

# **Bond Case Briefs**

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## **BANKRUPTCY - PUERTO RICO**

### **In re Financial Oversight and Management Board for Puerto Rico.**

**United States Court of Appeals, First Circuit - August 12, 2021 - 7 F.4th 31**

In the jointly administered restructuring cases of the Commonwealth of Puerto Rico and various governmental instrumentalities pursuant to Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the Puerto Rico Electric Power Authority (PREPA), PREPA's fiscal agent, and the Financial Oversight and Management Board for Puerto Rico (FOMB) moved for entry of order allowing administrative expense claim for the costs of certain "front-end transition services" that private consortium with which PREPA had contracted to assume control over PREPA's power transmission and distribution system (T&D system) had agreed to perform.

Creditors objected. The United States District Court for the District of Puerto Rico granted motion in part and denied it in part. Creditors appealed.

The Court of Appeals held that:

- Addressing an issue of apparent first impression for the court, the subsection of the Bankruptcy Code providing administrative expense priority for the actual, necessary costs and expenses of preserving the estate applies in Title III cases;
- The Title III court did not abuse its discretion in finding that the front-end transition services satisfied the requirements for administrative expense treatment; and
- The Title III court correctly determined that it was not authorized to review challenges to FOMB's decision to certify a fiscal plan and budget for PREPA that included the front-end transition service fee.

Subsection of the Bankruptcy Code providing administrative expense priority for the actual, necessary costs and expenses of preserving the estate applies in cases under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA); Congress incorporated the entirety of the Code's administrative expense section into PROMESA, such that each provision of that section must be given effect, and though there is no "estate" to preserve in Title III proceedings, reading "estate" in the context of the administrative expense provision to mean "property of the debtor" is sensible in light of the text and structure of Title III and the Code.

In case under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the Title III court did not abuse its discretion in finding that "front-end transition services" which private consortium with which the Puerto Rico Electric Power Authority (PREPA) had contracted to assume control over PREPA's power transmission and distribution system (T&D system) had agreed to perform satisfied the requirements for administrative expense treatment; the court correctly recognized that burden was on movants to show that payments at issue qualified to administrative expense priority, the court permissibly credited declaration submitted by movants indicating that services in question were necessary prerequisites to private consortium assuming control over the T&D system and so were beneficial to PREPA, and objectors did not provide any

contrary factual evidence that services did not benefit PREPA.

In case under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the Title III court correctly determined that it was not authorized to review challenges to decision of the Financial Oversight and Management Board for Puerto Rico (FOMB) to certify a fiscal plan and budget for the Puerto Rico Electric Power Authority (PREPA) that included fees for certain “front-end transition services” that private consortium with which PREPA had contracted to assume control over PREPA’s power transmission and distribution system (T&D system) had agreed to perform; PROMESA insulated FOMB’s certification determinations from judicial review in the federal courts.

In case under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), appellants’ argument that the Title III court’s interpretation of the PROMESA provision insulating decisions of the Financial Oversight and Management Board for Puerto Rico (FOMB) from judicial review violates the nondelegation doctrine was waived where appellants never raised the issue before the Title III court, and no exceptional circumstances warranted consideration of the argument for the first time on appeal.