto Rico Lawyer’s College Special Energy Commission.⁶⁹ The reasons behind these pronouncements range from the recurring pattern of longer and wider power outages, mismanagement of the energy grid, and subcontracting a third company, Centurion.⁷⁰ This last instance was denounced as a conflict of interest and outright violation of a Puerto Rico Law anti-corruption statute.⁷¹ Consequently, sitting legislators of the New Progressive Party, the same party that approved the LUMA agreement, publicly proposed the cancellation of the contract. The Special Energy Commission’s Final Report characterized the LUMA contract as *leonine* and asserted that LUMA has recurrently mismanaged and falsely represented their financial operations along with deteriorating service and ever-higher rates.⁷²

The Operation and Maintenance Agreement between the Power Authority, Public-Private Partnerships Authority, and LUMA Energy foresaw the need for dispute resolution and outlined the procedures to follow in in Article 15.⁷³ The preliminary step is to produce a written Notice of Dispute to the other party that “contain[s] a brief statement of the nature of the Dispute, [and] set[s] out the relief requested.”⁷⁴ The parties then enter a negotiation process lasting no more than 30 days. Most disputes not resolved can then enter mediation proceedings upon written notice by another party with the effect of barring a later civil action. Only technical disputes not resolved within the allotted period are then “referred to

65 In re Certificate Energy Compliance, 2020 WL 6887891 (2020).

66 *Id.* at 4 (Rivera de la Cruz, Dissenting).

67 Eliván Martínez Mercado, *Blackouts have worsened since LUMA’s arrival, a company document confirms*, CENTRO DE PERIODISMO INVESTIGATIVO (Sep. 21, 2021), <https://periodismoinvestigativo.com/2021/09/blackouts-have-worsened-since-lumas-arrival-a-company-document-confirms/>.

68 2020 WL 6887891 (2020).

69 The Special Energy Commission was created at the behest of President Vivian Godineaux Villaronga.

70 Notiséis, *Representantes del PNP piden cancelación contrato de LUMA*, WIPR, Aug. 2022.

71 Act No. 2-2018, P.R. LAWS ANN. tit. 3, §§ 1883a (2024).

72 Lawyer’s College Special Energy Commission, Final Report, ii-iii (2024), <https://capr.org/wp-content/uploads/2024/10/ESTUDIO-FINAL.pdf>.

73 Government of Puerto Rico, PREPA and Public-Private Partnerships Authority. Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement (2020), <https://docs.pr.gov/files/P3-PublicaPrivadas/Projects/Projects/TD%20%20LUMA/OM%20Agreement/executed-consolidated-om-agreement-td.pdf>.

74 *Id.* at 129-30.

an independent expert . . . for a final and binding expert determination”.⁷⁵ The final resort laid out by the Agreement is litigation with the designated venue of the Commonwealth Courts, paired with a waiver of a jury trial under applicable law. Article 14 enumerates eleven circumstances that shall constitute an event of default leading up to and including the termination of the agreement. Events of default by way of bankruptcy or violation of law are eligible for immediate termination without the need for a court decision or arbitral award confirming the Public-Private Partnership Authority’s right to terminate. Now, the remaining eight scenarios have the additional rigor or hindrance of requiring 120 days of written notice and the prior approval of the Energy Bureau or Fiscal Oversight and Management Board. Article 14 also contemplates a slew of additional termination rights and remedies available if an early termination were to occur. In short, depending on the particular instance of default, several fees would be due from the Power Authority to LUMA or vice versa and LUMA would not be able to procure another government contract for a span of ten years.⁷⁶

iii. Whitefish Energy Holdings, LLC.

Prior to the designation of LUMA Energy, LLC as the operator of the transmission and distribution systems of Puerto Rico, there had been an attempt to contract Whitefish Energy Holdings, LLC. in 2017. The utility infrastructure company was to rebuild the energy grid after the passing of Hurricane María for the amount of 300 million USD.⁷⁷ News of the contract were highly contentious in part to a lack of transparency in the selection process.⁷⁸ The Federal Emergency Management Agency was unaware of the contract.⁷⁹ There were also concerns about the structure and ties of the Whitefish, Montana based company with only two full-time employees and alleged ties to the then Secretary of the Interior Ryan Zinke.⁸⁰ Upon mounting public scrutiny and questioning from members of Congress, Governor Ricardo Rosselló Nevares advised the Governing Board of the Power Authority to cancel the contract.⁸¹ The then President of the Governing Board of the Power Authority resigned in the fall out of the cancellation.⁸² Whitefish filed suit over the cancellation and in 2022 reached a settlement agreement of

⁷⁵ *Id.* at 130-31.

⁷⁶ *Id.* at 126-28.

⁷⁷ Timothy Cama and Devin Henry, *Whitefish Puerto Rico contract stirs controversy*, THE HILL (Oct. 28, 2017), <https://thehill.com/policy/energy-environment/357572-whitefish-puerto-rico-contract-stirs-controversy/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Frances Roble and Deborah Acosta, *Puerto Rico Cancels Whitefish Contract to Rebuild Power Lines*, N.Y. TIMES (Oct. 29, 2017), <https://www.nytimes.com/2017/10/29/us/whitefish-cancel-puerto-rico.html#:~:text=Facing%20withering%20criticism%20from%20members,the%20island's%20battered%20power%20grid>.

⁸¹ *Id.*; Congress Letter to Deputy Inspector General Mary L. Kendall of the Department of the Interior, October 25th, 2017. Includes members of the House Natural Resources and Energy and Commerce Committees.

⁸² Dánica Coto, *Puerto Rico: renuncia el director de empresa de electricidad*, ASSOCIATED PRESS (Nov. 2, 2017), <https://apnews.com/general-news-ad1e7235e64a4077ado2ab66cc7b53d5>; See Resolución Núm. 17, Serie 2017-2018, Resolución para exigir la destitución inmediata del director ejecutivo de la Autoridad de Energía Eléctrica, Asamblea Legislativa del Municipio de San Juan, 31 de octubre de 2017.

approximately 40 million USD with the Power Authority.⁸³ This incident demonstrates a pattern of negligence and covert government dealings within Puerto Rico that predates privatization of the energy grid in 2020. LUMA is merely the current protagonist in an ongoing saga.

III. FISCAL OVERSIGHT AND MANAGEMENT BOARD V. PIERLUISI.

A. Act No. 10-2024.

On January 10th, 2024, the 19th Legislative Assembly of Puerto Rico and then-Governor Pedro R. Pierluisi Urrutia passed Act No. 10-2024.⁸⁴ The Act amended articles 4 and 9 of Act No. 114-2007 in regard to postponing the study to be conducted by the Puerto Rico Energy Bureau until 2030 and therefore preserving the current rates for net-metering. The reasoning behind this legislation is rather straight-forward:

Net metering is key for consumers to have the right to avail themselves of clean and local energy and be self-sufficient while also benefiting the electrical grid. The rapid growth of rooftop solar power systems in recent years is consistent with our public policy on energy. Unfortunately, this growth has been mostly driven by the energy needs of the various classes of consumers due to the instability and high cost of our energy system as well as the compensation incentive granted to prosumers through the net metering program . . . *It should be very clear that reducing the credit prosumers receive for the energy generated by their systems could be interpreted as another effort to tax the sun, which has been and must be rejected outright. This type of tax would contribute to the deterioration of a market that [i]s struggling to grow and would delay the economic recovery of the Island.*⁸⁵

Were the Puerto Rico Energy Bureau to modify the current 1 to 1 net-metering rate, the new rate would only to apply to agreements subscribed at minimum 12 months after their decision.⁸⁶ Prior consumers would continue under the current rate for another 20 years after the 2030 study. It is worth mentioning that the year 2050—the proposed end date for the 1:1 rate—coincides with estimates made by the PR100 study as to when Puerto Rico could achieve fully renewable energy. The PR100 Final Report compiles the work of the Federal Department of Energy, the Federal Emergency Management Agency, six national laboratories, and a plethora of other

⁸³ In re Financial Oversight and Management Board for Puerto Rico as Representative of the Puerto Rico Electric Power Authority, Case No. 17-4780, ECF Nos. 2740, 2763 (D.P.R. 2017)

⁸⁴ Ley para enmendar los artículos 4 y 9 de la Ley 114-2017, Act No. 10-2024, <https://aldia.microjuris.com/wp-content/uploads/2024/01/Descarga-la-Ley-10-2024.pdf>.

⁸⁵ Statement of Motives, Act No. 10-2024, <https://aldia.microjuris.com/wp-content/uploads/2024/01/Descarga-la-Ley-10-2024.pdf>. (emphasis added) (Translation provided).

⁸⁶ *Id.* at § 4.

contributors.⁸⁷ Act 10 revindicates the energy public policy adopted in Act 17-2019 and says so expressly.⁸⁸

B. Correspondence between the Board and AAFAF.

The FOMB publicly opposed the Act and warned it would seek judicial intervention in the matter under Title III of PROMESA. To this effect, the Board addressed two letters to the Puerto Rico Fiscal Agency and Financial Advisory Authority dated April 10th and May 2nd. The correspondence enumerated three main concerns as to Act 10. The Board notified violations of Sections 108 and 204 of PROMESA due to fiscal estimates on behalf of AAFAF being considered non-compliant and an understanding of Act 10 be an overreach of the Governor and Legislative Assembly in thwarting or reviewing the activities of the FOMB.⁸⁹ There was also apprehension regarding Act 10's incompatibility with the 2023 Certified Fiscal Plan for the Electrical Power Authority and a perceived breach of the autonomy of the Energy Bureau due to the postponing of the final study. The draft was made publicly available on June 14, 2024.⁹⁰ The Board afforded the Government of Puerto Rico first until April 15th and then May 7th, 2024, to repeal Act 10 under penalty of ensuing "litigation to annul Act-10."⁹¹

The AAFAF responded to the April 10th and May 2nd letters on April 15th and May 7th, respectively. In the April 15th letter Deputy Executive Director and CFO Luis J. Umpierre requested additional time to "assess any potential changes" to the § 204 submission or Act 10-2024 which might be necessary in order to "implement the Act in a manner not significantly inconsistent with PREPA's Certified Fiscal Plan".⁹² Umpierre also reasoned that the scope of the analysis the Board was expecting in compliance with § 204 would be tantamount to conducting the net-metering study, already a delegated faculty exclusive to the Energy Bureau. Most crucially, the letter verses about the legislative process of Puerto Rico, by which a Governor is not vested with the purported authority to unilaterally repeal or amend a law approved by the Legislative Assembly and bearing the chief executive's signature. Therefore, the Government could not possibly comply with the April 10th letter's demands, much less in the allotted four calendar days. In the second letter on May 7th, Executive Director Omar J. Marrero reiterates the need for more time, until June 30th, to receive industry

⁸⁷ Murali Baggu et al., *Puerto Rico Grid Resilience and Transitions to 100% Renewable Energy Study (PR100)*, NREL (March 2024) <https://www.nrel.gov/docs/fy24osti/88384.pdf>.

⁸⁸ *Id.* ("The net metering program plays a key role in the implementation of the public policy objectives established in Act No. 17- 2019, including 'to facilitate the interconnection of distributed generation to the electric power grid' and 'to make it feasible for energy service consumers to become prosumers.' There are currently no other incentives available to the various groups of consumers who choose to install solar power systems").

⁸⁹ *FOMB v. Pierluisi*, Case No. 24-00062, (D.P.R. 2024) Case No. 24-00062, (D.P.R. 2024), ECF No. 1-15 (*citing* 48 U.S.C. 2101 §§ 108(a)(1), 204 (a))("Neither the Governor nor the Legislature may [...] exercise any control, supervision, oversight, or review over the Oversight Board or its activities")("The Governor shall include with each law submitted to the Oversight Board [...] [a] formal estimate prepared by an appropriate entity of the territorial government with expertise in budgets and financial management of the impact, if any, that the law will have on expenditures and revenues").

⁹⁰ *In re Borrador de estudio sobre medición neta y energía distribuida*, Case No. NEPR-MI-2024-0006 (Jun. 14, 2024).

⁹¹ *FOMB v. Pierluisi*, Case No. 24-00062 at ECF No. 1-17 (Translation provided).

feedback on Act 10-2024 as well as continue discussions so as to avoid “unnecessary and costly litigation”.⁹³

C. Complaint in the United States District Court for the District of Puerto Rico.

On July 26th, 2024, the FOMB filed suit in the United States District Court for the District of Puerto Rico pursuant to Title III of PROMESA.⁹⁴ The case was assigned to District Judge Laura Taylor Swain who in turn referred it to Magistrate Judge Judith G. Dein.⁹⁵ In the original filing, the Board restates its grievances with Act 10 and alleges its permission of “complex energy policy to be dictated by politics and the desires of special interest groups”.⁹⁶ Per the complaint, the Government of Puerto Rico failed to abide by the certified Fiscal Plans for the Electrical Power Authority and that of the Commonwealth in abridging the Energy Bureau’s ability to be an independent regulator. The Board posits that postponing the Energy Bureau’s study on the net-metering program is tantamount to “[disabling its] ability to study, evaluate, and potentially adjust” the program’s economic terms.⁹⁷ The Board sustains this contention in their latest Certified Fiscal Plan for the Power Authority, released in February of 2025.⁹⁸ Insufficient fiscal estimates and faulty certifications are a recurrent concern as well.⁹⁹ In its prayer for relief the Board goes further than merely requesting Judge Laura Taylor Swain nullify Act No. 10 and enjoin its enforcement but that “[t]he Governor be permanently enjoined from enacting, implementing, and enforcing laws that restrict or compel action by the Energy Bureau”.¹⁰⁰ There is no further elaboration as to their magnanimous petition.

On August 22, 2024, the President of the Senate of Puerto Rico, José Dalmau Santiago filed a motion to intervene as an interested party in the ongoing litigation pursuant to Rule 24(a) of Federal Civil Procedure.¹⁰¹ The motion was denied in part on September 11th, 2024, since he was still allowed to intervene on behalf of the Senate albeit under Rule 24(b) instead. Similarly, various parties filed amicus curiae petitions for leave to submit a brief. Solar United Neighbors and Sierra Club Puerto Rico filed a joint brief on October 22, 2024, wherein they expressed support for Act 10-2024 and described the Board’s objections as “not only arbitrary and capricious, but petty”.¹⁰² A diverse coalition of 28 organizations

⁹² *Id.* at ECF No. 1-16.

⁹³ *Id.* at ECF No. 1-18 (The date of June 30th, 2024, coincided with the end of the 7th Ordinary Session of the 19th Legislative Assembly of Puerto Rico).

⁹⁴ Complaint of the Financial Oversight and Management Board for Puerto Rico in respect of Act 10-2024 against the Governor of Puerto Rico, *Fin. Oversight and Mgmt. Bd. v. Pierluisi*, Case No. 24-00062, (D.P.R. 2024), ECF No. 1.

⁹⁵ *Id.* See generally Federal Magistrates Act of 1968, 82 Stat. 1107.

⁹⁶ *Id.* at 2.

⁹⁷ *Id.* at 5.

⁹⁸ FOMB, Puerto Rico Electrical Power Authority Certified Fiscal Plan (2025) at 47, <https://oversightboard.pr.gov/fiscal-plans/>.

⁹⁹ Case No. 24-00062, ECF No. 1 at 7 (D.P.R. 2024).

¹⁰⁰ *Id.* at 26.

¹⁰¹ FED. R. CIV. P. 24(a).

¹⁰² Joint amicus curiae brief on behalf of Solar United Neighbors and Sierra Club at 4, *Fin. Oversight and Mgmt.*

spearheaded by the Solar and Energy Storage Association of Puerto Rico sought to also file as amici curiae but had their petition denied on October 31st, 2024, over concerns that their brief was tangential and could delay the resolution of the matter.¹⁰³

D. Public Reactions.

i. Remarks from Federal Officeholders.

Members of Congress have stepped forth to express their opposition to the FOMB's stance on Act 10-2024 and support for Puerto Rico's net-metering program.¹⁰⁴ In a letter dated May 17th, 2024, Members of the Senate and House of Representatives highlighted the economic and environmental benefits of Act 10-2024 and Act 114-2007 as paths to achieving Puerto Rico's renewable energy goal of 100% renewable energy generation by the year 2050.¹⁰⁵ Especial import was given to the function of solar power during grid system failures and the current figure of 800 megawatts being produced with photovoltaic technology.¹⁰⁶ These figures were attested to by the Energy Bureau's own Net Metering Compliance Docket.¹⁰⁷ Federal Energy Secretary Jennifer Granholm echoed these sentiments in comments to the press, reassuring Puerto Ricans that "we support net-metering".¹⁰⁸ Speaking before the House Natural Resources Committee on February 12, 2025, Puerto Rico Resident Commissioner Pablo José Hernández Rivera presented an amendment to the Committee's Authorization and Oversight Plan in order to specify their "oversight over the Board's position on Net Metering" and "management of the Puerto Rico Power Authority . . . bankruptcy litigation".¹⁰⁹ The amendment was not approved; however, this and other statements indicate that the defense of net metering in Puerto Rico is multifaceted in nature.

Bd. v. Pierluisi, Case No. 24-00062, (D.P.R. 2024), ECF No. 56.

103 Motion for joinder of amicus curiae filed by diverse entities in support of the governor's opposition to Financial Oversight and Management Board for Puerto Rico's Motion for summary judgement and the senate's opposition to plaintiff's motion for summary judgement, Fin. Oversight and Mgmt. Bd. v. Pierluisi Urrutia, Case No. 24-00062, (D.P.R. 2024), ECF No. 73; Order denying motion for leave to file amicus brief at 3. Fin. Oversight and Mgmt. Bd. v. Pierluisi Urrutia, Case No. 24-00062, (D.P.R. 2024), ECF No. 76.

104 Includes members of the House Natural Resources Committee, the Senate Committee on Energy and Natural Resources, and the Senate Committee on Environment and Public Works.

105 Natural Resources Committee Democrats, Letter FOMB on Net Metering in PR (2024), <https://democrats-naturalresources.house.gov/imo/media/doc/20240517letterfombnetmeteringinpr.pdf>. ("Weakening or ending net metering in Puerto Rico could be devastating").

106 *Id.* ("[R]esidential solar technology is responsible for most of the progress the archipelago has made toward its ultimate goal of generating 100% renewable energy by 2050").

107 In Re: Informes de Progreso de Interconexión de la Autoridad de Energía Eléctrica de Puerto Rico, NEPR-MI-2019-0016, Negociado de Energía de Puerto Rico, https://energia.pr.gov/numero_orden/nepr-mi-2019-0016/.

108 Manuel Guillama Capella, "Nosotros apoyamos la medición neta": Jennifer Granholm advierte sobre los efectos de alterar incentivos a los prosumidores, *EL NUEVO DÍA* (July 18, 2024), <https://www.elnuevodia.com/noticias/locales/notas/nosotros-apoyamos-la-medicion-neta-jennifer-granholm-advierter-sobre-efectos-de-alterar-incentivos-a-prosumidores/> (Translation provided). DOE Announces Over \$13 Million to Connect More Puerto Rico Communities to Residential Solar and Battery Storage, U.S. DEP'T OF ENERGY (Nov. 29, 2023), <https://www.energy.gov/articles/doe-announces-over-13-million-connect-more-puerto-rico-communities-residential-solar-and>; U.S. Department of Energy Announces \$325 Million for Solar and Battery Storage Community Benefits Plans, U.S. DEP'T OF ENERGY (Aug. 28, 2024), <https://www.energy.gov/gdo/articles/us-department-energy-announces-325-million-solar-and-battery-storage-community> (Federal support for solar technology in Puerto Rico during Secretary Jennifer Granholm's tenure).

ii. Industry and Public Outcry.

A coalition of fifteen national and local Puerto Rican organizations dedicated to environmental justice addressed a letter to President Joseph R. Biden on May 20th, 2024.¹¹⁰ In their communication they urged the President to appoint new board members who would protect Puerto Rico's net-metering legislation given six of them were due for appointment. The organizations rehashed the positive impacts of net-metering as an economic stimulus, a measure against climate change and a recovery tool in the aftermath of Hurricane María. The letter points to a study generated by Gabel Associates and cites precedent for delaying a draft study in the case of the federal Investment Tax Credit and the Inflation Reduction Act.¹¹¹ Included as well was a white paper prepared by the Solar Energy and Energy Storage Association of Puerto Rico which estimated the economic loss of devaluing net-metering on the archipelago at upwards of 4 billion USD and a potential loss of 6,000 jobs.¹¹² The *amicus curiae* SESA other organizations attempted to file also pointed to the fact of that of the families benefitting from Puerto Rico's net-metering program, "almost 60% of whom are households of low, moderate incomes (LMI) and of middle incomes".¹¹³ Solar recovery efforts post-María were also underscored.¹¹⁴

The Archbishop of San Juan, Roberto González Nieves, has twice made public his indignation over the FOMB's posture regarding Act 10-2024. Archbishop González Nieves emphasizes in his letters to Governor Pierluisi and ex-Chairman David A. Skeel that repealing the proposed amendments to the net-metering program would affect amongst the poorest residents within his Archdiocese.¹¹⁵ He also underscores his attendance at the inauguration of the Lady of Mount Carmel's Paroquial Center for Energy Resiliency in Cataño, Puerto Rico.¹¹⁶ The Center boasts seventeen solar panels to assist neighboring communities and is meant to serve as a model for further implementation of net-metering efforts in the Archdiocese of San Juan.¹¹⁷ Thus, the Archdiocese's independent and renewable energy vision for the future would be jeopardized by the possible nullification of Act

¹⁰⁹ Office of Resident Commissioner Pablo José Hernández Rivera, *Resident Commissioner Introduces Amendment to Strengthen Congressional Oversight of the Financial Oversight & Management Board, Net Metering Policies, and PREPA Bankruptcy* (Feb. 12, 2025), <https://hernandez.house.gov/media/press-releases/resident-commissioner-introduces-amendment-strengthen-congressional-oversight>.

¹¹⁰ Letter from SESA Puerto Rico, *et. al.* to President Joseph R. Biden (May 20, 2024).

¹¹¹ Gabel Associates, Inc., *Value of Net Metered Solar Energy in Puerto Rico* (2024), <https://gabelassociates.com/wp-content/uploads/2024/04/Gabel-Associates-Puerto-Rico-Value-of-Solar-NM-English-04.16.24.pdf>.

¹¹² Solar Energy and Energy Storage Association of Puerto Rico, *Impacts of the devaluation of the net metering policy in Puerto Rico*, 12-13 (2024), https://www.sesapr.org/_files/ugd/a17184_020e00cfa1eb4a5ba82a5b2e71842743.pdf.

¹¹³ Amicus curiae by diverse entities in support of the governor's opposition to Financial Oversight and Management Board for Puerto Rico's Motion for summary judgement and the senate's opposition to plaintiff's Motion for summary judgement at 6, FOMB v. Pierluisi Urrutia, Case No. 24-00062, (D.P.R. 2024), ECF No. 71.

¹¹⁴ *Id.*

¹¹⁵ Letter from Archbishop to Governor Pedro Pierluisi González Nieves and David A. Skeel (Apr. 17, 2024).

¹¹⁶ *Id.*

¹¹⁷ Andrea Cruz, *Inauguran centro de resiliencia con energía renovable en Cataño*, EL VOCERO (Apr. 17, 2024), https://www.elvocero.com/gobierno/inauguran-centro-de-resiliencia-con-energ-a-renovable-en-cata-o/articulo_b439b9ac-fc32-1ee-b572-23bfe7fba117.html.

10-2024. The Archbishop ends his letter on a note of prayer, acknowledging the complexity of the topic at hand and hoping for a swift resolution.¹¹⁸

Musical artists joined awareness efforts by galvanizing their followings against the privatization of the electrical grid in Puerto Rico. Benito A. Ocasio Martínez, known artistically as Bad Bunny, produced a twenty-two minute documentary to accompany his song *El Apagón*, starring Puerto Rican independent journalist Bianca Graulau.¹¹⁹ The video features multiple incidents relating to LUMA's breach of contract and non-compliance with service metrics required by the Energy Bureau. In congressional testimony before the House Subcommittee on Indian and Insular Affairs, LUMA President and CEO Juan Saca repeatedly tacked its deficiencies to "the lasting impacts of past failures."¹²⁰ Moreover, at least eleven other artists and musical groups performed at the University of Puerto Rico Concert for Energy Self-Sufficiency in an effort to promote the proposals of Casa Pueblo, a community-based solar energy project based in the municipality of Adjuntas.¹²¹

E. Government's Response.

The docket for this case has amassed upwards of 90 entries with multiple summary judgment motions, responses, and replies pending the Court's criterion. Of note, the Senate of Puerto Rico was allowed to intervene in the case as an interested party and moved for summary judgment under Rule 56(a) of Federal Civil Procedure, prompting the FOMB to file its own motion under Bankruptcy Rule 7056.¹²² Several oppositions and replies from the Board, Governor, and Senate followed, all pending resolution by Judge Laura Taylor Swain.¹²³

Senator José Dalmau Santiago—then President of the Senate of Puerto Rico—argued that the requests of the FOMB to nullify Act 10-2024 exceeded its statutory authority over fiscal matters appurtenant to the public debt and access to capital markets. Conceding the remedy requested by the Board would abridge the Senate of Puerto Rico's constitutional duty to legislate, and particularly that over public policy issues such as energy as an essential service, outside of direct fiscal purview. Further, the amendment to Section 4 of Act 114-2007 contained in Act 10-2024 would not substantively alter the prior, amounting to a simple extension of the original timeline for the Energy Bureau's net-metering study by

118 April 17th letter ("I am aware of the enormous responsibility that the Board has in dealing with the power system of Puerto Rico and its debt; and I am also aware of the suffering of our people due to our current energy system and its high costs . . . I pray that the Board may have the wisdom and courage to resolve this situation in a way which is more beneficial for our people").

119 A. Ocasio Martínez, "Bad Bunny - El Apagón - Aquí Vive Gente (Official Video) | Un Verano Sin Ti", September 16, 2022, 0:52-1:39, https://www.youtube.com/watch?v=ITCX_Aqz004.

120 Juan Saca, House Subcommittee on Indian and Insular Affairs, Hearing on Examining Puerto Rico's Electrical Grid and the Need for Reliable and Resilient Energy, September 26, 2024.

121 ARTURO A. MASSOL DEYÁ, *DEMOCRACIA Y ENERGÍA: 2DA EDICIÓN REVISADA Y AMPLIADA 181-184* (2024); SEE CASA PUEBLO, *AFTER DARK: THE MOVEMENT TO LIGHT UP PUERTO RICO WITH THE SUN*, Google Earth (2019). <https://youtu.be/kF6ffixXegk?si=5GEH5v6iCoT8B17s>.

122 FED. R. CIV. P. 56(a),(b); FED. R. BANKR. P. 7056.

123 *E.g.* FOMB v. Pierluisi Urrutia, Case No. 24-00062, (D.P.R. 2024) ECF Nos. 42, 45, 46, 63, 67, 86, 88. Current as of May 6th, 2025.

five years. The passage of Act 10-2024 was thus a legitimate legislative exercise of constitutional powers by the Assembly and Governor Pedro Pierluisi Urrutia. Infringing upon the aforementioned faculties would violate the separation of powers doctrine and implicitly delegate the authority of the Legislative Assembly to “reorganize and consolidate executive departments and . . . define their functions” to the FOMB relative to the Energy Bureau.¹²⁴ This would create a paradoxical landscape in which a creature of the Legislative Assembly, once created, would become immune to the oversight of its own creator. Amid the Board’s controversial 2017 appointment of Noel Zamont as Chief Transformation Officer of the Power Authority, Judge Laura Taylor Swain traced the line between local autonomy and fiscal oversight:

[T]here is no express provision within PROMESA and its incorporated Bankruptcy Code provisions, nor any inferential grant of power, that authorizes the FOMB to impose changes in structure or reporting lines within PREPA by appointing a CTO, or to exercise the authority of a chief executive officer, much less to delegate that authority to an agent of the FOMB. The structure established by Titles I and II, alongside the reservation of territorial power in section 303, requires the FOMB and the territorial government to work together to establish a fiscally responsible path forward that is acceptable to the FOMB. Congress might have chosen to make the FOMB’s job easier in the short term by granting it direct control and disabling the Commonwealth government’s ability to dissent, but it did not do so.¹²⁵

In sum, the Senate posits that “[t]his legislation reflects a policy judgment made by the elected representatives of Puerto Rico regarding how to best regulate and promote renewable energy within the Commonwealth.”¹²⁶ Fiscal oversight cannot come at the expense of autonomous political processes provided by the Constitution of Puerto Rico and recognized by the PROMESA statute. What’s more, the Energy Bureau was asked to submit a memorandum on Senate Project 1064—which would later become Act 10-2024—whereby President Commissioner Edison Avilés Deliz stated that “[a]mending Article 4 of Act 114-2007 . . . to extend said term until . . . distributed renewable energy . . . generation has exceeded twenty-five percent (25%) of the country’s energy consumption, could, in its practical application, benefit the net metering and distribution program.”¹²⁷

The Governor’s filing echoed the sentiment of the Senate in respect to the statutory bounds of the Board’s powers albeit focusing on Sections 204(a) and 108(a)(2) of PROMESA rather than 303. To start, Sections 204(a) empowers the Board to nullify an act if and

¹²⁴ CONST. PR. Art. IV § 6.

¹²⁵ *In re Financial Oversight and Management Board for Puerto Rico*, 583 B.R. 626 (D.P.R. 2017). See 48 U.S.C. 2101 § 303 (“[T]his title does not prohibit a territory from exercising political and governmental powers over itself and its instrumentalities”).

¹²⁶ Motion for summary judgement of the senate of Puerto Rico at 13, *FOMB v. Pierluisi Urrutia*, Case No. 24-00062, (D.P.R. 2024), ECF No. 42.

¹²⁷ Memorandum from Edison Avilés Delis to Hon. Javier Aponte Dalmau, Explanatory Memorandum of the PSRB’s Energy Bureau (Mar. 27, 2023).

only if it is “significantly inconsistent” with the applicable fiscal plan.¹²⁸ The motion asserts that Act 10-2024 cannot activate that disposition given the Board points to the 2023 Certified Fiscal Plan because it does not have direct fiscal repercussions and the 1:1 rate would not be affected in either scenario. With or without Act 10-2024, the assumed fiscal terrain behind the Fiscal Plan would remain untouched.¹²⁹ The same is said about the 108(a)(2) challenge from the Board that Act 10-2024 “impairs or defeats” the goals of the PROMESA legislation.¹³⁰ The Governor also questions the standard of review being requested by the Board, who seeks *ultra vires* review in lieu of the typical arbitrary or capricious standard reserved for agency determinations. The Board previously sought arbitrary or capricious review in prior litigation as well as earlier phases of the instant case.¹³¹ To boot, the First Circuit has looked favorably upon the arbitrary or capricious standard for FOMB actions, considering it “useful in evaluating a decision by the Board.”¹³² All in all, Governor Pedro Pierluisi Urrutia and the Senate defend their exercise of regulatory power.

ALTERNATIVES

Were the Board’s Motion for Summary Judgment granted, the Energy Bureau would have to publish the final net metering study expediently, given the original deadline was April 14, 2024, five years after the approval of Law 17-2019. The Bureau would subsequently adjust the billing rates for net metering customers as they see fit with current customers maintaining their actual 1:1 rate until at least the year 2030. This path of action has, at minimum, two overarching consequences. First the economic fall out in the solar industry if the incentives were to decrease. The impending loss of jobs, higher share of low-income households’ income going into their energy bills, and setback in meeting renewable energy goals for Puerto Rico would be dire. Fossil fuel energy dependence would increase, maintaining the status quo of susceptibility to climate change and volatile fuel prices. Second, summary judgment and the annulment of Law 10-2024 as prayed for by the Board newly highlights the contradiction between Puerto Rico’s status as a territory of the United States and presumably constitutional commonwealth with a republican tripartite form of government.

The Energy Bureau is but another administrative organ of the Executive Branch of Puerto Rico. As such, it responds to the will of the Legislative Assembly and authority of the Governor. The political insulation sought in the district court complaint mirrors the

128 See 48 U.S.C. 2101 § 204(a)(4)(B) (“[A]fter sending a notification to the Governor and Legislature under paragraph (3)(C) that a law is significantly inconsistent with the Fiscal Plan, the Oversight Board shall direct the territorial government to [...] (i) correct the law to eliminate the consistency; or (ii) provide an explanation for the inconsistency that the Oversight Board finds reasonable and appropriate”).

129 *The Governor’s Opposition to Financial Oversight and Management Board of Puerto Rico’s Motion for Summary Judgement pursuant to Bankruptcy Rule 56(d)* at 12, *FOMB v. Pierluisi Urrutia*, Case No. 24-00062 (D.P.R. 2024), ECF No. 67 (Oct. 23, 2024).

130 See 48 U.S.C. 2101 §§ 108(a), (a)(2) (“Neither the Governor nor the Legislature may [...] (2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, as determined by the Oversight Board”).

131 *FOMB*, Case No. 24-00062, ECF No. 67 at 26-33.

132 *Pierluisi v. Fin. Oversight & Mgmt. Bd. for P.R.* (In re Fin. Oversight & Mgmt. Bd. for Puerto Rico), 37 F.4th 746, 761 (1st Cir. 2022).

creation of a separate branch, with near-full independence. It could then become standard practice for the FOMB to petition the District Court to similarly inoculate other agencies from legislation or executive action. This scheme would seem irreconcilable with the concept of democratic government and the separation of powers. An imposed and unelected fourth power, neither fully local nor federal, without an obligation to produce public documents much less be confirmed by Congress, can then bar the Puerto Rican executive and legislative branches from complying with the constitutional duties of their offices and enforcing the environmental mandate consigned in their basic government charter. The Constitution of Puerto Rico would then rest in a state of legal and political limbo, a popularly ratified fundamental law that can be intermittently suspended piecemeal at the whim of the FOMB. This understanding has been availed in recent Supreme Court jurisprudence as to the consequence of the Puerto Rican Constitution's vigor since July of 1952.

Denying the Board's summary judgment motion is not without its consequences as well. It is possible that there could be ramifications as to lower revenues for the Electrical Power Authority and a cascade effect stemming from said decrease. One such case that the Board specifically mentions is the worsening condition of the transmission and distribution system due to an offset of maintenance costs onto customers who remain on the grid. However, that scenario ignores the lowering costs of photovoltaics and energy storage systems as well as federal and local funding opportunities to facilitate the transition to solar power. It presumes too that the Power Authority as we know it must remain under the same operative model regardless of technological and social transformations. Now, the Legislative Assembly could continue to postpone the study perpetually, seemingly bypassing the exact task it delegated to the Energy Bureau in the first place. Were they to do so, it would be completely within their right to assign, postpone, and revoke any delegation made to an administrative agency. No legislative action is unamendable, unquestionable, or irrevocable. Granting the Senate's motion for summary judgment would protect the separation and independence of the branches of government afforded by the Constitution of Puerto Rico and the powers contained therein. Many questions in regards to the relationship with the United States would remain unresolved as would the friction between the FOMB and local government but the bounds of each one's authority would be that much clearer.

Net-metering in Puerto Rico stands as an alternate means to reliably and affordably receive an essential utility service alongside a sustainable, resilient, community-oriented future. In order to preserve that potential, enforcement of interconnection agreements is critical. Compliant generation and storage systems must be interconnected in a timely manner to ensure that access to the program is streamlined. The overall service metrics of the current operator must be monitored closely pursuant to the terms of their contract and in the name of accountability. The procedure of approving and enforcing interconnection agreements must be subject to rigorous supervision by the independent regulator. Yet another sobering truth is that LUMA need not necessarily remain in their role as the private contractor for the transmission and distribution system. The contract includes avenues for its cancellation and as such, upon the continued circumvention of metrics or services, there can be a series of administrative penalties, breach of contract claims, and another process of selection via public auction of a new operator of the T & D system. Granted, ear-

ly termination and other fees would be due as required by the agreement. Given the Power Authority's ongoing bankruptcy litigation process, it is not in a position to assume any such debt. That is, presuming there is no change in the applicable law or regulation and that the government would not be able to negotiate a more preferable deal with LUMA.

CONCLUSION

The words of the illustrious writer and educator Eugenio María de Hostos y Bonilla resonate just as ever in the history of Puerto Rico. The archipelago finds itself in a perpetual umbra, both from the lack of consistent electrical service and under the shadow cast by the FOMB and PROMESA legislation. It must be recognized that the need for electrical power goes beyond its function as a utility, it is an *essential* public service and a human right. Its denial is a violent colonial act, perpetuating the suffering of Puerto Ricans whose quality of life hangs in the balance constantly. Students are unable to pursue their education, patients cannot power lifesaving medical equipment or temperature control sensitive medications, water cannot be pumped into homes, the list is never ending. A renewable and sustainable energy future is possible for Puerto Rico, with measures such as Act 10. May the sun shine again upon Puerto Rico, that sacred dawn spoken of by Hostos.