

**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 MARCH
AND APRIL 2020 AND RECALCULATION OF PROPOSED RIDER FACTORS**

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, May 15, 2020, PREPA¹ filed *Motion to Submit Reconciliations for the Months of March and April 2020 and Recalculation of Proposed Rider Factors* (the “Motion”). The Motion includes several attachments in *.xls* format in native form. These 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 form and (iii) are protected under Puerto Rico law.²

The Motion also includes draft internal calculations currently used by PREPA for the purpose of deliberating on the appropriate process to request reimbursement from FEMA and insurance carriers for the expenses incurred in the operation of the peaking units used to substitute

¹ Capitalized terms not defined herein shall be ascribed the same meaning provided in the Motion.

² See Motion at exhibits A and B.

Costa Sur’s generation. The calculations are not final and are currently being used as part of the deliberative process. Therefore, the calculations submitted in the spreadsheets are privileged.³

II. MEMORANDUM OF LAW

Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, Act No. 57 of 2014, as amended (“Act 57-2014”), provides that “any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]”⁴ “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.”⁵ If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.”⁶ “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.”⁷

Pursuant to its vested powers, , the Energy Bureau approved the *Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings* (the “Regulation 8543”). Regarding the safeguards that the Energy Bureau gives to confidential information, Regulation 8543 provides that:

³ See Exhibit D of the Motion.

⁴ 9 L.P.R.A § 1054n.

⁵ *Id.* at § 1054n(a).

⁶ *Id.* at § 1054n(c).

⁷ *Id.* at § 1054n(d).

[i]f 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.⁸

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.⁹ Regulation 8543 specifically provides for the designation of such information as confidential.¹⁰

The *Industrial and Trade Secret Protection Act of Puerto Rico* (“Act 80-2011”)¹¹ 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 y measures have been taken, as circumstances dictate, to maintain its confidentiality.¹²

⁸ Regulation 8543 at sec. 1.15.

⁹ See *Industrial and Trade Secret Protection Act of Puerto Rico*, as amended, Act No. 80-2011; see Act No. 57-2014, art. 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).

¹⁰ Regulation 8543 at sec. 1.15 (recognizing appropriateness of according proprietary information and trade secrets Confidential treatment); *cf.* Regulation 9021, *Regulation on Integrated Resource Plan for the Puerto Rico Electric Power Authority* duly recorded in the Puerto Rice Department of State on April 24, 2018, 1.15 (providing for designation of information submitted in support of an integrated resource plan as confidential).

¹¹ 10 L.P.R.A. § 4131, *et seq.*

¹² 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 its competitors.¹³ 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."¹⁴ In Puerto Rico, moreover, trade secrets "do not require registration or compliance with any formalities in order to be protected."¹⁵

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."¹⁶

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.¹⁷ Therefore, PREPA requests the Energy Bureau to grant confidential designation to exhibits A and B of the Motion to Submit.

b. Deliberative Process Privilege

Exhibit D includes confidential internal draft calculations made by PREPA to evaluate the

¹³ Act 80-2011 at Statement of Motives.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ On April 7, 2020, the Energy Bureau entered a *Resolution and Order* granting confidential designation to spreadsheets similar to exhibits A and B of the Motion to Submit.

requests for reimbursement of the expenses incurred in operating the peaking units used to substitute Costa Sur's generation. These calculations are not final and are being used to deliberate on managements' decisions and are therefore considered privileged.¹⁸

The documents produced by PREPA are public. However, access to public information is not absolute and there are various exemptions for the access of public information.¹⁹ These exemptions are:

(a) a law so declares; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is 'official information' pursuant to Rule 514 of Evidence, 2009, 32 LPRA Ap. VI (formerly Rule 31 of Evidence 32 LPRA for. Ap. IV). *Colon Cabrera v. Caribbean Petroleum, supra.*²⁰

A claim of confidentiality on the part of the government can prosper when the information is considered official privileged information, among others. *Colon Cabrera v. Caribbean Petroleum, supra; Santiago v. Bobb y El Mundo, Inc.*, 117 DPR 153 (1986). Rule 514 of Evidence, *supra*, establishes the privilege of official information in our system.²¹ Among the fundamental categories of privileged official information is the one used by public officers during the deliberative process related to the ongoing development of public policy.²²

Restricting the access to information used during the deliberative procedures "protects against *premature disclosure* of proposed policies and decisions before they have been finally formulated or adopted."²³

¹⁸ See Exhibit D of the Motion.

¹⁹ *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017).

²⁰ *Id.* at 83.

²¹ *Id.*

²² *Id.* at 86.

²³ *Id.* at 87.

PREPA's Regulation No. 6285 from January 10, 2001, known as *Regulation for the Document Administration Program of the Electric Power Authority* ("Regulation 6285")²⁴, regulates PREPA's administration of documents and defines which categories of documents are considered confidential. Pursuant to Regulation 6285, information related to the deliberative process used to implement public policy is confidential.²⁵

As previously stated, Exhibit D includes confidential internal draft calculations made by PREPA to evaluate the requests for reimbursement of the expenses incurred by PREPA in the operation of the peaking units currently used to substitute Costa Sur's generation. These calculations are not final and are being used by management to deliberate on future decisions and therefore are considered privileged. Consequently the Energy Bureau should maintain them under seal.²⁶

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

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15th day of May 2020.

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²⁴ Duly recorded in the Puerto Rico Department of State on January 11, 2011.

²⁵ Regulation 6285, Sec. V (16).

²⁶ See Exhibit D of the Motion.

Exhibit A to the Motion

Reconciliations for the months of March and April 2020

[*The native form of this exhibit has been filed under seal in a Share Point file and the public version can be downloaded at https://diazvaz-my.sharepoint.com/:f:/g/personal/kbolanos_diazvaz_law/EuKZiOuXqNNFhDnV1AIAEcMBBfPvFsH3fzoHDRdPwwqt0A?e=34tMVq*]

Exhibit B to the Motion

Proposed factors for remaining billing cycles of the quarter

[*The native form of this exhibit has been filed under seal in a Share Point file and the public version can be downloaded at https://diazvaz-my.sharepoint.com/:f:/g/personal/kbolanos_diazvaz_law/EuKZiOuXqNNFhDnV1AIAEcMBBfPvFsH3fzoHDRdPwwqt0A?e=34tMVq.*]

Exhibit D to the Motion

Deferment calculation

[This exhibit has been filed under seal.]