

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

NEPR

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IN RE: REVIEW OF THE PUERTO RICO ELECTRIC POWER AUTHORITY'S 10-YEAR INFRASTRUCTURE PLAN – DECEMBER 2020

CASE NO.: NEPR-MI-2021-0002

SUBJECT: MOTION SUBMITTING FOR REVIEW AND APPROVAL THE SCOPE OF WORK FOR THE TRANSFER OWNERSHIP TO PREPA OF TEMPORARY GENERATION UNITS

**MEMORANDUM OF LAW IN SUPPORT OF REQUEST
FOR CONFIDENTIALITY OF DOCUMENTS SUBMITTED UNDER SEAL
WITH THE JANUARY 14th AND JANUARY 22nd MOTIONS**

TO THE 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 January 14th, 2024, the Puerto Rico Electric Power Authority ("PREPA") filed before the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau" or "PREB") an *Urgent Motion Submitting for Review and Approval of the Scope of Work for the Transfer/Ownership to PREPA of the Temporary Generation Units*. Through this Motion, PREPA sought the Energy Bureau's approval of the initial scope of work for the acquisition and ownership of the temporary generation units installed in the Palo Seco Steam Plant (150MW) and the San Juan Power Plant (200MW). PREPA included fourteen (14) exhibits as

supporting documents to its petition and requested confidential treatment from the PREB.

On January 19th, 2024, the Energy Bureau issued a *Resolution and Order* whereby it, among other things, ordered PREPA to identify and inform the specific sources of funding for the acquisition and to notify the Puerto Rico Public-Private Partnerships Authority (“P3 Authority”) of PREPA’s intent to acquire the emergency power generating units.

On January 22nd, 2024, PREPA filed a *Motion in Compliance with the January 19th, 2024 Resolution and Order* to inform the Energy Bureau that the P3 Authority was notified of PREPA’s intent to acquire the emergency power generation units on that same date. PREPA attached, as Exhibit 1, the letter sent to P3 Authority and requested confidential treatment of the exhibit.

On January 26th, 2024, the Energy Bureau issued a *Resolution and Order* that required PREPA to comply with the guidelines set forth in the Energy Bureau’s Policy Management of Confidential Information. This, with respect to the exhibits filed with the January 14th and January 22nd motions.

In compliance with the January 26th Resolution, PREPA hereby submits the present memorandum, which includes the legal basis supporting the confidentiality argument and the request for some of the documents to remain under seal. It is worth noting that, after further analysis of the documents contained in the January 14th and 22nd motions, PREPA has determined to invoke the confidentiality claim on only some of the submitted exhibits.

II. REQUEST FOR CONFIDENTIAL DESIGNATION AND TREATMENT

In general, documents in possession of a public corporation like PREPA are presumed public. However, access to public information is not absolute. Bhatia Gautier v. Gobernador, 199 D.P.R. 59, 82 (2017). The document sought to be disclosed must enjoy, in effect, that public status. Ortiz v. Dir. Adm of the Courts, 152 DPR 161 (2000).

A government entity may keep the information confidential when:

- (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.

See Bhatia Gautier v. Gobernador, 199 D.P.R. 59, 83 (2017)

Article 6.15 of Act 57-2014 is the core provision for managing confidential information filed before the Energy Bureau. It provides, in its pertinent part, 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.

If the Energy Bureau believes, after the appropriate evaluation, that the 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).

The Energy Bureau's Policy on Confidential Information (as amended, the "Confidentiality Policy") details the procedures a party should follow to request

that a document or portion thereof be afforded confidential treatment. The policy requires identifying confidential information and filing a memorandum of law explaining the legal basis and support for a request to file information confidentially. See CEPR-MI-2016-0009, § A, as amended by the Resolution dated September 20th, 2016, CEPR-MI-2016-0009. The memorandum should also include a table that identifies the confidential information, a summary of the legal basis for the confidential designation, and why each claim or designation conforms to the applicable legal basis of confidentiality. *Id.* at ¶ 3.

Concerning Critical Energy Infrastructure Information (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 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. P27157, 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).

Furthermore, regarding the preceding argument, FERC has ruled several times 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).¹ Also, on numerous occasions, this Energy Bureau has accepted PREPA’s designations of material as CEII, recognizing that both federal law and Puerto Rico law support such designations when applicable.

Lastly, Rule 513 of the Puerto Rico Rules of Evidence, 32 LPRA App. VI, R. 513 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.

¹ *Federal Register*: March 3, 2003 (Volume 68, Number 41); *Rules and Regulations*, pp. 9857-9873.

On January 14th, 2024, PREPA requested the approval of the Initial Scope of Work (SOW) regarding the acquisition of the equipment at two (2) power generation sites at Palo Seco and San Juan ("temporary units"). The installation and operation of the temporary units were provided by FEMA as direct Federal Assistance, pursuant to section 403 (42 U.S.C. §5170b). New Fortress Energy ("NFE") acquired all the equipment and infrastructure necessary to operate the temporary units, some through purchase and some through leasing arrangements.

On January 5th, 2024, FEMA sent a letter to the Central Office for Recovery, Reconstruction, and Resiliency ("COR3") authorizing the commencement of negotiations with NFE and issuing the following instructions to COR3:

COR3 must ensure that Genera, as a subsidiary of NFE, be excluded from all discussions and sharing of information between Puerto Rico and the Federal government concerning the potential acquisition of NFE equipment, and any negotiations with NFE for the acquisition of that equipment.

Additionally, on January 17th, 2024, COR3 and NFE executed a Non-Disclosure Agreement ("NDA") concerning the potential acquisition of the temporary generation units.

PREPA has re-evaluated the documents submitted as confidential, the NDA between COR3 and NFE, and consulted with COR3 on the instructions from FEMA. After this analysis, PREPA informs the Energy Bureau that Exhibits 1, 5, 6, 7, 8, 12, 13, and 14 filed with the January 14th motion do not need confidential treatment. In light of the foregoing, PREPA withdraws its request for confidential treatment with

regard to Exhibits 1, 5, 6, 7, 8, 12, 13, and 14 filed before the Bureau on January 14th.

However, Exhibits 2, 3, 4, 9, 10, and 11 from the January 14th Motion and Exhibit 1 filed with the January 22nd Motion need to be kept under seal per the instructions by FEMA to not share information with Genera concerning the acquisition of the temporary units. In addition, some of the exhibits have pricing and CEII information and, consequently, need confidential treatment.

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

File	Summary of legal basis for Confidential Treatment
Ex. 2 Letter dated October 16, 2023, from FEMA to COR3	Confidential per FEMA instructions, trade secrets
Ex. 3 Letter dated November 7, 2023, from COR3 to FEMA	Confidential per FEMA instructions, trade secrets
Ex. 4 Letter dated November 17, 2023, from COR3 to FEMA	Confidential per FEMA instructions, trade secrets
Ex. 9 Letter dated January 5, 2024, from FEMA to COR3	Confidential per FEMA instructions, trade secrets
Ex. 10 General Requisition Form (RF 113)	Confidential per FEMA instructions, trade secrets; CEII
Ex. 11 Project Scope of Work with cost estimates	Confidential per FEMA instructions, trade secrets; CEII
Ex. 1 (January 22 Motion) Letter dated January 22, 2024, from PREPA to P3 Authority	Confidential per FEMA instructions, trade secrets; CEII

WHEREFORE, PREPA respectfully requests that the Energy Bureau take note of the above and determine that the above exhibits constitute confidential information and, therefore, order they be kept under seal.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on the 9th day of February 2024.

CERTIFICATE OF SERVICE: We hereby certify that this document was filed with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, which will send notification of such filing to all attorneys of record.

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