

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

NEPR

Received:

Feb 4, 2021

2:59 PM

IN RE:

THE PERFORMANCE OF THE PUERTO
RICO ELECTRIC POWER
AUTHORITY

CASE NO.: NEPR-MI-2019-0007

SUBJECT:

LUMA's response to PREPA's "Request for Order Regarding PREPA's Comments on Baseline and Compliance Benchmarks Filed on January 29, 2021"

**RESPONSE TO PREPA'S REQUEST FOR ORDER REGARDING COMMENTS FILED
BY PREPA ON JANUARY 29, 2021**

TO THE PUERTO RICO ENERGY BUREAU:

COME NOW, LUMA ENERGY, LLC, and LUMA ENERGY SERVCO, LLC
(collectively, **LUMA**), through the undersigned legal counsel and respectfully state and request the following:

1. This is in response to the request filed by the Puerto Rico Electric Power Authority (PREPA) on January 31, 2021, for remedies against LUMA to bar disclosure and require destruction of the "Comments of the Puerto Rico Electric Power Authority on the Establishment of Performance Baseline and Compliance Benchmarks for Electric Service Companies" ("January 29th Comments"), that were filed by PREPA and served to LUMA's counsel on January 29, 2021 ("January 31st Request for Remedies").
2. PREPA's January 31st Request for Remedies is grounded on a statement that the January 29th comments which PREPA served on counsel for LUMA as a public filing, included communications that PREPA considers to be covered by the attorney-client privilege.

3. Claiming to have publicly filed what it has labeled “privileged communications,” PREPA has requested that the Energy Bureau: (1) order LUMA to refrain from “forwarding or producing copies” of the January 29th comments and that LUMA destroy all copies of the document; (2) maintain sealed from public view the January 29th comments; and (3) accept as timely filed the amended comments that PREPA filed before the Energy Bureau and served on LUMA’s counsel on January 30, 2021.
4. LUMA does not oppose PREPA’s request to substitute the January 29th comments with the revised document that was filed on January 30, 2021. However, LUMA respectfully objects PREPA’s request to place the burden on LUMA to delete or destroy all electronic copies of the January 29th comments.
5. LUMA does not question the representation made by PREPA’s counsel that portray that the filing may have been a draft with internal comments. But, as a threshold matter, LUMA must note that PREPA’s January 31st Request for Remedies does not provide factual content to raise with specificity, as required by this Energy Bureau’s regulations, a claim that all or part of the January 29th Comments that were filed with a public entity and that were served as a filing subject to public review, had privileged information or retained said protection after they were filed before the Energy Bureau and served to LUMA’s counsel.
6. Although LUMA does not endeavor in this filing to obstruct the diligences by PREPA’s counsel to mitigate the harms attendant to the claimed erroneous filing, it is respectfully submitted that PREPA has not adequately met its burden of proof to establish the claimed privilege and it cannot reasonably shift the burden on LUMA, especially, because PREPA has requested sweeping remedies all the while sidestepping the effects as a matter of law

of disclosing allegedly privileged information and failing to recognize the prompt diligences that LUMA conducted on January 30, 2021, when PREPA’s counsel first raised a claim of privilege. We explain.

7. The attorney-client privilege “protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.” *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir. 2003). Importantly, “[f]or the attorney-client privilege to attach to a communication, it must have been made in confidence and for the purpose of securing or conveying legal advice.” *Id.* at. 23; *see also United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 684 (1st Cir. 1997).
8. It is settled law that the party invoking a privilege bears the burden of proof as to establishing its existence and that it has not been waived. *See e.g. Pagán v. First Hospital Panamericano*, 189 DPR 509, 519 (2013) (“it is indispensable that the burden to show that a privilege applies resides on the party who claims its existence, not on the opposing party.”) (translation provided); *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 289 (D. Mass. 2000) (“The party claiming the protection of a privilege bears the burden of demonstrating, by a fair preponderance of the evidence, not only that the privilege applies, but also that it has not been waived.”).
9. “The idea that the attorney-client privilege may be waived is a direct outgrowth of this well-established construction. When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.” *In re Keeper of Records*, 348 F.3d at p. 22.

10. Under Puerto Rico’s Rules of Evidence, the attorney-client privilege may be voluntarily waived. 31 LPRA Ap. VI. R. 505.¹ Waiver has also been recognized in common law. To wit, it has been held that inadvertent disclosures of privileged information may constitute waiver of the attorney-client privilege. *See e.g., Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 883–84 (1st Cir. 1995) (“It is apodictic that inadvertent disclosures may work a waiver of the attorney-client privilege.”)
11. The extent of a waiver due to inadvertent disclosure is evaluated under the prism of the circumstances in which the disclosure was made. Courts consider: “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.” *Figueras v. Puerto Rico Elec. Power Authority*, 250 F.R.D. 94, 97 (2008) (denying motion for protective order filed by PREPA and finding waiver in the context of an inadvertent disclosure of an e-mail communication that was produced to opposing counsel). In assessing the interests of fairness and justice, courts evaluate “the degree to which the disclosed communication has been relied upon by the recipient of the production.” *Id.*
12. In its January 31st Request for Remedies, PREPA states that the January 29th Comments included privileged communications. PREPA’s motion does not explain with specificity

¹ In administrative proceedings such as this, the Rules of Evidence apply in supplemental manner per the Energy Bureau’s discretion to manage cases. *See* Article 3.13(e) of Puerto Rico’s Rules of Evidence, 3 LPRA § 9653 (2020); Section 2.01, Regulation No. 8543, Regulation on Adjudicative, Notice of Non-Compliance, Rate Review and Investigative Proceedings.

how or to what extent the alleged communications were undertaken by and between PREPA and its counsel for the purposes of procuring legal advice.

13. Section 1.13 of Energy Bureau Regulation No. 9137, Regulation for Performance Incentive Mechanisms and Energy Board Resolution CEPR-MI-0009, establish the process by which a party may invoke the existence of a privilege to seal material from public disclosure. In essence, these rules and regulations require that the party who asserts a privilege before the Energy Bureau should identify the confidential or privileged information and include a supporting memorandum of law to explain the legal basis of the argument that the information is confidential. PREPA's December 31st Request for Remedies, however, does not comply with said regulatory and legal requirements.
14. LUMA respectfully posits that, as a matter of law, the public filing and formal notice to LUMA of the January 29th Comments amounts to waiver and/or has a material effect on PREPA's claim of privilege that must be considered in assessing any request for an order that seeks corrective actions against a LUMA; a third party who properly and formally received notice of a public filing and who took immediate reasonable steps on January 30, 2021, to protect PREPA's public filing from further dissemination.
15. Additionally, in its January 31st Request for Remedies, PREPA did not inform the Energy Bureau of the diligences that LUMA promptly conducted on January 30, 2021, when PREPA's counsel issued a notice of the mistaken filing.
16. On January 29, 2021 at 11:06 pm, counsel for PREPA served the undersigned counsel for LUMA an electronic copy of the January 29th Comments. The document included a stamp attesting that it had been filed before the Energy Bureau at 11:01 pm on January 29, 2021,

in case NEPR MI 2019-0007. **Exhibit 1.** Having received an electronic document that had been filed before a public agency, and in furtherance of the ongoing work with the LUMA team on the filings that were due before the PREB, the undersigned forwarded the same to several members of the LUMA team who reasonably considered PREPA's filing.

17. The next day, January 30, 2021, at 9:25, the undersigned received a message from PREPA's counsel stating that January 29th comments were filed in error and that they included what PREPA considers to be privileged information. **Exhibit 2.**
18. In a good faith endeavor and without waiving arguments that the PREPA January 29th Comments are public and non-privileged, the undersigned informed the LUMA team members of the notice issued by PREPA's counsel, requested that they do not further transmit the copy of PREPA's January 29th comments and that they substitute the January 29th Comments with the revised document that PREPA filed before the Energy Bureau and served on LUMA on January 30, 2021.
19. On January 30, 2021, the undersigned informed counsel for PREPA of the aforementioned reasonable diligences and of LUMA's reservation of rights to raise waiver and argue that the January 29th comments were public. **Exhibit 3.**
20. The aforementioned shows that LUMA cooperated timely with PREPA's counsel to avoid further dissemination of information that PREPA understands was filed in error before the Energy Bureau. These diligences by LUMA further justify, on balance, the denial of the sweeping coercive orders that PREPA pursues in the January 31st Request for Remedies.

21. Nothing in PREPA's January 31st Request for Remedies even suggests that LUMA's diligences are insufficient nor that PREPA is currently exposed to any harm that may justify an order against LUMA.
22. LUMA has and will honor its duties of confidentiality with regards to confidential information that it receives from PREPA. But LUMA respectfully objects PREPA's January 31st Request for Remedies that is not properly tailored to applicable law and unfortunately does not consider the proper diligences that LUMA conducted prior to the date when PREPA moved the Energy Bureau to issue sweeping orders against LUMA.
23. Because the January 29th Comments that were served on LUMA's counsel had been filed before a public entity, and were purposely served by PREPA on LUMA's counsel for consideration by LUMA, it is respectfully submitted there is no legal basis or need for an order directing LUMA to destroy or delete all electronic copies of the January 29th comments.
24. Respectfully, LUMA understands that PREPA has moved for coercive relief against LUMA eschewing its burden of persuasion of showing with specificity that the January 29th Comments include communications between PREPA and its counsel that were made for the purposes of procuring or obtaining legal advice. More importantly, PREPA failed to address the consequences as a matter of law of an inadvertent disclosure of claimed privileged information that is made in a public filing.
25. It is respectfully submitted that PREPA's waiver of the attorney-client privilege is two-fold: (1) substantively, by filing the communications for the public record and serving notice of the public filing to LUMA (even if for the purposes of argumentation the Energy

Bureau considers that the January 29th Comments included privileged communications); and (2) procedurally, by requesting coercive relief from LUMA but failing to properly raise and establish that the attorney-client privilege attaches to the January 29th comments.

WHEREFORE, LUMA respectfully requests that the Energy Bureau find that PREPA did not comply with applicable regulations to establish the applicability as against LUMA of the attorney-client privilege with regards to the January 29th Comments and/or that PREPA waived the attorney client privilege, and that the Energy Bureau deny PREPA's request to order LUMA to destroy or delete all copies of the January 29th Comments.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 4th day of February 2021.

I hereby certify that I filed this motion using the electronic filing system of the Puerto Rico Energy Bureau and that on this date, I will send an electronic copy of this motion to via electronic mail to the attorneys of record for the Puerto Rico Electric Power Authority Joannely Marrero-Cruz, jmarrero@diazvaz.law; and Katuska Bolaños-Lugo, kbolanos@diazvaz.law.

/s/ MARGARITA MERCADO ECHEGARAY
Margarita Mercado Echegaray
DLA Piper (Puerto Rico) LLC
PR Bar No. 16,266
Suite 401
500 Calle de la Tanca
San Juan, PR 00901-1969
787-945-9101
margarita.mercado@us.dlapiper.com

Mercado, Margarita

From: Katuska Bolaños <kbolanos@diazvaz.law>
Sent: Friday, January 29, 2021 11:06 PM
To: Mercado, Margarita
Cc: Joannely Marrero; Idelisa Carrero
Subject: RE: Motion in compliance with order filed case 2019-0007
Attachments: PREPA Comments on the Establishment of Baseline and Metrics 012921.pdf

[EXTERNAL]

Thank you.

Attached is PREPA's.

Have a good weekend.

Katuska Bolaños-Lugo



From: Mercado, Margarita <margarita.mercado@dlapiper.com>
Sent: Friday, January 29, 2021 10:56 PM
To: Katuska Bolaños <kbolanos@diazvaz.law>; Joannely Marrero <jmarrero@diazvaz.law>
Subject: Motion in compliance with order filed case 2019-0007

Dear Counsels:

Please find attached the motion and exhibits that were filed in the captioned case.

Cordially,

Margarita Mercado
Contract Attorney

margarita.mercado@us.dlapiper.com

DLA Piper (Puerto Rico) LLC
dlapiper.com



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Mercado, Margarita

From: Katuska Bolaños <kbolanos@diazvaz.law>
Sent: Saturday, January 30, 2021 9:25 AM
To: Mercado, Margarita
Cc: Joannely Marrero; Idelisa Carrero
Subject: Re: Motion in compliance with order filed case 2019-0007

[EXTERNAL]


Counsel - because of a clerical mistake, Prepa filed and served on Luma, by means of service to you, the incorrect version of the comments. These comments are attorney-client privileged communications. Please delete and destroy the document and any copy forthwith. Also, please certify that you have discarded and deleted the documents and any copy. Further, it is also requested that you certify that any other person that you forwarded or produced a copy of the comments has destroyed those copies as well.

Thank you.

Katuska Bolaños-Lugo

Díaz & Vázquez Law Firm
290 Jesús T. Piñero Ave.
Oriental Tower, Suite 1105
San Juan, PR 00918
e: kbolanos@diazvaz.law
t: (787) 395-7133
f: (787) 497-9664

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Please consider the environment before printing this email. 

From: Katuska Bolaños
Sent: Friday, January 29, 2021 11:05:39 PM
To: Mercado, Margarita <margarita.mercado@dlapiper.com>
Cc: Joannely Marrero <jmarrero@diazvaz.law>; Idelisa Carrero <icarrero@diazvaz.law>
Subject: RE: Motion in compliance with order filed case 2019-0007

Thank you.

Attached is PREPA's.

Have a good weekend.

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Margarita Mercado

Contract Attorney

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Mercado, Margarita

From: Mercado, Margarita
Sent: Saturday, January 30, 2021 6:07 PM
To: Katuska Bolaños
Cc: Joannely Marrero; Idelisa Carrero
Subject: RE: Motion in compliance with order filed case 2019-0007

Dear Counsel Bolaños:

On January 29, 2021 at 11:06 pm, I was served with a stamped copy of a motion with comments in compliance with order that was filed electronically by the Puerto Rico Electric Power Authority (PREPA) before the Puerto Rico Energy Bureau (PREB) at 11:01 pm on January 29, 2021, in case NEPR MI 2019-0007 (PREPA comments). Having received an electronic document that had been filed before a public agency, and per my duties and ongoing work with the LUMA team on the filings that were due before the PREB, I immediately forwarded the same to several members of the LUMA team.

At 9:25 am of today, January 30, 2021, I first received your notice that PREPA's comments were filed in error and of your statement that they include what PREPA considers to be privileged information. I immediately advised my client of your notice. In good faith and without waiving arguments that the PREPA comments that were filed before the PREB on January 29, 2021, are public and non-privileged, after receiving your notice this morning, I have requested that LUMA team members do not transmit the copy of PREPA's comments that were filed and served on January 29, and requested that they substitute the January 29th PREPA comments with the new proposed filing that you served today, January 30, 2021.

I appreciate your current efforts to correct the clerical mistake. Given that PREPA's comments were filed and served last night as a public document via electronic means, all before receiving this morning's notification, at this time I cannot assure that all of the electronic copies or versions of the document are currently capable of being deleted. In good faith, as stated above, upon receipt of your notice, I took reasonable steps to inform LUMA team members of the mistaken public filing and to ask them to abstain from further access or distribution of the copy of PREPA's comments of January 29, 2021 that you served last night via e-mail communication.

I have also proceeded to delete the electronic copy of PREPA's comments that I received at 11:06 pm of January 29, 2021 and have not kept a copy in my files.

I am able to confer with you in this matter.

Margarita Mercado

Contract Attorney

margarita.mercado@us.dlapiper.com

DLA Piper (Puerto Rico) LLC
500 Calle de la Tanca, Suite 401
San Juan, PR 00901-1969



dlapiper.com

From: Katuska Bolaños <kbolanos@diazvaz.law>
Sent: Saturday, January 30, 2021 12:18 PM
To: Mercado, Margarita <margarita.mercado@dlapiper.com>
Cc: Joannely Marrero <jmarrero@diazvaz.law>; Idelisa Carrero <icarrero@diazvaz.law>
Subject: RE: Motion in compliance with order filed case 2019-0007

[EXTERNAL]

Counsel -

Please find attached the revised version of PREPA's comments as filed today. Note that the only changes were: remove the attorney-client privileged information and a revision of the items listed under section III of the Table of Comments (pag. 2). The latter changed automatically when we removed the confidential information.

Also, please send us a certification that all the version produced last night has been deleted and any copy reproduced or forwarded as also been destroyed and will not be used.

We'll file a motion with the Energy Bureau explaining the situation, asking that the version filed last night is kept under seal until the Bureau determines that the version filed today will be allowed and not discarded as untimely filed.

I look forward to your prompt response with the certification.

Have a good weekend.

Katuska Bolaños-Lugo



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Cc: Joannely Marrero <jmarrero@diazvaz.law>; Idelisa Carrero <icarrero@diazvaz.law>
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Thank you.

Katuska Bolaños-Lugo

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Have a good weekend.

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Margarita Mercado

Contract Attorney

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