

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

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CASE NO.: NEPR-MI-2021-0004

IN RE: REVIEW OF LUMA’S INITIAL BUDGETS

SUBJECT: Memorandum of Law in Support of Request for Confidentiality of Documents Submitted Under Seal with the November 1 Motion

MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR CONFIDENTIALITY OF DOCUMENTS SUBMITTED UNDER SEAL WITH THE NOVEMBER 1 MOTION

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority (PREPA), through its counsel of record, and respectfully submits and prays as follows:

I. INTRODUCTION

On August 25, 2022, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (“Energy Bureau”) entered a *Resolution and Order* (“August 25 Order”) amending the procedural calendar followed in the case of caption and scheduling a virtual technical conference that would be held on September 13, 2022 (“September 13 Technical Conference”), during which PREPA and LUMA Energy, LLC (“LUMA”) were to discuss the proposed FY2023 Annual Budgets. PREPA is responsible for preparing and administering the Generation and HoldCo/PREPA¹ budgets.

On October 18, 2022, after some procedural events, the Energy Bureau celebrated the continuation of the Technical Conference. At the end of the October 18 Virtual Technical Conference, the Energy Bureau entered several bench orders, some were directed to LUMA, and

¹ “HoldCo” is not a separate entity or subsidiary. HoldCo refers to PREPA’s future state after the completion of the reorganization and unbundling of certain functions, services, and activities.

others were directed to PREPA. The Energy Bureau ordered PREPA to provide additional information regarding two questions or topics:

- a. Is there a line item in the budget for LUMA to replenish certain emergency accounts?
- b. Permits to operate the Palo Seco MegaGens.

On November 1, 2022, in compliance with the bench orders, PREPA submitted a document titled *Motion in Compliance with Bench Order Entered During the October 18, 2022, Virtual Technical Conference*, including the responses and document production responsive to the Energy Bureau's directives ("November 1 Motion"). PREPA submitted Annex A-2(a) under seal to protect critical energy infrastructure information, global positioning system (GPS) and third-party rights of certain documents attached for the consideration of this Honorable Bureau with the November 1 Motion.

In compliance with the Resolution in the case *In Re: Policy on Handling Confidential Information in Proceedings before the Commission*, Case No.: NEPR-MI-2016-0009, as amended on September 20, 2016 ("PREB's Confidential Policy"), PREPA submits the present memorandum, which includes the legal basis supporting the confidentiality argument and the request for some documents in Annex A-2 (a) to remain under seal. However, after further analysis of the documents included in Annex A-2 (a), PREPA has determined to un-seal several and re-submit the documents described in Section II below in a redacted version. See, Exhibit A. The rest of the documents that were part of Annex A-2 (a) of the November 1 Motion are hereby submitted without any confidentiality claim. See, Exhibit B.

II. REQUEST FOR CONFIDENTIAL DESIGNATION AND TREATMENT

Annex A-2 (a) to the November 1 Motion must be declared confidential and remain sealed for containing global positioning system (GPS) coordinates of PREPA’s power plants, which is considered critical energy infrastructure information (CEII). Also, some documents included as part of Annex A-2 contain confidential business information (CBI) of PREPA’s contractors and protected rights claimed by third parties. Upon detailed analysis of the documents included as Annex A-2, PREPA has determined to redact the documents listed below instead of requesting the Energy Bureau to keep them sealed. PREPA moves the Energy Bureau to accept the redacted version of the documents included as Exhibit A and to maintain the unredacted versions filed with the November 1 Motion under seal.

The following is a detailed list of the information that PREPA requests the Energy Bureau to declare confidential:

FILE	CONFIDENTIAL INFORMATION	LEGAL BASIS
19084.1 MP Aero Palo Seco MPs Emissions Compliance Test Protocol_Rev 3	Privileged Material p. 3-41	CBI
19084.1 MP Aero Palo Seco MPs Emissions Compliance Test Protocol_Rev 6	Privileged Material p. 3-47	CBI
19084.1 MP Aero Palo Seco MPs Emissions Test Protocol_Rev 2	Privileged Material p. 3- 30	CBI
Contestación PREPA PS MobilePacs Solicitud de información DRNA PFE-70-0120-0010-II-CAC 03-03-2022	Site Plans p. 25-36, 79-80,	CEII
Palo Seco Gas Conversion PTC Application and Appendices (WITH ENG SEALS) 02082022 - REV2	Privileged Material p. 77-78, 141-145, 154-155	CBI

	Site Plans p. 79, 146, 150-151, 156, 169-185	CEII
PREPA Palo Seco MobilePac Combustion Turbines Emissions Performance Test Transmittal Letter and Report 09-08-2022 (002)	Privileged Material p. 4, 6-545	CEII CBI
PREPA Palo Seco Test Protocol Combustion Turbines Supplemental Information and Updated Protocol	Privileged Material p. 36-37 Site Plans 38	CBI CEII

III. MEMORANDUM OF LAW

Section 6 of *The Puerto Rico Electric Power Authority Act*² provides that "the Authority shall give continuous access to and make available to customers all public information about the Authority." However, access to such information is not unrestricted since not all information is public.

In Puerto Rico, the right of access to public information has been recognized as intimately tied to the freedom of speech, press and association, in accordance with Art. II, Sec. 4 of the Constitution of the Commonwealth. *Bhatia Gautier v. Governor*, 199 DPR 59, 82 (2017). Access to public information allows citizens to evaluate and scrutinize the public function while, in turn, giving rise to effective citizen participation in governmental processes - which gives way to and promotes transparency and sound public administration. *Bhatia* at p. 80.

² *The Puerto Rico Electric Power Authority Act*, Act No. 83 of May 2, 1941, 22 L.P.R.A §§ 191-240 (Act 83-1941").

In the same manner, Section 409 of the *Code of Civil Procedure of Puerto Rico* recognizes the right of every citizen to inspect and copy any public document of Puerto Rico. 32 LPRa sec. 1781 (2004). However, this right does not operate in a vacuum, and the document sought to be disclosed must enjoy, in effect, that public status. *Ortiz v. Dir. Adm. of the Courts*, 152 DPR 161 (2000). Our legal system defines the term "public document" as follows:

[A]ny document that is originated, retained, or received in any agency of the Commonwealth of Puerto Rico pursuant to law or in connection with the conduct of public affairs and that pursuant to the provisions of sec. 1002 of this title is caused to be retained [...] permanently or temporarily as evidence of transactions or for its legal value. Includes those produced in electronic form that comply with the requirements established by laws and regulations. (Translation added)

Sec. 3(b) of Act No. 5 of December 8, 1955, the *Puerto Rico Public Records Management Act*, as amended, 3 LPRa sec. 1001(b) (2011).

Now, "it is necessary that the document that is sought to be disclosed enjoys, in effect, that public status." *Bhatia* at p. 81; *Ortiz*, supra. Thus, the right to information is not absolute and will be subject to those limitations that, by compelling necessity, the State imposes. *Id.* The restrictions claimed by the State must be duly justified since access to public information cannot be denied capriciously and arbitrarily. *Colón Cabrera v. Caribbean Petroleum*, 170 DPR 582, 590 (2007). Likewise, case law has recognized that "such right is not absolute and ... yields in cases of imperative public interest." *Id.* at p. 93 (emphasis supplied).

Puerto Rico's Supreme Court has recognized the following grounds on which the State may validly claim the confidentiality of information in its possession: (1) when a law so declares; (2) when the communication is protected by one of the evidentiary privileges that citizens may invoke; (3) when revealing the information may harm the fundamental rights of third parties; (4) when it involves the identity of a confidant, and (5) it is "official information" pursuant to Evidence Rule 514 of 2009, 32 LPRa App. VI (formerly Evidence Rule 31, 32 LPRa ant. App. IV). *Bhatia*

at p. 83; *Colón* at p. 591. If any of the exceptions outlined above are met, the State bears the burden of proof to validate its claim of confidentiality. *Bhatia* at p. 83; *Colón, supra*.

Meanwhile, Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of 2014, as amended (“Act 57”),³ 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[.]” *Id.* at Sec. 6.15. “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.* at Sec. 6.15(a). 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.” *Id.* at Sec. 6.15(b). “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.” *Id.* at Sec. 6.15(c).

Pursuant to its vested powers, the Energy Bureau approved the *Regulation on Adjudicative, Notices of Compliance, Rate Review, and Investigations Proceedings* (“Regulation 8543”).⁴ 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

³ *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056.

⁴ Energy Bureau, *Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings*, No. 8543 (December 16, 2015).

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 at Sec. 1.15.

a. Critical Energy Infrastructure Information

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 CFR sec. 388.113, as amended by Federal Energy Regulatory Commission (FERC) Order No. 683, *Critical Energy Infrastructure Information* (issued September 21, 2006); USA Patriot Act of 2001, sec. 1016, creating the *Critical Infrastructures Protection Act of 2001*, including 42 USC sec. 5195c(e) (defining Critical Infrastructure). FERC regulations subject such information to limitations on use and disclosure to “ensure that information deemed CEII stays out of the possession of terrorists.” 18 CFR sec. 388.113(d)(4). *Off. of People's Counsel v. Pub. Serv. Comm'n.*, 21 A.3d 985, 991, Util. L. Rep. P 27157, 2011 WL 2473405 (D.C. App. 2011).

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 USC sec. 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 the 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 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 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 CEII and will treat it as such." *See also* 18 CFR § 141.300(d) relating to the Form and CEII. Mainland regulators typically do not require a utility that designates material as CEII to follow any process before the federal government to make or support such a designation. Further, the regulator, in its informed discretion, can establish limits on how information that it considers CEII can be accessed.

Furthermore, and regarding the foregoing argument, FERC has ruled on several occasions that GPS coordinates "qualify as CEII because it provides more than just location." *See, e.g.,* Final Rule, Docket Nos. RM02-4-000, PL02-1-000; Order No. 630, Note 31, entered on February 21, 2003 (ruling that FERC considered the global positioning system coordinates of any project features (precise surveyed or GPS coordinates at or above two decimal points of accuracy of equipment and structures) gas information to qualify as CEII because it provides more than just location).⁵ Also, this Energy Bureau, on numerous occasions in prior dockets, has accepted the

⁵ *Federal Register: March 3, 2003 (Volume 68, Number 41); Rules and Regulations, pp. 9857-9873.*

PREPA'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 redacted portions of the documents containing GPS information be designated as confidential and that the Energy Bureau orders they remain redacted and kept under seal to protect the PREPA's CEII.

b. Confidential Business Information

Section 6(m) of Act 83-1941 provides that:

[T]he Authority shall make available to its customers information on the electric infrastructure, including information on public and private generators, so that customers may evaluate the status of the electric infrastructure and of the Authority as a public instrumentality. The Authority's documents and information shall be made available to customers upon request, with the exception of (i) information that is privileged as provided in the Rules of Evidence; (ii) information related to the negotiation of collective bargaining agreements, labor disputes or personnel matters, such as appointments, evaluations, discipline and dismissal; (iii) ideas in connection with the negotiation of potential contracts of the Authority or with the determination to terminate or rescind existing contracts; (iv) information regarding strategy in litigation matters of the Authority; (v) information regarding internal investigations of the Authority while such investigations are ongoing; **(vi) intellectual property matters of third parties; (vii) business secrets of third parties;** (viii) matters required to be kept confidential by the Authority under any confidentiality agreement; or (ix) public safety matters relating to threats to the Authority, its property or its employees. (Translation added)

Section 4(b) of Act 83-1941 further provides that the Authority must publish all contracts. Still, it shall not disclose confidential information, such as, for example, information that constitutes trade secrets of the contractor.

Also, PREPA's *Regulations for the Documents Administration Program of the Puerto Rico Electric Power Authority*,⁶ which has the force of law, regulates the administration of documents

⁶ PREPA, *Regulations for the Documents Management Program of the Puerto Rico Electric Power Authority*, No. 6285 (February 9, 2001) (Regulation 6285").

of PREPA and states in its Section V the categories of documents that may be designated as confidential. According to Section V of Regulation 6285, PREPA must keep confidential any trade or business secret disclosed to PREPA by its owner, agent or employee when one invokes confidentiality, provided it does not tend to conceal fraud.

Rule 513 of the Rules of Evidence, 32 LPRA App. VI, R. 513, states the following:

The owner of a trade or business secret has the privilege - which may be invoked by him or her or by the person who is his or her agent or employee - to refuse to disclose it and to prevent another person from disclosing it, provided that it does not tend to conceal a fraud or cause an injustice. If disclosure is ordered, the Court shall take such measures as necessary to protect the interests of the trade secret owner, the parties and justice. (Translation added)

This rule of evidence recognizes the trade secret privilege. Its purpose is "to protect the free enterprise system by providing that trade secret owner may refuse to disclose, or prevent another from disclosing, important secrets about their trade or business, so long as it does not tend to conceal a fraud or cause a miscarriage of justice." Secretariat of the Judicial Conference, *Rules of Evidence Report*, 2007, p. 287. In essence, this privilege protects confidential business information. Its recognition is grounded in public policy considerations aimed at fostering innovation, commercial production and business operational improvement that, in turn, contribute to economic and technological development. P. F. Rothstein and S. W. Crump, *Federal Testimonial Privileges: Evidentiary Privileges Relating to Witnesses & Documents in Federal Cases* Sec. 9:1 (2012-2013 ed.).

For example, documents marked as containing CBI for MC Hale & Associates, Inc. Emissions Compliance Test Protocol includes third-party confidentiality claims as expressed in the following statement:

The information contained within this document is intended only for the person or entity to which it is addressed and may contain confidential and/or

privileged material. Any review, editing, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient, is prohibited.

As previously established, the Rules of Evidence recognize a privilege for business secrets and, in turn, both Act 83-1941 and Regulation 6285 expressly establish that a business secret claimed by a third party is an exception to what is considered a public document, a third-party claimed business secret imposes a duty on PREPA to keep the said document as confidential. Therefore, in compliance with its statutory obligation, the PREPA requests the Energy Bureau to redact the CBI information.

IV. CONCLUSION

PREPA respectfully submits that the redacted GPS information qualifies as CEII and should be granted the confidential designation. It also moves the Energy Bureau to determine that the redacted CBI is third-party confidential information, which, in turn, is privileged and, thus, should remain redacted. Furthermore, it is affirmed that the redactions made are in the manner that least impact the public interest, transparency, and the rights of the parties involved in this administrative procedure. *See*, Act 57-2014 at Sec. 6.15(a). Accordingly, and pursuant to the above, it is respectfully requested that the Honorable Energy Bureau find that the information identified by PREPA as CEII and CBI in Exhibit A is confidential and direct the Secretary of the Energy Bureau to maintain the unredacted version under seal.

WHEREFORE, PREPA respectfully requests that the Energy Bureau take note of the above and determine that the redacted information constitutes CEII and CBI and, therefore, privileged and confidential information.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 14th day of November 2022.

s/ Katuska Bolaños-Lugo
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CERTIFICATE OF SERVICE

It is hereby certified that I have filed the foregoing with the Clerk of the Energy Bureau using the electronic filing system and also that I have served a copy to Atty. Hannia Rivera, hrivera@oipc.pr.gov and Atty. Margarita Mercado Echegaray, margarita.mercado@us.dlapiper.com.

In San Juan, Puerto Rico, this 14th day of November 2022.

s/ Katuska Bolaños-Lugo
Katuska Bolaños-Lugo

Exhibit A

REDACTED

Exhibit B

NOT UNDER SEAL