

**COMMONWEALTH OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU**

NEPR
Received:
Jun 26, 2019
5:10 PM

IN RE: REVIEW OF THE PUERTO RICO ELECTRIC POWER AUTHORITY INTEGRATED RESOURCE PLAN

CASE NO.: CEPR-AP-2018-001

SUBJECT: LOCAL ENVIRONMENTAL ORGANIZATION'S COMMENTS

LOCAL ENVIRONMENTAL ORGANIZATIONS' COMMENTS IN OPPOSITION TO PREPA'S MOTION FOR LIMITED WAIVERS UNDER REGULATION NO. 9021 AND VERIFIED MOTION FOR CONFIDENTIAL TREATMENT OF PORTIONS OF ITS INTEGRATED RESOURCE PLAN FILING

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW Comité Diálogo Ambiental, Inc., El Puente de Williamsburg, Inc., Enlace Latino de Acción Climática, and Sierra Club, Inc. and its Puerto Rico chapter ("Local Environmental Organizations") respectfully submitting to the honorable Puerto Rico Energy Bureau ("Energy Bureau") the following comments regarding the importance of public participation and transparency in this Integrated Resource Plan process. The Local Environmental Organizations urge that the Energy Bureau compel public disclosure of all documents in this matter.¹

COMMENT

On June 7, 2019, PREPA filed a motion² seeking, among other things, to withhold the following documents from public disclosure:

- Resource Plan Modeling Input Files
- Resource Plan Modeling Output Files - Minigrids Files

¹ Except the exceptional cases that the Energy Bureau has recognized as Critical Energy Infrastructure Information. Regulation No. 9021, Section 2.03(J).

² PREPA's *Verified Motion for Confidential Treatment of Portions of its Integrated Resource Plan Filing*, June 7, 2019, No. CEPR-AP-2018-0001. This motion continued the withholding requests made in PREPA's February 13, 2019 motion.

- Existing Resource Workpaper
- New Resources Workpaper - Distributed Generation Totals and Forecast
- Steady State Analysis Workpaper
- Post-Processing Analysis Workpaper Files
- Attachment B: Transmission & Distribution
- Appendix 1: Transmission & Distribution
- Appendix 1: Transmission Maps and Schematic Workpapers

PREPA filed a separate motion on June 7, 2019, proposing, *inter alia*, to also withhold public access to its modeling software, and the databases of information that were input into the modeling software.³

Previously, on March 14, 2019, the Energy Bureau issued an order reserving final judgment on PREPA's request to withhold the modeling information, noting that Regulation 9021 required production of that information:

...the Energy Bureau believes that PREPA's proposed approach to modeling and software will suffice *for the time being*. However, pursuant to the provisions of Regulation 9021... the Energy Bureau retains its authority to require a more careful examination of the modeling framework.⁴

The public absolutely must have access to the information in PREPA's modeling files in order to meaningfully participate in the Integrated Resource Plan process.⁵ To begin with, PREPA must provide the public with the entire database of inputs, parameters, and settings that were fed into the modeling software. Here are just a few examples of the types of information that would be contained in that database:

³ PREPA's Motion for Limited Waivers of Filing Requirements Under Regulation No. 9021, June 7, 2019, No. CEPR-AP-2018-0001. This motion continued the withholding requests made in PREPA's February 13, 2019 motion.

⁴ Resolution and Order on the Completeness of the Puerto Rico Electric Power Authority's Integrated Resource Plan Filing, Confidential Treatment of Portions of the Integrated Resource Plan, and Requested Waivers at 8, Mar. 14, 2019, No. CEPR-AP-2018-0001 (emphasis added).

⁵ PREPA might be able to justify that interested members of the public sign a reasonable Non-Disclosure Agreement prior to accessing some of this information (although PREPA has not yet submitted any such justification). However, PREPA cannot justify the blanket withholding of entire categories of documents.

- Characteristics of the existing interconnected generators on the island, including the location, size, condition, maintenance costs, expected remaining life, and resource type.
- The information used to construct both the “long-term capacity expansion” runs as well as any zonal and nodal dispatch runs performed.
- General locational information for Puerto Rico’s transmission and distribution systems.
- Transmission & Distribution system constraints imposed on the model.
- Restraints on resource optimization imposed on the model.
- All data underlying PREPA’s fuel cost forecasts.
- Recent and up to date CYMDIST, Synergi, ASPEN, DEW, Milsoft Windmil, and/or Milsoft Light Table modeling databases.

This input database underlies the rationale for the selection of PREPA’s preferred plan.

To have a meaningful opportunity to fully engage in this proceeding, interested members of the public must be able to review and evaluate the reasonableness of the modeling (including all inputs, settings, and outputs) prepared by PREPA, as well as to complete their own independent modeling. These submissions by the public will create a complete record, which the Energy Bureau can rely on to meet the Legislature’s mandate to “transform[] and restructur[e]” Puerto Rico’s energy system “at lowest cost possible” to its customers. 22 L.P.R.A. §§ 1051, 1054v(a).

PREPA seeks to withhold every line of the Resource Plan Modeling Input Files, and every parameter for the Existing Units. Looking at the list of existing unit parameters in Regulation No. 9021, Section 2.03(D)(1)(b) and (c), PREPA’s claim is clearly overbroad and unjustified. Many of the parameters of the Existing Units, as laid out in Regulation No. 9021, Section 2.03(D)(1)(b) and (c), obviously are not confidential: for example, resource type, nameplate and peak available capacity, annual capacity factor, or fuel type. PREPA must do a better job of tailoring its withholding request.

PREPA’s blanket request to withhold critical documents from the public violates the intent of the Legislature and the Energy Bureau to maximize public input into the Integrated Resource Plan, and fails to meet any legal standard for Critical Energy Infrastructure Information

or Trade Secrets. Through this Comment, the Local Environmental Organizations ask the Bureau to release, or require PREPA to release, these documents to allow for meaningful public participation in this process.

I. Public participation is critical to the Integrated Resource Plan process, therefore any restrictions on access to information must be structured in the way that least affects the public interest and transparency.

Citizens of Puerto Rico have a constitutional right to information possessed by PREPA.⁶

To protect this constitutional right, the Puerto Rico Legislature mandates reasonable access to information and broad public participation in Integrated Resource Plan proceedings;

“[t]ransparency and citizen participation in every process related to electric power service in Puerto Rico shall be promoted...[e]very [IRP] shall be devised with broad participation from citizens and other interested groups.”⁷ Through the process of passing Act 17-2019, the “Puerto Rico Energy Public Policy Act,” the Legislature re-examined and then re-affirmed this commitment to transparency.

During the first Integrated Resource Plan process, the Energy Bureau correctly emphasized the importance of public involvement, stating that interested persons and citizen groups like Local Environmental Organizations play a critical role in “the vital task of assessing the [Integrated Resource Plan].”⁸ The Energy Bureau called on the broader community to assist with this task, and assured the community’s experts that they would be “afforded the necessary

⁶ *Davila v. Superintendente General de Elecciones*, 82 D.P.R. 264, 281 n.9 (1960) (“No basta con que se reconozca meramente la importante justificación política de la libertad de información. Los ciudadanos de una sociedad que se gobierna a sí misma deben poseer el derecho legal de examinar e investigar cómo se conducen sus asuntos, sujetos sólo a aquellas limitaciones que impone la más urgente necesidad pública. Debe elevarse ese derecho a una posición de la más alta santidad si ha de constituir un baluarte contra un liderato insensible.” (citations omitted))

⁷ 22 L.P.R.A. §§ 1051(o), 1051a(hh)

⁸ Policy Statement on Public Participation, Intervenors, and Amici Curiae at 2, July 22, 2015, No. CEPR-AP-2015-0002.

information, tools, and opportunities to make their active, timely, informed, and responsible contributions to the [Integrated Resource Plan] assessment process.”⁹

The Energy Bureau’s Integrated Resource Plan regulation makes clear that the commitment to public access and transparency extends to the modeling software and databases used in Integrated Resource Plan proceedings. Section 2.02 of Regulation No. 9021 requires PREPA to provide the Energy Bureau and intervenors with access to these materials, sufficient to allow the Energy Bureau and intervenors to evaluate PREPA’s modeling and also contribute independent modeling results to the Energy Bureau.¹⁰ Should PREPA attempt to limit intervenor access, Section 2.02(F)(2) nonetheless requires the Energy Bureau to maintain “appropriate access to the program or its output” to intervenors.¹¹

The transparency required by the Energy Bureau’s regulations is consistent with Puerto Rico law, which directs the Energy Bureau to structure any restrictions of public access to information “in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure,” and permits documents to be kept “out of public reach *only in exceptional cases*.”¹² Even in the “exceptional cases” where the Energy Bureau may apply confidentiality restrictions to documents submitted to its proceedings, Puerto Rico law nonetheless states that once parties have executed a non-disclosure agreement the Energy Bureau “*shall* provide access to the document or the privileged portion . . . to the lawyers and external consultants involved in the administrative process.”¹³

⁹ *Id.* at 2–3.

¹⁰ Regulation No. 9021, Section 2.02(F)(2).

¹¹ *Id.*

¹² 22 L.P.R.A. § 1054n(a), (c) (emphasis added).

¹³ *Id.* § 1054n(b) (emphasis added).

Local Environmental Organizations seek to meaningfully engage in these Integrated Resource Plan proceedings, as part of the public participation and transparency that Puerto Rico law contemplates as central features of the process. As detailed above, only “exceptional” circumstances merit keeping information and documents from the public, so the Energy Bureau should accordingly limit restrictions to exceptionally sensitive materials, and not cast anti-participatory blanket restrictions over a wide and important range of PREPA’s filings. To the extent that PREPA seeks to limit access to documents, data, and programs, the Energy Bureau must proceed so as to “least affect” the interest of the public to meaningfully participate in an equitable outcome and a transparent process. In order for interested persons and citizen groups to play “an active, central, and informed role” and “contribute to the analysis and assessment of PREPA’s IRP filing,” the public must have access to the entire database of parameters, settings, and inputs fed into PREPA’s modeling software.¹⁴

The provision of electricity is an essential service that underpins the livelihoods and economic prospects of the whole of Puerto Rico. Rectifying the cost, reliability, and quality problems in the provision of that service are critical to the Legislature's goal to transform the island's electrical grid. The Act that established what is now the Energy Bureau recognizes this saying, “PREPA has become a monopoly that regulates itself; sets its own rates without actual oversight; incurs operational, managerial, and administrative deficiencies whose actual cost, at the end of the day, is borne directly by customers; and whose governance lacks transparency and citizen participation.”¹⁵ In addition, the Act directs “PREPA [to] prepare an integrated resource plan, which requires a detailed planning process with broad citizen participation.”¹⁶ The IRP is

¹⁴ Policy Statement on Public Participation, Intervenors, and Amici Curiae at 2.

¹⁵ Act 57-2014, Puerto Rico Energy Transformation and RELIEF Act (“Energy Transformation Act”) at Statement of Motives, pdf p. 4.

¹⁶ *Id.* at 5.

not merely the narrative that PREPA and/or its contractors write. It is also the analysis and decision-making that underpin that narrative. The Bureau cannot comply with its legal mandate if it restricts the ability of stakeholders to fully participate in this IRP. Denying access to wide portions of the modeling data that underpins the IRP would therefore be contrary to the transparency and citizen participation that Act 57-2014 intended.

II. The Energy Bureau has expanded the commitment to transparency since the last Integrated Resource Plan process, allowing the public to access information before intervention is granted.

Through Regulation No. 9021, the Energy Bureau removed a clause from the Integrated Resource Plan regulation, which previously mandated that “no petitioner shall be entitled to confidential information from PREPA until its petition to intervene has been granted by the Commission,” Regulation No. 8594, Section 3.02(C), Regulation No. 9021, Section 3.03. Freed from that prohibition, the Energy Bureau may now allow interested members of the public to obtain confidential information prior to the grant of intervention.

Although Local Environmental Organizations plan to seek formal intervention once the Energy Bureau has opened this docket to Motions to Intervene, interested members of the public require immediate access to many of the items that PREPA is currently withholding, in order to meaningfully participate in the process, especially the entire database of inputs to the modeling software.¹⁷ As PREPA and the Energy Bureau well know, modeling takes a great deal of time and effort; the Energy Bureau has granted PREPA numerous time extensions to complete this work. The public similarly deserves a fair chance to prepare their models and evaluations, and to critique PREPA’s modeling. Delaying future intervenors access to crucial information until the Energy Bureau has opened the proceedings to intervention would needlessly impair the ability of

¹⁷ And if PREPA updates or revises any inputs or settings, then PREPA must immediately provide those revisions to the public.

the public to fully participate, in contravention of the stated goals of the Energy Transformation Act, as well as the Energy Bureau's own regulations/orders.¹⁸

III. PREPA's withholding request fails to meet federal standards for withholding Critical Energy Infrastructure Information and is grossly overbroad by Puerto Rico's standards.

PREPA's request for a blanket designation of documents as Critical Energy Infrastructure Information does not address the applicable federal or Puerto Rico law. Those laws do not allow a utility to unilaterally decide to withhold entire documents from the public without explanation; rather they only authorize the government to allow limited withholding in certain "exceptional cases" and after extensive justification by the utility, which has not been provided here.

A. PREPA ignores the applicable federal regulations on Critical Energy Infrastructure Information.

PREPA acknowledges that Critical Energy/Electric Infrastructure Information (CEII), 18 C.F.R. § 388.113 (2017), is the controlling federal regulation, but fails to address this law. 18 C.F.R. § 388.113 defines Critical Energy Infrastructure Information and the procedure for the government to determine what constitutes Critical Energy Infrastructure Information. That definition does not allow a utility to unilaterally issue a blanket designation of all modeling files as Critical Energy Infrastructure Information:

- Critical energy infrastructure information means *specific* engineering, vulnerability, or *detailed* design information about proposed or existing critical infrastructure that:
- i. Relates details about the production, generation, transportation, transmission, or distribution of energy;
 - ii. Could be useful to a person in planning an attack on critical infrastructure;
 - iii. Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; *and*
 - iv. Does not simply give the general location of the critical infrastructure.

¹⁸ See, e.g., 22 L.P.R.A. §§ 1051(o), 1054b(cc), 1051a(ff), 1051a(hh); Policy Statement on Public Participation, Intervenors, and Amici Curiae at 2.

18 C.F.R. § 388.113(c)(2) (emphasis added). The procedures for determining what constitutes Critical Energy Infrastructure Information, at 18 C.F.R. § 388.113, make it clear that only FERC has the authority to make the determination as to what constitutes Critical Energy Infrastructure Information under this regulation, in response to a utility's request. PREPA has not made any such request.

Ignoring 18 C.F.R. § 388.113 completely, PREPA instead relies on FERC Form No. 715, Annual Transmission Planning and Evaluation Report, 18 C.F.R. § 141.300 (2003). This regulation is irrelevant to whether PREPA's IRP files can be withheld as Critical Energy Infrastructure Information.¹⁹ 18 C.F.R. § 141.300 requires utilities to submit a report to FERC each year. Anticipating that some of the information required by the report may be Critical Energy Infrastructure Information, the report directs utilities to comply with 18 C.F.R. § 388.113, which defines Critical Energy Infrastructure Information and outlines the procedures for dealing with Critical Energy Infrastructure Information. As detailed above, PREPA's motion fails to address 18 C.F.R. § 388.113.

B. PREPA ignores the applicable Puerto Rico law on Critical Energy Infrastructure Information, which limits that designation to seven specific documents.

Any request to withhold documents as Critical Energy Infrastructure Information must address the controlling Puerto Rico law: Regulation No. 9021, Section 2.03(J). PREPA ignores this directly applicable regulation, which recognizes that only seven specific portions of the Integrated Resource Plan submission can be withheld as Critical Energy Infrastructure Information:

¹⁹ PREPA's Verified Motion for Confidential Treatment of Portions of its Integrated Resource Plan Filing at 4. PREPA also misquotes 18 C.F.R. § 141.300(d) as stating that FERC "considers the information collected by this report to be Critical Energy Infrastructure Information (CEII) and will treat it as such." *Id.* That statement appears nowhere in the regulation.

- (1)(a)(iii): a schematic map of the transmission and subtransmission network.
- (1)(a)(iv): a map of transmission and subtransmission lines.
- (1)(b)(i)(C): a *portion* of the load flow or other system analysis of the utility’s distribution system performance.²⁰
- (1)(d)(vi)(A): descriptions and transcription diagrams of the base case load flow studies.
- (1)(d)(xii): a one-line diagram of the transmission network.
- (2)(b): System Stability Analysis.
- (2)(c): identification of thermal and voltage reliability issues in the transmission and distribution systems.

The Energy Bureau spent time and effort carefully considering whether each part of an Integrated Resource Plan submission could be Critical Energy Infrastructure Information and chose these seven specific items as the “exceptional cases” to be withheld from the public.²¹ The Energy Bureau’s decision to omit the rest of an Integrated Resource Plan submission from the Critical Energy Infrastructure Information designation clearly demonstrates that the Energy Bureau did not intend for any other part of the submission to be withheld from the public. We fully acknowledge that these seven specific portions of the Integrated Resource Plan submission are Critical Energy Infrastructure Information. However, through this Comment, Local Environmental Organizations ask that the Bureau open the remainder of the Integrated Resource Plan submission, especially the modeling input and output files, to the public.

IV. PREPA’s withholding request fails to comply with the Energy Bureau’s procedural requirements to withhold Trade Secret information, and fails to address applicable Puerto Rico law on Trade Secret designation.

As detailed above, Puerto Ricans have a constitutional right to information possessed by PREPA²², and a statutory right to the information underlying the Integrated Resource Plan.²³ To protect these rights, the Legislature limited PREPA’s authority to withhold documents as Trade

²⁰ This regulation requires PREPA to identify the specific portion that is CEII.

²¹ 22 L.P.R.A. § 1054n(a), (c).

²² *Davila*, 82 D.P.R. at 281 n.9.

²³ Act 57-2014, Energy Transformation Act (codified at 22 L.P.R.A §§ 1051–1056).

Secrets, and the Energy Bureau created a rigorous procedure for PREPA to justify each such designation. PREPA has failed to address applicable Puerto Rico law and ignored the Energy Bureau's procedure.

To the extent PREPA has a good faith belief that documents or data within its filings qualify for Trade Secret treatment, then PREPA must follow the Energy Bureau's procedure and justify that belief with specific reasoning and documentation.²⁴

A. PREPA fails to address relevant Puerto Rico law on Trade Secret designations.

PREPA's Memorandum of Law relies entirely on Act 80-2011, but fails to address the more recent Puerto Rico law on Trade Secret designations, in Act 57-2014, the Energy Transformation Act:

In accordance with the public policy established in § 1051(o) of this title, every information, data, statistics, reports, plans, and documents received and disclosed by any of the entities created under this chapter, PREPA, and every electric power company shall be subject to the following principles *data produced by employees, officials, or contractors* working for the Commonwealth of Puerto Rico shall not be subject to any copyright, patents, trademarks, or trade secret.

22 L.P.R.A. § 1051b (emphasis added). Act 57-2014 permits only "[r]easonable restrictions based on doctrines of privacy, security, and evidentiary privileges" which "shall not be . . . broader than . . . required." *Id.* § 1051b(a)(4), (7).

PREPA is a public agency of the Commonwealth of Puerto Rico.²⁵ PREPA must therefore square its Trade Secret withholding claims with 22 L.P.R.A. § 1051b, which states that the work, documents, and data produced by the Commonwealth (or contractors working for the Commonwealth, like Siemens) are "not subject to . . . trade secret" claims. *Id.* § 1051b(7).

²⁴ Including documentation of the "reasonable security measures" that have been taken to protect each item, Act 80-2011, Section 4 (pdf pp. 5-6).

²⁵ 22 L.P.R.A. § 193(a) (creating PREPA and designating it a "public organization and governmental instrumentality of the Commonwealth of Puerto Rico").

B. PREPA failed to comply with the Energy Bureau's procedure for Trade Secret designations.

In its August 31, 2016 Order on Confidentiality in Docket CEPR-MI-2016-0009, the Energy Bureau set forth a specific process that PREPA must follow for each designation of information as a Trade Secret. The August 2016 Order makes it clear that Bureau and Bureau staff must have access to each and every document. In addition, the August 2016 Order requires that PREPA provide the reasons that each specific document meets the claimed designation, and documentation supporting the confidentiality claim.²⁶ So, if PREPA can demonstrate that any of its submissions are not exempted from the Trade Secret designation by 22 L.P.R.A. § 1051b, then PREPA must still provide each document to the Energy Bureau, along with all supporting justification and documentation required by the August 2016 Order. With these justifications in hand, the Energy Bureau should then solicit public comment on such Trade Secret claims before making a ruling on whether to grant each specific piece of information Trade Secret protection.

CONCLUSION

For the reasons detailed in this Comment, Local Environmental Organizations urge the Bureau to compel the release of public disclosure of all documents in this matter, other than the seven "exceptional cases" that the Bureau has recognized as Critical Energy Infrastructure Information.

Respectfully submitted,

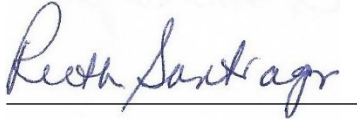


Raghu Murthy
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
T: 212-823-4991
E: rmurthy@earthjustice.org

²⁶ See Resolution on Confidentiality at 1–2, Aug. 31, 2016, No. CEPR-MI-206-0009.

/s/ Pedro Saadé Lloréns

Pedro Saadé Lloréns
RUA no. 4182
Condado 605 – Office 616
San Juan, PR 00907
T: 787-397-9993
E: pedrosaade5@gmail.com



Ruth Santiago
RUA no. 8589
Apartado 518
Salinas, PR 00751
T: 787-312-2223
F: 787-824-4368
E: rstgo2@gmail.com



Laura Arroyo
Puerto Rico Bar No. 16653
Earthjustice
4500 Biscayne Blvd. Ste 201
Miami, FL 33137
T: 305-440-5436
E: larroyo@earthjustice.org

/s/ Jordan Luebkekmann

Jordan Luebkekmann
Florida Bar. No. 1015603
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
T: 850-681-0031
E: jluebkekmann@earthjustice.org

*Counsel for Local Environmental
Organizations*

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on June 27, 2019, I have filed the above Comment with the Puerto Rico Energy Bureau in hard copy format at the office of the Clerk of the Puerto Rico Energy Bureau, at the Seaborne Building Plaza (old World Plaza Building), 268 Munoz Rivera Avenue, Plaza Level, Suite 202, San Juan, Puerto Rico, 00918; and further, at the approximately the same time, that courtesy copies of the Motion were sent via email to the Puerto Rico Energy Bureau via email to secretaria@energia.pr.gov and mcintron@energia.pr.gov, and to the office of the Energy Bureau's internal legal counsel via email to legal@energia.pr.gov and sugarte@energia.pr.gov.

/s/ Pedro Saadé Lloréns
Pedro Saadé Lloréns
RUA no. 4182
Condado 605 – Office 616
San Juan, PR 00907
T: 787-397-9993
E: pedrosaade5@gmail.com

/s/ Raghu Murthy
Raghu Murthy
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005
T: 212-823-4991
E: rmurthy@earthjustice.org

/s/ Ruth Santiago
Ruth Santiago
RUA no. 8589
Apartado 518
Salinas, PR 00751
T: 787-312-2223
F: 787-824-4368
E: rstgo2@gmail.com

/s/ Laura Arroyo
Laura Arroyo
Puerto Rico Bar No. 16653
Earthjustice
4500 Biscayne Blvd. Ste 201
Miami, FL 33137
T: 305-440-5436
E: larroyo@earthjustice.org

/s/ Jordan Luebke
Jordan Luebke
Florida Bar. No. 1015603
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
T: 850-681-0031
E: jluebke@earthjustice.org

*Counsel for Local Environmental
Organization*