



Office of the Deputy Attorney General
Washington, D.C. 20530

July 29, 2020

The Honorable Juan Ernesto Dávila Rivera
Chairman
Puerto Rico State Elections Commission
Post Office Box 195552
San Juan, Puerto Rico 00919-5552

Re: Request of Federal Funds for Puerto Rico Plebiscite

Dear Chairman Rivera:

Thank you for your June 3, 2020 submission of materials related to the plebiscite scheduled for November 3, 2020, which will ask voters whether Puerto Rico “should be admitted immediately into the Union as a State.” You have requested disbursement of funding under the Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 61 (2014) (“Appropriations Act”), which appropriated \$2.5 million for “objective, nonpartisan voter education about, and a plebiscite on, options that would resolve Puerto Rico’s future political status.” Consistent with the House Report that accompanied the Appropriations Act, and as it did with the Government of Puerto Rico’s submission related to the 2017 plebiscite, the Department has reviewed the plebiscite materials to determine whether it may notify Congress that “the voter education materials, plebiscite ballot, and related materials are not incompatible with the Constitution and laws and policies of the United States.” H.R. Rep. No. 113-171, at 53 (2014). Unfortunately, the Department has determined that it is unable to notify Congress that it approves of the plebiscite ballot and related materials, and therefore it will not obligate the funds.

Our first concern is that, in light of the deadline in Puerto Rico law, the submission did not provide sufficient time to complete the multi-layered process the Department must follow before releasing grant funding. The statute authorizing the plebiscite, Puerto Rico Act No. 51 of May 16, 2020 (“Act No. 51-2020” or “the Act”), establishes June 30, 2020, as “the deadline for completing any transaction, certification, and disbursement related to the holding of this plebiscite.” *Id.* § 3.1. And as you noted in your submission letter, the Act further contemplates that the Department would complete any “process, certification and disbursement” of funding under the Appropriations Act by the June 30 deadline. *Id.* § 3.3. The Act characterizes June 30 as a “deadline . . . to serve as a guide for the U.S. Attorney General” that is necessary “so as to not adversely affect [plebiscite] processes or the rights of the voters.” *Id.*, “Statement of Motives,” at 15. The Department is mindful of the importance of expeditious review. But given the steps involved in reviewing, certifying, and disbursing appropriated funds, the Department was unable to meet the June 30 deadline no matter how quickly it acted.

As Department officials have previously outlined, both in communications with your office about this plebiscite and with Puerto Rico officials following the 2017 submission, the process of disbursing grant funding includes a number of steps. The Department's substantive review of the plebiscite materials is the first step, and it requires time to coordinate among Department components and to request any additional information from the Government of Puerto Rico. Here, for instance, if your deadline and the other considerations discussed below did not preclude us from proceeding, we would have needed additional information about voter-education materials. The materials you submitted include a three-page outline of the planned "Non-Partisan Education Campaign," which states at a high level of generality that the campaign will educate voters on "[t]he importance and relevance of the 2020 Plebiscite vote" and the "Voter's registration process," including the availability of alternative voting mechanisms, and then "motivate people to go out and vote." But neither the outline nor any other materials provide further detail about the contents of the voter-education materials, which would have made it difficult for the Department to determine whether the actual materials will be consistent with the Constitution, laws, and policies of the United States. This stands in contrast to the 2017 submission, which included specific examples of the planned contents for the voter-education campaign.

If, following our substantive review, the Department were to decide to release the funds, additional steps in the funding process would follow. The Department would seek concurrence from the White House Office of Management and Budget ("OMB"); would notify congressional committees; would issue a grant solicitation to the Government of Puerto Rico; would review the grant application submitted in response to the solicitation; and, assuming everything was suitable and there were no objections from OMB or congressional committees, Department leadership would authorize the obligation of the funds. The Department received your submission on June 3, 2020, less than four weeks before the June 30 deadline. The entire funding review and grant-making process could take several weeks. And, in any event, the House Report specifies that "funds provided for the plebiscite shall not be obligated until 45 days after the Department notifies the Committees on Appropriations." H.R. Rep. No. 113-171, at 53. The completion of any one of these steps by June 30 would have been difficult; concluding all of them was simply infeasible, since the waiting period associated with congressional notification, taken alone, was 45 days.

Apart from that timing issue, however, the Department has also identified substantive concerns with the plebiscite materials that make them incompatible with the policies of the United States. First, the United States has consistently remained neutral about the legally permissible status options for the Commonwealth of Puerto Rico—Statehood, continued territorial status, and independence (including free association)—maintaining that the people of Puerto Rico, not the federal government, should "determine their preference among options for the islands' future status that are not incompatible with the Constitution and basic laws and policies of the United States." Exec. Order 13183 of Dec. 23, 2000 (Establishment of the President's Task Force on Puerto Rico's Status); *see also, e.g.*, Report by the President's Task Force on Puerto Rico's Status, at 23 (Mar. 2011) ("It has long been the policy of the Federal executive branch that Puerto Ricans should determine for themselves the future status of the

Island.”). Yet multiple aspects of Act 51-2020 make clear that it approaches the question of Puerto Rico’s future status from a decidedly pro-Statehood, and anti-territorial, point of view. *See* Act No. 51-2020, “Statement of Motives,” at 2, 14 (stating that “Under the U.S. flag and citizenship, . . . achieving a positive transformation would only be possible upon the recognition of equal rights and obligations for the U.S. citizens of Puerto Rico” through Statehood; that “Puerto Rico continues in this vicious territorial cycle”; and that the party favoring the current “unsustainab[le]” status “employs any mechanism, except the vote, so as to maintain the status quo to the detriment of voters”). In that context, the Department’s approval and funding of the plebiscite may be seen as an endorsement of these views and a rejection of the other available status options. And such a perception seems particularly likely because Article 4.4(b) of Act No. 51-2020 provides that the ballot would include language stating that the plebiscite is “promoted and supported by the Government of the United States of America with the funds appropriated under Public Law 113-76 of 2014.” While the Department would not object, in appropriate circumstances, to a similar statement endorsing an objective, non-partisan plebiscite process, it must do so here, when such a statement would imply that the United States has departed from its policy of neutrality to endorse a pro-Statehood initiative.

Second, the plebiscite appears to be based in part on a determination by the Legislature of Puerto Rico with which the Department disagrees—namely, that the 2012 and 2017 plebiscites “constitute a direct rejection of the current territory status and . . . options which entailed separate sovereignties.” *Id.* § 1.3(c); *see also id.* § 1.3(f) (stating that voters made an “electoral demand[] for equality through statehood” in 2012 and 2017), § 1.3(h) (describing the results of the 2012 and 2017 plebiscites as “conclusive”). The Department notes, as it did in 2017, that “the validity of the 2012 plebiscite’s results ‘have been the subject of controversy’ and debate,” and that “it is uncertain” whether the 2012 results reflect the “present will of the people.”¹ With respect to the 2017 plebiscite, the Department’s rejection of the initial ballot as incompatible with the laws and policies of the United States, coupled with low voter turnout that was likely related to boycotts by political parties and other groups, prevents us from seeing the results of the 2017 plebiscite as a decisive vote for Statehood.² Accordingly, the views on the prior plebiscites reflected in the Act, which provide the basis for the ballot’s yes-or-no vote on Statehood, conflict with the policy judgment of the United States that the people of Puerto Rico have not yet

¹ Letter from Dana J. Boente, Acting Deputy Attorney General, to Governor Ricardo A. Rosselló Nevares, *Re: United States Department of Justice review of plebiscite ballot, voter education materials, and expenditure plan*, at 2 (Apr. 13, 2017).

² The Department recognizes that the “Statehood” option on the 2017 plebiscite received 97% of the votes cast but notes that both the Popular Democratic Party and the Independence Party announced boycotts of the plebiscite based on the ballot language as amended. Congressional Research Service, *Political Status of Puerto Rico: Brief Background and Recent Developments for Congress*, at 1, 13 (Jun. 12, 2017). The Department further notes that the 23% turnout contrasts significantly with a voter-participation rate that “often hovers around 80 percent.” *See* Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), available at https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html?_r=0; *see also, e.g.*, Puerto Rico State Elections Commission, *General Elections 2012 and Plebiscite on Puerto Rico Political Status*, available at http://168.62.166.179/eg2012/REYDI_Escrutinio/index.html#es/default/CONDICION_POLITICA_TERRITORIAL_ACTUAL_ISLA.xml (noting that the 2012 plebiscite had a 78.19% participation rate).

definitively rejected the Commonwealth's current status. The Department cannot support a plebiscite in tension with that policy judgment, as it would further suggest that the United States is no longer neutral about the options for Puerto Rico's future status.

Finally, the Department is concerned that statements in the plebiscite materials may cause voters to misperceive the effect of a majority vote in favor of Statehood. The United States remains committed to allowing the people of Puerto Rico to determine the Commonwealth's future political status, but the Department must emphasize that a majority "yes" vote in this plebiscite would not lead automatically or immediately to admission. Yet the Proclamation of the State Elections Commission, which we understand has been made available to the public, states that "[s]hould the Statehood 'Yes' option be favored by a majority vote, a transition process shall begin forthwith to admit Puerto Rico into the Union, as described in the Act." Puerto Rico State Elections Commission, Proclamation of May 19, 2020, *Plebiscite to Define Puerto Rico's Ultimate Political Status* (the "Proclamation"); see also Act 51-2020, § 2.2 (same, directing inclusion of that language in the Proclamation). Although Act 51-2020 seems to acknowledge elsewhere that admission as a State would require the enactment of federal legislation establishing the terms of admission, voters may reasonably interpret the Proclamation's statement to mean that a majority "yes" vote will necessarily result in automatic or immediate Statehood, which is incorrect.

This fear of voter confusion is compounded by statements in both Act 51-2020 and the Proclamation that compare this plebiscite to those held in Alaska and Hawaii immediately before their admission to the Union. See Act 51-2020, § 1.3(g) (asserting that Puerto Rico has "completed the phase of asking voters about all the possible political status options" and that this plebiscite will "make the final demand to Congress" using "the same final voting mechanism employed by some former territories that became states of the Union which includes Alaska and Hawaii"); see also Proclamation (noting that, "[j]ust as the plebiscites held in Alaska and Hawaii . . . in this Puerto Rico plebiscite, there shall be a single ballot with the options Statehood: Yes or No"); Act 51-2020, § 2.2 (same, directing inclusion of that language in the Proclamation). These references to the Alaska and Hawaii plebiscites, however, omit an important distinction between those votes and this plebiscite. For both Alaska and Hawaii, the final, yes-or-no Statehood votes came at the end of the process of admitting them to the Union and were specifically directed by Congress in their admission acts. Act of July 7, 1958, Pub. L. No. 85-508, § 8(b), 72 Stat. 339, 343-44 (Alaska); Act of Mar. 18, 1959, Pub. L. No. 86-3, § 7(b), 73 Stat. 4, 7 (Hawaii). In other words, federal legislation had already established all the terms of their potential admission and conditioned such admission on an affirmative vote from the territories' voters. That is not the posture here. Following the model used for Alaska and Hawaii would require that the question of Statehood again be presented to the people of Puerto Rico once there is certainty as to all the conditions of admission. To the extent that the plebiscite materials' statements about finality and their references to Alaska and Hawaii imply that this plebiscite is the last time that Puerto Rico would conceivably vote on Statehood, they do not provide an accurate depiction of how the Statehood process would be likely to unfold and are therefore likely to result in voter confusion.

For the reasons stated above, the Department is unable to notify Congress that it approves of the materials for the November 3 plebiscite and is unable to obligate the appropriated funds.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff A. Rosen". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Jeffrey A. Rosen
Deputy Attorney General