

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

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IN RE:

ANNUAL PERFORMANCE TEST
PROCEDURE – THERMAL GENERATION
EQUIPMENT

CASE NO.: NEPR-MI-2023-0003

SUBJECT: Memorandum of Law in Support of
Confidential Treatment of the Final Revised
Annual Performance Test Submitted on July 10,
2024

**MEMORANDUM OF LAW IN SUPPORT OF CONFIDENTIAL TREATMENT OF THE
FINAL REVISED ANNUAL PERFORMANCE TEST SUBMITTED ON JULY 10, 2024**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW GENERA PR, LLC (“Genera”), as agent of the Puerto Rico Electric Power Authority (“PREPA”),¹ through its counsels of record, and respectfully submits and prays as follows:

I. Introduction

1. On May 23, 2024, the Puerto Rico Energy Bureau of the Public Service Regulatory Board (“Energy Bureau”) issued a Resolution and Order titled *Determination on Genera's Annual Performance Test Procedure* (“May 23rd Resolution”). In the May 23rd Resolution, the Energy Bureau evaluated and conditionally approved Genera's Annual Performance Test Procedure (“APT”)² subject to Genera filing a revised version of the APT

¹ Pursuant to the *Puerto Rico Thermal Generation Facilities Operation and Maintenance Agreement* (“LGA OMA”), dated January 24, 2023, executed by and among PREPA, the Puerto Rico Public-Private Partnerships Authority and Genera, Genera is the sole operator and administrator of the Legacy Generation Assets (as defined in the LGA OMA) and the sole entity authorized to represent PREPA before PREB concerning any matter related to the performance of any of the O&M Services (as defined in the LGA OMA) provided by Genera under the LGA OMA.

² See, *In re: Annual Performance Test Procedure – Thermal Generation Equipment*, Case No. NEPR-MI-2023-0003, *Motion to Submit Revised Annual Performance Test Procedure in Compliance with the Resolution and Order Dated August 29, 2023*, filed by Genera on September 28, 2023 (“September 28th Motion”).

incorporating the modification requirements of Attachment A to the May 23rd Resolution. The Energy Bureau granted Genera until May 31, 2024, to file the revised version of the APT.

2. On May 30, Genera filed a document titled Request for Extension to Submit Revised Annual Performance Test Procedure in Compliance with Resolution and Order Dated May 23, 2024 (“May 30th Motion”), through which it requested an extension of one week, that is, until Friday, June 7, 2024, to adequately finalize the APT in alignment with the requirements of the May 23rd Resolution due to encountering certain technical challenges.

3. On June 7, 2024, Genera filed a document titled Motion to Submit the Revised Annual Performance Test Procedure in Compliance with Resolution and Order Dated May 23, 2024 (“June 7th Motion”). In the June 7th Motion, Genera submitted as Exhibit A, a revised APT in accordance with the requirements and modifications set forth in Attachment A of the May 23rd Resolution (“Revised APT”).

4. On June 13, 2024, Genera submitted a motion titled "Motion to Inform and Clarify the Record Regarding Genera’s Revised Annual Performance Test Procedure Submitted on June 7, 2024." Through this Motion, Genera informed the Energy Bureau about a key revision in the Revised APT regarding the reduced number of performance tests from five to three, each at different load settings. This change, which was made after discussions with the Energy Bureau’s advisors, was not detailed in the May 23rd Resolution’s Attachment A but was integrated based on their recommendations.

5. On July 8, 2024, a detailed conference call was conducted with the advisors of the Energy Bureau. During this call, substantive discussions took place to address and clarify the concerns previously raised by the Energy Bureau regarding the Annual Performance Test

Procedure. The suggestions provided by the advisors regarding the Performance Testing Codes (PTC) were included in the plan.

6. On July 10, 2024, Genera submitted a document titled *Motion to Submit Final Revised Annual Performance Test Procedure* (“July 10th Motion”), through which Genera submitted a final revised version of the Annual Performance Test Procedure, included therein as Exhibit A, incorporating all suggested amendments from the July 8, 2024, conference call.

7. In accordance with the July 10th Motion, Genera respectfully submits this Memorandum of Law to support its request for maintaining the confidentiality of the GSUPU submitted as Exhibit A to the June 10th Motion. This request is made pursuant to the Energy Bureau’s Policy on Management of Confidential Information, CEPR-MI-2016-0009, issued on August 31, 2016, and partially amended on September 16, 2016 (“Energy Bureau’s Policy on Management of Confidential Information”), as it contains sensitive commercial information of a proposed site configuration project that has not been yet approved by the Energy Bureau.

II. Identification of Confidential Information

Document Name and File Date	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidential Designation, if applicable	Summary of why each claim or designation conforms to the applicable legal basis for confidentiality
Exhibit A – Final Revised Annual Performance Test Procedure – Filed on July 10, 2024.	Entire document.	Sensitive commercial information and Trade Secrets under Act 80-2011, <i>infra</i> .	The Revised APT submitted on July 10, 2024, contains sensitive commercial information regarding Genera's technical analysis for performance testing procedures that have not yet been approved by the Energy Bureau. This information is protected under the provisions of Act No. 80-2011 and, if disclosed, could

disadvantage Genera's competitiveness.

III. Memorandum of Law in Support of Confidential Treatment

A. Applicable Law

The governing statute for the management of classified information submitted to the Energy Bureau is Section 6.15 of Act No. 57 of May 27, 2014, as amended, also known as the *Puerto Rico Energy Transformation and RELIEF Act, 22 L.P.R.A § 1051 et seq* (“Act No. 57-2014”). This section stipulates that “[i]f any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted carries a confidentiality privilege, such person may request the [Bureau] to treat such information as confidential...” 22 L.P.R.A. § 1054n. If, after conducting appropriate evaluation, the Energy Bureau determines that the information warrants protection, it is required to “grant such protection in a manner that minimally 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 Section 6.15(a). Consequently, such information must be withheld from the public domain by the Energy Bureau and “must be duly safeguarded and provided exclusively to the personnel of the Energy [Bureau] who need to know such information under nondisclosure agreements.” *Id.* at Section 6.15(c). Therefore, “[t]he Energy [Bureau] must swiftly act on any privilege and confidentiality claim made by a person under its jurisdiction through a resolution for such purposes before any potentially confidential information is disclosed.” *Id.* at Section 6.15(d).

Furthermore, the Energy Bureau’s Policy on Management of Confidential Information details the procedures a party should follow to request confidential treatment for a document or a

portion of it. The Energy Bureau's Policy on Management of Confidential Information requires 1) identifying confidential information and 2) filing a memorandum of law explaining the legal basis and support for a request to file information confidentially. *See* Section A of the Energy Bureau's Policy on Management of Confidential Information. The memorandum should also include a table that identifies the confidential information, a summary of the legal basis for the confidential designation, and an explanation of why each claim or designation conforms to the applicable legal basis for confidentiality. *Id.* The party seeking confidential treatment of information filed with the Energy Bureau must also file both a "redacted" (or "public") version and an "unredacted" (or "confidential") version of the document that contains the confidential information. *Id.*

In addition to the aforementioned, it is worth noting that under Act. No. 80 of June 3, 2011, also known as *the Industrial and Trade Secret Protection Act of Puerto Rico, 10 L.P.R.A. § 4131 et seq.* ("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 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.

See Act No. 80-2011, 10 L.P.R.A. § 4132.

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. *See* Article 2(a) of Act No. 80-2011. In addition, Puerto Rico's Supreme Court has delineated a trade secret as any

process of 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).

In addition to the above, Genera's Revised APT encompasses Critical Energy Infrastructure Information ("CEII"). Federal statutes define CEII as:

[S]pecific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) discloses details about the production, generation, transportation, transmission, or distribution of energy; (ii) could be beneficial to a person planning an attack on critical infrastructure; (iii) is exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552; and (iv) does not merely reveal the general location of the critical infrastructure."

18 § 388.113(c)(2).

Further, "critical electric infrastructure" is defined as "a system or asset of the bulk-power system, either physical or virtual, the incapacity or destruction of which would have a negative impact on national security, economic security, public health or safety, or any combination thereof." *Id.* As indicated, CEII is exempt from FOIA disclosure and must not be "made available by any Federal, State, political subdivision, or tribal authority under any Federal, State, political subdivision, or tribal law mandating public disclosure of information or records." *Id.* § 388.113(c)(1).

The Critical Infrastructure Information Act of 2002, 6 U.S.C. §§ 131-134 ("CII Act"), a component of the Homeland Security Act of 2002, provides additional protection to critical infrastructure information ("CII"), which is defined by statute as "information not customarily in the public domain and related to the security of critical infrastructure or protected systems." *See*, 6 U.S.C. § 133. With regards to the disclosure of such information, the Act specifies:

“Notwithstanding any other provision of law, critical infrastructure information (including the identity of the submitting person or entity) voluntarily submitted to a covered federal agency for its use regarding the security of critical infrastructure and protected systems [...] (A) shall be exempt from disclosure under ... the Freedom of Information Act[]" and "(E) shall not, if provided to a state or local government or government agency, ... [] ... be made available pursuant to any state or local law requiring disclosure of information or records[.]” *Id.*, (a)(1)(A).

Regarding CEII, the Energy Bureau’s Policy on Management of Confidential Information stipulates that information designated by the Energy Bureau as validated Confidential Information on the grounds of being CEII may only be accessed by the parties' authorized representatives after they have executed and delivered a Non-Disclosure Agreement. *See* Section D(2) of the Energy Bureau’s Policy on Management of Confidential Information.

B. Ground for Confidentiality

This Memorandum of Law seeks confidential treatment for the revised APT, filed as Exhibit A to the July 10th Motion. The revised APT contains certain commercial information about Genera's energy production projects and specific procedures still in the proposal stage. These details have not yet been approved by the Energy Bureau, making it premature to disclose this information. The revised APT outlines Genera's strategies for optimizing operation and maintenance programs, specific performance test protocols, and technical data on equipment and site configurations. The disclosure of such sensitive information could severely harm Genera's competitive position, particularly concerning future Requests for Proposals related to the units being tested. Future proponents could gain insights into Genera’s operational efficiencies, performance metrics, and proprietary testing methodologies, potentially leveraging this knowledge

to Genera's disadvantage. The potential loss of competitive edge underscores the need for confidentiality to protect Genera's strategic interests.

Furthermore, the revised APT details specific operational protocols, instrumentation information, and procedures for conducting performance tests on generation equipment. Such detailed technical information, if disclosed, could reveal vulnerabilities within Genera's infrastructure, potentially exposing it to security risks and operational challenges. This information constitutes CEII, which should be protected due to its potential to reveal sensitive details about the production, generation, transmission, or distribution of energy.

Given these reasons, granting confidential status to the revised APT is imperative for maintaining Genera's competitive standing and protecting its proprietary information. Disclosure at this premature stage could have detrimental effects on Genera's competitive position and on the integrity of upcoming bidding processes. Therefore, Genera respectfully requests that the Energy Bureau grant confidential treatment to the revised APT in accordance with Act No. 80-2011 and Act No. 57-2014.

WHEREFORE, Genera respectfully requests that the Energy Bureau **take notice** of the above for all purposes and **grant** this request for confidential treatment of the revised APT filed as Exhibit A to the July 10th Motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 19th day of July 2024.

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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.

In San Juan, Puerto Rico, this 19th day of July 2024

/s/ Alejandro López Rodríguez
Alejandro López Rodríguez