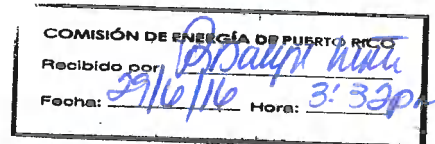


COMMONWEALTH OF PUERTO RICO  
PUERTO RICO ENERGY COMMISSION



IN RE: REVIEW OF RATES OF  
THE PUERTO RICO ELECTRIC  
POWER AUTHORITY

NO. CEPR-AP-2015-0001

SUBJECT: SUBMISSION OF  
INFORMATION IN COMPLIANCE  
WITH THE COMMISSION'S  
LETTER OF JUNE 22, 2016

**PREPA'S SUBMISSION OF INFORMATION IN COMPLIANCE WITH  
THE COMMISSION'S LETTER OF JUNE 22, 2016**

TO: THE PUERTO RICO ENERGY COMMISSION  
Through the General Legal Counsel via  
gbonet@energia.pr.gov  
afigueroa@energia.pr.gov and  
legal@energia.pr.gov

COMES NOW the Puerto Rico Electric Power Authority ("PREPA") and submits the following and attached information in compliance with the Puerto Rico Energy Commission's (the "Commission") Letter dated June 22, 2016 ("Letter").

**I. Privileged Material**

1. The Letter focuses on the selected material contained in reports by PREPA's Chief Restructuring Officer ("CRO"), Lisa Donahue, to PREPA's Governing Board, that PREPA has designated as covered by the attorney / client privilege.

**The CRO's Role in Discussing Privileged Information With the Board**

2. Ms. Donahue, as PREPA's CRO, has been working closely with its Governing Board and other management on the restructuring of PREPA's debt and the recovery and revitalization of PREPA since September 2014. Many of the issues on

which they have worked have had legal components, such as the interpretation of statutes and regulations, and legal advice on negotiations and contracts. Accordingly, in her capacity as PREPA's CRO, Ms. Donahue has consulted with counsel on behalf of PREPA, most commonly lawyers from the firm of Cleary Gottlieb Steen & Hamilton LLP, and also lawyers from other firms as needed. The portions of CRO reports that have been designated as covered by the attorney / client privilege are material where the CRO conveys to the Board information and advice from and of counsel.

#### **The May 26<sup>th</sup> Submission**

3. PREPA has provided the CRO reports to the Commission on two occasions. PREPA first filed the CRO reports called for by Regulation No. 8720, Section 3.02(A), on May 26, 2016. With that filing, PREPA included two sets of copies.

- The first set was called: CRO Reports Set #1 "Redacted Commission's Eyes Only". The only redactions were of material covered by the attorney / client privilege.
- The second set was called: CRO Reports Set #2 "Redacted Confidential Non-Disclosure Agreement Required for Access". The redactions were of material covered by the attorney / client privilege and also of Critical Energy Infrastructure Information ("CEII") and business confidential (including trade secrets information).

4. The purpose of submitting those two sets was and is that if the public or an intervenor asked to see the CRO reports material, then they would only be allowed

to see Set #2, except that an approved intervenor, if they signed a Commission-established non-disclosure agreement ("NDA"), could see Set #1.

5. The May 26<sup>th</sup> filing also included a document log that listed all of the material and identified which portions were covered by the privilege ("AC"), CEII, or "BC" (business confidentiality, including trade secrets).

#### **The May 27<sup>th</sup> Submission**

6. On May 27, 2016, PREPA filed its rate Petition and its voluminous attachments. In Attachment C to the Petition, PREPA filed the same two sets of CRO reports as called for as "Schedule I-3" by Section 2.11 of Regulation No. 8720, along with certain other materials.

7. On May 27<sup>th</sup>, PREPA inadvertently did not include a copy of the document log provided on May 26<sup>th</sup>. The Letter states in part that PREPA did not provide a list of the privilege and confidentiality designations as to Schedule I-3. The document log provided on May 26<sup>th</sup> also provided that list as to Schedule I-3.

8. Revised document logs are attached to this compliance filing as Attachments A and B, as discussed further below. Attachment A covers the CRO reports as filed on May 26<sup>th</sup>. Attachment B covers the CRO reports as filed again on May 27<sup>th</sup> (and also the other documents in Attachment C to the Petition).

#### **The June 3<sup>rd</sup> Motion**

9. On June 3, 2016, PREPA filed a combined "Motion for Entry of a Protective Order and for Confidential Treatment of Certain Items". The motion had two parts, although they are related. In brief, the first part of the motion discussed different

legal limits on the scope of request for information (and discovery), privilege and different types / levels of confidentiality such as CEII and trade secrets, and proposed a process for how such subjects would be handled in this case. A draft protective order was attached to the motion. A draft NDA also was intended to be attached to the draft protective order, but inadvertently, it was not attached.

10. The second part of the June 3<sup>rd</sup> motion discussed specific claims for confidentiality. Paragraph 27(a) referred to the CRO reports, but referenced only the BC claims, inadvertently not referencing the AC and CEII items, although privilege and CEII were discussed in the first part of the motion. Paragraphs 27(b), (c), and (d) and Exhibit B to the motion specifically listed the other items in the May 27<sup>th</sup> filing as to which PREPA was making confidentiality designations, all of which were business confidential (including trade secrets) designations.

11. Paragraph 28 supported the business confidentiality designations as to the CRO reports. Paragraphs 29 and 30 supported the business confidentiality designations as to the other May 27<sup>th</sup> items.

#### **The Letter and the Revised Document Logs**

12. The Letter calls for support of the privilege designations made in relation to the CRO reports. The Letter also notes the absence of a list of the CRO reports as filed on May 27<sup>th</sup>, as noted earlier. The Letter also calls for a revised document log as to the CRO reports.

13. In order to comply with the Letter, PREPA has revised the May 26<sup>th</sup> CRO reports document log to provide additional information in support of the AC, CEII, and

business confidentiality (including trade secrets) designations. PREPA has created two versions of this log: one covers the May 26<sup>th</sup> filing (Attachment A to this Motion) and one covers the May 27<sup>th</sup> filing (Attachment B to this Motion). The substance of the two logs is identical as to the CRO reports, but Attachment B also covers the other documents in Attachment C to the rate Petition. The level of detail in the revised logs is consistent with the range of levels of detail that one would expect of such a log in civil litigation. Even more importantly, PREPA intends the level of detail to be consistent with what it understands to be called for by the Letter and to be sufficient to support the designations. PREPA also is willing to provide further information if / as needed, if any, without waiving its claims.

**The Letter and Its Directive of Providing Unredacted Matter Under Seal**

14. There is one aspect of the Letter that PREPA views as problematic, however, and that is its call for the submission of unredacted versions of the CRO reports in which PREPA has designated material as covered by the attorney / client privilege. PREPA does not believe that this additional step is a necessary step, particularly in light of its submission of the revised logs.

15. In order to avoid delay, PREPA is submitting, under seal, on a "thumb drive", one set of those unredacted versions. The documents sum to roughly 1,000 pages of documents, which is why PREPA is supplying them on a "thumb drive". However, PREPA is prepared to print out the 1,000 pages if the Commission so desires.

16. However, in submitting the unredacted versions, PREPA does not waive any of its rights, including but not limited to its privilege claims, and PREPA urges the Commission not to review the sealed material.

17. PREPA takes this position that the Commission should not call for, or more importantly review, the sealed material for the following reasons.

18. There is no dispute about whether PREPA may invoke the attorney / client privilege. The June 3<sup>rd</sup> motion (at paragraph 10) notes that Puerto Rico, of course, recognizes the attorney / client privilege (as well as the attorney work product doctrine). The Letter confirms this point.

19. Puerto Rico law recognizes that the attorney-client privilege is "el más antiguo de los privilegios que emanan del derecho común y el privilegio no constitucional más sólido de nuestro ordenamiento." *Pagan v. First Hospital*, 189 D.P.R. 509, 520 (2013). Once the privilege is established, the essence of which can be summarized as a confidential communication made between a client and her attorney for purposes of seeking legal advice, the privilege can only be revoked in the following two conditions: (1) the holder of the privilege voluntarily relinquishes the privilege or (2) an exception to the privilege exists. *Id.* at 523. *See also*, Puerto Rico Rules of Evidence, Rule 503.

20. In determining whether an exception to the privilege exists, the U.S. Supreme Court has determined that a delicate balance must exist because "[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to

intolerable abuses." *U.S. v. Zolin*, 491 U.S. 554, 570-71 (1989) (involving the Internal Revenue Service's petition to enforce a summons against a church's refusal to produce documents withheld as attorney-client privilege; the IRS argued, among other things, that the documents fell within the crime-fraud exception to the privilege).

21. The Court in *Zolin* determined that when a challenge to privilege is raised on the basis of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the-fraud exception applies." *Id.* at 572.<sup>1</sup>

22. In *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318 (1915), the Supreme Court reaffirmed the importance of the privilege within the regulatory setting stating that the "desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now" (involving the Interstate Commerce Commission's unsuccessful attempt to examine confidential communications between the railroad and its lawyers based on the its power to examine records pursuant to the Interstate Commerce Act).

23. Similarly, in *S. Cal. Gas Co. v. Public Utils. Com.*, 50 Cal. 3d 31, 38 (1990), the California Supreme Court held that, "when an agency has the power to compel testimony, its power must be tempered by the attorney-client privilege, unless there is unambiguous statutory directive to the contrary. Although the commission is

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<sup>1</sup> See also, *In re Grand Jury Subpoena*, 745 F.3d 681 (3rd Cir. 2014); *U.S. v. Lonich*, 2016 WL 1733633 (N.D. Cal); *U.S. v. Jara*, 973 F.2d 746 (9th Cir. 1992); *Cunningham v. Connecticut Mutual Life Ins.*, 845 F. Supp. 1403 (S.D. Cal 1994).



granted broad powers under the Constitution, no provision exempts it from complying with the statutory attorney-client privilege. We conclude that the commission's powers pursuant to the state Constitution in this context are subject to the statutory limitation of the attorney-client privilege." (footnotes omitted) (vacating decisions of the California Public Utilities Commission requiring Southern California Gas Company to produce privileged documents because the attorney-client privilege applied to its proceedings and because there was no implied or express waiver of the privilege).

24. Thus, submission of material for *in camera* review is not an automatic practice whenever a party asserts the attorney / client privilege. Rather, such review should be required only if and as needed. PREPA respectfully submits that the privilege logs provide sufficient basis for a *prima facie* assertion of the privilege and thus for the Commission to approve the invocation of the privilege.

25. There are a number of other legal provisions relating to PREPA that support the protection of its privileged information. For example:

- Act 83-1941, Section 4, as amended by Act 4-2016, indicates that with respect to PREPA Governing Board meetings, among other things, that Board meetings do not need to be broadcasted and posted as to discussion of subjects that are confidential under the Puerto Rico Rules of Evidence, and that those present for such discussions should keep them confidential until they are not confidential or are required by law to disclose them. There is a similar provision about the Board's minutes.



- Section 6.24 of Act 57-2014 as amended by Act 4-2016 gives the Commission the power to investigate as to PREPA, but it also says that the Commission's requests for documents are "subject to any constitutional or statutory right, or applicable privilege..."
- Section 1-4(a) of Act 57-2014 has the general policy on transparency that applies to PREPA, but it recognizes an exception for (1) "... privileged information which shall be suppressed in accordance with the Rules of Evidence adopted by the Judicial Branch of Puerto Rico".
- Section 6.15 of Act 57-2014 is "Rules of Confidentiality". The section provides for protection of privilege and confidentiality. The section does provide for Commission access to material in some circumstances, but PREPA does not understand the section to be intended as an across the board provision requiring the production of privileged material.
- Regulation No. 8543 contains a number of provisions on privilege and confidentiality, but, again, PREPA does not understand the regulation to be intended as an across the board provision requiring the production of privileged material.

26. PREPA also notes that the Commission's second request for information, issued on June 23, 2016, explicitly does not require such *in camera* submission when PREPA makes an attorney / client privilege designation.

27. While PREPA is submitting the material under seal, as noted above, PREPA makes a general standing objection to this request and maintains that the

attorney-client privilege as recognized by Puerto Rico case law and Puerto Rule of Evidence 503, as well as applicable U.S. federal law, protects these documents from review by the Commission absent, at a minimum, the identification of a factual basis adequate to support a reasonable belief that review of the materials may reveal evidence to establish that an exception exists to PREPA's claims of privilege.

28. If the Commission agrees that *in camera* review is not required, then PREPA respectfully requests that the Commission not review the unredacted set and instead return it to PREPA.

## II. Other Confidentiality Designations

29. PREPA also has made CEII and BC (including trade secrets) designations, as noted above. Although the Letter focuses on PREPA privilege designations, PREPA also has revised the document logs to provide additional information about the confidentiality designations.<sup>2</sup> PREPA does not understand the Letter to be intended to indicate that PREPA has made insufficient showings on these points, but PREPA nonetheless has revised the logs.

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<sup>2</sup> Attorney / client privilege (and attorney work product) and confidentiality designations typically are discussed as two different kinds of items. Privilege designations relate to the core principles of legal practice and government, while confidentiality designations may have a wide variety of rationales, and are not necessarily a shield against discovery, assuming an appropriate protective order is in place and followed, although CEII, for example, sometimes is an exception. Some of the statutory and regulatory provisions related to the submission of information to the Commission use the term confidentiality to encompass both privilege and other forms of confidential information, while others mean it only in the latter sense. In some instances, the inconsistent use of this terminology can be confusing and arguably could be read (or mis-read) to diminish the attorney / client privilege. PREPA does not believe that to be the intention of the Legislative Assembly or the Commission, and PREPA asks that all such provisions not be read in such a manner.

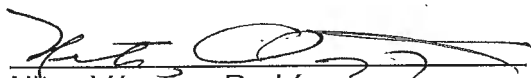
**III. Attachment of Draft Non-Disclosure Agreement**

30. As noted earlier, PREPA inadvertently did not attach the draft NDA to its June 3<sup>rd</sup> Motion. Accordingly, Attachment C hereto is the draft NDA. The draft NDA is based on, and highly similar (although not identical) to, the NDA issued by the Commission on October 30, 2015, in the pending Integrated Resources Plan docket, No. CEPR-AP-2015-0002.

WHEREFORE, the Puerto Rico Electric Power Authority respectfully requests that the Commission accept PREPA's submissions, approve PREPA's privilege and confidentiality designations, and approve PREPA's proposed protective order, including the proposed NDA.

Respectfully submitted, on June 29, 2016

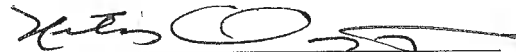
THE PUERTO RICO ELECTRIC POWER AUTHORITY



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**CERTIFICATE OF SERVICE**

I hereby certify that I have sent the above SUBMISSION OF INFORMATION IN COMPLIANCE WITH THE COMMISSION'S LETTER OF JUNE 22, 2016 to the Puerto Rico Energy Commission, through its General Legal Counsel, on June 29, 2016.



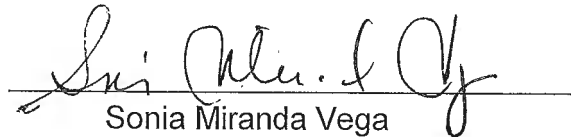
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**AFFIDAVIT**

I, Sonia Miranda Vega, of legal age, engineer, married and resident of Vega Alta, Puerto Rico, in my capacity of Director of Planning and Environmental Protection of the Puerto Rico Electric Power Authority ("PREPA"), under oath declare as follows:


1. My name and personal circumstances are those stated above. If called as a witness, I could testify competently as to the subject matter of this Affidavit.
2. I have reviewed PREPA's Submission of Information in Compliance with the Commission's Letter of June 22, 2016.
3. The information included in the submission is true on the basis of my personal knowledge or on the basis of the information supplied to me by employees of PREPA and other advisors to PREPA.
4. Nothing in this affidavit is intended to be a waiver of privilege or confidentiality.

In San Juan, this 29<sup>th</sup> day of June, 2016.

  
Sonia Miranda Vega

AFFIDAVIT 1880

Sworn and subscribed before me by SONIA MIRANDA VEGA, of the personal circumstances above mentioned, whom I personally know, in SAN JUAN, P.R., this 29<sup>th</sup> day of June, 2016.

  
Notary Public



COMISIÓN DE ENERGÍA DE PUERTO RICO	
Recibido por:	<i>Braulio Nolasco</i>
Fecha:	<i>29/6/16</i> Hora: <i>3:32pm</i>

**PREPA'S SUBMISSION OF INFORMATION IN  
COMPLIANCE WITH  
THE COMMISSION'S LETTER OF JUNE 22, 2016**

**Attachments**

ITEM 15  
PREPA'S SUBMISSION OF INFORMATION  
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COMISIÓN DE ENERGÍA DE PUERTO RICO	
Recibido por:	<i>Rosalva Ortiz</i>
Fecha:	<i>29/6/16</i> Hora: <i>3:33pm</i>