

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

NEPR Received: Apr 22, 2022 3:55 PM
--

IN RE: INTERRUPCIÓN DE SERVICIO
ELÉCTRICO DE 6 DE ABRIL DE 2022

CASE NO. NEPR-IN-2022-0002

SUBJECT:

**Memorandum of Law in Support of
Request for Confidential Treatment**

**MEMORANDUM OF LAW IN SUPPORT OF CONFIDENTIAL TREATMENT OF
APRIL 6TH PRELIMINARY INCIDENT REPORT**

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

As requested by this Honorable Puerto Rico Energy Bureau (“Energy Bureau”), on April 12, 2022, LUMA submitted, under seal of confidentiality, a report titled “*Costa Sur Substation Initial Facts from April 6, 2022 Incident*” (“April 6th Preliminary Incident Report”). LUMA submits this supporting Memorandum of Law stating the legal basis for the request to treat the aforementioned filing confidentially. As will be explained in this Memorandum, a figure of the April 6th Preliminary Incident Report should be protected from public disclosure as Critical Energy Infrastructure Information (“CEII”) as defined in federal regulations, 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674, and per the Energy Bureau’s Policy on Management of Confidential Information. See Energy Bureau’s 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.

II. Applicable Laws and Regulation to Submit Information Confidentially Before the Bureau.

The bedrock provision on the management of confidential information 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 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 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 identifying confidential information and filing 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 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 the 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 proceedings before this Energy 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).

Regarding ongoing investigations, Section 15.10 of Regulation Number 8543 provides that:

The Commission's record shall remain confidential while the investigation is in process.

The record shall be available to the general public once the investigation report is notified to the investigated party or upon conclusion of any investigation that does not require the Commission to prepare a report, as

set forth in Section 15.07 of this Chapter. However, any information classified as privileged during the course of the investigation, or any information that may violate the fundamental rights of third parties or the right to privacy of the person investigated, shall be duly protected.

III. Request for Confidentiality

The April 6th Preliminary Incident Report includes CEII 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.¹ In at least two proceedings on Data Security,² and Physical Security,³ this Bureau, *motu proprio*, has conducted proceedings confidentially, thereby recognizing the need to protect CEII from public disclosure. Additionally, this 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 on page 4, Case No. NEPR-MI-2021-0001, granting protection to CEII included in LUMA's Responses to Requests for Information. Similarly, in the proceedings on LUMA's proposed Initial

¹ See e.g., *In re Review of LUMA's System Operation Principles*, NEPR-MI-2021-0001 (Resolution and Order of May 3, 2021); *In re Review of the Puerto Rico Power Authority's System Remediation Plan*, NEPR-MI-2020-0019 (order of April 23, 2021); *In re Review of LUMA's Initial Budgets*, NEPR-MI-2021-0004 (order of April 21, 2021); *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).

² *In re Review of the Puerto Rico Electric Power Authority Data Security Plan*, NEPR-MI-2020-0017.

³ *In re Review of the Puerto Rico Electric Power Authority Physical Security Plan*, NEPR-MI-2020-0018.

Budgets and System Remediation Plan, this Energy Bureau granted confidential designation to several portions of LUMA's Initial Budgets and Responses to Requests for Information. Therein, it recognized 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 the 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 Non-Disclosure Agreement.

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

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), part of the Homeland Security Act of 2002, protects critical infrastructure information (“CII”).⁴ CII is

⁴ 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
 - (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.

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)⁵.

The April 6th Preliminary Incident Report identifies forensic data and provides forensic analysis on critical infrastructure and other components of the Transmission & Distribution System (“T&D System”). The April 6th Preliminary Incident Report includes assessments of operation and restoration capabilities of critical infrastructures and identifies vulnerabilities that could be used by third parties to harm the T&D System. Specifically, included in the April 6th Preliminary Incident Report is Figure 5-1 (“Figure 5-1”), which contains a single line diagram that identifies critical components of the T&D System and their functioning and capabilities. *See* Figure 5-1 on page 16.

It is respectfully submitted that Figure 5-1 of the April 6th Preliminary Incident Report submitted in redacted form and identified in the table below should be designated as confidential CEII. This designation is a reasonable and necessary measure to protect critical infrastructure and enable LUMA to leverage the information and assessment of critical infrastructures without external threats. The referenced figure provides detailed information beyond identifying critical

⁵ 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.

infrastructure to include identifying information on the assets and infrastructures and their vulnerabilities. Given the importance of ensuring the safe and efficient operation of the generation assets and the T& D System, LUMA respectfully submits that these materials constitute CEII that should be maintained confidentially to safeguard their integrity and protect them from external threats.

IV. Identification of Confidential Information.

In compliance with the Bureau’s Policy on Management of Confidential Information, CEPR-MI-2016-0009, below find a table summarizing the hallmarks of this request for confidential treatment.

	Document or file	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Filed
1	April 6 th Preliminary Incident Report	Figure 5-1 on page 16	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674.	April 12 th , 2022

WHEREFORE, LUMA respectfully requests that the Energy Bureau **grant** this request to keep confidential, Figure 5-1 of the April 6th Preliminary Incident Report identified in this Memorandum.

RESPECTFULLY SUBMITTED.

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

In San Juan, Puerto Rico, this 22th day of April 2022.



DLA Piper (Puerto Rico) LLC
500 Calle de la Tanca, Suite 401
San Juan, PR 00901-1969
Tel. 787-945-9132
Fax 939-697-6102

/s/ Yahaira De la Rosa Algarín
Yahaira De la Rosa Algarín
RUA NÚM. 18,061
yahaira.delarosa@us.dlapiper.com

/s/ Iván Garau-González
Iván Garau-González
RUA NÚM. 20,229
ivan.garau@us.dlapiper.com