

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

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IN RE:
IMPLEMENTATION OF THE PUERTO
RICO ELECTRIC POWER AUTHORITY
INTEGRATED RESOURCE PLAN AND
MODIFIED ACTION PLAN

CASE NO. NEPR-MI-2020-0012

**SUBJECT: Motion To Comply with Resolution and
Order of September 15, 2023 as Modified by Resolution
and Order of September 20, 2023**

**MOTION TO COMPLY WITH RESOLUTION AND ORDER OF SEPTEMBER 15,
2023, AS MODIFIED BY RESOLUTION AND ORDER OF SEPTEMBER 20, 2023**

1. On April 4, 2023, the Energy Bureau of the Puerto Rico Public Service Regulatory Board ("Energy Bureau") issued a Resolution and Order ("April 4th Order") whereby it, among other matters, ordered PREPA to require Tranche 1 RFP proponents to use the most recent interconnection cost estimates provided by LUMA to present their Best and Final Offer ("BFO") and determined that "[a]ny price discrepancy between the interconnection costs used for the BFO and the final interconnection cost (established by LUMA through the interconnection RFP [the "Final Interconnection Costs"]) **SHALL NOT** be assumed by the proponents". *See* April 4th Order on page 1.

2. On September 15, 2023, the Energy Bureau issued a Resolution and Order ("September 15th Order") in which it took administrative notice of a letter issued by the Fiscal Oversight Management Board on September 14, 2023 approving certain amendments to the Power Purchase and Operating Agreements ("PPOAs") for the Tranche 1 Projects and incorporated it into this proceeding. *See* September 15th Order on page 1. In addition, the Energy Bureau noted that the Automatic Termination Date of the PPOAs between PREPA and the project proponents chosen for Tranche 1 is approaching its deadline of September 30, 2023, and issued separate sets of orders to PREPA and LUMA related to the Final Interconnection Costs. *See id.* at pages 1-2.

3. Specifically, the Energy Bureau ordered PREPA to, within five (5) business days, file a report providing certain information specified in the September 15th Order including, among others, a comparison of the interconnection cost estimates used by the proponents for the execution of the PPOA and the Final Interconnection Costs, whether there is a decrease or increase regarding the final interconnection costs (“Interconnection Price Cost Discrepancy”), and any BFO reduction in case of a decrease in the interconnection costs. *See id.*

4. In addition, the Energy Bureau ordered LUMA to, within five (5) calendar days from the notification of the September 15th Order:

- i) **CONFIRM** that the interconnection costs for each project shall only include the costs of the works necessary for the interconnection of that project and reasonable oversight costs [(“Task (i)”)];
- ii) **INCLUDE** a detailed explanation for any [Interconnection Cost Price Discrepancies] [(“Task (ii)”)];
- iii) **INFORM** the Energy Bureau the estimated date in which LUMA would need funding for the Interconnection Cost Price Discrepancies for the Tranche 1 projects to ensure the timely development and construction of the points of interconnection for the Energy Bureau to ensure the timely availability of the funds [(“Task (iii)”)];
- iv) **PRESENT** a proposal to obtain the funds required to offset such interconnection costs discrepancy (e.g., include in the PPCA reconciliation factor to be recuperated during the 24 months after achieving subsequent closing date) [(“Task (iv)”)]; and
- v) **MODIFY** the terms of any interconnection agreement to be executed between LUMA and the Tranche 1 project proponents to be aligned with the April 4th Order (i.e., the developer will only assume the interconnection costs originally included in the BFO) [(“Task (v)”).

See id. at page 3 (footnote excluded).

5. On September 19, 2023, LUMA submitted a motion to the Energy Bureau requesting the Energy Bureau an extension of time, until Friday, September 22, 2023, to submit the information required under Tasks (i) through (iv) of the September 15th Order and an additional

five (5) work-day term to comply with Task (v) of the September 15th Order, commencing after the approval of the PPCA cost recovery proposal submitted by LUMA as per Task (iv) of the September 15th Order. Regarding Task (v) of the September 15th Order, LUMA explained that it would need to change the payment terms of the interconnection agreements to provide for greater upfront payments to address the shift of funding sources and timing for recovery of costs through the PPCA and in order to determine these payment terms with certainty, LUMA would need to know whether the PPCA cost recovery mechanism proposed by LUMA will be approved by the Energy Bureau. For this reason, LUMA requested the mentioned longer (five-day) extension to complete the necessary modifications to the interconnection agreements.

6. On September 20, 2023, the Energy Bureau issued a Resolution and Order (“September 20th Order”) granting an extension until September 22, 2023 for LUMA to comply with Tasks (i) through (v), including submitting “the proposed modified version (and a redline reflecting modification to payment terms)” of the interconnection agreement. *See* September 20th Resolution and Order on page 2.

II. Compliance with September 15th Order

7. In compliance with the September 15th Order, as modified by the September 20th Order, LUMA hereby submits the information and documents required under Tasks (i) to (v) of the September 15th Order. *See* Exhibits 1 and 2. Exhibit 1 includes confirmation on the costs for each project including the costs of the works necessary for the interconnection of the projects based on the proposal of the selected proponent in the procurement conducted by LUMA for the EPC contractor for the interconnection works (“EPC Procurement”) and the reasonable oversight costs; a detailed explanation for any Interconnection Cost Price Discrepancies; the proposal to obtain funds to offset the Interconnection Cost Price Discrepancies via the PPCA reconciliation factor,

based on recuperating the costs during the 24 months after achieving subsequent closing date; and an explanation regarding the modifications of the interconnection agreements to be aligned with the April 4th Order and the associated modifications to payment terms. Exhibit 2, in turn, includes copy of the latest LUMA version of the form of Interconnection Agreement developed by LUMA to be used for the Tranche 1 projects with the changes made to align this agreement with the April 4th Order and a redline version showing the modifications to the payment terms. The interconnection costs and specific payment amounts to be included in the Interconnection Agreement for each proponent are set forth in Exhibit 1.

8. LUMA is available to discuss the information in Exhibits 1 and 2 with the Energy Bureau if necessary to address any questions the Energy Bureau may have, via a confidential technical conference or other means deemed suitable by the Energy Bureau.

III. Request for Confidential Treatment

9. LUMA respectfully requests this honorable Energy Bureau to receive and maintain Exhibits 1 and 2 of this motion under seal of confidentiality 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 (together, the "Policy on Confidential Information"). The memorandum of law in support of this request is provided below.

IV. Memorandum of Law in Support of Request for Confidential Treatment

A. Applicable Law

10. The bedrock provision on management of confidential information that is filed before this Energy Bureau is Section 6.15 of Act 57-2014, which provides, in pertinent part, that: "[i]f 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 [Energy

Bureau] to treat such information as such [...]” 22 LPRA § 1054n. If the Energy 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.* § 1054n(a).

11. According to Section 6.15 of Act 57-2014, 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.* § 1054n(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 [Energy Bureau] who needs to know such information under nondisclosure agreements. However, the [Energy Bureau] shall direct that a non-confidential copy be furnished for public review.” *Id.* § 1054n(c).

12. In connection with the duties of electric power service companies, Section 1.10(i), of Act 17-2019 further provides that electric power service companies shall “provide documents and information as requested by customers, except for: [...] (viii) ***issues that should be maintained confidential in accordance with any confidentiality agreement***, provided, that such agreement is not contrary to public interest[.]” *Id.* § 114li(i) (Emphasis added.)

13. 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, this 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* Policy on Confidential Information, Section A. 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.* ¶ 3. The party who seeks confidential treatment of information filed with the Energy Bureau must also file both a “redacted” or “public version” and an “unredacted” or “confidential” version of the document that contains confidential information. *Id.* ¶ 6.

14. 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 honorable Energy Bureau. To wit, Section 1.15 provides that, “a person has the duty to disclose information to the [Energy 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 [according] to [...] Article 6.15 of Act No. 57-2015, as amended.”¹

B. Grounds for Confidentiality

15. Exhibit 1 of this Motion contains confidential information pertaining to topics that are being addressed with proponents of the Tranche 1 procurement process, which is ongoing and still the object of negotiations, strategies, and proposals. This honorable Energy Bureau has maintained under seal the documents, including confidential information related to the Tranche Request for Proposals (“RFP”) process. To that end, through its Resolution and Order of February

¹ See also Energy Bureau Regulation No. 9137 on *Performance Incentive Mechanisms*, Section 1.13 (addressing disclosure before the Energy Bureau of Confidential Information and directing compliance with the Policy on Confidential Information (CEPR-MI-2016-0009)).

2, 2022 (“February 2nd Order”) in Case No. NEPR-MI-2020-0012, the Energy Bureau established that confidential treatment is required pursuant to Sections 4 and 10.2 of the Joint Regulations for the Procurement, Evaluation, Selection, Negotiation, and Award of Contracts for the Purchase of Energy and for the Procurement, Evaluation, Selection, Negotiation and Award Process for the Modernization of the Generation Fleet, Regulation 8815 of October 11, 2016 (“Regulation 8815”), and that only once the RFP is completed, shall it be made public. *See* the February 2nd Order at footnote 28. This Energy Bureau’s actions are consistent with the interest of maintaining the purity of the procurement process and avoiding disclosure of information that may affect the financial, competitive or bargaining position of the parties. *See* Regulation 8815, Section 4.8(g).

16. In addition, Exhibit 1 contains the interconnection costs for each project based on the proposal submitted by the selected proponent in the EPC Procurement. According to the terms of the procurement, the proposals are confidential until the selected proponent is contracted. The selected proponent has not been contracted yet awaiting the final definition of the contract’s scope which will depend on which Tranche 1 projects will proceed. Therefore, the amounts of the proposal remain confidential under that procurement process.

17. With respect to Exhibit 2, containing the Form of Interconnection Agreement, this document constitutes, at this time, sensitive commercial information.

18. Under the Industrial and Trade Secret Protection Act of Puerto Rico, Act 80-2011, 10 LPRA §§ 4131-4144, industrial or trade secrets are deemed to be any information:

- (a) That has a present or a potential independent financial value or ***that provides a business advantage***, insofar as such information is not common knowledge or readily accessible through proper means by persons who could make a monetary profit from the use or disclosure of such information, and
- (b) for which reasonable security measures have been taken, as circumstances dictate, to maintain its confidentiality.

Id. §4131, Section 3 Act. 80-2011. (Emphasis added).

19. Trade secrets include, but are not limited to, processes, methods and mechanisms, manufacturing processes, formulas, projects, or patterns to develop machinery and lists of specialized clients that may afford an advantage to a competitor. *See* Statement of Motives, Act 80-2011. As explained in the Statement of Motives of Act 80-2011, protected trade secrets include any information bearing commercial or industrial value that the owner reasonably protects from disclosure. *Id.* *See also* Article 4 of Puerto Rico's Open Data Law, Act 122-2019 (exempting the following from public disclosure: (1) commercial or financial information whose disclosure will cause competitive harm; (2) trade secrets protected by a contract, statute or judicial decision (3) private information of third parties)), Articles 4 (ix) and (x) and (xi)), 3 LPRR §9894.

20. The Puerto Rico Supreme Court has explained that the trade secrets privilege protects free enterprise and extends to commercial information that is confidential in nature. *Ponce Adv. Med. v. Santiago Gonzalez*, 197 DPR 891, 901-02 (2017) (citation omitted); *see also Next Step Medical Co. v. MCS Advantage Inc.*, KLCE201601116, 2016 WL 6520173 (P.R. Court of Appeals, September 13, 2016 at page 11) (holding that in Puerto Rico, what constitutes trade secrets is evaluated applying a broad definition). A trade secret includes ***any and all information*** from which a real or potential value or economic advantage may be derived; that is not common knowledge or accessible through other means; and as to which reasonable security measures have been adopted to keep the information confidential. *Ponce Adv. Medical*, 197 DPR at 906.

21. Exhibit 2 is the draft form of Interconnection Agreement that has been separately negotiated with the various Tranche 1 proponents and which may still be the subject of negotiations and further revisions. Therefore, the disclosure of this information at this time may have an adverse effect on these negotiations as the proponents may not be fully aligned at this time on all

provisions. Therefore, maintaining it confidential at this time and on a temporary basis, until the negotiation process with the proponents is finalized, has value to LUMA. LUMA has taken reasonable measures to keep this current draft confidential.

22. In sum, Exhibit 1 contains information that could potentially impact two competitive procurement processes; it is not common knowledge or readily accessible by third parties; and reasonable measures have been taken by LUMA to protect it. In addition, Exhibit 2 contains sensitive commercial information that if disclosed may adversely affect an ongoing negotiation process that must be concluded in the next eight (8) days for the success of the Tranche 1 projects. Therefore, public interests are best served if this Energy Bureau keeps and maintains Exhibits 1 and 2 confidentially and pursuant to the Energy Bureau's Policy on Confidential Information. *See* CEPR-MI-2016-0009, as amended by the Resolution of September 16, 2016, CEPR-MI-2016-0009.

C. Identification of Confidential Information.

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

Documents	Scope	Summary of legal basis for confidentiality protection, if applicable	Legal Basis	Date filed
Exhibit 1	Entire document	Protect ongoing Tranche 1 procurement process EPC Procurement	Section 1.10(i), of Act 17-2019 and Sections 4 and 10.2 Regulation 8815	September 22, 2023
Exhibit 2	Entire document	Protect commercial sensitive information	Industrial and Trade Secret Protection Act of Puerto Rico, Act 80-2011, 10 LPRA §§ 4131-4144	September 22, 2023

WHEREFORE, LUMA respectfully requests the Energy Bureau to **take notice** of the aforementioned, accept Exhibits 1 and 2 of this Motion in compliance with the orders addressed to LUMA in the September 15th Order, as modified by the September 20th Order, and grant LUMA’s request for confidential treatment of Exhibits 1 and 2 of this Motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 22nd day of September 2023.

We hereby certify that we filed this motion using the electronic filing system of this Puerto Rico Energy Bureau and that copy of this motion was notified to PREPA counsel mvazquez@diazvaz.law and jmarrero@dazvaz.law.



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Confidential Exhibit 1

Responses to Tasks (i) to (v)

[Submitted under seal of confidentiality]

Confidential Exhibit 2

Standard Form of Interconnection Agreement for Tranche 1

[Submitted under seal of confidentiality]