COMMONWEALTH OF PUERTO RICO
PUERTO RICO ENERGY COMMISSION

CEPR
COMISIÓN DE ENERGÍA DE PUERTO RICO
2014

RE: INTEGRATED RESOURCE PLAN FOR THE PUERTO RICO ELECTRIC POWER AUTHORITY	**MATTER NO.:** CEPR-AP-2015-0002 **SUBJECT:** PREPA'S CONFIDENTIALITY CLAIMS

RESOLUTION AND ORDER

Section 6.15 of Act 57-2014 ("Act 57"), known as the Puerto Rico Energy Transformation and RELIEF Act, as amended, establishes that the "Commission shall keep the documents submitted for its consideration out of public reach *only in exceptional cases.*"[1] Moreover, Act 57 states that when the Puerto Rico Energy Commission ("Commission") grants confidentiality treatment to certain information, it "shall grant such protection in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure in which the allegedly confidential document is submitted."[2] Thus, it is clear that the Commission has a dual mandate to protect the public interest and the rights of the parties involved in a proceeding before it.

Pursuant to this mandate, the Commission established specific guidelines for parties to follow when raising confidentiality claims in a proceeding before the Commission.[3] On September 30, 2015, the Commission issued a Procedural Order establishing the process and requirements for raising confidentiality claims in the matter In Re: Integrated Resource Plan for the Puerto Rico Electric Power Authority, CEPR-AP-2015-0002 ("IRP process"). The Procedural Order of September 30th ordered any party raising a confidentiality claim to "submit a memorandum of law to the Commission stating in writing the legal basis and sources to support its argument that the information or documents identified should be classified as 'confidential' or 'privileged'."[4] As stated in the Procedural Order, the memorandum would facilitate the Commission's evaluation of the party's confidentiality claim.

JHRM

---

[1] Sec. 6.15(c) of Act 57-2014, as amended, known as the Puerto Rico Energy Transformation and RELIEF Act (emphasis added).
[2] Id. Sec. 6.15 (a).
[3] See Sec. 1.15 of Regulation No. 8594, also known as the Regulation on Integrated Resource Plan for the Puerto Rico Electric Power Authority, at 11-12 (May 22, 2015); see also Sec. 1.15 of Regulation No. 8543, also known as the Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings, at 11-12 (Dec. 18, 2014).
[4] Procedural Order, Part V.A.1.ii., at 4 (Sept. 30, 2015).

CEPR
COMISIÓN DE ENERGÍA DE PUERTO RICO
2014

In light of these guidelines, the Puerto Rico Electric Power Authority ("PREPA") has claimed confidentiality over a substantial amount of its Integrated Resource Plan ("IRP") filings. Pursuant to Act 57, and the Commission's regulations, we address PREPA's claims as follows.

I. PREPA's Confidentiality Claims

On July 7, 2015 PREPA filed the first version of its IRP.[5] With this filing, PREPA made a general claim of confidentiality, stating that "some information is identified as confidential and submitted as such, because it constitutes critical infrastructure information, as defined by the Department of Homeland Security (DHS) [. . .] all information related to the electrical infrastructure, particularly information which describes in detail the characteristics, interconnection and location of the components of the electrical system, is considered critical, and as such should be protected and treated confidentially, in order to ensure the stability of the energy supply in the United States. PREPA is bound by such requirements."[6] In addition to the DHS' definition of "critical infrastructure", PREPA also cited the Presidential Policy Directive of February 12, 2013 ("Presidential Policy 21") as a basis to keep the information filed as confidential.[7] As such, PREPA identified as "confidential" a substantial part of Volume II of the IRP filed on that date.[8]

On July 16, 2015 PREPA filed the *Submittal of Answers and Documents in Response to Resolution on Waiver Request.* In it, PREPA identified as "confidential" its answers to Sections 2.03(B)(9)(c) and 2.03(B)(9)(d) of Regulation No. 8594 .[9] This claim was based on the allegation that the requested maps are "confidential information of critical infrastructure."[10]

On August 17, 2015, PREPA filed its *Submittal of the Revised Draft Integrated Resources Plan as Ordered by the Commission.* Once more, PREPA made a general claim of confidentiality for some of the information submitted, explaining that such information "constitutes critical energy infrastructure information [. . .], as defined by the Department of Homeland Security [. . .]."[11]

JHRM

---

[5] PREPA's Submittal of the Draft Integrated Resources Plan Subject to Further Modification, at 2 (July 7, 2015); see PREPA's Motion to Confirm Presentation (July 8, 2015).

[6] PREPA quotes the definition of "critical infrastructure" as defined in Section 1016(e) of the USA Patriot Act of 2001, known as the Critical Infrastructures Protection Act of 2001 (42 U.S.C.A. 5195c(e)) (West through P.L. 114-115). PREPA's Submittal of the Draft Integrated Resources Plan Subject to Further Modification, *supra*, at 2-3.

[7] Id. at 3.

[8] Id.

[9] PREPA's Submittal of Answers and Documents in Response to Resolution on Waiver Request, at 7-8.

[10] Id. at 7. PREPA once again relied on Section 1016(e) of the USA Patriot Act of 2001 (42 U.S.C. 5195c(e)) and the Presidential Policy Directive of February 12, 2013.

[11] PREPA's Submittal of the Revised Draft Integrated Resources Plan as Ordered by the Commission, at 15-16.

CEPR
COMISION DE ENERGIA DE PUERTO RICO
2014

On September 30, 2015, PREPA filed its *Submittal of the Revised Volume V of the Integrated Resource Plan in Compliance with the Commission's Orders*. PREPA did not raise any confidentiality claims with respect to the information contained in that filing.[12]

On January 12, 2016, PREPA responded to the Commission's second information requirement. In its *Information Submission and Answers to Request for Production of Documents*, PREPA again raised the claim that certain sections of Volume II of the updated IRP filed on August 17, 2015 should be considered "confidential".[13] PREPA argued that information in Volume II includes confidential information "related to critical energy infrastructure information (CEII), which includes vulnerabilities of the electrical system or detailed design information related to critical information existing or proposed that: (i) details the production, generation, transmission or distribution of energy, (ii) could be useful to a person in planning an attack on critical infrastructure and threaten the safety of the electrical system."[14] PREPA further argued that the information in Volume II identified as confidential "contains details of the configuration of the electrical system and contingencies that can cause severe damage or emergency conditions and be used to attack critical infrastructure."[15]

Likewise, PREPA also claimed confidentiality over the report on reliability of the electrical system that is referenced in the IRP.[16] According to PREPA, said filings constitute critical energy infrastructure information ("CEII").[17]

On January 28, 2016, PREPA submitted its *Memorandum of Law on Confidential Information* ("*Memorandum*") requesting a protective order for certain information.[18] In said *Memorandum*, PREPA once again referenced the DHS' definition of "critical infrastructure" as the basis for its confidentiality claims. In addition to citing the DHS' definition of "critical infrastructure," PREPA cited —in general— the Federal Energy Regulatory Commission's ("FERC") regulation on CEII as implemented through FERC's Order No. 683.[19]

In the alternative to a protective order, PREPA requested that said information be provided only to those intervenors who: "(a) file a Motion with the Commission setting forth specific reasons as to why they need access to it; [. . .] (b) agree in writing to comply with heightened protections with respect to these materials; [and (c)] be required to

JHRM

---

[12] See PREPA's Submittal of the Revised Volume V of the Integrated Resource Plan in Compliance with the Commission's Orders, at 5.
[13] PREPA's Information Submission and Answers to Request for Production of Documents, at 2.
[14] Id. at 2–3.
[15] Id. at 3.
[16] Id.
[17] Id.
[18] Memorandum, at 1, 13-14. PREPA claimed confidentiality of the "(a) Volume II of the Integrated Resource Plan [. . .] draft dated August 17, 2015; (b) PREPA's Electric Power Reliability Study prepared by Siemens PTI dated September 29, 2014 [. . .]; and (c) PREPA's System Reliability Study Supplementary Evaluation prepared by Siemens PTI dated September 9, 2015 [. . .]". Id. at 2, 4, 7, 12.
[19] Id. at 3; see 18 CFR § 388.113.

review the documents at PREPA's offices and not to copy or distribute the reviewed information."[20]

Having outlined PREPA's confidentiality claims, we proceed to evaluate them against the public's fundamental right to information and Act 57's principles of transparency, and issue a ruling accordingly.

II. Right to Public Information

In Puerto Rico, the public has a fundamental right to access public documents.[21] The Puerto Rico Supreme Court has continuously underscored the public's *fundamental right* to access public information.[22] A public document is defined as "[a]ny document which originates, or is kept or received in any dependency of the Commonwealth of Puerto Rico according to the law or in relation to the management of public affairs and that [. . .] is required to be permanently or temporarily preserved as evidence of transactions or for its legal value."[23]

If information falls within the definition of public document, the government cannot withhold that information from the public unless (1) a law grants nondisclosure, (2) the communication is protected under one of the evidentiary privileges, (3) revealing the information can infringe on a third party's fundamental rights, (4) the identity of an informant is involved, or (5) when it is official information pursuant to Evidence Rule 514.[24] Pursuant to these limited exceptions, the Commission will only grant confidentiality claims that are duly grounded and consistent with Act 57's principles of transparency and the public's right to information.

III. Analysis

Section 5195 c(e) of the Critical Infrastructures Protection Act of 2001 ("CIPA 2001"), cited by PREPA to support its claims, defines "critical infrastructure" as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters."[25] While defining the term "critical infrastructure," CIPA 2001 does not impose

---

[20] Id.

[21] See PR CONST. Article II, Sec. 4; Code of Civil Procedure, 32 L.P.R.A. § 1781 ("Every citizen has a right to inspect and take a copy of any public document of Puerto Rico, except as otherwise expressly provided by law."); see also López v. Policía de PR, 118 D.P.R. 219, 229 (1987) (interpreting Article II, Sec. 4's right to speech as granting the public a right to public documents).

[22] See Colón Cabrera v. Caribbean Petroleum Corp., 170 D.P.R. 582, 592 (2007).

[23] Article 3(b) of Act No. 5 of December 8, 1955, as amended, known as the "Administration of Public Documents Act", 3 L.P.R.A. § 1001(b) (translation and emphasis provided).

[24] Colón Cabrera, *supra*, at 591; see also López, *supra*, at 229. The privilege over official information was previously Evidence Rule 31. See id.

[25] 42 U.S.C.A. § 5195c(e).

CEPR
COMISIÓN DE ENERGÍA DE PUERTO RICO
2 0 1 4

specific obligations on local, state or federal governments other than collaborating with the private sector. Likewise, Presidential Policy 21 does not impose specific responsibilities on state agencies like the Commission.

On the other hand, the Critical Infrastructure Information Act of 2002 ("CII Act of 2002"),[26] launched the Protected Critical Infrastructure Information ("PCII") Program as a branch of the DHS.[27] Under the CII Act of 2002, information is submitted to the PCII Program as "critical infrastructure information" and, once validated as PCII, this information is exempt "from disclosure under federal, *state*, and local information-disclosure laws," and may be used restrictively pursuant to the limitations set out in Section 214(a)(1) of the CII Act of 2002.[28]

According to the DHS's Rule on Procedures for Handling Critical Infrastructure Information, promulgated to implement the CII Act of 2002, a person requesting information in their possession to receive the non-disclosure protections of the CII Act of 2002, must submit that information to the PCII Program Manager.[29] The PCII Program

---

[26] Critical Infrastructure Information Act of 2002, 6 U.S.C.A. § 133 *et seq.* (West through P.L. 114-115). The Critical Infrastructure Information Act of 2002 is a subpart of the Homeland Security Act.

[27] 6 U.S.C.A. §§ 132, 133, *supra.*

[28] See National Association of Regulatory Utility Commissioners, Information Sharing Practices in Regulated Critical Infrastructure States: Analysis and Recommendations 13 (June 2007). The PCII validates information as "critical infrastructure information" if the submitted information meets a set standard—the information needs to be "voluntarily submitted" to the DHS and accompanied by "an express statement." 6 U.S.C.A. § 133 (a)(1), *supra* ("the term 'express statement', with respect to information or records, means [. . .] a written marking on the information or records substantially similar to the following 'This information is voluntarily submitted to the Federal Government in expectation of protection from disclosure [. . . .]") (emphasis added). Meanwhile, "critical infrastructure information" is defined as

> information not customarily in the public domain and related to the security of critical infrastructure or protected systems—
>
> **(A)** actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct (including the misuse of or unauthorized access to all types of communications and data transmission systems) that violates Federal, State, or local law, harms interstate commerce of the United States, or threatens public health or safety;
>
> **(B)** the ability of any critical infrastructure or protected system to resist such interference, compromise, or incapacitation, including any planned or past assessment, projection, or estimate of the vulnerability of critical infrastructure or a protected system, including security testing, risk evaluation thereto, risk management planning, or risk audit; or
>
> **(C)** any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, reconstruction, insurance, or continuity, to the extent it is related to such interference, compromise, or incapacitation.

6 U.S.C.A. §131(3), *supra.*

[29] 6 CFR § 29.5(a)(1).

CEPR
COMISIÓN DE ENERGÍA DE PUERTO RICO
2014

Manager is the only individual designated to "validate and mark information as PCII."[30] Similarly, FERC's CEII Regulation establishes a step-by-step procedure for a person requesting that information be considered CEII.[31]

Nothing in the IRP record suggests PREPA submitted the information it claims is confidential through the PCII Program validation process or FERC's CEII Program. The information that PREPA submitted as "confidential" is not marked pursuant to the DHS Rule or FERC's CEII Regulation.[32] For PREPA to raise PCII under the DHS or CEII under FERC's, it must have complied with the procedures set forth by the agencies' respective Regulations. PREPA failed to demonstrate that its information has been classified as *PCII* or *privileged material*, by one of the aforementioned agencies.

Moreover, PREPA's filings are considered public documents since they were received by the Commission, a government agency, and are kept as evidence in the record. Accordingly, the Commission is urged to disclose the information, absent another compelling reason for nondisclosure—namely, if (1) a law grants nondisclosure, (2) the communication is protected under one of the evidentiary privileges, (3) revealing the information can infringe on a third party's fundamental rights, (4) the identity of an informant is involved, or (5) when it is official information pursuant to Evidence Rule 514.

However, PREPA failed to demonstrate that the information identified as confidential meets any of the aforementioned requirements. PREPA did not demonstrate compliance with the PCII Program or FERC's CEII Program. Furthermore, PREPA did not provide evidence that the allegedly confidential information is communication protected under one of the evidentiary privileges, that revealing the information could infringe on a third party's fundamental rights, that the identity of an informant is involved, or that it is official information pursuant to Evidence Rule 514.

Notwithstanding, Act 57 allows for nondisclosure of certain information. According to Article 1.2(f) of Act 57, it is the public policy of the Commonwealth of Puerto Rico to maintain the electricity infrastructure in "optimum conditions as to ensure the reliability and safety of the electric power service." On the other hand, and although Article 1.4 of Act 57 promotes the accessibility of information the Commission receives, it also provides for a narrow exception regarding the security of the electric grid. Specifically, Article 1.4(a)(7) states that the Commission may place "reasonable restrictions based on doctrines of privacy, *security*, and evidentiary privileges."[33] Moreover, Article 6.3(d) of Act 57 tasks the Commission with overseeing the "quality and *reliability* of the electric power service[]."[34]

JHRM

---

[30] 6 CFR § 29.6(a).
[31] 18 CFR § 388.112 (b).
[32] See 6 CFR § 29.6(c); see also 18 CFR § 388.112 (b) (1).
[33] (Emphasis added).
[34] (Emphasis added).

CEPR
COMISIÓN DE ENERGÍA DE PUERTO RICO
2014

The Commission's authority to restrict access to information that may be used to destabilize the electric grid is further underscored by Act No. 83 of May 2, 1941, as amended, known as the "Puerto Rico Electric Power Authority Act" ("Act 83"). Section 6(m) of Act 83 directs PREPA to disclose to "its customers information of the electric power infrastructure", however, it allows PREPA to withhold information regarding "matters of *public security* involving *threats* against PREPA, *its property* or employees."[35]

Thus, the statutory language provides a clear indication that the Legislative Assembly bestowed the Commission with discretion to restrict access to information related to the security of the electric grid. Moreover, the federal government, through Presidential Policy 21, the CIPA 2001, the CII Act of 2002, and FERC's CEII Program made it a priority to protect "security" sensitive information, particularly critical infrastructure information.

Finally, it should be recognized that pursuant to Article 6.3(d) of Act 57 the Commission has the duty to oversee the electric power service's quality and reliability. Therefore, in order to fulfill its duty, to further the public policy of maintaining the electric infrastructure in optimum conditions, and to facilitate our evaluation of confidentiality claims based on "critical infrastructure", the Commission adopts, but does not limit itself to, the Presidential Policy 21's definition of "security", the DHS's definition of "critical infrastructure" as defined in 42 U.S.C.A. § 5195c(e), *supra*, and the DHS' definition of "critical infrastructure information" as defined in 6 U.S.C.A. §131(3), *supra*.

In light of these pronouncements, PREPA **is ORDERED to** file a supplemental memorandum no later than April 15, 2016 answering the following:

1. **Why would the information PREPA catalogued as "confidential" in the IRP filings deserve protection?** PREPA may not merely cite the DHS' definition of critical infrastructure information, but must explain in detail how information may threaten the security of the electric grid. If PREPA has the appropriate documents demonstrating that the protections of the DHS' PCII Program or FERC's CEII Program apply to PREPA's purportedly confidential information, PREPA must submit those documents to the Commission.

2. **What restrictions, other than absolute confidentiality, may be placed on the information PREPA catalogues as "confidential" so that both citizens' right to access public information and PREPA's security interests, if any, are protected?**

JHRM

[35] (Emphasis added).

Be it notified and published.

Agustín F. Carbó Lugo
Chairman

Ángel R. Rivera de la Cruz
Associate Commissioner

José H. Román Morales
Associate Commissioner

I certify that the Puerto Rico Energy Commission has so agreed on April 5, 2016. I also certify that on this date a copy of the Resolution and Order was notified by electronic mail sent to

acasellas@amgprlaw.com
ana.rodriguez@oneillborges.com
carlos.valldejuly@oneillborges.com
cfl@mcvpr.com
dortiz@elpuente.us
edwin.quinones@aae.pr.gov
epo@amgprlaw.com
fermin.fontanes@oneillborges.com
hburgos@cabprlaw.com
jperez@oipc.pr.gov
lionel.orama@upr.edu
mgrpcorp@gmail.com
n-vazquez@aeepr.com
valvarados@gmail.com
agraitfe@gmail.com
carlos.reyes@ecoelectrica.com
ccf@tcmrslaw.com
codiot@oipc.pr.gov
dperez@cabprlaw.com
energiaverdepr@gmail.com
felipelozada1949@gmail.com
fviejo@amgprlaw.com
icv@mcvpr.com
lga@elpuente.us
lmateo@ferraiuoli.com
n-ayala@aeepr.com
rstgo2@gmail.com
victorluisgonzalez@yahoo.com

Brenda Liz Mulero Montes
Interim Secretary

CERTIFICATION

I certify that his is a true and exact copy of the Resolution and Order issued by the Puerto Rico Energy Commission. I further certify that today, April ___, 2016, I have proceeded with the filling of this Order and I have sent a copy thereof to the:

Windmar Group
Attn.: Mr. Víctor González
Calle San Francisco #206
San Juan, PR 00901

Lcdo. Fernando Agrait
701 Ave. Ponce de León
Oficina 414, Edificio Centro de Seguros
San Juan, PR 00907

Roumain & Associates, PSC
1702 Avenida Ponce de Lean, 2ndo Piso
San Juan, PR 00909

Autoridad de Energía Eléctrica de Puerto Rico
Attn.: Nélida Ayala and Nitza D. Vázquez Rodríguez
Apartado 364267
Correo General
San Juan, PR 00936-4267

EcoEléctrica, L.P.
Carlos A. Reyes, P.E.
Carretera 337 Km 3.7, Barrio Tallaboa Poniente
Peñuelas, PR 00624

Toro, Colón Mullet, Rivera & Sifre, PSC
Lcdo. Carlos Colón Franceschi
PO Box 195383
San Juan, PR 00919-5383

José G. Maeso González
Director Ejecutivo
Oficina Estatal de Política Pública Energética
PO Box 41314
San Juan, PR 00940

Felipe Lozada-Montanez
Coordinador, Mesa de Diálogo Energético
PMB 359
425 Carr. 693, Suite 1
Dorado, PR 00646

Enlace Latino de Acción Climática
41 Calle Faragan
Urb. Chalets de Villa Andalucía
San Juan, PR 00926

Lcda. Ruth Santiago
Apartado 518
Salinas, PR 00751

El Puente de Williamsburg, Inc.
211 South 4th St.
Brooklyn, New York 11211

Comité de Diálogo Ambiental, Inc.
Urb. Las Mercedes Calle 13 #71
Salinas, PR 00751

Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.
Lcdo. Eric Pérez-Ochoa
PO Box 702924
San Juan, PR 00936

JHRM

Casellas, Alcover & Burgos, P.S.C.
Lcdo. Heriberto Burgos/Lcda. Diana Pérez Seda
PO Box 364924
San Juan, PR 00936

McConnell Valdés, LLC
Lcdo. Carlos Fernández Lugo
PO Box 364225
San Juan, PR 00936

O'Neill & Borges, LLC
Lcdo. Carlos Valldejuly/Lcdo. Fermín Fontanes/Lcda. Ana Rodríguez
American International Plaza
250 Muñoz Rivera Ave, Ste. 800
San Juan, PR 00918

Instituto Nacional de Energía y Sostenibilidad Isleña
Lionel R. Orama Exclusa, D.Eng. P.E.
Jardín Botánico
1187 Flamboyán
San Juan, PR 00926

Asociación Puertorriqueña de Energía Verde
Alan M. Rivera Ruíz
Presidente
PO Box 50688
Toa Baja, PR 00950-0688

Ferraiuoli, LLC
Lcda. Lillian Mateo-Santos
PO Box 195168
San Juan, PR 00919-5168

Oficina Independiente de Protección al Consumidor
Lcdo. José A. Pérez Vélez/Lcda. Coral Odiot
268 Ave. Ponce de León
Hato Rey Center, Suite 524
San Juan, PR 00918

JHRM

For the record, I sign this in San Juan, Puerto Rico, today, April ___, 2016.

_____
Rafael O. García Santiago
Clerk of the Puerto Rico
Telecommunications Regulatory Board