

**LET THE PEOPLE SPEAK (MEANINGFULLY):
RESIDENT TAXPAYERS AS STAKEHOLDERS
IN TITLE III BANKRUPTCY UNDER PROMESA**

ARTICLE

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INTRODUCTION

Since its inception, the *Puerto Rico Oversight and Economic Management Board* (PROMESA) has given rise to a myriad of controversies.¹ These have been both legal and political in nature. However, there is minimal room to distinguish between the political and legal issues. In many ways, PROMESA and all its components signified the further disenfranchisement of the people of Puerto Rico. This article only addresses one component—Title III—the bankruptcy component of PROMESA. PROMESA is, among its other attributes, the first bankruptcy law for U.S. territories.

Although the municipal and territorial bankruptcy procedures under PROMESA share a lot of their statutory framework, there are key differences that warrant treating territorial bankruptcies differently. Specifically, the presence of strong and imposing

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¹ Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §§ 2101-2241 (2016). For an overview of the historical context that resulted in this action, see Zoé C. Negrón Comas, *Puerto Rico’s Eleventh Amendment Sovereign Immunity and the Financial Oversight Board*, 54 REV. JUR. UIPR 1 (2020).

federal oversight in territories as a prerequisite for entering bankruptcy under PROMESA heightens the need for representation of certain sectors in the bankruptcy proceeding; sectors that are not considered by the Bankruptcy Code.

As observed in the Commonwealth of Puerto Rico's (*Puerto Rico*) Title III Bankruptcy Proceeding, "large municipal bankruptcy cases [call] into question the rights of debtor-cities to impair their capital markets creditors, on the one hand, and beneficiaries of their unfunded public pension promises, on the other."² Nevertheless, as Prof. Diane Lourdes Dick states, "for all the focus on these two dominant creditor classes, an important stakeholder—the debtor-city's taxpaying residents—has been largely overlooked in the public discourse."³ She argues that "taxpaying residents should be granted *standing and formal representation* in the proceedings."⁴ This concern extends to Puerto Rico's Title III Bankruptcy Proceeding. Moreover, the key differences between municipal Chapter 9 and Puerto Rico's Title III intensify this concern. Unlike Chapter 9 debtors, Title III debtors do not retain the ability to govern their affairs free from federal intervention. On the contrary, Title III debtors are subjected to oversight of a federal composed of unelected officials with no accountability to Puerto Rico's residents and taxpayers.⁵

In view of the foregoing, this article proposes that Puerto Rican resident taxpayers should have a seat at the table when it comes to the Title III Bankruptcy and its application. *Part I* will summarize the key differences between a Chapter 9 proceeding and a Title III proceeding. *Part II* will provide an overview of the active Title III bankruptcy proceedings. *Part III* will explain why Puerto Rico's resident taxpayers need and deserve representation in Title III. *Part IV* will summarize potential strategies to allow Puerto Rico's resident taxpayers to participate in Title III. Furthermore, *Part V* will provide an overview of PREPA's Title III case. Conclusions and reflections will follow at the end.

I. AN OVERVIEW: MUNICIPAL AND TERRITORIAL BANKRUPTCY

Congress enacted PROMESA in 2016,⁶ with the purported intention of facilitating Puerto Rico's financial recovery. The statute includes a specific bankruptcy proceeding for Puerto Rico, known as Title III.⁷ While Title III was largely modeled after Chapter 9

2 Diane Lourdes Dick, *Recognizing Taxpayers as Stakeholders in Municipal Bankruptcies*, 14 J.L. ECON. & POL'Y 91, 91 (2017). See, also, C. Scott Pryor, *Who Pays the Price? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L.J. 81, 81 (2015) ("The recent narrative of Chapter 9 municipal bankruptcies has focused on the battle between two sets of powerful creditor interests: municipal retirees and bondholders.").

3 Dick, *supra* note 2 (emphasis added) (footnotes omitted). See also Pryor, who states the following:

There remains, however, a large constituency whose members are not creditors, but a substantial set of stakeholders who do not have an opportunity to vote on the plan negotiated among the claimants. Taxpayers are not creditors; thus, taxpayers do not have a formal role or representative in a Chapter 9 case.

Pryor, *supra* note 2, at 82.

4 Dick, *supra* note 2, at 92 (emphasis added) (footnotes omitted).

5 Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, et al., No. 18-1334, slip op. at 23 (1st Cir. Jun. 1, 2020) (emphasis added) ("The Board members, tasked with determining the financial fate of a self-governing Territory, exist in a twilight zone of accountability, neither selected by Puerto Rico itself nor subject to the strictures of the Appointments Clause.").

6 Puerto Rico Oversight, Management, and Economic Stability Act §§ 2101-2241. See, also, Negrón Comas, *supra* note 1.

of the Bankruptcy Code, there are significant differences due to certain provisions under PROMESA, as discussed in the coming paragraphs.

A. Chapter 9 Bankruptcy

Chapter 9 of the Bankruptcy Code is specifically designed for the adjustment of municipal debts.⁸ This is a “relatively new phenomenon, originating in the 1930s in response to rapidly deteriorating municipal finances during the Great Depression.”⁹ Its purpose is to grant temporary relief and establish a payment plan while “preserv[ing] critical jobs and keep[ing] the municipal debtor economically viable.”¹⁰ Unlike other chapters of the Bankruptcy Code, Chapter 9 has very distinct goals.¹¹ When a municipality files for bankruptcy, it must balance the interests of providing the debtor with a fresh start, ensuring the creditor’s right to payment, and maintaining its ability to provide essential services for its citizens. It is not a “profit-making enterprise that can be dismantled and distributed if it ceases to be successful[.]”¹² People depend on the municipality to provide essential services.¹³ Because its goals are different, and due to the constitutional considerations that surround Chapter 9, there are numerous differences in this chapter’s governance.

To be eligible for Chapter 9, an entity must be an insolvent municipality that has been specifically authorized to be a debtor by state law, among other requirements.¹⁴ This provision limits bankruptcy eligibility based on insolvency, which “delays and discourages municipal bankruptcy filings and thus serves as an effective gatekeeper[.]”¹⁵ It also hinges on whether the state to which the municipality belongs permits bankruptcy. This second limitation “has roots in the constitutional principle that the federal government may not interfere with the internal governance of a state or its political subdivisions.”¹⁶ It is evident

7 ROLANDO EMMANUELLI JIMÉNEZ & YASMÍN COLÓN COLÓN, PROMESA: PUERTO RICO OVERSIGHT, MANAGEMENT AND ECONOMIC STABILITY ACT 47 (2017) (Puerto Rico used to be eligible for Chapter 9 Bankruptcy, but in 1984, for reasons unfounded, it was excluded; thus, the “need” for a new law.).

8 See 11 U.S.C. §§ 901-946. See, also, Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425 (1993).

9 Michael J. Deitch, *Time for an Update: A New Framework for Evaluating Chapter 9 Bankruptcies*, 83 FORDHAM L. REV. 2705, 2721-22 (2015).

10 *Id.* at 2724.

11 See Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH & LEE L. REV. 403, 429-40 (2014).

12 *Id.* at 438.

13 *Id.*

14 11 U.S.C. §§ 101(52), 109(c) (It should be noted that “[t]he term ‘State’ includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title.”) (emphasis added). For comment on that, see *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115 (2016) and EMMANUELLI & COLÓN, *supra* note 7, at 47-52; Deitch, *supra* note 9, at 2710-13 (explaining what a municipality is).

15 As McConnell and Picker explain:

In this context, insolvency means that the municipal debtor either currently cannot pay its debts as they become due—the bills arrive and cannot be paid—or that the debtor will not be able to pay such debts as they become due—bills will arrive in six months and cannot be paid then.

McConnell & Picker, *supra* note 8, at 456.

16 *Id.* at 457 (“There was, and still may be, substantial doubt about the constitutionality of depriving a state of the power to determine which of its subdivisions can file for bankruptcy.” (footnote omitted)).

that “[t]he Bankruptcy Code thus erects serious obstacles to municipal filing beyond those faced by private debtors.”¹⁷

Part of what sets Chapter 9 apart from other bankruptcy chapters is “the degree of control exercised by the court over the debtor during the proceeding.”¹⁸ Chapter 9 explicitly states that it “does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures[.]”¹⁹ Furthermore, it limits the power of the bankruptcy court to “interfere with—(1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the debtor’s use or enjoyment of any income-producing property.”²⁰ That is, “unless the debtor consents or the plan so provides[.]”²¹ Together, these provisions uphold constitutional principles against federal interference in state governance, which are absent in private bankruptcies.²²

There are other distinctions between Chapter 9 and private bankruptcies. For example, municipalities are not subject to involuntary bankruptcy petitions, unlike private corporations.²³ The decision to file for bankruptcy is within the municipality’s discretion, not the state or the creditors. In private bankruptcies, a group of creditors can file an involuntary bankruptcy petition, forcing the individual or entity to undergo liquidation or reorganization, subject to certain requirements; Chapter 9 does not allow this.²⁴

Additionally, Chapter 9 debtors have complete control and exclusive rights to file the debt adjustment plan.²⁵ Again, this is different from private bankruptcies, where only the debtor has priority or a first right to file a plan.²⁶ This plan may then be rejected or overridden by a creditor-proposed plan. Thus, the standard for confirming the plan under Chapter 9 is “lengthy and complex.”²⁷ However, Chapter 9 does incorporate cramdown protections from Chapter 11, with one extraofficial caveat:

17 *Id.* at 460-61. It is also worth noting that:

There are two additional limits on filings by municipalities: § 109(c) imposes a procedural bar and § 921(c) empowers the bankruptcy court to dismiss petitions not filed in “good faith.” The procedural bar mandates certain pre-filing efforts by the municipal debtor to work out its financial difficulties. It must either have reached an agreement sufficient to confirm a plan under Chapter 9, have failed to do so despite good faith negotiations, or such negotiation must be “impracticable.” Again, these requirements are unique to the Chapter 9 debtor. While most private debtors do engage in pre-petition negotiations and while some do reach an agreement to be enforced through the bankruptcy court—this is the heart of the “prepackaged plan,” the latest rage in bankruptcy practice—nothing obligates private debtors to negotiate.

Id.

18 *Id.* at 462.

19 11 U.S.C. § 903.

20 *Id.* § 904.

21 *Id.*

22 McConnell & Picker, *supra* note 8, at 463.

23 *Id.* at 455.

24 *See* 11 U.S.C. § 303.

25 *Id.* § 941.

26 *Id.* § 1121.

27 *See* 11 U.S.C. § 943; McConnell & Picker, *supra* note 8, at 464.

In the context of the private corporation, this means that objecting unsecured creditors are entitled to be paid in full, so long as stockholders receive any value on account of their stock. *Cities, however, have no stockholders. The current managers—that is, the current officeholders—owe their allegiance to the citizens who put them into control, not to the creditors. The managers need not pay off unsecured creditors to remain in control, but instead can retain control while confirming a plan giving unsecured creditors very little.* In the extreme, the debtor might be able to abrogate the claims of the unsecured creditors altogether, so long as it can find an impaired class of secured claims willing to approve the plan.²⁸

This leads us to another key difference between Chapter 9 and private bankruptcies: the Bankruptcy Court cannot name a trustee. As Prof. Juliet Moringiello states, “[a]llowing a bankruptcy court to replace municipal management with a trustee would not only give creditors and other parties in interest far more rights in bankruptcy than they would have outside of bankruptcy[,] but would fall afoul of the Tenth Amendment.”²⁹ In other words, allowing a trustee appointment in Chapter 9 would not only raise constitutional issues but would also do precisely what bankruptcy should not—grant creditors more rights over the debtor than they would otherwise possess.

B. Title III Bankruptcy

Having established the distinctions between Chapter 9 and private bankruptcies, we must examine Title III bankruptcy under PROMESA and identify its differences with Chapter 9, which it was modeled after.³⁰ Firstly, it is important to note that Title III is only one component of PROMESA.³¹ The statute was specifically created to address Puerto Rico’s financial crisis.³² However, Title III, along with PROMESA’s other provisions, can apply to *any* U.S. territory.³³ I highlight this not only to set the stage for its eligibility requirements, but also to underscore why this article, and any other interpretations of PROMESA, have relevance that extends far beyond Puerto Rico’s eventual, potential or hypothetical return to fiscal health.

To be eligible for Title III, an entity must be “(A) a territory that *has requested* the establishment of an Oversight Board or *has had* an Oversight Board *established* for it by

²⁸ McConnell & Picker, *supra* note 8, at 464 (emphasis added).

²⁹ Moringiello, *supra* note 11, at 438.

³⁰ EMMANUELLI & COLÓN, *supra* note 7, at 54 (translation supplied) (Although it is generally understood that “Title III establishes a hybrid between Chapter 9 and 11 of the Bankruptcy Code [,]” I find this to be redundant to the extent that Chapter 9 incorporates so many sections of Chapter 11 already. What really cements this description of hybridity is the presence of the Oversight Board, as we will discuss further on.)

³¹ 48 U.S.C. §§ 2161-2178.

³² *Id.* § 2241 (“It is the sense of the Congress that any durable solution for Puerto Rico’s fiscal and economic crisis should include permanent, pro-growth fiscal reforms that feature, among other elements, a free flow of capital between possessions of the United States and the rest of the United States.”).

³³ *Id.* § 2104(20) (“The term ‘territory’ means—(A) Puerto Rico; (B) Guam; (C) American Samoa; (D) the Commonwealth of the Northern Mariana Islands; or (E) the United States Virgin Islands.”).

the United States Congress . . . ; or (B) a covered territorial instrumentality of a territory . . . ” as defined in PROMESA.³⁴ It also requires that the Oversight Board issue a certification under section 2146(b)³⁵ and that “the entity *desires* to effect a plan to adjust its debts.”³⁶ Herein lies the biggest difference between Chapter 9 and Title III: the presence of a federal entity encroaching on the debtor’s autonomy.³⁷ Though many of Chapter 9’s provisions are transferred intact into Title III, they are all limited by the presence of the Oversight Board. While many provisions of Chapter 9 are constructed in such a way that the debtor retains the power to conduct its political and governmental affairs, the Oversight Board deprives the Title III debtor of the same consideration. Thus, Title III incorporates what Chapter 9 restricts: a trustee figure. In fact, PROMESA instructs us to interpret the Bankruptcy Code as referring to the *Oversight Board* wherever it mentions the *trustee*.³⁸

Pursuant to PROMESA, and before a debtor can be eligible to file a petition for Title III, the Oversight Board has to issue a restructuring certification, approved by a vote of no fewer than five members.³⁹ Before issuing this certification, the Oversight Board “shall determine, *in its sole discretion*, that—(1) the entity has made good-faith efforts to reach a consensual restructuring with creditors[,]” and complied with a set of requirements set forth in PROMESA.⁴⁰ As previously mentioned, by requiring state law authorization for a municipality to file, Chapter 9 upholds the principle that “the federal government may not interfere with the internal governance of a state or its political subdivisions.”⁴¹ Similarly, Title III “does not limit or impair the power of a covered territory to control, by legislation or otherwise, the territory or any territorial instrumentality thereof in the exercise of the political or governmental powers of territory or territorial instrumentality, including expenditures[.]”⁴² However, this is “[s]ubject to the limitations set for in subchapters I and II,” meaning that the powers of the Oversight Board supersede this provision.⁴³

Title III, like Chapter 9, explicitly limits the power of the bankruptcy court to “interfere with—(1) any of the political or governmental powers of the debtor; (2) any of the property or revenues of the debtor; or (3) the use or enjoyment by the debtor of any income-producing property.”⁴⁴ Unlike Chapter 9, this interference is “[s]ubject to the limitations set forth in subchapters I and II of this chapter,” thus the bankruptcy court may interfere if the Oversight Board consents.⁴⁵ In sum, Title III may be a copy of Chapter 9,

34 *Id.* § 2162(1) (emphasis added).

35 *Id.* § 2162(2).

36 *Id.* § 2162(3) (emphasis added).

37 See 48 U.S.C. § 2161(c)(7); Negrón, *supra* note 1, at 20-24 (for an analysis on why the Oversight Board is a federal entity) (Regardless of recent Supreme Court decisions, the Board is still a federally created entity and, in the context of Title III, it functions as a trustee. This alone creates sufficient grounds to call it a federal entity in the Title III proceeding, regardless of any technicalities the Supreme Court identifies.).

38 48 U.S.C. § 2161(c)(7).

39 *Id.* § 2146(b). It should be noted that none of the voting members of the Oversight Board are elected, they are all appointed pursuant to PROMESA’s own terms. See *Id.* § 2121(e) (on membership of the Oversight Board).

40 *Id.* § 2146(a) (emphasis added) (on requirements for restructuring certification).

41 McConnell & Picker, *supra* note 8, at 457.

42 48 U.S.C. § 2163.

43 *Id.*

44 See 11 U.S.C. § 904; 48 U.S.C. § 2165.

45 48 U.S.C. § 2165; *Cf.* 11 U.S.C. § 904.

but because Congress included the Oversight Board in the other titles, PROMESA creates a Chapter 9 and Chapter 11 hybrid, with the Oversight Board as an obligatory and automatically appointed trustee. Additionally, while Title III similarly requires the confirmation of a debt-adjustment plan, “[o]nly the Oversight Board . . . may file a plan of adjustment of the debts of the debtor.”⁴⁶

This overview should illustrate the following distinctions: a Chapter 9 debtor’s bankruptcy is controlled by the Chapter 9 debtor, whereas a Title III debtor’s debt is controlled by the Oversight Board. In Chapter 9, the Court refrains from certain issues and provides deference to protect the debtor’s autonomy. In Title III, the Court also refrains from certain issues, but it provides deference to consolidate the Oversight Board’s control. The effect of this difference is that, while elected officials maintain control over Chapter 9 proceedings, they do not in Title III. Thus, in Title III there is not even an indirect representation of the interests of resident taxpayers, as there is in Chapter 9. In Title III, resident taxpayers have no representation unless they are individually part of a creditor group or otherwise have claims against the debtor; the collective is left without any representation.

II. PUERTO RICO’S TITLE III BANKRUPTCY PROCEEDINGS

As this article is being written, the Title III debtors are: (1) the Commonwealth of Puerto Rico; (2) the Puerto Rico Electric Power Authority (*PREPA*); (3) the Puerto Rico Highways and Transportation Authority (*HTA*); (4) the Employees Retirement System of the Government of the Commonwealth of Puerto Rico (*ERS*); (5) the Puerto Rico Sales Tax Financing Corporation (*COFINA*), and (6) the Puerto Rico Public Building Authority (*PBA*).⁴⁷ In summary, among the Title III covered instrumentalities are those in charge of electricity, housing, roads, and public transport.⁴⁸ Also in Title III is the retirement system for Puerto Rico’s public employees. However, the only Title III case pending confirmation for a Plan of Adjustment is *PREPA*’s.⁴⁹

Of course, the Commonwealth itself is also in Title III. That is, the Commonwealth is an independent debtor with its own bankruptcy case, separate from the covered instrumentalities that have filed so far. This alone should impress the reader of the extent to which Title III proceedings affect Puerto Rican resident taxpayers.⁵⁰ However, to promote

⁴⁶ 48 U.S.C. § 2172(a).

⁴⁷ *In re* The Financial Oversight and Management Board for Puerto Rico, No. 17 BK 3283-LTS, 709 F. Supp. 3d 52 (D.P.R. 2023); *In re* Puerto Rico Electric Power Authority, No. 17 BK 4780-LTS, 703 F. Supp. 3d 318 (D.P.R. 2023); *In re* Employees Retirement System of the Government of the Commonwealth of Puerto Rico, No. 17 BK 3567-LTS, 432 F. Supp. 3d 25, 25 n.1 (D.P.R. 2020); *In re* Employees Retirement System of the Government of the Commonwealth, No. 17 BK 3566-LTS, 590 B.R. 577 (D.P.R. 2018); *In re* Puerto Rico Sales Tax Financing Corporation (COFINA), No. 17 BK 3284-LTS, 301 F. Supp. 3d 274 (D.P.R. 2017); *In re* Puerto Rico Public Buildings Authority, No. 19 BK 5523-LTS (Docket No. 1).

⁴⁸ An instrumentality is defined in PROMESA as: “any political subdivision, public agency, instrumentality—including any instrumentality that is also a bank—or public corporation of a territory, and this term should be broadly construed to effectuate the purposes of this chapter.” 48 U.S.C. § 2104(19). They become covered instrumentalities once the Oversight Board designates them as such. *Id.* § 2104(7).

⁴⁹ *In re* Puerto Rico Electric Power Authority, 703 F. Supp. 3d 318, 362 (D.P.R. 2023).

⁵⁰ *In re* The Financial Oversight and Management Board for Puerto Rico, No. 17 BK 3283-LTS (Docket No. 1).

a deeper understanding of its impact, we will take a brief look at each of the debtor instrumentalities. Due to Puerto Rico's government structure, these Title III proceedings affect essential services for the people.

On May 9, 2017, the Financial Oversight and Management Board for Puerto Rico (*Oversight Board*) filed a Title III petition on behalf of the Commonwealth of Puerto Rico.⁵¹ While this case tends to garner the most attention—as it should—it is not the only Title III case that was filed within the jurisdiction. Five other Title III cases further complicate the situation of Puerto Rico's finances and public services. For instance, on the same date as the Commonwealth's Title III case, the Oversight Board filed a Title III petition on behalf of COFINA as a covered instrumentality under PROMESA.⁵² COFINA is a public corporation and instrumentality of Puerto Rico, created through Act No. 91-2006 to finance the appropriation-backed debt of Puerto Rico.⁵³ COFINA was created after Puerto Rico incurred in debt to finance its operations without identifying effective methods for repayment.⁵⁴ In essence, COFINA collects a portion of the Sales and Use Tax (*SUT*) imposed on the sale, use, consumption and storage of taxable items in Puerto Rico. Consumers in Puerto Rico pay an 11.5% *SUT*. However, COFINA accrued an outstanding debt of \$17.64 billion, resulting in the Title III petition.⁵⁵ To date, COFINA is the only Title III case that has been closed.⁵⁶

Additionally, on May 21, 2017, the Oversight Board filed a Title III petition on behalf of HTA as a covered instrumentality.⁵⁷ HTA was created by Act No. 74 of June 23, 1965, and is a public corporation, charged with the construction, operation and maintenance of Puerto Rico's major highways, toll network and transportation facilities.⁵⁸ HTA also operates San Juan's heavy rail system and associated bus lines.⁵⁹ Puerto Rico's roads are currently ranked fifty-first out of fifty-two in quality in the United States, which, according to the Oversight Board, "imposes economic costs on its citizens, decreases safety and increases the overall cost of road maintenance."⁶⁰ Moreover, it "makes improving the condition of Puerto Rico's roads a key part of the broader structural reforms . . . to grow Puerto Rico's economy, attract investors, increase jobs, ease doing business, and otherwise promote eco-

51 *Id.*

52 *In re* Puerto Rico Sales Taxes Financing Corporation (COFINA), No. 17 BK 3284-LTS (Docket No. 1).

53 *About Puerto Rico Sales Taxes Financing Corporation (COFINA)*, COFINA <https://cofina.pr.gov/cofina-pr/about/i6094> (last visit Sept. 19, 2024).

54 Statement of Motives, Puerto Rico Sales Tax Financing Corporation Act, Act No. 91-2006, 2018 LPR 2270.

55 *In re* Puerto Rico Sales Taxes Financing Corporation (COFINA), No. 17 BK 3284-LTS (Docket No. 58) at 58.

56 *In re* Puerto Rico Sales Taxes Financing Corporation (COFINA), No. 17 BK 3284-LTS (Docket No. 836). This occurred on October 30, 2024.

57 *In re* Puerto Rico Highways and Transportation Authority, No. 17 BK 3567-LTS (Docket No. 1).

58 Puerto Rico Highway and Transportation Authority Act, Act No. 74-1965, 9 LPR §§ 2001-2020a (2022); PRHTA FINAL FISCAL PLAN 2018-2023, 7 from PDF (2018), https://docs.pr.gov/files/AAFAF/Financial_Documents/Fiscal%20Plans/FISCAL%20PLAN%20SUBMISSIONS/Puerto%20Rico%20Highways%20and%20Transportation%20Authority/April-5-2018-Puerto-Rico-Highways-and-Transportation-Authority-Fiscal-Plans-Submissions.pdf. See, also, *Puerto Rico Highway & Transportation Authority*, BLOOMBERG, <https://www.bloomberg.com/profile/company/27481MF:US> (last visit Sept. 20, 2024).

59 2020 FISCAL PLAN FOR THE PUERTO RICO HIGHWAYS & TRANSPORTATION AUTHORITY (HTA) 15 from PDF (2020), <https://drive.google.com/file/d/1QomKHgAMiPH15rkwBw6REl4VU7jA6Uqs/view> (last visit Sept. 19, 2024).

60 *Id.* at 28.

conomic development. [That improvement] also allows Puerto Rico to be better prepared for future natural disasters.”⁶¹ However, the state of this instrumentality’s finances was severe enough for the Oversight Board to file a Title III case.

On the same date, the Oversight Board also filed a Title III petition on behalf of ERS as a covered instrumentality.⁶² ERS provides retirement and disability annuities, death benefits, and loans to Puerto Rico’s public employees.⁶³ It was created by Act No. 447 of May 15, 1951.⁶⁴ The system covers police, public entity employees, members and employees of the legislature, and municipality officers and employees.⁶⁵ This instrumentality is the source of the government’s broad pension obligations, which weigh heavily on Puerto Rico.

Furthermore, on July 3, 2017, the Oversight Board filed a Title III petition on behalf of the Puerto Rico Electric Power Authority (PREPA) as a covered instrumentality under PROMESA.⁶⁶ PREPA is a government-owned corporation established in 1941, through Act No. 83 of May 2, 1941.⁶⁷ As a public utility, PREPA accounts for the operations of retail and wholesale electric utility services to all of Puerto Rico.⁶⁸ PREPA has consolidated all electrical systems in Puerto Rico under a single entity.⁶⁹ As of June 2020, PREPA served approximately 1.5 million customers.⁷⁰ Of those customers, 91% are residential, 9% commercial, and 1% industrial;⁷¹ consequently, of those 1.5 million customers, the majority were families.

PREPA is one of the largest public power utilities in the United States, responsible for the power distribution of the *entire* archipelago.⁷² If PREPA failed to distribute electric utility services, the whole population of Puerto Rico would be affected.

61 *Id.*

62 *In re* Employees Retirement System of the Government of the Commonwealth of Puerto Rico, No. 17 BK 3566-LTS (Docket No. 1).

63 *Puerto Rico Commonwealth Government Employees Retirement System*, BLOOMBERG, <https://www.bloomberg.com/profile/company/68007MF:US> (last visit Sept. 26, 2024).

64 *Employees Retirement System of the Government of the Commonwealth of Puerto Rico*, Act No. 447 of May 15, 1951, 3 LPRA § 761 (2017 & Supp. 2024).

65 *Junta de Retiro*, *Historia*, RETIRO <https://www.retiro.pr.gov/ley-organica/> (last visit Sept. 26, 2024).

66 *Notice of Filing of Statement of Oversight Board Regarding PREPA’s Title III Case*, *In re* The Financial Oversight and Management Board for Puerto Rico, No. 17-04780, Doc#: 2 (filed Jul. 2, 2017).

67 P.R. LAWS ANN. tit. 22, §§ 191-281 (2019).

68 *Puerto Rico Electric Power Authority*, BLOOMBERG, <https://www.bloomberg.com/profile/company/27482M-F:US> (last visit Sept. 14, 2024) (It should be noted that even after the efforts to privatize the electric system, this remains true. Luma Energy LLC and GeneraPR LLC are private companies that operate the transmission and distribution system, as well as the legacy generation assets, respectively. However, they do so under operation and management agreements that do not relieve PREPA of its obligations or the burden that comes with being the sole utility in Puerto Rico. For more on this subject, readers are encouraged to read the report written by the Special Commission for the study of the Luma and Genera contracts, which was presided over by this author. See *Comisión Especial para Estudiar a Fondo los Contratos de LUMA Energy y GeneraPR*, Colegio de Abogados y Abogadas de Puerto Rico (Oct. 24, 2024), <https://capr.org/comision-especial-de-presidencia-luma-y-genera-pr/>).

69 *Nuestra historia*, AUTORIDAD DE ENERGÍA ELÉCTRICA, <https://aeepr.com/#/about> (last visit Sept. 19, 2024).

70 FIN. OVERSIGHT & MGMT. BD. FOR PUERTO RICO, 2020 FISCAL PLAN FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY 12 (June 29, 2020), <https://aldia.microjuris.com/wp-content/uploads/2020/06/2020-prepa-fiscal-plan-as-certified-by-fomb-on-june-29-2020.pdf>.

71 *Id.* at 20.

72 *Id.* at 12.

On September 27, 2019, the Oversight Board filed a Title III petition on behalf of the Puerto Rico Public Building Authority (PBA) as a covered instrumentality under PROMESA.⁷³ The PBA is a public corporation responsible for the administration and maintenance of office buildings, courts, warehouses, schools, health care facilities, welfare facilities, shops, and related facilities leased to Puerto Rico and its instrumentalities.⁷⁴ It was created by Act No. 56 of June 19, 1958.⁷⁵

In sum, the Title III Court currently has multiple Puerto Rican instrumentalities that provide public services under its jurisdiction. Therefore, the decisions made in these cases affect Puerto Rico's resident taxpayers just as much as they affect the debtors and creditors. Not only are the resident taxpayers burdened with whatever increase in tax revenue the plans require, but they also suffer from inevitable cutbacks in public services. During the drafting of this article, we have witnessed this materialize through confirmed plans under Title III. At present, PREPA's Title III case remains without a confirmed plan of adjustment.

III. THE NEED FOR RESIDENT TAXPAYER PARTICIPATION IN TITLE III BANKRUPTCY

The Title III proceedings encompass a range of essential services necessary for the taxpayers residing in Puerto Rico to maintain a dignified standard of living. Yet, Puerto Rico's resident taxpayers do not have representation in these proceedings. While not all the instrumentalities are funded directly through tax revenue, they provide essential services and are, in many ways, interdependent with the Commonwealth and municipalities. Thus, by some means, resident taxpayers bear the burden of the insolvency of these Title III debtors, financially and in terms of quality of life.

However, before we go any further, it is essential to define *resident taxpayers* for the purposes of this article. When this article refers to *resident taxpayers*, the relevant definition is as follows:

I mean persons who *reside in the debtor-city and are subject to taxes (such as sales and property taxes)* that are assessed and levied by the debtor-city to support services and infrastructure. This key stakeholder is likely to play a central role in the case, and is not only substantially impacted by the bankruptcy filing but also capable of substantially impacting any proposed restructuring plan. This is because, in an emerging prototype of municipal bankruptcy restructuring, debtor-cities slash services in the years and months leading up to the bankruptcy filing, and also rely in large part on tax increases to support their plans to exit bankruptcy with a stronger fiscal foundation.⁷⁶

Notably, this definition excludes absentee corporations or resident investors who pay minimal or no taxes. Our definition of a resident taxpayer revolves around residency and

⁷³ *In re* Puerto Rico Public Buildings Authority, No. 19 BK 5523-LTS, Doc#: 1 (filed Sept. 27, 2019).

⁷⁴ *Puerto Rico Public Buildings Authority*, PUERTO RICO FISCAL AGENCY & FINANCIAL ADVISORY AUTHORITY, <https://www.aafaf.pr.gov/puerto-rico-issuers/puerto-rico-public-buildings-authority-pba> (last visit Sept. 15, 2024).

⁷⁵ P.R. LAWS ANN. tit. 22, §§ 902-917 (2019).

⁷⁶ Dick, *supra* note 2, at 91-92 (footnotes omitted) (emphasis added).

contribution. These are the people who, as stated by Prof. C. Scott Pryor, “bear a disproportionate share of the risk of municipal default.”⁷⁷

Commentators have repeatedly argued that taxpayers should have representation in Chapter 9, but taxpayers are not generally granted any form of standing [under Chapter 9]. According to Prof. Dick, “[w]here courts have refused to grant taxpayers standing, they have cited the narrow purposes of Chapter 9 bankruptcy to effectuate debt adjustments *and the importance of respecting the municipality’s right to manage its own policy choices and political affairs.*”⁷⁸ To extend that reasoning to Puerto Rico’s Title III bankruptcy would be implausible, to say the least, since Title III proceedings are controlled entirely by the Oversight Board, providing minimal room for elected officials to exercise independent judgment. Additionally, the Oversight Board can operate with minimal interference from the Title III court. This control suppresses taxpayer representation: while taxpayers of Chapter 9 municipalities are represented by the debtor, taxpayers of Title III debtors are *completely unrepresented* in these proceedings, which could alter their overall quality of life and finances. For that reason, we should create mechanisms for taxpayer representation in Title III.

Moreover, if taxpayers were given participation in Title III cases, they would “put before the court a unique perspective on the viability of a proposed plan and prospects for long-term financial recovery.”⁷⁹ Because taxpayers are ultimately responsible for funding the proposed plans, they can shed light on whether the “increased tax burden proposed in a plan will render the plan unfeasible.”⁸⁰ This is particularly true in Puerto Rico’s current context, where the high cost of living, low wages, and declining quality of public services, coupled with natural and political disasters, have led to a mass migration of the working and professional class to the United States.⁸¹

IV. ACHIEVING TAXPAYER PARTICIPATION IN TITLE III

A. *Squeezing in as a Party in Interest*

One method for taxpayer participation in Title III is through the existing framework of *party in interest* standing to object. To understand this, we must define *party in interest* as it appears in the Bankruptcy Code. Moreover, analyzing how this figure has been used in Chapter 9 cases will sustain our main claim: the need of taxpayer participation in Title III Bankruptcy.

⁷⁷ Pryor, *supra* note 2, at 107.

⁷⁸ Dick, *supra* note 2, at 101 (emphasis added).

⁷⁹ Christine A. Schleppegrell, *Can Taxpayers Leverage The Ambiguity Of “Party-In-Interest” To Enter The Chapter 9 Arena?*, ABI JOURNAL, Jan. 2014, at 20, 62.

⁸⁰ Pryor, *supra* note 2, at 109.

⁸¹ See Pedro Cabán, *Puerto Rico’s Forever Exodus*, NACLA (February 22, 2018), <https://nacla.org/news/2018/02/22/puerto-rico%E2%80%99s-forever-exodus>. The influence of these realities on Title III cases is evident in the filings in PREPA’s case. See, e.g., Expert Rebuttal Report of Professor Simon Johnson, *In re* Puerto Rico Electric Power Authority, No. 17-BK-4780-LTS (D.P.R. 2024) (Docket 4389-1); Declaration of Professor Simon Johnson, *In re* Puerto Rico Electric Power Authority, No. 17-BK-4780-LTS (D.P.R. 2024) (Docket 4644-1).

Section 1109(b) of the Bankruptcy Code, made applicable to both Chapter 9 and Title III, allows a *party in interest* to raise objections in the proceeding.⁸² This section has been considered rather vague, but it explicitly includes “the debtor, the trustee, creditors committee, equity securities holders committee, a creditor, an equity security holder, or an indentured trustee, may raise and may appear and be heard on any issue in a case”⁸³ However, determining a party in interest entails case-by-case analysis.⁸⁴ Truthfully, because the definition is non-exhaustive, it generally refers to anyone with a significant financial, legal or practical stake in the outcome of the bankruptcy.⁸⁵

Despite the previous requisite, when taxpayers have attempted to be heard in Chapter 9 cases, the *party in interest* argument has been most successful at the confirmation stage.⁸⁶ This is logical, as the most immediate impact of the Title III on resident taxpayers is due to increased taxes and reduced public services. In other areas, such as adversary proceedings and avoidance actions, resident taxpayers may be indirectly affected to the extent that the debtor is impacted. However, unless they are parties to a contract with the debtor or are otherwise creditors or beneficiaries, their claim to standing as a party in interest will be weakened, making it easier for the Court to dismiss.

At the confirmation stage, pursuant to Section 314 of PROMESA, a Plan of Adjustment must meet specific requirements.⁸⁷ Chief among those requirements, PROMESA requires the Oversight Board to file a feasible plan.⁸⁸ Feasibility is a two-prong inquiry: (1) whether the debtor “will be able to satisfy its obligations under the Plan”, and (2) whether the debtor will be able to provide the services it owes to the public.⁸⁹ The Title III Court has specifically said about feasibility that:

“The Court has an independent duty to determine feasibility and to make specific findings of fact.” Under PROMESA, a plan of adjustment must be supported by financial projections that are “reasonable and demonstrate a probability that the debtor will be able to satisfy its obligations under the Plan.” Additionally, as in [C]hapter 9, a PROMESA debtor, as a government entity, must show that it is “probable that the debtor can both pay post-petition debt and provide future public services at the level necessary to its viability as a territory.” The core inquiry has been articulated as follows: “Is it likely that the debtor, after the confirmation of the Plan of Adjustment, will be able to sustainably provide basic municipal services to the citizens of the debtor and to meet the obligations contemplated in the Plan without the significant probability of a default?”⁹⁰

82 11 U.S.C. § 1109(b).

83 *Id.*

84 Schleppegrell, *supra* note 79, at 20.

85 See *In re El Comandante Mgmt. Co., LLC*, 359 B.R. 410, 416-17 (Bankr. D.P.R. 2006). See also *Savage & Assocs. P.C. v. K&L Gates LLP (In re Teligent, Inc.)*, 640 F.3d 53, 60-61 (2d Cir. 2011).

86 See Schleppegrell, *supra* note 79, at 21. See also Christine Sgarlata Chung, *Municipal Bankruptcy, Essential Municipal Services, and Taxpayers' Voice*, 24 WIDENER L.J. 43, 77-78 (2015).

87 48 U.S.C. § 2174(b).

88 *Id.* § 2174(b)(6).

89 *In re Fin. Oversight & Mgmt. Bd.*, 637 B.R. 223, 302-03 (Bankr. D.P.R. 2022)

90 (citation omitted).

These requirements provide resident taxpayers with an opportunity to assert their interest in objecting to the confirmability of an unfeasible plan of adjustment. Commentators always refer to *In re Mount Carbon Metropolitan District* and *In re Wolf Creek* to support this argument:

In *In re Mount Carbon Metropolitan District*, for example, the court held that *landowning taxpayers had the right to weigh in on the debtor's proposed plan of adjustment*:

“The Plan implicitly depends upon District property owners paying for all repair and installation of infrastructure. The Plan indirectly imposes the entire financial cost of repair and installation of sewers, street and other infrastructure upon landowners. If the Plan is confirmed and landowners refuse to pay for such improvements, *landowners will be burdened by greater taxation* without the ability to realize the value of their investment. *Because the landowners' vital interests are affected by the Plan, they have sufficient stake in the Chapter 9 proceeding to object to its confirmation.*”

Likewise, in *In re Wolf Creek*, the court held *an owner of real property in the debtor district was a party-in-interest where the property owner was subject to a \$120,262 tax liability because the proposed plan exempted the owner from favorable tax treatment*. Note well, however, that these cases limit party-in-interest status to landowning taxpayers and that current and future citizens of the debtor likely do not have standing under this line of cases to object to a debtor's proposed debt adjustment plan. In addition, there are cases that have refused to confer party-in-interest status on taxpayers, even at the plan confirmation stage, on the grounds that the taxpayers' material interest was not affected, so authority is (and remains) mixed.⁹¹

Furthermore, they suggest:

A taxpayers' group should rely on *In re Wolf Creek* and *In re Mount Carbon* to *focus the court's attention on the effect that the tax will have on individual citizens' finances*. Taxpayers themselves should draw on the court's analysis in *Wolf Creek* as the court focuses on the end result: *the financial impact on the taxpaying citizen*. In *Wolf Creek*, the proposed tax was actually favorable, but the citizen was exempted from the tax and therefore subject to a higher tax rate.⁹²

In summary, the argument is that the party in interest has standing at the confirmation stage because the proposed adjustment plan would directly affect the resident taxpayers in question. For example, “[w]here a Chapter 9 plan proposes to increase taxes,

⁹¹ Chung, *supra* note 86, at 78 (brackets, ellipsis and footnotes omitted) (emphasis added) (citing *In re Mount Carbon Metropolitan District*, No. 97-20215 MSK, 1999 WL 34995477, at *4 (Bankr. D. Colo., 1999); *In re Wolf Creek Valley Metropolitan Dist.* No. IV, 138 B.R. 610 (D. Colo. 1992)).

⁹² See Schleppegrell, *supra* note 79, at 21, 62 (emphasis added).

taxpayers clearly have the requisite imminent concrete injury that can be redressed by the bankruptcy court.”⁹³

At the confirmation stage, where a plan of adjustment is going to be confirmed by the court, a Chapter 9 debtor will have to identify the funds they will be using to pay creditors in the plan. For the debtors, locating funds involves two aspects: allocating funds from public services and raising taxes.⁹⁴ Here, taxpayers can demonstrate a pecuniary interest:

To the extent that taxpayers are *funding* a reorganization plan that does not propose to provide *even the status quo level of service*, taxpayers’ pecuniary interests are being harmed.

Taxpayers must overcome the § 904 barrier and navigate the tension between § 904 principles of state sovereignty and the right of taxpayers not otherwise represented in the case to voice their concerns. Taxpayers should distance themselves from the term “taxpayers” and emphasize that they are primarily *individual residents whose financial interests are being impacted*.⁹⁵

Moreover, “[a]nother angle is to play up the pecuniary-interest element by arguing that taxpayers have a stake in the outcome since they are being asked to fund a plan that will only increase the level of service insolvency.”⁹⁶ Of course, the collection of articles and cases studied in this section predate PROMESA. Thus, there is no mention at all of Title III. Nonetheless, the provided analysis for leveraging *party in interest* in Chapter 9 cases translates exactly into Title III.

Certain Title III debtors, like Chapter 9 debtors, are funded through tax revenue. In this case, Title III debtors also provide essential public services for the residents of Puerto Rico. Hence, based on the previous analysis, Puerto Rico’s taxpayers will undoubtedly be directly affected by the confirmation of a debt adjustment plan under Title III. The confirmation of a plan will necessarily involve increases in tax revenue or public service fees and rates and decreases in public services.

In this context, the following perspectives are considered for the party in interest analysis: (1) the pecuniary interest that taxpayers have when tax increases are proposed to fund the confirmed plan, and (2) the pecuniary interest that taxpayers have when they are funding a plan that does not maintain public services. The taxpayers are forced to fund confirmed plans that require tax increases.⁹⁷ Moreover, as Schleppegrell suggests, “[t]o the extent that taxpayers are funding a reorganization plan that does not propose to provide even the status quo level of service, taxpayers’ pecuniary interests are being harmed.”⁹⁸ As discussed below, this strategy was employed sparingly in PREPA’s Title III case.

Another potential strategy for integration is through permissive intervention. Under the Federal Rules of Civil Procedure, “the court may permit anyone to intervene who: (A) is

93 Pryor, *supra* note 2, at 104.

94 Schleppegrell, *supra* note 79, at 62.

95 *Id.* (emphasis added) (footnotes omitted).

96 *Id.*

97 Pryor, *supra* note 2, at 105.

98 Schleppegrell, *supra* note 79, at 21.

given a conditional right to intervene by a federal statute, or (B) has a claim or defense that shares with the main action a common question of law or fact.”⁹⁹ However, this is an exercise of discretion.¹⁰⁰ While the threshold is low, it will still depend on the Court’s determination of whether the intervention is warranted. This intervention may also be limited in scope, or otherwise conditioned by the Court.¹⁰¹ Under the Bankruptcy Rules of Procedure, “[r]epresentatives of the state in which the debtor is located may intervene in a Chapter 9 case.”¹⁰² Nonetheless, it is possible that, under the permissive intervention rule, taxpayers could gain access to the Title III proceedings and aid the Court’s feasibility determination.

The problem with parties in interest and permissive intervention is having to rely on the Court’s discretion, along with the burden of litigation. While the statute’s language may allow taxpayer residents to enter the case, it would ultimately fall on the Court to determine whether they meet the statutory and equitable requirements to be considered parties in interest or allow permissible intervention. Additionally, meaningful participation in a case of this nature is not accessible for an individual or small group of people. While aggressive community efforts may help, a more streamlined and uniform approach is needed. As such, another option is to legislate the formation of a Resident Taxpayer Committee.

B. Resident Taxpayer Committee

Much like unsecured creditors are represented by a committee as a collective, the selection of a committee to represent resident taxpayers would aid their cause in a way that is effective and uniform. Moreover, it would provide resident taxpayers with the means to engage meaningfully and participate throughout the process.

Under the Bankruptcy Code, the Unsecured Creditors’ Committee (UCC) is selected by the U.S. Trustee.¹⁰³ This is applicable both in Chapter 11 and Chapter 9 cases.¹⁰⁴ The UCC is usually composed of no more than seven representatives from a list of the twenty largest unsecured creditors, but the Court has the discretion to increase that number and representativity.¹⁰⁵ The UCC represents the interests of all unsecured creditors. Although the individual creditors have distinct interests reflected in their proofs of claim, the category of general unsecured creditors receives uniform treatment under a plan of adjustment. Therefore, the UCC’s duty is to ensure the best recovery for that group.

The powers and duties of the UCC in Chapter 9 include selecting and authorizing the employment of attorneys, accountants and other agents; consulting with the debtor regarding the administration of the case; investigating the debtor; participating in the

⁹⁹ FED. R. CIV. P. 24(b)(1).

¹⁰⁰ See *T-Mobile N.E. LLC v. Town of Barnstable*, 969 F.3d 33, 40-41 (1st Cir. 2020).

¹⁰¹ See *Autonomous Municipality of San Juan v. Fin. Oversight and Mgt. Bd. for Puerto Rico*, No. 17-cv-02009, 2017 WL 11286619, at *3 (D.P.R. 2017).

¹⁰² Fed. R. Bankr. P. 11 U.S.C. app. R. 2018.

¹⁰³ 11 U.S.C. § 1102(a)(1).

¹⁰⁴ *Id.* § 901(a).

¹⁰⁵ *Id.* § 1102(b)(2).

formulation of the adjustment plan, etc.¹⁰⁶ The members of the UCC are not compensated, but their expenses are covered by the bankruptcy estate, this includes attorneys and other professionals the UCC may retain to further the interests of the general unsecured creditors. The Bankruptcy Code permits the court to name additional creditor committees other than the UCC.¹⁰⁷

Using the UCC as a model, an amendment to PROMESA may provide for a Resident Taxpayer Committee, which would be represented by individuals appointed or elected through a predetermined process. These members would represent the interests of resident taxpayers, which may conflict with the interests of the creditors and the debtor simultaneously. However, providing compensation within the case from the bankruptcy estate would provide a more meaningful opportunity for these resident taxpayers to participate because they would have access to attorneys and other professionals to make their case.

V. PREPA'S TITLE III CASE

Throughout the tenure of the Oversight Board and PROMESA, it has been widely acknowledged that, among all the Title III cases, PREPA would be the most difficult—but also the most important—to restructure. This is because PREPA serves as the driving force of Puerto Rico's economy. Without it, or in the absence of a viable restructuring for this corporation, even the confirmed plans of other entities are in danger. To illustrate this, it is essential to examine PREPA's history.

A. Historical Background and Title III Proceeding

Electricity was introduced to Puerto Rico in 1893 through private distributors, primarily concentrated in urban areas.¹⁰⁸ In 1941, a public utility was created to address the increase in demand for electricity.¹⁰⁹ Through Act No. 83 of May 2, 1941 (Act 83), the precursor to PREPA was established.¹¹⁰ Following extensive efforts to provide electricity to most, if not all, of Puerto Rico through Act No. 57 of May 30, 1979, PREPA was established as an amendment of its predecessor, in response to changes in electricity management.¹¹¹ By 1981, PREPA had completed the consolidation of Puerto Rico's electric system.¹¹²

Throughout its history, PREPA and its predecessor were the first to provide electricity to the entire archipelago of Puerto Rico. This constitutes PREPA's legacy. Today, PREPA is a public corporation governed by Act 83, now the *Puerto Rico Electric Power Authority Act*. "For decades, PREPA has served as the sole electric power utility in Puerto Rico and has operated a complex energy system in the context of several ongoing challenges, which will

¹⁰⁶ *Id.* § 1103(c).

¹⁰⁷ *Id.* § 1102(a)(2).

¹⁰⁸ *Nuestra historia*, *supra* note 69.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

be discussed in subsequent sections.”¹¹³ Over time, the government bankrupted a public monopoly.

On July 3, 2017, the Oversight Board filed a Title III petition on behalf of PREPA as a covered instrumentality under PROMESA.¹¹⁴ On June 1, 2021, LUMA Energy, LLC and LUMA Energy ServCo, LLC (collectively and interchangeably *LUMA*) assumed the control and operation of the T&D System in accordance with the *Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement* (T&D OMA), which has a fifteen-year term.¹¹⁵ Under the T&D OMA, PREPA retains ownership of the T&D System, but LUMA, a private corporation, manages its operations.¹¹⁶ Moreover, on January 24, 2023, another privatizer entered the scene: GENERA PR LLC (GENERA).¹¹⁷ Through the *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement* dated as of January 24, 2023, by the *Puerto Rico Electric Power Authority* as owner, the *Puerto Rico Public-Private Partnerships Authority* as Administrator, and *Genera PR LLC* as Operator (LGA OMA), GENERA assumed full control of PREPA’s generation functions and assets on July 1, 2023.¹¹⁸ These privatizations were strongly supported by the Oversight Board and endorsed by the Title III Court.

Throughout PREPA’s Title III proceeding, there was an ongoing discussion regarding the impact of PREPA’s restructuring on its ratepayers, as any plan of adjustment is ineffective if it relies on rate increases that cannot be levied. Since PREPA holds a public monopoly over electricity in Puerto Rico, any reference to ratepayers here inherently refers to all of Puerto Rico’s resident taxpayers^{3/4} because of the way the privatizations were carried out, this fact has not changed^{3/4}. However, ratepayers are not creditors in the case, so their interests are usually defended by PREPA’s workers and, in limited instances, through the intervention of environmental groups. In 2023, the Oversight Board filed a Plan of Adjustment, which was subsequently amended on multiple occasions. Finally, in March 2024, the Title III Court held the confirmation hearing for this plan.¹¹⁹ The process spanned just over two weeks and involved highly contentious litigation.¹²⁰ To understand the intensity of the dispute, it is necessary to examine the Legacy Charge.

i. The Legacy Charge

PREPA presents an interesting case for this article due to the Legacy Charge. As a public corporation, PREPA is not funded through tax revenue, but through electricity rates. However, as previously discussed, PREPA was—and functionally remains—a

¹¹³ FIN. OVERSIGHT & MGMT. BD. FOR PUERTO RICO, 2023 FISCAL PLAN FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY 24 (Jun. 23, 2023).

¹¹⁴ *In re* Fin. Oversight & Mgmt. Bd. for Puerto Rico, 301 F. Supp. 3d 278, 282 (D.P.R. 2017).

¹¹⁵ FIN. OVERSIGHT & MGMT. BD. FOR PUERTO RICO, *supra* note 113, at 50.

¹¹⁶ *Id.* at 20.

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.*

¹¹⁹ Fin. Oversight & Mgmt. Bd. For Puerto Rico, *Confirmation Hearings for the Plan of Adjustment for the Puerto Rico Electric Power Authority Conclude*, FIN. OVERSIGHT & MGMT. BD. FOR PUERTO RICO (Mar. 31, 2024), <https://oversightboard.pr.gov/newsletter-march-2024/>.

¹²⁰ *Id.*

public monopoly, serving as the only electric utility in Puerto Rico. As such, subject to those exemptions created by law, everyone in Puerto Rico must pay its electricity rates. Realistically, there is no other alternative, other than going completely off the grid. Consequently, PREPA's confirmation process centered on the ability of Puerto Rico's taxpayer residents to pay the Legacy Charge, a critical factor for the sustainability of the Plan. Though PREPA is not funded through taxes, the rates serve as a functional equivalent and provide transparency. Unlike taxes, which are often seasonal, increases in electricity rates are consistently visible. Residents receive monthly electricity bills, where changes are directly reflected.

At the time of writing this article, the latest version of the Plan of Adjustment defines the Legacy Charge as "the hybrid fixed monthly Customer Charge and volumetric charge by Reorganized PREPA to be included in Reorganized PREPA's rates, fees, and charges to its customers . . . to pay principal and interest on the New Bonds and any Refunding Bonds . . ." under the Plan of Adjustment.¹²¹ It consists of "all applicable Customer Charges and Volumetric Charges set at the levels for each customer class set forth . . ."¹²² Its sole purpose is to "ensure sufficient cash flow required for PREPA's debt service on the New Bonds issued under the Plan."¹²³ According to the Plan, "[t]he Legacy Charge will be assessed on all of PREPA's customers, except where the Plan specifically exempts some or all of the Customer Charge or Volumetric Charge. The Legacy Charge will apply to existing and future classes of PREPA customers in use by PREPA and/or LUMA Energy . . ."¹²⁴

Thus, the Legacy Charge includes a flat fee or Customer Charge "incremental to any existing PREPA rates and fees [which] . . . is not linked to a customer's power consumption, but rather is assessed for each non-exempt customer being connected to the PREPA electricity grid."¹²⁵ It also includes a Volumetric Charge, which is "incremental to any existing PREPA rates and fees . . . based on each customer's monthly consumption of electricity."¹²⁶ This charge is calculated in cents per kilowatt hour (c/kWh) and depends on whether the customer exceeds the threshold of 425 kWh.¹²⁷

Historically, PREPA has been unable to implement the necessary operational reforms and transformations to provide reliable electricity. The system is currently unreliable and unaffordable, with rates exceeding over 26 cents per kWh—more than twice the average rate in U.S. jurisdictions.¹²⁸

¹²¹ Third Amended Title III Plan of Adjustment of the Puerto Rico Electric Power Authority at 16, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 301 F. Supp. 3d 278 (D.P.R. 2017) (No. 17-BK-4780-LTS), Doc#:3918.

¹²² *Id.* at Schedule B p. 2.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at Schedule B p. 3.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Tom Sanzillo, *Testimony of Tom Sanzillo before the United States District Court for the District of Puerto Rico*, IEEFA (May 1, 2023), <https://ieefa.org/resources/testimony-tom-sanzillo-united-states-district-court-district-puerto-rico>.

ii. PREPA's Confirmation: A Three Sided-Battle

PREPA's Title III case has been unique, even among its peers, and has been the most contested and litigious proceeding under PROMESA. A comparison of the minutes of the Commonwealth's confirmation hearing with those of the confirmation hearing for PREPA, reveals a striking difference. Having witnessed it firsthand, PREPA's confirmation hearing resembled a full-scale civil trial rather than a bankruptcy confirmation hearing. Despite the Court's time constraints, the parties engaged in rigorous litigation for two weeks. In contrast, the evidentiary portion of the Commonwealth's case confirmation hearing lasted two days, with little confrontation of the evidence presented.¹²⁹ The remaining days were used for oral arguments.¹³⁰ Meanwhile, PREPA's confirmation hearing lasted nearly two weeks, leaving no room for oral arguments.¹³¹ The evidence presented included around ten fact witnesses and eighteen expert witnesses. Collectively, the parties spent over a hundred hours on their cross-examinations and redirects, while the Court entertained numerous motions regarding admissibility. The list of exhibits expected to be submitted to the court was in the hundreds.¹³² It was an intense litigation; time was split evenly between the objecting and supporting parties.

While this was the official division, PREPA's case perfectly captured the three sides of the debate. In practice, the supporting parties are seated on the right side of the courtroom, and the objecting parties on the left. However, among the supporting parties, there were various creditors that had reached plan support agreements with the Oversight Board —this included the UCC, the Fuel Line Lenders, National, and certain settling bondholders.

Additionally, on the objecting side, there was a clear divide between the objecting bondholders, whose counsel occupied most of the room, and the social objectors, who fit in a row closer to the back with the press. The social objectors, or non-bondholder objectors, included the environmental groups, parties in interest that represent environmental and community organizations; ICSE, a Section 501(c)(3) non-governmental organization that represents consumers and public interest, and a party in interest; PV Properties and Windmar Renewable Energy, solar power companies and creditors with millions of dollars in claims; UTIER, a creditor with a billion dollar claim that represents union members; and SREAEE, with a claim above \$3 billion, represented by its Board of Trustees on behalf of all retirement plan participants (both active and retired). The arguments and evidence clearly reflected the divide: while the objecting bondholders argued in favor of increasing the Legacy Charge, among other things, the social objectors challenged the viability of any rate increase to pay bondholder debt.

¹²⁹ Minutes of Proceedings, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-BK-3283-LTS, Doc#: 19155, 19197.

¹³⁰ *Id.* at Doc#: 19130, 19147, 19253, 19288, 19342, 19345.

¹³¹ Minutes of Proceedings, *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-BK-4780-LTS, Doc#: 5001.

¹³² *Id.* at Doc#: 5019, 5023, 5045, 5062, 5072, 5082, 5095, 5099.

iii. Ratepayer Participation

The Legacy Charge sparked a heap of controversy and even a campaign that drove people to the streets, the court and the legislature to resist the imposition of additional charges on their energy rates to pay legacy debt.¹³³ Part of this effort involved collaboration with attorneys representing social creditors to bombard the Court with *pro se* objections and other non-creditor objections to the Plan and, specifically, to the Legacy Charge. This effort led to the submission of over 800 *pro se* objections.¹³⁴ The *pro se* objections were rooted in the language of a party in interest:

The question of who is a “party in interest” should be answered on a case-by-case basis. The definition is non-exhaustive. It generally refers to anyone with a financial stake or significant legal or practical stake in the outcome of bankruptcy. *See, e.g., Savage & Assocs. P.C. v. K&L Gates LLP (In re Teligent, Inc.)*, 640 F.3d 53 (2d Cir. 2011). That should mean anyone who will be significantly impacted; *see, also Alan Resnick & Henry J. Sommer, Collier on Bankruptcy* ¶ 1109.01 (16th ed. 2011) (“The general theory behind the section [11 U.S.C. § 1108] is that anyone holding a direct financial stake in the outcome of the case should have an opportunity ... to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest.”)¹³⁵

Many of these *pro se* objectors and community were also permitted to participate during the public comments section of the confirmation hearing.¹³⁶ However, they were unable to participate in the evidentiary process or oral arguments alongside the appearing parties and creditors of the case, except for one individual who explicitly requested to do so. Instead, within the hearing, the interests of the ratepayers, resident taxpayers, and people of Puerto Rico were represented mostly by the participation of the social objectors, which included a consumer protection group, a union, a retirement system, and various environmental and community organizations. These groups argued and presented evidence against the Legacy Charge, among other legal issues more germane to their interests.¹³⁷

Despite their efforts, the confirmation of this Plan of Adjustment would result in the imposition of an electric rate exceeding what the economy can sustain. However, the individuals and entities that would bear the burden of these rates were not direct participants in the process. They had no vote, and their elected representatives were not part of the proceedings either. Consequently, arguments and expert evidence against the imposition of

¹³³ NO MÁS AUMENTOS A LA LUZ, www.nomasaumentos.com (last visit Sept. 28, 2024).

¹³⁴ *Radican sobre 800 objeciones ciudadanas contra el PAD-AEE*, METRO (30 de enero de 2024), <https://www.metro.pr/noticias/2024/01/30/radican-sobre-800-objeciones-ciudadanas-contra-el-pad-ae/>.

¹³⁵ *See Minutes of Proceedings, In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17-BK-4780-LTS, Doc#: 4396.

¹³⁶ *Id.* at Doc#: 5013.

¹³⁷ This author had the honor of litigating the case on behalf of UTIER and SREAEE, the union and the retirement system, as well as argue before the Court for UTIER.

the Legacy Charge were left to the social objectors, whose resources were far more limited than those of the bondholders, other creditors, or the Oversight Board itself.

CONCLUSION

In conclusion, the differences between PROMESA's Title III and Chapter 9 of the Bankruptcy Code call for a heightened standard of resident taxpayer participation. While Chapter 9 debtors retain control of their affairs, Title III debtors are subject to a near absolute authority of the Oversight Board. As a result, the voices of the individuals and entities that fund a Title III plan are diminished, and their concerns become tangential. PREPA's case demonstrated what happens when there is no meaningful representation of the public in Title III.

Looking back at the entire process, from beginning to end, one cannot help but wonder how these proceedings might have unfolded with truly meaningful participation.¹³⁸ If Puerto Rico's resident taxpayers had been given a genuine opportunity to be heard and contribute, to present and confront evidence—in a case that so often felt like it left those resident-taxpayers as tangential, despite their centrality—the outcome may have been different. They could have had attorneys representing their interests. They could have presented experts, influenced the plan, and spoken directly to the Court and the other stakeholders in a setting where they felt genuinely heard. But that is not what happened.

When a corporation enters bankruptcy, and if it needs to raise prices or lower quality to fund a restructuring, its customers have the option to look for their product or services elsewhere. When a municipality files for bankruptcy, its elected officials remain subject to public scrutiny. Under Title III, however, when taxes or rates increase or service quality decreases, resident taxpayers have no alternatives. The Oversight Board is beyond their reach and immune to their judgment. As such, resident-taxpayer representation in Title III proceedings is necessary to preserve any semblance of democratic accountability.

¹³⁸ On a personal note, PROMESA took a lot from us. As the most recent iteration of Puerto Rico's colonial status, it tastes much the same as the rest. We did what we could with what we had at the time. However, PROMESA does not end with us. Puerto Rico is the first, the guinea pig—as is the trend. To the extent that Congress deems PROMESA a success, it will undoubtedly seek to replicate its results elsewhere. I can only hope that this article assist others, should that happen. In that sense, this article is part-critique, part-academic exercise and part message of hope and resistance—from my colony to yours.