

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

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IN RE: PUERTO RICO ELECTRIC
POWER AUTHORITY'S EMERGENCY
RESPONSE PLAN

CASE NO.: NEPR-MI-2019-0006

SUBJECT: Memorandum of Law in Support of Confidential Treatment of a Portion of Exhibit 2 of LUMA's Motion Submitting LUMA's Annual Report pursuant to Section 6(m) of Act 83 of May 12, 1941, as Amended

**MEMORANDUM OF LAW IN SUPPORT OF CONFIDENTIAL TREATMENT OF A
PORTION OF EXHIBIT 2 OF LUMA'S MOTION SUBMITTING LUMA'S ANNUAL
REPORT UNDER SECTION 6(M) OF ACT 83 OF MAY 12, 1941, AS AMENDED**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW LUMA Energy ServCo, LLC¹ ("LUMA"), and, through the undersigned legal counsel, respectfully state and submit:

On May 27, 2021, LUMA submitted to this honorable Puerto Rico Energy Bureau of the Public Service Regulatory Board ("Energy Bureau") its annual report (the "2022 Annual T&D Emergency Preparedness Report") on emergency preparedness for the Puerto Rico transmission and distribution system ("T&D System") pursuant to Section 6(m) of Act 83 of May 12, 1941("Act-83-1941"). *See* LUMA's May 27, 2022 Motion Submitting LUMA's 2022 Annual T&D Emergency Preparedness Report (the "May 27th Motion"). The 2022 Annual T&D Emergency Preparedness Report was submitted as Exhibits 1 and 2 to the May 27th Motion, with Exhibit 2 consisting of LUMA's revised and updated Emergency Response Plan for the T&D System ("T&D ERP").

¹ Register No. 439373.

In the May 27th Motion, LUMA requested the Energy Bureau to keep confidential a portion of the T&D ERP in Exhibit 2 pursuant to the Energy Bureau's Policy on Management of Confidential Information (*see* CEPR-MI-2016-0009, issued on August 31, 2016, and partially amended on September 16, 2016), and, to that end submitted a redacted public version of Exhibit 2. The portion of Exhibit 2 over which LUMA requested confidentiality to be maintained is Appendix C of the T&D ERP, which contains a list of "Critical Facilities". LUMA herein submits its Memorandum of Law in support of its request for confidentiality.

I. Law and Regulation Applicable to Information Filed Before the Energy Bureau that has Been Designated as Confidential.

The bedrock provision for the management of confidential information is Section 6.15 of Act 57-2014, as amended, known as the "Puerto Rico Energy Transformation and Relief Act" ("Act 57-2014"). It provides, in its 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 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 the Energy Public Policy Act of Puerto Rico, Act 17 of April 11, 2019 ("Act 17-2019") establishes that an electric power service company shall "provide documents and information as requested by customers, except for: (i) confidential information in accordance with the Rules of

Evidence of Puerto Rico; . . . and (ix) matters of public security involving threats against PREPA, its property or employees.”

Per Act 57-2014, access to 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 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 Bureau’s Policy on Confidential Information also provides the following rules with regards to access to validated 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 (2).

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, 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), a part of the Homeland Security Act of 2002, protects from disclosure of critical infrastructure information (“CII”).²

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)³

² 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.

³ 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

II. Request for Confidentiality

LUMA respectfully submits that the entire Appendix C of the T&D ERP in Exhibit 1 of the May 27th Motion should be protected as containing CEII. Appendix C contains a list of facilities identified as “critical facilities” classified by priority levels for purposes of restoration after a major outage.

Using the guidance of the Cybersecurity and Infrastructure Security Agency (“CISA”) under the “Presidential Policy Directive 21 (PPD-21): Critical Infrastructure Security and Resilience”, LUMA developed a hierarchy of critical infrastructure and facilities, prioritized as Levels 1, 2 and 3, to categorize various facilities based on the principles of “Community Lifelines”. *See* T&D ERP at p. 30. Under the T&D ERP, Community Lifelines are those that “enable the continuous operation of critical government and business functions, but [that] are also essentially to human health, safety and economic security.” *See id.* at p. 12. As explained in the T&D ERP, the Federal Emergency Management Agency (FEMA) established seven Community Lifelines: Energy (Power & Fuel); Food, Water, Shelter; Transportation; Communications; Health and Medical; Safety and Security; and Hazardous Materials. *See id.*

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.

The T&D ERP explains that “the loss of power to critical infrastructure such as chemical and industrial plants, sewer lines, and water treatment and distribution systems may result in severe environmental and public health hazards to the population”. *See id.* It also identifies as critical facilities hospitals, fire stations, police stations, storage of critical records, and similar facilities. *See id.* The identified critical facilities are listed Appendix C.

The list of critical facilities in Appendix C is organized by the T&D System region. For each critical facility, the address of the facility is provided. In addition, the customer substation, key transmission feeders, and lines serving the critical facilities are identified. The critical facilities include: hospitals and other health facilities; Puerto Rico Aqueduct and Sewer Authority water pumps, wells, water treatment plants, and wastewater treatment plants, among others; police stations; fire stations; power generation facilities; manufacturing plants; medical products facilities; fuel distribution facilities; food production and sale facilities; government facilities; nursing homes; and schools, among others.

In sum, Appendix C of Exhibit 2 identifies and describes the transmission and distribution system assets that supply other critical infrastructure facilities and other critical facilities for health, safety, and security. In addition, this list identifies the level of prioritization of energy restoration efforts to be applied with respect to these facilities. This information could potentially be used to identify areas of criticality in the T&D System with respect to their effect on the operations of other critical infrastructure facilities (e.g., water) and facilities critical for health, safety, and security. Therefore, Appendix C of Exhibit 2 contains information about critical electric infrastructure, the incapacity or destruction of which would negatively affect national security, economic security, public health, or safety. As provided in the format, organization, and combination included in Appendix C, this information is not common knowledge and is not made

publicly available. LUMA takes reasonable measures to protect it from public disclosure. Therefore, it is respectfully submitted that, on balance, the public interest in protecting CEII weighs in favor of protecting Appendix C of Exhibit 2 from disclosure.

The redacted version of Exhibit 2 submitted with the May 27th Motion contains a redacted Exhibit C so that the information contained therein is protected from public view.

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 2 of Motion Submitting LUMA’s Annual Report under Section 6(M) of Act 83	May 27, 2022	Pages 90-145	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674

WHEREFORE, LUMA respectfully requests that the Energy Bureau **take notice** of the aforementioned and **approve the request for confidential treatment** of Appendix C in Exhibit 2 of LUMA’s May 27th Motion, as identified herein.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6th day of June 2022.

We hereby certify that we filed this Motion using the electronic filing system of this Energy Bureau. We 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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