

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

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 Request for Confidential Treatment of the
Documents and Information Submitted in
Compliance with the Third Set of IRP
Prefiling Period Requests of Information

NEPR

Received:

Jun 17, 2024

6:15 PM

**MEMORANDUM OF LAW IN SUPPORT OF CONFIDENTIAL TREATMENT OF THE
DOCUMENTS AND INFORMATION SUBMITTED IN COMPLIANCE WITH THE
THIRD SET OF IRP PREFILING PERIOD REQUESTS OF INFORMATION**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COME NOW LUMA Energy, LLC (“ManagementCo”), and **LUMA Energy ServCo, LLC** (“ServCo”), (jointly referred to as “LUMA”), and respectfully state and request the following:

I. Introduction:

On May 17, 2024, the Honorable Puerto Rico Energy Bureau (“Energy Bureau”) entered a Resolution and Order in which it instructed LUMA to respond on or before June 7, 2024, to a *Third Set of IRP Prefiling Period Requests of Information* (“RFIs”) set forth in Attachment A to the Resolution and Order (“May 17th Order”). The Energy Bureau based its decision to issue these requests on the need to continue ascertaining the adequacy of LUMA’s next Integrated Resource Plan (“IRP”) proposal.

In compliance with the May 17th Order, on June 7, 2024, LUMA submitted its responses to the RFIs. *See Motion Submitting Responses to the Third Set of IRP Prefiling Period Requests of Information and Request for Confidential Treatment*. The Responses included certain attachments that LUMA submitted separately to the Energy Bureau in their native Excel format (.xls). LUMA requested confidential treatment for one of the *Excel* files submitted in response to specific requests for information. Specifically, LUMA requested confidential treatment for the *Excel* file labeled RFI-LUMA-AP-2023.0004-20240517-PREB-001c_list_legacy_units, column H- Variable Operation and Maintenance Costs (VOC (\$/MWh)), column I- Fixed Operation and Maintenance Costs (FOM (\$/kW-yr)), and column O- Startup Cost Adder (\$000).

LUMA submits this Memorandum of Law setting forth the legal basis for which LUMA is entitled to submit portions of an *Excel* file as part of the responses to RFIs 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 managing 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 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 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.*, 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 companies shall provide the information requested by customers, except for confidential information under the Rules of Evidence of Puerto Rico. 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 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 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 Bureau must also file both a “redacted” or “public version” and an “unredacted” or “confidential” version of the document that contains confidential information. *Id.*, paragraph 6.

The aforementioned policy of the Energy Bureau on the management of confidential information in procedures states the following with regard to access to validated Trade Secret Information:

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.

Id. Section D (on Access to Validated Confidential Information).

Germanely, 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 [Bureau] the protection of said information, and provide supportive arguments, in writing, for a claim of information of privileged nature. The [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* Regulation No. 9137 on *Performance Incentive Mechanism*, Section 1.13 (addressing disclosure before the Bureau of Confidential Information and directing compliance with Resolution CEPR-MI-2016-0009).

III. Grounds for Confidentiality

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. 80-2011.¹

¹ Correlatedly, Rule 513 of the Rules of Evidence of Puerto Rico provides that the owner of a trade secret may invoke the privilege to refuse to disclose and to prevent another person from revealing trade secrets, provided that these actions

Trade secrets include, but are not limited to, processes, methods, 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). *See* Act 122-2019, Articles 4 (ix) and (x) and (xi)). The Puerto Rico Supreme Court has explained that the trade secrets privilege protects free enterprise and extends to confidential commercial information. *Ponce Adv. Med. v. Santiago Gonzalez*, 197 DPR 891, 901-02 (2017) (citation omitted).

In the *Excel* file labeled RFI-LUMA-AP-2023.0004-20240517-PREB-001c_list_legacy_units, the columns H- Variable Operation and Maintenance Costs (VOC (\$/MWh)), column I- Fixed Operation and Maintenance Costs (FOM (\$/kW-yr)), and column O- Startup Cost Adder (\$000) are protected as trade secrets. The data inputted therein was collected from AES Puerto Rico LP, Ecoeléctrica LLC, and Genera PR, LLC, and the calculations were made by LUMA. The product has commercial value to LUMA and the Puerto Rico Electric Power Authority (“PREPA”). It also reveals confidential processes and analyses to produce calculations. LUMA keeps and maintains this native file confidential and does not disclose them to the public or unauthorized third parties.

LUMA appreciates the importance of placing the Energy Bureau in the position of reviewing the responses to the RFI. However, to avoid future competitive harm if original format spreadsheets with formulas and calculations are publicly disclosed, LUMA respectfully requests that columns H- Variable Operation and Maintenance Costs (VOC \$/MWh), column I- Fixed Operation and Maintenance Costs, and column O- Startup Cost Adder (\$000) of the *Excel* file labeled RFI-LUMA-AP-2023.0004-20240517-PREB-001c_list_legacy_units, be received, kept, and maintained confidentially by this Energy Bureau.

do not tend to conceal fraudulent activities or lead to an injustice. 32 PR Laws Annot. Ap. VI, R. 513. If a court of law mandates the disclosure of a trade secret, precautionary measures should be adopted to protect the interests of the trade secret owner. *Id.*

The column H- Variable Operation and Maintenance Costs (VOC \$/MWh), column I- Fixed Operation and Maintenance Costs (FOM \$/kW-yr), and column O- Startup Cost Adder (\$000) of the *Excel* file labeled RFI-LUMA-AP-2023.0004-20240517-PREB-001c_list_legacy_units are: (1) documents with commercial and financial value, and (2) involve data that **is not common knowledge or readily accessible** by third parties who may seek to profit from the data or gain commercial advantages. The spreadsheets are business documents showing processes, methods, and mechanisms that garner protection under Act 80-2011. They are original documents that have not been disclosed to third parties and whose disclosure would reveal sensitive and private commercial processes employed by LUMA. The disclosure of this sensitive commercial information would place LUMA in vulnerable and disadvantageous commercial positions that could affect LUMA customers and impact rates. Reasonable measures have been taken to protect the files from disclosure and avoid unauthorized access by third parties that could seek to gain commercial advantages. It is respectfully submitted that columns H- Variable Operation and Maintenance Costs (VOC \$/MWh), column I- Fixed Operation and Maintenance Costs (FOM \$/kW-yr), and column O- Startup Cost Adder (\$000) of the *Excel* file labeled RFI-LUMA-AP-2023.0004-20240517-PREB-001c_list_legacy_units are trade secrets protected from public disclosure by Act 80-2011.

IV. Identification of Confidential Information

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

Document	Name	Pages in which Confidential Information is Found, if applicable	Summary of Legal Basis for Confidentiality Protection, if applicable	Date Filed
Exhibit 1	RFI-LUMA-AP-2023.0004-20240517-PREB-001c_list_legacy_units	Columns H- Variable Operation and Maintenance Costs (VOC (\$/MWh)), Column I- Fixed Operation and Maintenance Costs (FOM (\$/kW-yr)), and Column O- Startup Cost Adder (\$000)	Trade Secrets (<i>see</i> Industrial and Trade Secret Protection Act of Puerto Rico, Act 80-2011, 10 LPRR §§ 4131-4144)	June 7, 2024

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that this Motion was filed using the electronic filing system of this Energy Bureau and that electronic copies of this Motion will be notified to the Puerto Rico Electric Power Authority: lionel.santa@prepa.pr.gov and through its attorneys of record González & Martínez, Mirelis Valle-Cancel, mvalle@gmlex.net; and Alexis G. Rivera Medina, arivera@gmlex.net; and Genera PR, LLC: brannen@genera-services.com; kbolanos@genera-pr.com; regulatory@genera-pr.com.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on June 17, 2024



DLA Piper (Puerto Rico) LLC
Calle de la Tanca #500, Suite 401
San Juan, PR 00901-1969
Tel. 787.945.9122
Fax 939.697.6147

/s/ Margarita Mercado Echegaray
Margarita Mercado Echegaray
PR Bar No. 16,266
margarita.mercado@us.dlapiper.com