

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

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IN RE:

THE PERFORMANCE OF THE PUERTO
RICO ELECTRIC POWER
AUTHORITY

CASE NO.: NEPR-MI-2019-0007

SUBJECT: Confidentiality Memorandum

**MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR CONFIDENTIAL
TREATMENT OF PORTIONS OF RAW DATA SUBMITTED ON NOVEMBER 7, 2022**

TO THE PUERTO RICO ENERGY BUREAU:

COMES NOW, LUMA ENERGY SERVCO, LLC (“LUMA”), through the undersigned legal counsel and respectfully states and requests the following:

I. Introduction and Procedural Background

On August 18, 2022, this Honorable Puerto Rico Energy Bureau (“Energy Bureau”) issued a Resolution and Order with the subject “June 2021-May 2022, 12-Month Metric Summary” (“August 18th Order”). Attachments A and B of the August 18th Order include a summary and analysis by this Energy Bureau of the system data that LUMA and PREPA reported from June 1, 2021, through May 31, 2022.

On October 7, 2022, the Energy Bureau entered a Resolution and Order directing LUMA to file on or before October 17, 2022, “the underlying data and supporting calculations with all formulae intact for the SAIDI and SAIFI performance metrics for the first and last month of each quarter the period starting June 1, 2021, through May 31, 2022, for the purposes of auditing LUMA’s and PREPA’s reported metrics.” (the “October 7th Order”). The Energy Bureau further

ordered PREPA to “provide such information for its generation fleet to LUMA on or before October 12, 2022, in order for LUMA to include in the October 17, 2022, filing deadline.” On October 14, 2022, LUMA requested additional time, until November 7, 2022, to comply with the October 7th Order.

In a Resolution and Order issued on October 20, 2022, this Energy Bureau granted LUMA until November 7, 2022, to file its submission of underlying data and supporting calculations with all formulae intact for the SAIDI and SAIFI performance metrics in compliance with the October 7th Order (“October 20th Order”). In the October 20th Order, this Energy Bureau expanded the scope of the underlying data, definitions and supporting calculations that LUMA shall submit by November 7th to include the underlying data, definitions, and supporting calculations with all formulae intact for the following performance metrics: Estimated vs. Read Bills (LUMA); Available vehicles (LUMA and PREPA); and Total Workforce: Definition and/or Exclusion (LUMA and PREPA). *See* October 20th Order at page 2. Finally, this Energy Bureau ordered “LUMA and PREPA to attest to the veracity and accuracy of the required underlying data, definitions, and calculations.” *Id.*

In compliance with the October 7th and October 20th Orders, on November 7, 2022, LUMA submitted, via email, six spreadsheets in excel format. One of those spreadsheets, entitled “SAIDI_SAIFI_Outage_Data_062021-052022_Confidential.xlsx,” includes a column with confidential Critical Energy Infrastructure Information (“CEII”). The spreadsheet was submitted under seal of confidentiality along with a public version of said spreadsheet. LUMA informed that, pursuant to 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, it would

submit a Memorandum of Law in support of its request that this Energy Bureau keep and maintain confidentially, the version of the aforementioned spreadsheet that includes CEII.

As will be explained in this Memorandum, column “E” entitled “Alimentador” of the excel spreadsheet entitled “SAIDI_SAIFI_Outage_Data_062021-052022_Confidential.xlsx”, identifies feeder numbers that are critical to the proper and safe functioning of the Transmission and Distribution System (“T&D System”). The identification of feeders by numbers should be protected from public disclosure as 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.

In furtherance of Act 57-2014’s mandate that documents submitted before this Energy Bureau should be kept out of public reach only in exceptional circumstances, this request for confidential designation is narrowly tailored to specifically protect the information that has been identified as confidential according to applicable law and regulations on CEII. As the Energy Bureau may confirm, all but one of the six spreadsheets that were submitted on November 7th were filed for the public record and only one column of the spreadsheet entitled “SAIDI_SAIFI_Outage_Data_062021-052022_Confidential.xlsx,” is covered by the request for confidential treatment. LUMA is committed to enrich this proceeding with transparency and to enable the Energy Bureau, interested stakeholders, and customers, to fully evaluate the performance data submitted with this Energy Bureau.

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 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 Energy 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 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 Energy 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, Energy 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 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 [Energy Bureau] the protection of said information, and provide supportive arguments, in writing, for a claim of information of privileged nature. The [Energy 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* Energy 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

Column “E” of the spreadsheet entitled “SAIDI_SAIIFI_Outage_Data_062021-052022_Confidential.xlsx,” that was filed with this Energy Bureau on November 7th, 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 T&D 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 to submit CEII under seal of confidentiality.¹

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

As mentioned above, the Energy Bureau’s Policy on Confidential Information provides for 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 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. See also 16 U.S.C. § 824o-1(a)(3).

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. 18 C.F.R. § 388.113; *see also* 16 U.S.C. § 824o-1(a)(2). Finally, “[c]ritical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction

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).

of which would negatively affect security, economic security, public health or safety, or any combination of those matters.” 18 C.F.R. § 388.113.

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”).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 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

It is respectfully submitted that column “E” on “Alimentador” or feeder number, found in the confidential filing of the spreadsheet entitled “SAIDI_SAIIFI_Outage_Data_062021-052022._Confidential.xlsx,” should not be disclosed to the public. Seen in conjunction with the other information in the spreadsheet entitled “SAIDI_SAIIFI_Outage_Data_062021-052022_Confidential.xlsx,” that also identifies the district where outages occurred, and includes detailed information on outages, the feeder number constitutes a detail that identifies CEII and CI and will thus enable third parties to identify the precise locations of critical assets of the T&D System. This will render the T&D System vulnerable to attacks by persons seeking to cause harm to the systems. The request for designation of the column “E” as confidential CEII is a reasonable and necessary measure to enable LUMA to protect the proper functioning of critical infrastructures and avert external threats. Given the importance of ensuring the safe and efficient operation of the generation assets and the T& D System, LUMA respectfully submits that column “E” of the spreadsheet entitled “SAIDI_SAIIFI_Outage_Data_062021-052022_Confidential.xlsx,” constitutes CEII that should be maintained confidentially.

IV. Identification of Confidential Information.

In compliance with the Bureau’s Policy on Management of Confidential Information, CEPR-MI-2016-0009, a table identifying the information covered by the request for confidential treatment is included below:

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.

	Document or file	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Filed
1	SAIDI_SAIFI_Outage_Data_062021-052022 Confidential.xlsx (Excel spreadsheet)	Column “E” entitled “Alimentador” or “feeder number”	Critical Energy Infrastructure Information 18 C.F.R. §388.113; 6 U.S.C. §§ 671-674.	November 7, 2022

WHEREFORE, LUMA respectfully requests this Honorable Bureau **take notice of the** aforementioned; and **grant** this request to keep confidential, column “E” with “feeder number” included in the spreadsheet entitled “SAIDI_SAIFI_Outage_Data_062021-052022_Confidential.xlsx (Excel spreadsheet,” filed on November 7, 2022.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 16th day of November 2022.

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 the attorneys for PREPA, Joannely Marrero-Cruz, jmarrero@diazvaz.law; and Katuska Bolaños-Lugo, kbolanos@diazvaz.law.



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