

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

IN RE: REVIEW OF LUMA'S SYSTEM
OPERATION PRINCIPLES

CASE NO. NEPR-MI-2021-0001

SUBJECT: Memorandum of Law in Support of Request for Confidential Treatment of Portions of May 14th Submission of Additional Information Requested in Technical Conference, Supplemental Responses to Questions and Clarifications

**MEMORANDUM OF LAW IN SUPPORT OF REQUEST TO SUBMIT
PORTIONS OF LUMA'S MAY 14th SUBMISSION OF ADDITIONAL INFORMATION
RELATED TO THE SYSTEM OPERATION PRINCIPLES CONFIDENTIALLY**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME now **LUMA Energy, LLC** ("ManagementCo"), and **LUMA Energy ServCo, LLC** ("ServCo"), (jointly referred to as the "Operator" or "LUMA"), and respectfully state and request the following:

I. Introduction

On April 27, 2021, the honorable Puerto Rico Energy Bureau ("Bureau") issued a Resolution and Order that set a procedural calendar in this proceeding and included a technical conference scheduled for May 10th and 11th, 2021 ("April 27th Order"). The April 27th Order also directed that LUMA would have until May 14, 2021, to file additional information that the Bureau could require during the Technical Conference.

The Technical Conference was held on May 10th and 11th, 2021. Throughout the two days of the Technical Conference, Commissioners and Bureau consultants issued requests for additional information. Similarly, LUMA representatives offered and requested leave to file additional

information or responses with regards to several topics, and/or to provide written clarification on several matters. The Bureau issued bench orders granting LUMA leave to provide additional information or supplemental written responses to certain questions and/or to submit clarifications on or before May 14, 2021.

On May 14, 2021, LUMA filed before the Bureau a “Motion for Submission of Additional Information Requested in Technical Conference, Supplemental Responses to Questions and Clarifications” (“Motion Submitting Additional Information”). The Motion Submitting Additional Information included three (3) partially confidential responses to wit, TC-RFI-LUMA-MI-21-0001-210510-PREB-004, TC-RFI-LUMA-MI-21-0001-210510-PREB-005 and TC-RFI-LUMA-MI-21-0001-210510-PREB-006. Furthermore, attachment to TC-RFI-LUMA-MI-21-0001-210510-PREB-005 was submitted to the Bureau under seal of confidentiality (together with Responses TC-RFI-LUMA-MI-21-0001-210510-PREB-004, TC-RFI-LUMA-MI-21-0001-210510-PREB-005 and TC-RFI-LUMA-MI-21-0001-210510-PREB-006, the “Confidential Responses”). LUMA used the Bureau’s electronic filing system to file a “public” version of the Responses and attachments, as well as “redacted” versions of the Confidential Responses. A “non-redacted” or “confidential” version of the Confidential Responses was submitted both through the Bureau’s electronic filing (with the exception of attachment 1 of TC-RFI-LUMA-MI-21-0001-210510-PREB-005 which was submitted in Excel format) and via e-email message to the Bureau’s clerks’ office.

At page 4 paragraph 5 of the Motion Submitting Additional Information, LUMA explained that a separate supporting legal memorandum would be filed forthwith in compliance with the Bureau’s Policy on Management of Confidential Information, CEPR-MI-2016-0009, issued on

August 31, 2016, and partially amended on September 16, 2016 (“Bureau’s Policy on Confidential Information”).

In compliance with the Bureau’s Policy on Confidential Information, LUMA hereby submits this supporting Memorandum of Law that further identifies the Confidential Responses and states the legal basis for the requested confidential treatment. As will be explained in this Memorandum, the Confidential Responses, include Critical Energy Infrastructure Information pursuant to 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674 and sensitive commercial information and trade secrets protected under Act 80-2011.

It is respectfully submitted that in furtherance of Act 57-2014’s mandate that documents submitted before the Bureau should be kept out of public reach only in exceptional circumstances, this request for confidential designation of portions of the Confidential Responses is narrowly tailored to specifically protect the information that has been identified as confidential pursuant to applicable law.

II. Applicable Laws and Regulation to submit information confidentially before the Bureau.

The bedrock provision on management of confidential information that is filed before this Bureau, is Section 6.15 of Act 57-2014, known as the “Puerto Rico Energy Transformation and Relief Act.” It provides, in pertinent part, that: “[i]f any person who is required to submit information to the Energy Commission believes that the information to be submitted has any confidentiality privilege, such person may request the Commission to treat such information as such” 22 L.P.R.A. §1054n. If the Bureau determines, after 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.*, Section 6.15 (a).

Relatedly, in connection with the duties of electric power service companies, Section 1.10 (i) of Act 17-2019 provides that electric power service company shall provide information requested by customers, except for confidential information in accordance with the Rules of Evidence of Puerto Rico.”

Access to the confidential information shall be provided “only to the lawyers and external consultants involved in the administrative process after the execution of a confidentiality agreement.” *Id.* Section 6.15(b). Finally, Act 57-2014 provides that this 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 [Bureau] who needs to know such information under nondisclosure agreements. However, the [Bureau] shall direct that a non-confidential copy be furnished for public review”. *Id.* Section 6.15 (c).

The Bureau’s Policy on Confidential Information, details the procedures that a party should follow to request that a document or portion thereof, be afforded confidential treatment. In essence, the referenced Policy requires identification of the confidential information and the . . . filing of a memorandum of law explaining the legal basis and support for a request to file information confidentially. *See* CEPR-MI-2016-0009, Section A, as amended by the Resolution of September 16, 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 a summary of the reasons why each claim or designation conforms to the applicable legal basis of confidentiality. *Id.* paragraph 3. The party who seeks confidential treatment of information filed with the Bureau must also file both “redacted” or “public version”

and an “unredacted” or “confidential” version of the document that contains confidential information. *Id.* paragraph 6.

The aforementioned Bureau policy on management of confidential information in procedures states the following with regards to access to validated Trade Secret Information and CEII:

1. Trade Secret Information

Any document designated by the [Energy Bureau] as Validated Confidential Information because it is a trade secret under Act 80-2011 may only be accessed by the Producing Party and the [Bureau], unless otherwise set forth by the [Bureau] or any competent court.

2. Critical Energy Infrastructure Information ("CEII")

The information designated by the [Energy Bureau] as Validated Confidential Information on the grounds of being CEII may be accessed by the parties' authorized representatives only after they have executed and delivered the Nondisclosure Agreement.

Those authorized representatives who have signed the Non-Disclosure Agreement may only review the documents validated as CEII at the [Energy Bureau] or the Producing Party's offices. During the review, the authorized representatives may not copy or disseminate the reviewed information and may bring no recording device to the viewing room.

Id. Section D (on Access to Validated Confidential Information).

Relatedly, Bureau Regulation No. 8543, *Regulation on Adjudicative, Notice of Noncompliance, Rate Review, and Investigation Proceedings*, includes a provision for filing confidential information in adjudicatory proceedings before this honorable Bureau. To wit, Section 1.15 provides that, “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 [that] the material merits protection,

proceed accordingly to . . . Article 6.15 of Act No. 57-2015, as amended.” *See also* Bureau Regulation No. 9137 on *Performance Incentive Mechanisms*, Section 1.13 (addressing disclosure before the Bureau of Confidential Information and directing compliance with Resolution CEPR-MI-2016-0009).

III. Request for Confidentiality

A. Sensitive Commercial Information

Under the Industrial and Trade Secret Protection Act of Puerto Rico, Act 80-2011, 10 P.R. Laws Annot. §§ 4131-4144, 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.

Id. §4131, Section 3 Act. 80-2011.¹ They include, but are not limited to, processes, methods and mechanisms, manufacturing processes, formulas, projects or patterns to develop machinery and lists of specialized clients that may afford an advantage to a competitor. *See* Statement of Motives, Act 80-2011; *see also* Article 4 of Puerto Rico’s Open Data Law, Act 122-2019, exempts the following from public disclosure: (1) commercial or financial information whose disclosure will cause competitive harm; and (2) trade secrets protected by a contract, statute or judicial decision. *See* Act 122-2019, Articles 4 (ix) and (x).

¹ Relatedly, Rule 513 of the Rules of Evidence of Puerto Rico provides that the owner of a trade secret may invoke the privilege to refuse to disclose, and to prevent another person, from disclosing trade secrets, provided that these actions do not tend to conceal fraudulent actions or lead to an injustice. 32 P.R. Laws Annot. Ap. VI, R. 513. If a court of law mandates disclosure of a trade secret, precautionary measures should be adopted to protect the interests of the owner of the trade secret. *Id.*

The Puerto Rico Supreme Court has explained that the trade secrets privilege protects free enterprise and extends to commercial information that is confidential in nature. *Ponce Adv. Med. v. Santiago Gonzalez*, 197 DPR 891, 901-02 (2017) (citation omitted).

As identified in the table at Section IV *infra*, TC-RFI-LUMA-MI-21-0001-210510-PREB-006 includes commercial information on LUMA's approach to system interoperability involving Operation Technology and the Energy Management System ("EMS"). The response also mentions proprietary materials that LUMA has developed, namely, Design Control Documents ("DCD"). In addition to the sensitive commercial information contained in TC-RFI-LUMA-MI-21-0001-210510-PREB-006, said response also contains critical energy infrastructure that should be maintained confidentially as described herein below.

B. Critical Energy/Electric Infrastructure Information (CEII)

The redacted portions of the Confidential Responses, including TC-RFI-LUMA-MI-21-0001-210510-PREB-006 mentioned above, reference critical energy infrastructure information that, under relevant federal law and regulations, is protected from public disclosure and garners confidential treatment to protect critical infrastructure from threats that could undermine the system and have negative repercussions in electric power services to the detriment of the interests of the public, customers, and citizens of Puerto Rico. In several proceedings, this Energy Bureau has considered and/or granted requests by PREPA to submit CEII under seal of confidentiality.²

² See *In re Implementation of Puerto Rico Electric Power Authority Integrated Resource Plan and Modified Action Plan*, NEPR MI 2020-0012 (Resolution of January 7, 2021, granting partial confidential designation of information submitted by PREPA as CEII); *In re Optimization Proceeding of Minigrad Transmission and Distribution Investments*, NEPR MI 2020-0016 (where PREPA filed documents under seal of confidentiality invoking, among others, that a filing included confidential information and CEII); *In re Review of the Puerto Rico Electric Power Authority Integrated Resource Plan*, CEPR-AP-2018-0001 (Resolution and Order of July 3, 2019 granting confidential designated and request made by PREPA that included trade secrets and CEII) *but see* Resolution and Order of February 12, 2021 reversing in part, grant of confidential designation).

In at least two proceedings on Data Security,³ and Physical Security,⁴ this Bureau, *motu proprio*, has conducted proceedings confidentially, thereby recognizing the need to protect CEII from public disclosure. More importantly, in this proceeding, this honorable Energy Bureau has granted requests by LUMA to protect CEII in connection with LUMA's System Operation Principles. *See* Resolution and Order of May 3, 2021, table 2 at page 4, granting protection to CEII included in LUMA's Responses to Requests for Information. Similarly, in the proceedings on LUMA's proposed Initial Budgets and System Remediation Plan, this honorable Energy Bureau granted confidential designation to several portions of LUMA's Initial Budgets and Responses to Requests for Information, recognizing that they included CEII, *see* Resolution and Order of April 22, 2021 on Initial Budgets, table 2 at pages 3-4 and Resolution and Order of April 22, 2021 on Responses to Requests for Information, table 2 at pages 8-10, Case No. NEPR-MI-2021-0004; Resolution and Order of April 23, 2021 on Confidential Designation of Portions of LUMA's System Remediation Plan, table 2 at page 5 and Resolution and Order of May 6, 2021 on Confidential Designation of Portions of LUMA's Responses to Requests for Information on System Remediation Plan, table 2 at pages 7-9, Case No. NEPR-MI-2020-0019.

As mentioned above, the Bureau's Policy on Confidential Information provides for management of CEII, and directs that information validated as CEII shall be accessed by the parties' authorized representatives only after they have executed and delivered a Nondisclosure Agreement.

Generally, CEII or critical infrastructure information is exempted from public disclosure because it involves assets and information the disclosure of which poses public security, economic, health and safety risks. Federal Regulations on CEII, particularly, 18 C.F.R. § 388.113, states that:

³ *In re Review of the Puerto Rico Electric Power Authority Data Security Plan*, NEPR-MI-2020-0017.

⁴ *In re Review of the Puerto Rico Electric Power Authority Physical Security Plan*, NEPR-MI-2020-0018.

Critical energy infrastructure information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
- (ii) Could be useful to a person in planning an attack on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and
- (iv) Does not simply give the general location of the critical infrastructure.

Id.

Additionally, “[c]ritical electric infrastructure means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

Id. Finally, “[c]ritical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.” *Id.*

The Critical Infrastructure Information Act of 2002, 6 U.S.C. §§ 671-674 (2020), a part of the Homeland Security Act of 2002 provides protection from disclosure of critical infrastructure information (“CII”).⁵

⁵ Regarding protection of voluntary disclosures of critical infrastructure information, 6 U.S.C. § 673, provides in pertinent part, that CII:

- (A) shall be exempt from disclosure under the Freedom of Information Act;
- (B) shall not be subject to any agency rules or judicial doctrine regarding ex parte communications with a decision making official;
- (C) shall not, without the written consent of the person or entity submitting such information, be used directly by such agency, any other Federal, State, or local authority, or any third party, in any civil action arising under Federal or State law if such information is submitted in good faith;
- (D) shall not, without the written consent of the person or entity submitting such information, be used or disclosed by any officer or employee of the United States for purposes other than the purposes of this part, except—
 - (i) in furtherance of an investigation or the prosecution of a criminal act; or
 - (ii) when disclosure of the information would be--
 - (I) to either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee thereof or subcommittee of any such joint committee; or

CII is defined as “information not customarily in the public domain and related to the security of critical infrastructure or protected systems...” 6 U.S.C. § 671 (3).⁶

As identified in the Table at Section IV *infra*, all Confidential Responses contain CEII and/or CII and LUMA’s, including details on redundancy, restoration capabilities, generation units, interoperability, information on the EMS and information technology assets, similar to the information that the Bureau has designated as CEII in connection with LUMA’s Initial Budgets and System Remediation Plan. *See* Resolution and Order of April 22, 2021 on Initial Budgets, table 2 at pages 3-4 and Resolution and Order of April 22, 2021 on Responses to Requests for Information, table 2 at pages 8-10, Case No. NEPR-MI-2021-0004; Resolution and Order of April 23, 2021 on Confidential Designation of Portions of LUMA’s System Remediation Plan, table 2

(II) to the Comptroller General, or any authorized representative of the Comptroller General, in the course of the performance of the duties of the Government Accountability Office

(E) shall not, be provided to a State or local government or government agency; of information or records;

(i) be made available pursuant to any State or local law requiring disclosure of information or records;

(ii) otherwise be disclosed or distributed to any party by said State or local government or government agency without the written consent of the person or entity submitting such information; or

(iii) be used other than for the purpose of protecting critical Infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act.

(F) does not constitute a waiver of any applicable privilege or protection provided under law, such as trade secret protection.

⁶ CII includes the following types of information:

(A) actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct (including the misuse of or unauthorized access to all types of communications and data transmission systems) that violates Federal, State, or local law, harms interstate commerce of the United States, or threatens public health or safety;

(B) the ability of any critical infrastructure or protected system to resist such interference, compromise, or incapacitation, including any planned or past assessment, projection, or estimate of the vulnerability of critical infrastructure or a protected system, including security testing, risk evaluation thereto, risk management planning, or risk audit; or

(C) any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, construction, insurance, or continuity, to the extent it is related to such interference, compromise, or incapacitation.

at page 5 and Resolution and Order of May 6, 2021 on Confidential Designation of Portions of LUMA's Responses to Requests for Information on System Remediation Plan, table 2 at pages 7-9, Case No. NEPR-MI-2020-0019.

First, TC-RFI-LUMA-MI-21-0001-210510-PREB-006 includes information on LUMA's approach to system interoperability involving Operation Technology and the EMS. As stated above, the Bureau has granted protection in connection with LUMA's Initial Budgets, Case No. NEPR-MI-2021-004 and System Remediation Plan, NEPR-MI-2020-0019, to information regarding the EMS which is a critical component of system operations.

Secondly, TC-RFI-LUMA-MI-21-0001-210510-PREB-004, includes LUMA's assessment of what would happen if there is a fault in the transmission lines from Eco Eléctrica. The response includes details of the capabilities of said transmission lines and their vulnerabilities. It discusses current procedures employed by PREPA to provide frequency response and includes a blueprint of how LUMA would manage the system in a hypothetical scenario of an outage. This is CEII that, if disclosed, could threaten the transmission and distribution system and LUMA's ability to adequately manage the same. Respectfully, the public interest in protecting the integrity and safety of the transmission lines mentioned in TC-RFI-LUMA-MI-21-0001-210510-PREB-004, outweighs any interest of disclosure of information that involves the operation of critical infrastructure to provide an essential service in Puerto Rico.

Similarly, TC-RFI-LUMA-MI-21-0001-210510-PREB-005 and attachment 1 to TC-RFI-LUMA-MI-21-0001-210510-PREB-005, include CEII on system restoration, black-start capabilities and the capacity and characteristics of generation units, including Aguirre, Costa Sur, Palo Seco, and the San Juan units. Attachment 1 to TC-RFI-LUMA-MI-21-0001-210510-PREB-005 includes information on the supply stack for the generation units and generation capacity of

the generating units. Both TC-RFI-LUMA-MI-21-0001-210510-PREB-005 and attachment 1 to the same, relate details about generation of energy. The information could be useful to attack or imperil the units and does not simply give the general location of said critical infrastructure. The referenced response and attachment 1 to the response, contain CEII whose protection from disclosure is in the public interest. Protection of this information will assist LUMA in ensuring that citizens of Puerto Rico receive safe, reliable and efficient electric power services.

The Confidential Responses that have been identified in the table below as containing CEII and/or CII, involve critical elements of systems that are essential for LUMA’s operations as key components of system operations and performance. If the information falls in the hands of people who may want to harm the system, it will certainly provide sufficient details to expose the system to risks and harms and would interfere with the orderly and safe functioning of several critical components of systems operations.

IV. Identification of Confidential Information.

In compliance with the Bureau’s Policy on Management of Confidential Information, CEPR-MI-2016-0009, a table summarizing the hallmarks of this request to submit several Attachments to the Responses to Requests for Information, confidentially.

#	Response	Subject	Pages in which Confidential Information is Found, if applicable	Date of Filing	Summary of Legal Basis for Confidentiality Protection, if applicable
1	TC-RFI-LUMA-MI-21-0001-210510-PREB-004	System Redundancy	Pages 1-2	May 14, 2021	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674

#	Response	Subject	Pages in which Confidential Information is Found, if applicable	Date of Filing	Summary of Legal Basis for Confidentiality Protection, if applicable
2	TC-RFI-LUMA-MI-21-0001-210510-PREB-005	System Restoration Capabilities	Pages 1-5	May 14, 2021	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674
3	TC-RFI-LUMA-MI-21-0001-210510-PREB-005 Attachment 1	System Restoration Capabilities	All Tabs	May 14, 2021	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674
4	TC-RFI-LUMA-MI-21-0001-210510-PREB-006	Interoperability	Page 1	May 14, 2021	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674 and Sensitive Commercial Information and Trade Secrets under Act 80-2011 and Act 122-2019.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **grant** LUMA’s request to keep confidentially portions of the aforementioned Confidential Responses that were filed with LUMA’s Motion Submitting Additional Information on May 14, 2021 and **accept** the submission for the public record of a redacted version of the Confidential Responses.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 24th day of May 2021.

I hereby certify that I filed this motion using the electronic filing system of this Energy Bureau and that I will send an electronic copy of this motion to the attorneys for PREPA, Joannely Marrero-Cruz, jmarrero@diazvaz.law; and Katuska Bolaños-Lugo, kbolanos@diazvaz.law.



DLA Piper (Puerto Rico) LLC
500 Calle de la Tanca, Suite 401
San Juan, PR 00901-1969
Tel. 787-945-9107
Fax 939-697-6147

/s/ Margarita Mercado Echegaray
Margarita Mercado Echegaray
RUA NÚM. 16,266