

**COMMONWEALTH 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'S
SYSTEM REMEDIATION PLAN

CASE NO. NEPR-MI-2020-0019

SUBJECT: Memorandum of Law in Support of Request for Confidential Treatment of Portions of Motion in Compliance with Request for Information of June 2, 2021, and Submitting Executed Copy of Limited Waiver

**MEMORANDUM OF LAW IN SUPPORT OF REQUEST TO SUBMIT
PORTIONS OF LUMA'S MOTION IN COMPLIANCE WITH REQUEST FOR
INFORMATION OF JUNE 2, 2021, AND SUBMITTING EXECUTED COPY OF
LIMITED WAIVER CONFIDENTIALLY**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC ("ManagementCo")¹, and LUMA Energy ServCo, LLC ("ServCo")², (jointly, "LUMA"), through the undersigned legal counsel and respectfully submit the following:

I. Introduction

On June 2, 2021, the honorable Puerto Rico Energy Bureau ("Energy Bureau") issued a Resolution and Order ("June 2nd Request for Information"), whereby the Energy Bureau directed LUMA to file on or before June 4, 2021 at noon, a copy of the waiver ("Limited Waiver") executed by the parties to the Puerto Rico Transmission and Distribution System Operation and Maintenance Agreement ("OMA").

¹ Register No. 439372.

² Register No. 439373.

On June 4, 2021, LUMA complied with the June 2nd Request for Information by filing before the Energy Bureau a “Motion in Compliance with Request for Information of June 2, 2021 and Submitting Executed Copy of Limited Waiver” (“June 4th Motion”). Exhibit C to the Limited Waiver was submitted, in part, under seal of confidentiality (“Exhibit C”). LUMA submitted for the record using the Energy Bureau’s electronic filing system, a redacted public version of Exhibit C. A “non-Redacted” or “confidential” version of Exhibit C was submitted both through the Energy Bureau’s electronic filing using the confidentiality feature of the filing docket and via e-mail message to the Energy Bureau’s clerks’ office.

At pages 5 and 6, the June 4th Motion, paragraph 16, LUMA explained that a separate supporting legal memorandum would be filed forthwith in compliance with 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 (“Bureau’s Policy on Confidential Information”).

As will be explained in this Memorandum, portions of Exhibit C include Sensitive Commercial Information protected under Act 80-2011 and Rule 513 of the Puerto Rico Rules of Evidence.

In compliance with the Bureau’s Policy on Confidential Information, LUMA submits this supporting Memorandum of Law that further identifies the confidential portions of Exhibit C and states the legal basis for the requested confidential treatment. 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 Exhibit C 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” 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).

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:

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.

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: 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. 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.

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); *see also Next Step Medical Co. v. MCS Advantage Inc.*, 2016 WL 6520173, KLCE201601116 (P.R. Court of Appeals, September 13, 2016 at page 11 (holding that in Puerto Rico, what constitutes trade secrets is evaluated applying a broad definition). A trade secret includes **any and all information** from which a real or potential value or economic advantage may be derived; that is not common knowledge or accessible through other means; and as to which reasonable security measures have been adopted to keep the information confidential. *Ponce Adv. Medical*, 197 DPR. at 906.

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.*

As identified in the table at Section IV *infra*, Exhibit C includes commercial information regarding analysis of possible insurance policies to be purchased by LUMA and related estimations and assumptions on costs. Particularly, Exhibit C includes LUMA's plan on how to obtain insurance required by the OMA as well as an analysis of current PREPA coverages and their compliance/non-compliance with OMA requirements. Additionally, Exhibit C establishes a timeframe for completion of the OMA insurance requirements. Disclosure of this information will place LUMA in unfair advantages in the insurance markets to the detriment of customers and ratepayers. The relevant and redacted portions of Exhibit C should be kept confidentially to secure the orderly conduct of future negotiations in the insurance market. Disclosure of the information will stifle future negotiations and the possibility of competitive interactions that reduce costs since possible insurers will have had the benefit of seeing LUMA's estimates and original analysis and methods in connection with acquisition of OMA required insurance coverages.³

³ The Energy Bureau has held in the past that information related to PREPA insurance-related information be maintained confidentially. *See* Case No. NEPR-MI-2020-0001, Resolution and Order dated June 10, 2021 granting motions filed by the Puerto Rico Electric Power Authority ("PREPA") on April 16, 2021 and April 30, 2021 both entitled "Informe de Reclamaciones y Solicitud de Determinación de Confidencialidad."

As persuasive authority on the need to protect from early disclosure, information relevant to competitive procurement processes, LUMA requests that this honorable Energy Bureau consider Section 10.1 of the Joint Regulation 8815, *Joint Regulation for the Procurement, Evaluation, Selection, Negotiation and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet*, which provides for the confidentiality of information presented for procurement processes within PREPA, prior to awarding a contract, and that preserves the confidentiality of trade secrets, proprietary information or privileged and confidential information.

The redacted portions of Exhibit C contain information that has not been publicly disclosed to third parties or the public given its sensitive nature and to protect public interests in negotiating acquisition of insurance policies.

LUMA requests that the redacted portions of Exhibit C, identified in Table Section IV, *infra*, as commercially sensitive information, be maintained confidentially before this Energy Bureau as they contain sensitive commercial information whose premature disclosure would also contravene public policy on competitive acquisition processes and will impede efficient allocation of PREPA funds within annual budget constraints.

IV. Identification of Confidential Information.

In compliance with the Energy Bureau’s Policy on Management of Confidential Information,” CEPR-MI-2016-0009, a table summarizing the hallmarks of this request to submit portions of Exhibit C to the Limited Waiver, confidentially.

Document	Document Type	Pages in which Confidential Information is Found	Date of Filing	Summary of Legal Basis for Confidentiality Protection	Summary of Reasons Why Each Claim Conforms to Legal Basis for Confidentiality
Exhibit C to the Limited Waiver	PDF	Redacted Portions	June 4, 2021	Sensitive Commercial Information Protected under Act 80-2011 and Rule 513 of the Puerto Rico Rules of Evidence	Section III A of this Memorandum provides the legal basis to establish that the specified sections of Exhibit C include confidential information.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **grant** LUMA’s request to keep confidentially portions of Exhibit C to the Limited Waiver that were filed in

redacted form with the June 4th Motion and **accept** the submission for the public record of a redacted version of Exhibit C.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 14th day of June 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.



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