

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

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IN RE: IMPLEMENTATION OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY INTEGRATED RESOURCE
PLAN AND MODIFIED ACTION PLAN

CASE NO.: NEPR-MI-2020-0012

SUBJECT: Draft Procurement Plan

**REQUEST FOR CONFIDENTIAL DESIGNATION
AND SUPPORTING MEMORANDUM OF LAW**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority through the undersigned legal representation and respectfully submits and requests as follows:

I. INTRODUCTION

Yesterday, the Authority¹ submitted a *Motion in Compliance with Order Submitting Final Procurement Plan and Associated Request for Proposal* (the “Motion”). The Motion was accompanied by several appendixes submitted in compliance with the Order that were submitted under seal. In compliance with Regulation 8543,² the Authority herein submits a memorandum of law setting forth the legal basis in support of its argument that the information attached to the Motion contains confidential information and must remain under seal.

II. REQUEST FOR CONFIDENTIAL DESIGNATION

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

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

² Energy Bureau, *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures*, No. 8543, (December 18, 2014) (“Regulation 8543”).

confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]”³ “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.”⁴ 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.”⁵ “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.”⁶

Pursuant to its vested powers, the Energy Bureau approved the Regulation 8543. Regarding the safeguards that the Energy Bureau gives to confidential information, Regulation 8543 provides that:

[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.⁷

The Appendixes to the Motion contain information that qualifies as proprietary and includes trade secrets (*i.e.*, confidential and other protected information) which is protected under

³ 9 L.P.R.A § 1054n.

⁴ *Id.*, § 1054n(a).

⁵ *Id.*, § 1054n(c).

⁶ *Id.*, § 1054n(d).

⁷ Regulation 8543, Sec. 1.15.

Puerto Rico law.⁸ Regulation 8543 specifically provides for the designation of such information as confidential.⁹ Further, the information included in the appendixes are drafts that, when final, will be part of competitive procurement processes and, if publicly disclosed now, will provide a competitive advantage to some parties, which will disrupt the competitive process and therefore, affect the Authority and the customers.

a. Trade Secrets

The *Industrial and Trade Secret Protection Act of Puerto Rico* (“Act 80-2011”)¹⁰ 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.¹¹

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.¹² 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

⁸ 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).

⁹ Regulation 8543, Sec. 1.15 (recognizing appropriateness of according proprietary information and trade secrets Confidential treatment); cf. Energy Bureau, *Regulation on Integrated Resource Plan for the Puerto Rico Electric Power Authority*, No. 9021, (April 24, 2018), Sec. 1.15 (providing for designation of information submitted in support of an integrated resource plan as confidential).

¹⁰ 10 L.P.R.A. § 4131, *et seq.*

¹¹ 10 L.P.R.A. § 4132

¹² Act 80-2011, *Statement of Motives*.

includes "any confidential information with trade or industrial value, which its owner reasonably protects to prevent its disclosure."¹³ In Puerto Rico, moreover, trade secrets "do not require registration or compliance with any formalities in order to be protected."¹⁴

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."¹⁵

The Authority, 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 the appendixes is proprietary, commercially sensitive and qualifies as trade secrets. The disclosure of this information could place the Authority in a competitively disadvantageous position in dealing with potential proponents, ultimately harming customers. Therefore, the Authority herein requests the Energy Bureau to determine that the appendixes contain confidential trade secrets of the Authority and thus will remain under seal.

b. Critical Energy Infrastructure Information

Federal and Puerto Rico law and Energy Bureau include multiple provisions and recognitions of critical energy infrastructure information (CEII). The appendixes to the Motion include CEII.

Federal and Puerto Rico law protect the confidentiality of CEII, the public disclosure of which may pose a security threat in that the information could be useful to a person or group in planning an attack on critical infrastructure. *See, e.g.*, 18 C.F.R. § 388.113, as amended by Federal Energy Regulatory Commission (FERC) Order No. 683, *Critical Energy Infrastructure*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Information (issued September 21, 2006); *USA Patriot Act of 2001*, § 1016, creating the *Critical Infrastructures Protection Act of 2001*, including 42 U.S.C. § 5195c(e) (defining Critical infrastructure).

Under the Critical Infrastructures Protection Act of 2001, the term “critical infrastructure” means “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.” 42 U.S.C. § 5195c(e).

In 2006, FERC Order no. 683 amended the regulations for gaining access to CEII and simplified procedures for obtaining access to CEII without increasing vulnerability of the energy infrastructure and ensuring that access to CEII does not facilitate acts of terrorism.

A utility is not required to obtain FERC or other federal government approval in order to designate information as CEII. For example, information required by FERC’s Annual Transmission Planning and Evaluation Report, Form No. 715, (“FERC No. 715”), is *de facto* considered CEII and is automatically afforded the heightened protections. FERC No. 715 requires that any transmitting utility that operates integrated (non-radial) transmission facilities at or above 100 kV must annually submit information including but not limited to: Power Flow Base Cases, Transmitting Utility Maps and Diagrams, Transmission Planning Reliability Criteria, Transmission Planning Assessment Practices, and Evaluation of Transmission System Performance. Any utility that submits the required transmission information pursuant to FERC No. 715 does so with the knowledge that, as stated in the Form’s Instructions, FERC “considers the information collected by this report to be Critical Energy Infrastructure Information (CEII) and will treat it as such.” *See also* 18 C.F.R. § 141.300(d) relating to the Form and CEII.

The Authority further states that mainland regulators typically do not require a utility that designates material as CEII to follow any process before the federal government in order to make or support such a designation, and, further, that the regulator, in its informed discretion, can establish limits on how information that it considers CEII can be accessed.

The Energy Bureau, on numerous occasions in prior dockets has accepted the Authority's designations of material as CEII, recognizing that both federal law and Puerto Rico law support such designations when applicable. Wherefore, it is respectfully requested that the appendixes are designated as confidential and the Energy Bureau orders they remain under seal to protect the Authority's CEII.

c. Administrative Competitive Procurement Process

The appendixes are part of a draft request for proposal that will be soon opened to the public for competitive processes. Publishing these documents now would give an unfair advantage to potential proponents. Moreover, the attached appendixes are still draft forms subject to the Energy Bureau's approval and therefore, are communications leading to a competitive procurement process, that, if disclosed at this time, would disrupt the future proceedings.

III. CONCLUSION

Wherefore, the Authority respectfully requests the Energy Bureau to find that the appendixes to the Motion are confidential and order that they remain under seal.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23rd day of December 2020.

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