

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

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IN RE:

10 YEAR PLAN FEDERALLY FUNDED
COMPETITIVE PROCESS

CASE NO.: NEPR-MI-2022-0005

SUBJECT: Memorandum of Law Requesting Confidential Designation and Treatment of Genera PR LLC's Proposed Process for the Procurement of Black-Start and Emergency Peaking Resources

**MEMORANDUM OF LAW REQUESTING CONFIDENTIAL DESIGNATION
AND TREATMENT OF GENERA PR LLC'S PROPOSED PROCESS FOR THE
PROCUREMENT OF BLACK-START AND EMERGENCY PEAKING RESOURCES**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW GENERA PR, LLC ("Genera PR"), through its counsel of record, and respectfully submits and prays as follows:

I. INTRODUCTION

1. On May 8th, 2023, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (the "Energy Bureau") issued a Resolution and Order (the "May 8th Order") in connection with the Request for Proposals ("RFP") processes initiated by the Puerto Rico Electric Power Authority ("PREPA"). These processes specifically concerned the procurement of the black start systems at Costa Sur and Yabucoa, designated under RFP 3784, and the procurement of emergency generators at the Jobos, Dagua, and Palo Seco Power Stations, as detailed under RFP 3899.¹

2. Pursuant to the May 8th Order, the Energy Bureau directed Genera PR to submit, on or before May 15, 2023, any proposed amendments to the RFP process documents and bid

¹ See Resolution and Order, *In re: 10 Year Plan Federally Funded Competitive Process*, Case No. NEPR-MI-2022-0005, May 8, 2023 ("May 8th Order")

schedules for RFP 3784 and RFP 3899. The proposed changes were to outline a plan for the transition of RFP administration from PREPA to Genera PR. Moreover, Genera PR was also required to outline a proposed process for implementing its suggested modifications, as well as for managing the RFPs specifically pertaining to black start and emergency generation resources.

3. In compliance with the May 8th Order, Genera PR hereby submits to the Energy Bureau its proposed process for the procurement process of black-start and emergency peaking resources for this Energy Bureau's review and approval. See Exhibit 1, submitted under seal of confidentiality.

4. Additionally, Genera PR hereby formally requests that Exhibit 1 be kept confidential and, in support of this request, submits its Memorandum of Law below, elucidating the legal rationale under which Exhibit 1 should be filed under a seal of confidentiality. As will be expounded upon subsequently, the proposed RFP process outlined in Exhibit 1 warrants protection from public disclosure, as these documents encompass privileged and confidential information. This information includes but is not limited to details about Genera PR's technical analysis and additional data that may be classified as trade secrets.

II. REQUEST FOR CONFIDENTIAL DESIGNATION

A. Applicable Law and Regulation to a request for confidentiality before the PREB

5. The primary statute that oversees the handling of classified information submitted to this Honorable Energy Bureau is Section 6.15 of Act No. 57-2014, also known as the "Puerto Rico Energy Transformation and RELIEF Act." This section provides that "[i]f 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..." 22 L.P.R.A. § 1054n. If, upon conducting a thorough evaluation, the Energy Bureau

deems that 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 allegedly confidential document is submitted.” *Id.* At Section 6.15(a). Accordingly, such information shall be kept out of public reach by the Energy Bureau, and “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 Section 6.15(c). Thus, “[t]he 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 Section 6.15(d).

6. In conjunction with the aforementioned, Energy Bureau Regulation 8815, also known as the *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 and other Resources* (“Regulation 8815”), provides clear and explicit safeguards for confidential information during competitive bidding procedures, as delineated in Articles 4.2 and 10.2.

7. In its pertinent part, Article 4.2 of Regulation 8815 mandates that “prior to launching any public procurement process, and after receiving the approval of the [Board of Directors] from PREPA to proceed with the proposed [p]roject and procurement process, the Executive Director [of PREPA] will notify in writing to the Energy [Bureau] the recommendations of the Project Committee with respect to²: (i) the proposed [p]roject, including all associated documents that explain the [p]roject; (ii) the proposed parameters to determine such profit margin

² Article 2.21 of Regulation 8815, the project committee is designated to receive and evaluate qualifications and or proposals received in a Request for Qualifications or RFP process, negotiate with the highest ranking Proponent or Proponents, and make recommendations for selection, negotiation, and approval and signing of a contract.

and price escalators; (iii) consistence with the Integrated Resource Plan approved by the Energy [Bureau]; and (iv) compliance with Regulation 8815, the Acts, and other applicable regulations.”³ Importantly, Article 4.2 further provides that this communicated **information should remain confidential while the administrative competitive procurement process is ongoing.**⁴

8. Additionally, in its relevant part, Article 10.2 of Regulation 8515 further provides guidance that:

Once the Contract has been executed, [PREPA] shall make public the report of the Project Committee which shall contain the information related to the procurement, evaluation, scoring, selection and negotiation process, and the information contained in the Proposal as required by law, except trade secrets, proprietary or privileged information of the Proponent clearly identified as such by the Proponent, or information that must otherwise be protected from publication according to law, unless otherwise ordered by a court order, in each case, if [PREPA] determines that the protection of such information is appropriate.”

9. In addition to the aforementioned, it is worth noting that under Act. No. 80-2011, also known as *the Industrial and Trade Secret Protection Act of Puerto Rico* (“Act. No. 80-2011”), certain information may be granted protection as a trade secret. Specifically, Act. No. 80-2011 provides that industrial or trade secrets are deemed to be any information:

- a. 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
- b. For which reasonable security measures have been taken, as circumstances dictate, to maintain its confidentiality.

10. Furthermore, in the context of Act. No. 80-2011, information refers to knowledge that amplifies or clarifies existing understanding, including but not limited to formulas, compilations, methods, techniques, processes, recipes, designs, treatments, models, or patterns.

³ Article 4.2 of Regulation 8815.

⁴ *Id.*

See Article 3 of Act. No. 80-2011. In addition, Puerto Rico's Supreme Court has delineated a trade secret as any process for manufacturing, treating, or preserving materials, a formula or recipe, a blueprint or pattern for the development of machinery, or even a list of specialized customers that constitute a distinct market, thereby bestowing a competitive advantage upon its owner. *See Ponce Adv. Med. v. Santiago González*, 197 DPR 891, 903-904 (2007).

B. Grounds for Confidentiality

11. While the provisions of Article 4.2 of Regulation 8815 primarily outline the relationship between the Executive Director of PREPA and the Energy Bureau in the process of RFP content approval by the Energy Bureau, Genera PR maintains that these provisions should apply to them, particularly in light of the nature of the information that the Energy Bureau has sought from Genera PR under the May 8th Order. Given the present stage of proceedings, revealing Genera PR's proposed RFP process could potentially compromise the impartiality of all forthcoming proposals offered by Proponents.

12. Furthermore, Genera PR's proposal results from an in-depth proprietary analysis built upon a comprehensive market understanding and assimilation of past experiences. It contains detailed strategic insights that, if disclosed, could provide undue advantage to other parties in the procurement process and compromise the fairness of competitive bidding. Hence, it is of paramount importance that the confidentiality of Genera PR's proposed RFP process is respected and upheld.

13. As a result, Genera PR respectfully requests the Energy Bureau to confirm the confidential status of these documents and information and to issue an order mandating their preservation under seal. Disclosure of these proposed RFP processes would provide an unfair advantage to potential proponents. Moreover, these comments are still draft forms subject to the

Energy Bureau's approval. As such, they represent communications leading to a competitive procurement process that could disrupt future proceedings if disclosed at this juncture.

WHEREFORE, for the reasons stated above, Genera PR respectfully requests that the Energy Bureau take **NOTICE** of this Motion, **ACCEPT** Genera's response included in Exhibit 1 to this Motion and the attachments to Exhibit 1 and **keep the same confidential**.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 25th day of May 2023.

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CERTIFICATE OF SERVICE

We hereby certify that a true and accurate copy of this motion was filed with the Office of the Clerk of the Energy Bureau using its Electronic Filing System and that we will send an electronic copy of this motion to the attorney for Puerto Rico's Electric Power Authority (PREPA), Joannely Marrero-Cruz, at jmarrero@diazvaz.law; and Maralíz Vázquez-Marrero, at mvazquez@diazvaz.law.

In San Juan, Puerto Rico, this 25th day of May 2023

s/ Jorge Fernández-Reboredo
Jorge Fernández-Reboredo

Exhibit 1