

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

NEPR Received: Dec 10, 2021 8:03 PM
--

IN RE:
IN RE: PUERTO RICO ELECTRIC POWER
AUTHORITY PERMANENT RATE

CASE NO. NEPR-MI-2020-0001

**SUBJECT: Submission in Compliance with Order and
Request for Confidential Treatment**

**MOTION IN COMPLIANCE WITH ORDER ON POTENTIAL INSURANCE CLAIMS
TO COVER INCREMENTAL COSTS DUE TO OUTAGES AND REQUEST FOR
CONFIDENTIAL TREATMENT**

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”), through the undersigned counsel, and respectfully state and request the following:

I. Submission in Compliance with Order

Per a Resolution and Order issued by this Puerto Rico Energy Bureau (“Energy Bureau”) on September 17, 2021, a technical conference was held in this proceeding on September 22, 2021, to discuss LUMA’s *Motion Submitting of FCA and PPCA Quarterly Reconciliations and Proposed Factors and Request for Confidential Treatment* filed on September 16, 2021, involving proposed Fuel Charge Adjustment (“FCA”) and Purchased Power Charge Adjustment (“PPCA”) reconciliations for the months of June, July, and August, 2021, and the proposed factors for the FCA, PPCA and FOS riders to be applied from October 1, 2021 until December 31, 2021 (“September 16th Submission”).

During the technical conference, the Energy Bureau issued several bench orders, including directing LUMA to inform whether LUMA's insurance program may include coverage for use of the peaker units due to outages during the June through August 2021.

On September 28, 2021, LUMA filed with this Energy Bureau, a confidential first response on insurance coverage.

On September 30, 2021, PREB issued a Resolution and Order setting FCA and PPCA factors. In relevant part, the PREB directed that by December 15, 2021, LUMA shall file its final analysis on insurance coverage. Thereafter, in a Resolution and Order dated October 26, 2021, PREB directed that by December 10, 2021, LUMA should file its final response on its analysis on potential insurance coverage related to recent outage events ("October 26th Resolution and Order").

In compliance with the October 26th Resolution and Order, LUMA hereby submits its analysis on potential insurance coverage for recent outage events. *See* Exhibit 1, submitted under seal of confidentiality. Exhibit 1 includes as attachments, twenty-six (26) Incident Report Forms prepared by PREPA in response to a request for information issued by LUMA.

II. Request for Confidential Treatment

A. 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 LPRR §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:

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).

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).

B. Grounds for Confidentiality

Under the Industrial and Trade Secret Protection Act of Puerto Rico, Act 80-2011, 10 LPRA §§ 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 Trade secrets 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. As explained in the Statement of Motives of Act 80-2011, protected trade secrets include any information bearing commercial or industrial value that the owner reasonably protects from disclosure. *Id.* *See also* Article 4 of Puerto Rico's Open Data Law, Act 122-2019 (exempting the following from public disclosure: (1) commercial or financial information whose disclosure will cause competitive harm; (2) trade secrets protected by a

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.*

contract, statute or judicial decision (3) private information of third parties). *See* Act 122-2019, Articles 4 (ix) and (x) and (xi)).

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.*

LUMA's response filed today as Exhibit 1, includes original analysis by LUMA personnel on the feasibility of potential claims for insurance coverage that LUMA to cover some or all of the outages between June and August 2021. It also includes incident reports prepared by PREPA that are part and parcel of LUMA's analysis and have not been disclosed to the public. These documents are integral to LUMA's internal analysis and will serve to spearhead future processes for potential

claims for insurance coverage. Disclosure of these documents and information will place LUMA and PREPA in an unfair advantage in connection with claims for insurance coverage to the detriment of customers and ratepayers. Exhibit 1 and its attachments should be kept confidentially to secure the orderly conduct of future potential negotiations or claims with LUMA's insurers. Disclosure of the information could stifle future negotiations, including legal claims that could be pursued to benefit the public interest, since LUMA's insurers will have had the benefit of seeing LUMA's original analysis, strategies and methods.

To avoid future commercial harms that could ensue if LUMA's internal analysis are publicly disclosed and are known prematurely to LUMA's insurers, LUMA respectfully requests that the response marked as Exhibit 1 be received, kept and maintained confidentially by this Energy Bureau.

Exhibit 1 and its attachments, (1) have commercial and economic value to LUMA on its confidential analysis regarding potential insurance claims, and (2) involve analysis and information that **are not common knowledge or readily accessible** by third parties who may seek to gain commercial or economic advantages by prematurely knowing LUMA's analysis and arguments regarding insurance coverage for recent outages. The information included in Exhibit 1 and in the attachments to Exhibit 1, has not been disclosed to the third parties. Its disclosure would reveal sensitive and private commercial processes employed by LUMA and PREPA and place them in a vulnerable and disadvantageous commercial position that could affect customers and impact rates. Reasonable measures have been taken to protect the files from disclosure and avoid unauthorized access by third parties that could seek to gain commercial advantages.

WHEREFORE, LUMA respectfully requests that the Energy Bureau **accept** LUMA's response included in Exhibit 1 to this Motion and the attachments to Exhibit 1 and **keep the same confidential**.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 10th day of December 2021.



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
margarita.mercado@us.dlapiper.com

Exhibit 1 and 26 Attachments
Submitted Under Seal of Confidentiality