

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

**NEPR**

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**IN RE:** REVIEW OF LUMA'S INITIAL BUDGETS

**CASE NO.:** NEPR-MI-2021-0004

**SUBJECT:** Motion to Request Confidential Designation of Legal Memorandum Submitted as Part of Exhibit B to PREPA's June 21 Motion

**MOTION TO REQUEST CONFIDENTIAL DESIGNATION OF  
LEGAL MEMORANDUM SUBMITTED AS PART OF EXHIBIT B  
TO PREPA'S JUNE 21 MOTION**

**COMES NOW** the Puerto Rico Electric Power Authority ("PREPA"), through its counsel of record, and respectfully submits and requests as follows:

1. On May 16, 2023, LUMA<sup>1</sup> filed a document titled *Submission of Consolidated Annual Budget for Fiscal Year 2024 and Annual T&D Projections through Fiscal Year 2026* ("May 16 Motion") before the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau"). The May 16 Motion included the FY2024 Budget Proposal for the Puerto Rico Energy System.
2. The FY2024 Budget Proposal for the Puerto Rico Energy System is comprised of the proposed budget for the Transmission and Distribution System ("Proposed T&D Budgets"), developed by LUMA; the budget proposal for the legacy thermal generation units (the "Proposed GenCo Budget"), developed by Genera PR LLC ("Genera"); the budget proposal for the hydroelectric generating units and the public irrigation facilities<sup>2</sup> (the "Proposed HydroCo

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<sup>1</sup> LUMA Energy, LLC and LUMA ServCo, LLC (collectively, "LUMA").

<sup>2</sup> Hydroelectric generating units and the public irrigation facilities ("Hydroelectric Assets")

Budget"), and the budget proposal for PREPA and its subsidiaries other than GenCo and HydroCo (the, "Proposed HoldCo Budget"), both developed by PREPA.<sup>3</sup>

3. After a series of procedural events, submissions, and answers to the Energy Bureau's requirements of information (ROIs), on June 9, 2023, the Virtual Technical Conference was held. As part of the Technical Conference, the Energy Bureau issued a series of bench orders ("June 9 Bench Orders"). Furthermore, the Technical Conference concluded at approximately 7:00 pm, before the Energy Bureau's questioning of PREPA's witnesses was completed. Upon conclusion of the Technical Conference, the Energy Bureau indicated it would issue additional ROIs to address the remaining questions.

4. On June 12, 2023, the Energy Bureau issued a *Resolution and Order* ("June 12 Order"). Through the June 12 Order, the Energy Bureau expressed that additional information was required for its review and evaluation of the HoldCo and HydroCo proposed budgets and ordered PREPA to submit answers to PREB's Third ROI (36 ROIs).

5. On June 21, 2021, PREPA submitted a document titled *Motion to Submit Responses to the Energy Bureau's June 9 2023 Bench Orders and Third Request for Information in Compliance with the June 12, 2023 Order*, whereby PREPA provided the responses to the June 9 Bench Orders as Exhibit A. Furthermore, PREPA submitted its responses to the Energy Bureau's Third Request for Information in compliance with the June 12 Order as Exhibit B ("June 21 Motion").

6. As part of the June 21 Motion, PREPA submitted underseal the memorandum prepared by McGuire Woods LLP with more detailed information in response to ROI#9 (f) ("McGuireWoods Memorandum"). The McGuireWoods Memorandum is a confidential document subject to

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<sup>3</sup> Proposed HydroCo Budget and Proposed HoldCo Budget, (together, "PREPA's Proposed Budgets").

attorney-client privilege and the attorney work product doctrine, as it includes the description of anticipated services, litigation and settlement possibility in connection with the insurance claims stemming from the Hurricane Maria and Earthquake claims.

7. In compliance with the Energy Bureau’s Policy on Management of Confidential Information CEPR-MI-2016-0009, issued on August 31, 2016 as amended on September 21, 2016 (“Policy Management of Confidential Information”), PREPA requests confidential treatment to the McGuireWoods Memorandum.

<b>FILE</b>	<b>CONFIDENTIAL INFORMATION</b>	<b>LEGAL BASIS</b>
McGuireWoods Memorandum	Privileged Material Attorney Work Product p. 1-6	Rule 503 of Evidence

**I. MEMORANDUM OF LAW**

Section 6 of the *Puerto Rico Electric Power Authority Act*<sup>4</sup> provides that "the Authority shall give continuous access to and make available to customers all public information about the Authority". However, access to such information is not unrestricted since not all information is public.

In Puerto Rico, the right of access to public information has been recognized, because it is recognized that such right is one that is intimately tied to the freedom of speech, press and association, in accordance with Art. II, Sec. 4 of the Constitution of the Commonwealth. *Bhatia*

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<sup>4</sup> *Electric Power Authority Act*, Act No. 83 of May 2, 1941, 22 L.P.R.A §§ 191-240 (Act 83-1941").

*Gautier v. Governor*, 199 DPR 59, 82 (2017). Access to public information allows citizens to evaluate and scrutinize the public function, while, in turn, giving rise to effective citizen participation in governmental processes - which gives way to and promotes transparency and sound public administration. *Bhatia* at p. 80.

In the same manner, Section 409 of the *Code of Civil Procedure of Puerto Rico* recognizes the right of every citizen to inspect and copy any public document of Puerto Rico. 32 LPRA sec. 1781 (2004). This right, however, does not operate in a vacuum and it is necessary that the document that is sought to be disclosed enjoys, in effect, that public status. *Ortiz v. Dir. Adm. of the Courts*, 152 DPR 161 (2000). Our legal system defines the term "public document" as follows:

"[A]ny document that is originated, retained, or received in any agency of the Commonwealth of Puerto Rico pursuant to law or in connection with the conduct of public affairs and that pursuant to the provisions of sec. 1002 of this title is caused to be retained [...] permanently or temporarily as evidence of transactions or for its legal value. Includes those produced in electronic form that comply with the requirements established by laws and regulations." (Translation added)

Sec. 3(b) of Act No. 5 of December 8, 1955, the *Puerto Rico Public Records Management Act*, as amended, 3 LPRA sec. 1001(b) (2011).

Now, "it is necessary that the document that is sought to be disclosed enjoys, in effect, that public status". *Bhatia* at p. 81; *Ortiz*, supra. Thus, the right to information is not absolute and will be subject to those limitations that, by compelling necessity, the State imposes. *Id.* The restrictions claimed by the State must be duly justified since access to public information cannot be denied in a capricious and arbitrary manner. *Colón Cabrera v. Caribbean Petroleum*, 170 DPR 582, 590 (2007). Likewise, case law has recognized that, "such right is not absolute and ... yields in cases of imperative public interest". *Id.* at p. 93 (emphasis supplied).

Puerto Rico's Supreme Court has recognized the following grounds on which the State may validly claim the confidentiality of information in its possession: (1) when a law so declares;

(2) when the communication is protected by one of the evidentiary privileges that citizens may invoke; (3) when revealing the information may harm the fundamental rights of third parties; (4) when it involves the identity of a confidant, and (5) it is "official information" pursuant to Evidence Rule 514 of 2009, 32 LPRA App. VI (formerly Evidence Rule 31, 32 LPRA ant. App. IV). *Bhatia* at p. 83; *Colón* at p. 591. In the event that any of the exceptions outlined above are met, the State bears the burden of proof to validate its claim of confidentiality. *Bhatia* at p. 83; *Colón, supra*.

Meanwhile, Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of 2014, as amended (“Act 57”)<sup>5</sup>, provides that “any person who is required to submit information to the Energy [Bureau] believes that the information to be submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]” *Id.* at Sec. 6.15. “If the Energy [Bureau], after the appropriate evaluation, believes such 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.* at Sec. 6.15(a). If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.” *Id.* at Sec. 6.15(b). “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.” *Id.* at Sec. 6.15(c).

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<sup>5</sup> *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056.

Pursuant to its vested powers, the Energy Bureau approved the *Regulation on Adjudicative, Notices of Compliance, Rate Review, and Investigations Proceedings* (“Regulation 8543”).<sup>6</sup>

Regarding the safeguards that the Energy Bureau gives to confidential information, Regulation 8543 provides that:

[i]f in compliance with the provisions of [Regulation 8543] or any of the Energy Bureau’s orders, a person has the duty to disclose to the Energy Bureau information 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 the material merits protection, proceed according to what is set forth in Article 6.15 of Act No. 57-2014, as amended. Regulation 8543 at Sec. 1.15.

a. The information included in the McGuireWoods Memorandum filed under seal is exempt from disclosure due to the attorney's work product privilege.

Rule 503 of Evidence of 2009, 32 LPRA App. VI, establishes the privilege for the work product or work product of an attorney, consultant, guarantor, insurer or agent, prepared or obtained "in anticipation of, or as part of a civil, administrative or criminal investigation or procedure". In particular, the work product or labor of attorneys “consists of that information that [the lawyer] has gathered and the mental impressions, legal theories and strategies that he pursues or has adopted, derived from interviews, depositions, memorandums, correspondence, summaries, investigations of facts or law, personal beliefs and other tangible or intangible media[...]”. *McNeil Healthcare, LLC v. Municipio de Las Piedras*, 2021 TSPR 33 (2021) (citing *Casasnovas et al. v. UBS Financial et al.*, supra, p. 1056; *Ades v. Zalman*, 115 DPR 514, 525 esc. 3 (1984)).

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<sup>6</sup> Energy Bureau, *Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings*, No. 8543 (December 16, 2015).

The legal opinions and mental effort (work product) of an attorney who provides his services in the public sector, ordinarily, is exempt from disclosure when the required document meets the following criteria: (1) it is a draft, some notes or a legal memorandum; (2) it is not a document used in the ordinary course of business of the agency, and (3) the public interest in maintaining its secrecy outweighs the interest in disclosure. *Aponte Hernandez v. AFI*, 173 D.P.R. 991, 997, (2008).

The McGuireWoods Memorandum is a legal memorandum from PREPA's outside counsel that are not employees in the ordinary course of the agency. In addition, after an evaluation thereof, this Honorable Energy Bureau may conclude that the public interest in keeping the information on McGuireWoods Memorandum outweighs the damage that could be caused by the disclosure of such information from the Authority.

## **II. CONCLUSION**

It is very respectfully requested that the information contained in the McGuireWoods Memorandum be declared protected information that: (i) is the product of the lawyer's work (work product), (ii) constitutes communications between the lawyer and his client, (iii) includes information on deliberative processes, and (iv) in conclusion, it is confidential information that under applicable laws and regulations must remain sealed and not disclosed.

**WHEREFORE**, PREPA respectfully requests the Energy Bureau to grant confidential designation to the McGuireWoods Memorandum as included in response to ROI 9(f) of the June 21 Motion.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, this 5<sup>th</sup> day of July 2023.

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## CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and a courtesy copy of the filing was sent to LUMA through its legal representatives at [margarita.mercado@us.dlapiper.com](mailto:margarita.mercado@us.dlapiper.com) and [ana.rodruiguezrivera@us.dlapiper.com](mailto:ana.rodruiguezrivera@us.dlapiper.com) and to Genera-PR, LLC through its legal representatives [jfr@sbgblaw.com](mailto:jfr@sbgblaw.com); [alopez@sbgblaw.com](mailto:alopez@sbgblaw.com); [legal@genera-pr.com](mailto:legal@genera-pr.com); [regulatory@genera-pr.com](mailto:regulatory@genera-pr.com).

In San Juan, Puerto Rico, this 5<sup>th</sup> day of July 2023.

/s Joannely Marrero-Cruz  
Joannely Marrero Cruz