

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

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IN RE:

**REVIEW OF THE PUERTO RICO
ELECTRIC POWER AUTHORITY
INTEGRATED RESOURCE PLAN**

CASE NO.:
CEPR-AP-2018-0001

SUBJECT:
Local Environmental Organization's request
to amend non-disclosure agreement

**OBJECTION TO THE LOCAL ENVIRONMENTAL ORGANIZATIONS'
PETITION TO AMEND THE NON-DISCLOSURE AGREEMENT**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority through the undersigned legal representation and respectfully sets forth and pray:

I. INTRODUCTION

On November 20, 2019, the Local Environmental Organizations (LEOs) filed with the Puerto Rico Public Service Regulatory Board (the "Energy Bureau") a *Petition Requesting Amendment to Non-Disclosure Agreement (NDA)* (the "Petition"). In its Petition, LEO argues that the non-disclosure agreement that the parties have to sign in order to access information classified as confidential by the Energy Bureau should be modified because its "unnecessarily broad and contrary to the own Energy Bureau's resolutions." LEO also alleges that the non-disclosure agreement should be modified to indicate that a party's signature of a non-disclosure agreement should not necessarily imply the loss of the right to question a confidentiality designation.

LEO's untimely request should not be taken lightly. The Petition moves the Energy Bureau to make a blanket statement amending a non-disclosure agreement that has been created and

enforced under the powers granted to the Energy Bureau by the Legislature and most importantly of all, protects critical information that is not public. Therefore, PREPA requests the Energy Bureau to deny the Petition.

II. ACCESS TO PUBLIC INFORMATION

a. Public Information

The Supreme Court of the Commonwealth of Puerto Rico has acknowledged “the right to press and of the citizens in general to have access to public information as a fundamental right of constitutional rank.” *Bhatia Gautier v. Gobernador*, 199 D.P.R. 80. The right to access public information is firmly connected to the exercise of the rights of liberty of speech, press, association formally stated in Art. II, sec. 4 of the Constitution of Puerto Rico, LPRA, Tome I. *Id.*

However, the right to access the information does not operate without limitation. It is necessary that the document that wants to be disclosed has in fact that public condition. *Ortiz v. Dir. Adm. De los Tribunales*, supra. *Id.* at 81. “Therefore, the right to information is not absolute and will be subject to those limitations that by imperious need, the State imposes.” *Id.* at 81–82.

The access to documents is limited when:

(a) 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). *Colon Cabrera v. Caribbean Petroleum*, supra.

Id. at 82–83.

b. Limitations to Access Information as Set Forth by PREPA’s Enabling Act

Pursuant to Article 6 of the *Puerto Rico Electric Power Authority Act*¹, PREPA’s documents and information shall be made available to those customers who so request, except for:

- (1) confidential information in accordance with the Rules of Evidence; (2) information related to collective bargaining, labor-related disputes, or issues related to personnel such as appointments, evaluation, disciplinary actions, and dismissal; (3) ideas with regard to the negotiation of potential PREPA contracts or a determination to rescind or terminate contracts in effect; (4) information of strategies regarding lawsuits of PREPA; (5) information of internal investigations of PREPA while these are being conducted; (6) aspects regarding the intellectual property of third parties; (7) trade secrets of third parties; (8) issues that PREPA should keep confidential in accordance with any confidentiality agreement; or (9) **matters of public security involving threats against PREPA, its property or employees.**

§ 196 Powers, 22 L.P.R.A. § 196

c. The Puerto Rico Energy Bureau Power to Make Confidentiality Designations

In 2014, the Legislature of Puerto Rico enacted the *Puerto Rico Energy Transformation and Relief Act*² (“Act-57-2014”). Act 57-2014 created the Puerto Rico Energy Commission (now known as the Puerto Rico Energy Bureau)³ as an independent regulatory entity in charge of regulating, overseeing, and ensuring compliance with the public policy on energy of the Commonwealth of Puerto Rico. 22 L.P.R.A. § 1054.

Pursuant to Act 57-2014, if 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, subject to the following:

- (a) 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

¹ 22 L.P.R.A. § 191

² 22 L.P.R.A. § 1051

³ Puerto Rico Public Policy Act, 19 L.P.R. 17

parties involved in the administrative procedure in which the allegedly confidential document is submitted.

(b) To such purposes, the Energy [Bureau] shall provide access to the document or the privileged portion of the document only to the lawyers and external consultants involved in the administrative process after the execution of a confidentiality agreement.

(c) The Energy [Bureau] shall keep the documents submitted for its consideration out of public reach only in exceptional cases. In these cases, 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. However, the Energy [Bureau] shall direct that a non confidential copy be furnished for public review.

(d) 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.

22 L.P.R.A. § 1054n

In the exercise of its legislative authority and powers as granted by Act 57-2014, the Energy Bureau approved the *Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Proceedings* (“Regulation 8543”). In Regulation 8543, the Energy Bureau detailed the manner in which the it will handle the disclosure of financial information. Section 1.15 of Regulation 8543 provides that

[i]f in compliance with the provisions of this Regulation or any of the [Bureau]'s orders, a person has the duty to disclose information to the [Bureau] considered to be privileged, pursuant to the Rules of Evidence, said person shall identify the allegedly privileged information, request the [Bureau] the protection of said information, and provide supportive arguments, in writing, for a claim of information of privileged nature. The [Bureau] shall evaluate the petition and, if it understands the material merits protection, proceed according to what is set forth in [Section 1054n] of Act No. 57-2014, as amended.

Regulation 8543, § 1.15

To that effect, the Energy Burau approved the following resolution: *In Re: Regulation on Adjudicative, Notice of Noncompliance, Rate Review and Investigation Procedures*, resolution no.

CEPR-MI-2016-0009 (the “Confidentiality Resolution”). The Confidentiality Resolution was approved “[t]o protect against the inappropriate use or disclosure of such information, and to facilitate an orderly process to identify and protect such information[.]” *See* Confidentiality Resolution, p. 1. Pursuant to the Confidentiality Resolution, a party who wishes to protect certain information submitted to the Energy Bureau because it understands that is confidential must file a request stating the legal basis in support of its argument that the information filed contains Confidential Information and deserves some kind of protection. *Id.* at ¶ A (2). The Energy Bureau has the authority to decide each confidentially claim and, when the confidential treatment is granted, the information is classified as Validated Confidential Information. *Id.* at ¶ C (2). The Energy Bureau may rule on the following types of confidential information: (1) Trade Secret Information, (2) Critical Energy Infrastructure Information (CEII) and (3) Attorney-Client Privilege and Attorney Work-product.⁴ The Validated Confidential Information receives the protection that is included in the Non-Disclosure Agreement that is attached as Appendix A to the Confidentiality Resolution (the “Challenged NDA”). *Id.* at ¶ D. The Energy Bureau has reserved its right to grant additional protections as it deems it necessary. *Id.*

III. ARGUMENT

Every citizen of Puerto Rico has the right to ask for and receive information from a governmental agency or public corporation. However, as the above-discussed case law establishes, the disclosure of information is not absolute, and all requests are subject to the information being public and not privileged or confidential. Act 57-2014 authorizes the Energy

⁴ The attorney-client and attorney work-product privileges claims are evaluated by an independent Administrative Law Judge.

Bureau to grant or deny confidentiality treatment and keep under seal certain documents that a party requests to be treated as confidential.

In the exercise to its power, the Energy Bureau approved Regulation 8815 and the Confidentiality Resolution. Both Regulation 8815 and the Confidentiality Resolution establish a public process –in the form of motion practice- in which a party may request the confidentiality designation and protection of a document or information. After the Energy Bureau makes a determination that a document is in fact confidential, any party may initiate a process under the Confidentiality Resolution to access information that has been validated as confidential. The access to the validated confidential information is subject to the execution of a non-disclosure agreement that is attached to the Confidentiality Resolution (the “Challenged NDA”). Since the request for confidentiality validation is a public process, any party that is made aware of a request of such nature can object or present its formal position regarding any request that PREPA makes to the Energy Bureau to grant confidentiality treatment of certain documents or information. To this day, PREPA has filed over fourteen (14) in the case of caption and LEO has not made a single objection to any of them. Instead, LEO now requests the Energy Bureau to amend the Challenged NDA because its allegedly “unnecessarily broad and contrary to the own Energy Bureau’s resolutions.” *See* Petition at ¶ 9.

In summary, LEO distinguishes between the defined terms Confidential Information and Validated Confidential Information to justify the request that the Energy Bureau revises and amends the operative Challenged NDA. But, pursuant to the applicable laws and regulations, specifically the Confidentiality Resolution, PREPA has a right to request that certain information be classified as Confidential Information. *See* Confidentiality Resolution, p. 1. The Energy Bureau evaluates and decides on each request for Confidential Information determination and if granted,

the information is classified as Validated Confidential Information. *Id.* at ¶ C (2). Afterwards, if the information is deemed confidential because it is Critical Energy Infrastructure Information (CEII), a parties' representative may seek to have access to the information subject to signing the Challenged NDA. Based on these defined terms and lack of the specific word *validated* together with the phrase "Confidential Information", LEO moves the Energy Bureau to modify the Challenged NDA and make it of application *only* to information labeled as *Validated Confidential Information*. The request should be denied.

Deduction leads us to conclude that the requirement to execute the Challenged NDA to access confidential information or not, hinges on the type⁵ of information that is submitted, not the inclusion of the word *validated*. The Challenged NDA applies only to information classified as CEII.⁶ It is customary that when the Energy [Bureau] makes a determination of granting or denying a confidentiality designation, it issues a resolution in which it simply determines "designated as confidential" or "not designated as confidential" and the classification of the type of information under consideration. The classification can be, for example, CEII or Trade Secret. Whenever the Energy Bureau makes a determination to classify the information as CEII, independent of the inclusion or lack thereof the word *validated*, a party that wishes to have access to the information has to execute the Challenged NDA. This conclusion is logical because the Confidentiality Resolution's requirement of execution of the Challenged NDA applies only to

⁵ When deciding of the type of information being considered, the Energy Bureau uses the word "reason".

⁶ Pursuant to the Confidentiality Resolution, Trade Secret Information may only be reviewed by the producing party and the Energy [Bureau] and information that is kept confidential based on an administrative judge determination that it is attorney-client privileged or attorney work-product, will not be available to any party, to the Energy Bureau or to the general public.

CEII and therefore, the inclusion or lack thereof the word *validated* in the confidentiality designation is inconsequential.

Let's say that, *arguendo*, the Energy Bureau classifies certain information as Validated Confidential Information because it contains certain PREPA's trade secrets. The inclusion of the word *validated* does not give the parties a right to request to execute the Challenged NDA to access the information, because the Confidentiality Resolution doesn't allow for trade secrets to be accessed by any party other than the producing party and the Energy Bureau. Therefore, and again, the word *validated* becomes inconsequential to determine if a party may execute the Challenged NDA or not, because the relevant classification is the *type* of information.

LEO also moves the Energy Bureau to rule "that a party's signature of a non-disclosure agreement should not necessarily imply the loss of the right to question a confidentiality designation." See Petition at ¶ 11. This request is lacks logic and its contrary to law.

If a party gets to the point in which it requires to access confidential information and therefore, must sign the Challenged NDA to have the access granted, it implies that there has been a ruling by the Energy Bureau in which it was determined that certain information submitted by a party was classified as confidential. Such rulings are made in public resolutions and orders and any party that its affected by a resolution and order may move for reconsideration or judicial review. As a matter of fact, all the resolutions and orders in which there is a ruling related to confidential treatment has the following language:

Any party affected by this determination may move for reconsideration of this Resolution and Order before the Puerto Rico Energy Bureau under Section 11.01 of Regulation 8543, and the provisions of Act 38-2017, known as the Uniform Administrative Procedures Act of the Government of Puerto Rico ("UAPA"). The affected party shall move for reconsideration within the term of twenty (20) days from filing this Resolution and Order.

Such request must be presented to the Bureau Clerk's Office, at World Plaza Building, 268 Ave. Muñoz Rivera, Level Ste. 202, San Juan, P.R. 00918, or electronically in the Energy Bureau's digital platform at <https://radicacion.energia.pr.gov/>.

The Energy Bureau shall consider said motion within fifteen (15) days of its filing. Should the Energy Bureau reject it forthright or fail to act upon it within fifteen (15) days, the term to request review shall recommence from notice of such denial, or from the expiration of the fifteen (15)-day term. If a determination is made in its consideration, the term to petition for review shall commence from the date when a copy of the notice of the Energy Bureau's resolution definitively resolving the motion to reconsider is filed in the record. Such resolution shall be issued and filed in the record within ninety (90) days after the motion to reconsider has been filed. If the Energy Bureau accepts the motion to reconsider but takes no action regarding said motion within ninety (90) days of its filing, it shall lose jurisdiction on the motion and the term to file judicial review shall commence upon the expiration of the ninety (90)-day term, unless the Energy Bureau, for just cause and within those ninety (90) days, extends the term to resolve for a period that shall not exceed thirty (30) days.

Any affected party may file a petition for review before the Court of Appeals within a term of thirty (30) days from the date the copy of the notice of this Resolution and Order was filed in the record of the Energy Bureau. Under Section 11.03 of Regulation 8543, and the dispositions of the UAPA and the Court of Appeals Regulation.⁷

The warnings made by the Energy Bureau in each resolution and order clearly detail the process that a party that understands that the Energy Bureau's ruling is incorrect, contrary to law or has some adverse effect must follow in order to have the decision reviewed. LEO pretends that the Energy Bureau allows a reservation of rights to make an untimely challenge to confidentiality designations. If the right is reserved in the Challenged NDA, that means that the deadline to reconsider or request judicial review has elapsed. Said approach is contrary to law and must be denied.

⁷ Some of these deadlines are jurisdictional and thus, cannot be extended.

WHEREFORE, the Puerto Rico Electric Power Authority requests the Energy Bureau to deny the Petition.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6th day of December 2019.

/s Katuska Bolaños
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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date I have filed the above motion using the Energy Bureau's Electronic Filing System, at the following address: <http://radicacion.energia.pr.gov> and that a courtesy copy of the filing was sent via e-mail to: sierra@arctas.com; tonytorres2366@gmail.com; cfl@mcvpr.com; gnr@mcvpr.com; info@liga.coop; amaneser2020@gmail.com; hriviera@oipc.pr.gov; jriviera@cnslpr.com; carlos.reyes@ecoelectrica.com; ccf@tcmrslaw.com; manuelgabrielfernandez@gmail.com; acarbo@edf.org; pedrosaade5@gmail.com; rmurthy@earthjustice.org; rstgo2@gmail.com; larroyo@earthjustice.org; jluebkekmann@earthjustice.org; acasellas@amgprlaw.com; loliver@amgprlaw.com; epo@amgprlaw.com; robert.berezin@weil.com; marcia.goldstein@weil.com; jonathan.polkes@weil.com; gregory.silbert@weil.com; agraitfe@agraitlawpr.com; maortiz@lvprlaw.com; rnegron@dnlawpr.com; castrodieppalaw@gmail.com; voxpopulix@gmail.com; paul.demoudt@shell.com; javier.ruajovet@sunrun.com; escott@ferraiuoli.com; SProctor@huntonak.com; GiaCribbs@huntonak.com; mgrpcorp@gmail.com; aconer.pr@gmail.com; axel.colon@aes.com; rtorbert@rmi.org; apagan@mpmlawpr.com; mpietrantoni@mpmlawpr.com.

In San Juan, Puerto Rico, this 6th day of December, 2019.

s/ Katuska Bolaños
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