

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

NEPR Received: Jan 5, 2023 1:58 PM

IN RE: 10 YEAR PLAN FEDERALLY FUNDED COMPETITIVE PROCESSES

CASE NO.: NEPR-MI-2022-0005

SUBJECT: Memorandum of Law Requesting Confidential Designation and Treatment of the Emergency Generation Draft RFP Submitted on December 29, 2022

MEMORANDUM OF LAW REQUESTING CONFIDENTIAL DESIGNATION AND TREATMENT OF THE NEW EMERGENCY GENERATION UNITS AT JOBOS, DAGUAO AND PALO SECO DRAFT RFP SUBMITTED TO THE ENERGY BUREAU ON DECEMBER 29, 2022

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

1. On December 29, 2022, PREPA submitted to the Energy Bureau of the Public Service Regulatory Board (“Energy Bureau”) a notice titled *Request for Approval to Proceed with Request for Proposals for the New Emergency Generation Units at Jobos, Daguao and Palo Seco* (“Request”). The request had attached a draft request for proposals identified as *Jobos, Daguao and Palo Seco Emergency Generation Projects* (“Emergency Generation Draft RFP”). PREPA submitted the Request and the Emergency Generation Draft RFP under seal.

2. The Emergency Generation Draft RFP was presented to the Energy Bureau in accordance with the Energy Bureau and PREPA’s *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet*, No. 8815 (November 9, 2016) (“Regulation 8815”).

3. Article 4.2 of Regulation 8815 provides that the Executive Director of PREPA, before launching any public procurement process and after receiving the approval of the PREPA

Governing Board to proceed with a proposed project and procurement process, will notify in writing the Energy Bureau the recommendation of the project committee concerning (i) the proposed project, including all associated documents that explain the project, (ii) the proposed parameters to determine such profit margin and price escalators, (iii) consistency with the Integrated Resource Plan approved by the Energy Bureau, and (iv) compliance with Regulation 8815, the Acts and other laws and regulations related to procurement processes by PREPA and the powers of the Energy Bureau. Regulation 8815 explains the iterative process between the Energy Bureau and PREPA to exchange further information and amend the submitted project and procurement process if warranted. Article 4.2 further provides that “[t]hese communications shall be maintained confidential while the administrative competitive procurement process is ongoing.”

4. The Request and the Emergency Generation Draft RFP were submitted in compliance with the preceding article and, thus, sealed. PREPA respectfully requests that Energy Bureau follow the provisions of Regulation 8815, determine that the Request and the Emergency Generation Draft RFP are confidential and direct the Secretary of the Energy Bureau to maintain them under seal until the competitive procurement process is completed.

5. Applicable laws and regulations support the confidentiality request herein made. The documents in possession of a corporation like PREPA are presumed public. However, access to public information is not absolute, and there are various exemptions for access to public information. *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017) (emphasis added).

6. These exceptions are:

(1) 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). *Colón Cabrera v. Caribbean Petroleum*, supra.

Id. at 83.

7. Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*¹ 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[.]” Act 57 at Art. 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 Art. 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 Art. 6.15(c). “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 Art. 6.15(d).

8. In exercising its powers, the Energy Bureau and PREPA approved joint Regulation 8815, which has the force of law. *Id.* at Art. 6.3(b); see also *Puerto Rico Electric Power Authority Act*,

¹ *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 LPRA §§ 1051-1056 (“Act 57”).

Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”) at Sec. 5 (“The regulations so adopted shall have the force of law once the provisions of Act No. 38-2017, the *Government of Puerto Rico Uniform Administrative Procedure Act*, are complied with.”). As stated above, according to Article 4.2 of Regulation 8815, which has the force of law, communications between the Energy Bureau and PREPA shall remain confidential. At the same time, the administrative competitive procurement process is ongoing. The iterative process of reviewing and approving the Emergency Generation Draft RFP is in the early stages and ongoing and, thus, fits into the qualification of Regulation Article 4.2 of maintaining the Request and the Emergency Generation Draft RFP confidential and thus under seal for the moment.

9. Lastly, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”). Regulation 6285 has the force of law and, according to its provisions, documents, including information on evaluating offers or bids requests, are confidential while the evaluation, adjudication and award processes are still ongoing. *Id.* at Sec. V, ¶ 13. The Request and the Emergency Generation Draft RFP include information on evaluating proposals, and the process is currently ongoing. Thus, Regulation 6285 favors PREPA’s request for the Energy Bureau to resolve that the Request and the Emergency Generation Draft RFP are confidential and, therefore, must remain under seal while the process is ongoing.

10. PREPA has requested confidential treatment of requests for approval of draft requests for proposals in the past and has been granted. For example, on November 10, 2022, PREPA submitted to the Energy Bureau a *Request for Approval to Proceed with Request for Proposals (“RFP”) for the New Black-Start Systems at Costa Sur and Yabucoa* with the draft request for proposals styled as *Yabucoa and Costa Sur New Black-Starts Units Projects* (“Black-Start Systems Draft RFP”)

attached. On November 15, 2022, the PREPA filed a *Memorandum of Law Requesting Confidential Designation and Treatment of the Black-Start Systems Draft RFP Submitted to the Energy Bureau on November 10, 2022*, by which PREPA requested the Energy Bureau to determine that following Regulation 8815, the Black-Start Systems Draft RFP was confidential and thus, should remain under seal.

11. On December 5, 2022, the Energy Bureau entered *Resolution and Order* with the subject *Resolution and Order regarding Motion Requesting Expedited Approval of the RFP Process for the New Black-Start Systems at Costa Sur and Yabucoa, filed by the Puerto Rico Electric Power Authority* (“December 5 Order”) by which the Energy Bureau determined, *inter alia*, that the confidential designation of the Black-Start Systems Draft RFP was warranted and thus, it was granted.

12. PREPA requests that the Energy Bureau follows the precept of confidentiality of requests for proposals as established by Regulation 8815 and follow its prior decisions to keep these documents sealed, as it was determined in the December 5 Order.

WHEREFORE, PREPA respectfully requests the Energy Bureau to determine that the Request and the Emergency Generation Draft RFP are confidential and order the Secretary of the Energy Bureau to maintain them under seal.

In San Juan, Puerto Rico, this 5th day of January 2023.

s/ Katuska Bolaños-Lugo

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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>.

In San Juan, Puerto Rico, this 5th day of January 2023.

s/ Katuska Bolaños-Lugo
Katuska Bolaños-Lugo