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# FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO



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## **BY ELECTRONIC MAIL**

April 6, 2021

The Honorable Pedro Pierluisi Urrutia  
Governor of Puerto Rico

The Honorable José Luis Dalmau Santiago  
President of the Senate of Puerto Rico

The Honorable Rafael Hernández Montañez  
Speaker of the House of Representatives of Puerto Rico

Dear Governor Pierluisi Urrutia, Senate President Dalmau Santiago, and Speaker Hernández Montañez:

We write with respect to Senate Bill 213 (“SB 213”) and House Joint Resolution 88 (“HJR 88,” and together with SB 213, the “Bills”), and our concerns regarding their financial impact, inconsistency with the 2020 Fiscal Plans for the Commonwealth and PREPA (together, the “Fiscal Plans”), and propensity to impair and defeat the purposes of PROMESA.

The Bills, as explained below, would interfere with efforts by the Government of Puerto Rico, supported by the Oversight Board and required by the Fiscal Plans, to modernize and transform PREPA’s facilities and operations, including the Operation and Maintenance Agreement (the “OMA”) among PREPA, the P3 Authority, and LUMA Energy, LLC (“LUMA”). The Bills are, therefore, inconsistent with the express terms of the Fiscal Plans and contrary to the purposes of PROMESA. If enacted, the Bills would violate PROMESA, as well as the Contracts Clause of the U.S. Constitution. As the Bills are currently pending before the Legislature, we offer our initial analysis of the Bills and explain why their enactment would violate PROMESA section 108(a)(2).

## **SB 213**

SB 213, among other things, would amend Law 83-1941<sup>1</sup> to impose a Legislative approval requirement for various PREPA actions, including creating subsidiaries, developing industrial projects, and conveying any PREPA property.

By requiring Legislative approval of the sale and disposition of the property of the debtor, among other covered actions,<sup>2</sup> SB 213 impermissibly conditions and interferes with the Oversight Board's authority under Bankruptcy Code section 1123(b) to include transfers of PREPA's property in a plan of adjustment under PROMESA. PROMESA section 315(b) states "[t]he Oversight Board in a case under this title is the representative of the debtor" and section 312(a) adds that *only* the Oversight Board "may file a plan of adjustment of the debts of the debtor." SB 213 would grant the Legislature veto power regarding certain determinations that fall squarely within the purview of the Oversight Board as PREPA's sole representative in its Title III case. Similarly, the Legislature's imposition of its own control over PREPA's property (including implementation of the OMA) violates the automatic stay, which bars acts to exercise control over the debtor's property pursuant to section 362(a) of the Bankruptcy Code, as incorporated by PROMESA section 301.

SB 213, if passed, would also be inconsistent with the Fiscal Plans. The Fiscal Plans for the Commonwealth and PREPA are intended to, among other things, eliminate structural deficits and enable the achievement of fiscal targets for the Commonwealth and PREPA. PROMESA sections

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<sup>1</sup> Law 83-1941 is also known as the Puerto Rico Electric Power Authority Act.

<sup>2</sup> SB 213 purports to amend Section 5(u) of Law 83 of May 2, 1941, as amended, known as the Puerto Electric Power Authority Act, read as follows:

"With the prior approval of the Bureau *and the ratification of the Legislature, through Concurrent Resolution*, to create, either in Puerto Rico or in any other jurisdiction, or to contract with, companies, partnerships, or subsidiary corporations, for pecuniary or non-pecuniary purposes, affiliates or associates, for the purposes, among others, of:

- i. splitting off and separating into one or more subsidiaries, the Authority's functions of generation, transmission, and distribution,
- ii. participating in Public Private Partnerships according to Law 29-2009, as amended and Law 120-2018, as amended,
- iii. developing, financing, building, and operating industrial and other infrastructure projects directly related to the maximization of the Authority's electrical infrastructure (to have a stable, state-of-the-art, sustainable, reliable and highly efficient electric system),
- iv. acquiring, having, and disposing of securities and shares, contracts, bonds, or other interests in other companies, entities, or corporations, and exercising each and every one of the powers and rights that such interest grants, provided that, in the opinion of the Board, such endeavor is necessary, appropriate, or convenient to achieve the purposes of the Authority or to exercise its powers, and
- v. selling, leasing, assigning, or otherwise transferring any property of the Authority or delegating or transferring any of its rights, powers, functions, or duties to any of said companies, entities, or corporations that are subject to its total or partial control, except for the right to initiate expropriation proceedings."

201(b)(1)(D) and (G). The changes SB 213 would impose at PREPA would hinder the fulfillment of these requirements not only at PREPA, but also at the Commonwealth given the substantial impact that the cost of power supply has on Puerto Rico's economy.

SB 213 is also inconsistent with the requirements in the Fiscal Plans for a strong independent regulator and the depoliticization of PREPA.<sup>3</sup> Giving the Legislature authority to overturn the decision-making afforded to the professional and politically independent regulator – the Puerto Rico Energy Bureau (“PREB”) – erodes and limits PREB's powers and independence, and subjects it to direct political oversight and influence. Such a result is directly contrary to the directives in the Fiscal Plans, including transforming PREPA into an effective, reliable, and affordable electric utility necessary for economic growth – that is free from direct political control.<sup>4</sup> The bill also appears aimed at hindering the break-up of PREPA's vertical monopoly and transition to separate and independent private operation of transmission and distribution (“T&D”) and power generation, as well as the use of private-public partnerships (“P3s”) to further reform the power sector, all as required by the Fiscal Plans.<sup>5</sup>

Further, if enacted, SB 213 would impair and defeat the purposes of PROMESA, as determined by the Oversight Board, and the Legislature and Governor are enjoined from enacting, implementing, and/or enforcing SB 213 (or any law premised on SB 213) pursuant to PROMESA section 108(a)(2). SB 213 impairs PREPA's and the Commonwealth's ability to transform Puerto Rico's electric system, a key component in achieving fiscal responsibility and access to capital markets. In addition, SB 213 is significantly inconsistent with the Fiscal Plans in that, among other things, it undermines the implementation of an existing contract (*i.e.*, the OMA) that was approved by the Oversight Board, impedes transformation of generation facilities, erodes an independent regulatory scheme for PREPA, and jeopardizes future private sector investment in PREPA and Puerto Rico generally by purporting to insert the Legislature into the already complex approval process of any future or current P3 contract. In so doing, SB 213 violates the Oversight Board's objectives, which are consistent with PROMESA, of making the territorial government a facilitator of, and not a competitor to, private enterprise and avoiding the creation of any additional bureaucratic obstacles to efficient contracting, including the politicization of the P3s process. PROMESA § 204(b)(3).

Finally, SB 213, if passed, would violate PROMESA section 108(a)(1), as it seeks to impose impermissible Legislative oversight, control, review and supervision over the Oversight Board's activities and decisions as they relate to PREPA and its assets.

## **HJR 88**

HJR 88 seeks to halt all efforts to implement the OMA, until January 15, 2022 to compel unilateral

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<sup>3</sup> See 2020 Commonwealth Fiscal Plan at 138; 2020 PREPA Fiscal Plan at 13, 16, 30, 31, 36, 37.

<sup>4</sup> See 2020 Commonwealth Fiscal Plan at 134; 2020 PREPA Fiscal Plan at 37.

<sup>5</sup> See 2020 Commonwealth Fiscal Plan at 132-33; 2020 PREPA Fiscal Plan at 11.

and fundamental amendments to the OMA that will eliminate key benefits of the OMA and impede LUMA's performance, which in turn will provide LUMA with termination rights under the OMA.

If enacted, HJR 88 would run afoul of the United States Constitution, the Bankruptcy Code, and PROMESA. HJR 88 would interfere with and impair existing and lawful government contractual obligations. The Contracts Clause of the United States Constitution dictates a state (or territory) cannot amend a contract unilaterally as "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. No applicable exception exists to justify this proposed interference with the OMA.

HJR 88 would also violate the automatic stay under section 362(a)(3) of the Bankruptcy Code by taking control of PREPA's property (*i.e.*, the OMA). The OMA provides substantial benefits to PREPA that represent an invaluable opportunity for the transformation of the T&D system and depoliticization of the utility. HJR 88 is a clear effort by the Legislature to seize control over PREPA's rights under the OMA in a manner that would impair and substantially erode, if not altogether eliminate, the OMA's value to PREPA and the Commonwealth.

HJR 88 would also violate various provisions of PROMESA. First, HJR 88 would be significantly inconsistent with the Fiscal Plans. Similar to SB 213, the changes that HJR 88 would impose at PREPA would interfere with the Commonwealth and PREPA eliminating their structural deficits and achieving their respective fiscal targets. PROMESA section 201(b)(1)(D) and (G). HJR 88 would interfere with the OMA, which is critical to several PREPA and Commonwealth Fiscal Plan objectives, such as improving operational efficiencies, improving service quality, and reducing costs through better management and operational practices.<sup>6</sup> As HJR 88 would necessarily impose a delay in implementation which will add unnecessary costs and risk possible termination of the OMA, it would forestall and likely defeat the Commonwealth's efforts to modernize the Island's energy system as contemplated by the Fiscal Plans and further impair Puerto Rico's return to fiscal stability.<sup>7</sup> Moreover, the amendments called for in HJR 88 would effectively reestablish some political control over the operation of the T&D system, the elimination of which is a primary policy goal of the Oversight Board, as stated in the Fiscal Plans.<sup>8</sup> The amendments would also require that PREPA remain the employer of all T&D personnel, defeating the Fiscal Plans' goal of improving PREPA's finances and financial stability going forward.<sup>9</sup>

HJR 88 would also violate PROMESA section 204(b), which authorizes the Oversight Board to "establish policies to require prior Oversight Board approval of certain contracts ... to ensure such proposed contracts promote market competition and are not inconsistent with the approved Fiscal Plan." The FOMB Policy on the Review of Contracts ("Contracts Review Policy") requires prior Oversight Board review of certain "contracts to determine whether they are consistent with the applicable fiscal plan." "All contracts or series of related contracts, inclusive of any amendments,

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<sup>6</sup> See 2020 Commonwealth Fiscal Plan at 133-34; 2020 PREPA Fiscal Plan at 30-31.

<sup>7</sup> *Id.*

<sup>8</sup> See 2020 Commonwealth Fiscal Plan at 138; 2020 PREPA Fiscal Plan at 13, 16, 30, 31, 36, 37.

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

modifications, or extensions, with an aggregate expected value of \$10 million or more, including any professional advisory or personal services contracts must be submitted to the FOMB for its approval before execution.” By purporting to empower the Legislature to amend an approved, executed contract, HJR 88 would impose a material amendment to a Board-approved contract with a face value of greater than \$10 million without prior Oversight Board approval.

Finally, if enacted, HJR 88 would impair and defeat the purposes of PROMESA, as determined by the Oversight Board, and the Legislature and Governor are enjoined from enacting, implementing, and/or enforcing HJR 88 (or any law premised on HJR 88) pursuant to PROMESA section 108(a)(2). Even if HJR 88 does not result in the termination of the OMA, it would reestablish political control over the utility and defeat a critical policy goal of PROMESA as determined by the Oversight Board in achieving independent, professional management of the utility.<sup>10</sup> HJR 88 impairs PREPA’s and the Commonwealth’s ability to transform Puerto Rico’s electric system, a key component in achieving fiscal responsibility and access to capital markets. HJR 88 is also significantly inconsistent with the Fiscal Plans in that, among other things, it would undermine the Fiscal Plans’ goal of transforming the power sector in Puerto Rico through professional private management able to adopt industry best practices to provide the people of Puerto Rico an affordable, reliable, safe, and resilient electric power service by transforming Puerto Rico’s energy system.<sup>11</sup> HRJ 88 also seeks to defeat and impair PROMESA’s purposes of promoting market competition, making government contracting more effective, increasing the public’s confidence in the government contracting process, and making the Commonwealth Government a facilitator and not a competitor to private enterprise. PROMESA § 204(b)(3).

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For the reasons set forth above, enactment and implementation of the Bills, as currently drafted, is barred by the Contracts Clause of the United States Constitution, Bankruptcy Code sections 362(a) and 1123(b), and PROMESA sections 108(a)(2), 204(a), 204(b), 312(a), and 315(b). If enacted, the Bills would impair and defeat the purposes of PROMESA, as determined by the Oversight Board – for the reasons detailed in this letter – and the Legislature and Governor are enjoined from enacting, implementing, and/or enforcing the Bills. If the Legislature and Governor nevertheless proceed with enacting the Bills into law, the Oversight Board will be prepared to seek judicial intervention to enforce section 108(a)(2)’s injunction and to seek nullification of the laws by the Title III court.

The Oversight Board urges the Legislature to reconsider SB 213 and HJR 88 in light of the gravely negative impact they would have on both PREPA and the Commonwealth. The Oversight Board reserves all its rights including its rights under PROMESA sections 104(k), 108, 204, 312(a), and 315(b), its rights to remedies for intentional violations of section 108(a)(2), and its rights to pursue remedies for violations of the United States Constitution. We hope vindication of those rights will be unnecessary.

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<sup>10</sup> *Id.*

<sup>11</sup> See 2020 Commonwealth Fiscal Plan at 132; 2020 PREPA Fiscal Plan at 10.

Governor Pierluisi Urrutia  
Senate President Dalmau Santiago  
Speaker Hernández Montañez  
April 6, 2021  
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We look forward to continuing to work together for the benefit of the people of Puerto Rico.

Sincerely,



Natalie A. Jaresko

CC: Mr. Omar Marrero Díaz