

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

NEPR

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IN RE:

Review of the Puerto Rico Electric Power
Authority Integrated Resource Plan

CASE NO. NEPR-AP-2023-0004

**SUBJECT: Memorandum of Law in Support of
Confidential Treatment of Documents and Information
Submitted in Compliance with Resolution and Order
dated September 27, 2023**

**MEMORANDUM OF LAW IN SUPPORT OF CONFIDENTIAL TREATMENT OF
DOCUMENTS AND INFORMATION SUBMITTED IN COMPLIANCE WITH
RESOLUTION AND ORDER DATED SEPTEMBER 27, 2023**

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:

On September 27, 2023, the Energy Bureau issued a Resolution and Order in this proceeding, whereby it ordered LUMA’s personnel to attend the second pre-IRP filing period technical conference scheduled for October 31, 2023 (“October 31st second pre-IRP filing technical conference”), together with its technical consultant (“September 27th Order”). The Energy Bureau issued, as Attachment A to its September 27th Order, an Agenda for the October 31st technical conference and ordered LUMA to prepare a presentation in accordance with the agenda and to submit it by October 25, 2023. The Energy Bureau also ordered LUMA to respond to a series of Requests for Information (RFI’s) included as Attachment B of its September 27th Order by October 24, 2023.

In compliance with the September 27th Order, on October 24, 2023, LUMA submitted its responses to the RFIs. *See, Motion Submitting Responses to Requests for Information Issued Through Resolution and Order Dated September 27, 2023.* The responses to the RFIs included certain attachments that LUMA submitted separately to the Energy Bureau in their native *Excel* form. LUMA requested confidential treatment as to some of those *Excel* files submitted in response to RFI 5.¹ In addition, LUMA submitted a draft Resource Adequacy Analysis Report (“RAAR”) in response to RFI 1 under seal of confidentiality.

In further compliance with the September 27th Order, on October 25, 2023, LUMA filed the presentation materials prepared in accordance with the Agenda for the October 31st second pre-IRP filing technical conference. *See, Motion Submitting Presentation for Second Pre-filing Technical Conference in Compliance with Resolution and Order dated September 27, 2023.* LUMA submitted under separate cover and under seal of confidentiality, a limited portion of those presentation materials that LUMA deems confidential (the “Confidential Slides”). *See, Motion Submitting Confidential Portion of Presentation for Second Pre-filing Technical Conference in Compliance with Resolution and Order dated September 27, 2023.* LUMA requested confidential treatment for that limited portion of the presentation materials and that they be discussed in a confidential session of the second pre-filing technical conference.

On October 25, 2023, LUMA also filed a *Motion Submitting Supplemental Documents and Revised Attachment to Responses to Requests for Information dated September 27, 2023*, whereby it submitted as Exhibit 1 the analytical workpapers associated with the confidential draft of the RAAR in their native *Excel* form (the “Analytical Workpapers”) and, as Exhibit 2, a revised

¹ In compliance with the September 27th Order, on this same date, LUMA submitted the presentation materials prepared in accordance with the Agenda for the October 31st second pre-IRP filing technical conference. *See, Motion Submitting Presentation for Second Pre-filing Technical Conference in Compliance with Resolution and Order dated September 27, 2023.*

electric vehicle charging impact forecast to substitute the one originally submitted as part of its response to RFI 5 (the “EV Forecast”). The Confidential Slides, the draft RAAR, the confidential EV Forecast and the revised confidential EV Forecast and the Excel files submitted in response to RFI 5 are hereinafter collectively referred to as the “Confidential Documents”.

LUMA submits this Memorandum of Law setting forth the legal basis for which LUMA is entitled to tender the Confidential Documents under seal of confidentiality. For the reasons explained below, LUMA hereby requests that the Energy Bureau receive and maintain the entire contents of the Confidential Documents 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 (“Policy on Confidential Information”).

II. Applicable Laws and Regulations to Submit Information Confidentially Before the Energy Bureau.

The bedrock provision on the management of confidential information filed before this Energy 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 [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 LPRC § 1054n (2023). If after appropriate evaluation the Energy Bureau determines 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).

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).

Relatedly, in connection with the duties of electric service companies, Section 1.10 (i), (vii) and (viii) of Act 17-2019 provide that electric power service companies shall “provide documents and information as requested by customers, except for: (i) confidential information in accordance with the Rules of Evidence of Puerto Rico; [...] (vii) trade secrets of third parties; [and] (viii) issues that should be maintained confidential in accordance with any confidentiality agreement, provided, that such agreement is not contrary to public interest;...”. (Emphasis added.)

Moreover, the Energy Bureau’s Policy on Confidential Information details the procedures 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 20, 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 why each claim or designation conforms to the applicable legal basis of confidentiality. *Id.* at ¶ 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.* at ¶ 6.

The Policy on Confidential Information also contains a provision governing information on trade secrets by providing that “[a]ny 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.” *Id.* Section D (on Access to Validated Confidential Information).

III. Grounds for Confidentiality

A. Confidential Slides

On October 25, 2023, LUMA submitted the Confidential Slides under seal of confidentiality and requested that they be addressed in a confidential session of the October 31st second pre-filing technical conference. It is respectfully submitted that the Confidential Slides contain commercially sensitive information of the type that LUMA keeps and maintains confidential as part of its business dealings and to protect its competitive procurement processes. Specifically, the Confidential Slides address that section of the Agenda of the second pre-filing technical conference pertaining to resources that are currently under procurement as part of Tranche 1 and Tranche 2, including the location of the solar photovoltaic and battery storage Tranche 1 Projects, the name of the developers for each of those Projects, the size of the Projects and first year rate per kWh and the annual escalator percentage calculation.

The information contained in the Confidential Slides is currently confidential as it is associated to the Tranche 1 and Tranche 2 procurement processes which are still ongoing and the object of negotiations, strategies, and proposals. Accordingly, it is respectfully submitted that the disclosure of the Confidential Slides at this time may adversely impact the integrity of the Tranche

1 and Tranche 2 procurement processes. LUMA has taken reasonable measures to protect the information included in the Confidential Slides from public disclosure. For the reasons discussed above, confidentiality of the Confidential Slides and any portion of the second pre-filing technical conference in which they are discussed is in the public interest and that of ratepayers.

Consistent with the foregoing, this honorable Energy Bureau has maintained under seal documents with confidential information related to the Tranche 1 procurement process. To that end, through its Resolution and Order of February 2, 2022 (“February 2nd Order”) in Case No. NEPR-MI-2020-0012, *In RE: Implementation of Puerto Rico Electric Power Authority Integrated Resource Plan and Modified Action Plan*, this honorable Energy Bureau established that such confidential treatment is required pursuant to Sections 4(g) 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 procurement is completed, shall it be made public. *See* the February 2nd Order, footnote 28. In addition, during the initial pre-filing technical conference held by the Energy Bureau on August 8, 2023, after discussing the items on the agenda, the Energy Bureau opened a confidential portion of the initial technical conference for purposes of discussing the contracting of the IRP Technical Consultant which was not finalized at the time. This Energy Bureau’s action is consistent with the interest of maintaining the purity of procurement processes.

In light of the above, the public interests are best served if this Energy Bureau keeps and maintains the Confidential Slides confidentially and pursuant to the Energy Bureau’s Policy on Confidential Information and holds a confidential session of the second pre-filing technical

conference to discuss the information set forth in the Confidential Slides. *See* CEPR-MI-2016-0009, as amended by the Resolution of September 16, 2016, CEPR-MI-2016-0009.

B. Confidential Draft RAAR and associated Analytical Workpapers

As part of its Response to RFI 1, LUMA submitted a confidential draft of the RAAR. As explained in its response, the draft RAAR while complete, is still under internal review. As such, the draft RAAR may undergo changes and modifications arising from its internal review. Its premature disclosure may, therefore, give rise to confusion and speculation if it later undergoes changes.

The Analytical Workpapers relied upon by LUMA in its development of the draft RAAR should be kept confidential while the draft RAAR is finalized. The Analytical Workpapers consist of three categories of native Excel files, to wit: dispatch graphs, effective load carrying capability calculations, and analyses of varying scenarios. The Analytical Workpapers contain detailed information that LUMA considers sensitive commercial information.

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.

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 LPRA §9894.

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.

LUMA requests that the Analytical Workpapers be kept confidential because they contain sensitive information relating to the economics of LUMA's portfolio which could be used by an interested party to maximize its profits. Further, the scenario analyses contain confidential formulae that are proprietary information of a third party. In sum, the Analytical Workpapers contain sensitive and proprietary commercial information regarding LUMA's portfolio that should not be publicly disseminated.

C. Native *Excel* files responsive to ROI 5

On October 24th, 2023, LUMA submitted under seal of confidentiality as part of its Response to ROI 5, various *Excel* files in their native form, to wit (as defined in its Response to RFI 5): (i) Energy Efficiency Forecast (“EE Forecast”), (ii) Flexible Demand Forecast; (iii) Distributed Photovoltaic and Distributed Battery Energy Storage Systems Forecast (“Distributed PV and BESS Forecast”; and (iv) the EV Forecast. On October 25th, LUMA submitted a revised version of the EV Forecast. The data contained in the Energy Efficiency, Distributed PV and BESS, and EV forecasts was generated as part of the Puerto Rico Grid Resilience and Transitions to 100% Renewable Energy Study (“PR100 Study”) currently being conducted by the U.S. Department of Energy’s Office of Grid Deployment Office (“DoE”). Since the results of the PR100 Study are scheduled to be published by late 2023, the DoE considers the information generated as part thereof as confidential. The PR100 Study team shared the information with LUMA on a confidential basis and authorized LUMA to disclose it to the Energy Bureau in connection with the second pre-filing technical conference related to the 2024 IRP. LUMA is contractually bound by that certain *Puerto Rico Grid Resilience and transitions to 100% Renewable Energy Study (PR 100) Data Use Agreement* to protect the confidentiality of data shared by the PR100 Study. Consequently, not only are the *Excel* files detailed above drafts in use by the PR100 Study team that may undergo changes and modifications prior to the publication of PR100 Study, but LUMA is also contractually bound to take measures to protect their confidentiality.

Finally, the Flexible Demand Forecast is a draft document created by LUMA’s consultants which is still undergoing review. As such, LUMA protects its confidentiality as a proprietary work in progress.

IV. Identification of Confidential Information.

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.

Document or file	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Submitted
Confidential Slides	Entire document	Sensitive Commercial Information and Trade Secrets under Act 80-2011 Information that is subject to confidentiality agreement pursuant to Section 1.10(viii) of Act 17-2019 LUMA procurement process document that has not been disclosed to protect the integrity of a competitive process.	October 25, 2023

Document or file	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Submitted
Draft RAAR	Entire document	Document in draft form undergoing internal review	October 24, 2023
Analytical Workpapers	Entire document	Documents in draft form undergoing internal review Critical Energy Infrastructure Information 18 C.F.R. § 388.113; 6 U.S.C. §§ 671-674.	October 25, 2023

Document or file	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Submitted
Energy Efficiency Forecast	Entire document	Draft document containing detailed data generated as part of the PR100 Study	October 24, 2023
Flexible Demand Forecast	Entire document	Document in draft form undergoing internal review	October 24, 2023

Document or file	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Submitted
Distributed Photovoltaic and Distributed Battery Energy Storage Systems Forecast	Entire Document	Draft document containing detailed data generated as part of the PR100 Study	October 24, 2023
Electric Vehicle Charging Impacts Forecast original and revised versions	Entire Document	Draft document containing detailed data generated as part of the PR100 Study	October 24-25, 2023

WHEREFORE, LUMA respectfully requests that the Energy Bureau **grant** this request to keep the Confidential Documents under seal of confidentiality and **open** a confidential session of the second pre-filing technical conference for the discussion of the Confidential Slides.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico on November 3, 2023.

I HEREBY CERTIFY that we filed this notice and request using the electronic filing system of this Puerto Rico Energy Bureau and that courtesy copy of this notice and request was notified to counsel for PREPA mvazquez@diazvaz.law and jmarrero@diazvaz.law, Lionel.santa@prepa.pr.gov; and to Genera PR LLC through brannen@genera-services.com; kbolanos@genera-pr.com; regulatory@genera-pr.com.



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