

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

NEPR

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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

**MOTION IN COMPLIANCE WITH ORDER SUBMITTING RENEWABLES RFP
PACKAGE WITH MODIFICATIONS REQUESTED BY THE FINANCIAL
OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO AND DRAFT
COMMUNICATIONS**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority (“PREPA”) through the undersigned legal representation and respectfully submits and requests as follows:

1. On February 3, 2021 the Puerto Rico Energy Bureau for the Public Service Regulatory Board (“Energy Bureau”) entered Resolution and Order (“Order”) regarding the “*Modifications to RFP required by the Financial Oversight & Management Board for Puerto Rico*”.
2. The Order was in response to PREPA’s “*Motion Submitting Letter from the Financial Oversight & Management Board for Puerto Rico Regarding Procurement Plan and Renewables RFP Recommendations*” (“Motion Submitting the Oversight Board’s Letter”) in which PREPA informed the Energy Bureau that it would incorporate comments and recommendations suggested by the Oversight Board’s from letter sent on January 29, 2021.
3. On February 3, 2021, in response, the Energy Bureau stated that “[it] did not construe the recommendations included in the Letter as an impediment to comply with the January 26, 2021 Resolution and the RFP timeline, as established by the Energy Bureau.”

4. In furtherance of that Order, the Energy Bureau ordered PREPA to file the following:
 1. A copy of the RFP package with the modifications requested by the FOMB, on or before February 5, 2021.
 2. A list of the renewable energy projects PREPA will choose to acquire 150 MW from amongst the 16 proposed projects⁶ for which PREPA had requested and later withdrew petitions for the Energy Bureau's approval to execute the corresponding Power Purchase and Operation Agreements ("PPOAs"). Said list shall be submitted by PREPA on or before February 9, 2021. PREPA shall include in its filing a timeline for the filing of the draft PPOAs for the Energy Bureau's evaluation and approval.
 3. As part of the procurement process (i.e., in parallel with the RFP's issuance and evaluation process), a detailed plan to address and solve any potential longer-term renewable energy penetration issues on or before April 1, 2021. The mentioned plan shall include a detailed description of the work required and a timeline, to timely achieve compliance with the Approved Integrated Resources Plan, the Modified Action Plan⁷ and the applicable Puerto Rico Renewable Portfolio Standards.
 4. Draft copies of any communications, documents, and/or plans intended to comply with the recommendations included in the Letter prior to their filing with the FOMB.
5. In compliance with the February 3, 2021 Order PREPA hereby files 1) copy of the RFP package with the modifications requested by the Oversight Board as well as 2) draft communication PREPA intends to submit to the Oversight Board regarding compliance with the recommendations presented by the Oversight Board.
6. In furtherance of this filing, PREPA hereby incorporates by reference the "*Request for Confidential Designation and Supporting Memorandum of Law*" filed on December 23, 2020 whereby PREPA requested that the Energy Bureau grant confidential designation and treatment of certain documents including the draft RFP and its annexes. The Energy Bureau granted partial confidential designation and treatment to redacted versions of the documents by Resolution and Order dated January 7, 2021. Given that the copy of the RFP package with the modifications requested by the Oversight Board submitted today are amended versions of the December 22, 2020 filings, the same confidential designation

and treatment to the redacted versions apply.

7. As to the attached draft communications PREPA intends to submit to the Oversight Board, PREPA requests that they be treated as confidential as they are part of PREPA's still ongoing deliberative process, the information on it is not final, and include the approach and discussion of matters highlighted by the FOMB concerning the RFP and the Procurement Plan (PP).
8. 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[.]"¹ "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."² 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."³ "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."⁴
9. Exhibit B includes a draft version of a communication that is intended to inform the

¹ 9 L.P.R.A § 1054n.

² *Id.* at § 1054n(a).

³ *Id.* at § 1054n(c).

⁴ *Id.* at § 1054n(d).

Oversight Board how PREPA will integrate the comments and recommendations suggested on letter sent on January 27, 2021. This draft is not yet final and is being used to deliberate on managements' decisions and are therefore considered privileged.⁵

10. Access to public information is not absolute and there are various exemptions for the access of public information.⁶ 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.*⁷

11. 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.⁸ 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.⁹

12. 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."¹⁰

⁵ See Exhibit B of the Motion.

⁶ *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017).

⁷ *Id.* at 83.

⁸ *Id.*

⁹ *Id.* at 86.

¹⁰ *Id.* at 87.

13. PREPA's Regulation No. 6285 from January 10, 2001, known as *Regulation for the Document Administration Program of the Electric Power Authority* ("Regulation 6285")¹¹, 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.¹²
14. Pursuant to the above, PREPA requests Exhibit B to be classified as Confidential as it is part of PREPA's still ongoing deliberative process, the information on it is not final, and include the approach and discussion of sensitive matters highlighted by the FOMB concerning the RFP and the Procurement Plan (PP). Therefore, the content in the draft comply with the exception of the public information confidentiality according to the Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, Act No. 57 of 2014, as amended ("Act 57-2014"), PREPA's Regulation No. 6285 from January 10, 2001, known as *Regulation for the Document Administration Program of the Electric Power Authority* ("Regulation 6285")¹³, and the jurisprudence of the Supreme Court of Puerto Rico¹⁴. Consequently, the Energy Bureau should maintain it under seal.¹⁵

WHEREFORE, in compliance with order, PREPA SUBMITS copy of the RFP package with the modifications requested by the Oversight Board as well as draft letter PREPA intends to send to the Oversight Board regarding recommendations to the Procurement Plan and RFP and request that it be designated as confidential.

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

¹² Regulation 6285, Sec. V (16).

¹³ Duly recorded in the Puerto Rico Department of State on January 11, 2011.

¹⁴ See *Bhatia Gautier v. Gobernador*, 199 DPR 59, 83 (2017); *Colón Cabrera v. Caribbean Petroleum*, 178 DPR 582, 591 (2007), and *Santiago v. Bobb y El Mundo, Inc.*, 117 DPR 153 (1986).

¹⁵ See Exhibit B of the Motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 5th day of February 2021.

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Exhibit A to the Motion

RFP Package with Oversight Board Recommendations

https://diazvaz-my.sharepoint.com/:f:/g/personal/kbolanos_diazvaz_law/EkTtokvSbVJNgx8-VFGvg14BFgDi_0_kHZnMnYBtG4DPoQ?e=Njqho6

Exhibit B to the Motion

Draft Letter to Oversight Board Regarding RFP with Oversight Board Recommendations