

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

~~NEPR~~
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IN RE:

**PUERTO RICO ELECTRIC POWER
AUTHORITY PERMANENT RATE**

CASE NO.:
NEPR-MI-2020-0001

SUBJECT:
Request for Confidential Designation and
Treatment

**REQUEST FOR CONFIDENTIAL DESIGNATION OF ATTACHMENTS TO MOTION
TO SUBMIT RECONCILIATIONS FOR THE MONTHS OF DECEMBER 2019 TO
FEBRUARY 2020, PROPOSED FACTORS FOR THE QUARTER OF APRIL
TO JUNE 2020 AND PUBLIC LIGHTING REPAIR REPORT**

TO THE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority through the undersigned legal representation and respectfully sets forth and pray:

I. INTRODUCTION

Today, March 13, 2020, the Puerto Rico Electric Power Authority (PREPA) filed a *Motion to Submit Reconciliations for the Months of December 2019, January and February 2020, Proposed Factors for the Quarter of April to June 2020 and Public Lighting Repair Report* (the “Motion”).

The Motion includes several excel spreadsheets attachments. The excel spreadsheets in their native form have (1) formulas, calculations and procedures that are proprietary information of PREPA, that (2) should not be made public in their native for and (iii) are protected under Puerto Rico law. *See* exhibits A and B.

The Motion also includes a presentation that explains the financial situation of PREPA after the seismic events. *See* Exhibit D. The information included in this presentation is part of

PREPA's deliberative process and thus, is privileged. The presentation contains information of alternatives that PREPA is still considering and said information is not final.

I. MEMORANDUM OF LAW

The Puerto Rico Energy Transformation and RELIEF Act, as amended, Act No. 57-2014, § 6.15 establishes that any person having the obligation to submit information to the Energy Bureau can request privileged or confidential treatment of any Information which the submitting party believes to warrant such protection.

If the Energy Bureau, after the appropriate evaluation, believes such information should be protected, 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. *Id.*

In the exercise of its faculties and powers granted by Act 57-2014, the Energy Bureau approved Regulation 8543. Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings ("Regulation 8543"). Regulation 8543 also includes a provision regarding the safeguards that the Energy Bureau gives to confidential information. The regulation provides that:

If in compliance with the provisions of [Regulation 8543] or any of the Energy Bureau's orders, a person has the duty to disclose to the Energy Bureau information considered to be privileged pursuant to the Rules of Evidence, said person shall identify the allegedly privileged information, request the Energy Bureau the protection of said information, and provide supportive arguments, in writing, for a claim of information of privileged nature. The Energy Bureau shall evaluate the petition and, if it understands the material merits protection, proceed according to what is set forth in Article 6.15 of Act No. 57-2014, as amended.

Regulation 8543, § 1.15.- Confidential Information

a. Trade Secrets

Exhibits A and B to the Motion contain information that qualifies as proprietary and includes trade secrets (*i.e.*, confidential and other protected information) which is protected under Puerto Rico law.¹ The Energy Bureau's regulations specifically provide for the designation of such information as Confidential.²

The *Industrial and Trade Secret Protection Act of Puerto Rico* ("Act 80-2011")³ defines a trade secret as any information that:

has a present or a potential independent financial value or that provides a business advantage, insofar as such information is not common knowledge or readily accessible through proper means by persons who could make a monetary profit from the use or disclosure of such information; and [f]or which reasonable security measures have been taken, as circumstances dictate, to maintain its confidentiality.

10 L.P.R.A. § 4132

Trade secrets may take a variety of forms, including a process to manufacture, treat or preserve materials, a formula or recipe, a project or pattern to develop machinery, or simply a list of specialized clients that constitute a specific market which provides the owner with an advantage over his/her competitors. These examples are not exhaustive, however, and the Legislative Assembly has acknowledged in Act 80-2011's Statement of Motives, the broad definition of a trade secret includes "any confidential information with trade or industrial value, which its owner reasonably protects to prevent its disclosure." In Puerto Rico, moreover, trade secrets "do not

¹ See *Industrial and Trade Secret Protection Act of Puerto Rico*, as amended, Act No. 80-2011; see also Puerto Rico Energy Transformation and RELIEF Act, as amended, Act No. 57-2014, § 6.15 (establishing that any person having the obligation to submit information to the Energy Bureau can request privileged or confidential treatment of any Information which the submitting party believes to warrant such protection).

² Regulation 8815, § 10.2 (recognizing appropriateness of according proprietary information and trade secrets Confidential treatment); *cf* Regulation 8594, § 1.15 (providing for designation of information submitted in support of an IRP as Confidential).

³ 10 L.P.R.A. § 4131, *et seq.*

require registration or compliance with any formalities in order to be protected." *Id.*

As the Legislative Assembly has noted, "failure to protect trade secrets could leave companies at the mercy of any competitor or former employee who gains knowledge of any such secret, whether directly from the owner or by other means." *Id.*

PREPA, as a public body whose costs are ultimately borne by citizens of Puerto Rico, has a strong interest in protecting its trade secrets. The information included in Motion to Submit attachments is proprietary, commercially sensitive and qualifies as trade secrets. The disclosure of this information could place PREPA in a competitively disadvantageous position in dealing with potential proponents, ultimately harming customers.

b. Deliberative Process Privilege

In support of the confidentiality designation, PREPA maintains that the document identified as Exhibit D to the Motion is not a public document since its presently a draft and the information contained in them are part of a deliberative process that is still ongoing.

The Electric Power Authority's Regulation No. 6285 from January 10, 2001 known as Regulation for the Document Administration Program of the Electric Power Authority ("Regulation 6285"), which has the force of law, regulates the administration of documents of PREPA and indicates in §V the categories of documents that can be designated as confidential. According to Regulation 6285, and in relation to this case, the following documents are confidential: (16) Information declared confidential and exempt from disclosure by law and by regulations approved under its protection.

By law, then, PREPA may claim as privileged and confidential those documents in a deliberative process, information on ongoing internal investigations and those documents that are still in draft form and therefore are not yet public.

Exhibits D can be categorized as a draft in a deliberative process not yet final, that should be granted confidential treatment by the Energy Bureau.

As a matter of example, in case *Eduardo Bhatía Gauthier v. Hon. Ricardo Rosselló*, 199 DPR 59 (2017) Associate Justice Mr. Kolthoff-Caraballo issued an Opinion in conformity that expressed the following:

The People's right to know, which emanates from the First Amendment of the federal Constitution and our Bill of Rights as the cornerstone of our democracy, does not include and cannot include - under the parameters of common sense and justice - the draft of what in a moment could become a public document. The case file clearly shows the fact that the document in controversy is a draft. That is, a document that is not final, because there is still the possibility for it to be modified before being notified to its addressee.

In other instances, the Supreme Court of Puerto Rico has had the opportunity to evaluate the scope of the public nature of a document. As an example, in the case of *Pueblo v. Tribunal Superior.*, 96 DPR 746 (1968), the Supreme Court of Puerto Rico had before it a controversy about the special nature of those documents that are prepared and circulated in the course labor for internal purposes of the governmental entity. There the Supreme Court ruled that, in light of Art. 1170 of the Civil Code, *supra*, “a report, memorandum or document pre-prepared by an employee or officer in the exercise of his/her position or employment for a superior or for internal purposes of the decisions and actions of the department are not public documents that, pursuant to Art. 47 of the Law of Evidence, every citizen has the right to inspect.” (Current Rule 611 of the Evidence Law of 2009). *Bhatia v. Governor*, *supra*, p. 102.

The determination in that case was based on reasons of public order and the implications that resolving the contrary could have on the effective functioning of the Government. Specifically, it was indicated that “[for] reasons of public order; because this would affect the effective operation of the government and would prevent officials from acting with complete freedom and integrity,

without fear or inhibition in the preparation of reports, memoranda or other expressions or communications in the course of their duties, for departmental purposes, we must conclude that the Report concerned here, as such, is not subject to inspection under Rule 95 as a “document” or “paper” obtained by El Pueblo, from another person. ”

The Puerto Rico Department of Justice has emphasized that “the right of inspection guaranteed by the Law of Evidence does not extend to the notes, memoranda and correspondence of governmental officers, that are produced incidentally to the administration of office matters, or to that information that is of confidential nature, disclosure of which could entail the prejudice of the good operation of the agency that possesses it.” Op. Sec. Just. No. 46 of September 14, 1966, page 226.

Exhibit D contains information that is not in a final form and is still in the deliberative process.

WHEREFORE, PREPA respectfully requests the Energy Bureau to grant confidential designation to exhibits A, B and D to the Motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of March 2020.

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EXHIBIT A

Reconciliations for the months of December 2019 to February 2020

[The native form of this exhibit has been filed under seal in a Share Point file.]

EXHIBIT B

Proposed Factors for the quarter of April to June 2020

[The native form of this exhibit has been filed under seal in a Share Point file.]

Exhibit D

Presentation related to the impact of January 2020 seismic events

[This exhibit has been filed under seal in a Share Point file.]