

**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: Urgent Motion to Reiterate
PREPA's Request for Approval of the Baker
Donelson Contract Amendment**

**URGENT MOTION TO REITERATE REQUEST FOR APPROVAL OF
THE BAKER DONELSON CONTRACT AMENDMENT**

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, LUMA¹ filed a document titled *Submission of Consolidated Annual Budgets for Fiscal Year 2024 and Proposed Annual T&D Projections Through Fiscal Year 2026* ("May 16 Motion") for the Energy Bureau of the Puerto Rico Public Service Regulatory Board's ("Energy Bureau") review and approval. The May 16 Motion included the following budget components: (i) the proposed T&D budget developed by LUMA, (ii) the proposed generation budget developed by Genera PR, LLC ("Genera") on behalf of the PREPA, for the PREPA subsidiary GENCO LLC ("GenCo"), and (iii) the proposed Budget developed by PREPA for its holding company, HoldCo, and its subsidiaries PREPA HydroCo LLC ("HydroCo") and PREPA PropertyCo, LLC ("PropertyCo").

2. On June 25, 2023, the Energy Bureau issued a *Resolution and Order* ("June 25 Order") through which it modified the Proposed Consolidated Fiscal Year 2024 submitted by LUMA and

¹ LUMA Energy, LLC and LUMA Energy ServCo, LLC (jointly referred to as, "LUMA").

approved the modified budgets subject to compliance with various orders ("FY24" Approved Budget"). The June 25 Order directed PREPA to file for review and approval, any new contract or amendment to an existing contract, before executing or making any award of such contract or amendment.

3. On July 11, 2023, the Energy Bureau issued a Resolution and Order ("July 11 Order"). In the July 11 Order, the Energy Bureau stated that for the Energy Bureau to review and grant approval of these contracts, PREPA had to specify: 1) if these are the totality of the contracts to be executed during FY24 and 2) how the amounts referenced pertaining to these contracts fit within the FY24 Approved Budget. The Energy Bureau also ordered PREPA to certify that there was no duplicity of scopes of work between the efforts handled by LUMA, Genera, and/or PREPA.

4. On July 19, 2023, after a series of procedural events including various contract submittals, the Energy Bureau ordered PREPA to submit, in its future filings, a table including the approved and proposed contracts, the amounts approved and proposed for those contracts, the line items from the Non-Labor/Other Operating Expenses Category to which they correspond, and the remaining balance of budgeted amount for Non-Labor Expenses by line-item, as approved in the June 25 Order.² This order was reiterated by the Energy Bureau on the August 3, 14, and 16 orders.

5. On September 12, 2023, PREPA filed a document titled *Motion to Submit Amendment to Approved Contract and Two New Proposed Contracts for the Energy Bureau's Review and Approval* ("September 12 Motion"). In the September 12 Motion, PREPA in compliance with the June 25 and July 11,19 orders, submitted for the Energy Bureau's review and approval an amendment to contract no. 2024-P00017, executed on July 26, 2023, between PREPA and Baker Donelson Caribe LLC ("Baker Donelson"). The amendment requested by PREPA consists of

² *Resolution and Order* dated June 19, 2023 ("June 19 Order") at p. 3.

increasing the Baker Donelson Contract amount by one million dollars (\$1,000,000) to a total not to exceed amount of one million two hundred thousand dollars (\$1,200,000). In the September 12 Motion, PREPA also informed that the Baker Donelson Contract corresponds to the PREPA Restructuring & Title III budget line item HoldCo, Non-Labor/Other Operating Expenses of the FY2024 Approved Budget.

6. Notwithstanding that PREPA has funds available in the Restructuring & Title III budget line item HoldCo, Non-Labor/Other Operating Expenses of the FY2024 Approved Budget, the Energy Bureau has yet to issue a determination pertaining to the contract amendment request.

7. PREPA herein restated its need to execute the Baker Donelson Contract and provides a list and descriptions of matters that Baker Donelson is currently handling on behalf of PREPA, See, Annex A. These matters are of utmost importance to pursue Federal Emergency Management Agency (FEMA) funds and defend PREPA's interest in the cases regarding the Whitefish arbitration and Cobra Contract Dispute. Annex A includes the matters that Baker Donelson is currently working on behalf of PREPA, the upcoming deadlines and/or advice from Baker Donelson to PREPA. This list of information and deadlines was provided by Baker Donelson to PREPA for the purpose of this motion, for the Energy Bureau to understand the importance and the high stakes for PREPA to be left without legal representation if the current contract is exhausted, prior to the requested amendment approval.

8. 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 Annex A.

FILE	CONFIDENTIAL INFORMATION	LEGAL BASIS
Annex A- Description of Legal Services currently provided by Baker Donelson	Privileged Material Attorney Work Product Complete document.	Rule 503 of Evidence

I. MEMORANDUM OF LAW

Section 6 of the *Puerto Rico Electric Power Authority Act*³ 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 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

³ *Electric Power Authority Act*, Act No. 83 of May 2, 1941, 22 L.P.R.A §§ 191-240 (Act 83-1941").

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 LPRC 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 LPRC App. VI (formerly Evidence Rule 31, 32 LPRC 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”)⁴, 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).

Pursuant to its vested powers, the Energy Bureau approved the *Regulation on Adjudicative, Notices of Compliance, Rate Review, and Investigations Proceedings* (“Regulation 8543”).⁵ 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

⁴ *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056.

⁵ Energy Bureau, *Regulation on Adjudicative, Notices of Compliance, Rate Review and Investigations Proceedings*, No. 8543 (December 16, 2015).

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 Annex A is filed under seal, exempt from disclosure due to the attorney's work product privilege.

Rule 503 of Evidence of 2009, 32 LPR 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 Financical et al.*, supra, p. 1056; *Ades v. Zalman*, 115 DPR 514, 525 esc. 3 (1984)).

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).

As stated above, Annex A includes the matters that Baker Donelson is currently working on behalf of PREPA, the upcoming deadlines and/or advice from Baker Donelson to PREPA. After an evaluation thereof, this Honorable Energy Bureau may conclude that the public interest

in keeping the information included in Annex A confidential 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 Annex A 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 take **NOTICE** of the information provided, **GRANT** confidential designation to Annex A and **GRANT** approval for PREPA to Execute the Baker Donelson Contract amendment.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 19th day of September 2023.

/s Maralíz Vázquez-Marrero

Maralíz Vázquez-Marrero

TSPR 16,187

mvazquez@diazvaz.law

/s Joannely Marrero-Cruz

Joannely Marrero Cruz

TSPR 20,014

jmarrero@diazvaz.law

DÍAZ & VÁZQUEZ LAW FIRM, P.S.C.

290 Jesús T. Piñero Ave.
Oriental Tower, Suite 803
San Juan, PR 00918
Tel.: (787) 395-7133
Fax. (787) 497-9664

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 and laura.rozas@us.dlapiper.com and to Genera-PR, LLC through its legal representatives jfr@sbgblaw.com; alopez@sbgblaw.com; legal@genera-pr.com; regulatory@genera-pr.com.

In San Juan, Puerto Rico, this 19th day of September 2023.

/s Joannely Marrero-Cruz
Joannely Marrero Cruz

Annex A
[submitted under seal]