

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

**NEPR**

**Received:**

**Dec 27, 2021**

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**IN RE:**  
IMPLEMENTATION OF THE PUERTO  
RICO ELECTRIC POWER AUTHORITY  
INTEGRATED RESOURCE PLAN AND  
MODIFIED ACTION PLAN

**CASE NO. NEPR-MI-2020-0012**  
**SUBJECT: Memorandum of Law in Support of**  
**Request for Confidential Treatment of Draft RFQ/RFP**  
**for IRP Consultant and Draft Contract Submitted on**  
**December 17, 2021**

**MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR CONFIDENTIAL  
TREATMENT OF DRAFT RFQ/RFP FOR IRP CONSULTANT AND DRAFT  
CONTRACT**

**TO THE PUERTO RICO ENERGY BUREAU:**

**COMES NOW LUMA Energy ServCo, LLC** (“LUMA”), through the undersigned legal counsel, and respectfully submits the following:

On December 17, 2021, LUMA submitted to this honorable Puerto Rico Energy Bureau (“Energy Bureau”) a *Motion to Submit Report on Resource Planning Process for Next IRP Cycle and Draft RFQ/RFP for IRP Consultant and Request for Confidential Treatment* (“December 17<sup>th</sup> Motion”). Among others, in the December 17<sup>th</sup> Motion, LUMA submitted under seal of confidentiality, as Exhibit 3, a draft Request for Qualifications/Request for Proposals with draft contract (“RFQ/RFP”) in accordance with Section V(B)(2) of the Final Resolution and Order of August 24, 2020 in Case CEPR-AP-2018-0001, *In Re: Puerto Rico Electric Power Authority Integrated Resource Plan* (“August 24<sup>th</sup> Resolution”)<sup>1</sup> and the Resolution and Order issued by the

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<sup>1</sup> In the August 24<sup>th</sup> Resolution, the Energy Bureau approved in part and rejected in part the Puerto Rico Electric Power Authority’s (“PREPA”) Integrated Resource Plan (“IRP”) and approved an associated Modified Action Plan.

Energy Bureau in this proceeding on December 15, 2021<sup>2</sup>. Section V(B)(2) of the August 24<sup>th</sup> Resolution orders PREPA to comply with the requirements set forth therein for the selection of a technical consultant to be engaged for IRP-related services, including the submittal to the Energy Bureau for review and approval of the documents related to the procurement and contracting thereof (the “IRP Consultant Contracting Process”).

As explained in the December 17<sup>th</sup> Motion, the RFQ/RFP is intended to consolidate several requirements of the IRP Consultant Contracting Process in one document and addresses the requirements of paragraphs (a), (b) and (e) under Section V(B)(2) of the August 24<sup>th</sup> Resolution.

LUMA submitted **Exhibit 3** to the December 17<sup>th</sup> Motion under seal of confidentiality and requested that the Energy Bureau keep and maintain the same in confidence, pursuant to the Policy on Management of Confidential Information, CEPR-MI-2016-0009 (“Policy on Management of Confidential Information”), issued on August 31, 2016, as amended by the Resolution dated September 16, 2016. In this memorandum of law, LUMA supports said request for confidential treatment of Exhibit 3 to the December 17<sup>th</sup> Motion.

### **I. Applicable Laws and Regulation to Submit Information Confidentially Before this Energy 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 [now Energy Bureau] believes that the information to be

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<sup>2</sup> In this Resolution, the Energy Bureau granted LUMA until December 17, 2021 to submit the mentioned RFQ/RFP document.

submitted has any confidentiality privilege, such person may request the Commission to treat such information as such [ . . . ] ” 22 LPRA §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 an electric power service company shall “provide documents and information as requested [ by customers, except for: ... confidential information in accordance with the Rules of Evidence of Puerto Rico.”

Per Act 57-2014, 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 states the following with regards to access to validated Trade Secret Information:

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.

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

## **II. Request for Confidential Treatment of Exhibit 3 to the December 17<sup>th</sup> Motion**

It is respectfully submitted that the documents included in Exhibit 3 to the December 17<sup>th</sup> Motion are commercially-sensitive documents and drafts subject to approval by this Energy Bureau that LUMA has kept and maintained confidentially as part of its business dealings and to protect future competitive procurement processes and documents that are subject to approval by this Energy Bureau. These are: (1) the draft RFP/RFQ, including a detail of the proposal requirements, evaluation criteria, the statements of qualifications that LUMA shall require from proponents, the scope of the services that proponent shall offer, and the process for selection of proponents; and (2)

the draft contract to be executed by the selected proponent and the exhibits to the draft contract. Thus, Exhibit 3 to the December 17<sup>th</sup> Motion includes documents designed to become a part of the IRP Consultant Contracting Process which has not commenced. Their disclosure will adversely impact the integrity of the procurement process.

It should be noted that Exhibit 3 is an original business document developed using LUMA's business expertise. If disclosed prior to issuance of the RFP/RFQ, it will give future proponents insights into LUMA's commercial processes and analysis for preparing its proposal to be submitted to this Energy Bureau and will affect LUMA's ability to procure IRP consultant services in a competitive and open manner during the IRP Consultant Contracting Process. It is the type of business document showing processes, methods and mechanisms, that is protected under Act 80-201. It is important to note that Act 80-2011 has been interpreted broadly by the Puerto Rico Supreme Court to protect information belonging to a business such as LUMA, that are kept privately to protect the orderly conduct of business and to avoid competitive harms. *See Ponce Adv. Med.*, 197 DPR 891.

The documents submitted as Exhibit 3 to the December 17<sup>th</sup> Motion are subject to revisions by this Energy Bureau. Thus, it is in the public interest to keep them confidentially. As part of its processes and commercial practices, LUMA does not disclose draft documents. Disclosure of Exhibit 3 would run counter to public interests, as the public may mistakenly construe that it is the final version of the RFP/RFQ and of the contract to be used by LUMA and that is to be approved by this Energy Bureau in connection with contracting an IRP consultant.<sup>3</sup> The public interests are

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<sup>3</sup> It bears noting that in the proceeding *In re Review of LUMA's System Operation Principles*, Case NEPR-MI-2021-0001, in a Resolution and Order dated August 25, 2021, this Energy Bureau granted LUMA's

best served if this Energy Bureau keeps and maintains Exhibit 3 confidentially and pursuant to the Energy Bureau's Policy on Confidential Information. *See* CEPR-MI-2016-0009, as amended by the Resolution of September 16, 2016, CEPR-MI-2016-0009.

It bears noting that this Energy Bureau grants confidential treatment to communications with the Puerto Rico Electric Power Authority regarding approval of the contents of an RFP conducted pursuant to the *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*, Regulation No. 8815. *See* Section 4.2, Joint Regulation 8815. Although the RFQ/RFP for the IRP Consultant Contracting Process is not ruled by Joint Regulation 8815, it is respectfully submitted that the confidentiality concerns that apply to communications between this Energy Bureau and PREPA for approvals by this Energy Bureau of RFP documents and materials under Joint Regulation 8815, also apply to submissions made by LUMA to this Energy Bureau for approval of RFP/RFQ documents and contracts related to competitive procurement processes to select an IRP consultant.

In sum, Exhibit 3 to the December 17<sup>th</sup> Resolution and Order includes: (1) draft documents with commercial and financial value, and (2) detailed information and requirements for future competitive procurement processes that are **not common knowledge or readily accessible** by third parties who may seek to profit from or gain commercial advantages *via* premature disclosure of

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request to designate as confidential, fourteen draft operational procedures, deeming that the drafts were protected as sensitive commercial information. Thus, there is precedent by this Energy Bureau to protect from disclosure documents that are subject to revisions or changes or submitted for consideration by this Energy Bureau in draft form.

LUMA’s proposal to this Energy Bureau on how to conduct the competitive procurement process to select the IRP consultant and of the draft contract to be executed with the selected proponent which will form a part of the IRP Consultant Contracting Process.

Reasonable measures have been taken to protect the documents included in Exhibit 3 to the December 17<sup>th</sup> Motion and safeguard this Energy Bureau’s authority to review and approve the drafts. Confidentiality of Exhibit 3 to the December 17<sup>th</sup> Motion is in the public interest and that of ratepayers.

**III. 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 for confidential treatment:

Document	Date of Submission	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable
Exhibit 3	December 17, 2021	Full contents of Exhibit 3, Draft RFP/RFQ and Attachment D (Draft Contract) which includes the following Exhibits and Attachments: Exhibit A (General Terms and Conditions); Exhibit B (Scope of Services) with: Annex 1 to Exhibit B (Contractor Proposal); Exhibit C (Agreement Price) with: Attachment 1 (Reimbursable); Annex 1 to Attachment 1 (All-Inclusive Charge Out Rates) Annex 2 to Attachment 1 (Own Equipment Rates) Attachment 2 (Unit Rate); Annex 1 to Attachment 2 (Unit Rates); Attachment 3 (Excluded Costs); Attachment 4 (Actual Costs);	Sensitive Commercial Information and Trade Secrets under Act 80-2011.  Draft RFP and RFQ document that is subject to approval by this Energy Bureau and has not been disclosed to protect the integrity of future competitive processes

Document	Date of Submission	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable
		<p>Annex 1 to Attachment 4 (Actual Costs Re Contractor Owned Equipment); and  Annex 2 to Attachment 4 (Actual Costs re Contractor’s Personnel);  Exhibit D (Form of Work Order) with:  Annex 1 (Reimbursable Work Schedule);  Annex 2 (Unit Rate Work Schedule);  and  Annex 3 (Unit Rates);  Exhibit E (Government Contracting Requirement (Offshore)) with:  Attachment 1 (Form of Sworn Statement- Tax Liability);  Attachment 2 (Form of Sworn Statement- Act 2-2018); and  Attachment 3 (Form of Sworn Statement CRIM);  Alternate Exhibit E (Government Contracting Requirement (On Island)) with:  Attachment 1 (Form of Sworn Statement- Act 2-2018); and  Annex 1 to Attachment 1 (Contract Certification Requirement);  Exhibit F (Key Personnel);  Exhibit G (LUMA Policies);  Exhibit H (Change Order Process) with:  Attachment 1 (Change Order Form); and  Attachment 2 (Change Order Proposal Form).</p>	

**WHEREFORE**, LUMA respectfully requests the Energy Bureau to **take notice** of the aforementioned and determine to treat **Exhibit 3** to the December 17<sup>th</sup> Motion, confidentially.



**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 27<sup>th</sup> day of December 2021.

We hereby certify that we filed this notice and request using the electronic filing system of this Puerto Rico Energy Bureau and that courtesy copy of this notice and request will be notified to PREPA counsel [mvazquez@diazvaz.law](mailto:mvazquez@diazvaz.law) and [kbolanos@diazvaz.law](mailto:kbolanos@diazvaz.law).



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